

<b>Matter of Ghiggeri v State of N.Y., Div. of Hous. &amp; Community Renewal</b>
2009 NY Slip Op 32559(U)
October 28, 2009
Supreme Court, New York County
Docket Number: 108790/2009
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Edmead  
Justice

PART 35

Ghiggeri

INDEX NO. 108790/09

MOTION DATE 9/22/09

MOTION SEQ. NO. 01

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

- v -  
Division of Housing and  
Community Renewal

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 \_\_\_\_\_

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based on the  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED and ADJUDGED that the application of petitioners Joanna Ghiggeri and the 190 Riverside Drive Tenants' Association for an order, pursuant to CPLR Article 78, vacating and annulling the determination of respondent Division of Housing and Community Renewal is denied, and the Petition is dismissed; and it is further

ORDERED that counsel for Division of Housing and Community Renewal shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioners.

This constitutes the decision and order of this court.

Dated: 10/28/09

  
**HON. CAROL EDMEAD** 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 35

\_\_\_\_\_  
In the Matter of the Application of  
JOANNA GHIGGERI and the 190 RIVERSIDE  
DRIVE TENANTS' ASSOCIATION,

Index No. 108790/09

Petitioners,

**DECISION/ORDER**

For judgment under Article 78 of the  
Civil Practice Law & Rules

-against-

STATE OF NEW YORK, DIVISION OF HOUSING  
AND COMMUNITY RENEWAL and 190 RIVERSIDE  
DRIVE CONDOMINIUM,

Respondents.

\_\_\_\_\_  
EDMEAD, J.S.C.

**MEMORANDUM DECISION**

Petitioners Joanna Ghiggeri and the 190 Riverside Drive Tenants' Association ("petitioners") move for an order, pursuant to CPLR Article 78, nullifying the determination of respondent Division of Housing and Community Renewal ("DHCR") on the underlying Petition for Administrative Review ("PAR"), on the grounds that the determination is arbitrary, capricious, and an abuse of discretion.

*Background/Administrative History<sup>1</sup>*

This proceeding concerns the rent-stabilized housing accommodations located at 190 Riverside Drive, New York, New York ("the Premises"), owned by respondent 190 Riverside Drive Condominium ("the Owner"). On October 10, 2006, the Owner filed an application for a

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<sup>1</sup>Information is taken from petitioners' PAR and DHCR's Answering Affirmation ("DHCR's Answer").

rent increase based on major capital improvement (“MCI”) for the installation of a boiler-burner and a TV security system (“the MCI Application”).

The Owner included with its MCI Application (1) a signed contract (“the Contract”) with Commercial Combustion Service & Installation Corp. (“the boiler contractor”) for the installation of the boiler, (2) approvals from the New York City Department of Buildings and the New York City Department of Environmental Protection, (3) canceled checks, and (4) an affirmation from the president of the boiler contractor. For the security system installation, the MCI Application included (1) the signed sales agreement, and (2) canceled checks.

On January 25, 2007, the tenants submitted a response (“the Tenants’ Answer”) stating that the Owner’s MCI Application was defective because (1) the Owner did not submit invoices; (2) there was a discrepancy between the proposal submitted by the boiler contractor and the actual cost of the boiler; (3) the proposal contained extensive costs for pre-wired control gas ignition, which were irrelevant for an oil burner; (4) costs were added for oil a mixing valve and cleaning of the oil piping; (5) the required contractor affirmation for the security system was not signed;<sup>2</sup> and (6) all of the checks were not legible. The tenants further stated, *inter alia*, that the replaced boiler (Federal Model # 3036) was only 25 years old and has a useful life of 30-35 years, according to a report from Rand Engineering, P.C. (“the Engineering Report”),<sup>3</sup> and the security system is not a new service but was required when the owner eliminated elevator operators.

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<sup>2</sup>In their Answer, tenants contended that DHCR rules mandated that supporting documentation include statements from contractors. “The application for the TV security system fails to include any supporting documentation from a contractor implementing the service,” they argued (Tenant’s Answer, p. 2).

<sup>3</sup>DHCR notes that the Engineering Report was not submitted to the Rent Administrator (DHCR’s Answer, p. 3, note 1).

On March 21, 2007, the Owner submitted a response (“the Owner’s Response”) stating that the difference between the contract amount of \$131,500 and the total amount for the boiler of \$134,000 was to provide heat to the building during the boiler installation, and that the costs associated or incurred with the installation of such an MCI are eligible to be included in the total cost. The Owner also maintained that the replaced boiler was well over 35 years old and, therefore, had exceeded its useful life. The Owner submitted a letter from Easco Boiler Corp., the boiler’s manufacturer, stating that the boiler was installed in the 1950s and 1960s, and that any Federal Boiler Model #3036 still operating today would be more than 40 years old (see “the Easco Letter”).

