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

PRESENT: JANE S. SOLOMON Justice PART 55

Index Number : 103512/2008
170 EAST 77TH 1 LLC
VS.
NYS DIV. HOUSING & COMMUNITY RENEWAL
SEQUENCE NUMBER : # 001
ARTICLE 78

INDEX NO. 103512-08
MOTION DATE 7/2/08
MOTION SEQ. NO. #001
MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-6
Replying Affidavits	7-8

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is decided in accordance with the annexed Memorandum Decision and judgment.

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).

Dated: 9/2/08

JANE S. SOLOMON J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

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In the Matter of the Application of 170 EAST 77TH 1 LLC, 170 EAST 77TH 2 LLC 170 EAST 77TH 3 LLC, 170 EAST 77TH 4 LLC 170,EAST 77TH 5LLC,170 EAST 77TH 6 LLC,170 EAST 77TH REALTY GROUP, as tenants in common,

Petitioners,

Index No.: 103512/08

-against-

DECISION AND JUDGMENT

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent

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).

JANE S. SOLOMON, J.:

BACKGROUND

Petitioner landlord instituted this proceeding to vacate the determination of respondent agency that the apartment in question was subject to the Rent Stabilization Law (RSL), that the tenant was overcharged for rent, and that the tenant was entitled to treble damages and a renewal lease.

By stipulation of the parties, dated May 12, 2008, the tenant, Margaret Schorsch (tenant), was added as a respondent to this action, and the caption was agreed to be amended to include her name.

The former rent-regulated tenants had resided in the subject apartment for approximately 26 years, and vacated on April 30, 2003, as agreed to by stipulation after the prior owner

instituted a holdover proceeding against them in the Housing Part of the Civil Court.

Once the apartment was vacant, the prior owner commenced renovation, which are claimed to include installing a new dishwasher, stove, refrigerator, cabinets and tiles in the kitchen; new faucet, toilet bowl and vanity/sink in the bathroom; new doors in the bedroom and kitchen; new windows throughout the apartment; new plumbing fixtures; rewiring; and air conditioner units. Additionally, the former owners sanded the floors and did some plastering and painting.

Based on the renovations performed, the prior owner rented the apartment to tenant for a monthly rent of $3,000. The prior rent-regulated tenants were paying a rent of $994.21 per month. Pursuant to RSL § 26-511 (c) (5-a), an owner of a rent-regulated apartment is entitled to a 20% Vacancy Increase when the apartment is leased to a new tenant, which entitled the prior owner to an additional monthly rent increase of $198.84 on the subject apartment. Additionally, pursuant to RSL § 6-511 (c) (5-a), an owner is entitled to charge a Longevity Increase of .06% for each year the previous rent-regulated tenant resided in the apartment, which entitled the prior owner to an increase of $155.10. These amounts are not in dispute, and total a new allowable monthly rent of $1,348.15 following the vacancy of the former tenants.

In addition to the foregoing, if an owner renovates an apartment that has been vacated by a rent-regulated tenant, the owner is entitled to a rent increase of 1/40 of the total cost of the renovations, pursuant to RSL § 2522.4 (a) (1) (a). Further, if the new rent exceeds $2,000 per month, the apartment is no longer subject to the rent regulation laws (deregulated), and the owner is entitled to charge market value for the apartment. RSL § 25-504.2.

In the instant case, the prior owner claimed that the total cost of the renovations was $27,712.23, resulting in an allowable rent increase of $692.81 (1/40 of the total renovation cost). Using these figures, the new allowable rent would be $2040.96, meaning that the apartment would no longer be subject to the rent regulation laws. As a consequence, the owner would be entitled to charge a new tenant the market rent for the apartment. RSL §§ 2520.11 (r) (8) and 26-504.2.

On September 29, 2005, tenant filed a "rent overcharge" complaint with respondent Division of Housing and Community Renewal (DHCR). Petitioner, successors in interest to the prior owner, answered the complaint by submitting bills for all of the work performed.

After reviewing the documents, DHCR determined that not all of the work constituted a renovation of the apartment. DHCR stated that some of the work, such as sanding the floors and

painting and plastering, were regular maintenance and repair costs, which are not permitted to be included as "renovation costs" to allow a rent increase for an apartment. DHCR calculated that only $13,066.33 of the costs claimed by petitioner were renovation costs, meaning that petitioner would only be allowed an increase of $326.66 per month (1/40 of $13,066.33), bringing the total allowable new rent to $1,674.81. Based on these calculations, DHCR determined that the apartment was still subject to rent regulation, and that the tenant was being overcharged. DHCR also granted tenant treble damages, as permitted under RSL § 2526.1. Petitioner filed a Petition for Administrative Review (PAR) following DHCR's initial decision.

