Matter of Heritage Place LLC v New York State Div. of Hous. & Community Renewal
2010 NY Slip Op 31191(U)
May 3, 2010
Supreme Court, Nassau County
Docket Number: 15186/09
Judge: Karen V. Murphy

Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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In the matter of the Application of
HERITAGE PLACE LLC,

Petitioner(s),

Index No. 15186/09

Motion Submitted: 3/9/10
Motion Sequence: 001

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(s).

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The following papers read on this motion:

Notice of Motion/Order to Show Cause.....X
Answering Papers.....X
Reply.....
Briefs: Plaintiff's/Petitioner's.....X
Defendant's/Respondent's.....X

Petitioner moves this Court for an order pursuant to CPLR Article 78 modifying the Order and Opinion of the New York State Division of Housing and Community Renewal dated May 22, 2009, bearing Docket No. WE710068RO to approve the amount submitted for a rent increase based on a Major Capital Improvement (MCI). Respondent opposes the requested relief.

Petitioner is the owner/landlord of 451 Fulton Avenue, Hempstead, NY (the subject premises). The premises is subject to the Emergency Tenant Protection Act (ETPA). Respondent New York State Division of Housing and Community Renewal (DHCR) is vested with the authority to implement ETPA.

The Emergency Tenant Protection Act of 1974 (ETPA), 65 McK. Unconsol. Laws, §§ 8621 through 8634, and its implementing regulations, the Tenant Protection Regulations (TPR), 9 NYCRR §§ 2500.1 through 2511.9, provide a comprehensive system of regulation, which governs the rent that landlords may charge for rent stabilized housing accommodations located in Nassau, Rockland and Westchester counties, and the rent increases they may lawfully obtain. Under this regulatory system a landlord may not charge in excess of the legal regulated rent plus applicable guidelines increases tied to the execution of vacancy and renewal leases [ETPA § 8626(a) & (b)] except upon certain specific limited grounds, which include the installation of building-wide Major Capital Improvements. (***ETPA § 8626(d) (3); TPR § 2502.4(a)[1]***).

On October 14, 2005, petitioner filed an application for a rent increase based on Major Capital Improvement (MCI) at the subject premises. Petitioner requested a rent increase for pointing and water proofing; elevator upgrading; paving of the parking lot and the installation of a new front door. The Rent Administration (RA) issued an order dated April 24, 2008 denying a rent increase based on the MCI for the pointing and waterproofing. Petitioner submitted bills claiming the pointing and waterproofing cost $435,000. On May 28, 2008, the owner/landlord filed a Petition for Administrative Review (PAR) of the RA's order. DHCR's order affirmed the order of the RA as to the pointing and waterproofing; and modified it in part, by increasing the amount approved for the elevator upgrade from $183,000 to $195,000 due to an earlier miscalculation. The sole issue now before the court is whether the DHCR's affirmance of the RA's finding that the waterproofing and pointing was not a Major Capital Improvement (MCI) so as not to qualify for an MCI rent increase was irrational, unreasonable or arbitrary. Had the petitioner established to the satisfaction of the respondent DHCR that the pointing and waterproofing was a valid MCI, the owner would be able to pass the cost on to its tenants. Permanent MCI rent increases serve to encourage the owners of regulated housing accommodations to make voluntary capital investments in their buildings, thereby upgrading and improving the rental housing stock. At the outset, respondent indicates that pursuant to the schedule of qualifying Major Capital Improvements set forth under Section 2502.4(a)(2)(vi) of the Emergency Tenant Protection Regulations, work characterized as "pointing and waterproofing as necessary on exposed sides of the building" may qualify as a capital improvement for which a building-wide rent increase is warranted.

In rejecting the petitioner's appeal, the DHCR agreed with the RA's finding that based on the contractor's proposal and affidavit, the cost of pointing and waterproofing should be

disallowed in its entirety as nothing more than normal routine maintenance. Respondent's both proposals from L&B Construction, dated February 19, 2003 and April 7, 2003, mention spot pointing, except at the top of the parapet wall, where 100% pointing was performed. DHCR asserts its long standing position that spot pointing is considered mere repair and does not constitute an MCI.

On or about September 21, 2003, petitioner submitted an Owner's Request for Prior Opinion on Major Capital Improvement. In support of the within motion, the petitioner submitted a copy of a "Prior Opinion on Major Capital Improvement (MCI)" dated June 24, 2005 signed by Eduviges J. Rasquin, District Rent Administrator stating that in response to your request for a Prior Opinion for a Major Capital Improvement, DHCR has determined as follows: "1. Pointing, waterproofing, parapet wall repairs, lintel replacement and replacement of bricks" constitutes an MCI at the subject premises.

In an Article 78 proceeding, such as the one presently before this Court, the only questions that may be raised are whether or not a 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 or discipline imposed. (***CPLR § 7803[3]***).

DHCR's argument that the Prior Opinion Order was not binding since it was issued after the work had been completed and the owner did not rely on the prior opinion ignores the fact that petitioner could have completed the work without a prior order and then applied for the MCI. The question herein is an analysis of the respondent's actions not the petitioner's.

