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

PRESENT: HON. NICHOLAS FIGUERON Justice PART 46

Index Number : 108059/2008
MED, LLC
VS
DIV. OF HSG & COMMUNITY
Sequence Number : 001
ARTICLE 78

INDEX NO. 108059/08
MOTION DATE 8/29/08
MOTION SEQ. NO. 001
MOTION CAL. NO. ____

this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits ____	4, 5
Replying Affidavits ____	6, 7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion all accompanying 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).

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

Dated: December 22, 2008

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: PART 46

In the Matter of the Application of
MED, LLC,

Petitioner,

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

- against -

DIVISION OF HOUSING AND
COMMUNITY RENEWAL,

Respondent.

Index No. 108059/08

DECISION AND JUDGMENT

Nicholas Figueroa, J.:

Petitioner seeks a judgment, pursuant to CPLR Article 78, reversing and annulling respondent's final determination, dated April 30, 2008, denying its petition for administrative review (PAR) challenging respondent's Rent Administrator's determination granting a rent reduction at its rent stabilized building due to the diminution of a service resulting from the elimination of a courtyard.

The tenants' rent reduction complaint noted that they had previously filed another complaint concerning the courtyard. Respondent denied that complaint in which the tenants alleged that petitioner was using the courtyard as a garbage dump and that it failed to maintain the courtyard's garden. In denying that complaint, respondent held that "The modification or failure to maintain a particular aspect of landscaping where the grounds are generally maintained are *de minimus*."

In their present complaint, the tenants alleged that petitioner removed the entire courtyard. The tenants alleged that petitioner replaced the courtyard with a one story "horizontal enlargement" which eliminated a required secondary egress, light and ventilation in the common hallways and storage space for garbage. The tenants argued that the elimination of the courtyard and garden constituted a reduction in services.

The tenants submitted photographs of the courtyard space before and after the removal. The pictures depicting the space prior to the removal show accessible space, flowers and foliage. The post-removal depictions are of workman altering the areas and the new structure.

The tenants noted that the petitioner installed doors that allowed some tenants to have access to the new structure's roof. Petitioner now charges this group of tenants higher rents for their apartments than it charged in the past. The roof area serves as a terrace.

Petitioner opposed the complaint, noting that the tenants' prior complaint had been dismissed.

Next, petitioner argued that the area was never a courtyard, as it contained no amenities and was merely a place of ingress and egress. According to petitioner, the foliage in the area was not a service; instead, it was "merely landscaping the owner has the power to change at its discretion."

Petitioner denied that the new structure deprived the tenants a means of entering or leaving the premises. It reiterates that "These were no benches or sitting areas, or any of the other indicia of a gathering place."

Petitioner contended that the space was a garbage disposal area.

Finally, comparing the lack of a courtyard to lack of roof access, petitioner argued that Rent Stabilization Code Section 2523.4 states that roof access is "a *de minimus* reduction where there are

no formal facilities in that area, unless a lease provision provides for that service." Petitioner notes that none of its leases provided for courtyard access.

Replying to petitioner's response, the tenants alleged that they held tenant meetings in the courtyard and held a memorial service there when the building superintendent died. Further, there was a faucet and hose that the tenants used to water the garden and wash their bicycles. They stated that they "planted flowers in the garden even [sic] potted our own houseplants while enjoying the sun in the courtyard." They added, "Tenants buried pets in the garden."

The tenants denied petitioner's allegation that the courtyard had been exclusively a garbage disposal area. The tenants asserted that there had been a single trash bin in the yard; although, petitioner subsequently added recycle bins. However, the tenants urged, the area was never "overwhelmed by garbage as it was immediately after the current landlord took over." The tenants described the area as now being "a dump."

The tenants challenged petitioner's argument that the permissible deprivation of roof access is analogous to the deprivation of courtyard access. According to the tenants, a courtyard is easily accessible; however, access to a roof service requires a "hike".

Again, the tenants stated that the courtyard was used as a gathering area adding that it included brickwork, iron railings and planters. They noted that "the short brick walls containing the garden served nicely as sitting facilities." Continuing, the tenants stated that the area provided ample room for lawn chairs that the tenants used when they gathered in the area to socialize with each other.

Respondent's inspector confirmed that the courtyard had been eliminated and replaced by a commercial space. In its October 23, 2007 order, respondent found that petitioner decreased its

service to the tenants by failing to maintain the courtyard. The order noted that the inspection report confirmed its elimination. It directed petitioner to restore the service and ordered a rent reduction.

In its PAR, petitioner argued that the courtyard's elimination "...cannot, as a matter of law, form the basis for a rent reduction in this instance."

Petitioner argued that the dismissal of the prior complaint about the courtyard and landscaping is *res judicata*.

