

**Matter of Wolk Props., LLC v Division of  
Hous. & Community Renewal**

2009 NY Slip Op 30342(U)

February 10, 2009

Supreme Court, New York County

Docket Number: 109151/08

Judge: Sheila Abdus-Salaam

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: HON. SHEILA ABDUS-SALAAM  
*Justice*

PART 13

In the Matter of Wolk Properties, LLC

INDEX NO. 109151/08

- v -

MOTION DATE 10/30/08

MOTION SEQ. NO. 001

Division of Housing and Community Renewal

and

740 West End Avenue Tenants Association

*This judgment may not be removed by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counter or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415)*

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for

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 Article 78 proceeding to annul the determination of respondent Division of Housing and Community Renewal ("DHCR") dated May 15, 2008 which denied petitioner's application for a major capital improvement ("MCI") rent increase for installation of a new roof, is granted.

In January 2003 the owner of 740 West End Avenue filed an application for a building-wide rent increase based on the installation of a new roof. The tenants objected and claimed, among other things, that the roof work was defective and that the three apartments directly below the roof had water damage. After considering proofs submitted by both the owner and the tenants, DHCR's Rent Administrator granted the owner's application in January 2004. The tenants then

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

filed a Petition for Administrative Review ("PAR") claiming that the application should not have been granted in light of the tenants' unrebutted engineering report dated July 31, 2003 which showed water damage and concluded that the roof covering was not watertight. The tenants' engineering report identified problems with the roof including "poorly done" roof surface, roof seam and flashing, damaged and incomplete flashing on the parapet wall, and water stains at the stairwell under the roof.

DHCR' Deputy Commissioner Roldan granted the PAR and revoked the rent increase, finding that "the Administrator erred in granting the owner's MCI application as the weight of the evidence supports the tenants' association's claim that the roof installation was not installed in a workmanlike manner." (June 23, 2006 PAR determination.) The owner challenged this determination in an Article 78 proceeding and the matter was resolved by stipulation of the parties, which provided that the proceeding "is remitted on consent for further consideration and processing of the proceeding." (So Ordered Stipulation dated August 3, 2006.) The Notice of Re-Opening issued by DCHR states that "[u]pon reopening, the Commissioner will review the administrative record. An inspection will be performed during this remand proceeding." (Return, Ex. C-2).

Upon the re-opening, the tenants of apartment 134 and apartment 136 wrote to DHCR stating that they have a recurring problem of moisture and water damage in their apartments which they attribute to the roof. The tenants' association also advised DHCR that two of the top floor apartments have recurring leaks emanating from the roof. A DHCR inspection was conducted on January 12, 2007. The inspection form listed five "requests" for the inspector, as follows:

- 1) Examine Ceilings of Apts 134, 135 + 136 for water penetration from roof. Also, examine for visible water damage. Utilize water meter.
- 2) Inspect stairwell below roof for water damage on the exterior wall. Utilize moisture meter.

- 3) Inspect parapet wall and roof flashing. Is there evidence of water damage?
- 4) Examine railing installation. Is the railing properly installed?  
Please describe condition of railing?
- 5) Inspect roof for ponding.

In his report, the inspector notes that the building owner, the building superintendent and Ms. Judy Frost (President of the Tenants' Association) were present at the inspection. The inspector found as follows with respect to apartments 134, 135 and 136:

**Apt. 134:** The master bedroom ceiling and wall on the south west corner showed water damage with stains visible in an area of approximately a square foot.

A moisture meter was used and it read 100% wet.

**Apt: 135:** The kitchen east wall and ceiling showed water damage, with cracks and blistering. The bathroom ceiling and wall had a large area of water damage, with falling plaster. The moisture meter showed a slight dampness in the wall and ceiling. The bedroom ceiling area over the windows had water damage with brown stains. The moisture meter read dry. The bedroom ceiling by the I beam showed water damage as did the bedroom north wall, with a large area of water damage, "shows MM dry ATOM".

**Apt. 136:** The master bedroom north wall showed water damage in an area of two square feet. The moisture meter read 100% "ATOM". The east wall in the master bedroom had water damage and the moisture meter read wet. The right hand window had a moisture meter reading of dry. The living room ceiling's plaster paint was bubbly and cracked in an area of one square foot.

