

**Matter of Caputo v Vanamerongen**

2009 NY Slip Op 33055(U)

December 23, 2009

Supreme Court, New York County

Docket Number: 111250/2009

Judge: O. Peter Sherwood

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: Q. PETER SHERWOOD  
Justice

PART 61

In the Matter of the Application of,  
ROSE CAPUTO and LILY DOMINGUEZ,

INDEX NO. 111250/09

Petitioners,

MOTION DATE Sept. 23, 2009

-against-

MOTION SEQ. NO. 001

DEBORAH VANAMERONGEN, as Commissioner  
of NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL and JENNIFER  
BARNABY,

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

Respondents.

The following papers, numbered 1 to 8 were read on this petition for a judgment pursuant to CPLR Article 78

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

PAPERS NUMBERED

1-5

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

6-7

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

8

Cross-Motion:  Yes  No

Upon the foregoing papers, the petition for a judgment pursuant to CPLR Article 78  
is decided in accordance with the accompanying decision, order 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).

Dated: December 23, 2009

  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 61**

-----x

In the Matter of the Application of  
**ROSE CAPUTO AND LILLY DOMINGUEZ,**

**Petitioners,**

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

**DECISION, ORDER  
AND JUDGMENT**

**-against-**

**Index.: 111250/2009**

**DEBORAH VANAMERONGEN, AS COMMISSIONER,  
OF NEW YORK STATE DIVISION OF HOUSING AND  
COMMUNITY RENEWAL, AND JENNIFER BARABY,**

**Respondents.**

-----x

**O. PETER SHERWOOD, J.:**

As alleged in the petition, petitioners own fractional shares of two adjacent buildings located at 45 Second Avenue and 47 Second Avenue in New York, New York (collectively "Buildings"). Each building consists of three residential units. The Buildings have separate entrances but share some facilities, including a common heating unit.

This proceeding pursuant to CPLR Article 78 has commenced to annul a final order ("Final Order") of the Deputy Commissioner of the New York State Division of Housing and Community Renewal ("DHCR") affirming an order of the Rent Administrator that determined that the Buildings comprise a horizontal multiple dwelling containing six or more units within the meaning of New York City Rent Stabilization Law §26-505("RSL") and regulations promulgated pursuant to that law (*see* Rent Stabilization Code §2520.11, 9 NYCRR §2520.11 ["RSC"])and therefore is subject to regulation under the RSL.

The RSL generally provides that housing accommodations located in buildings that contain six or more housing accommodations shall be subject to regulation (*see* RSL §26-504[a]). The RSL also extends regulation to multiple family garden-type maisonette dwelling complexes containing six or more dwelling units having common facilities such as sewer line, water main, and heating plant, and operated as a unit under a single ownership (*see* RSL §26-505). Such housing complexes are commonly referred to as "horizontal multiple dwellings."

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and does not constitute an official record. Entry cannot be served without the signature of the County Clerk or authorized representative thereof. **FILED BY BARBARA BY**  
appear before me at the Judgment Clerk's Desk (Floor 11)

In the administrative proceeding before DHCR and in this proceeding, petitioners argue that at least since 1968, the buildings have been treated as two separate three-family buildings and a “*de facto* cooperative”. They explain that in 1968, the six residents of the Building combined to create a partnership in which each held a 1/6 interest for the purpose of having a permanent place of residence. The intention was to create a *de facto* residential cooperative. Petitioners emphasize that at the time of purchase, the Buildings were registered with DHCR as “owner occupied,” although the relevant documents showing that fact are no longer available. They add that Buildings are registered with the Department of Buildings as two buildings on one tax lot. They also state that each building has its own electric meters, entrance door, basement, roof, gutters and leaders, gas connection, front bell and intercom system, rear staircase and mailboxes. The buildings are not connected by any common internal access doors.

After conducting a site visit and reviewing the documentary record, the DHCR Rent Administrator concluded that there are sufficient indicia of common facilities, common ownership, management and operation to warrant treating 45 Second Avenue and 47 Second Avenue as an integrated unit and multiple dwelling subject to regulation. The Rent Administrator found that the two buildings have been commonly owned and managed; that the two buildings share a heating system; have a common chimney; share a water main and a sewer line; have a common facade; are both situated on Tax Block 458, Lot 27 and have been assessed local property taxes under a single tax bill; have a common lighting system, and that the electrical meters for both buildings are contained in the 45 Second Avenue building; and have a common entry into their respective basements.

The Rent Administrator determined that there were sufficient common features present to warrant a finding that the subject buildings together comprise a horizontal multiple dwelling consisting of six or more housing accommodations, pursuant to the applicable section of the Rent Stabilization Law and Code and that the Buildings are subject to regulation under the jurisdiction of the Rent Stabilization Law and Code. These findings were affirmed by DHCR in a Final Order dated June 11, 2009.

### ***DISCUSSION***

Administrative agencies enjoy broad discretionary power when rendering determinations on matters they are empowered to decide. Judicial review of an agency’s exercise of discretion is limited in scope. Section 7803 of the CPLR provides in pertinent part:

The only questions that may be raised in a proceeding under this article are:

- (3) Whether a 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, including abuse of discretion as to the measure or mode of penalty or discipline imposed.

