

**Matter of 219 E. 69th St. Tenants v NYS Div. of Hous.  
& Community Renewal**

2010 NY Slip Op 30176(U)

January 26, 2010

Supreme Court, New York County

Docket Number: 112077/2009

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

*Justica*

Index Number : 112077/2009  
**219 EAST 69TH STREET TENANTS**  
 vs.  
**N.Y.S.D.H.C.R.**  
 SEQUENCE NUMBER : 001  
 ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE 1/22/10

MOTION SEQ. NO. \_\_\_\_\_

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

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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 motion

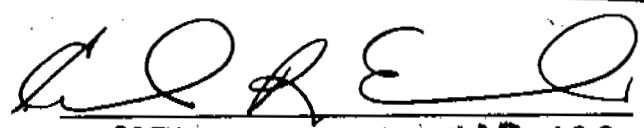
The instant matter (motion sequence 001) is decided in accordance with the annexed Memorandum Decision. It is hereby

**ORDERED** and **ADJUDGED** that the application of Petitioner 219 East 69<sup>th</sup> Street Tenants Association and its constituent members, for a judgment pursuant to Article 78 of the CPLR (a) reversing and annulling the Order of respondent the New York State Division of Housing and Community Renewal issued June 25, 2009 under Administrative Review Docket WF410001RP (Related Docket Numbers SJ410022RT and SG410148RT); and (b) for legal fees, is denied and the instant Petition is dismissed. And it is further **ORDERED** that the Clerk of the Court is directed to enter judgment accordingly. And it is further

**ORDERED** that counsel for Petitioner shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

**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).

Dated: 1/26/10



**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

\_\_\_\_\_ X  
In the Matter of the Application of the  
219 EAST 69<sup>th</sup> STREET TENANTS ASSOCIATION  
and its constituent members,

Petitioner,

Index No. 112077/2009

**DECISION/ORDER**

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

-against-

NEW YORK STATE DIVISION OF HOUSING AND  
COMMUNITY RENEWAL,

Respondent

And

219 EAST 69<sup>th</sup> STREET, LLC,

Intervenor-Respondent

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

**MEMORANDUM DECISION**

Petitioner 219 East 69<sup>th</sup> Street Tenants Association and its constituent members (petitioner) moves for a judgment pursuant to Article 78 of the CPLR (a) reversing and annulling the Order of respondent the New York State Division of Housing and Community Renewal (DHCR) issued June 25, 2009 under Administrative Review Docket WF410001RP (Related Docket Numbers SJ410022RT and SG410148RT), on the grounds that the DHCR acted arbitrarily and capriciously in finding that all of the claimed improvements of the Intervenor-Respondent 219 East 69<sup>th</sup> Street, LLC (the Owner) were Major Capital Improvements (MCIs); and (b) awarding petitioner legal fees.

**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 4-110).

### *Background*

On April 20, 2001, the Owner filed an Application for Rent Increase Based on Major Capital Improvements, stating that the work done included exterior restoration, new windows, asbestos removal, new boilers, and air conditioning in the lobby. Associated costs included engineering fees and a sidewalk bridge. Submissions included, *inter alia*, copies of contracts, canceled checks, invoices, work permits, approvals, and contractor statements. Petitioner filed an "omnibus" objection to the application on December 28, 2001.

On June 24, 2004, the Rent Administrator granted the Owner's application and allowed most of the claimed increases, except for the lobby air conditioning (as not building wide) and the tax portion of the sidewalk bridge costs, for a total increase of \$13.60 per room, per month. Tenants who did not receive all new windows received a reduced increase.

Petitioner filed a Petition for Administrative Review (PAR) of the order. The Commissioner granted the tenants' PAR in part. Thereafter petitioner filed an Article 78 petition against DHCR. Respondent DHCR cross-moved for remittal for reconsideration and the issuance of a new determination. The court (Justice Payne) granted respondent DHCR's cross motion and remitted the matter to DHCR for further consideration, including consideration of petitioner's problems with the windows.