Nor does the court give weight to respondent's argument that the tenants did not get notice of the filing of the prior opinion application before commencing work. "If an owner files an application for prior opinion, tenants will be permitted to challenge the proposed cost and propriety of the planned installation. If a Prior Opinion Order is issued, it will be subject to administrative review by any aggrieved party." (Supplement 1 to Operational Bulletin 84-4 (MCI) January 30, 1986, Exhibit C, Petitioner's Reply Memorandum of Law). The record demonstrates that the tenants were given notice of the application for an MCI rent increase and a handful submitted comments.

Rather than explain in detail and with specificity how the Prior Opinion Order from the same agency with the signature of a District Rent Administrator is defective, respondent concludes that the mention of spot pointing, except at the top of the parapet wall where 100% pointing was performed, supports the conclusion that the pointing and waterproofing was nothing more than normal routine maintenance. The Prior Opinion Request is dated August

19, 2003. The Prior Opinion Order has a date of June 24, 2005. Almost two years expired from the date of the initial request and the issuance of the Prior Opinion Order by the District Rent Administrator that the pointing, waterproofing, parapet wall repairs, lintel replacement and replacement of bricks constituted a Major Capital Improvement on the subject premises. The fact that petitioner started the work before receiving notification of the Prior Opinion Order does not diminish its significance.

Respondent also argues that the supporting evidence does not indicate that an inspection of the entire exterior of the building was done to determine exactly where the pointing would be needed. "While it is fully appreciated that the April 7, 2003 specification by L&B lists work described as 'repair all cracked spalling bricks on parapet walls and facade;' 'repair bulkhead cracks, chimney stack and coping stone', and 'replace broken cracked bricks as required around the building and repair all vertical cracks,' this work cannot reasonably be considered as equivalent to the actual testing of mortar building-wide." In denying the application, respondent asserts the petitioner's supporting evidence does not indicate that an inspection involving the physical testing of the "mortar building-wide" was undertaken by the contractor. There is no indication how such an inspection should be conducted, the guidelines for conducting the inspection and the process of verifying the inspection. Moreover, respondent's characterization of the work in questions as "repair" and "spot pointing" does not rebut petitioner's documentary evidence that District Rent Administrator, Eduviges J. Rasquin approved the work as an MCI.

Respondent does not refute petitioner's documentation that petitioner paid over $400,000 for the work. The purpose of a Prior Opinion is to permit the owner to know with certainty before making any significant financial commitment or expenditure whether the proposed work qualifies for a rent increase as an MCI or substantial rehabilitation. Moreover, it is illogical at best to have a procedure in place for an applicant to apply in good faith for a Prior Consent Order only to have it completely ignored. This Court notes that the attorneys for respondent have failed to address the issue of the Prior Consent Order in their opposing papers. Respondent should have come forward with specific reasons based on a diligent evaluation as to why the Prior Opinion Order should be ignored. Due process requires certainty and predictability in the administrative process. Ignoring an order of the same agency is neither rational nor reasonable.

The petitioner has supported its application with sufficient documentary evidence. (See ***Brotherton v. State Div. of Hous. & Community Renewal***, 193 A.D.2d 500, 597 N.Y.S.2d 377 (1st Dept., 1993); ***Weinreb Management v. DHCR***, 204 A.D.2d 127, 611 N.Y.S.2d 545 (1st Dept., 1994; ***Henschke v. Division of Hous. & Community Renewal***, 249 A.D.2d 204, 671 N.Y.S.2d 740 (1st Dept., 1998); ***Matter of West Vil. Assoc. v. Division of Hous. & Community Renewal***, 277 A.D.2d 111, 717 N.Y.S.2d 31 [1st Dept., 2000]).

It is the judgment of this Court that the determination of the New York State Division of Housing and Community Renewal that the application for pointing and waterproofing did not constitute a Major Capital Improvement and was not supported by a rational basis in the record. The determination was arbitrary and unreasonable. (See ***Matter of Ansonia Residents Assn. v. New York State Div. of Hous. & Community Renewal***, 75 N.Y.2d 206, 551 N.E.2d 72, 551 N.Y.S.2d 871 (1989); ***Matter of Executive Towers at Lido v. New York State Div. of Hous. and Community Renewal***, 236 A.D.2d 397, 653 N.Y.S.2d 630 (2d Dept., 1997); **Matter of *Prospect Assoc. v. New York State Div. of Hous. & Community Renewal***, 206 A.D.2d 374, 614 N.Y.S.2d 49 (2d Dept., 1994); **Matter of *Wesley Ave. Assoc. v. New York State Div. of Hous. & Community Renewal***, 206 A.D.2d 378, 614 N.Y.S.2d 58 (2d Dept., 1994); ***Matter of 126 Franklin Ave. Assoc. v. New York State Div. of Hous. & Community Renewal***, 203 A.D.2d 464, 610 N.Y.S.2d 316 [2d Dept., 1994]).

Petitioner's motion is granted. The DHCR is directed to issue an amended order granting the petitioner an MCI rent increase based on the determination that the pointing and waterproofing was an MCI.

The foregoing constitutes the Order of this Court.

Dated: May 3, 2010
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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ENTERED
MAY 06 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE