Matter of 600 Height LLC v New York State Div. of Hous. & Community Renewal

2008 NY Slip Op 31857(U)

June 27, 2008

Supreme Court, New York County

Docket Number: 0112803/2007

Judge: Marilyn Shafer

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SCANNED ON 7/2/2008

[* 1]

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

PRESENT: HON. MARILYN SHAFER, JSC PART 8

Index Number : 112803/2007

HEIGHTS 600 LLC.

vs

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

Sequence Number : 001

ARTICLE 78

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

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 decided pursuant to attached Mem

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

Dated: 6/27/08

MARILYN SHAFER J.S.C.

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

---------------------------------------X

In the Matter of the Application of
600 HEIGHTS LLC.,

Petitioner,

Index No. 112803/07

-against-

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL,

Respondent.

---------------------------------------X

Marilyn Shafer, J.:

This Article 78 proceeding is brought by petitioner 600 Heights LLC. to annul a decision of respondent New York State Division of Housing and Community Renewal (DHCR) which denied petitioner a Major Capital Improvement (MCI) rent increase for the installation of a boiler costing $80,000. DHCR denied petitioner's application on the ground that it was untimely brought.

I. Background

Pursuant to section 3522.4 (a) (2) (i) of the Rent Stabilization Regulations, a landlord is permitted to apply for an MCI rent increase if he or she has made improvements to the rental premises which satisfy the lengthy particulars of that section. There is, apparently, no question that a new boiler

would be an MCI.[1] The application must be made within two years of the completion of the MCI. Rent Stabilization Regulations, section 2522.4 (a) (8). Petitioner's application for a MCI rent increase was made on July 28, 2006. Record of DHCR Proceedings, Ex. A-1. Therefore, the application would only apply to improvements made on or after July 28, 2004.

Petitioner claims that its evidence establishes that the work on the boiler was completed in November 2004, which would make the application timely. However, DHCR's Rent Administrator found that the work was completed upon the filing of a Certificate of Electric Inspection (CEI), dated June 25, 2004.

Petitioner filed a Petition for Administrative Review (PAR) on January 8, 2007. Record of DHCR Proceedings, Ex. B-1. In an Order and Opinion (Order) dated July 26, 2007 (Petition, Ex. A.), the Rent Commissioner held to the determination of the Rent Administrator, and denied petitioner's application as untimely. The Commissioner reviewed petitioner's documentary submissions in making this decision, including petitioner's contract with the boiler company (Contract)(Petition, Ex. C), which set forth a schedule for payment.

The Contract provides that petitioner was to pay $35,000 upon signing, $15,000 upon delivery, $20,000 upon firing of the

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[1]Petitioner applied for MCI rental increases for several other improvements, such as new doors and windows. DHCR approved the rent increases as to these items.

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boiler, and $10,000 upon "Receipt of Certificates." Petitioner's evidence shows that it made the first payment on May 27, 2004; the second on December 31, 2004, the third on June 15, 2005; and the fourth on September 8, 2005. From this schedule the Commissioner noted that:

> [g]iven the event upon which the installation payments were made, it could be rightly inferred that the delivery of the equipment occurred on or about the time that the second check was paid (12/31/04). However, the Certificate of Electrical Inspection (CEI), an MCI required municipal approval for any boiler/burner installation, was issued on June 25, 2004. Given the analysis above, that date was prior to the commencement date of said installation.

Order, at 2.

The Commissioner went on to say that he:

> notes that although the owner claims to have submitted the necessary documentation, the record has not borne out that the submitted CEI is for the newly installed boiler/burner. If, as the owner insists, the CEI is accepted as that of the newly installed boiler/burner, it will merely support the position that the installation was completed prior to or about June 25, 2004, and that the owner's MCI rent increase application, filed on July 28, 2006, was lately filed, i.e., not filed within two years of work completion. Based on the above, the owner has failed to prove its entitlement within the MCI rules.

Id.

On the present petition, petitioner faults the Commissioner with failing to consider "the totality of the circumstance and dates at issue in determining the date of completion of the boiler/burner." Petition, unnumbered page 3. Petitioner, who apparently provided documentation to the Commissioner beyond the

CEI (as he has here), states that the Commissioner "disregarded the fact that almost every other document pertaining to the installation of the boiler/burner aside from the Electrical Inspection Certificate is dated within two years of July 28, 2006." *Id.* He insists that the "physical installation of the boiler/burner was not fully completed until November 2004." *Id.*