A court may not disturb an administrative decision unless the agency's action was arbitrary and capricious, in violation of lawful procedures, or made in excess of its jurisdiction (*see Pell v. Board of Education*, 34 NY2d 222, 356 NYS2d 833 [1974]). Where a question involves the application of a broad statutory provision, the construction placed on the statute and regulations by the agency with responsibility for their administration is entitled to great weight (*see Salvati v. Eimicke*, 72 NY2d 784, 537 NYS2d 16 [1988]), *reconsideration den.*, 73 NY2d 995, 540 NYS2d 1006 [1989]). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed, *Colton v. Berman*, 21 NY2d 322, 287 NYS2d 647 (1967), even if a court would have come to a different conclusion, *Mid State Mgt. Corp. v. New York City Conciliation and Appeals Bd.*, 112 AD2d 72, 491 NYS2d 634 (1<sup>st</sup> Dept 1985), *aff'd*, 66 NY2d 1032, 499 NYS2d 398 (1985). The court may not substitute its judgment for that of the Commissioner where his decision is rationally based in the record (*see Howard Carol Tenant's Ass'n. v. New York City Conciliation and Appeals Bd.*, 64 AD2d 546, 6 NYS2d 845 [1<sup>st</sup> Dept 1979], *aff'd*, 48 NY2d 768, 423 NYS2d 911 [1979], *reargument den.*, 48 NY2d 1027, 425 NYS2d 1029 [1980]).

RSL §26-504 provides that housing accommodations located in buildings containing six or more housing accommodations are generally subject to regulations under the RSL and RSC, with certain specified exceptions and exemptions. RSL §26-505 further provides as follows:

**§26-505. Application to multiple family complex.**

For purposes of this chapter a class A multiple dwelling shall be deemed to include a multiple family garden-type maisonette dwelling complex containing six or more dwelling units having common facilities such as sewer line, water main, and heating plant, and operated as a unit under a single ownership on May [6, 1969], notwithstanding that certificates of occupancy were issued for portions thereof as one or two-family dwellings.

RSL §2520.11 provides that the RSC shall apply to all classes of housing accommodations made subject to regulation by the RSL or any other provision of law, excepting, *inter alia*:

(d) buildings containing fewer than six housing accommodations on the date the building first became subject to the RSL, unless such buildings are otherwise subject to [the RSC] pursuant to the RSL or other statutes and regulations; for the purposes of this subdivision, a building shall be deemed to contain six or more housing accommodations if it was part of a multiple family garden-type maisonette dwelling complex containing six or more housing accommodations having common facilities such as a sewer line, water main or heating plant and was operated as a unit under common ownership on the date the building or complex first became subject to the RSL, notwithstanding that Certificates of Occupancy were issued for portions thereof as one or two-family dwellings...

The Court of Appeals has held that in determining the existence of a regulated horizontal multiple dwelling, the crucial factor is not whether the housing accommodations are part of a “multiple family garden-type maisonette complex”, but rather:

whether there are sufficient indica of common facilities, common ownership, management and operation to warrant treating the housing as an integrated unit and multiple dwelling subject to regulation.

72 NY2d 784, 791-792 (1988). Applying this standard, the Rent Administrator held that the Buildings comprise a horizontal multiple dwelling and are subject to rent stabilization regulations. DHCR found that the Buildings have a single owner in which petitioners each have partnership interests. Over the years petitioners have represented themselves as the owners of the Buildings. The rent Administrator found that the Buildings share common facilities, including a central heating system, single water main, single sewer pipes, common lighting system, a shared chimney and the electric meters for both buildings are located in the basement of one of the buildings. The determination is supported by evidence in the record, is rational and may not be disturbed by the court.

The determination to reject petitioner’s claim of exemption from regulation on the ground that the units in the Buildings are locate in a “*de facto* cooperative” is supported in the record. There is no provision in the Rent Stabilization Law or Code that would exempt a housing accommodation from rent stabilization based upon its conversion to a cooperative, unless it was accomplished pursuant to the General Business Law (“GBL”). In this case, the Final Order properly found there is no evidence that the Buildings were converted to a cooperative in accordance with the provisions of GBL §352-eeee. Moreover, in a decision of the Supreme Court, New York County (Abdus-

Salaam, J.), entitled *Carr v. Caputo*, Index No. 117185/1997, the court held, "that the 1969 Agreement did create a partnership, that the said partnership was never dissolved," and that it was not established that the Buildings "were in fact converted to condominium status." The determination is rational and may not be disturbed by the court.

Accordingly, it is

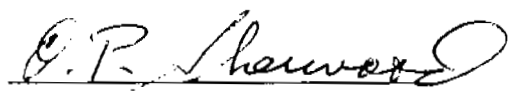
ORDERED and ADJUDGED that the Final Order of DHCR is AFFIRMED and the petition is DISMISSED; and it is further

ORDERED that the original record before the DHCR shall not be filed with the County Clerk and shall be returned to respondent, attention Gary Conner, General Counsel, NYS Division of Housing and Community Renewal, Room 707, 25 Beaver street, New York, New York 10004, upon filing of this Decision, Order and Judgment.

This is the decision, order and judgment of the court.

DATED: December 23, 2009

So Ordered



O. PETER SHERWOOD  
J.S.C.

**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).**