Matter of Schessel v New York State Div. of Hous. and Community Renewal
2008 NY Slip Op 32744(U)
October 2, 2008
Supreme Court, New York County
Docket Number: 115560/07
Judge: Alice Schlesinger
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SCANNED ON 10/6/2008

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

PRESENT: ALICE SCHLESINGER PART IA Part 16

Index Number : 115560/2007

SCHESSEL, MARTHA

VS.

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

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

MOTION CAL. NO. ______

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~~ Article 78 petition is denied and the proceeding is dismissed in accordance with the accompanying memorandum decision. The Clerk is directed to enter judgment accordingly.

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

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: OCT 0 2 2008

ALICE SCHLESINGER, 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: IAS PART 16

---X

In the Matter of the Application of
MARTHA SCHESSEL d/b/a HARMIL REALTY, LLC,

Petitioner,

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

- against -

Index No. 115560/07
Motion Seq. No. 001

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent,

-and-

156 WEST 86th STREET TENANTS ASSOCIATION,

Respondent-Intervenor.

---X

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).

SCHLESINGER, J.

Petitioner Martha Schessel d/b/a Harmil Realty is the owner of an apartment building at 156 West 86th Street in Manhattan. The owner commenced this proceeding to annul the September 27, 2007 decision of the Deputy Commissioner of the Division of Housing and Community Renewal (DHCR) which affirmed the decision of DHCR's Rent Administrator (DRA) denying the owner's application for a rent increase based on major capital improvements (MCI). As the basis for its decision, the DRA stated in its June 26, 2006 decision as follows:

> - INSTALLATION(S) DO NOT CONSTITUTE A MAJOR CAPITAL IMPROVEMENT BUT ARE CONSIDERED AS REPAIRS AND MAINTENANCE. NO EXECUTED CONTRACT EXISTS.

- OTHER: PER AFFIDAVIT FROM VILES CONTRACTING CORP. DATED FEBRUARY 22, 2006, AN EXECUTED CONTRACT DOES NOT EXIST.

DHCR has opposed the petition. The rent-regulated tenants in the building whose rents are at issue have intervened and opposed the petition as well.

Background Facts

By application affirmed by its principal Martha Schessel on February 11, 2005, the owner applied to DHCR for an MCI rent increase for all rent-regulated tenants in the amount of $60.23 per month for each of the 220 rooms at the building[1], in perpetuity. (A-1).[2] The application was based on the following work, all of which was allegedly completed for the "preservation, maintenance and operation of the structure":

a) Exterior Restoration from 12/00 - 12/03 at a claimed cost of $1,054,175.67;
b) Lobby/Vestibule Door from 5/03 - 6/03 at a claimed cost of $28,000.00; and
c) Architect Fee from 12/00-12/03 at a claimed cost of $30,875.03

With respect to the exterior restoration, the owner submitted an affirmation signed by Ms. Schessel attesting that the work consisted of pointing/waterproofing and roof work performed by a Manhattan-based contractor Viles Contracting Corp., an entity with "no relationship, financial and/or otherwise," with the owner. The affirmation indicated that the original "contracted cost" was $644,648.00 but that an additional $409,527.67 had been paid pursuant to "change orders corresponding to additional work." Viles submitted an affirmation signed by the General Manager Robert Gutierrez essentially confirming the information provided by the owner.

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[1] Each apartment contains multiple rooms, with some containing more than others.

[2] Unless otherwise indicated, the citations refer to the Return prepared by DHCR which contains all the documents from the administrative proceeding.

Significantly, the owner did not provide a copy of any contract with Viles. Instead, it provided the various payment applications from Viles, including change orders, and cancelled checks from the owner to Viles signed by Ms. Schessel.

Regarding the vestibule work, the owner submitted her affirmation and one from the contractor J. Padin, Inc. of Newark, NJ attesting that work had been performed at a cost of $28,000. Again, cancelled checks were provided, but no contract or proposal. Similarly, for the architect fee, affirmations and cancelled checks were provided, along with copies of some blueprints and permits, but no contract was included. Also included was a letter from the consulting engineer E.S. Barrekette, prepared on December 2, 2004 for the express purpose of the MCI application, indicating that he had inspected the building before and after the work and had concluded that "all necessary pointing and waterproofing was done on all exposed sections of each exterior wall where such work was required."