Regarding the security system, the Owner stated that the affidavit of the security system contractor was not signed due to a dispute between that contractor and the Owner, which had nothing to do with the installation on the Premises. The Owner also attached more legible copies of the checks in question. The Owner further stated that even if a service such as the security system is mandated, replacement of that service is normally eligible for an MCI increase.

In a letter dated June 27, 2007 (the “June 27, 2007 Letter”), the tenants’ attorney claimed that the Owner’s Response acknowledged that there was insufficient documentation substantiating time sheets, contractual obligations, signed contracts or invoices. The tenants also claimed that the Owner’s explanation for its failure to submit a signed statement from the security system contractor was not supported by any independent verifiable documentation. The tenants further stated that the Owner acknowledged that the TV security service was mandated, and failed to address the tenants’ point concerning the mandate to maintain a minimum level of required service, pursuant to a DHCR Order issued March 18, 2003. The tenants contended that

the Owner failed to identify the age of the prior boiler, and that it is incumbent upon the Owner to identify the date of the boiler's installation.

In response to the Rent Administrator's requests, the Owner later submitted a notarized affidavit indicating why the security system contractor did not sign the MCI Application, and a notarized statement concerning the payment for the boiler from the condominium reserve fund and the assessment to replenish the reserve fund.

On February 1, 2008, the Rent Administrator for DHCR issued an order granting the Owner an MCI rent increase for the boiler *only* (see "the Rent Administrator's Order"). The Rent Administrator rejected the Owner's arguments regarding the security system, noting that, pursuant to an order issued March 18, 2003, the security system was a required, not new, service.

On March 5, 2008, petitioners filed their PAR, wherein they alleged that (1) the replaced boiler had not outlived its useful life; (2) the majority of the work on the boiler was repairs; and (3) the Owner did not submit the necessary documentation concerning the scope of the work and use of condominium reserve funds to pay for the improvement.

On April 24, 2009, DHCR denied petitioners' PAR and affirmed the Rent Administrator's Order (see "the Final Order").

*Petitioners' Contentions*

Petitioners argue that the Court should annul the Final Order and deny the Owner's MCI Application for a rent increase because the Final Order "does not establish" that the old boiler had exceeded its useful life expectancy (Petition, ¶ 16). Petitioners contend that the Premises has a history of serious maintenance code violations related to the Owner's failure to maintain the old boiler. The Owner's MCI Application failed to identify the age of the old boiler or the date of its

\* 6]

installation. The record only establishes that the old boiler is a cast iron boiler with a life expectancy of 35 years. As the MCI is predicated only upon the need to repair the old boiler, the installation of the new boiler does not qualify for an MCI rent increase. †

Moreover, petitioners contend, to allow an MCI to increase for deferred maintenance and repairs contravenes the purpose of Rent Stabilization Law (“RSL”) §26-501 to “prevent exactions of unjust, unreasonable and oppressive rents and rental agreements and to forestall profiteering, speculation and other disruptive practices.” Petitioners further contend that the Rent Guidelines Board establishes annual rent adjustments or “fair rent increases” designed to account for most general changes in cost or maintaining rental housing. Rent increases for MCIs are imposed in addition to fair rent increases, and should, therefore, be tailored to serving their narrow purpose. An MCI increase is not a pretext for avoiding the regulations set forth in the RSL, petitioners argue. †

Here, the Owner was on notice from the Engineering Report that the boiler required extensive maintenance and repair, petitioners argue. If the repairs had been undertaken in a timely matter, an MCI would not have been required. In essence, by waiting the additional years to undertake the necessary repairs on an already defective boiler, the cost has been wrongfully passed on to the tenants before the expiration of the useful life expectancy of the boiler. The costs attributable to the boiler’s repairs are, therefore, directly related to the Owner’s post-notification negligence in failing to repair the boiler in a timely, expeditious and economical fashion. To allow the Owner a windfall profit at the expense of the tenants is contrary to the intent of the Rent Stabilization Code (“RSC”) and MCI legislation. To grant the rent increase herein will set a precedent in rewarding owners for the cumulative neglect of their property. †

Moreover, as set forth in the Petitioners' Answer and not addressed by DHCR, the Owner's Response acknowledges the omission of any documentation substantiating the contractor's time sheets, contractual obligations, signed contracts or invoices, petitioners contend. "This glaring omission, conceded by the Owner and not addressed by DHCR, renders the MCI a nullity pursuant to RSC §2522.4(a)(2)," petitioners argue. "The Owner's explanation of his failure to submit any signed statement from the contractor is not supported by any independently verifiable documentation." The Owner's employees or officers claim of a dispute with the contractor is itself not supported in the record by anything other than a self-serving statement, petitioners contend (*id.*)<sup>4</sup>.

