

Matter of 507 W. 170th St. L.P. v New York City Dept. of Hous. Preserv. & Dev.
2011 NY Slip Op 31060(U)
April 22, 2011
Supreme Court, New York County
Docket Number: 113368/2010
Judge: Martin Schoenfeld
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Schoenfeld

PART 28

Justice

Index Number : 113368/2010
507 WEST 170TH STREET L.P.
VS.
N.Y.C. DEPT. OF HOUSING
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED
1-3
4-5
6-7

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion *is decided in accordance with the accompanying memorandum decision.*

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: April 22, 2011

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 28

-----X

In the Matter of the
application of
507 West 170th Street L.P.,
Petitioner,
for a judgment pursuant to
Article 78 of the Civil
Practice Law and Rules

Index
Number
113368/2010

-against-

New York City Department of
Housing Preservation and
Development,
Respondent.

-----X

Martin Schoenfeld, J.:

Petitioner seeks a judgment vacating an order to correct (the Correction Order), dated June 15, 2010, issued by respondent to the extent that it directs petitioner to replace the electrical system, water supply and waste lines at the petitioner's building (petition, ¶ 9). Respondent has interposed an answer, contending that the Correction Order's determination to require these repairs was reasonable and that the petition should, therefore, be dismissed.

Underlying Facts and Procedural History

Petitioner is the owner of a building (the Building) located at 507 West 170th Street, New York, N.Y. which is a 25-unit residential apartment building (*id.*, ¶¶ 1-2). The Building was

designated by respondent for participation in the Alternative Enforcement Program (AEP) by notice (the Notice) dated November 12, 2009 (*id.*, ¶ 11). Respondent enforces AEP to correct violations of the Housing Maintenance Code (the Code) (New York City Administrative Code § 27-2001 *et. seq.*) (petition, ¶¶ 4-5).

Petitioner contends that it was "unaware" of the Correction Order and that it has corrected and removed more than 80% of the violations upon which the Notice was based (*id.*, ¶ 16). It claims that it should be discharged from AEP, since it is in substantial compliance, and should not be required to rewire the entire Building and to replace the building-wide systems of water supply and waste lines (*id.*, ¶ 18). It asserts that such extensive work is more than repair (*id.*, ¶ 22) and that any remaining violations are the result of normal wear and tear (*id.*, ¶¶ 25-28).

Petitioner has submitted reports of Demar Plumbing Corp. (Demar), dated September 30, 2010, and HiRise Engineering, P.C. (HiRise), dated September 28, 2010, that contend that the water system, waste lines and electrical system are in good working order and that systemic repair is not necessary (*id.*, ¶¶ 33-37). It therefore contends that there is inadequate justification for the Correction Order, that the Correction Order is arbitrary and capricious and that it should be annulled.

Respondent's records indicate that the Building had 225 open violations as of November 11, 2009 and was, consequently, designated to be in AEP by service of the Notice (answer, ¶¶ 56-57) and that the quarterly inspection on March 15, 2010 indicated that the Building had 367 open violations (*id.*, ¶ 58). Respondent sent petitioner a notice dated March 15, 2010 (the Inspection Notice), advising that, due to the failure to correct the required 100% of violations related to heat and hot water, to correct at least 80% of class B (hazardous) and class C (immediately hazardous) violations and to pay the outstanding charges including liens for emergency repair work, respondent failed to meet the conditions for discharge from AEP (*id.*, ¶ 19).

Under AEP, respondent conducted an inspection of the Building, which resulted in the Correction Order (*id.*, ¶ 60). Respondent has annexed an affidavit of service of the Correction Order, together with a copy of the signed certified mail receipt (*id.*, Exhibit I).

Respondent states that Demar's and HiRise's reports are dehors the administrative record and should not be considered by the court. It also asserts that the inspection performed at the Building (El Bey affidavit, ¶¶ 3-5) showed extensive violations of the Code, which resulted in issuance of the Correction Order. The electrical system had problems, including inadequate

amperage, cloth wiring, ceramic fuses and exposed wiring, all of which raised safety issues and required electrical rewiring of the entire Building (*id.*, ¶¶ 82-89). The plumbing (water and waste systems) had leaks, mold, obstructions in the waste lines, defective connections, collapsing ceilings and undulating walls, which are indicative of excessive water infiltration and inadequate repairs (*id.*, ¶¶ 90-94). Therefore, the level of disrepair required replacement of the domestic water supply and waste lines to correct the defective condition of these systems (*id.*, ¶ 95).

Respondent contends that its Correction Order sets forth the appropriate level of necessary repairs to the Building, that its determination is not arbitrary and capricious and that the Correction Order should be upheld and the petition dismissed.

Arbitrary and Capricious

Review of a Correction Order issued under the AEP is through a proceeding under article 78 to determine whether the determination is arbitrary and capricious (*Wilson Realty, LLC v New York City Dept. of Hous. Preserv. & Dev.*, 25 Misc 3d 1221[A], *9, 2009 NY Slip Op 52226[U] [Sup Ct, NY County 2009]).

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in

reason and ... without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc. v Division of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]).

"[T]he construction given statutes ... by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (*Matter of Brooklyn Assembly Halls of Jehovah's Witnesses, Inc. v Department of Env'tl. Protection of City of N.Y.*, 11 NY3d 327, 334 [2008], quoting *Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971]).

"[R]egulation reflecting the choice made by the department ... is beyond [the court's] power to disturb unless it is 'so lacking in reason for its promulgation that it is essentially arbitrary'" (*Goodwin v Perales*, 88 NY2d 383, 396 [1996], quoting *Matter of Bernstein v Toia*, 43 NY2d 437, 448 [1977]).

The court may not weigh conflicting choices by the administrative agency, if the agency's determination has a basis in reason (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

Analysis

- Applying the principles governing judicial review of

administrative actions, the court must decline to set aside the Correction Order, and dismisses the petition. The court must give the appropriate deference to administrative agencies interpreting and applying rules in their field of expertise (*Brooklyn Assembly*, 11 NY3d at 334). Respondent has presented a reasonable basis for the Correction Order's determination as to what repairs are necessary for the Building.

Generally, judicial review of administrative agency determinations is limited to the facts and record adduced before the agency (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]). The Demar and HiRise reports were not presented to the respondent prior to the issuance of the Correction Order and are, therefore, not properly before the court. Even if the court were to consider them, it would present, at best, a conflict as to the required level of necessary repairs. It would not establish that the respondent's determination was "without [a] sound basis in reason [or was] ... without regard to the facts" (*Pell*, 34 NY2d at 231). Put another way, "[t]he courts may not weigh the evidence or reject the choice made by [an administrative agency] where the evidence is conflicting and room for choice exists" (*Matter of Berenhaus v Ward*, 70 NY2d 436, 444 [1987]; *Matter of Shuman v New York State Racing & Wagering Bd.*, 40 AD3d 385, 386 [1st Dept 2007]).

Since there is a reasonable basis for the Correction Order, it must be upheld and the petition to vacate it is, accordingly, dismissed.

Order and Judgment


It is, therefore,

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to the respondent; and it is further

ADJUDGED that the respondent, having an address at 100 Gold Street, New York, N.Y., do recover from the petitioner, having an address at 507 West 170th Street, New York, N.Y., costs and disbursements in the amount of \$_____, as taxed by the Clerk, and that the respondent have execution therefor.

Dated: April 22, 2011

ENTER:



J.S.C.