Continuing, it argued that "...the 'courtyard' was never a 'courtyard' at all. It was not a tenant gathering place; it was means of ingress and egress to the building only." Petitioner denied that the area did not contain any amenities. It contended that the trees and bushes the tenants referred to in their complaint were not a service; rather, that it could change at its discretion.

Petitioner again argued that Rent Stabilization Code §2523.4 states that discontinuance of roof service is a *de minimus* reduction if there were no formal facilities in that area, unless a lease clause provides for such a service.

Petitioner stated that the wall the tenants referred to was not intended as a place to sit. Petitioner argued that a service is something an owner provides, and that the tenants could not create a service by their unilateral designation of the area as a courtyard.

In the order denying the PAR, respondent found that petitioner eliminated the courtyard without obtaining an order, pursuant to Rent Stabilization Code §§2522.4(d) and (e) permitting the decrease.

Respondent rejected petitioner's argument that its prior administrative determination, Docket Number SK41005URT, supported petitioner's claim on the instant administrative proceeding. Rather that determination, "belies the owner's interpretation posited in the appeal." Instead, that

"...determination supports the tenants' claims that this proceeding primarily involved landscaping and grounds-maintenance issues and that it made no determination as to the area's status or classification and that it did not conclude that the alternation or elimination of the courtyard was a de minimus [sic] event."

PAR's order affirmed the Rent Administrator's order.

The prior determination the parties refer to denied the tenants' complaint alleging a decrease in services. The tenants based their complaint on a rubbish accumulation in the courtyard area. According to that determination, an inspection did not reveal an "accumulation of scattered or loose garbage." Because the condition did not exist when the inspection occurred, there was no basis for a rent reduction under respondent's Policy Statement 90-2. Further, respondent noted that it "does not enforce the Housing Maintenance Code, referred to by the tenants in their PAR."

The earlier determination did not address the question of whether the area was a courtyard.

The standard of review on the instant proceeding is whether the determination was arbitrary and capricious. The court must accept the determination if it has "warrant in the record" and a reasonable basis in the law. The judicial function ends when the court determines that there was a rational basis for the administrative determination (see *Matter of Plaza Mgt. v. City Rent Agency*, 48 AD2d 129, 131; *affd* on the per curiam opa. below 37 NY 2d 837; see also *Matter of Pell v. Board of Education*, 34 NY2d 222, 230-231).

The administrative agency, not the court, makes factual determinations (see *Matter of Oriental Boulevard G. v. New York City Conciliation and Appeals Board*, 92 AD2d 470, *affd* for the reason stated at the Appellate Division 60 NY2d 633). The agency determines what constitutes a required service and whether that service has been maintained (*id.*).

Under Rent Stabilization code §2520.6(r)(1) required services are:

> "That space and those services which the owner was maintaining or was required to maintain on the applicable base dates set forth below, and any additional space or services provided or required to be provided thereafter by applicable law. These may include, but are not limited to, the following: repairs, decorating and maintenance, the furnishing of light, heat, hot and cold water, elevator services, janitorial services and removal of refuse."

The base date the code section refers to is the date four years prior to the date a complaint to respondent is filed. (Rent Stabilization Code §2520.6(f)(1)).

There is no dispute that the area in question existed four years before the overcharge complaint. Rather, the issues on this proceeding are: Did petitioner's alteration of the area constitute a *de minimus* change? Did the alteration of the area constitute a decrease in services entitling the tenants to a rent reduction?

The answers to the first question is no. The answer to the second question is yes. Therefore, respondent's determination was not arbitrary and capricious and the petition is denied.

Petitioner's reliance on Rent Stabilization Code §2523.4(e)(19) is misplaced. The section treats the discontinuance of a roof as a recreation area as *de minimus*. However, the code provision does not mention courtyards. The court may not re-write the provision by substituting a courtyard for a roof.

Nothing in the record indicates that either petitioner or the prior owner restricted access to the courtyard area or instructed tenants not to use it. Nothing in the record indicates that physical access to the area was impeded, prior to petitioner's alteration. Rather, the unrefuted facts show that the tenants used the space as a place to congregate, sit and perform gardening activities. Under these circumstances, respondent had a rational basis for its determination that the area was a courtyard and

that its complete alteration was a decrease in services warranting a rent reduction (cf. *Meirowtiz v. New York State Division of Housing and Community Renewal*, 28 AD3d 350).

The court may not substitute its judgment for the agency's if, as in the instant case, the determination was rationally based on the record (see *Matter of Fresh Meadows Associates v. New York City Conciliation and Appeals Board*, 88 Misc. 2d 1003, *affd*, 55 AD2d 599, *affd*, 42 NY 2d 925). Therefore, the court may not interfere with respondent's finding that petitioner decreased an essential service by eliminating the courtyard.

Accordingly, it is

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

This constitutes the decision and judgment of the court.

Dated: December 22, 2008

ENTER

J.S.C.