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

PRESENT: Joan B. Lobis Justice PART 6

Index Number : 116072/2010
BLUESTAR PROPERTIES INC
VS.
M.Y.S.D.H.C.R.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 3/4/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	Pet. 1-22
Answering Affidavits — Exhibits	Aff. 23-27 return +2
Replying Affidavits	

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).

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 5/19/11

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
NEW YORK COUNTY: IAS PART 6

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In the Matter of the Application of
BLUESTAR PROPERTIES, INC.,

Petitioner,

Index No. 116072/10

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

Decision, Order and Judgment

- against -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

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JOAN B. LOBIS, J.S.C.:

Petitioner Bluestar Properties, Inc., ("Bluestar") brings this proceeding, pursuant to Article 78 of the C.P.L.R., as owner of a residential building located at 327 St. Nicholas Avenue in Manhattan (the "Building"). Bluestar seeks to overturn the October 13, 2010 order and opinion of the Deputy Commissioner of the State of New York Division of Housing and Community Renewal (the "DHCR"). That order and opinion denied a petition for administrative review ("PAR") brought by Bluestar, and upheld the order of a DHCR rent administrator, issued on February 11, 2010, retroactively reducing the rent for tenants in the Building and freezing the rent until further order due to Bluestar and its predecessor's failure to allow the tenants to use a community room in the Building's basement and requiring Bluestar to provide use of the community room.

It is uncontested that various apartments in the Building are rent stabilized. On December 31, 2007, Lillian Carino, as a tenant representative, and thirty-four other tenants of the Building filed an "application for a rent reduction based upon decreased building-wide service(s)"

(the "Application"). The tenants complained of, inter alia, a broken intercom, inadequate security cameras, broken tiles in the common areas, roof leaks, poor maintenance of laundry room equipment, vermin infestations, and denied access to a community room. The Application set forth that the Building's then owner, P.S. 157 Associates ("PS") was notified of these complaints by letter dated October 30, 2007 from the Building's tenants' committee (the "October Letter"). That letter elaborates on all of the grievances in the Application. In the October Letter, with regard to the community room, the tenants' committee set forth that PS had denied the tenants access to the community room for the past twelve years.

By letter dated April 15, 2008, PS opposed the Application. After making some procedural objections, PS set forth that it had installed a "state-of-the-art intercom system" as well as a new surveillance system. With regard to the laundry room, PS contended that it had a service contract with a third party vendor and that all complaints about equipment should be directed to the vendor. PS further contended that it had completed repairs in a timely and satisfactory manner. PS maintained that it had a service contract with a exterminator, who visited the Building on the second Tuesday of every month. Concerning the community room, PS asserted that "[t]he community room is and always was available to the tenants," but that it wanted the tenants to be willing to take responsibility for any damage it the room. In June 2008, PS sold the Building to Bluestar.

The tenants' committee responded by letter dated August 4, 2008. It asserted, inter alia, that although the security camera in front of the Building had been repaired, the intercom system remained "mostly inoperable." The tenants' committee contended that the owner failed to increase the Building's plumbing capacity to fit the needs of the laundry room, resulting in water overflows.

It further contended that it was impractical to have an exterminator visit the Building on Tuesdays, when most of the tenants are at work, and that the Building was infested with water bugs, cockroaches, mice, and rats. The tenants' committee also disputed the assertion that the community room was available to the tenants. It set forth that the tenants' committee, as well as individual tenants, have consistently been denied use of the community room.

Bluestar responded by letter on October 14, 2008. Bluestar set forth that the intercom system and security cameras were recently repaired and, as of the date of the letter, in working order. Bluestar contended that the complaints about improper maintenance in the common areas were overly broad, but set forth that all known floor damage had been repaired. Bluestar asserted that it had contracted with a new exterminator, allowing the Building to be serviced on the third Saturday of each month. Bluestar further asserted that the third party vendor that serviced the laundry room equipment had confirmed that all equipment was in working order. As to the community room, Bluestar set forth that the community room is a de minimis service. Bluestar further asserted that the tenants' failure to complain about the use of the community room for over four years was presumptive evidence that the service is de minimis. Bluestar set forth that the failure to provide a de minimis service was not grounds for a rent reduction.