Regarding the stairwell below the roof, the inspector found no water damage to the stairwell wall below the roof "ATOI". As for the parapet wall and roof flashing, the inspector states that he checked the full length of the parapet wall and roof flashing "ATOI", and found no defects. With respect to the railing, he found that the stainless steel railing to the roof is properly installed and that it is secure with anchors to the parapet wall. Concerning the fifth and last "request"

that was made to the inspector, he found that there is evidence of several dry ponds on the roof and he concluded that "it appears that the roof was done in workmanlike manner" and that "[t]he copper flashing installation and roofing done in a workmanlike manner."

Petitioner alleges that DHCR never forwarded the results of the inspection to petitioner "on its own volition" and "[i]nstead, it was not until Petitioner filed a request under the Freedom of Information Law (FOIL) for a copy of any report that the Respondent-DHCR sent a copy of the report . . . to the Petitioner for comment." (Petition, ¶ 15.) This is denied by DHCR (Answer, ¶¶ 1-2), which also asserts in its memorandum of law that both the owner and the building superintendent were present at the inspection and that DHCR is not required to serve the inspection report on the parties. Although DHCR has denied petitioner's allegation that the owner did not receive the inspection report until it filed a FOIL request, petitioner has provided a copy of an email from DHCR's FOIL/Subpoena Section to petitioner's counsel dated January 16, 2008, indicating that the inspection report is being forwarded, as requested, and that petitioner has 20 days from the date of mailing to submit any comments.

The owner responded to the inspection report by letter dated January 23, 2008, noting among other things that the inspection had confirmed that the roof had been done in a workmanlike manner. The owner asserted that any water penetration in the three apartments was not from the roof, but from the fact that the owner was in the final stages of a facade renovation. Petitioner explained that the roof had been completed in 2002 and that upon completion of that project, the owner had commenced a facade restoration project. It wrote that "[i]f any tenant was experiencing water penetration, it is understandable that such tenant would at least at first think that the new roof was not installed correctly, but the fact remains there was other work that was needed, unrelated to the roof, that would make the building watertight." (Letter, p. 2.) The owner urged that any leaks were coming from the facade (which was the subject of a separate

application for an MCI increase), and not the roof. According to petitioner's January 23, 2008 letter, at about the same time that the DHCR inspection had been performed, the owner had learned from some of the tenants that there was water penetration. Skyline Restoration, the company that had done the facade restoration, then performed extensive water tests, which, according to the owner, revealed that the problems were caused by clogged weep-holes. The owner stated that the clogged holes were cleaned and that the problem no longer exists.

Petitioner also included letters dated November 2007 signed by the tenants of apartment 134 and 136. The letter from the tenants of apartment 136 states that the damage from the leaks and water penetration had been repaired and that currently there is no sign of leaks in their apartment. The letter from the tenants in apartment 134 states, among other things, that it appears the leaks and water penetration that they have had "in the main bedroom since the new roof was installed in 2002 have finally stopped." An earlier email that was sent by the tenants of apartment 134 to the President of the Tenants' Association in August 2007 is incorporated by reference in their November 2007 letter. That email indicates that the ceiling is moist and the wall is damp, and that the moisture meter reading for the ceiling reads "action". As for apartment 135, there was no letter from that tenant, but the owner's counsel stated that upon information and belief, that apartment was no longer experiencing water penetration.

By order dated May 18, 2008, Deputy Commissioner Torres found that an MCI rent increase was not warranted. The Commissioner cited what the DHCR inspector had found in the three top floor apartments in terms of water damage and moisture readings. But the Commissioner made no mention whatsoever of the other aspects of the inspection - - the four other areas that the inspector was told to examine (the stairwell below the roof, the parapet wall and roof flashing, the railing, and water ponding on the roof). The Commissioner did not acknowledge or otherwise address the significant finding by DHCR's inspector that the roof and the copper flashing was done in a workmanlike manner.

The Commissioner did note that the tenants had complained of water damage since the filing of the initial MCI application but did not acknowledge or otherwise address the fact that the tenants of two of the three top floor apartments had stated that as of November 2007 there were no more signs of leaks or water penetration in their apartments.