DHCR served the tenants with the application, and the tenants opposed the application on August 1, 2005. (A-10). The answer consisted of a memorandum from their counsel and a detailed report and photographs from Stephen J. Morrison, P. E., of Futura Consulting Company. As particularly relevant here, the tenants asserted that "there are significant defects and deficiencies in the work that was allegedly done and the three year project constitutes ongoing repairs, not an MCI;" and that the owner "failed to provide required and essential documentation substantiating the work that was done" and its cost. More specifically, the tenants complained that "No specific contracts for the work" had been provided, that insufficient architectural drawings had been provided, and that some discrepancies existed between the claimed cost and proof of payment.[3]

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[3]The tenants also included opposition to a separate MCI increase application based on the installation of a video intercom (Dckt No. 4300500M), not at issue herein.

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DHCR forwarded the tenants' answer to DHCR under cover of a Request for Additional Information/Evidence, stating "Kindly address all issues raised by tenants or their attorney." (A-13). The owner, through counsel, responded on February 24, 2006. (A-14). As relevant here, the owner asserted that the work constituted an MCI, rather than repairs, in that all the work was "part of a comprehensive plan .... completed pursuant to a single verbal agreement" between the parties. The owner provided the backs of certain cancelled checks inadvertently omitted earlier and insisted generally that the documentation was sufficient, but did not address all the particular points raised by the tenants as to document discrepancies, such as why the claimed cost for vestibule work was $28,000 when the checks for $9,000 and $15,000 totaled only $24,000.

In direct response to the tenants' complaint that no written contract had been provided, the owner provided an affidavit from Robert Gutierrez, the General Manager of Viles Contracting. Gutierrez attested that he was "personally familiar with the work ... and the arrangements concerning the work performed" by Viles. He said that he had been informed that "a request has been made for the submission of an 'executed contract' between Viles and Harmil Realty, LLC to address certain specific questions" relating to the owner's MCI application. Gutierrez went on to state clearly and emphatically in his affidavit (at ¶ 5): "In fact, the 'executed contract' sought in the DHCR proceeding does not exist." Contradicting his earlier assertion that the parties had "no relationship," Gutierrez then explained that "Viles and Ms. Schessel had developed an amicable working relationship" through their previous dealings and that as a result, "no signed contract was entered into. Rather, based solely upon a handshake and Ms. Schessel's verbal authorization, we proceeded to complete the exterior work."

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DHCR then forwarded those documents to the tenants with a request that they "Kindly comment." (A-17). The tenants did comment, on April 6, 2006. (A-18). While maintaining their other points, the tenants emphasized their defense of inadequate documentation. They characterized as "inconceivable" the assertion by Viles that such a substantial project had been undertaken based on a handshake with no executed contract. They asserted that the credibility of the entire application was in doubt due to the owner's failure to provide her own affidavit or one from the supervising architect as to the lack of a contract and the failure to address certain inconsistencies and omissions previously raised, particularly in light of the Viles affidavit which "raises more questions than it answers."

The DRA agreed and issued its June 26, 2006 order, quoted above (at pp. 1 - 2) denying the owner's MCI application. While not detailed in its discussion of its reasoning, DHCR found that the owner had failed to submit adequate documentation to sustain its burden of proving that the work constituted a major capital improvement which qualified for a substantial, permanent rent increase, as opposed to ordinary repairs and maintenance (A-19). The absence of an executed contract was specifically mentioned.

The owner promptly requested reconsideration in a letter from counsel dated July 18, 2006. (A-20). Counsel's argument was twofold: (1) the DRA had erred in finding that the owner had failed to prove that the work qualified as an MCI, rather than repairs and maintenance, particularly in light of the Contractor's Application No. 2 for payment which itemized the categories of work to be performed and the cost of each; and (2) if the DRA needed more information, it had a duty to specifically request it, consistent with its custom and practice. With respect to the DRA's reference in its order to the absence of a contract,

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counsel stated in a footnote that: "we have recently been made aware of the existence of a contract document apparently executed by the owner and by an officer of the contracting corporation who had retired by the time the contractor's general manager executed the affidavit submitted to DHCR." However, no contract was attached to the papers.

By letter dated August 11, 2006, DHCR denied the owner's Request for Reconsideration. (A-21). In the letter, DHCR acknowledged both the owner's arguments regarding the finding that the work was "repair and maintenance" and the footnote regarding the purported contract. DHCR then indicated that the absence of a contract for the costly work justified the presumption that the work consisted of repairs and maintenance, and the owner had failed to rebut the presumption.

By letter dated October 10, 2006, the owner made a second Request for Reconsideration. (A-22). The owner outlined the work allegedly performed and the documentation of that work which had been submitted with the initial MCI application. Counsel argued that the documents, combined with the contractor's affidavit that no written contract existed, established the existence of an oral contract. Counsel then began some serious backpedaling, offering an affidavit from the owner's principal Martha Schessel and the contractor Robert Gutierrez attesting to the authenticity of a recently discovered document claimed to be the written contract executed by the owner and Viles for the exterior restoration work.