*DHCR's Contentions*

DHCR argues that its Final Order was not arbitrary or capricious, because it was based on DHCR's determination that the administrative record established that the boiler installation met the requirements for an MCI rent increase, and the Owner submitted the requisite documentation to substantiate its MCI. To qualify for an MCI rent increase, an owner must have made an installation or performed work that meets the requirements set forth in RSC §2522.4(a). DHCR's determination of an owner's entitlement to an MCI rent increase is based upon the nature and extent of the improvement and its satisfactory completion. The amount of the rent increase is based upon the substantiated cost of the improvement.

An owner applying for an MCI rent increase must provide all information necessary to allow DHCR to determine whether or not all requirements are met, pursuant to Policy Statement

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<sup>4</sup>The Court notes while the Owner made reference to a dispute between it and the TV security system contractor (see the Owner's Response), the record contains no evidence of a dispute between the Owner and the boiler contractor.

8] 90-10. DHCR argues that the documents submitted by the Owner substantiated its entitlement to a MCI increase. DHCR also notes that petitioners' attorney commented on various components included in the contract in the Petitioners' Answer, dated January 25, 2007. Clearly, the administrative record shows that petitioners' allegations that the Owner failed to submit the documentation to establish its entitlement for an MCI lack merit.

DHCR further argues that, as an administrative agency charged with enforcing a statute, it has broad discretion in evaluating factual data and determining the inferences to draw from it. DHCR has discretion to determine what installations constitute an MCI, and what expenses are eligible for MCI rent increases. DHCR contends that the Court should affirm DHCR's fact-finding determination if it has a rational basis in the record. The policy behind an MCI is to provide an incentive for owners to upgrade the house stock. The useful life schedule is intended to protect tenants from repeated or unnecessary rent increases. DHCR's longstanding policy satisfies both policy goals, and grants MCIs for items that meet the criteria of RSC §2522.4(a), where the tenants have not previously paid a MCI increase for the item or component.

Here, DHCR's records showed that the Owner had not previously received an MCI for the old boiler, and, therefore, the Owner was not required to prove the age of the old boiler. Moreover, the Owner submitted the Easco letter stating that the old boiler was installed in the 1950s and 1960s, and that any such model still operating today would be more than 40 years old.

DHCR disputes petitioners' contention that much of the work performed was repairs, which did not qualify as a MCI. Further, the fact that the installation of the new boiler may have been necessary because of deferred maintenance does not preclude the Owner from receiving a rent increase for an MCI-eligible installation. Pursuant to RSC §2522.4, the installation of a new

boiler and the work undertaken directly related to a qualifying boiler installation, including electrical work and the components needed to complete the installation, qualify as an MCI.

*Discussion*

CPLR §7803 states that the court review of a determination of an agency, such as DHCR, consists of whether the 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 (*Windsor Place Corp. v New York State DHCR*, 161 AD2d 279 [1<sup>st</sup> Dept 1990]; *Mazel v DHCR*, 138 AD2d 600 [1<sup>st</sup> Dept 1988]; *Bambeck v DHCR*, 129 AD2d 51 [1<sup>st</sup> Dept 1987], *lv denied* 70 NY2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken “without sound basis in reason and . . . without regard to the facts” (*Pell v Board of Education*, 34 NY2d 222, 231[1974]). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*Pell* at 231). The court’s function is completed on finding that a rational basis supports an agency’s determination (*Howard v Wyman*, 28 NY2d 434, 438 [1971]). Further, where the agency’s interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 AD2d 72 [1<sup>st</sup> Dept 1985], *affd* 66 NY2d 1032 [1985]).

Here, contrary to petitioners’ arguments, DHCR’s determination affirming the approval of the Owner’s MCI Application was not arbitrary, capricious or an abuse of discretion.

