

**Matter of W. 97th St. Realty Corp. v New York  
State Div. of Hous. and Community Renewal**

2007 NY Slip Op 33362(U)

October 15, 2007

Supreme Court, New York County

Docket Number: 0102207/2007

Judge: Eileen Bransten

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

PRESENT: BRANSTEN

PART 6

Index Number : 102207/2007  
WEST 97TH STREET REALTY  
vs  
HOUSING & COMMUNITY RENEWAL  
Sequence Number : 001  
ARTICLE 78

INDEX NO. 102207/07  
MOTION DATE 6/6/07  
MOTION SEQ. NO. 001  
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

**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 1409).

IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM  
THE ACCOMPANYING MEMORANDUM

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

Dated: 10/15/07

Eileen Branst  
HON. EILEEN BRANSTEN J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

-----X

In the Matter of the Application of  
WEST 9<sup>th</sup> STREET REALTY CORP.,

*Petitioner,*

Index No.: 102207/07  
Motion Date:

For a judgment Pursuant to Article 78  
of the Civil Practice Laws and Rule

DECISION AND ORDER

- against -

NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL

*Defendant*

**UNFILED JUDGMENT**  
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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  
1499).-----X

PRESENT: EILEEN BRANSTEN, J:

Petitioner West 97<sup>th</sup> Street Realty Corp. ("Petitioner") seeks a judgment pursuant to CPLR 7803(3) reversing, annulling, and setting aside a determination by Respondent New York State Division of Housing and Community Renewal ("DHCR") that the garage is subject to rent stabilization under the Rent Stabilization Law of 1969 ("RSL"). DHCR and Respondent-Intervener Park Gardens Tenants' Association ("Tenants") oppose the petition. <sup>1</sup>

**BACKGROUND**

The Mitchell-Lama program provides participating buildings with below-market interest rate loans and tax benefits from both New York City and New York State. The owner, in exchange, can

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<sup>1</sup> The parties entered into a stipulation authorizing the Tenants to intervene in this proceeding.

only rent to tenants with low or middle-income. DHCR is the administrative agency charged with overseeing the program.

Under PHFL § 35 (2), an owner may voluntarily dissolve, or remove the building, from the Mitchell-Lama program and its regulations. Upon making this election, an owner must pay the remaining mortgage loan and all expenses incurred in the dissolution. In addition, at least twenty years must have elapsed between the time that the building was first occupied and dissolution.

In November 2004, Petitioner purchased a Mitchell-lama building located at 50 West 97<sup>th</sup> Street, New York, New York 10025 (“the Building”). Shortly thereafter, it voluntarily withdrew from the program, with no objection from DHCR’s Mitchell-Lama Supervising Unit. On January 7, 2005, Petitioner prepaid the balance of its Mitchell-Lama loan.

Upon exit from the Mitchell-Lama program, the Building became subject to the RSL and the implementing Rent Stabilization Code (“RSC”) pursuant to the Emergency Tenant Protection Act of 1974 (“ETPA”). ETPA makes subject to rent stabilization, *inter alia*, buildings completed and occupied after March 10, 1969 and before January 1, 1974. DHCR also administers this program.

The Building contains a 114-space garage on the first floor. Since 1969, the garage was and continues to be managed by an operating company pursuant to lease agreements with both the Building’s previous owner and Petitioner. Under the Mitchell-Lama program, all components of a building, including garages, are subject to its regulation. With respect to garage facilities, PHFL requires parking for all tenants; regulates the rental price; and has specific requirements regarding

its location, access, construction, and lighting. *See*, 9 NYCRR 1711-6.7; 1711-7.25; 1711-9.2; 1711-9.9; 1728-1.5

Pursuant to the RSL and the RSC, owners are required to continue so-called ancillary services that were provided to the tenants on the “base date.” *See*, DHCR Verified Answer, Ex B, DHCR Advisory Opinion 91-2 at 3, ¶ e. The base date for premises and services previously regulated under the PHFL is the date on which such regulation ends. *See*, RSC § 2520.6(r)(4)(vii). Garage facilities are deemed an ancillary service. *See*, RSC § 2520.6(r)(3).

The RSC, however, provides an exemption for certain ancillary services:

“A service as defined in paragraph (3) of this subdivision for which there is or was a separate charge, shall not be subject to the provisions of this Code where no common ownership between the operator of such service and the owner exists or existed on the applicable base date, or at any time subsequent thereto, and such service is or was provided on the applicable base date and at all times thereafter by an independent contractor pursuant to a contract or agreement with the owner.”

