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

PRESENT: HERMAN CAHN PART 49

Index Number : 103298/2007

JANCO REALTY CORP.

vs

N.Y.S.D.H.C.R.

Sequence Number : 001

ARTICLE 78

INDEX NO.

MOTION DATE 5/2/07

MOTION SEQ. NO. 001

MOTION CAL. NO. 6

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

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION IN MOTION SEQUENCE .....

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

Dated: 10/11/07

HC

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 49

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In the Matter of the Application of
JANCO REALTY CORP.,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

-against-

Index No. 103298/07

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITYRENEWAL.,

Respondent.

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CAHN, J.

This owner's Article 78 proceeding challenges a final order issued by the Commissioner of the New York State Division of Housing and Community Renewal (DHCR) on January 11, 2007. The Commissioner's order modified the decision of the Rent Administrator (RA) and affirmed the denial of the owner's Petition for Administrative Review (PAR), as modified. Petitioner now seeks to set aside the Commissioner's order as arbitrary and capricious. CPLR 7801, *et seq.*

The petition alleges that petitioner Janco Realty Corp. (Janco) is the owner of 56 Mott Street, New York, New York (the subject premises), and that the rents in the premises have been subject to the Rent Stabilization Law (RSL) and Rent Stabilization Code (RSC) during all relevant times.

The administrative history of this action began on May 30, 2006, when Janco filed a

Major Capital Improvement (MCI) application based upon rewiring of the subject premises at a cost of $22,500. On July 13, 2006, the Commissioner denied the petitioner's MCI application, asserting that a rewiring MCI had been granted under a prior docket number, on February 25, 2002, and because the useful life of those improvements had not yet expired. Petitioner thereafter filed a PAR, asserting that the work performed as reflected in the current MCI application was totally different from the work which was the subject of the prior MCI order. In its PAR, Janco alleged that the premises consisted of a 100 year-old building that required expensive electrical upgrading; that the owner had encountered cash flow problems necessitating the completion of the upgrading in two phases, involving different work from that performed under the 2002 MCI application.

The Commissioner's January 11, 2007 order denied Janco's PAR, but it held that the work had been performed on a preferential basis and constituted repairs and maintenance, rather than a major capital improvement.

Janco claims that the rewiring improvements at issue satisfied RSC § 2522.4 and the requirements for rent increases stated therein, based on a landlord's major capital improvement to the premises. Janco argues that the statute requires that in order to be entitled to an MCI increase, the improvement must be building-wide; must be depreciable under the Internal Revenue Code, other than for ordinary repairs; must be required for the operation, preservation, and maintenance of the structure; and must replace an improvement whose useful life has expired.

Janco claims that since it satisfied the requirements of the RSC by performing separate work in 2006 from that done in 2002, the Commissioner's denial of its PAR should be

overturned as being arbitrary and capricious.

DHCR answered with denials, and has submitted an Answering Brief.

In denying the owner's PAR, the Commissioner determined that the electrical work was undertaken in two phases, roughly four years apart. This constituted piecemeal work, which is not eligible for an MCI building-wide rent increase.

In its brief, the Commissioner argues that in order for rewiring to qualify as an MCI, the work must include new electrical service to the building and new copper risers and feeders extending from the property box in the basement to every apartment. RSC §2522.4 (a) (3). The record before the Commissioner was found to show that new electrical service was provided to the building during the owner's first MCI application. However, new copper risers and feeders were not installed until the owner's second MCI application, filed four years after the first. Just because work is different in a new application does not support the grant of an MCI. Further, the owner was found to have admitted in its PAR that the electrical work was performed piecemeal, in two phases.

An exception to the rule against piecemeal work permits an MCI to be granted, under proven extenuating circumstances followed by completion in a building-wide fashion, in two phases. Another exception permits an MCI increase if the project was planned as a consecutively timed project, with proof that it was always contemplated as such, and that both phases were completed within a reasonable time of each other.

Since Janco never alleged extenuating circumstances in its PAR, and never mentioned that the two phases of the rewiring, four years apart, were contemplated and consecutively timed, the Commissioner claims to have properly denied the MCI application in 2006.

The Commissioner relied on the following facts in reaching the determination: the owner filed the first of two MCI applications for electrical rewiring on August 20, 2001. The work was started on February 2, 2001 and completed on November 30, 2001 at a cost of $18,000. The owner's reason for the MCI was "Worn Out Electrical." The electrical contractor installed new electrical service to the building, including: installation of a new 400 amp 3-phase switch; installation of a meter bank for 30 apartments with circuit breaker main for existing apartments; relocating existing apartment feeders to a new meter bank circuit breaker panel; installation of new ground wires to the water main; removing older wiring and feeders; and installation of a new house meter. On February 25, 2002, the RA granted the owner's MCI application, approved the $18,000 cost and increased the tenant's rent accordingly. On May 30, 2006, almost five years later, the owner filed a second MCI application for electrical rewiring and again the owner's reason was because of "Worn Out Electrical." This second phase of the work started on June 11, 2004 and was completed on November 16, 2005 at a cost of $22,500. The electrical contractor's affidavit stated that it installed new copper risers and feeders from the basement to all 30 apartments.

The RA denied the second MCI application in an order dated July 13, 2006, finding that the rewiring MCI had been granted in the first MCI application, and because the useful life of the rewiring had not yet expired, citing RSC §2522.4 (a) (2).

In the PAR filed before the Commissioner, Janco explained the factors that had prevented it from completing the second phase of the electrical rewiring in a more timely fashion: it had encountered cash flow problems; the electrical contractor had commitments to other pending electrical projects; and, at times, work was relegated to cooler months when apartment electrical

usage was minimal.

The Commissioner's order denying the PAR relied on Section 2522.4 of the RSC, and DHCR policy. The owner's assertion in the PAR that the electrical work was undertaken in phases was found to support a finding that the required electrical upgrading was completed on a piecemeal bases, roughly four years apart. The RA's denial of the MCI was affirmed, however the basis was modified to reflect the finding that the work was done on a piecemeal basis, and consisted of repairs and maintenance, which do not qualify as an MCI.

The court's function in reviewing an agency determination is circumscribed by CPLR 7803. The court must decide whether the agency's determination was supported by a reasonable basis. *Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, N.Y.*, 34 NY2d 222 (1974), *Matter of Clancy-Cullen Stor. Co. v Board of Elections of City of N. Y.*, 98 AD2d 635 (1st Dept 1983).

The court agrees that petitioner did not sufficiently prove the need for doing the work in two phases, and that the second (later) phase was a necessary and required part of the electrical upgrade. This may have well been an oversight or may indeed have been because petitioner can not show a good reason for having the work done in stages.

Therefore, the court grants the petition only to the extent of remanding the proceeding to DHCR for further consideration of the issue of whether there was a good reason to do the electrical work in two phases, and whether the second (later) phase was a necessary and required part of the upgrade.

Accordingly, it is

ADJUDGED that the petition is granted to the extent herein set forth.

This constitutes the decision and judgment of this court.

Dated: October 11, 2007

ENTER:

J.S.C.