[* 1]

PRESENT:

PART 35

Index Number : 117226/2007

FIELDS, RONALD P.

VS

COMM'R DEBORAH VAN AMERONGEN

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 2/25/08

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

The within Petition is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the Petition herein is **dismissed;** and it is further

ORDERED that counsel for respondents shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner.

FOR THE FOLLOWING REASON(S):

his judgment has 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)

Dated: 3/3/08

CAROL EDMEAD J.S.C.

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 35

x

In the Matter of the Application of
RONALD P. FIELDS and MADELEINE MORRIS

Index No. 117226/07

Petitioners

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

DECISION/ORDER

-against-

COMMISSIONER DEBORAH VAN AMERONGEN, STATE OF NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL, NEW YORK STATE ATTORNEY GENERAL ANDREW M. CUOMO,

Respondents.

x

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioners Ronald P. Fields ("Fields") and Madeleine Morris ("Morris") (collectively "petitioners"and/or "owners"), *pro se*, move for a judgment, pursuant to CPLR Article 78: (1) reversing the Order granting, in part, the Petition for Administrative Review ("PAR"); (2) sustaining that the "rust stain" and "missing paint on the refrigerator door handles" are *de minimus,* and not rent impairing; and (3) restoring the rent for the apartment located at 318 West 107th Street, Apartment 10, New York, New York 10025 (the "subject apartment"), as of the original submission date of July 13, 2006.

Administrative History

On or about July 19, 2005, Grace Johnson, the tenant in the subject apartment (the "tenant") filed an administrative complaint entitled "Application for a Rent Reduction Based

upon Decreased Services (s) - Individual Apartment." She stated that her apartment contained neither a working stove nor a refrigerator. Respondent New York State Division of Housing and Community Renewal ("DHCR") notified both the tenant and the owners (petitioners herein) that it would inspect the apartment. The inspector submitted photographs which showed that the stove in the tenant's apartment was "red tagged" by Con Edison in 1997. The report also stated that there was no refrigerator in the apartment.

Based on the inspection report, DHCR found in a determination issued November 29, 2005 that the owner failed to provide a working stove/oven and refrigerator. Petitioners filed a PAR. On June 8, 2006, DHCR issued a determination granting the owners' PAR in part finding that the tenant improperly rejected the offered replacement stove. However, DHCR upheld the remainder of the Rent Administrator's service reduction order because "[t]here was no evidence in the record that the owner offered or the tenant refused a replacement refrigerator."

Petitioner never filed an Article 78 proceeding to challenge the rent reduction order. Instead, they filed an application to restore rent, the denial of which is the basis of this Article 78 proceeding.

In the Petitioners' first rent restoration application, the tenant admitted that the petitioners placed a used refrigerator in her apartment. However, she complained that the refrigerator was damaged because of the presence of (1) rusted metal stains on the roof of the refrigerator, (2) the two refrigerator door handles had paint missing, and (3) the vegetable bin had a two inch crack in the lid.

DHCR sent an inspector to the tenant's apartment on October 25, 2006. According to the inspector's report, she observed areas of rusted metal stains on the roof of the refrigerator, the

two refrigerator door handles had paint missing, and the vegetable bin had a crack in the lid.

On November 8, 2006, petitioners filed a PAR challenging DHCR's decision to deny the rent restoration application. Petitioners objected to DHCR's determination on the ground that "Insp. Marzan and tenant did not invite landlords to inspection even though both live at and were in the building at the time. Ms. Marzan stayed over an hour with the tenant." According to the petitioners, the tenant admitted that she received "on 6/23/06 a used refrigerator in good working condition" and petitioners cited the tenant's own words in her answer to the petitioners' rent restoration application. Petitioners further maintained that the presented refrigerator met the DHCR criterion for a replacement unit. "The 3 items cited by Insp. Marzan are 'de minimus' and do not rise to the level of a rent impairing violation. Tenant has refused the landlords access to remedy the "de minimus" condition."

