

**Matter of Marbru Assoc. v State of N.Y. Div. of
Hous. & Community Renewal**

2009 NY Slip Op 30200(U)

January 20, 2009

Supreme Court, New York County

Docket Number: 111949/08

Judge: Eileen A. Rakower

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

PRESENT: EILEEN A. RAKOWER

PART 5

J.S.C.

Index Number : 111949/2008

MARBRU ASSOCIATES

vs.

HOUSING & COMMUNITY RENEWAL

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 ...

1

Answering Affidavits — Exhibits _____

2, 3

Replying Affidavits _____

4, 5, 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

REMOVED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

JAN 22 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/20/09

[Signature]

EILEEN A. RAKOWER 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 5

-----X
In the Matter of the Application of
MARBRU ASSOCIATES,

Index No.
111949/08

-against-

FILED
JAN 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

DECISION
and ORDER

STATE OF NEW YORK DIVISION OF
HOUSING AND COMMUNITY RENTAL,

Respondent.

Mot. Seq. 001

-----X
HON. EILEEN A. RAKOWER:

Petitioner, Marbru Associates ("Marbru"), an owner of residential and professional buildings, brings this Article 78 petition, seeking to modify the New York State Division of Housing and Community Renewal's ("DHCR") March 22, 2007 and March 16, 2007 orders (the "35th Street order" and the "36th Street order," respectively) as to Marbru's applications for major capital improvement ("MCI") increases at 35 East 35th Street (35th Street) and at 36 East 36th Street ("36th Street), New York, New York. Marbru seeks to increase in the legal rents in both locations. DHCR cross-moves for dismissal or remittance of the petition as to 35th Street and, separately, submits an answer and opposition papers seeking dismissal of the petition as to 36th Street.

In support of its verified petition, Marbru submits the following documents: (1) a notice of petition; (2) the Article 78 petition; (3) the 35th Street order; (4) the 36th Street order; (5) Marbru's two petitions for administrative review ("PAR"s), each filed with DHCR on April 2, 2007, and seeking review of the 35th and 36th Street orders, respectively; (6) DHCR's July 3, 2008 order, denying Marbru's PAR; (7) counsel's affidavit in opposition to respondent's cross-motion as to 35th Street; and (8) counsel's reply affidavit as to 36th Street. Marbru contends that DHCR miscalculated the MCI rent increases because: (1) it did not consider that elevator upgrade improvements were made to elevators used solely by the residential tenants at 35th Street; (2) it based the 35th Street order on an erroneous

room count; (3) it based the 36th Street order on an incorrect allocation of commercial vs. professional tenants in the building; and (4) it disregarded the fact that seven of the professional apartments at 36th Street had private entrances from the street or ground-floor lobby and thus received no benefit from the elevator upgrade. Marbru also argues that DHCR's failure to respond to its PAR concerning the 35th Street order (the "35th Street PAR") should be deemed a denial of that PAR.

DHCR, in support of its cross motion and in opposition to Marbru's petition, submits: (1) a notice of cross-motion to dismiss or remit to DHCR (regarding 35th Street); (2) DHCR's verified answer (regarding 36th Street); (3) DHCR's July 3, 2008 order denying Marbru's PAR as to 36th Street (the "36th Street PAR"); (4) DHCR's MCI Policy Statement 90-10 (June 26, 1990); (7) the record of the proceedings before the Rent Administrator and then before the Commissioner; and (6) DHCR's memorandum of law. DHCR admits that it has not issued an order on the 35th Street PAR and requests that, if this court does not dismiss the Article 78 petition, it instead remit the proceeding to DHCR for further consideration. As to its denial of the 36th Street PAR, DHCR argues that its prior order was based on a review of the record and had a rational basis because the elevator work benefitted all commercial and residential tenants in that the integrity of the building was maintained.

The determination petitioner seeks to vacate resulted from consideration of the following facts and circumstances. On September 5, 2006, Marbru filed MCI applications with DHCR, seeking rent increases to reflect building improvements, in each of the two locations, including elevator upgrades as to both buildings, and the installation of a new boiler/burner at 36th Street. On March 16, 2007, DHCR issued an order granting, in part, Marbru's application for the MCI rent increases at 36th Street, and, on March 22, 2007, it issued a second order, granting, in part, Marbru's application for the MCI rent increases at 35th Street. Also on March 22, 2007, Marbru filed the 35th and 36th Street PARs, respectively challenging the MCI rent increase amounts in DCHR's 35th and 36th Street orders for the reasons stated above herein. DCHR issued an order and opinion denying the 36th Street PAR on July 7, 2008. No order was issued on the 35th Street PAR.

