Matter of 184-186-188 Norfolk St. Tenants Assn. v New York State Div. of Hous. & Community Renewal
2010 NY Slip Op 30241(U)
February 1, 2010
Supreme Court, New York County
Docket Number: 110686/2009
Judge: O. Peter Sherwood
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SCANNED ON 2/3/2010
[* 1]

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

In the Matter of the Application of,
184-186-188 NORFOLK STREET TENANTS ASSOCIATION,

Petitioner,

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

INDEX NO. 110686/2009

MOTION DATE Oct. 22, 2009

MOTION SEQ. NO. 001

MOTION CAL. NO. 128

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3
Answering Affidavits — Exhibits	4-5 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 pursuant to 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: 2/1/2010

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):

[* 2]

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

---X

In the Matter of the Application of

Susan Howard, Johnny Balay, Vanessa Cleary, Nerida Colon, Clarence Dennis, Nilda Galarza, Jeff Kilmer, William Linn, Joaquina Mayoly, Wanda Ramos, Stuart Richards, Carmen Rodriguez, Margarita Santana, Jane Spencer, Corey Sipkin, Zaida Vazquez, Rodney L. White Individually and as members of the 184- 186- 188 Norfolk Street Tenants Association,

Petitioner,

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.

---X

DECISION, ORDER AND JUDGMENT

Index No. 110686/2009

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SHERWOOD, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence number 002, proposed intervenor-respondent Granite International Management LLC (Granite) moves for leave to intervene in this Article 78 proceeding. Granite is the managing agent for the owner of the premises involved in the proceeding. In motion sequence number 001, petitioner Susan Howard, *et al.* (Petitioner) seeks (1) to have the determination of respondent New York State Division of Housing and Community Renewal (DHCR) reversed, annulled and vacated, and (2) to recover attorney's fees incurred in this proceeding.

FACTS

On August 20, 2004, the landlord of 184-186-188 Norfolk Street, New York, New York ("the premises") filed an application for an increase in rent based on a major capital improvement ("MCI")

to the premises. The work involved electrical rewiring, which was performed from May 16, 2003 through October 16, 2003. The tenants were notified by DHCR of the application on September 3, 2004. Thirty-one out of a total of 49 tenants responded with objection to the MCI, asserting that the work did not benefit all tenants, many apartments had already been gut renovated and so had previously received electrical upgrades and individual apartment rent increases based on those renovations, the wiring was hazardous and inadequate, there are other hazardous conditions in the premises, there has been a reduction of services in the premises, and that 42 conductors were installed, not 49, and no rewiring was done within apartments.

On January 10, 2005, the rent administrator denied the MCI increase, finding that no feeders were installed as per contract and approvals. The landlord filed a Petition for Administrative Review ("PAR") on February 14, 2005, alleging that the terminology for copper risers and feeders had changed, and that the work was done. The tenants asserted all previous objections at the PAR, and pointed out that the sign off listed the installation of 42 meter pans, panels and conductors, not 49 risers, feeders or subfeeders.

The Commissioner granted the PAR, stating, in part:

> It is the established position of the Division that the rewiring work performed meets the definitional requirements of a major capital improvement for which a rent increase may be warranted. The Commissioner notes that rewiring requires the installation of new electrical service from the property box in the basement to every housing accommodation of sufficient capacity to accommodate the installation of air conditioner circuits and outlets as well as two double outlets in the kitchen to accommodate heavy duty appliances. It is not necessary that all existing wiring be replaced to qualify for a rent increase. (Amended Petition, Ex. B., at 2).

The Commissioner went on to state that a DHCR inspector found that new risers, new electrical meters and pans for each apartment were installed. The Commissioner further found that the owner submitted documentation to verify that it had removed the lead paint violations from the record. Thus, the Commissioner concluded that a rent increase was warranted, and ordered an increase in the amount of $4.35 per room per month (*Id.* at 2-3). Petitioner then brought this proceeding, pursuant to Article 78 of the CPLR.

DISCUSSION

The court will first address Granite's motion for leave to intervene. The courts grant leave to intervene liberally, especially where the intervenor has a stake in the outcome of an action or proceeding (*Matter of Park Terrace Gardens Tenants Assn. v Joy*, 80 AD2d 773 [1st Dept 1981]; *Matter of Eberlin v Herman*, 18 AD2d 1068 [1st Dept 1963]). Here, Granite is acting on behalf of the landlord, as its managing agent (*see*, Rent Stabilization Code § 2520.6 [i]). There is no question that the landlord can be adversely affected by the outcome of this proceeding, and, therefore, has an interest in it. Petitioner's concern that such intervention will unnecessarily delay resolution of the dispute is unwarranted. The merits of the petition are being considered at the same time as the motion for leave to intervene, and Granite has submitted its papers in opposition to this Article 78 proceeding. Accordingly, Granite is granted leave to intervene, and its papers will be considered.

