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

PRESENT: KORNREICH Justice PART 54

166 EAST 65 TENANTS ASSOC -v- DHCR

INDEX NO. 102320/08

MOTION DATE 2/28/08

MOTION SEQ. NO. Article 78

MOTION CAL. NO. 001

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... Article 78	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, It is ordered that this motion

FILED

SEP 12 2008

COUNTY CLERK'S OFFICE NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

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

Dated: 9/9/08

HON. SHIRLEY WERNER KORNREICH J.S.C.

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

[ ] DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54
----------X

In the Matter of the Application of

166 EAST 61st STREET TENANTS ASSOCIATION and BARBARA WILLIAMS, DONA MUNKER and HARTMUT MUNKER,

Petitioners,

Index No.:102320/2008

For a Judgment Pursuant to Article 78 of the C.P.L.R.,

-against-

DECISION and ORDER

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

-and-

R-R SIXTY-ONE LLC,

Respondents.
----------X

KORNREICH, SHIRLEY WERNER, J.:

By order to show cause, Petitioners 166 East 61st Street Tenants Association ("Association"), representing rent-stabilized tenants of a coop located at 166 East 61st Street, NY, NY ("the building"), along with tenants and Association officers Barbara Williams, Dona Munker and Hartmut Munker, bring this Article 78 proceeding for a judgment reversing and annulling the December 11, 2007 order and opinion (final order) issued by respondent New York State Division of Housing and Community Renewal (DHCR) under Docket No. VC410006RP. By that final order, DHCR granted respondent R-R Sixty-One, LLC ("R-R") a rent increase based on Major Capital Improvements ("MCI") at the building. R-R is the owner of the stock and proprietary leases allocated to 22 unsold apartments in the cooperatively-owned building.

Petitioners allege, pursuant to CPLR Article 7803(3), that DHCR's final order was arbitrary and capricious and lacked a rational basis in law or fact. DHCR has filed a verified answer and legal memorandum opposing the petition. R-R has a filed a cross-motion to dismiss the petition.

I. Background

On January 25, 2002, R-R's predecessor, Z-166 LLC, filed an application with DHCR for an MCI increase. On January 22, 2004, Lynn Levenberg, a rent stabilized tenant, filed a complaint styled "Application for a Rent Reduction Based Upon Decreased Building-Wide Services" in which she detailed more than 15 required services, including the eradication of security cameras in the lobby of the doorman building. Exh. 3 to Exh. C-3, Return Part III of III. DHCR conducted inspections of the building on February 17, 2004 and July 15, 2004. On July 26, 2004, DHCR ruled on the complaint and issued an "Order Reducing Rents for Rent Stabilized Tenants," rejecting all but the allegation that security cameras had not been maintained during the renovation of the lobby. Exh. C, Petition. On August 26, 2004, Z-166 LLC filed a Petition for Administrative Review (PAR) from the rent reduction order. R-R acquired Z-166 LLC's interest in the building on October 27, 2004.

On December 16, 2004, DHCR issued an order denying the PAR, rejecting the sole argument raised by R-R's predecessor–that the Cooperative Corporation, not the apartments' owner, was responsible for conditions relating to renovation of the lobby. Exh. D, Petition. Seven days later, on December 23, 2004, the Rent Administrator issued an order denying the application for an MCI rent increase that had been filed on January 25, 2002, on the ground that "a building-wide service reduction order is in effect ... [and] administrative review petition by owner ... was denied on 12/16/04." Exh. E, Petition. One month later, R-R filed two applications

with DHCR, one for a restoration of rent, and a second for a PAR from the MCI denial. On March 25, 2005, DHCR restored the original rent as R-R had demonstrated that there were functioning security cameras in the lobby area. Exh. F, Petition. A year and a half later, on September 14, 2006, DHCR denied the PAR from the MCI denial, making the following findings:

> A review of the record reveals that the Administrator properly denied the proceeding below, since a building wide reduction order was in effect. The Commissioner notes that as per the Policy Statement 90-8, if there is a DHCR order in effect determining a failure to maintain a building-wide service which resulted in a rent reduction, when an MCI rent increase is applied for, an order of denial of the MCI application will be issued. If the owner has filed a rent restoration application or a PAR against a building-wide rent reduction order, the pending restoration application or PAR will be expedited and the MCI will be held in abeyance until a determination is made.
>
> In the instant case, the record shows that the failure to maintain a building-wide service which resulted in a rent reduction order occurred during the processing of the MCI rent increase application, and that the owner, although having a choice of filing an appeal and/or a restoration of rent application, chose to file the former only. Based on the denial of the appeal, the Rent Administrator properly denied the MCI rent increase in accordance with Policy Statement 90-8. An Administrative appeal is not an open-ended process and the Division was under no obligation to provide the owner with any further opportunity to have the rent restored.

