

**Matter of Hirner v New York State Div. of  
Hous. & Community Renewal**

2007 NY Slip Op 32066(U)

June 29, 2007

Supreme Court, New York County

Docket Number: 0105116/2007

Judge: Lewis Bart Stone

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: STONE  
HON. LEWIS BART STONE Justice

PART 575

ALAN HIRNEN  
- v -  
NY STATE DHCR

INDEX NO. 105716/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion  
is decided in accordance with attached Decision & Order.

**FILED**  
JUL 13 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 29 June 2007

Lewis Bart Stone  
HON. LEWIS BART STONE S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50

-----X  
In the Matter of the Application of :  
ALAN HIRNER, DONALD GRAY and MILTON :  
NORRIS a/k/a the TENANT RESEARCH TEAM :

Petitioner, :

DECISION AND  
ORDER

For a Judgment Pursuant to Article 78 of the :  
Civil Practice Law and Rules setting aside :  
Administrative Review Docket No. UB410075RT, :  
Rent Administrator's Docket Nos. SF4100290D and :  
SF4100300D, issued by the New York State D.H.C.R. :

INDEX NUMBER  
105116/07

- against-

NEW YORK STATE DIVISION OF HOUSING  
and COMMUNITY RENEWAL and SP 96-97  
STREET LLC,

Respondents. :  
-----X

**FILED**  
JUL 13 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Hon. Lewis Bart Stone:

This proceeding was commenced on April 18, 2007 pursuant to Civil Practice Law and Rules ("CPLR") Article 78, by petitioners Alan Hirner, David Gray and Milton Norris a/k/a The Tenant Research Team (hereafter "Hirner") to set aside a decision of Respondent, State Division of Housing of Community Renewal ("DHCR") dated February 15, 2007 (the "Decision") denying Hirner's petition for Administrative Review ("PAR"), which had been filed on February 14, 2006, to challenge an order of the DHCR Rent Administrator (the "Order"), issued December

28, 2005, and amended January 2006, granting the predecessor in interest of Respondent, SP96-97 Street LLC (the "Owner") the right to terminate the rent inclusion of electricity with respect to rent stabilized apartments at the Owner's buildings at 120 West 97<sup>th</sup> Street, 160 West 97<sup>th</sup> Street and 135 West 96<sup>th</sup> Street, New York, N.Y. (the "Building"). The Notice of Motion dated April 16, 2007, by which this proceeding was commenced was returnable on June 28, 2007, over two months later. On April 17, 2007, Hirner, by a separate Order to Show Cause, sought a preliminary injunction to enforce the Owner from continuing all work to install sub-meters. This Court granted the Order to Show Cause, making it returnable on April 27, 2006.

On the return day of the Order to Show Cause, the Court set an accelerated briefing schedule for the initial motion, for the production of DHCR records and the parties' response papers and for argument and denied Hirner's motion for preliminary injunction. All parties except Hirner, who without further authorization of this Court delivered papers after the date set therefor, complied with such schedule, and on the argument date, May 31, 2007, all parties except Hirner appeared. The matter was submitted.

## SUB METERING

In some New York City apartment buildings, electricity service is not separately charged to apartments but is provided as a part of the building services provided by owners with the owner paying the electric bill and ostensibly recovering these costs from rental payments. When fuel costs and therefore electric rates were low, many developers of multiple dwellings opted for this configuration to avoid the capital costs of installing separate metered lines and meters.

The world has changed, and fuel and electric costs are no longer low. It is now public policy in the City of New York to encourage the reduction of energy consumption in order to reduce the production of greenhouse gasses.<sup>1</sup> As tenants who separately pay for the electricity they consume have an economic incentive to conserve electricity, and tenants who do not separately pay have no incentive do so, converting electric inclusion buildings to separate metering advances the City's public policy to reduce energy consumption and greenhouse gasses.<sup>2</sup>

While in an un-rent regulated world, this process of change could occur

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<sup>1</sup> See Mayor Bloomberg's recently issued plan entitled GreeNYC.

