

**Matter of Douglas Elliman Prop. Mgt. v  
Div. of Hous. and Community Renewal**

2009 NY Slip Op 30008(U)

January 2, 2009

Supreme Court, New York County

Docket Number: 105511/08

Judge: Shirley Werner Kornreich

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

PRESENT: HON. SHIRLEY WERNER KORNREICH

PART 54

Index Number : 105511/2008

DOUGLAS ELLIMAN PROPERTY

vs  
DIV OF HSG & COMMUNITY RENEWAL

Sequence Number : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE 9/4/08

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this motion to/for Article 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2-5  
6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served in person. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1412).

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

Dated: 1/2/09

HON. SHIRLEY WERNER KORNREICH

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 STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

----- X  
In the Matter of the Application of  
DOUGLAS ELLIMAN PROPERTY MANAGEMENT,

Petitioner,

Index No.: 105511/08

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

DECISION  
and ORDER

-against-

DIVISION OF HOUSING AND  
COMMUNITY RENEWAL

Respondent.

-and-

229 WEST 78<sup>TH</sup> STREET/230 WEST 79<sup>TH</sup> STREET  
TENANTS ASSOCIATION

Respondent-Intervenor

----- X  
KORNREICH, SHIRLEY WERNER, J.:

**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  
1412)

Petitioner Douglas Elliman Property Management ("petitioner" or "Douglas Property") brings this Article 78 proceeding seeking a judgment reversing and annulling respondent Division of Housing and Community Renewal's ("respondent" or "DHCR") denial of its application for administrative review of a rent reduction for rent controlled and stabilized property located at 230 West 79<sup>th</sup> Street, New York, New York (Premises). The October 5, 2007, rent reduction was based on a decrease in services. On October 23, 2007, petitioner filed a Petition for Administrative Review (PAR) challenging the rent reduction. On February 29, 2008, DHCR Deputy Commissioner Leslie Torres denied the PAR and affirmed the rent reduction.

*I. Background*

On or about November 16, 2006, tenants at the Premises filed an application for a rent reduction based upon a decrease in building wide services. The tenants' application stated that petitioner failed to adhere to DHCR Docket # SE430038RT (2004 Order) and 1976 Service Modification Orders ZLD16939 and ZLD16976 (1976 Orders) by failing to maintain lobby attendant hours from 8:00 a.m. to 6:00 p.m. seven days a week. The application also stated that petitioner was in noncompliance with the 1976 Orders by failing to install security cameras to monitor the basement service entrance. Regarding these two issues, the 1976 Orders state the following:

(4) That following the permanent closing of the West 78<sup>th</sup> Street entrance, the landlord shall provide uniformed Lobby attendant service, from the hours of 8 A.M. until 6 P.M., 7 days per week, at the West 78<sup>th</sup> Street end of the new lobby...

(6) That in addition to the intercom system, the landlord shall install a closed-circuit television network, which will monitor all areas of the new lobby as well as the basement service entrance.

On April 2, 2007, DHCR Inspector Kyriakos Cambos inspected the Premises. In his report, Inspector Campos stated that there was "no camera monitoring the basement entrance." Inspector Campos provided several photographs of the basement service entrance which he took during the inspection as evidence of his finding. Both the report and photographs have been provided to the court.

On April 11, 2007, petitioner's attorney requested and was granted a 60 day extension to install a security camera in the vicinity of the basement service entrance. In a letter dated May 15, 2007, petitioner's attorney stated that Douglas Property would be installing a security camera in the basement service entrance area. A copy of the contract to install the camera was sent with

the letter. On June 6, 2007, petitioner's counsel sent respondent a letter indicating that the camera had been installed. On June 13, 2007, as a supplement to the June 6 letter, petitioner's counsel sent respondent a copy of the final invoice for the installation of the camera.

On July 2, 2007, Inspector Cambos conducted a subsequent inspection of the Premises to see if in fact the camera had been installed. Once again, he found no security camera in the basement service entrance area. As in his April inspection, Inspector Campos provided several photographs of the basement service entrance which he took as evidence of his finding. Both the report and photographs have been provided to the court.

On October 15, 2007, the Rent Administrator ordered the rent reduction due to petitioner's failure to install the camera and maintain the appropriate lobby hours. On October 23, 2007, Douglas Property filed a PAR challenging the rent reduction. It claimed that the security camera had been installed one month prior to the RA's decision to order the rent reduction. Douglas Property also argued that the lobby attendant service was a *de minimus* condition and thus was barred by the four year statute of limitations provided by section 2523.4(f) of the Rent Stabilization Code. In opposition, the tenants argued, *inter alia*, that petitioner was barred from relitigating the issue of the lobby attendant hours due to a decision issued by the Hon. Emily Jane Goodman on July 6, 2005. In her decision, Justice Goodman denied the owner's Article 78 petition challenging the 2004 Order, which held that petitioner was required to maintain lobby attendant services pursuant to the 1976 Orders. In pertinent part, Justice Goodman stated:

Contrary to the landlord's contentions, DHCR reasonably determined that the RA's decision to allow the landlord to eliminate the 78<sup>th</sup> street lobby attendant on the premises was incorrect. DHCR rationally found that the petitioner failed to provide substantial

evidence that the tenants no longer used the lobby attendant. It was reasonable for the DHCR to find that the owner's assertion that lobby attendant had "no official function" other than to be present was contradicted by the detailed list of lobby attendant duties that the owner later submitted in response to DHCR's request for additional information. The list supplied by the owner stated that the back door attendant had duties such as to "dust furniture in the back lobby, sweep and mop up floors in the back lobby and passage way, help tenants with packages, relieve the front doorman for lunch, sort out and deliver mail, clean mirror and glass table, and direct guests and deliveries"...In fact, in light of these duties, it is completely disingenuous for petitioner to maintain that it never instructed the lobby attendant to provide services for the tenant and that the attendant only provided "favours" because the attendant was "bribed" by the tenants.

