

<b>Matter of Robinson v New York State Div. of Hous. &amp; Community Renewal</b>
2010 NY Slip Op 32320(U)
August 26, 2010
Supreme Court, New York County
Docket Number: 101475/10
Judge: O. Peter Sherwood
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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  
CHARLES ROBINSON

Petitioner,

-against-

NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL and  
SAVOY PARK OWNER LLC,

Respondents.

INDEX NO. 101475/10  
MOTION DATE June 2, 2010  
MOTION SEQ. NO. 001  
MOTION CAL. NO. 21

The following papers, numbered 1 to 7 were read on this petition pursuant to CPLR Article 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED	
1-3	
4-6	
7	

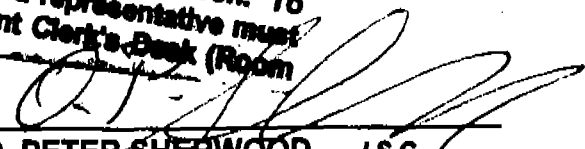
MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Cross-Motion:  Yes  No

Upon the foregoing papers, the CPLR Article 78 petition is decided in accordance with 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 hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 8/26/10

  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

-----X

In the Matter of the Application of

CHARLES ROBINSON,

Petitioner,

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

-against-

NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL and  
SAVOY PARK OWNER LLC,

Respondents.

-----X

O. PETER SHERWOOD, J.:

In this CPLR Article 78 proceeding (motion sequence number 001), petitioner Charles Robinson ("petitioner") seeks judicial review of an order by respondent New York State Division of Housing and Community Renewal ("DHCR"), dated December 11, 2009 (the "DHCR Order").

DHCR moves for an order striking exhibit "A" of petitioner's reply affirmation and permitting DHCR to submit a sur-reply affirmation (motion sequence number 003). Delano Village Tenants Association and Valerie Orridge, President of the Delano Village Tenants Association, cross-move to intervene in this proceeding as party petitioners.

Motion sequence numbers 001 and 003 are consolidated for purposes of disposition.

*Background*

Petitioner resides at 2300 Fifth Avenue, Apartment 7F, New York, New York, which is one of seven buildings that comprise a complex known as Savoy Park a/k/a Delano Village (the "Complex"). The other buildings that are part of the Complex are located at 620 and 630 Lenox Avenue, 30 West 142nd Street, 30 West 141st Street, 15 and 45 West 139th Street. The Complex

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contains a total of 1,800 residential units, the majority of which are rent stabilized. A co-respondent, Savoy Park Owner LLC (the "Owner"), is the owner of the Complex.

Petitioner claims that he is an authorized representative of Delano Village Tenants Association (the "Tenants Association"), an unincorporated, voluntary association of the tenants residing in the Complex.

Prior to 2007, each building in the Complex had a master electricity meter, and the Owner paid the utility bill. The rents collected from the tenants of the Complex included charges for electricity.

In February 2007, the Owner applied to the New York State Public Service Commission ("PSC") for permission to submeter electricity to tenants of the Complex (the "PSC Application"). Under the proposed arrangement, each apartment would have its own electric meter, and each tenant would pay his or her own utility bill to the Owner. In March 2007, the PSC published a notice in the New York State Register, setting a 45-day public comment period (the "Comment Period") on the Owner's application (*see* Amended Petition, exhibit "B").

The tenants of the Complex allegedly received a letter from the Owner about prospective submetering on or about July 19, 2007 (*see* Amended Petition, ¶¶ 20-21; exhibit "D"). On August 2, 2007, the Owner held a public meeting for the tenants on the same topic, but allegedly failed to advise the tenants that it already had a pending application with the PSC (*see* Amended Petition, ¶ 26).

On October 3, 2007, the New York State Department of Public Service, Office of Consumer Services ("OCS") issued a statement recommending that PSC adopt, as proposed, the Owner's submetering plans. On October 25, 2007, PSC approved the Owner's proposal as per OCS's recommendation, and without any modifications ("PSC Decision") (*see* Return, A-1).

In December 2008, the Owner filed seven applications, one per each building, with DHCR ("DHCR Applications"). The Owner sought permission to discontinue including electricity charges in rent payments and, instead, to bill the tenants directly for electricity usage, following the

installation of individual meters (*see* Return, A-1). The tenants of the Complex filed their oppositions (Amended Petition, exhibit “F”). In May 2009, DHCR’s Rent Administrator (“RA”) granted the Owner’s DHCR Applications (“RA’s Orders”) (*see e.g. id.*, exhibit “G”).

