Matter of 338 W. 46th St. Realty, LLC v State of N.Y. State Div. of Hous. & Community Renewal

2010 NY Slip Op 31394(U)

May 28, 2010

Sup Ct, NY County

Docket Number: 106941/09

Judge: Emily Jane Goodman

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SCANNED ON 6/8/2010

[* 1]

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

PRESENT: EMILY JANE GOODMAN PART 17

Justice

Index Number : 106941/2009

338 WEST 46TH ST. RLTY,

vs.

STATE OF NEW YORK D.H.C.R.

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	PAPERS NUMBERED
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Petition is decided per attached

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).

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

Dated: 5/29/10

EMILY JANE GOODMAN

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ~~DO NOT POST~~ ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

In the Matter of the Application of
338 WEST 46th STREET REALTY, LLC,

Petitioner,

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

-against-

Index No.: 106941/09

THE STATE OF NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL, LESLIE TORRES, DEPUTY COMMISSIONER FOR RENT ADMINISTRATION,

Respondents,

----------X

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).

EMILY JANE GOODMAN, J.S.C.:

Petitioner, 338 West 46th Street Realty (the Landlord), a landlord, moves, pursuant to CPLR Article 78, to annul, reverse and set aside the March 27, 2009 administrative order (the Order) of Deputy Commissioner Leslie Torres of respondent the New York State Division of Housing and Community Renewal (DHCR) and for attorney's fees. Petitioner contends that the Order is arbitrary and capricious because it did not take into account valid and reasonable arguments which were set forth in the petition for administrative review (PAR) filed by the petitioner. In a separate motion, sequence number 002, five tenants (the Tenants), who live in the Landlord's building, and are the plaintiffs in a lawsuit against the Landlord for rent overcharges in the New York City Civil Court, seek leave to intervene and for attorney's fees.

In June 2008, the Landlord filed a request with DHCR for an order determining the legal rent for five apartments in which the Tenants resided in the Landlord's building. By order dated

December 12, 2008, the Landlord's application was denied by a DHCR rent administrator, based on a finding that the legal regulated rents for the apartments at issue would be determined in the Civil Court case. Thus, the rent administrator did not determine the legal regulated rents for the Tenants' apartments. The Landlord's PAR was denied by the Order, which is the subject of this proceeding.

In the petition, the Landlord states, and it is undisputed, that, in late 2005, it brought an action against the Tenants, in the Housing Part of the New York City Civil Court, New York County (hereafter, Housing Court), seeking to evict them, on the ground that their apartments were not rent-stabilized because the building, years before, had been substantially rehabilitated, such that it was no longer subject to rent-stabilization law. The Landlord also contends that parallel to the 2005 housing court case, under DHCR docket number VA410010R0, it was engaged in a DHCR proceeding concerning the same issue, of whether or not the building was no longer subject to rent-stabilization law due to substantial rehabilitation.

The Landlord notes that, before it purchased the building in 2005, and prior to its commencement of the 2005 housing court case, one of the Tenants, Ute Schmid, had, on June 16, 2005, filed a complaint with DHCR alleging that a prior owner had refused to offer to her a rent-stabilized lease (DHCR docket number TF-410030-RV). On or about March 30, 2006, the DHCR closed Schmid's DHCR proceeding, stating that the owner should offer to Schmidt a rent stabilized vacancy lease and rider if the building were found not to have been substantially rehabilitated. Also on January 19, 2006, the Landlord filed an application to have the building declared exempt for rent stabilization, based on substantial rehabilitation.

By decision dated June 13, 2006, in the Housing Court case, Laurie Lau, JHC, finding that DHCR had taken the lead in determining the regulatory status of the building, opined that

there was no reason for the court to act where the DHCR is "the entity responsible for determining the rent stabilization *status* of an apartment or a building and were it already has had submitted to it information it needs to determine that *status*." (emphasis added). The Judge also marked the cases off the court's calendar, granted the Landlord's motion for use and occupancy payments, and stated that either the Landlord or the Tenants could restore the pending motions.

Pursuant to a December 14, 2006 order and a October 2, 2007 decision on a PAR, DHCR found that the subject premises had not been substantially rehabilitated, and thus were subject to the rent-stabilization law. The DHCR did not determine the legal regulated rent(s) or any tenant rent overcharge issues, however, and the Landlord did not bring an CPLR article 78 petition challenging DHCR's determination as inadequate.

Thereafter, in April 2008, the Housing Court dismissed the holdover proceeding brought by the Landlord against the Tenants in 2005, severed the Tenant's counterclaims (asserted in 2006) against the Landlord, and transferred the Tenant's claims to a general, New York City Civil Court part, that is, to a non-housing part (hereinafter, the Civil Court). At that point the Tenant's claims were assigned new, 2008, index numbers.

