

**Matter of Northern Star Realty Co. v State of N.Y.
Div. of Hous. and Community Renewal**

2007 NY Slip Op 33300(U)

October 5, 2007

Supreme Court, Queens County

Docket Number: 0008118/2007

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

In the Matter of the Application x of NORTHERN STAR REALTY CO., <p style="text-align: center;">Petitioner,</p> <p style="text-align: center;">- against -</p> STATE OF NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL, <p style="text-align: center;">Respondents.</p>	x	Index Number <u>8118</u> 2007 Motion Date <u>June 27,</u> 2007 Motion Cal. Number <u>8</u> Motion Seq. No. <u>1</u>
x		

The following papers numbered 1 to 11 read on this Article 78 proceeding by Northern Star Realty Co. (Northern), to annul and vacate the denial of the Petition and Review (PAR), dated January 30, 2007, and to annul and vacate the November 16, 2006 order which upheld the rent overcharge complaint by Julio C. Melara.

	<u>Papers Numbered</u>
Notice of Petition - Affidavits - Exhibits	1-5
Answering Affidavits - Exhibits	6-9
Reply Affidavits	10-11

Upon the foregoing papers it is ordered that the petition is denied.

By this Article 78 action, Northern challenges a final order of the Commissioner of the Department of Housing and Community Renewal (DHCR), which found that Northern, the petitioner-landlord, had willfully overcharged Julio C. Melara, a tenant at 147-25 Northern Boulevard, Flushing, New York (building/premises), for the rental of a parking space thereat. The Commissioner of DHCR directed that Northern roll back the rent to the lawful stabilized amount and that Northern refund overcharges collected, inclusive of treble damages.

DHCR found that the complaining tenant's parking space is an ancillary service that Northern is required to provide; that the rent for the parking space is governed by rent stabilization guidelines; and Northern does not qualify for an exception that would remove parking in the subject building from the definition of "ancillary services." Northern alleges that the denial of its petition for Administrative Review (PAR) issued by DHCR must be annulled on the grounds that it was not supported by sufficient evidence; that it was affected by errors of law; that it is unlawful in that it was arbitrary and capricious; and that it constituted an abuse of discretion.

Northern has provided no basis for concluding that DHCR's determination should be vacated. The key issue which was determined in the PAR was whether the parking spaces in the Building (including the subject parking space) fall within the definition of "ancillary service" within the meaning of Section 2520.6 of the Rent Stabilization Code (RSC). The standard established in section 2520.6(r)(4)(xi) of the RSC is whether the parking space was not provided primarily for the use of tenants in the building at any time subsequent to the base date, and the base date for determining whether a service provided in a building complex such as the one at issue, is an ancillary service is May 31, 1968. Also, under the RSC, if at some point on or after the 1968 based date, the landlord was providing the service, any increase over the initial rent for such service is subject to the applicable rent guidelines unless the landlord proves that at no time on or after the 1968 base date was the service provided primarily for the use of tenants.

DHCR also found that where a party seeks to assert the benefit of an exception to the general rule, that party has the burden of proof to establish its entitlement thereto particularly where, as here, Northern has asserted facts which invoke the applicability of the general rule regarding ancillary services.

Northern failed to produce sufficient evidence to establish the mode of operation as to parking for tenants between the base date and 1982. Northern alleged that it had no records pertaining to the rental of parking spaces before 1983, which was the year Northern claims that it took title to the building. Northern alleged that "due to burglaries, break-ins, floods and other occurrences in the managing agent's office;" their evidence consisted solely of records from the year 1997 to the present.

