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

Index Number : 111000/2009

DERMOT DUNWOODY LLC

VS.

NYS DIV.HOUSING & COMMUNITY RENEWAL

SEQUENCE NUMBER : # 001

ARTICLE 78

_____ *Justice*

PART _____

INDEX NO. 111000-09

MOTION DATE _____

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-8
Answering Affidavits — Exhibits	9-16
Replying Affidavits	17

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

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).

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 1/27/10

_____ J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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In the Matter of the Application of
DERMOT DUNWOODY LLC and DPA 184th ST LLC,

Petitioners,

Index No. 111000/09

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

Decision, Order and Judgment

- against -

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL,

Respondent.

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JOAN B. LOBIS, J.S.C.:

Petitioners Dermot Dunwoody LLC and DPA 184th St LLC bring this proceeding, pursuant to Article 78 of the C.P.L.R., seeking to overturn the June 4, 2009 opinion and order (the "Order") of the Deputy Commissioner of the State of New York Division of Housing and Community Renewal ("DHCR" or the "Division"), denying petitioners' petition for administrative review ("PAR"). The denial of the PAR upholds the Division's determination denying the request for a Major Capital Improvement ("MCI") increase for the installation of security system.

Petitioners are owners of a residential apartment building located at 201 West 11th Street in Manhattan (the "Building"), having purchased the Building on August 16, 2005 from the former owners, Greenwich Street Properties, L.P. ("Greenwich"). On or about January 19, 2005, Greenwich filed an application for an MCI increase with DHCR. The application set forth a request for an increase for installation of boiler room doors, a new closed circuit television system ("CCTV System"), new conduits, wiring, and circuit breakers. The total cost was set forth as $28,681.25,

itemized as follows:

boiler room doors	$2,200
basement doors	$3,000
CCTV System	$22,460
rewiring	$245
routing CCTV/Supplies	$776

The Building contains 24 rent-regulated apartments, consisting of a total of 121 rooms. The requested increase for all of the work was $2.82 per room, per month.

The Division mailed the tenants a summary of the application and invited them to comment. Three tenants filed responses opposing the requested MCI increase. The tenants claimed that the changes did not improve the infrastructure; that the doors had been in good condition and did not need to be replaced; that the replacement doors were cheap; that heat was distributed unevenly; and, that garbage remained uncollected. The tenants further asserted that the CCTV System served no purpose for the tenants, in that it failed to record three attempted break-ins. The tenants suspected that the camera was installed as a "spying device" to track their comings and goings to see if they actually resided in their rent-regulated apartments. The Division requested additional information from Greenwich, which was submitted on or about February 24, 2005. In the submission, which was prepared by Knightbridge Management, the authorized agent to file the MCI for Greenwich, the applicant denied that the videotaped system was designed to discover whether tenants were actually using their apartment for less than six months per year. The letter states that "[t]hese are security devices that offer a deterrent aspect and are monitored on a random basis to review any questioned time period or occurrence."

In a decision dated March 14, 2005, the Rent Administrator ("RA") granted the MCI application only to the extent of approving the $2,200 for replacement of the boiler room doors and $3,000 for replacement of the basement doors. The rent was increased by .51 per room, per month. The RA disallowed the request for an increase for the costs of the CCTV System, the rewiring, and the routing CCTV/supplies, based on DHCR's requirement that the security camera be monitored twenty-four (24) hours a day, and not randomly.

Petitioners filed a PAR, dated March 30 and received by DHCR on March 31, 2005, seeking to reverse the portion of the RA's decision that denied the MCI increase for the CCTV System and related expenses. In support of their application, which was filed by Stonehenge Management LLC on behalf of Greenwich, the applicants argued that nothing in the Rent Stabilization Code, DHCR policy statements or bulletins require that security cameras be monitored continuously; that the camera does in fact record 24 hours a day; and, that it is connected to a central system in the main office and is "viewed by Management personnel all day long and reviewed on a continuous basis." While the former owner asserted that the system operated 24 hours a day, and all activity is recorded 24 hours a day, there was no assertion that anyone is observing the live recording 24 hours a day. Again, tenants opposed the request for an MCI increase. The tenants asserted that the owner replaced the full-time superintendent with a part-time superintendent. One tenant disputed the claim that employees in the management office were viewing the tape, and asserted that since the camera was hidden from view, it had no deterrent effect.[1]

[1] The tenants also commented that there have been different managers. The court notes that a new management company filed the PAR, while a different management company filed the initial application, although the application was signed by the same individual, as authorized agent, on behalf of the two different management companies.

On June 4, 2009, the Deputy Commissioner of DHCR issued the Order denying the PAR, finding that the costs of the CCTV System should be excluded from the MCI increase, based on DHCR's policy that all entrances to a building must be monitored on a twenty-four (24) hour basis, or there must be a visual capacity in each apartment in conjunction with a functioning intercom system. The Order notes that a television system that is not associated with an intercom, and which merely records activities but is not monitored continuously, does not constitute an improvement warranting an MCI increase. Petitioners commenced this Article 78 proceeding on August 3, 2009 to challenge that portion of the Order denying the request for an MCI increase for the CCTV System. Petitioners asserts that it was improper for DHCR to deny the MCI increase for the CCTV System because there is no requirement that a CCTV System be monitored on a 24-hour per day basis to qualify for the MCI increase, and that DHCR's determination is arbitrary and capricious because the alleged policy-based determination is undefined and unexplained.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact.'" Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id. With respect to determinations made by DHCR, the First Department has recognized that the Division "has broad discretion in setting rents to effectuate the laws governing rent regulation." Harding v. Calogero, 45 A.D.3d 363, 364 (1st Dep't 2007) (citation omitted).

Section 2522.4(a)(3) of the Rent Stabilization Code sets forth the schedule of major capital improvements. Subdivision 26 provides that an increase may be awarded for a "new security monitoring [television] system including additional components needed for the system." However, where there is a determination that the work performed does not benefit the tenants, DHCR's denial of an application for an MCI increase cannot be deemed arbitrary and capricious. Riverton Associates v. New York State Div. of Hous. and Comm. Renewal, 15 A.D.3d 225 (1st Dep't 2005) (citing 9 N.Y.C.R.R. § 2522.4(a)(2)(i)(c), which provides that an MCI increase must be for an improvement to the building which "inures directly or indirectly to the benefit of all tenants."). Here, the Division determined that the CCTV System did not benefit the tenants, in that it was not monitored continuously and was not installed at all entrances and exits.

Annexed to DHCR's papers is a copy of a decision in another case denying, on similar grounds to the ones here, a request for an MCI increase for installation of a television security system: Matter of the Administrative Appeal of 184 West 10th Street Corp., Admin. Review Dkt. No. TA430023RO (Aug. 17, 2006). In that case, the tenants asserted that not all of the entrances were monitored; that the owner installed a surveillance system and not a security system; and, that the system was not monitored on a full-time basis. The Division, in its denial, questioned the efficacy and purpose of the system and its actual costs.

Here, too, there are questions as to the efficacy of the system–it is not monitored around-the-clock and there is no intercom system in each apartment. For all of these reasons, the decision of the Deputy Commissioner denying the PAR and upholding the limited MCI increase,

which rejected the request for an increase for the CCTV System and related expenses, is not arbitrary and capricious. The petition is denied and this proceeding is dismissed. This constitutes the decision, order and judgment of the court.

Dated: January 27, 2010

JOAN B. LOBIS, J.S.C.