The Landlord maintains that it registered the apartments and building, retroactively to 2001, and offered rent-stabilized renewal leases to the Tenants, which they refused to sign. The Landlord also states that on March 21, 2008, it attempted a DHCR mediation, but that the Tenants refused to participate. In June 2008, the Landlord filed an application at DHCR for a determination of the legal rent of each of the five apartments. As discussed above, DHCR's rent administrator denied the application, and did not determine the legal rents for the apartments, and in the Order at issue here, DHCR denied the PAR, thereby upholding the DHCR rent administrator's determination.

The Landlord argues that the PAR should have been granted, and that DHCR should have determined the legal regulated rents for the Tenants' apartments, because, as previously discussed, Schmid filed a case at DHCR, in June 2005, months before any case was commenced in the Housing Court, and three years before the Tenants' cases were transferred from the Housing Court to the Civil Court in 2008. The Landlord also argues that DHCR's reasoning, that the Housing Court and Civil Court cases are the same, and thus have been pending since 2005, means that Judge Lau's June 13, 2006 decision is still in effect. The Landlord maintains that the June 13, 2006 decision requires DHCR to make a determination as to what the rent should be, and that DHCR made a finding that the subject premises are rent-stabilized, but then did not finish the job by addressing the rent amount.

Petitioner further argues that if the Housing Court and the Civil Court cases are deemed separate cases, that there is no prejudice to the Tenants in having DHCR determine the rents because the Civil Court would not be able to award damages going back to 2002, but only to 2004. Petitioner claims that it is prejudiced by the delay created by the Tenants in refusing to mediate the matter before the DHCR, and taking the longer court litigation route.

Petitioner also maintains that DHCR should determine the legal regulated rents because a mediation attempt took place on March 21, 2008, before the Tenants' rent overcharge claim was restored to the calendar and transferred to the Civil Court, in April 2008, and that, with regard to issue of the mediation of the amount of rent, DHCR was thus involved with the issue before the Civil Court, and at a time when there was no pre-existing claim of rent overcharge before either court. Petitioner further maintains that DHCR had primary or at least contingent jurisdiction, is competent to make a determination of the legal regulated rents, and that its failure to do so substantially prejudices the Landlord, as the rents have been frozen since 2005.

The Landlord further contends that the Order is arbitrary and capricious because it is facially incorrect in stating, among other things, that the Housing Court holdover cases were terminated, when in fact, they were withdrawn, and that the mediation attempt by the owner took place in April 2008, when it occurred on March 21, 2008. The Landlord also contends that the Order is facially incorrect in that the initial proceeding filed by any party was filed by Schmid in 2005, and not by the Landlord, and because the pending cases are before the Civil Court, and not the Housing Court, as the 2005 Housing Court case were previously terminated.

Discussion

On a CPLR article 78 petition, the role of the court is to consider 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 ..." (CPLR 7803 [3]). On judicial review of an agency action under CPLR Article 78, the courts must uphold the agency's exercise of discretion unless it has no rational basis or the action is arbitrary and capricious (*Matter of Pell v Board of Educ. Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*id.* at 231). Where the agency's interpretation is founded on a rational basis, its interpretation should be affirmed, regardless of whether the court's conclusion might have been different (*see Matter of Mid-State Mgt. Corp. v New York City Conciliation & Appeals Bd.*, 112 AD2d 72 [1st Dept], *affd* 66 NY2d 1032 [1985]).

In the Order denying the Landlord's PAR, Deputy Commissioner Leslie Torres (the DC) found that the Housing Court proceeding was commenced by the Landlord prior to the *Landlord's* filing of the request for administrative determination with the DHCR, and that the

June 13, 2006 Housing Court decision did not explicitly state that the DHCR should adjudicate the Tenants' rent overcharge claims, but evidenced the Housing Court judge's intention to keep those claims within that court's purview. The DC also stated that the mediation proceeding was commenced after the Tenants brought their overcharge complaints as counterclaims in response to the Landlord's eviction proceeding in the Housing Court, and that mediation is not an overcharge complaint. The DC also found that Schmid's DHCR complaint (DHCR docket number TF410030RV), had been terminated, and that the Schmid complaint is similar to those of the four other tenants, such that the Civil Court was not prevented from hearing that rent claim.

As additional reasons for the PAR denial, the DC opined that the Tenants were entitled to argue before the Civil Court concerning the timing of the calculation of overcharges to commence with the 2006 interposition of their counterclaims. The DC also noted that a request for administrative determination is filed by an applicant with the intent of granting the applicant relief, and that "[a] determination of a rent overcharge, including the possibility of the imposition of treble damages, is not suited for that type of proceeding" (Verified Answer, Exh. A, at 4), referring to the Landlord's June 2008 request with DHCR for an order determining the legal regulated rent of the apartments at issue.

