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

PRESENT: KIBBIE F. PAYNE PART 4
Justice

134 WEST 58TH STREET TENANTS' ASSOCIATION

INDEX NO. 106327/08

MOTION DATE 08-26-08

- v -

MOTION SEQ. NO. 001

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL

MOTION CAL. NO.

The following papers, numbered 1 to ___ were read on this motion for Article 78

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, the petition is decided in accordance with the annexed Judgment/Decision.

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: October 21, 2008

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 STATE OF NEW YORK
COUNTY OF NEW YORK: PART 4

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In the Matter of the Petition
Pursuant to Article 78 of the CPLR of the
134 WEST 58TH STREET TENANTS' ASSOCIATION
on behalf of its individual members,
TONY WARREN et al.,

Petitioner,

Index No. 106327/08

-against-

Judgment/Decision

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

KIBBIE F. PAYNE, J.:

In this Article 78 proceeding, petitioner 134 West 58th Street Tenants' Association (the "TA") seeks to annul the March 7, 2008 determination of respondent New York State Division of Housing and Community Renewal ("DHCR"), rendered upon the TA's petition for administrative review ("PAR") (hereinafter, the "2008 PAR determination"). Specifically, petitioner claims that the DHCR's 2008 PAR determination regarding major capital improvements ("MCIs") at 134 West 58th Street, New York, New York (the "building") was unreasonable, arbitrary and capricious. Respondent DHCR has answered and opposes the petition.

The application for a rent increase based on MCIs, which precipitated the instant proceeding, was filed on April 10, 2000 by the building's owner, Wilshire Plaza, LLC, (the "owner"). The application cited the following MCI work, totaling $1,025,608.69:

new apartment doors; the architect's fee; new roof/major facade work; and scaffolding/sidewalk bridge erection. After being notified of the owner's application, on January 11, 2001, the TA submitted an answer to the DHCR, arguing that "the owner [was] not entitled to an MCI rent increase" (DHCR file, Ex. A-15, at 9).

On May 14, 2002, the DHCR's rent administrator ("RA"), Lilia Albano, granted the owner's MCI rent increase (the "2002 RA determination"), noting that the building's tenants had objected to the increase and that the owner had since withdrawn its request for an MCI increase with regard to the new apartment doors. The RA found that "evidence in [the] file supports the other improvements and therefore, increase has been granted" (*id.*, Ex. A-47, at 1). The TA then submitted its petition for administrative review ("PAR") on June 12, 2002, claiming that the 2002 RA determination "overlook[ed] substantial defects in workmanship and deficiencies in the [owner's] application" (*id.*, Ex. B-1, at 1). According to the TA, its own engineer's report found certain unsubstantiated costs, as well as excessive costs, which contradicted the report of the owner's engineer. For this reason, the TA sought a reversal of the RA determination, as well as a DHCR inspection to resolve the issues disputed by the respective engineer reports.

Paul A. Roldan, DHCR Deputy Commissioner, issued an order

denying the TA's PAR and upholding the RA's 2002 determination, on August 28, 2003[1] (the "2003 PAR determination"). Mr. Roldan determined that, in response to the TA's PAR, the owner had demonstrated its entitlement to the rent increase and that "[b]ased on the totality of the evidence of record, . . . the Rent Administrator's order is correct" (DHCR file, Ex. C-6, at 4).

In 2003, the TA commenced an Article 78 proceeding before Justice Harold Beeler entitled *134 West 58th Street Tenants' Association v. New York State Division of Housing and Community Renewal* under Index Number 118969/03 (the "First Article 78 proceeding"). In that proceeding, petitioner claimed that the 2003 PAR determination was contrary to law, unreasonable, arbitrary and capricious. The TA further claimed it was denied due process, as the DHCR never served it with a number of documents that were submitted by the owner and cited in the 2003 PAR determination and/or the 2002 RA determination. The DHCR cross-moved to remit the proceeding back to the agency, in order to examine the TA's Article 78 claims.

On June 1, 2004, the court (Beeler, J.) granted the petition

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[1] Although the DHCR issued a PAR determination in June 2002, that determination was made on a procedural issue, to wit, the TA's failure to file its PAR with proper documentation. The 2002 PAR determination allowed the TA to correct the "procedural defect" and refile its PAR, which it did within the prescribed time frame.

"to the extent that the order of the DHCR Deputy Commissioner [was] vacated and the matter [was] remitted to the DHCR . . . to reconsider its original determination based upon petitioner's claims" (First Article 78 proceeding Decision dated June 1, 2004, at 3). After the matter was reopened by the DHCR, in a letter dated March 28, 2005, petitioner for the first time raised the claim that "[a]t *all* times during this MCI proceeding and at prior times, the premises has [*sic*] been afflicted by hazardous violations and immediately hazardous 'C' violations issued by NYC's Department of Housing Preservation Development (HPD)"[2] (DHCR file, Ex. D-4, at 1) (emphasis as in original). Petitioner contended that the existence of such a violation "is a bar to an MCI, and should result in denial" (*id.*, at 1).