<sup>2</sup> A tenant who pays directly for energy use will, as a general rule, consume less than one who does not. As such a tenant will have a financial incentive to turn off lights and air conditioners when not in use. Further, many of the usual incentives to save energy, which require capital expenditures such as paying more for screw-in florescent bulbs to achieve a favorable economic pay back on saved energy costs, do not work when savings on electric bills cannot be achieved.

without government intervention, the existence of rent stabilization effectively requires governmental agencies to address any change in the method of providing electricity for rent stabilized apartments as rent stabilization require owners to continue all building services to stabilized tenants until the regulator otherwise permits. Pursuant to DHCR, Operational Bulletin 2003-1 owners, on application, may convert electric inclusion buildings to separate metering or sub-metering, conditional on rent reductions to reflect reduced owner costs and other provisions to protect senior citizens and to eliminate prior surcharges for certain supplemental electrical service which had been allowed. Such process was followed in this case.

Under New York law, changing from direct rent inclusion electric to sub-metering for rent regulated apartment also requires approval of the Public Service Commission ("PSC") as under sub-metering, as distinct from direct metering, the building becomes a distributor of electricity, and thus subject to PSC jurisdiction. Thus to make the changes here sought by the Owner's predecessor and the Owner, both PSC and DHCR approvals were necessary. Although both agencies must act before the conversion is fully implemented, neither agency has power to rule on issues to be addressed by the other agency.<sup>3</sup>

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<sup>3</sup> This jurisdictional split and the concomitant delay seems counterproductive to the public policy to reduce greenhouse gasses. The process in this case has, as of the date of this opinion, taken over four years. However, any cure for this delay to promote the public policy

### PRIOR PROCEEDINGS

The PCS initially issued an approval to sub-metering the Buildings by PSC Order of August 18, 2003. Following such approval, the Owner's predecessor submitted its application to DHCR, which sent notice of such application to the tenants on August 3, 2004.

After the PSC issued its initial order, Hirner petitioned the PSC for a rehearing. On rehearing, the PSC order of August 18, 2003 was modified and reissued on June 15, 2005, effective August 12, 2005. Such modified order authorized sub-metering at the buildings on certain conditions.

DHCR Rent Commissioner after having received the PSC order of June 15, 2005, processed the application to sub-meter and issued its decision on December 28, 2005, approving the conversion.

Hirner challenged the Order by filing a Petition for Administrative Review ("PAR") with DHCR. The Decision denied the PAR on February 15, 2007. The Owner thereafter commenced work at the building to install the meters and other equipment necessary to carry out the sub-metering project. Hirner then commenced this proceeding to review the Decision within the applicable period of limitations and

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goals above set forth is for the Legislature or the involved Agencies, not this Court.

sought temporary restraint on the installation of the equipment needed to carry out the sub-metering project.

The Court denied the application for restraint because there could be no irreparable injury to Hirner by reason of the continuation of such Owner work at the Building. To the extent Hirner might prevail in this proceeding, either at this Court's level, or on appeal, so as to prevent the Building from being sub-metered or by modifying the rent formulas, the only impact will be monetary and if Hirner so prevails, Hirner would be entitled, at most, to reimbursement by the Owners for the amount by which Hirner's electrical bills exceeded of the rent reductions ordered by DHCR for Hirner's apartments for any period after the time the conversion had been completed. To the extent there is a possibility of such a result, the Buildings themselves offer a massive security to assure the payment of any amount owing to Hirner. On the other hand, the Court must balance damages to the environment, the Owner's interests in the project as well as the interests of the other rent stabilized tenants<sup>4</sup> of the Buildings who would be deprived of the opportunity during the delay,

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<sup>4</sup> Non regulated tenants have "no dog in this fight," and are subject to their lease provisions during their lease terms and the Owner would be free to offer renewal leases without electric inclusion. Low income seniors are protected expressly by the DHCR order and any change to sub-metering would not affect them. The other rent stabilized tenants of the Building have apparently been satisfied with the change and the opportunity to lower their overall occupancy costs through conservation. Although Hirner purports to be the "Tenant Research Team," Hirner represents three people in two apartments out of 418 rental apartments at the building. During the pendency of this matter many of the other Rent Stabilized tenants were

of reducing their occupancy costs by reducing their energy consumption by conservation measures. Finally, to issue an injunction, the court would have to fix a bond for damages, should Hirner be unsuccessful.

The Court announced the denial of preliminary injunction on the initial return date of the petition, and on such date, with the consent of the parties, established a briefing schedule, which has now been completed and the matter submitted for decision.