There is no dispute that Schmid filed a complaint with DHCR prior to the Landlord's commencement of the housing court action. The June 13, 2006 Housing Court decision notes that Schmid was seeking a rent-stabilized lease, and that the DHCR closed Schmid's complaint of a lease violation, Docket No. TF-410030-RV, without finding, due to the Landlord's proceeding at DHCR to determine the substantial rehabilitation issue. The court also noted that the DHCR stated that if it were determined that the building was subject to rent stabilization, that

the Landlord should offer Schmid a rent stabilized lease. While such language in the Housing Court decision may be read to indicate that DHCR was permitted to adjudicate other issues, such as the legal regulated rent issue, and certainly DHCR has the necessary expertise, Judge Lau did not explicitly state that DHCR should adjudicate the Tenants' rent overcharge claims and the decision explicitly states that either the Landlord or the Tenants were permitted to restore the case to the court's calendar by motion. Had DHCR determined the Tenant's counterclaims, the same matter issue could not have been re-litigated in the Housing Court. Consequently, DHCR's determination about Judge Lau's decision is not irrational, arbitrary or capricious.

The DHCR's contention that the mediation attempt was not an overcharge complaint and that the Tenants' counterclaims were interposed well before the Landlord attempted to bring the Tenants to mediation, is also not irrational or arbitrary and capricious. The Landlord provides no support to demonstrate its contention that the counterclaims were not interposed with the Tenants' answer in the Housing Court in 2006, or that the Tenants' claims were only commenced upon restoration to the Civil Court's calendar in 2008, after being transferred from the Housing Court to the Civil Court. The Tenant's Civil Court cases were commenced in 2006.

While the Landlord claims that it is prejudiced because of the length of time involved in the litigation process, it does not demonstrate that this matter would be resolved more quickly at DHCR than at the Civil Court, or that this is a basis for determining that the DHCR decision is arbitrary and capricious. Nor did the Landlord appeal the decision of the Housing Court which deferred to DHCR the issue of determining whether the apartments were subject to rent stabilization. In addition, the Landlord may address, at the Civil Court, any concerns it has with what it claims has been the Tenants' failure to pursue the Civil Court action.

To the extent that the Landlord is correct that the DC's determination is facially incorrect, the Landlord does not point to any mistake on the part of DHCR that would change the outcome here. An agency determination is not arbitrary or capricious where it has facial mistakes that do not affect the merits of the dispute. Further, when DHCR did not adjudicate Schmid's application as part of DHCR docket number VA410010R0, the Landlord did not bring a CPLR article 78 proceeding challenging the DHCR's failure to do so. Moreover, *Matter of Rego Estates v DHCR* (20 AD3d 539 [1st Dept 2005]), does not support the Landlord's position. In that case, DHCR actually established the legal regulated rent, but then improperly dismissed, as academic, the owner's request for a determination of legal regulated rent for the period four years prior to the commencement date of that proceeding. Here, DHCR has declined to established the legal regulated rent, and therefore, the regulation at issue in *Matter of Rego Estates* does not apply. Moreover, unlike *Matter of Rego Estates*, DHCR has deferred to a pending Civil Court case, based on the rational conclusion the Civil Court has the issue pending before it.

As the court has determined that the DHCR determination was not arbitrary and capricious, the petition must be dismissed. Therefore, the court need not address petitioner's application for attorney's fees.

Furthermore, regarding the Tenants' motion for leave to intervene, courts "may allow other interested persons to intervene" in special proceedings (CPLR 7802 [d]), and the motion is

granted, essentially without opposition.[1] As the petition has been dismissed, the Landlord's contention that part of the Tenants' answer should be stricken is academic. If the Tenants have any basis for attorney's fees, they do not so state in their motion, and their request for such fees is denied.

In light of the determinations above, the petition must be dismissed in its entirety, and it is hereby

ORDERED that the motion of George Morton, Robyn Davis, Edward Eisele, Robert Leonardi and Ute Schmid a/ka Ute Keyes for leave to intervene as respondents and to serve an answer is granted; and it is further

ORDERED and ADJUDGED that the petition is denied and the proceeding dismissed.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: May 28, 2010

ENTER:

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)

[1]The Landlord seeks an order precluding the Tenants from seeking legal fees for this motion claiming that it offered to stipulate to the Tenants' intervention in exchange for their agreement not to seek legal fees in the event that the main petition was dismissed, or in the event of appeal. The Landlord's argument is not persuasive.