RSC § 2520.6.(r)(4)(xi). Under this provision, an ancillary service for which there is a separate charge, provided at all times by an entity other than the owner, may be exempt from regulation. It is here where the genesis of the instant dispute is found.

On January 6, 2007, the day before the Building exited the Mitchell-Lama program and entered rent stabilization, Petitioner wrote to DHCR’s Rent Stabilization Unit. It requested an administrative determination as to whether the garage was an ancillary service subject to rent stabilization. *See*, Verified Petition, Ex B. Petitioner asserted that the garage

“has been operated at all times by an independent contractor, which is unrelated to the owner. Therefore, as defined by [RSC § 2520.6.(r)(4)(xi)], the parking garage could not be considered a rent stabilized required or ancillary service.”

*Id.* In support of its contention, Petitioner proffered a copy of the original lease dated May 30, 1984.<sup>2</sup> Since the garage was operated in part by someone other than the owner, Petitioner avers that it cannot be considered a service that must be rent-regulated under the RSL and RSC.

DHCR sent notice to Petitioner and Tenants on February 18, 2005 that it was commencing an administrative proceeding in order to determine the garage's rent-regulatory status. *See*, Verified Petition, Ex A. In a reply filed with DHCR on March 8, 2005, the Tenants argued that the relationship between the Petitioner/Owner and the garage operator was irrelevant, and that the garage therefore should be rent-regulated. *Id.*

In support of their contention, Tenants relied on DHCR Advisory Opinion 91-2 ("Advisory Opinion"), which addresses a building's transition from the Mitchell-Lama program to rent stabilization. It provides, in relevant part, that

"Garage and other ancillary services for which there is a *legal regulated separate permanent charge* must be registered at the amount paid on the base date\* \* \* [A]ny increase, other than the charge provided in the initial agreement\* \* \* shall conform to the applicable rent guidelines rate."

DHCR Verified Answer, Ex B.(emphasis added)

In 1992, the then-owner applied to DHCR to increase the monthly garage-fee from \$110.00 to \$135.00. *See*, Verified Petition, Ex A. Tenants aver that this rental increase, which required

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<sup>2</sup> At the time the lease's creation, the Building's owner was the Central Park Garden, Inc. Petitioner assumed the lease when it purchased the Building in November 2004.

DHCR's approval, constitutes a "legally regulated separate charge" for the garage during the time the Building was in the Mitchell-Lama program. Therefore, they conclude, it is of no moment whether the garage was managed by someone other than the owner; the garage's distinct rental fee requires it to be included in the rent stabilization program. *Id.*

Petitioner responded to Tenants letter on April 17, 2005, with the contention that the Advisory Opinion is inapplicable. It avers that the Advisory Opinion pertains only to buildings and its ancillary services presently in rent stabilization, and not those transferring into rent stabilization from Mitchell-Lama. *Id.*

On May 4, 2005, DHCR published its determination that the garage is an ancillary service subject to rent stabilization. *Id.*, Ex D. In its order, the DHCR stated that

"[Petitioner's] assertion that the garage was operated independently of the premises is contrary to the Mitchell-Lama Law \* \* \* In short, the financing, regulatory, and statutory structure of the Mitchell-Lama program belies any claim of operation with respect to the Mitchell-Lama resident's parking, independent from the housing accommodations themselves. Any claim of real independence by [Petitioner] in this regard is also belied by the history of continued regulation of those parking spaces for these tenants under the Mitchell-Lama Law. \* \* \* [T]he immediate entry into Rent Stabilization \* \* \* has the net effect and intended result of assuring the continuation of services to the tenants. On the other hand, the Administrator notes that [Petitioner] is not required to lease subsequent rentals of these accommodations with parking [at the earlier rate]."

Return: A-13 at 2.

Petitioner filed a Petition for Administrative Review ("PAR") of DHCR's order on June 8, 2005. *See*, Return B-1. It argued that DHCR order incorrectly applied the Mitchell-Lama law, and ignored the evidence that the building and the garage had and continue to have no common

ownership. *Id.*, at 10-11, ¶ 27. DHCR sent notices to both Petitioner and Tenants for an opportunity to review and comment. *See*, Return B-2. In response, both Petitioner and Tenants repeated their previous arguments.