In an Order and Opinion dated November 2, 2007, granting in part the PAR, DHCR found that the crack in the vegetable bin was *de minimus*. However, DHCR rejected petitioners' assertion that the rusting areas and missing paint condition on the door handle were *de minimus*.

DHCR also found that petitioners did not attend the inspection and they did not file a reply to the tenant's answer.

Petitioners' Contentions

Petitioners argue that DHCR, by order dated November 29, 2005, ordered owners to replace a refrigerator in the subject apartment. After many problems gaining access, the DHCR ordered the tenant to receive a replacement unit. On July 13, 2006, the owners applied to restore the rent, then resubmitted the same application twice on the 18th and 29th of August, 2006, as DHCR kept misfiling it.

In her reply, dated September 21, 2006, the tenant acknowledge that the unit was "in good working condition"; however, there was some damage: (1) rusted metal stains on the roof; (2) two refrigerator door handles have paint missing; (3) the vegetable din has a two inch crack. DHCR denied the owners' application for restoration of rent citing the tenant's complaints above, verbatim.

On November 18, 2007, owners filed a PAR, claiming the three items were *de minimus* situations as neither the inspector nor the tenant informed the resident owners of the inspector's arrival and as the tenant had denied the owners access to cure these minor damages. In their Order and Opinion in answer to the owners' PAR, the DHCR granted item #3 of the administrator's decision below.

The unit had been under a skylight which when opened would allow rainwater with rust from the skylight to fall on the unit. Coffee, blueberry or rust stain by definition is a discoloration, not an alteration of the material. The Commissioner made assumptions of a condition not witnessed by the tenant and inspector who were both present and theorized on matters not in evidence.

Respondents' Opposition

The record clearly shows that the subject apartment was lacking both working refrigerator and stove for years. DHCR issued an initial rent reduction order based on the lack of these appliances. When the tenant wrongly refused the petitioners' attempt to replace the stove, DHCR limited its rent reduction order to the lack of a working refrigerator. Petitioners failed to challenge the rent reduction order in court.

This court must reject petitioners' unsupported assertion that the stated defects, rusty

areas and pealing paint on the door handle, do not constitute a reduction in services and that DHCR's finding is arbitrary and capricious.

DHCR did not abuse its discretion when it found that petitioners' failure to provide a working refrigerator which was also properly painted and rust-free justified a rent reduction. Improperly repaired, maintained or defective items justify a rent reduction. The rusty areas and pealing door handle are not *de minimus* conditions.

Analysis

CPLR 7803 states that the court review of a determination of an agency, such as DHCR, consists of whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed. CPLR 7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1st Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1st Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1st Dept.1987], *lv. den.* 70 N.Y.2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts." *Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. *Matter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's function is completed on finding that a rational basis supports the DHCR's determination (*see Howard v Wyman*, 28 N.Y.2d 434 [1971]). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1st Dept.], aff'd 66 N.Y.2d 1032 [1985]).

N.Y. 1974, is instructive on the basic standard of Article 78 review:

> In article 78 proceedings: the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is 'substantial evidence. (Cohen and Karger, Powers of the New York Court of Appeals, s 108, p. 460; 1 N.Y.Jur., Administrative Law, ss 177, 185; see Matter of Halloran v. Kirwan, 28 N.Y.2d 689, 690, 320 N.Y.S.2d 742, 743, 269 N.E.2d 403 (dissenting opn. of Breitel, J.)). The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals. The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious. (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460--461; see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7803.04 Et seq.; 1 N.Y.Jur., Administrative Law, ss 177, 184; Matter of Colton v. Berman, 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 650--651, 234 N.E.2d 679, 681--682).

Pell at 839.