Ms. Schessel explained that, when she undertook the project, she discussed the work with Robert Gutierrez, Marie Lorenzo and Fernando Vidal of Viles and her consulting engineer and had then signed a written contract with Ms. Lorenzo. She went on to explain in her affidavit that, because she was ill while the MCI application was pending, her son

Harry was assisting her with the building. She claims that Harry, in response to her counsel's questioning, referred the attorneys to Viles to confirm whether a contract existed. Upon learning that the MCI application had been denied, Ms. Schessel began looking for a contract herself and ultimately found a fax copy, but not the original, a copy of which she was now providing (albeit without the referenced attachments).

As for Gutierrez, he explained in his new affidavit that he had prepared a written proposal for the work and had thereafter been told to begin the project, but he had never signed or seen any contract even though he was in charge of the work. Finding no contract in his file when the MCI application was pending, he swore that none existed. But he claimed he did recognize the signature of Marie Lorenzo on the newly discovered document and the fax number as belonging to Viles' Bronx office where Lorenzo had worked before that office was closed. However, no copy had been sent to Viles' main office in NJ or to the NY office which was the base for Gutierrez and the work at issue herein. Neither Schessel nor Gutierrez had any knowledge or recollection as to why Viles might have faxed a copy of the contract to the owner in April 2002, years after the work had commenced, and what happened to any original.

By letter dated November 20, 2006, DHCR denied the second Request for Reconsideration for the reasons previously stated. (A-23). However, the agency did agree to include the papers in the owner's Petition for Administrative Review (PAR) which was then pending. In the PAR, which had been timely filed on July 27, 2006, the owner reiterated the arguments previously made; the papers in fact consisted of the first Request for Reconsideration. (B-1). The tenants opposed the PAR, pointing to the contractor's sworn affidavit that no contract existed and highlighting the deficiencies in the

documentation and the work previously alleged by counsel and the tenants' engineer. (B-3). The owner then supplemented its PAR with a copy of its Second Request for Reconsideration (B-7), which DHCR forwarded to the tenants with an opportunity to respond (B-8). The tenants did respond on March 19, 2007. (B-9). They urged denial of the PAR on three grounds which they argued in detail:

1. the alleged contract was improperly submitted at the PAR level almost two years after the filing of the MCI application and is of dubious validity;

2. the "Detailed Price List" allegedly annexed to the newly discovered contract is a fraudulent document submitted for the purpose of misleading the agency;[4] and

3. the Owner has failed to rebut the numerous findings of the Tenants Association's engineer regarding defects in the MCI work.

By order and opinion dated September 27, 2007, DHCR denied the PAR. (B-11). DHCR indicated (at pp. 2,3) that DHCR has always required that all written contracts be submitted with MCI applications and that "in the absence of the existence of a written contract there must be other compelling and contemporaneous written evidence which clearly establishes the precise scope of work performed... so that a determination can be made that the work meets the criteria for MCI eligibility as established by the [Rent Stabilization] Code and [DHCR] Policy and to ensure that the costs alleged are attributable to an eligible project and that the work was not done on a piecemeal basis." DHCR then explained with specificity some deficiencies in the owner's documentation which supported its conclusion that the owner had failed to meet its burden of proving MCI eligibility.

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[4] The owner claimed that the Price List was referenced in the contract, but the newly discovered contract was a fax copy with no attachments and the Price List appeared freshly printed from a computer.

As to the contract for the exterior restoration work attached to the owner's second Request for Reconsideration and submitted as a supplement to the PAR, DHCR concluded (at p. 4) that "this document is of questionable evidentiary value" and insufficient to remedy the previously-noted omissions and deficiencies in the owner's initial application. DHCR went on to explain as follows (at pp. 4-5):

> The record of the proceeding before the Administrator contains an affidavit by Robert Gutierrez, the general manager of Viles Contracting (the exterior restoration contractor) which states in relevant part that the executed contract sought by DHCR "does not exist." In submitting the supposedly newly discovered contract after the Rent Administrator's order had been issued, the owner concurrently submitted two new affidavits: one by the owner, endeavoring to explain why a copy of this contract had not been submitted during the proceeding before the Administrator, and one by Mr. Gutierrez, attempting to explain (and contradict) his original averment that this document "does not exist." It is noted that this second Gutierrez affidavit contains many statements which are based on conjecture or hearsay (including for example, statements regarding supposed actions taken by the individual who signed the contract for Viles, Marie Lorenzo, though no first hand affidavit from Ms. Lorenzo verifying these suppositions has been submitted). Additionally the statements in the affidavits raise many questions and ambiguities with regard to the sudden discovery of this contract. In light of this conflicting and unconvincing evidence, the Commissioner finds that the contract attached to the October 10, 2006 Request for Reconsideration does not offer persuasive evidence of the exact scope of work performed on the exterior of the building.