On May 21, 2009, DHCR conducted an inspection of apartments about which DHCR received complaints. On June 25, 2009, the Commissioner issued an order further granting in part the petitioner's PAR and modifying the Rent Administration order.

The instant Article 78 proceeding ensued.

*Petitioner's Contentions*

DHCR deliberately and arbitrarily limited the scope of certain window inspections following a court-ordered remand (Index No. 108758/07 J. Payne) in which Justice Payne specifically remitted the matter "for further consideration including consideration of the tenant's problems with the new windows as to which the agency did not fully develop a record." The limited nature of the inspections conducted by the DHCR precluded a rational determination of whether the windows were installed building wide in an unworkmanlike manner in connection with the Owner's application for a rent increase based upon a building wide MCI. DHCR inspectors failed to examine even a significant fraction of the windows in the subject building.

And, DHCR arbitrarily granted rent increases for various other alleged improvements on the basis of an application that, upon information and belief, was replete with material omissions, mistakes and shady additions; where some of the exterior renovations were not building wide, lacked sufficient supporting documentation and were not done in a workmanlike manner; and where there was inadequate documentation to support the boiler replacement; and commercial unit allocations were wrongly calculated.

*DHCR's Opposition*

Petitioner has set forth no basis on which to overturn DHCR's order. The Commissioner properly revoked the rent increases for those apartments whose windows were found defective.

Petitioner misstates DHCR's policy with respect to windows. An increase is not granted where a high proportion of windows *installed* are defective, not windows *inspected*. Petitioner's contention that its list of defective windows was not intended to be complete is not relevant. The onus is on the tenants to provide information in opposition to a rent increase application. DHCR

is not required to speculate that there are problems that are not pointed out by tenants, nor would it be rational for DHCR to do so.

Complete denial of an MCI increase based on defects in a small portion of windows is not required by statute, regulation, policy or practice. DHCR's order is consistent with agency precedent and court decisions.

Petitioner does not seriously challenge DHCR's findings with respect to those installations other than windows. Petitioner's vague claims of insufficient documentation are not supported by the record, which contains substantial evidence of installations qualifying for rent increases under the Rent Stabilization Law and Code.

*Owner's Opposition*

The only arguments that the Deputy Commissioner was permitted to consider in the Remand Proceeding were arguments relating to the access request forms, and therefore, any consideration of petitioner's claims by the Deputy Commissioner would have been improper as beyond the scope of the Remand Proceeding.

Even if the court concludes that the Deputy Commissioner was entitled to address window-related arguments other than arguments relating to the access request forms, it will still be required to conclude that the Deputy Commissioner's decision in this case should be affirmed.

There is no merit to petitioner's argument that the Deputy Commissioner should have considered whether work at the subject building other than the installation of the windows, warranted an MCI increase.

*Petitioner's Reply*

Respondents have failed to address the two central issues in this case: the DHCR has failed to explain in substantive terms why it treated a sample survey of window problems as mere isolated individual complaints. Moreover the DHCR has not addressed its failure to honor the court's order upon remand to develop a full record on problems with the window installation.

The Commissioner's finding that only eleven windows out of 967 were defective ignores two basic realities. First and foremost, access for inspection was only attempted for 21 apartments and only 11 of those apartments were actually inspected. Problems were found in 7 of the 11 of those apartments which inspectors gained access to. Without a larger sample, it was absurd for the Commissioner to conclude that defects existed in only 11 out of 967 windows. Second, it is unreasonable to assume that the petitioner is in a position to inspect and report each and every defect in all of the 967 newly installed windows. They must use a sample.

It is absolutely clear that petitioner never intended the submission of its "survey" as anything more than a sample pointing to a general building wide problem with unworkmanlike window installations.