By letter dated November 24, 2008, the tenants' committee responded. It maintained that tenants had complained about lack of access to the community room in the past. The tenants' committee asserted that in 2003 a representative from Congressman Charles B. Rangel's office wrote to PS about its failure to allow the tenants to use the community room. The tenants' committee further asserted that it had complained to the DHCR in 2003 about the lack of access to the

community room, but that the complaint was rejected since the tenants' committee failed to first notify PS of the issue. After that complaint was rejected, the tenants' committee pursued an action in Housing Court. According to the tenants' committee, the judge in Housing Court "suggested" that use of the community room was not an issue for Housing Court and told the tenants to pursue the matter with the DHCR.

The November 24, 2008 letter went on to assert that portions of the common areas remained in disrepair. The tenants' committee also contended that the exterminator was not performing a satisfactory job. As to the laundry room, the tenants' committee maintained that the washers and dryers were not working properly. The tenants' committee further asserted that an awning installed in 2008 reduced the visibility of the security cameras and that the intercom remained broken in several apartments.

On or about December 12, 2008, the DHCR sent an inspection request to multiple tenants in the Building, Ms. Carino, and Bluestar. The request set forth that the inspector would, inter alia, check the intercom, check the security camera's visibility, examine the common areas for leaks and cracked floor tiles, check for any sign of vermin, inspect the laundry room equipment, and check if the tenants have access to the community room. On January 9, 2009, the DHCR inspector determined that every apartment that she inspected had an operative intercom. The inspector further determined that the security camera's visibility was obstructed by the awning; that there were no signs of disrepair in the common areas; that there were no vermin in the common areas; and that the laundry room equipment was working properly. With regard to the community room, the inspector confirmed that the tenants had no access to the community room.

By letter dated January 12, 2009, Bluestar set forth its response to the allegations in the November 24, 2008 letter. Bluestar asserted, inter alia, that the community room was never considered a service in the Building nor was it mentioned in any of the tenants' leases. Bluestar further maintained that the failure to use a community room is a de minimis condition, "similar to discontinuance of recreational use of a roof." Bluestar further argued that the tenants' failure to complain about access to the community room for 12 years is further evidence that the condition is de minimis.

The tenant' committee responded on February 18, 2009. It set forth, inter alia, that the intercoms work only sporadically in several apartments; that the security camera, though unobstructed, has a more limited view; and that the common areas remained in disrepair. As to the community room, the tenants' committee maintained that it was intended for use by the tenants since 1993; that tenant meetings and social gatherings have been held there; and that it served as the location of a flea market in 2005. The tenants' committee further set forth that PS "acknowledged that [the community room] is and was always available to [t]enants."

On February 11, 2010, after receiving several more letters from tenants raising issues with the security of the Building and performing a second inspection, the DHCR issued its determination (the "February Order"). The DHCR found that the only service not maintained by Bluestar was the use of the community room. The rents were therefore reduced to the levels in effect "prior to the most recent guidelines increase for the tenants [sic] lease which commenced prior to [April 1, 2008]." Bluestar was directed to refund all rent in excess of the reduced rent from April 1, 2008 forward and to restore access to the community room.

On or about March 18, 2010, Bluestar filed the PAR. In the PAR, Bluestar argued that under 9 N.Y.C.R.R. § 2523.4, the failure to complain about a condition for over four years is presumptive evidence that the condition is de minimis. Bluestar set forth that the tenants had presented no evidence that they had ever complained about lack of access to the community room in that four year window nor rebutted the presumption that the condition is de minimis. Bluestar further argued that under 9 N.Y.C.R.R. § 2523.4(e) use of an area like the community room is considered de minimis in nature because Bluestar had provided the tenants with a similar facility, an outdoor recreational area in the back of the Building.

Several tenants responded to the PAR. Most of the responses contained one or both of the following arguments: (1) that the community room was advertised as an amenity in 1993, when the Building first became available for residential use, and (2) that the tenants had complained about their inability to use the community room since 2001.