RSL §§26-501 through 26-520 of the Administrative Code of the City of New York and its implementing regulations in the RSC (9 NYCRR §§2520.1 through 2530.1) govern the rent that may be charged for rent-stabilized housing, and provides that owners of such housing may

obtain rent increases only upon certain limited grounds. In order for an owner to qualify for an MCI rent increase, the MCI must (1) be “deemed depreciable under the Internal Revenue Code, other than for ordinary repairs”; (2) be “for the operation, preservation and maintenance of the structure”; (3) be building-wide in nature; (4) benefit all tenants; and (5) “meet the requirements set forth on the following useful life schedule, except with DHCR approval of a waiver” (see RSC §2522.4[a][2]).<sup>5</sup>

RSL §26-511(c)(6)(b) and RSC §2522.4 (a)(2)(i) further provide that where an owner establishes that it has made a building-wide MCI, the owner is entitled to pass the cost of such improvement on to the tenants through a permanent building-wide rent increase. This rent increase serves to encourage the owners of regulated housing accommodations to make voluntary capital investments in their buildings, and thereby upgrade and improve the rental housing stock of the City of New York. According to DHCR Policy Statement No. 90-10, an MCI Application must contain at least one of the following documentation as proof of the new equipment’s costs and payments: (1) canceled checks contemporaneous with the work’s completion date; (2) an invoice or receipt marked “paid in full” contemporaneous with the work’s completion; (3) a signed contract or agreement; or (4) a contractor’s affidavit indicating that the installation was completed and paid in full. The monthly amount of the rent increase is based upon the cash purchase price of the MCI, amortized over seven years, pursuant to RSL §26-511(c)(6)(b) and RSC §2522.4(a)(2)(i).

The Courts have recognized DHCR’s broad authority to award a permanent rent increase based upon the completion of an MCI (*Harding v Calogero*, 45 AD3d 363, 364 [1st Dept 2007])

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<sup>5</sup>The useful life schedule for boilers range from 25-35 years, depending on the type of boiler.

[holding that “DHCR has broad discretion in setting rents to effectuate the laws governing rent regulation”]; *Ansonia Residents Ass'n v New York State Div. of Housing and Community Renewal*, 75 NY2d 206, 214 [1989]). The Court of Appeals explained in *Versailles Realty Co. v New York State Div. of Hous. and Community Renewal* (76 NY2d 325, rearg denied 76 NY2d 890 [1990]):

The Rent Stabilization Law allows the DHCR to grant rent increases in excess of standard guideline increases in various circumstances, including increases for MCI's, as determined by the agency. By permitting the cost of such improvements to be shifted permanently to the tenants – continuing even after actual costs have been recouped – owners are encouraged to make voluntary investments in the improvement of their buildings, which also redounds to the benefit of the tenants.

Further, DHCR's interpretation of the statutes it administers is entitled to deference, if the interpretation is not unreasonable or irrational (*Partnership 92 LP v State Div. of Housing and Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007]; *Rudin Management Co., Inc. v New York State Div. of Housing and Community Renewal*, 215 AD2d 243 [1st Dept 1995]; *Matter of Salvati v Eimicke*, 72 NY2d 784 [1988], rearg denied 73 NY2d 995 [1989]).

Here, DHCR based its Final Order rejecting petitioners' PAR on the following grounds:

The record of the instant proceeding supports the Administrator's determination that the owner's Application for Rent Increase should be granted as to the boiler replacement, based on the owner's substantiation of the improvement with the requisite documentation, including copies of a contract and cancelled checks evidencing payment (it is noted, the cost of a television security system included in the Application was disallowed by the Administrator).

(Final Order, pp. 1-2)

The Final Order goes on to reject petitioners' arguments:

The tenant's first claim in the PAR, that the pre-existing boiler had not outlived its useful life, is not a basis for revoking the Administrator's Order in the instant proceeding. . . . The tenant's second claim, that the much of the work performed was repairs which do not qualify as an MCI, provides no basis for revoking the Administrator's Order. . . . The tenant's further claim, that the owner had failed to properly maintain the old boiler, does

not alter this finding, in that, even lending credence to this unsubstantiated claim, the fact that the new installation may have been necessary because of deferred maintenance does not preclude the owner from receiving a rent increase for an MCI-eligible installation. The tenant's third claim, that the owner did not submit required documentation, is unsupported by the evidence.

(*Id.* at 2)

The Court finds that petitioners' arguments, repeated herein, similarly lack merit.