Exh. G, Petition.

R-R then filed an Article 78 Petition (Index No. 116927/2006) with this court (Mills, J.) challenging the MCI PAR decision. The only named respondent was DHCR. Petitioners here, the tenants and Tenants Association, were neither named as respondents nor notified of that proceeding. By stipulated order dated December 11, 2006, R-R and DHCR remanded the matter to DHCR "for further processing." Exh. H, Petition. On remand, by order dated December 11, 2007 (final order), DHCR reversed the prior DHCR order denying R-R's MCI PAR. The

Commissioner, characterizing the proceeding on remand as one for "reconsideration," granted the MCI rent increase, to be effective March 1, 2005, the date of the rent restoration order, and made the following key findings:

> The petitioner [R-R] filed a Petition for Administrative review (PAR) against an order issued by the Rent Administrator on October 29, 2004 ... wherein the owner's major capital improvement (MCI) rent increase application was denied because of the existence of a building-wide rent reduction order....
>
> * * *
>
> It is noted that the rent reduction was granted based on a building-wide service complaint filed by one tenant and based on a single issue. Also, under Docket No. TA410083OR, issued on March 25, 2005, the building-wide service was determined to have been restored and the rent was restored. Also, a review of DHCR records shows that there are no building-wide rent reduction orders currently pending against the subject premises....

Exh. A, Petition. The Commissioner also discussed the evidence and submissions of the parties, which appear to be the same as what they previously submitted for the original PAR.

The pending Article 78 Petition was filed on February 11, 2008 with an Order to Show Cause also seeking a stay of the final order of the DHCR granting the MCI increase. The court denied the stay by order dated February 13, 2008. The parties, by stipulation dated April 30, 2008, modified the challenged order of the DHCR to decrease the per month per room rent increase from $55.45 to $46.84.

R-R cross-moves to dismiss the petition and, in the event the cross-motion is denied, requests leave to file an answer to the petition within twenty days of the order of denial. DHCR answered and opposes the petition. R-R seeks dismissal of the petition as failing to state a cause of action, citing CPLR 3211(a)(7). DHCR has answered and opposes the petition.

II. Discussion and Rulings

On a motion to dismiss pursuant to CPLR 3211, the court must accept the facts as alleged in the complaint as true, accord Plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory. *Morone v Morone,* 50 NY2d 481, 484 (1980); *Rovello v Orofino Realty Co.,* 40 NY2d 633, 634 (1976). "[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Id.* at 636. Petitioners' allege that DHCR's final order, reversing its earlier order denying the MCI increase, was arbitrary, capricious, and without a rational basis. The court disagrees with this position, but will deny the motion to dismiss and reach the merits of the petition as it also alleges procedural and factual deficiencies that, at least facially, could warrant Article 78 relief.

CPLR section 7803(3) states that the following questions may be raised with respect to an Article 78 proceeding: "Whether a determination was made in violation of lawful procedure, was effected by 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 or discipline imposed." In deciding whether an agency's determination was arbitrary, capricious, or an abuse of discretion, courts are limited to an assessment of whether a rational basis exists for the administrative determination, "without disturbing underlying factual determinations." *Heinz v. Brown*, 80 N.Y.2d 998, 1001 (1992); *see Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974) ("Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.").

Exclusion of petitioners from the first Article 78 proceeding was a violation of due process as petitioners "might" have been inequitably affected by the outcome and were

consequently "necessary" parties to the proceeding. CPLR 1001(a); *see Notre Dame Leasing, Ltd. Partnership v. Division of Hous. & Community Renewal*, 22 A.D.3d 667 (2d Dept. 2005) (petitioner necessary party where inequitably affected by judgment); *Magier v. Joy*, 105 Misc. 2d 434 (Sup. Ct. N.Y. County 1980) (tenants necessary parties to Art. 78 proceeding where eviction could result); *cf. In re Whitney Museum of American Art*, 139 A.D.2d 444 (1st Dept. 1988) (tenants not necessary to Art. 78 where court's only available option was remand for factual hearing). Although the court ultimately remanded the matter to DHCR on stipulation, the parties to the Article 78 proceeding, R-R and DHCR, raised substantive arguments that could have resulted in a judgment increasing petitioners' rent. The fact that R-R and DHCR agreed to remand "for further consideration" does not cure the failure to notify petitioners of the Article 78 proceeding in the first place.