Five tenants, including petitioner, claiming to represent the other tenants, filed seven petitions for administrative review (“PAR”s) (*see* Return, B-1, D-1, F-1, H-1, J-1, L-1, N-1). DHCR consolidated the PARs for disposition, and, by way of the DHCR Order, denied the PARs (*see id.*, B-6). Petitioner now seeks a judicial review of the DHCR Order.

By order, entered on March 23, 2010, this court previously granted the Owner’s motion for leave to intervene in this proceeding and ordered that the Owner be added as a respondent (motion sequence number 002).

#### *Discussion*

“[T]he judicial review of an administrative determination is limited to whether such determination was arbitrary or capricious or without a rational basis in the administrative record” (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 [1st Dept 2007], *aff’d* 11 NY3d 859 [2008]; *see also Matter of DiPalma v Suardy*, 207 AD2d 397, 398 [2d Dept 1994] [under CPLR Article 78, “the scope of judicial review is limited to questions of law and to a determination as to whether the record reveals a rational basis for the agency’s action”]).

The apartments in the Building are governed by the Rent Stabilization Law (“RSL”) of 1969 (Administrative Code of City of NY § 26-501, *et seq.*) and the Rent Stabilization Code (“RSC”) (9 NYCRR 2520.1, *et seq.*). RSL regulates the maximum amount of rent a landlord may charge, known as the legal regulated rent (*see e.g. Aijaz v Hillside Place, LLC*, 37 AD3d 501, 501 [2d Dept 2007]).

RSC provides that

[a]n owner may file an application [to DHCR] to decrease required services for a reduction of the legal regulated rent ... on the grounds that ...(3) such decrease results from an approved conversion from master metering of electricity, with the cost of electricity included in

the rent, to individual metering of electricity, with the tenant paying separately for electricity ...

(9 NYCRR 2522.4 [d] [3]). Individual metering can be either in the form of direct metering or submetering (*id.*). Submetering is an arrangement where “the tenant purchas[es] electricity from the owner ... who[, in turn,] purchases electricity from a utility at the bulk rate ...” (*id.*, § 2522.4 [d] [3] [ii]).

Operational Bulletin 2003-1 (“OB”) in a Schedule of Rent Reductions sets actual amounts of reduction in the legal regulated rent as a result of switching to individual metering (*see id.*, § 2522.4 [d] [3], § 2527.11 [b]; *see also* 05/07/10 Ossi Aff., exhibit “B”, OB; exhibit “C”, Update Number 1 to OB).

#### The PSC Order

Petitioner argues that the PSC Order was improper because the Owner failed to give the tenants proper notice of its PSC Application (*see* 16 NYCRR 96.2 [b] [5]).

As DHCR correctly counters, petitioner did not raise this contention in the administrative proceedings before DHCR and may not do so for the first time in this proceeding (*see e.g. Matter of Rozmae Realty v State Div. of Hous. & Community Renewal, Of. of Rent Admin.*, 160 AD2d 343, 343 [1st Dept 1990]; *see also Matter of Kahn v Planning Bd. of City of Buffalo*, 60 AD3d 1451, 1451-1452 [4th Dept 2009]; Return A-3, B-1, B-5 [petitioner did not raise the issue of improper notice before the RA or in his PAR]).

Additionally, this proceeding is limited to the review of the determination by DHCR. DHCR was not the administrative agency that issued the PSC Order, and PSC is not a named respondent in this proceeding. Accordingly, judicial review of the PSC Order is unwarranted.

The court notes that OCS and PSC specifically addressed the issue of notice and found it to be adequate (*see* Return, A-1, the PSC Order). Petitioner claims, among other things, that the Owner was supposed to give notice to the tenants of its PSC Application before the end of the Comment Period. Petitioner, however, does not point to a statute or case law that requires such (*see* 16 NYCRR

96.2 [b] [5] [the statute does not specify that an owner's notice to the tenants must be given during a public comment period]). Petitioner appears to confuse notice of a submetering proposal that PSC itself gives by way of publication in the New York State Register, governed by the State Administrative Procedure Act § 202 (1) (a), with notice that an owner gives to its tenants, which is governed by the regulations on residential submetering of the Department of Public Service (*see* 16 NYCRR 96.2 [b] [5]). OCS and PSC found that both notices were adequate (*see* Return, A-1, the PSC Order).