In a later affirmation submitted to the DHCR on May 26, 2005, petitioner, among other things, again raised the issue of "C" violation existing at that time at the premises. The owner responded to these claims and, on March 7, 2008, the DHCR issued the 2008 PAR determination. In the 2008 PAR determination, with regard to the allegations of a class "C" violation, the DHCR found that:

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[2] A printout of an HPD "Building Registration Summary Report" indicates that a violation in Hazard Class C was issued to the premises on August 4, 1998 pursuant to Section 27-2005 of the Administrative Code of the City of New York, to "abate the nuisance consisting of mold & mildew" in Apartment 406.

> the Commissioner notes that the violation alleged had been in existence since July 1998, and the petitioner did not indicate any reason why the issue was not raised below. Accordingly, the Commissioner is constrained to foreclose consideration of the issue.
> (2008 PAR determination, at 3).

Addressing the all other issues and claims, the DHCR determined that the evidence demonstrated:

> the owner's entitlement to an MCI rent increase of $750,00.00 for the façade and roof work, $34,875.00 for the sidewalk scaffolding, and . . . $75,000.00 for the architect's fee.
> Thus, a total of $834,766.65 [the above amount less the commercialSeptember 22, 2008 tenant's share] is hereby approved, and a recalculation of the MCI rent increase is warranted.
> (*Id.* at 4).

The effective dates of the rent increase were determined to be as follows: July 1, 2000 for rent-stabilized tenants and June 1, 2002 for rent-controlled tenants. Petitioner then commenced the instant Article 78 proceeding challenging the 2008 PAR determination.

Article 78 provides that:

> The only questions that may be raised in a proceeding under [it] are . . . whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or . . . whether a determination was made in violation of lawful procedure, was affected by an 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
> (CPLR 7803 [2], [4]).

The court's review of an administrative decision is limited to an assessment of whether it is arbitrary and capricious—"whether there is a rational basis for the administrative determination without disturbing underlying factual determinations" (*Heintz v. Brown*, 80 NY2d 998, 1001 [1992]). Only the evidence and arguments raised before the agency at the time of the administrative determination will be considered (*HLV Assocs. v. Aponte*, 223 AD2d 362, 363 [1st Dept 1996]).

Here, the crux of petitioner's argument is that in refusing to consider the HPD class "C" violation pending against the premises from 1998 until 2007, the DHCR acted arbitrarily and capriciously in its 2008 PAR determination, which granted the owner's application for a rent increase. The court disagrees with petitioner for the following reasons.

The New York Rent Stabilization Code (9 NYCRR) § 2529.6 provides:

> Review pursuant to this Part shall be limited to facts or evidence before a rent administrator as raised in the petition. Where the petitioner submits with the petition certain facts or evidence which he or she establishes *could not reasonably have been offered or included in the proceeding prior to the issuance of the order being appealed*, the proceeding may be remanded for redetermination to the rent administrator to consider such facts or evidence (Rent Stabilization Code [9 NYCRR] § 2529.6) (emphasis supplied).

It is undisputed that petitioner raised the Class C violation

issue for the first time in 2005-only after the First Article 78 proceeding had remitted the matter back to the DHCR. Nor does petitioner offer any reason for its utter failure to offer or include any facts and/or evidence relating to this issue in any of the TA's prior multiple submissions opposing the owner's rent increase application. Thus, the DHCR was not required to consider this issue, raised for the first time by petitioner upon a PAR submission (*see 60 Gramercy Park Co. v. State Div. of Hous. & Community Renewal*, 188 AD2d 371, 371 [1st Dept 1992]). The cases cited by petitioner in support of its argument do not militate for a different result.[3]

Nor does the determination in the First Article 78 proceeding dictate otherwise. Affording the DHCR's interpretation of its own regulations and the statutes it administers due deference, the 2008 PAR determination has a rational basis and is neither arbitrary, nor capricious (*see Ansonia Assoc. v. State Div. of Housing & Community Renewal*, 160 AD2d 210, 211 [1st Dept 1990]). Accordingly, it is

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[3] In *251 W. 98th St. Owners, LLC v. New York State Div. of Hous. & Community Renewal* (276 AD2d 265 [1st Dept 2000]), unlike the proceeding at bar, certain "C" violations "were found upon inspections conducted *during the proceedings before the Rent Administrator*, and remained of record during the time proceedings for administrative review were commenced" (*id.* at 266). While in *370 Manhattan Ave. Co., L.L.C. v. N.Y. State Div. of Hous. & Cmty. Renewal* (11 AD3d 370 [1st Dept 2004]), HPD violations occurred *after* the date that the owner filed its MCI application.

ORDERED and ADJUDGED that the petition is denied in its entirety, respondents' cross-motion is granted, and the special proceeding is dismissed.

The foregoing constitutes the decision and judgment of this court.

Dated: October 21, 2008

ENTER:

KIBBIE F. PAYNE
J.S.C.