### CONCLUSIONS

Hirner's motion raises a series of objections to the Decision and seeks other relief. None of the objection have merit, and accordingly, Hirner's petition must be dismissed.

Hirner's motion initially requested that the Court "approve the attached subpoena duces tecum to compel production of the documents requested therein." However, Hirner attached no subpoena duces tecum. Accordingly, this Court cannot even address such request. Hirner also requested an extension to review the documents recovered by the subpoena and, "if necessary" to amend the petition. As there was no subpoena, the request for further delay is also denied as moot.

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represented by a different group, which eventually acquiesced in the sub-metering program as eventually authorized by DHCR.

In any event, as this proceeding is an Article 78 proceeding, it is a special proceeding subject to CPLR Art. 4, and specifically CPLR §408, which requires leave of this Court, for any discovery so as “to preserve the summary nature of a special proceeding.” Practice Commentaries, CPLR §408:1 McLoughlin. Here, the Court finds that Hirner is uninterested in any summary result and is attempting to prolong any final resolution of this matter. For example, Hirner’s initial filing was made returnable over seventy days after filing. While the CPLR does not generally prohibit a petitioner from giving more time than the minimum for a response, long experience shows few litigants give more than a small additional amount of time, absent an agreement of parties. Hirner’s late submission of papers is an additional example of Hirner’s dilatory practices.<sup>5</sup>

As the essence of Hirner’s Art. 78 proceeding is a claim that the agency was arbitrary and capricious or violated some requirement of law or procedure in reaching its determination, it is hard to see how any discovery would be appropriate, as there is an extensive record. Hirner’s papers further offer no basis to support the need for relevant discovery. Given this Court’s suspicion as to the delaying tactics of Hirner

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<sup>5</sup> The record also shows that Hirner has other issues with the Owners’ predecessor in interest and various other pending disputes with Owners including non-payment proceedings, where actions to delay implementing sub-metering could be used as leverage to settle other scores.

and the lack of any factual affidavit supporting Hirner's request for a subpoena, it is highly unlikely that the Court would have approved any subpoena in this proceeding even if one had been submitted.

Hirner also requests that this Court order DHCR to issue an opinion letter as to certain legal implications relating to sub-metered electricity. Under CPLR Art. 78, under which Hirner's petition is brought, such request would be in the nature of a request for mandamus, ordering DHCR to carry out an obligation which DHCR had and which DHCR had refused to do. Hirner makes no showing of any obligation of DHCR to issue advisory opinions. While Hirner includes as an exhibit a request from a City Council member asking for the opinion sought by Hirner, Hirner cites no provision of law or regulation creating such an obligation and makes no other showing that DHCR has any legal obligation to issue an opinion in response to such a request. Accordingly, no mandamus order to compel DHCR to issue such an opinion may be issued by this Court.

Hirner's prayer in the petition is to "vacate the Challenged order in its entirety." To do so, Hirner must establish one of the limited bases for court intervention under CPLR Art. 78. Hirner cannot.

Hirner's first objection to the DHCR Decision is that it is premature, and was decided prior to final action on the Owners' sub-metering application to the PSC, and

until all time for challenge thereto had run out. While Hirner does not discuss how this objection may be raised in an Article 78 proceeding, Article 78 does permit a Court to set aside an administrative decision which “was made in violation of a lawful procedure.” CPLR §7803(3). Accordingly, this Court must review whether any statute or regulation having the force of law required DHCR to defer its decision making on the Owner’s application until there was a final, unappealable, un-reopenable decision of the PSC to authorize sub-metering. While DHCR initially elected to delay its consideration of the Owner’s request for conversion from electric inclusion until the PSC ruled, and advised Hirner that it would reject an application for such metering if an Order from the PSC was not included, when it accepted the application, Hirner does not and cannot point to any law or regulation requiring such a deference or delay, and in any event, when DHCR first accepted the Owners’ application the initial PSC Order was included. The Court finds no basis in law or regulation why the DHCR, having thus initially observed the bona fides of the Owner’s application, could not then proceed. Thus, this Court rejects Hirner’s suggestion that because DHCR’s December 25, 2005 Decision was issued before Hirner’s time to appeal the underlying PSC determination on re-hearing had expired,<sup>6</sup>

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<sup>6</sup> As it is unnecessary to decide, this Court need not address whether in fact the period to challenge the PSC order still was open.