This Article 78 proceeding ensued.

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Discussion

The determination of this Article 78 proceeding necessarily begins with the standard of judicial review. It is well established that the courts must uphold a DHCR decision denying an MCI application unless the decision lacks a rational basis in the record and hence is "arbitrary and capricious." CPLR §7803(3); *370 Manhattan ave., Co., LLC v. NYS Division of Housing and Community Renewal*, 11 AD3d 370, 372 (1st Dep't 2004), citing *Matter of Residential Mgt. v. Division of Housing and Community Renewal*, 234 AD2d 154, 155 (1st Dep't 1996), *lv denied* 90 NY2d 805 (1997).

As recently emphasized by our Appellate Division *in Partnership LP v. State Div. of Housing and Comm. Renewal*, the court's function is a very limited one:

> Once, it has been determined that an agency's conclusion has a 'sound basis in reason' ... the judicial function is at an end" ... Indeed, the determination of an agency, acting pursuant to its authority and within the orbit of its expertise is entitled to deference ... and even if different conclusions could be reached as a result of conflicting evidence , a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record ... Moreover, it is also well settled that an agency's interpretation of the statutes and regulations it is responsible for administering is entitled to great deference, and must be upheld if reasonable (citations omitted).

When evaluating an application for an MCI rent increase, DHCR must apply the various criteria in the governing statute and regulations, including Rent Stabilization Law §26-511(c)(6)(b) and Rent Stabilization Code §2522.4(a)(2)(I). For example, to merit a rent increase the work must be performed in a workmanlike manner on a building-wide basis and inure to the benefit of all the tenants. *Cenpark Realty v. DHCR*, 257 AD2d 543 (1st

Dep't 1999). The application must be denied if the work consists of repairs performed on a piecemeal basis and not completed within a reasonable time. *West Village Assoc. v. DHCR*, 277 A.D.2d 111 (1st Dep't 2000). Unless the owner proves that the work qualifies as a building-wide improvement, as opposed to repairs and maintenance, no rent increase will be allowed. *Maxwell-Kates v. DHCR,* 196 AD2d 456 (1st Dep't 1993). What is more, the burden of proof is clearly on the owner to establish its entitlement to a rent increase. *985 Fifth Avenue v. DHCR*, 171 AD2d 572 (1st Dep't 1991), *lv denied* 76 NY2d 861 (1991).

The owner insists that its application meets these criteria and asserts that DHCR in denying the application "for one reason only," i.e., the owner's failure to attach the written contract to its initial application. Counsel construes the agency's decision as saying that, "without a written contract, DHCR could not determine the scope of the work, and was thus purportedly obligated to rule that the work was not an MCI, but was instead ordinary repairs." (Memo of Law at p. 3). Reviewing the evidence presented in detail, the owner insists that it documented a qualifying pointing and waterproofing project, even without a contract (9-15), criticizes the agency for not crediting the contract when later submitted (16-20), and accuses the agency of deviating from its practice of requesting additional documentation when needed (21-22). In reply, the owner further contends that DHCR deviated from its Policy Statement 90-10 in requiring a written contract when the Policy Statement merely lists a contract as one alternative and allows documentation, such as cancelled checks or a contractor's affidavit, to be submitted instead.

In so arguing, the owner misconstrues DHCR's decision. As the Commissioner explained in detail in the PAR decision, the agency did not base its denial solely on the absence of a contract. Rather, the agency reviewed all the evidence submitted, evaluated

it in a detailed fashion, and concluded that it failed to satisfy the owner's burden of proof. Citing some of the differences in the documentation, the Commissioner stated (at p. 3):

> The contractor's requisitions attached to the Application contain only a brief line-item description of various work categories (commonly known as a Trade Payment Breakdown), and do not provide necessary details regarding the work whether was performed ... The change order requests attached to the application, while offering fairly detailed descriptions of the add on work, provide no clarification regarding the original scope of work. Thus, the information on record does not contain adequate detail for a determination to be made that the work performed meets the criteria for MCI eligibility.

Simply stated, DHCR was willing to accept "other comprehensive writing" in lieu of a contract, but the owner's documentation was inadequate (p. 4).