The violation does not mandate annulment of DHCR's final order after the remand, but it does affect the legal basis for DHCR's reconsideration of its prior order. The Court of Appeals has confirmed DHCR's broad powers and authority to alter its prior determinations on remission. *See e.g. Matter of Yasser v. McGoldrick,* 306 N.Y. 924 (1954), *affg* 282 A.D. 1056 (2d Dept.1953). Absent the joinder of necessary parties, the court did not have the requisite authority to issue the remand order, and any reconsideration by DHCR of its prior order was necessarily constrained by the prerequisites of 9 NYCRR § 2501.13, which provides, in pertinent part:

> The commissioner, on application of either party or on his own initiative, and upon notice to all parties affected, may, prior to the date that a proceeding for judicial review has been commenced in the Supreme Court pursuant to article 78 of the Civil Practice Law and Rules, modify, supersede or revoke any order issued by him under these or previous regulations where he finds that such order was the result of illegality, irregularity in vital matters, or fraud....

This, DHCR had the power to reconsider its prior decision.

The function of the court upon an application for relief under CPLR article 78 is to determine, upon the proof before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. Disposition of the proceeding is limited to "the facts and record adduced before the agency" when the administrative determination was rendered. *Fanelli v. New York City Conciliation & Appeals Bd.*, 90 A.D.2d 756, 757 (1st Dept. 1982), *affd by* 58 N.Y.2d 952 (1983); *see Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000).

Here, the court must determine whether the administrative record rationally supports DHCR's decision to reverse its prior order. DHCR had the authority to revisit the matter and its final order is rationally based on the record. In its prior order DHCR, citing Policy Statement 90-8, denied the PAR from denial of the MCI increase on the grounds that a rent reduction order was in effect during the processing of the MCI application. Exh. G, Petition. Policy Statement 90-8 does not, however, support DHCR's conclusion: "Where there is a DHCR order in effect determining a failure to maintain a building-wide service which resulted in a rent reduction, when an MCI increase is applied for, an order of denial of the MCI application will be issued." Here, the MCI application had been pending for two years before the rent reduction order was sought and obtained. Section 90-8 , therefore, did not require denial of the MCI.

Rather, under section 2522.4(13) of the NYC Rent Stabilization Code, DHCR could have conditionally granted the MCI:

> The DHCR shall not grant an owner's application for a rental adjustment...in whole or in part, if it is determined by the DHCR prior to the granting of approval to collect such adjustment that the owner is not maintaining all required services

> .... However, ...such application may be granted upon condition that such services will be restored within a reasonable time....

RSC 2522.4(13). The record shows that rent was restored by order dated March 25, 2005 after services were restored. DHCR, in its final order, determined that the effective date of the MCI increase would be the same as that of the rent restoration, March 1, 2005. This was entirely rational and based squarely on DHCR's own policies and the applicable law.

The court further rejects petitioners' additional grounds for relief, including claims that the MCI work was inadequate and incomplete, and that DHCR relied on statements made by R-R responding to the inspection report of DHCR, when petitioners had never received a copy of R-R's response. DHCR's determination that the exterior restoration work constitutes a major capital improvement necessarily entails the agency's expertise in evaluating factual data and is entitled to deference if there is evidence in the record to support its conclusion. *See Sewell v. New York*, 182 A.D.2d 469, 473 (1st Dept. 1992). DHCR, in the final order, rejected the tenants' numerous claims, finding that "substantiating documentation" had been made available to the tenants by DHCR, that conditions identified in an earlier DHCR inspection report were being corrected, and that apartments where the conditions had not been addressed would be exempted from the MCI increase until the conditions were remedied. The parties have also stipulated to a reduction of the per room MCI increase from $55.45 to $46.84 a month, rendering moot petitioners' claim that R-R improperly increased the per room amount from $50.06 to $55.45.

Accordingly, it is

ORDERED that respondent R-R Sixty-One, LLC's cross-motion to dismiss the petition is denied, and its alternative request for an opportunity to answer the petition is denied as moot; and

it is further

ORDERED that petitioners' application seeking to vacate and annul DHCR's December 11, 2007 order is denied and the proceeding is dismissed.

ENTER:

Date: September 9, 2008
New York, N. Y.

J.S.C.