As to any claim by the owners that the DHCR misapplied the relevant statutes, the court is guided by the Court of Appeals in *Howard v Wyman*, 28 N.Y.2d 434 N.Y. 1971, wherein the Court stated:

> It is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld. (See, e.g., Matter of Mounting & Finishing Co. v. McGoldrick, 294 N. Y. 104, 108; Matter of Colgate-Palmolive-Peet Co. v. Joseph, 308 N. Y. 333, 338; Udall v. Tallman, 380 U. S. 1, 16-18; Power Reactor Co. v. Electricians, 367 U. S. 396, 408.) As this court wrote in the Mounting & Finishing Co. case (294 N. Y., at p. 108), "statutory where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited' (Board v. Hearst Publications, 322 U. S. 111, 131). The administrative determination is to be accepted by the courts 'if it has "warrant in the record" and a reasonable basis in law' (same citation). 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body' (Rochester Tel. Corp. v. U. S., 307 U. S. 125, 146)."

Howard at 434.

On judicial review of an agency action under CPLR Article 78, the courts must uphold the agency's exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." *Pell v Board of Ed. Union Free School District,* 34 NY2d 222, 230-31, 356 NYS2d 833, 839 (1974) "The arbitrary and capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." 34 NY2d at 231, 356 NYS2d at 839 *See also Jackson v New York State Urban Dev Corp.,* 67 NY2d 400, 417, 503 NYS2d 298, 305 (1986) (on review of agency action under CPLR Article 78, the courts may not "second guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence").

Moreover, where, as here, the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference. *See Flacke v Onondaga Landfill Systems, Inc.,* 69 NY2d 355, 363, 514 NYS2d 689, 693 (1987). Courts are required to "resolve [any] reasonable doubts in favor of the administrative findings and decisions" of the responsible agency. *Town of Henrietta v Department of Envtl. Conservation,* 76 A.D.2d 215, 224, 430 NYS2d 440, 448 (4th Dep't 1980). *See also Jackson,* 67 NY2d at 417, 503 NYS2d at 305; *City of Rome v Department of Health Dept.,* 65 A.D.2d 220, 225, 441 NYS2d 61, 64 (4th Dep't 1978), *lv. To app. denied,* 46 NY2d 713, 416 NYS2d 1027 (1979).

And, "Where evidence conflicts, issues of credibility are the province of an administrative hearing officer, since 'the decisions by an Administrative Hearing Officer to credit

the testimony of a given witness is largely unreviewable by the courts.' " *Wooten v Finkle,* 285 AD2D 407, 408 (1st Dept 2001) (*quoting Berenhaus v Ward*, 70 NY2d 436, 443 (1987). And the courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists (*Berenhaus,* 70 N.Y.2d at 444, 522 N.Y.S.2d 478, 517 N.E.2d 193; *Matter of Stork Rest. v Boland,* 282 N.Y. 256, 267, 26 N.E.2d 247 [1940]; *Matter of Acosta v Wollett,* 55 N.Y.2d 761, 447 N.Y.S.2d 241, 431 N.E.2d 966 [1981]; *Matter of Verdell v Lincoln Amsterdam House, Inc.,* 27 A.D.3d 388, 390, 813 N.Y.S.2d 68 [2006]).

In the instant case, based on the record before the court, the determination of DHCR was sound and reasonable. It appears that the Commissioner reviewed all of the evidence in the record and carefully considered that portion of the record relevant to the issues raised by the PAR. DHCR properly found that the petitioners failed to remedy the defects in the refrigerator as evidenced by the inspection report. DHCR had full authority to determine that the refrigerator surface condition constituted a reduction in services. That is to say, a defective refrigerator is sufficient to warrant a rent reduction. Nor is the finding that the rusty areas and pealing door handle is not a *de minimus* condition arbitrary and/or capricious.

Conclusion

Based on the foregoing, it is here

ORDERED and ADJUDGED that the Petition herein is **dismissed;** and it is further

ORDERED that counsel for respondents shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: March 3, 2008

Carol Robinson Edmead, J.S.C.