Matter of 601 W. Realty, LLC v New York State Div. of Hous. & Community Renewal

2010 NY Slip Op 30597(U)

March 15, 2010

Supreme Court, New York County

Docket Number: 111759/2009

Judge: O. Peter Sherwood

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[* 1]
SCANNED ON 3/23/2010

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,
601 WEST REALTY, LLC,

Petitioner,

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

INDEX NO. 111759/2009

MOTION DATE Feb. 8, 2009

MOTION SEQ. NO. 001

MOTION CAL. NO. 102

The following papers, numbered 1 to 6 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
Replying Affidavits	6

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 [illegible] entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room

Dated: 3/15/10

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
601 WEST REALTY, LLC,

Petitioner,

DECISION, ORDER
AND JUDGMENT

Index No. 111759/2009

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

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent.

---------- X

UNCLED 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).

O. PETER SHERWOOD, J.:

In this CPLR Article 78 proceeding, petitioner 601 West Realty, LLC ("petitioner") seeks a judgment reversing and annulling the June 19, 2009 determination (docket number WJ-410002-RP) of respondent the New York State Division of Housing and Community Renewal ("DHCR" or "Commissioner" or "respondent") which denied petitioner's rent restoration application. Respondent seeks dismissal of the petition, and contends that it acted rationally and in accordance with the New York City Rent Stabilization Law ("RSL") and New York City Rent Stabilization Code ("RSC").

Background and Factual Allegations

In 1993, the tenants in an individual apartment unit located at 601 West 160th Street, New York, New York, filed a complaint against the former owner, alleging that multiple services were not maintained. The DHCR conducted an inspection and determined that 12 services or conditions were not maintained in the apartment unit, and the tenants then received a reduction in rent. On September 5, 2004, the petitioner, who had become the new owner, filed a rent restoration application with DHCR. After an inspection on November 8, 2004, the inspector reported back to the Rent Administrator that three out of the 12 original conditions still needed repair. These three conditions included:

- Living room floor warped at center of room (area approx. 2' x 2').
- Bathroom wall tiles have hair line cracks (approx. 7-8 tiles).
- Bathroom walls above the wall tiles over tub near entry bulging and has peeling paint, (area approx. 4"x 4"); No cracks.

(Petitioner's Exhibit "E", at 2).

Based on the inspection, on December 15, 2004, the Rent Administrator denied the petitioner's application for rent restoration. On January 19, 2005, petitioner appealed this decision with the Commissioner, who, on June 9, 2005, upheld the Rent Administrator's determination.

On August 8, 2005, petitioner filed an Article 78 petition based on the Commissioner's determination (*Matter of 601 West Realty LLC v New York State Div. of Hous. & Comm. Renewal,* Index No. 111022/05). On July 18, 2006, Justice Sheila Abdus-Salaam, formerly a Justice of this Court, found that DHCR's determination lacked a rational basis, and issued a detailed order, remanding the matter to DHCR to specifically evaluate whether the three remaining conditions were de minimis. De minimis conditions have been defined by Section 2523.4 (e) of the Rent Stabilization Code (RSC) as follows:

> (e) Certain conditions complained of as constituting a decrease in a required service may be de minimis in nature, and therefore do not rise to the level of a failure to maintain a required service for the purposes of this section. Such conditions are those that have only a minimal impact on tenants, do not affect the use and enjoyment of the premises, and may exist despite regular maintenance of services. (9 NYCRR 2523.4 [e]).

Judge Abdus-Salaam held, in pertinent part:

> The court finds that the three remaining conditions found by DHCR's inspector to exist in November 2004 may well be de minimis as contemplated by the RSC and thus may not constitute a failure to maintain a required service. It was arbitrary and capricious for respondent's Deputy Commissioner not to consider this on the basis that the de minimis concept had not been raised before the Rent Administrator. The Rent Administrator was presumably well aware of the provision of the RSC when determining whether rent should be restored, and should have applied the law when considering petitioner's application for a rent restoration. It is clear that under the

current law, de minimis conditions are not a basis for a rent reduction. (Petitioner's Exhibit "G", at 2).

The Court also indicated that, under the circumstances, it may have been appropriate to restore the rent before the conditions had even been corrected. It stated, "[r]espondent was also without rational basis to conclude that all conditions must be corrected before a rent restoration can be ordered." (*Id*).