On February 8, 2007, while the PAR was still pending, tenant filed a "lease renewal" complaint with DHCR, alleging that petitioner had failed to offer her a new lease. Because DHCR had determined that the apartment was subject to rent regulation, it granted tenant's demand to receive a renewal lease. On June 7, 2007, petitioner filed a PAR challenging the lease renewal order.

Petitioner's PARs were denied in all respects. In reaching its determination, DHCR's Deputy Commissioner stated that the costs that were disallowed in the calculation of the renovation costs were: bathroom faucet, toilet bowl, vanity/sink, doors to the kitchen and bathroom (because an inspection indicated that the doors had not been installed), sanding the floors, painting

the radiator, removal of mirrors from the walls, and removal of damaged tiles from the bathroom. The Commissioner stated that all of these costs constituted routine maintenance and repairs. Additionally, DHCR disallowed an invoice for the kitchen cabinets, saying that the bills were duplicative. DHCR also disallowed $3,399.55 for the installation of floor expansion joints, claiming that such work also constituted required maintenance.

In reaching its ultimate conclusion, DHCR found that the work performed was not a complete renovation of the one-bedroom apartment. Although the kitchen was substantially renovated, and there was rewiring and new windows, there was no work done in the living room, bedroom or other areas with wooden floors that required the floors to be refinished, and no work was described that required the radiators to be repainted. Furthermore, according to the DHCR inspection, no exterior doors were installed, and the bathroom was not completely renovated as asserted by petitioner (no new walls, floor, tiles, bathtub, shower, medicine cabinet, etc.) The inspector also stated that, based on his expertise, some of the items in question were too old to have been installed when claimed.

DHCR concluded by saying that, even taking petitioner's figures as true, the orders for the kitchen appliances and air conditioners, whose total costs were $3,021.80, were not even

placed until after tenant signed the lease. Simply subtracting 1/40th of this amount from what petitioner claims is the correct new rent, $2,040.96, brings the lawful rent below the $2,000 rent deregulation mark.

Petitioner argues that the bills for the kitchen cabinets, which DHCR asserts is duplicative, in fact represent one bill for the cost of the cabinets and one for the cost of installing those cabinets. Petitioner also asserts that DHCR was incorrect in basing part of its decision on the inspection, because the inspection was made three years after the renovations and tenant does not maintain the apartment in good condition, thereby making all the fixtures look old. Petitioner maintains that all of the work that DHCR claims was routine maintenance and repairs actually was renovation. While conceding that some of the contested work may ordinarily be characterized as maintenance and repairs (for example, scraping and painting the radiators), petitioner argues that its cost should be included in the calculation of renovation expense if such work constitutes an integral and necessary component of the overall renovation. And finally, petitioner contends that, if nothing else, it should not be subject to treble damages because any alleged overcharge was not willful, but was the result of an honest interpretation of the law.

In joining the action, tenant has, in substance, adopted

DHCR's arguments, but has additionally requested to be awarded attorneys' fees.

DISCUSSION

It is well settled that "a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citation omitted] [emphasis in original]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaronack, Westchester County*, 34 NY2d 222, 232 (1974). The test is whether the action taken is justified or without foundation in fact. *Id.* at 231. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Id.*

A court's

> "review of DHCR's interpretation of the statutes it administers is limited. 'Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld' [internal citation omitted]."

Matter of Ansonia Residents Association v New York State Division of Housing and Community Renewal, 75 NY2d 206, 213 (1989).

In order to qualify for a rent increase based on renovations

to an apartment, the burden is on the owner to justify the increases that are being claimed. *985 Fifth Avenue, Inc. v DHCR*, 171 AD2d 572 (1st Dept 1991). Additionally, the owner must prove that the work was actually performed in the apartment, and that it did not constitute routine maintenance and repair. *Linden v DHCR*, 217 AD2d 407 (1st Dept 1995). Any question as to what qualifies as an improvement, as opposed to maintenance and repair, is left to the discretion of DHCR. *See Ador Realty, LLC v DHCR*, 25 AD3d 128 (2d Dept 2005).

Many of the items claimed by petitioner to be renovations have been previously determined to be routine maintenance and repairs. *425 3rd Avenue Realty Co. v DHCR*, 29 AD3d 332 (1st Dept 2006)(painting and plastering); *Yorkroad Associates v DHCR*, 19 AD3d 217 (1st Dept 2005)(replacing window glass and refinishing a floor); *Ador Realty, LLC v DHCR*, 25 AD3d 128, *supra*; *Mayfair York Company v DHCR*, 240 AD2d 158 (1st Dept 1997)(partial floor replacement and partial rewiring). Costs of routine maintenance are not improvements to an apartment that would qualify for a rent increase of 1/40th of their costs. *See 201 East 81st Street Assoc. v DHCR*, 288 AD2d 89 (1st Dept 2001).

The assertion that a physical inspection made three years after the alleged renovations is unreliable has also been rejected by the courts. *Pickman Realty Corp. v DHCR*, 299 AD2d 552 (2d Dept 2002). Here, petitioner contends that a 2006

inspection by the DHCR failed to differentiate between fixtures installed in 2003, and those installed before 1978. This involves a factual determination within the agency's area of expertise, and petitioner has not shown that DHCR's interpretation of the facts before it was irrational or unreasonable. *Matter of Ansonia Residents Association v DHCR*, 75 NY2d at 213.

Lastly, pursuant to RSL § 26-516 (a), there is a presumption of willfulness with respect to rent overcharges, which an owner must overcome by a preponderance of the evidence. *Sterling Apartments v DHCR*, 269 AD2d 266 (1st Dept 2000).

> "The burden of establishing lack of willfulness is on the landlord. A rent overcharge is presumed willful unless a landlord proves by a preponderance of the evidence that it was not. DHCR interprets this to mean that when an owner submits no evidence or when the evidence is equally balanced, the overcharge is deemed willful [internal quotation marks and citations omitted]."

East 163rd Street LLC v DHCR, 4 Misc 3d 169, 174 (Sup Ct Bronx County 2004).

Under an Article 78 proceeding, a court's duty is to make sure that a landlord was given a fair and meaningful opportunity to present evidence on the issue of the willfulness of the overcharge before DHCR's final determination. *Metz v DHCR*, 113 AD2d 758, (2d Dept 1985). Once these requirements are met, the court defers to DHCR's ruling. *See generally Adria Realty Investment Associates v DHCR*, 270 AD2d 46 (1st Dept 2000).

Based on the foregoing, it cannot be said that the DHCR's determination that the lawful rent for the apartment was less that $2,000 per month is arbitrary or unreasonable. Since the lawful rent is less than $2,000 per month, and tenant was charged $3,000 per month, tenant has been overcharged. Facts supporting the DHCR's determination on the overcharge also support a finding that the overcharge was willful. For example, DHCR found that petitioner claimed that new exterior doors were installed in a room that did not include an exterior door; that the bathroom was renovated where inspection revealed no such renovation; and that petitioner submitted unreliable and duplicative documentation of its expenses. In light of the foregoing, DHCR's determination regarding willfulness was not irrational or an abuse of discretion. *See East 163rd Street LLC v DHCR, supra.*

Finally, once it has been determined that the apartment is not deregulated, tenant, pursuant to the rent stabilization laws, is entitled to be offered a renewal lease. The court declines to award tenant attorneys' fees, pursuant to RSL § 26-516 (a)(4)(attorneys' fees *may* be assessed). Accordingly, it hereby is

ORDERED that all papers, pleadings and proceedings in the above-entitled action be amended to include Margaret Schorsch as Respondent-Tenant, without prejudice to the proceedings heretofore had herein, and the action shall bear the following caption:

In the Matter of the Application of 170 EAST 77TH 1 LLC, 170 EAST 77TH 2 LLC 170 EAST 77TH 3 LLC, 170 EAST 77TH 4 LLC 170,EAST 77TH 5LLC,170 EAST 77TH 6 LLC,170 EAST 77TH REALTY GROUP, as tenants in common,

Petitioners,

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

MARGARET SCHORSCH,

Respondent-Tenant

And it further is

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry upon the Clerk of the Court who is directed to amend the records to reflect such change in the caption herein; and it is further

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

Dated: September 2 , 2008

ENTER

J.S.C.

JANE S. SOLOMON