In her February 29, 2008 decision, Deputy Commissioner Torres denied Douglas Property's PAR and held that the RA's decision ordering a rent reduction for petitioner's failure to provide these two enumerated services was warranted. With regard to the security camera, Deputy Commissioner Torres stated that based upon the April 2, 2007 inspection, and other evidence, the record showed that no camera had been installed at the basement service entrance. As such, the record did not support petitioner's contention that the camera was installed one month prior to the rent reduction. Deputy Commissioner Torres also held that there was no evidence to support Douglas Property's contention that the reduction of the lobby attendant's hours was *de minimus*. She stated that "it is undisputed that lobby-attendant service is a required and provided service and that the hours of the attendant had been reduced by the owner." In addition, Deputy Commissioner Torres stated that the *de minimus* clause in Section 2523.4(f) provides, at best, a rebuttable presumption. She further indicated that DHCR effectively rebutted the presumption by showing that Douglas Property did not maintain the lobby attendant hours in accordance with the 2004 and 1976 Orders.

## II. *Conclusions of Law*

A court reviewing an Article 78 proceeding must judge the propriety of an administrative

[\* 6 ]

action solely on the reasons cited by the administration. *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). Such an action must be upheld unless it “shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law.” *Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000). CPLR section 7803 states that the following questions may be raised in 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.”

A. *Lobby Attendant Hours*

New York law uses a transactional approach to analyze *res judicata* issues.

*Schwartzreich v. E.P.C. Carting Co., Inc.*, 246 A.D.2d 439, 440-41 (1<sup>st</sup> Dept 1998). Pursuant to this approach, “once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy.” *Schwartzreich*, 246 A.D.2d at 441 quoting *O’Brien v. City of Syracuse*, 54 N.Y.2d 353, 357 (1981); *Browning Avenue Realty Corp. v. Rubin*, 207 A.D.2d 263, 264 (1<sup>st</sup> Dept 1994). For *res judicata* to take effect, the previous disposition must have been on the merits and the party in opposition must have had a full and fair opportunity to litigate the claim in the prior proceeding. *Browning*, 207 A.D.2d at 264; *Schwartzreich*, 246 A.D.2d at 441 (if party against whom *res judicata* is sought had a full and fair opportunity to litigate his claim in a prior proceeding based upon same transaction, but did not raise it, he is barred from raising it in a subsequent action). The doctrine bars not only claims that were actually litigated but also claims that could have been litigated. *Browning*, 207 A.D.2d at 264. For *res judicata* purposes,

a set of facts are deemed to arise from the same transaction if they are closely related in time, space, motivation, or origin such that treating them as a single unit is convenient for trial and meets the parties expectations. *Schwartzreich*, 246 A.D.2d at 441

On July 6, 2005, Judge Goodman denied the owner's Article 78 petition to eliminate the lobby attendant services at issue. Judge Goodman's decision was a final disposition on the merits. Petitioner was given a full and fair opportunity to litigate its claims. The facts in this proceeding arise from the same series of transactions as those in the 2005 decision. Petitioner could have made the *de minimus* argument in 2005. It failed to do so. As such, any remaining claims arising from this transaction are barred. Therefore, Douglas Property's petition to annul respondent's determination regarding the lobby attendant services is denied.

*B. Security Camera*

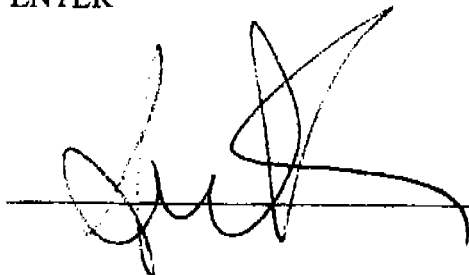
With regard to the security camera, petitioner argues that Inspector Cambos inspected and took pictures of the wrong area during his July 2, 2007 inspection. In support of this contention, Douglas Property claimed that it attached photos of the actual service entrance which show that the camera had in fact been installed. Petitioner also claims to have attached photos of the monitor in the lobby connected to the camera. *See Verified Petition* at ¶¶ 10, 12, 16-18. However, none of these alleged photos were attached to the petition. The actual photos provided, taken by Inspector Cambos during his inspections of the Premises in April and July 2007, support respondent's findings that no camera was installed at the basement service entrance. The contract, letters and receipts provided by petitioner may purport to show that a camera was installed, but they do not show where the camera was installed. These documents, on their own, do not serve to rebut the photos taken of the basement service entrance by Inspector Cambos

during his July 2, 2007 inspection. As such, Deputy Commissioner Torres' reliance on the inspection reports, photos contained within, along with the other documentary evidence, to make her determination that the camera had not been installed one month prior to the rent reduction was neither arbitrary nor capricious. Accordingly, it is

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

This constitutes the decision and judgment of the Court

ENTER

 J.S.C.

DATE: January 2, 2009  
New York, NY

**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).