DHCR records indicate that, in 1984, Northern was renting to rent-stabilized tenants in the building at least 58 percent of what it claims is the available number of parking spaces. DHCR

noted that Northern stated that it had no records to establish that parking was not a service provided primarily for tenants of the complex between the base date and 1982, and that Northern thus had no records to substantiate its allegations with regard to the period of 1982-1997. Despite Northern's failure to provide essential records regarding the mode of operation as to parking for tenants between the base date and 1982 (it alleged that it had no records pertaining to the rental of parking spaces before 1983), Northern had filed initial registration statements with the DHCR in 1984 which recorded the various services provided to each tenant. According to the 1984 registration statements, at least 18 rent-stabilized tenants were renting parking spaces from Northern and it listed those parking privileges as a service provided by the landlord. DHCR thereupon found that parking fees charged the residential tenants of the subject building are subject to the RSC; that said charges may not be increased except in accordance with the RSC; and that Northern does not qualify for the exemption under section 2520.6(r)(4)(xi) of the RSC.

Generally speaking, landlords of rent regulated buildings are required to maintain services. "The purpose and policy of the rent laws is to tie rent increases to the landlord's maintenance of services in order to maintain the quality and quantity of housing ..." (Rubin v Eimicke, 150 AD2d 697, 699 [1989], lv denied 75 NY2d 704 [1990]). A tenant's right to continued use of the garage was first recognized as an "essential service" in rent-controlled tenancies (see Streg, Inc. v Herman, 35 Misc 2d 351 [Sup Ct, NY County, Feb. 28, 1962]). The Court of Appeals also held that garage space available to a building's tenants is ordinarily considered a service provided in connection with the leasing or use of the housing accommodation (Kew Gardens Hills Housing Assocs. v Office of Rent Control, 41 NY2d 963 [1977]; Einhorn v 100 E. 21st Street Garage Corp., 278 AD2d 848 [1951]). DHCR's finding that a garage is a required ancillary service is also consistent with section 60(1)(b) of the Multiple Dwelling Law which requires that landlords provide parking spaces to building occupants (see Missionary Sisters of the Sacred Hearts v Meer, 131 AD2d 393 [1987]).

The finding that Northern's garage situated adjacent to its apartment building and directly accessible therefrom, constituted a "required service," provided primarily for the use of the tenants in the apartment building and, thus, that Northern's rental of parking privileges to its tenants was subject to the rent limitation guidelines of the Rent Stabilization Law, is rationally supported by the evidence (see Rent Stabilization Code §§ 2520.6[r][3] and [r][4][x]; see also, Matter of Netherland Operating Corp. v Eimicke, 135 AD2d 352 [1987], lv denied

71 NY2d 802 [1988]). The finding is not rendered irrational by the fact that in recent years an average of 57% of the users of the garage have been non-tenants (see Matter of Lyndonville Props. v DHCR, 287 AD2d 413 [2001]; see generally Matter of Howard v Wyman, 28 NY2d 434 [1971]). The governing provision of law focuses on whether the service was "provided primarily for the use of the tenants," not whether the service was "used primarily by the tenants." Thus, the Commissioner's finding cannot be annulled simply because the percentage of users of the garage fell below 50 percent in certain years.

Where, as here, the weight of the evidence supports a finding that parking is a service used by the tenants and is a required ancillary service, such a finding is entitled to judicial affirmance (see East 87th Street Realty Co., LLC v New York State Division of Housing and Community Renewal, 22 AD3d 294 [2005]; Londonville Properties v New York State Division of Housing and Community Renewal, 287 AD2d 413 [2001]; Sterling Ridge Realty Co., Inc. v New York State Division of Housing and Community Renewal, 185 AD2d 354 [1992]). The court perceives no ground upon which DHCR's overcharge determination might be judicially disturbed (see Rent Stabilization Code §§ 2520.6[r][3] and [r][4][x]; see also, Matter of Netherland Operating Corp. v Eimicke, supra).

Accordingly, the motion to annul and vacate the denial of the Petition and Review (PAR), dated January 30, 2007, and to annul and vacate the November 16, 2006 order which upheld the rent overcharge complaint, is denied.

Dated: October 5, 2007

J.S.C.