DHCR violated any lawful procedure.

Although it is clear that the Owner may not bill tenants for sub-metered electricity without the final approval of PSC and may not eliminate electricity as a rent-included service to tenants until DHCR has ruled within their respective areas of responsibility, there is no requirement that the PSC or DHCR proceed first to resolve issues within its competence. As neither agency's decision on its own issues may be affected by the other agency's decision on its own issues, and as both approvals are necessary for a change to sub-metering billing, there is no inherent reason for either agency to go first or to wait for the other. While DHCR here may have stated that it would wait at least for the first PSC order before addressing the Owner's application, it did not have to and could have ruled on those matters within its jurisdiction without PSC action so as to allow the Owner to proceed on parallel tracks to expedite the change to sub-metering.

As there are clear environmental benefits to speeding the process, this Court should not seek to invent new requirements for seriatim approvals which can only delay such benefits, adding extra greenhouse gasses to the environment during the delay period. Whether or not the DHCR policy to build into the approval process a delay to await an initial ruling of PSC before even addressing an application for sub-metering is proper is not before the Court and will not be therefore addressed in this

## Decision and Order.

Hirner's next objection is that DHCR deprived the tenants of the opportunity to comment by pre-approving the application. It is not clear which portion of Article 78 Hirner seeks to invoke in support of this claim. However, again, the closest applicable ground is that such might have violated a procedural requirement of law. Initially, this objection also suffers from the lack of any proof that DHCR "pre-approved" anything. While Hirner offers a hearsay assertion that a representative of the Owner "mentioned to tenants" that DHCR had clearly approved the sub-metering, and the only thing holding up the process was a determination of "rent reduction amounts," such allegation is not backed up by any evidence or affidavit of the alleged tenant to whom such statement was allegedly made or any proof that the statement of the alleged tenant was in fact true. In any event, given that the decision to approve sub-metering was a PSC decision and the decision as to how the rents would be adjusted was one for DHCR, even if such statement was made by the Owner, it was well within what a reasonable owner might believe after reading DHCR Operating Bulletin 2003-1 which effectively "pre-approved" conversions, setting forth certain requirements which had to be met and reviewed by DHCR, and could hardly be a basis for showing an impropriety in DHCR's proceeding. In any event, DHCR conducted a full hearing for tenants on the issues required to be addressed under

Operational Bulletin 2003-1, presented before the time of the issuing Order or the Decision.

Hirner's next objection is that DHCR has acted in an abuse of discretion, and has been arbitrary and capricious in the conduct of its proceeding. While CPLR §7803(3) also permits a court to set aside a "determination which was ...arbitrary and capricious or an abuse of discretion," mere recitation of this formulary is insufficient to establish that such criteria have been met. Hirner's papers are devoid of any showing how the Decision violated any of these standards.

Hirner also charges DHCR with bias. While Article 78 does not expressly confer jurisdiction on a court to review a decision of an administrative body on such grounds, bias may be shown in proving that a decision was arbitrary and capricious or represented an abuse of discretion. Again, except for the fact that Hirner has disagreed with the Decision there is neither evidence on the record or precedent presented to support Hirner's claims in this case.

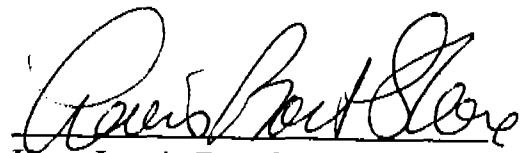
Finally, Hirner objects as to the lack of any reference to other tenant complaints in the Decision. The record, however, shows the "missing" complaints were part of the record and also shows tenants other than Hirner have not objected to the Rent Administrator's ruling upheld by the Decision. The fact of other earlier tenant complaints is in any event irrelevant. Only Hirner, representing two or more than 400

apartments, filed the PAR and Hirner's PAR which was rejected by the Decision, represented the only matters appropriate for the Decision to address.

The petition is dismissed.

This is the Decision and Order of the Court.

DATED: JUNE 29, 2007  
NEW YORK, NEW YORK



Hon. Lewis Bart Stone  
Justice of the Supreme Court

**FILED**  
JUL 13 2007  
NEW YORK  
COUNTY CLERK'S OFFICE