

Matter of 254 PAS Prop. LLC v Division of Hous. & Community Renewal

2012 NY Slip Op 30791(U)

March 28, 2012

Sup Ct, NY County

Docket Number: 113797/11

Judge: Cynthia S. Kern

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3/29/2012

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

PRESENT: _____
Justice

PART _____

Index Number : 113797/2011
254 PAS PROPERTY LLC
vs.
NYS DIVISION OF HOUSING
SEQUENCE NUMBER : 001
ARTICLE 78

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s)** _____
Answering Affidavits — Exhibits _____ **No(s)** _____
Replying Affidavits _____ **No(s)** _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

FILED

MAR 29 2012

NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED

MAR 29 2012

NEW YORK COUNTY CLERK'S OFFICE
SUPREME COURT - CIVIL

Dated: 3/28/12

eg J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
In the Matter of the Application of
254 PAS PROPERTY LLC,

Petitioner,

Index No. 113797/11

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

DIVISION OF HOUSING AND COMMUNITY
RENEWAL,

Respondent.

-----X
HON. CYNTHIA S. KERN, J.S.C.

FILED

MAR 29 2012

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for
: _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner 254 PAS Property, LLC ("petitioner" or "Landlord"), the Owner/Landlord of the rent stabilized building located at 254 Park Avenue South, New York, New York ("the building"), brought this petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") challenging a final order ("Final Order") issued July 28, 2011 by respondent Division of Housing and Community Renewal ("DHCR"). The Final Order reduced the rent for tenant Ernest Sgroi ("Tenant") based upon a finding that the required "Intercom, Bell & Buzzer System" service had been diminished. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. On or about May 18, 2009, Tenant filed a Decrease in

Services Complaint with respondent requesting a rent reduction based on a decrease in building-wide services. Tenant complained, *inter alia*, that the building intercom system, which was operative when Tenant moved into the building twelve years earlier, had been eliminated, causing building staff to contact Tenant on his own personal telephone to inform him about visitors or other building matters.

By letter dated June 30, 2009, petitioner's attorneys responded to Tenant's complaint and stated, in pertinent part, that "[t]he intercom system is part of the phone system. Therefore, each tenant can call down to the main desk and receive calls from the front desk through his or her own telephone."

On March 25, 2010, the DHCR conducted an inspection of the building. The inspector reported that:

1. The tenant's intercom panel in his apt is no longer in use see photo (#1919). 2. The doorman's telephone by the desk see photo (#1927) rings tenant's telephone which they communicate. The bldg. has 24 hr doorman service, once the visitor enters the bldg. goes to the desk, doorman calls the tenant...3. The doorman uses the telephone to call tenants. When inspector arrived the doorman called tenant, were able to communicate.

By order issued June 1, 2010, the DHCR's Rent Administrator reduced the rent for various tenants based on a finding that the stairway A exit door was not being maintained, but found that several other services *were* being maintained, including the "intercom/telephone system" finding that "[t]he doorman and tenant can communicate via tenant's phone."

Tenant, by his attorney, filed a timely petition for administrative review ("PAR") seeking a modification of the Rent Administrator's order, requesting that that portion of the order which denied a rent reduction for decrease in services due to intercom removal should be reversed. Tenant

argued that removal of the existing intercom system is a decrease in services which cannot be fixed or compensated by the Tenant and doorman communicating via the Tenant's cellular telephone. Tenant further argued that the Landlord's new system does not use a phone installed in Tenant's apartment by the Landlord at the Landlord's cost and maintained by the Landlord, but rather the doorman calls Tenant's own cellular telephone no matter where Tenant may be located at that time. Tenant's PAR argued that the Landlord was shifting the responsibility and cost of the service to the Tenant and away from the Landlord and that a disruption of the private telephone line will leave Tenant with no intercom and no remedy from the Landlord.

By letter dated August 3, 2010, the Landlord's attorney responded to Tenant's PAR by stating, in part, that there was no decrease in services with respect to the intercom as the DHCR's inspector found that the doorman and Tenant can still communicate via Tenant's cellular phone and that requiring the Tenant to use his cellular phone as a means of communicating with the doorman is not a decrease in services.

By Final Order issued July 28, 2011, the DHCR's Deputy Commissioner Woody Pascal ("Deputy Commissioner Pascal") granted Tenant's PAR and found that the Rent Administrator incorrectly determined that the intercom service in the building was maintained. Deputy Commissioner Pascal held that the Landlord had unilaterally changed or modified a required service without permission from DHCR. Thus, Deputy Commissioner Pascal modified the Rent Administrator's order to add "intercom/telephone system" to the list of services not maintained and determined that the rent reduction would apply to two items: the stairway A exit door and the intercom/telephone system.

By letter dated November 15, 2011, the Landlord's attorney requested reconsideration of the

[*5]

Final Order. By letter dated November 30, 2011, the DHCR denied the Landlord's request for reconsideration. The Landlord then commenced this action with the filing of an Article 78 petition on December 9, 2011.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); see *Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, this court finds that Deputy Commissioner Pascal's Final Order, reversing the Rent Administrator's order which denied a rent reduction for Tenant based upon the allegation that the intercom system service had been diminished was made on a rational basis. A landlord has the affirmative burden to maintain required services and to certify annually that all required services are being maintained. See N.Y. Code § 26-514. Further, pursuant to Sections 2522.4(d) and (e) of the Rent Stabilization Code ("RSC"), a building owner is required to file an application for permission to eliminate or modify required services prior to doing so, providing that