It is well established that, in order to obtain a rent increase based upon an MCI, the landlord must carry its burden of demonstrating that it completed an MCI in accordance with the requirements of the DHCR (*see, Matter of 370 Manhattan Ave. Co., L.L.C. v New York State Div. of Hous. & Community Renewal*, 11 AD3d 370 [1st Dept 2004]). It is also undisputed that the determination of an agency cannot be annulled unless it is arbitrary and capricious, or without a basis in fact or law (*see, Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]).

Here, the Commissioner approved the rent increase based upon the submissions of the landlord, and the results of the DHCR inspection, which showed that new meters, pans and risers were installed. However, according to the Commissioner's own opinion, that alone is insufficient to warrant a rent increase. Rather, the landlord must also demonstrate that the wiring is "of sufficient capacity to accommodate the installation of air conditioner circuits and outlets as well as two double outlets in the kitchen to accommodate heavy duty appliances" (*see* PAR decision, Amended Petition, Ex. B., at 2; Rent Stabilization Code [RSC] § 2522.4 [a] [3] [22]). The record before this court, which contains the file that was before the DHCR, does not contain documentation to support a finding that the wiring installed is of sufficient capacity to accommodate the installation of air conditioner circuits, nor is there any evidence that two double outlets were installed in kitchens to accommodate heavy duty appliances. In fact, the evidence indicates that there are some apartments

that have only 20 amps of service in the apartment. This does not indicate that the apartment has the capacity for the appliances that are supposed to be able to be supported when rewiring is done and warrants an MCI increase. In view of the fact that the tenants questioned the sufficiency of the wiring both before the rent administrator and the PAR,[1] and the fact that it is the landlord's obligation to demonstrate that the improvement complies with DHCR requirements, the landlord's failure to offer evidence that such requirements were met requires this court to grant the petition and remand the matter so that the DHCR can determine whether the rewiring, in fact, met with all of the requirements set by the DHCR and the housing codes, and, therefore, whether an MCI increase is warranted.

While the DHCR is entitled to rely on its own inspectors (*Matter of 333 E. 49th Assoc. LP v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 9 NY3d 982 [2007]), there is nothing in the report of the DHCR inspector that addresses the adequacy of service to the apartments. The inspector merely reported that 42 feeders and risers, and new electrical meters and pans were installed. That, alone, is insufficient to meet the DHCR's requirements for an MCI increase, especially in view of the questions raised by the tenants concerning the quality of the work, whether it complies with DHCR requirements, as well as the reports before the DHCR which demonstrate that there are apartments with rather minimal supplies of electricity. It appears unlikely that those apartments have the 220 volt capacity called for by both the Rent Stabilization Code and DHCR precedent. The Commissioner's failure to address that issue makes it impossible for this Court to ascertain whether the DHCR considered all of the issues necessary before granting the MCI increase. Similarly, this Court cannot evaluate the import of the number of new risers and feeders (42) compared with the number of apartments in the buildings (49). For these reasons, the matter must be remanded to the commissioner for additional findings.

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[1] There is a report submitted in this proceeding, from an electrician hired by the tenant's association, that the electrical work was not in accordance with the National Electrical Code, and there were electrical violations. However, that report was not before the Rent Administrator or the PAR, and cannot, therefore, be considered by this court. Nonetheless, there were complaints before both those entities regarding the quality of the work that was performed. Thus, that issue was before the DHCR, and can be considered in this proceeding.

The Court notes that the DHCR's objection to Susan Howard bringing this proceeding on behalf of the tenant's association is without merit. Not only was there no objection to her standing before the DHCR, but the evidence before the court, and before the DHCR, demonstrates that she is the President of the tenants' association, and, thereby, has standing to bring this proceeding on the Association's behalf.

Petitioner contends that she should be awarded attorneys' fees because the DHCR refused to follow its own precedents and policies. At this juncture, it is unclear whether an MCI increase was warranted. Accordingly, it would be premature to consider the propriety of granting an award of attorneys' fees (*see* CPLR Art. 86).

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Granite International Management LLC for leave to intervene (Motion Sequence No. 002) is granted, and said party is permitted to intervene in the above-entitled proceeding as a party respondent; and it is further

ORDERED that Granite International Management LLC's answer submitted with the moving papers is deemed served on the other parties to this action; and it is further

ORDERED that the petition in the above entitled proceeding be amended by adding Granite International Management LLC thereto as a party respondent; and it is further

ORDERED that the attorney for the intervenor shall serve a copy of this order with notice of entry upon the Clerk of the Court who is directed to amend his records to reflect such change in the caption herein; and it is further

ADJUDGED that the petition is granted and the order under review is null and void in its entirety and the matter is remanded to the New York State Division of Housing and Community Renewal for reconsideration of the matter in accordance herewith.

DATED: February 1, 2010

ENTER:

UNFILED JUDGMENT
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O. PETER SHERWOOD
J.S.C.