*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, including abuse of discretion as to the measure or mode of penalty imposed. CPLR 7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1<sup>st</sup> Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1<sup>st</sup> Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1<sup>st</sup> Dept.1987], *lv. den.* 70 N.Y.2d 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." *Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. *Matter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's function is completed on finding that a rational basis supports the DHCR's determination (see *Howard v Wyman*, 28 N.Y.2d 434 [1971] ). 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 (see *Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1<sup>st</sup> Dept.], aff'd 66 N.Y.2d 1032 [1985] ) ["To the extent that the finding of the CAB was premised upon the absence of evidence, it was the failure and refusal of petitioner to furnish the requested proof. The CAB was entitled to make its determination based on the available evidence provided such determination had a rational basis."].

Moreover, where, as here, the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference. See *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363, 514 NYS2d 689, 693 (1987). Courts are required to "resolve [any] reasonable doubts in favor of the administrative findings and decisions" of the responsible agency. *Town of Henrietta v Department of Env'tl. Conservation*, 76 A.D.2d 215, 224, 430 NYS2d 440, 448 (4<sup>th</sup> Dep't 1980). See also *Jackson*, 67 NY2d at 417, 503 NYS2d at 305; *City of Rome v Department of Health Dept.*, 65 A.D.2d 220, 225, 441 NYS2d 61, 64 (4<sup>th</sup> Dep't 1978), lv. *To app. denied*, 46 NY2d 713, 416 NYS2d 1027 (1979).

Petitioner correctly points out in its reply brief that DHCR is required to conduct an inspection. However, as pointed out by DHCR, the onus is on the tenants to provide information in opposition to a rent increase application. DHCR is not required to speculate that there are problems that are not pointed out by tenants, nor would it be rational for DHCR to do so. Tenants are advised that DHCR will determine an application based on the evidence and information it receives from the owner and tenants. There is no requirement that DHCR extrapolate information or complaints received to include apartments about which no complaints were received.

In a decision by Justice Shafer in this court (*925 West End Avenue v DHCR*, Sup. Ct. NY Co., Index No. 105538/04, January 7, 2005) the court affirmed that DHCR's processing of an MCI application based on new windows, similar to that in the instant matter, was proper, finding that it was appropriate for DHCR to base the scope of its inspection on those tenants who indicated a need for inspection. There is no basis in the record for an assumption that tenants had defective windows who did not notify either DHCR or petitioner. The decision states in part:

To the extent that the tenants suggest that the DHCR inspection was not comprehensive, the argument is without merit. It was rational for the DHCR to contact the individual tenants and base the scope of its inspection on those tenants who indicated a need for an inspection.

What was before DHCR was a relatively small number of apartments with defective windows. There was no evidence before DHCR of pervasive defects and no basis on which to revoke the entire rent increase for windows. Courts have upheld DHCR's findings, granting or denying MCI increases based on its evaluation of the evidence before it.

And, as stated by the Court of Appeals and applied over time, the courts have upheld DHCR's findings, granting or denying MCI increases based on its evaluation of the evidence before it:

We note at the outset that our review of DHCR's interpretation of the statutes it administers is limited. "Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld....DHCR's determination that an alteration constitutes a major capital improvement.... necessarily entails the agency's expertise in evaluating factual data and is entitled to deference if not irrational or unreasonable.

*Ansonia Residents Ass'n v DHCR*, 75 NY2d 206, 551 NYS2D 871 (1989).

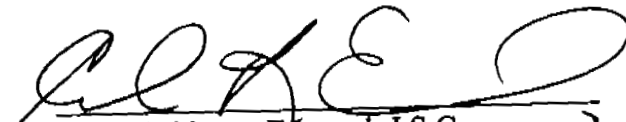
#### Conclusion

Based on the foregoing, it is hereby

**ORDERED** and **ADJUDGED** that the application of Petitioner 219 East 69<sup>th</sup> Street Tenants Association and its constituent members, for a judgment pursuant to Article 78 of the CPLR (a) reversing and annulling the Order of respondent the New York State Division of Housing and Community Renewal issued June 25, 2009 under Administrative Review Docket WF410001RP (Related Docket Numbers SJ410022RT and SG410148RT); and (b) for legal fees, is denied and the instant Petition is dismissed. And it is further

**ORDERED** that counsel for Petitioner shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: January 26, 2010



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMOAD**

**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).