

**Matter of 108 Realty LLC v Department of Hous.
Preserv. & Dev.of the City of N.Y.**

2010 NY Slip Op 30029(U)

January 5, 2010

Supreme Court, New York County

Docket Number: 113982/09

Judge: Carol R. Edmead

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Index Number : 113982/2009

108 REALTY LLC

vs

DEPT. OF HSG PRESERVATION

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 12/28/2010

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The instant Article 78 Petition is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the application of Petitioner 108 Realty LLC for an order and judgment, pursuant to CPLR Article 78, annulling the determination of respondent the New York City Department of Housing Preservation and Development, is denied. And it is further

ORDERED and ADJUDGED that the cross motion of Respondents to dismiss the Petition is granted and the instant Petition is dismissed. And it is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for Petitioner.

This judgment is not enforceable until it is filed with the County Clerk and notice of entry is given to the respondent based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1/5/2010

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
108 REALTY LLC,

x

Index No. 113982/09

Petitioner,

DECISION/ORDER

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

-against-

DEPARTMENT OF HOUSING PRESERVATION AND
DEVELOPMENT OF THE CITY OF NEW YORK
DEPARTMENT OF FINANCE OF THE CITY OF
NEW YORK, and CITY OF NEW YORK

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).

Respondents.

x

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner 108 Realty LLC ("petitioner") moves for an order and judgment, pursuant to CPLR Article 78, annulling the determination of respondent the New York City Department of Housing Preservation and Development ("HPD") that petitioner's project was ineligible for the requested tax benefit, and ordering HPD to issue a new determination on petitioner's J-51 Tax Exemption/Tax Abatement Program ("J-51 Program")¹ application, in that said determination was arbitrary and capricious.

Respondents cross move to dismiss the Petition, arguing that petitioner fails to demonstrate that HPD's determination was either arbitrary or capricious. Rather, respondents acted reasonably, lawfully, and properly in making the determination.

¹ The J-51 Program is authorized by Section 489 of the New York State Real Property Tax Law ("RPTL") and Section 11-243 of the New York City Administrative Code ("Code").

Background/Administrative History

Petitioner, a New York limited liability company, is the owner and landlord of property located at 108 West 116th Street in the borough of Manhattan (the "Premises"). On or about October 1, 2002, petitioner purchased the Premises. The Premises was classified as a Class B multiple dwelling when petitioner purchased the Premises. Petitioner renovated the Premises and converted it from a Class B multiple dwelling to a Class A multiple dwelling.

On or about July 17, 2006, petitioner applied to HPD for a tax exemption pursuant to the J-51 Program. Nearly three years later, by letter dated June 5, 2009, HPD issued a determination on petitioner's J-51 application (the "Determination"), finding petitioner's project "ineligible for the requested tax benefit because it does not meet the J-51 Program's criteria for eligible projects." In part, the HPD denial stated:

To be eligible for tax benefits under the J-51 Program, the conversion of a building or structure classified as a Class B multiple dwelling or a Class A multiple dwelling used for single room occupancy into a Class A multiple dwelling must be carried out with substantial government assistance....

Petitioner commenced this proceeding on or about October 5, 2009, challenging HPD's Determination as arbitrary and capricious.

Petitioners' Contentions

HPD's sole basis for its Determination is that HPD concluded that the Premises was converted from a Class B SRO into a Class A Multiple Dwelling by private funding. HPD's Determination that the Premises was formerly an SRO and ineligible for inclusion in the J-51 Program was arbitrary and capricious. To the contrary, while the conversion was entirely privately funded, the Premises was never an SRO.

In making its final Determination, HPD ignored the documentary record included in petitioner's application for J-51 benefits. The Premises was never identified or categorized in any certificate of occupancy as an SRO. Further, HPD did not identify a single document which identified the Premises as an SRO at any time since its construction. Nevertheless, HPD arbitrarily determined without any factual or legal basis that the Premises was formerly an SRO.

Since the Premises was never an SRO, its conversion from a Class B multiple dwelling to a Class A multiple dwelling, makes it prima facie eligible for inclusion in the J-51 Program.

Respondents' Contentions

Petitioner concedes that it converted the Premises from a Class B multiple dwelling to a Class A multiple dwelling, and the conversion was entirely privately funded. Because that statute authorizing the J-51 Program clearly states that the benefits of the J-51 Program do not apply to such a conversion unless it is carried out with substantial government assistance, HPD properly determined that petitioner's project was ineligible for benefits under the J-51 Program.

HPD's Determination does not state that the Premises was or is classified as an SRO, nor was that the basis of the determination of ineligibility. Petitioner has misconstrued the clearly articulated and rational reason for the denial of its J-51 Program application. HPD's determination was based upon the fact that the Premises was a Class B multiple dwelling prior to the privately-funded conversion into a Class A multiple dwelling.

Moreover, the modifying criteria - that the dwelling was used in whole or in part for single room occupancy - is irrelevant with respect to class B dwellings since the very definition of a class B dwelling includes SROs.

Petitioner's Reply

Respondents' assertion that petitioner fails to demonstrate that HPD's determination was either arbitrary or capricious is premature. Petitioner does not need to "demonstrate" its ultimate entitlement to judgment in order to defeat respondents' motion to dismiss. Rather, establishment of a viable Petition and the prima facie claim herein set forth is sufficient to maintain and justify Article 78 review.

Discussion

CPLR §7803 states that the court review of a determination of an agency, such as HPD, 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 [1st Dept 1990]; *Mazel v DHCR*, 138 AD2d 600 [1st Dept 1988]; *Bambeck v DHCR*, 129 AD2d 51 [1st 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 [1st Dept 1985], *affd* 66 NY2d 1032 [1985]).

Here, contrary to petitioners' arguments, HPD's determination was not arbitrary,

capricious or an abuse of discretion. HPD denied petitioner's J-51 Program application consistent with J-51 Program eligibility criteria, as set forth in Section 5-04 of the Rules. Petitioner's conversion of the Premises from a Class B multiple dwelling to a Class A multiple dwelling precluded eligibility for tax benefits under the J-51 Program.

Further, HPD'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]).

As petitioner has failed to show that HPD's Determination was arbitrary, capricious or an abuse of discretion, petitioner's request to nullify HPD's Determination is denied, and the cross motion to dismiss the Petition is granted.

Conclusion

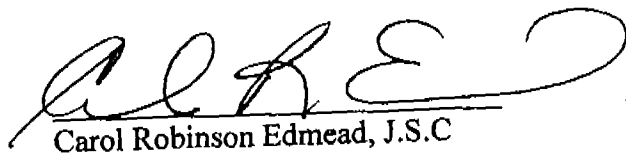
Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of Petitioner 108 Realty LLC for an order and judgment, pursuant to CPLR Article 78, annulling the determination of respondent the New York City Department of Housing Preservation and Development, is denied. And it is further

ORDERED and ADJUDGED that the cross motion of Respondents to dismiss the Petition is granted and the instant Petition is dismissed. And it is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for Petitioner.

Dated: January 5, 2010



Carol Robinson Edmead, J.S.C

HON. CAROL EDMEAD

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).