On October 10, 2010, the Acting Deputy Commissioner of the DHCR issued an order and opinion denying the PAR (the "Final Determination"). The Deputy Commissioner acknowledged that 9 N.Y.C.R.R. § 2523.4(f) sets forth that "the DHCR may consider the passage of time during which a disputed service was not provided and during which no complaint was filed" (emphasis added by Deputy Commissioner) as evidence that the service is de minimis. However, he found that there was never a dispute over whether or not the community room was a service. In fact, PS acknowledged that the community room was always available for the tenants to use. Therefore, according to the Deputy Commissioner, 9 N.Y.C.R.R. § 2523.4(f)(1) did not apply, and the tenants' alleged failure to timely file a complaint was "irrelevant." Even so, the Deputy Commissioner

credited the tenants' committee's assertion that tenants were able to use the community room up until 2005, when they held a flea market. The Deputy Commissioner also rejected Bluestar's argument that the rear recreational area was an adequate substitute for the community room. The Deputy Commissioner set forth that the community room could be used at any time and in any weather, unlike the backyard area. On or about December 16, 2010, the DHCR determined that use of the community room had been restored and restored rent to the levels prior to February Order.

In the petition, Bluestar asserts that the Deputy Commissioner's interpretation of 9 N.Y.C.R.R. § 2523.4(f)(1) is erroneous and that the Final Determination is arbitrary, capricious, and contrary to precedent. Bluestar argues that the community room, by its very nature, is de minimis under 9 N.Y.C.R.R. § 2523.4(e). Bluestar further argues that under 9 N.Y.C.R.R. § 2523.4(f)(1), the term "disputed service" applies to all services whether the tenant and owner disagree about the requirement of the service or not. Thus, the failure to complain about a service that is not provided for four years or more is presumptive evidence that the service is de minimis, even if the owner does not object to providing the service. Bluestar contends that in light of its position that the service was de minimis all along and the tenants' admission in the October Letter that they could not use the community room for twelve years prior, there should have been a presumption that the service was de minimis. Bluestar asserts that the Deputy Commissioner's finding that the tenants used the community room two years prior to the October Letter finding is against the weight of the evidence. Even if the court were to credit the finding that the community room was used in 2005, Bluestar asserts that the outdoor recreation area provided by Bluestar and PS was a sufficient alternative to the community room.

In opposition, the DHCR argues that the Deputy Commissioner's Final Determination was not arbitrary, capricious, erroneous, or contrary to the law, was in accordance with the Rent Stabilization Law and Code, and should be upheld. The DHCR sets forth that the community room was an undisputed service and, therefore, 9 N.Y.C.R.R. § 2523.4(f)(1) does not apply. Even if the court were to credit Bluestar's argument that Section 2523.4(f)(1) applies, the DHCR argues that the Deputy Commissioner found that the last use of the community room occurred in 2005, two years prior to the October Letter, and that such finding should not be disturbed. The DHCR further argues that a community room cannot be considered, by its nature, de minimis as it is not comparable with other services listed as such under 9 N.Y.C.R.R. § 2523.4(e), such as janitorial services and landscaping.

In reply, Bluestar argues that the DHCR cannot now claim that a community room, because it is not akin to landscaping, cannot be considered de minimis in nature. According to Bluestar, the Deputy Commissioner never took that position. Bluestar, while disputing the Deputy Commissioner's finding that the tenants used the community room in 2005, sets forth that any such use was for storage purposes.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). A determination is considered arbitrary when it is made "without sound basis in reason or regard to the facts." In re Peckham v. Calogero, 12

N.Y.3d 424, 431 (2009), citing Pell, 34 N.Y.2d at 231. If the agency's determination is rationally supported, the court must sustain the determination "even if the court concludes that it would have reached a different result than the one reached by the agency." Peckham, 12 N.Y.3d at 431 (citation omitted). The court cannot "weigh the evidence, choose between conflicting proof, or substitute its assessment of the evidence or witness credibility for that of the administrative factfinder." In re Porter v. New York City Hous. Auth., 42 A.D.3d 314 (1st Dep't 2007) (citations omitted).