Petitioners' argument that the work related to the boiler was not an MCI, pursuant to RSL §26-511(c)(6)(b) and RSC §2522.4 (a)(2)(i), but instead routine repair and maintenance is not supported by the evidence in the record. Here, contrary to the facts in the cases petitioners cite,<sup>6</sup> DHCR's determination that the Owner's purchase of a replacement boiler constituted an MCI and not mere repair work, was based on the documents the Owner provided: (1) the Contract with the boiler contractor, (2) the required approvals from the New York City Department of Buildings and the New York City Department of Environmental Protection, (3) the canceled checks, (4) an affirmation from the president of the boiler contractor, and (5) the Easco Letter stating that the old boiler was more than 40 years old (see the Easco Letter).

In its Final Order, DHCR explained the requirements for an MCI: "Rent increases for MCIs . . . are warranted when the improvements are *building-wide; depreciable under the Internal Revenue Code, other than for ordinary repairs; required for the operation, preservation and maintenance of the structure; and replace an item whose useful life has expired*" (Final Order, p. 1) (emphasis added). DHCR went on to explain:

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<sup>6</sup>For example, petitioners cite *Weinreb Mgt. v New York State Div. of Housing and Community Renewal* (305 AD2d 207, 208 [1st Dept 2003]) for the proposition that where an owner does not provide sufficient documentation, DHCR will reject an MCI application. In *Weinreb*, the Court held that contrary to the petitioner/landlord's argument, "the record before DHCR permitted it rationally and reasonably to find that the window installations at issue were defective and, accordingly, to conclude that those window installations did not constitute improvements to the building justifying a major capital improvement rent increase" (*id.*).

In the instant proceeding, there is no evidence that any of the work undertaken was not directly related to the qualifying boiler installation. Accordingly, there was no error by the Administrator in granting the owner's Application for Rent Increase. (Final Order, p. 2)

Contrary to petitioners' arguments, the Easco Letter indicates that the old boiler's useful life indeed had expired. DHCR held that even if the old boiler's useful life had not expired, "DHCR records show no MCI rent increase having previously been granted for boiler installation at the subject premises, and thus, the owner has not received, and the tenants have not had to pay, additional rent for a new boiler. Accordingly, there is no basis to deny an MCI rent increase for the boiler installation presently at issue" (Final Order, p. 2).

DHCR maintains that the useful life schedule is intended to protect tenants from repeated or unnecessary rent increases. Therefore, it has granted MCIs for items that meet the criteria of RSC §2522.4(a), where the tenants have not previously paid a MCI increase for the item or component. For example, in *McCullin* (Administrative Review Docket No. UE230051RT [October 12, 2006]), the tenants' PAR challenged an MCI increase for the installation of a boiler, where the owner replaced a boiler that was installed only three years prior to the installation of a new boiler. DHCR records showed that no prior MCI rent increase had been granted for a prior boiler replacement; therefore, it affirmed the MCI increase. Similarly, in *Levine* (Administrative Review Docket No. VH410007RT [April 3, 2008]), the tenants' PAR was denied, as DHCR records did not show that the owner was granted a MCI rent increase for its prior boiler. Likewise, in *Various Tenants of 1286-1290 First Avenue* (Administrative Review Docket No. LF430146RT [September 8, 2009]), the tenants' PAR was denied on the ground that the replaced items were never the subject of a prior MCI increase, and therefore, the useful life requirement was not violated. Here, the Court does not find DHCR's determination that the new boiler was

an MCI even if the old boiler had not outlived its usefulness "irrational or unreasonable" (*Ansonia Residents Ass'n* at 213).

Finally, as discussed above, the evidence in the record flatly contradicts petitioners' argument that the Owner failed to provide the required documentation justifying the MCI increase for the boiler.

As petitioners have failed to show that DHCR's Final Order was arbitrary, capricious or an abuse of discretion, petitioners' request to nullify DHCR's PAR determination is denied, and the Petition is dismissed.

*Conclusion*

Based on the foregoing, it is hereby

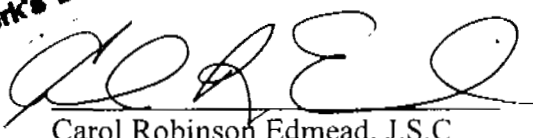
ORDERED and ADJUDGED that the application of petitioners Joanna Ghiggeri and the 190 Riverside Drive Tenants' Association for an order, pursuant to CPLR Article 78, vacating and annulling the determination of respondent Division of Housing and Community Renewal is denied, and the Petition is dismissed; and it is further

ORDERED that counsel for Division of Housing and Community Renewal shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioners.

This constitutes the decision and order of this court.

Dated: October 28, 2010

**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).



Carol Robinson Edmead, J.S.C

**HON. CAROL EDMOAD**