On April 30, 2009, an inspection was conducted and it was determined that the warped condition in the living room floor was no longer there. The inspector specifically wrote that, at the time of the inspection, the living room floor appeared normal. Respondent claims that the condition was repaired by the tenant; however, the petitioner disputes this fact. Regardless, it is undisputed by both parties that the warped condition no longer existed as of the inspection on April 30, 2009.

On June 19, 2009, as a result of the remand, DHCR issued an order upholding the June 9, 2005 order denying the rent restoration. The Commissioner reviewed the 2004 inspection and concluded that the paint peeling condition of the bathroom walls and the hairline cracks in the bathroom tiles were de minimis. However, the Commissioner felt that the warped living room floor as of 2004 was not a de minimis condition. Even though the Commissioner stated in her determination that she had reviewed the 2009 inspection, she did not rely on this inspection to make her decision, but only relied on the 2004 inspection.

On August 18, 2009, petitioner filed this CPLR Article 78 petition, which was amended on October 5, 2009, challenging the respondent's June 19, 2009 determination which upheld the denial of a rent restoration.

DISCUSSION

In the context of an Article 78 proceeding, courts have held that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious" (*Matter of Soho Alliance v New York State Liquor Authority*, 32 AD3d 363, 363 [1st Dept 2006], *citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 [1974]; *see* CPLR 7803 [3]). "The arbitrary and capricious standard asks whether the determination in question had a rational basis [internal quotation marks

and citations omitted]" (*Matter of Mankarios v New York City Taxi and Limousine Commission*, 49 AD3d 316, 317 [1st Dept 2008]).

In the Court's order dated July 18, 2006, Justice Abdus-Salaam remanded the matter to DHCR to see if the three outstanding conditions fell within the de minimis standard. On remand, the Commissioner determined that the two bathroom conditions were de minimis. An inspection was done on April 30, 2009, and the inspector specifically indicated that the living room floor appeared normal at the time of the inspection. At that point, there should have been nothing to prevent a legitimate rent restoration. Given that information, on June 19, 2009, the Commissioner still denied petitioner's application for rent restoration. The Commissioner conceded that she had read the April 30, 2009 inspection, yet based her decision on the inspection performed in 2004.

Although the date of the repair is not on record, it is undisputed that, as of April 30, 2009, the warped condition in the living room was no longer there. For this reason, the Court need not consider whether the warped condition is de minimis and will not determine whether it would defer to the respondent's expertise on that question (*see Matter of Tockwotten Associates, LLC v New York State Div. of Housing and Community Renewal*, 7 AD3d 453, 454 [1st Dept 2004] [generally "an agency's determination, acting pursuant to legal authority and within its area of expertise, is entitled to deference"]).

The court is aware that respondent was reviewing the original record from 2004. However, given the circumstances, the court is not "bound by an agency determination that is irrational or unreasonable" (*Matter of 721 Ninth Avenue, LLC v New York State Division of Housing and Community Renewal*, 8 AD3d 41, 45 [1st Dept 2004]). The Commissioner stated in her determination that she had reviewed the "entire evidence of record" (Petitioner's Exhibit "A", at 1). Given that information, it was arbitrary and capricious for respondent to not adhere to its own record or the RSC statutes. The DHCR determination on June 19, 2009 was arbitrary and capricious and without a rational basis, given the record and the instructions from Justice Abdus-Salaam. It was arbitrary and a waste of administrative resources not to consider the April 2009 inspection. Accordingly, the respondent's determination is annulled. Petitioner will be granted a rent restoration retroactive to April 30, 2009.

The court is aware of petitioner's new application for rent restoration filed with respondent after the April 30, 2009 inspection. This application is currently pending. Given the Court's decision and the record before it, respondent should be able to render a decision expeditiously.

Accordingly, it is hereby

ADJUDGED that the petition is granted and the respondent's determination, dated June 19, 2009, is annulled only to the extent that the petitioner is found to be entitled to rent restoration as of April 30, 2009, as well as costs and disbursements in the sum of $ _____ as taxed by the Clerk of the Court, and petitioner shall have execution therefor.

This constitutes the decision, order and judgment of the Court.

DATED: March 15, 2010

ENTER:

O. P. Sherwood

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).