On December 21, 2006, DHCR rejected Petitioner's request for a PAR, finding that

“[Petitioner's] allegation that the garage operator was an independent contractor, and that the garage operator did not operate the subject building's garage in common with the subject building's owner is belied by the evidence submitted in this proceeding.”

Return B-39 at 3.

DHCR, moreover, found that

“[The lease] provided, in part, that the garage operator could not permit the garage to be used by others \* \* \* without prior written consent of the landlord in each instance \* \* \* [and] that the tenant agrees that the occupants\* \* \* shall have first and prior preferences to store motor vehicles \* \* \* [and that] the garage operator agreed not to charge the residents \* \* \* more than \$100.00 per month \* \* \*”

*Id.*

DHCR further emphasized

“[T]here is no evidence that the garage operator had requested, or had the authority to seek increases in, the garage rentals on its own.

\* \* \*

“Based upon the parking garage's location within the subject premises and the building's [Certificate of Occupancy] indicating that the garage is primarily for the building's residence \* \* \* the parking garage would be included in the definition of a housing accommodation.

\* \* \*

“Even if the Petitioner's allegations as to separate ownership of the parking garage were found to be true, it would be contrary to public policy to confer a benefit in the form of

exemption of the garage spaces from regulation under the [RSC] for violation of the letter and/or spirit of the Mitchell-Lama Law.”

*Id.*

Finally, DHCR concluded that

“Based upon the above, the record reflects that the subject building’s owner and its predecessors in interest maintained ownership and/or control of the garage at all times \* \*  
\* The Commissioner finds that for any subject tenants who had a garage space as of the base date, that tenant’s garage rent should be based upon the last rent established under the Mitchell-Lama law, and this rent is subject to the applicable guidelines increase.”

*Id.*

On February 13, 2007, Petitioner commenced the instant Article 78 proceeding, averring that DHCR’s order and Administrative Review were arbitrary and capricious, and should be reversed and annulled. DHCR and Tenants oppose the application.

### ANALYSIS

Judicial review of an administrative determination pursuant to CPLR Article 78 is limited to the inquiry into whether the agency acted arbitrarily or capriciously, without any sound basis in reason. *See, Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231-232 (1974); *see also, Matter of Arrocha v. Board of Educ.*, 93 N.Y.2d 361, 363 (1999). As long as there is some rational basis or credible evidence to support an administrative determination, the agency’s decision must be upheld. *See, Matter of Guzman v. Safir*, 293 A.D.2d 281 (1st Dept. 2002) (determination was not arbitrary and capricious “because there was some credible evidence to support the Board’s conclusion”), *lv. denied* 98 N.Y.2d 614 (2002). Judicial review is not intended to weigh the merits of competing

professional opinions because doing so undermines the function, authority and expertise of administrative agencies. *See, Matter of Arrocha v. Board of Educ.*, 93 N.Y.2d, at 363.

Here, DHCR's determination that the garage is a rent-regulated ancillary service is based on a credible analysis of the statutes, code, and evidence presented. While a third party was and is involved in the garage's management, DHCR rationally concluded that Petitioner and its predecessor-in-interest oversaw its overall operation. Indeed, the lease provides that the operator must seek the owner's approval in certain circumstances, and provide preferential treatment to the tenants. *See, Return B-39*. Moreover, DHCR reasonably determined that these restrictions are rooted in the PHFL. *See, Return A-13*. Furthermore, because the Building's Certificate of Occupancy lists the garage as a service primarily for the tenants' benefit, and its location on the first floor comports with the Mitchell-Lama program's ambit of ancillary services, DHCR logically reasoned that the garage like the Building was subject to rent-regulation. *Id.*

Ultimately, it is not for the Court to substitute its judgment for that of the agency vested with making its own determinations. *See, McCabe v. Hoberman*, 33 A.D.2d 547, 548 (1st Dep't 1969). This Court is charged with ensuring that the administrative decision here was neither arbitrary nor capricious and has no reservations about reaching that conclusion under these circumstances. There can be little doubt that DHCR's decision was well-reasoned, rational, and supported by the evidence.

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the Court.

Dated: New York, New York  
October 15, 2007

ENTER:

  
\_\_\_\_\_  
Hon. Eileen Bransten

**HON. EILEEN BRANSTEN**

**UNFILED JUDGMENT**

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