#### Petitioner's Other Arguments

Petitioner next contends that DHCR's rent-reduction formula, used in DHCR's Operational Bulletin 2003-1, is based on unreliable data and flawed methodology (*see* Amended Petition, ¶¶ 50-70; *see also* 05/07/10 Ossi Aff., exhibits "B", "C", OB and Update to OB). However, as DHCR argues, the validity of the DHCR's methodology at issue has previously been litigated and upheld (*see Matter of Car Barn Flats Residents Assn. v New York State Div. of Hous. & Community Renewal*, 27 AD3d 240, 241 [1st Dept 2006]; *see also Matter of Fernandez v New York State Div. of Hous. & Community Renewal*, 2009 NY Slip Op 31301[U] [Sup Ct, NY County 2009] [Kornreich, J.]). Additionally, petitioner did not make this argument before DHCR and, hence, cannot assert it for the first time in this proceeding (*Rozmae Realty*, 160 AD2d at 343).

Petitioner further argues that the Owner, as part of its application to DHCR, failed to provide a required affidavit from an installer of the submeters (*see* Amended Petition, exhibit "E", DHCR Application, at 2, Part C, § 2). Petitioner claims that an affidavit from Herbert E. Hirschfeld, P.E. is insufficient since he is not an installer of submeters. This, however, is a factual issue, and the court may not substitute its judgment of the facts for that of DHCR if there is substantial evidence that supports DHCR's conclusion (*see e.g. Matter of 330 Rest. Corp. v State Liq. Auth.*, 26 NY2d 375, 378 [1970]; *see also Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]). Here, such evidence exists (*see* Return, B-6, DHCR Order, at 3).

Petitioner also maintains that the Owner failed to implement an energy conservation plan and made false representations to the tenants about potential financial incentives from New York State Energy Research and Development Authority, thereby undermining the purpose of submetering. DHCR in its Order addressed this contention, essentially stating that the conversion to individual metering is an energy conservation measure in itself, and that the Owner need not show the existence of any other measures (*see* DHCR Order, at 3). RSC provides that DHCR may grant an application for reduction of the legal regulated rent based only on conversion from master metering to individual metering (*see* 9 NYCRR 2522.4 [d] [3] [ii]). Accordingly, DHCR's conclusion is not arbitrary or capricious.

#### DHCR's Motion to Strike

DHCR's motion to strike exhibit "A" to petitioner's reply is granted. Petitioner provides a purported authorization from his fellow tenants to represent them before DHCR. Petitioner does not deny that this authorization was obtained after the conclusion of the administrative proceedings before DHCR. This evidence was not before DHCR, and the court, therefore, may not consider it now for the first time (*see Rozmae Realty*, 160 AD2d at 343).

#### Petitioner's Capacity and Cross Motion

The parties argue whether petitioner is proceeding in an individual capacity or as an authorized representative of the Tenants Association. Additionally, the Tenants Association and its President, Valerie Orridge, cross-move to intervene in this proceeding. However, in light of the court's finding that the DHCR Order is not arbitrary or capricious and is supported by substantial evidence, the issue of representation and the cross motion are rendered moot. Whether in his individual capacity or as an authorized representative, petitioner's arguments are without merit. Tenants Association and its President also do not assert any additional grounds in their challenge of the DHCR Order. Accordingly, their cross motion is denied.

*Conclusion*

For the foregoing reasons, it is hereby

**ORDERED** that the motion (motion sequence number 003) of respondent Division of Housing and Community Renewal is granted only to the extent that exhibit "A" attached to petitioner Charles Robinson's Reply is stricken from the record, and the motion is otherwise denied; and it is further

**ORDERED** that the cross motion (motion sequence number 003) of Delano Village Tenants Association and Valerie Orridge to intervene in this proceeding is denied; and it is further

**ADJUDGED** that the petition (motion sequence number 001) of petitioner Charles Robinson is denied and the proceeding is dismissed without costs and disbursements.

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

DATED: 8/26/10

ENTER,



O. PETER SHERWOOD

J.S.C.

**UNFILED JUDGMENT**

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