The Rent Stabilization Code §2529.11 states:

If the commissioner does not act finally within a period of 90 days after a PAR is filed, or within such extended period as provided for herein, the PAR may be "deemed denied" by the petitioner for the purposes of commencing [and Article 78 proceeding].

The section provides that the commissioner may be granted one 30 day extension, with the consent of the party filing the PAR, and that further extensions require consent of all parties to the PAR. (The Rent Stabilization Code §2529.11.)

When the DHCR Commissioner does not render a determination on a PAR within 90 days after filing, the PAR may be deemed denied, pursuant to the Rent Stabilization Code. (*Kibel v. State Division of Housing and Community Renewal*, 590 N.Y.S.2d 88, 88 [1st Dept 1992]. See also *Daniel v. New York State Division of Housing and Community Renewal*, 683 N.Y.S.2d 404, 409 [N.Y. Sup. Ct. 1998].) However, "for reasons of comity and judicial economy as well as adherence to the requirement for administrative finality...the better course is generally to direct the agency to render a final determination within a reasonable and definite time period." (*Kibel* at 88; See also *Daniel* at 409.) The First Department has noted that, "had the Legislature...wished to divest the reviewing agency of jurisdiction after the lapse of ninety days, it could easily have framed its intention in explicit language to that effect." (*140 West 57th Street Corp. v. State Division of Housing and Community Renewal* 517 N.Y.S.2d 720, 722 [1st Dept. 1987].) The court, in *140 West 57th Street* further held:

Where an aggrieved party fails to obtain a determination of his protest within the ninety days and thereafter commences a judicial proceeding the court may, of course, review the initial agency determination or, where appropriate, fashion a remedy upon remand, such as a time limitation for issuance of a determination...Remittitur to the reviewing agency in such circumstances does not render the 'deemed denial' remedy useless or illusory." (*Id.* at 724.)

Thus, Marbru's Article 78 petition, to the extent it concerns the 35th Street PAR, is properly remanded to DHCR with the requirement that DHCR is to issue a determination on the 35th Street PAR within 90 days of notice of entry of this decision.

The “[j]udicial review of an administrative determination is confined to the ‘facts and record adduced before the agency’.” (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency’s determination but must decide if the agency’s decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency’s determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency’s determination “arbitrary and capricious” if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]). Additionally, if a penalty is imposed by the agency, “the sanction 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 NY2d 550, 554 [2000]).

A review of the record demonstrates that, in the proceeding before Rent Administrator, several 36th Street tenants submitted room count information contradicting that presented by Marbru. It further shows that DHCR subsequently sent Marbru a Request for Additional Information and that Marbru then submitted a response. The Rent Administrator’s 36th Street order indicates that the ultimate room count determination was based on a review of these conflicting submissions.

The Commissioner’s subsequent order, denying Marbru’s 36th Street PAR, reflects that the Commissioner considered the entire record and concluded that the Rent Administrator properly determined the professional tenants’ share of the approved cost of MCI’s, based upon the percentage of space occupied by the professional tenants. In upholding the Rent Administrator’s determination, the Commissioner noted that Marbru had neglected to provide the information concerning certain professional tenants’ private entrances to the Rent Administrator, and that this information was thus beyond the proper scope of the Commissioner’s review. The Commissioner also found that “...the Rent Administrator properly determined that the elevator upgrade inured to the benefit of all lobby floor tenants, including professional tenants, as the work impacts on the integrity of the premises wherein said professional establishments are located.” Accordingly, DHCR articulated a rational basis for denying Marbru’s PAR.

Wherefore, it is hereby

ORDERED the cross motion is granted, and the matter as it concerns DHCR's the 35th Street PAR, is remanded to DIICR for further proceedings; and it is further

ORDERED that DIICR is to issue a determination on Marbru's PAR appealing DHCR's March 22, 2007 35th Street order (Case Docket No: UI 410003 OM) within 90 days of notice of entry of this decision; and it is further;

ORDERED that Marbru's Article 78 petition is denied in all other respects; and it is further;

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: January 20, 2008



EILEEN A. RAKOWER, J.S.C.

FILED
JAN 22 2009
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NEW YORK