Regarding the owner's assertion that the water damage was attributable to an ongoing water proofing project, the Commissioner found that the owner had "failed to submit any evidence to substantiate the claim that the water damage resulted from waterproofing or any other on going repair work". Commissioner Torres concluded that the tenants' allegations had been supported by documentary evidence and the inspector's report, although as noted, the inspector did not identify any defect in the roof but to the contrary, stated that the roof was done in a workmanlike manner.

As is pointed out by respondents, a determination by DHCR as to whether an alteration constitutes an MCI entails the agency's expertise and is entitled to deference if it is not irrational or unreasonable (West Village Associates v. New York State Div. of Hous. & Community Renewal, 277 AD2d 111 [2000]).

Respondent DHCR also stresses that it is entitled to rely on the reports of its inspectors (see Whitehouse Estates Inc. v. New York State Div. of Hous. & Community Renewal, 5 AD3d 190 [2004]). The problem here is that the Commissioner explicitly states that the Commissioner *is* relying on the inspector's report (and some unspecified documentary evidence) but yet the Commissioner completely ignores the fact that DHCR's own inspector was told by DHCR to inspect specific areas of the roof and the stairwell, and that the inspector did so and reported that there was no water damage in the stairwell wall below the roof; that the parapet wall and roof flashing had no defects; that the railing was properly installed and secured; and that the roof and copper flashing were done in a workmanlike manner.

The court surmises that these specific areas were targeted by DHCR

because the tenants' engineer had stated in his July 2003 report that he had seen, among other problems, "poorly done" roof surface, roof seam and flashing, damaged and incomplete flashing on the parapet wall, and water stains at the stairwell under the roof. Notably, when DHCR's inspector saw these areas in January 2007, he concluded that there were no defects, that the work had been done in a workmanlike manner, and that there was no water damage in the stairwell. These findings all support the MCI increase, and yet, the application was denied with no reference to these findings.

The Commissioner's failure to address these findings where the Commissioner bases the determination, in large part, on the inspector's report, renders the determination irrational. Did the Commissioner accept the inspector's findings with respect to the water damage in the apartments, but reject the findings regarding the remainder of the report? Did the Commissioner conclude that the presence of water damage and moisture in the top floor apartments must mean that the roof is defective and that accordingly, the inspector's finding that the roof was done in a workmanlike manner must be rejected? The determination offers no indication.

The significance of the inspector's conclusion that the roof was done in a workmanlike manner is underscored by the fact that in an earlier proceeding in this matter, DHCR granted the tenants' PAR and revoked the MCI rent increase for the roof installation because "the weight of the evidence supports the tenants' association's claim that the roof installation was not installed in a *workmanlike manner*." (June 23, 2006 PAR determination, emphasis supplied.) A finding of whether the work is done in a workmanlike manner is evidently a cornerstone in determining whether this MCI should be granted and yet the Commissioner in this latest round of the MCI application never made a finding one way or the other as to whether the roof was installed in a workmanlike manner, or was defective (compare Matter of Epfol Realty Co. v. New York State Div. of Hous. & Community Renewal, NYLJ Aug. 8, 2003, at 19, col 5).

DHCR's inspector found that the roof had been done in a workmanlike manner, and yet, the Commissioner concluded that the report supported the tenants' contention that an MCI increase is not warranted. There is an internal inconsistency in the stated reasoning which leads this court to conclude that the determination lacks a rational basis.

As noted above, while the Commissioner relied upon the fact that the tenants had been complaining of water damage and leaks since the filing of the MCI application, the Commissioner did not acknowledge the letters from two of the three top floor tenants indicating that as of November 2007 they were no longer experiencing any water penetration problems. Respondents have argued here that even if the problem had been corrected at that point, the owner is not entitled to an MCI increase because the roof work was done in a piecemeal fashion and not completed within a reasonable time (see Executive Towers at Lido v. New York State Div. of Hous. & Community Renewal, 236 AD2d 397 [1997], lv denied 90 NY2d 811 [1997]). However, there is no indication that this "piecemeal" issue was considered by the Commissioner and was the basis for the determination. Accordingly, that argument is not applicable here.

Based upon the foregoing, the petition is granted.

ADJUDGED that the determination is vacated and this matter is remanded to respondent DHCR for further proceedings.

Dated: February 10, 2009

SA-A

J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:     DO NOT POST     REFERENCE

**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 14TB).