Petitioner has provided this court with numerous documents, including work permits from the Department of Buildings (DOB). They include a "Schedule C Heating & Combustion Equipment" form, and three documents entitled "Work Permit Application" dated August 10, 2004 (*id.*, Ex. F); a "Final Work Report fo PC Filing," dated September 9, 2004 (*id.*, Ex. G), which purports to "legalize replacement of boiler and oil burner ..."; Work Permits marked "approved" on September 16, 2004, purportedly to "Legalize replacement of boiler and oil burner ... (*id.*, Ex H, I[2]); a "Certificate of Approval for Oil Burning Installation, stating that the oil burning equipment installed ... conforms with the requirements of this Department ... , as well as a Certificate of Boiler Inspection," both dated October 12, 2004 (*id.*, Ex. J); and a "Certificate to Operate," dated April 4, 2005 (*id.*, Ex. L). Aside from these DOB forms, petitioner provides checks to A&C

[2]Petitioner claims that exhibit H shows the Work Permit as "approved," while Exhibit I shows the Permit as "issued" on September 22, 2004, but the two permits appear identical, and only bear the date September 16, 2004 as the date of "approval." Neither document says "issued."

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Combustion Service Corp. (A&C), dated December 31, 2004, June 15, 2005, and September 8, 2005 (*id.*, Ex. K, M and O); a letter from A&C dated June 16, 2005, providing petitioner with various certificates pertaining to the installation of the boiler/burner; and an unsworn letter from A&C, dated October 12, 2006, stating that the work on the boiler/burner started on June 7, 2004, and was completed "including painting, insulation, etc." in November 2004 (*id.*, Ex. P).

II. Discussion

"'[J]udicial review of an administrative determination is limited to whether such determination was arbitrary or capricious or without a rational basis in the administrative record, and once it has been determined that an agency's conclusion has a sound basis in reason the judicial function is at an end.'" *Matter of Mankarios v New York City Taxi and Limousine Commission*, 49 AD3d 316, 317 (1st Dept 2008), quoting *Matter of Partnership 92 LP & Building Management Company, Inc. v State of New York Division of Housing & Community Renewal*, 46 AD3d 425, 428 (1st Dept 2007). Further, a court may not substitute its judgment for that of the agency "*unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [emphasis in original][internal quotation marks and citations omitted]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale and*

Mamaroneck, Westchester County, 34 NY2d 222, 232 (1974). "The burden of establishing entitlement to a major capital improvement increase rests upon the owner" (*Matter of Ador Realty, LLC v Division of Housing and Community Renewal*, 25 AD3d 128, 138 [2d Dept 2005]), and the determination of the agency is entitled to "great weight." *Matter of Wesley Avenue Associates v New York State Division of Housing and Community Renewal, Office of Rent Administration*, 206 AD2d 378, 379 (2d Dept 1994).

One of DHCR's complaints is that petitioner has provided the court with certain documents which were submitted during the administrative proceeding before the Commissioner which were not before the Rent Administrator. Therefore, DHCR claims that these few documents should not be considered by this court. While it is true that an agency need not consider documents provided to DHCR which were not before the Rent Administrator (*Matter of Mayflower Development Corporation v Roldan*, 298 AD2d 291 [1st Dept 2002]), DHCR does not actually say that it did not consider the documents in its review, only that it did not have to, and this court is not convinced that the documents should not be considered.

Regardless, this court finds that petitioner's documents do not require reversal of DHCR's finding that the date of the issuance of the CEI marks the conclusion of the installation of the boiler/burner. The court notes that the Rent Administrator,

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in her order, stated that the MCI increase was denied as to the boiler "due to a series of conflicting dates submitted by the Owner in addition to exhaustion of the two year limit between the date of the electrical inspection (6/25/04) and the application submission of 7/28/2006." Rent Administrator's "Order Granting MCI Rent Increase," Record of DHCR Proceeding, A-11.

These same conflicting dates appear before the court in this Petition. The documents in the main represent various inspections of the boiler at various times after the June 25, 2004 electrical inspection. They do not establish that the work on the boiler was still ongoing at the time the inspections were made; rather, they seemingly show that the boiler was already in place when the inspections were made. For instance, the work permits indicate that their purpose is to "legalize" the boiler, not replace it. *See e.g.* Petition, Ex. F. Likewise, the CEI, without further explanation, indicates a complete installation.

The documents are confusing in other particulars. For example, the schedule of payments to be made, the dates on which payments were made, and the date petitioner and A&C say the work was completed, conflict. While petitioner insists that the work was completed in November 2004, it paid A&C for delivery of the system in December 2004, and made the remainder of the payments into 2005. There is no way to tell from this information when the boiler was installed.

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The Commissioner was within his authority when he made a determination as to the credibility of this evidence, including the letter from A&C. As a result of the confusion of documents, this court finds that using the date upon which the CEI was issued to determine the date upon which the installation was completed was reasonable, and that the petition should be denied.

Accordingly, it is

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

Dated: 6/27/08

ENTER:

MARILYN SHAFER
J.S.C.

J.S.C.