Rent stabilized apartments in New York City are subject to the Rent Stabilization Law (Administrative Code of the City of New York § 26-501 et seq.) and the Rent Stabilization Code (9 N.Y.C.R.R. § 2520.1 et seq.). Under Administrative Code § 26-514, an owner of a rent stabilized building must maintain all services that were provided when the building first became subject to rent stabilization. These services include, but are not limited to "repairs, decorating and maintenance, the furnishing of light, heat, hot and cold water, elevator services, janitorial services and removal of refuse," as well as ancillary services like "garage facilities, laundry facilities, recreational facilities, and security." 9 N.Y.C.R.R. § 2520.6(r). If the owner fails to maintain these services, any tenant may seek an order from the DHCR reducing rent to the level prior to the most recent increase and requiring the owner to maintain the service. Administrative Code 26-514; 9 N.Y.C.R.R. § 2523.4(a).

9 N.Y.C.R.R. § 2523.4(e) sets forth a number of services that are de minimis in nature of which the failure to maintain is permissible, such as recreational areas that are reasonably substituted, reduced in equipment, or the combined with other recreational areas. Additionally, when determining whether a service is de minimis, "the DHCR may consider the passage of time during which a disputed service was not provided and during which no complaint was filed by any tenant

alleging failure to maintain such disputed service, as evidencing that such service condition is de minimis." 9 N.Y.C.R.R. § 2523.4(f). "[T]he passage of four years or more shall be considered presumptive evidence that the condition is de minimis." 9 N.Y.C.R.R. § 2523.4(f)(1).

"What constitutes essential or required services within the meaning of the rent laws and whether they have been reduced are factual questions to be determined by [the] DHCR." In re 140 West 57th Street Corp. v. New York State Div. of Hous. and Comm. Renewal, 260 A.D.2d 316, 317 (1st Dep't 1999) (citations omitted). Additionally, the DHCR's "interpretation of its own regulations is entitled to deference if that interpretation is not irrational or unreasonable. Put another way, the courts will not disturb [the DHCR's] determination unless it lacks any rational basis." In re IG Second Gen. Partners, L.P. v. New York State Div. of Housing & Comm. Renewal, 10 N.Y.3d 474, 481 (2008) (internal quotations and citations omitted). Here, it was not irrational for the DHCR to hold that the de minimis presumption applies only to services which the owner objects to providing. Such a reading is in accord with the plain language of 9 N.Y.C.R.R. § 2523.4 which applies to "disputed services." Bluestar's reading of the statute would make the term "disputed" superfluous, contravening a basic principle of construction. See Majewski v. Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577, 587 (1998). Furthermore, Bluestar's reading of the statute would allow an owner to agree to provide or restore a service, but deliberately delay the action for four years, in order to eventually not have to provide the service. Such a construction flaunts the principle that "the [Rent Stabilization Code] should not be construed to facilitate a landlord's 'ignoring and circumventing' legislative mandates." In re Parcel 242 Realty v. New York State Div. of Hous. and Comm. Renewal, 215 A.D.2d 132, 136 (1st Dep't) (citation omitted), app denied, 86 N.Y.2d 706 (1995)

As to the Deputy Commissioner's findings of fact, it was not arbitrary or capricious for the DHCR to consider PS's statement that the community room "is and was always available for the tenants" as an acknowledgment that the service is indisputably required. It was not arbitrary and capricious for DHCR to consider the community room a service that is not de minimis in nature under 9 N.Y.C.R.R. § 2523.4(e). The DHCR rationally found that the outside recreation area was not an adequate substitute for the community room given that the community room could be used at any time of day and without regard to weather conditions. Furthermore, there was adequate, albeit sometimes contradictory, evidence in the record that the community room was used in 2005, two years prior to the Application, making the four year de minimis presumption inapplicable. Accordingly, it is hereby

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

Dated: May 19, 2011

JOAN B. LOBIS, 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).