

<b>Matter of Buckner v 910 W.E.A. Realty LLC</b>
2008 NY Slip Op 32605(U)
September 24, 2008
Supreme Court, New York County
Docket Number: 0107372/2008
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 107372/2008  
**BUCKNER, THOMAS**  
vs.  
**910 W.E.A. REALTY LLC**  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE 7/22/08  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1-3  
4-5

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered <sup>and adjudged</sup> that this ~~motion~~ petition is decided in accordance with the enclosed 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: 9/24/08

  
**JANE S. SOLOMON** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

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

-----x  
In the Matter of the Application of  
THOMAS BUCKNER,

Petitioner,

Index No.: 107372/08

-against-

DECISION and JUDGMENT

910 W.E.A. REALTY LLC and  
STATE OF NEW YORK DIVISION OF HOUSING  
AND COMMUNITY RENEWAL OFFICE OF  
RENT ADMINISTRATION,

Respondents

-----x

JANE S. SOLOMON, J.:

**BACKGROUND**

Petitioner, acting pro se, is a tenant who is challenging the determination of the New York State Division of Housing and Community Renewal (DHCR), pursuant to CPLR Art. 78, that his apartment is subject to a Major Capital Improvement (MCI) rent increase.

On March 18, 2008, DHCR granted petitioner's landlord, defendant 910 W.E.A. Realty LLC, an MCI for a facade restoration, and roof and fire door installation. Pursuant to that order, several apartments, including petitioner's, were excluded from the MCI increase, due to alleged leaks and water damage in the units. The landlord sought a review of the order to have it modified to include the excluded apartments, and on March 28, 2008, DHCR granted the landlord's modification, in part, and determined that petitioner's apartment was subject to the MCI. The basis of granting the modification was an architect's report

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stating that there were no leaks emanating from the building's facade, and the allegation that petitioner had refused access to his apartment in order to make repairs.

In his petition, petitioner states that he has always allowed access to his apartment, and he alleges that the landlord is lying about not being granted access. Petitioner does not dispute that the landlord did the work for which the MCI was granted, but maintains that the work was not properly done, and, because of water leaks and mold problems in his apartment, his apartment should be excluded from the MCI increase. Petitioner has included a Department of Housing Preservation and Development (HPD) violation report, dated May 23, 2008, indicating four water and mold related Class B violations on his apartment.

#### **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 & Mamaroneck, 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.* If the agency's action is founded on a rational basis, that action should be affirmed, even if the court would have come to a different conclusion. *Mid-City Management Corp. v New York Conciliation and Appeals Board*, 112 AD2d 72 (1<sup>st</sup> Dept), *affd* 66 NY2d 1032 (1985).

Courts rarely upset the determinations of DHCR as to whether an item qualifies as an MCI, and which expenses are eligible for inclusion in an MCI rent increase. *Ansonia Residents Association v New York State Division of Housing and Community Renewal*, 75 NY2d 206 (1989). As long as DHCR's determination is reasonable and rational, its decision will be upheld. See *Matter of Rudin Management Co., Inc. v New York State Division of Housing and Community Renewal*, 215 AD2d 243 (1<sup>st</sup> Dept 1995).

In the instant matter, the landlord provided DHCR with all of the information it requested in order to determine whether an MCI was appropriate. This documentation included a contract with a detailed work breakdown, cancelled checks, architect letter, and a contractor statement with accompanying building diagram. Issues of credibility and weight of the evidence are for DHCR to determine. *Jane St. Co. v DHCR*, 165 AD2d 758 (1<sup>st</sup> Dept 1990). Petitioner has provided no evidence to indicate that the work claimed by the landlord was not done, nor does his conclusory statement, without evidentiary support, merit overturning DHCR's determination. See *Tall Trees Construction Corp. v Zoning Board*

*of Appeals of the Town of Huntington*, 97 NY2d 86 (2001).

In reaching its determination that petitioner's apartment should not be exempt from the MCI, the landlord included evidence of two letter/notices sent by certified mail to petitioner seeking access to the apartment to make repairs. In response, petitioner alleged that he contacted the landlord to schedule another date for access, but the landlord did not respond to him. Petitioner failed to submit any evidence, other than his statement, that he contacted the landlord. Issues of the credibility of the witnesses are "exclusively determined by the administrative factfinder." *Lugo v New York State Department of Health*, 306 AD2d 766, 768 (3d Dept. 2003)

The HPD report submitted by petitioner with his petition indicates that the HPD inspection took place almost two months after the DHCR decision, which could support the landlord's statement that it was not granted access to make repairs. Further, the court cannot consider evidence not submitted to the administrative agency at the time the administrative action was taken. *Fanelli v New York City Conciliation and Appeals Board*, 90 AD2d 756 (1<sup>st</sup> Dept 1982), *affd* 58 NY2d 952 (1983).

Petitioner has not submitted evidence that would warrant the court overturning the decision of DHCR. However, petitioner may have recourse to file a service reduction complaint with DHCR to have his rent reduced if he can demonstrate that violations exist

[\* 6]  
in his apartment which the landlord does not repair.

**CONCLUSION**

Based on the foregoing, it hereby is

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

Dated: September 24, 2008

ENTER:



Jane S. Solomon, J.S.C.

JANE S. SOLOMON

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