Regarding the belatedly offered contract, DHCR did consider it but found that it, too, did "not offer persuasive evidence of the exact scope of work performed on the exterior of the building" (p.5). This conclusion was reached in the context of the "conflicting and unconvincing evidence" submitted by the contractor and the owner as to the existence of the contract (pp 4-5). For example, Gutierrez first affirmed that the parties had "no relationship," then insisted that no contact existed because the parties had a long-standing relationship, and then sought to authenticate a fax copy of a newly discovered "contract" and explain (unconvincingly) why he had been mistaken earlier when he attested that "none exists."

Ms. Schessel blamed the error on her son, who was "assisting" with the building when she was ill but provided no affidavit himself. But it was Ms. Schessel herself who

signed the MCI application and the various affirmations detailed above which were submitted when the application was first filed. Presumably, Ms. Schessel also provided the canceled checks attached to the application and the various change orders. She negotiated the contract and signed all the checks for the work performed, but she apparently never gave a copy of the contract to Gutierrez who was in charge of the project or her consulting engineer who supervised the project. Indeed, her affidavit suggests that she never even mentioned the contract to anyone, presumably not even her counsel when they worked together to prepare the application. Considering these discrepancies and the limited standard of review, this Court cannot find that DHCR acted in an arbitrary and capricious manner when it found the contract unpersuasive.

Similarly unavailing is the owner's argument that DHCR based its denial solely on the absence of a written contract. While the argument is superficially appealing when one first reads the DRA order, it is belied by the language in the Commissioner's order. The owner cannot reasonably dispute the principle applied by the Commissioner in the PAR decision (at p. 2): "In the absence of the existence of a written contract there must be other compelling and contemporaneous written evidence which establishes the precise scope of work performed." And this Court cannot reasonably dispute DHCR's finding that the evidence on the whole was inadequate, as the Court must defer to the agency's evaluation of factual data in a case such as this one, even if in the first instance the Court might have reached a different conclusion. *Matter of Mid-State Mgmt v. NYC Conciliation and Appeals Bd.*, 112 AD2d (1st Dep't), *aff'd* 66 NY2d 1032. The change orders do contain extraordinarily brief descriptions of the work (such as "Pointing-Rear Elevations" and "Window caulking"), various applications for payment (and the purported contract) list a

15% mobilization fee of $96,697.20, which was never paid (lacking any personal knowledge, counsel claims in his memorandum in this proceeding at p. 17 that the fee was replaced by a 15% increase in each line item), and the architectural drawings provide limited details. In addition, the tenants' engineer detailed numerous document deficiencies in his report and also disputed that the work was a building-wide improvement, as opposed to spot repairs. In support of this assertion, he presented photographs of deficiencies and omissions in the work performed and documented, based on his own inspection, continued water infiltration in various apartments at the building.

Wholly unavailing is the owner's claim that DHCR erred in not specifically requesting the contract or additional documentation before denying the application. Our Appellate Division has rejected the notion that any such duty exists, stating: "nor do we impose upon the Rent Administrator the obligation to notify the applicant that additional documentation is required before the sought relief may be granted." *West Village*, 277 AD2d at 113. What is more, the tenants in their various submissions pointed to the missing contract , various document deficiencies and omissions, and the insufficiency of the work, labeling it repairs rather than a qualifying major capital improvement. The owner was given a chance to respond and did with, among other things, the Viles affirmation attesting in detail why "no contract exists." Thus, the owner received ample notice of the issues and an ample opportunity to be heard on all the issues.

That part of the application related to the vestibule work was also properly denied. No contract or other detailed documentation was provided to establish the qualifying nature of the work. Also, the checks totaled $4000 less than the amount claimed, and no explanation was ever offered as to this discrepancy. As to the work by the consulting

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engineer, that claim must fail alongside the rejection of the underlying work.

Accordingly, it is hereby

ADJUDGED that the owner's Article 78 petition is denied and the proceeding is dismissed.

Counsel for DHCR may retrieve the Administrative Return from the Part Clerk in Room 222.

This constitutes the decision and judgment of the Court. The Clerk is directed to enter judgment accordingly.

Dated: October 2, 2008

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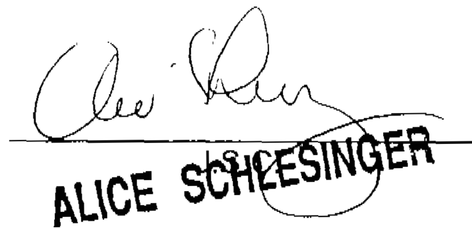

This judgment [illegible] and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).