Columbus 95th St. LLC v New York State Div. of Hous. & Community Renewal
2015 NY Slip Op 32032(U)
March 12, 2015
Supreme Court, New York County
Docket Number: 100200/2014
Judge: Margaret A. Chan

[* 1]

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

PRESENT: HON. MARGARET A. CHAN PART 52

FA 3/16/15 E

Index Number : 100200/2014

COLUMBUS 95TH STREET, LLC.

vs

NYS DIVISION OF HOUSING

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 8 were read on this motion to/for Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4, 5, 6, 7
Replying Affidavits	8

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION DETERMINED PURSUANT TO ANNEXED DECISION AND ORDER

FILED

MAR 17 2015

NEW YORK COUNTY CLERK'S OFFICE

Respondent DHCR has 45 days to retrieve its certified transcript submitted with its answer.

GENERAL CLERK'S OFFICE NYS SUPREME COURT - CIVIL RECEIVED MAR 16 2015

Dated: 3/16/15

HON. MARGARET A. CHAN J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 52

INDEX 100200/2014

Decision and Order

COLUMBUS 95TH STREET LLC,
Petitioner,

- vs. -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Respondent,

- and -

COLUMBUS HOUSE TENANTS ASSOCIATION AND LESLIE BURNS, INDIVIDUALLY AND AS PRESIDENT OF THE COLUMBUS HOUSE TENANTS ASSOCIATION,
Intervenors -Respondents,

Margaret A. Chan, J.:

In this Article 78 proceeding, petitioner Columbus 95th Street LLC seeks to vacate, reverse or modify the order rendered by respondent New York State Division of Housing and Community Renewal (DHCR) on December 20, 2013 (the Order). Petitioner argues it is entitled to rent increases for 248 apartments located in its building at 95 West 95th Street, in the County, City and State of New York. Columbus House Tenants Association and Leslie Burns, individually, and as president of the Columbus House Tenants Association appear as intervener-respondents (collectively, the Tenants Association).

Background

The building, until March 3, 2006, was subject to Article II of the New York State Private Housing Finance Law, known as the Mitchell-Lama program. The Mitchell-Lama program allows developers to construct housing for qualified low and middle income tenants, in exchange for loan and tax incentives. Upon the dissolution of the Mitchell-Lama company, here, Columbus House, Inc., and the withdrawal of the building from the program, a Mitchell-Lama building becomes subject to the regulations of the New York City Rent Stabilization Law (RSL) and Code (RSC), pursuant to the Emergency Tenant Protection Act of 1974, as amended (*see* Uncons. Laws § 8621 *et seq.*). At the time of withdrawal from the Mitchell-Lama program, owners may apply to DHCR for rent increases, pursuant to RSL § 26-513 (a).

When the subject apartments became rent stabilized under the RSL and RSC, their rents were set at the last legally regulated rent as charged under the Mitchell-Lama program (*see* RSL § 26-512[b] and RSC § 2521.1[j]). RSL § 26-513 (a), states that an owner may file for an adjustment of the initial legal regulated rent after the owner withdraws the building from the Mitchell-Lama program, and that, upon application,

> "[t]he commissioner may adjust such initial legal regulated rent upon a finding that the presence of unique or peculiar circumstances materially affecting the initial legal regulated rent has resulted in a rent which is substantially different from the rents generally prevailing in the same area for substantially similar housing accommodations."

On April 20, 2006, petitioner filed 248 separate applications for rent increases, one for each of the 248 apartments in the building. The Rent Administrator (RA) consolidated the applications under a single docket number. A notice of the applications was served on the affected tenants. In July 2007, while petitioner's applications were still pending, DHCR proposed to amend RSC § 2522.3, renaming it the "Fair Market Rent Appeal and Other Applications for Adjustment of Initial Legal Regulated Rent for Housing Accommodations," adding a new subsection, (f)(4), which reads, as pertinent here, "[p]revious regulation of the rent for the housing accommodation under the PHFL or any other State or Federal law shall not, in and of itself, constitute a unique or peculiar circumstance within the meaning of this subdivision." This amendment was adopted as law in November 2007.

By letter dated November 27, 2007, DHCR advised petitioner of the adoption of the amendment to RSC § 2522.3, and that petitioner's applications would be determined under that regulation as amended. Petitioner was invited to amend its applications, or provide additional submissions if it so chose, within 14 days of the letter. The parties agreed to extend the date for amendment or new submissions until March 2008.

All of this was discussed in previous litigation in an Article 78 proceeding commenced by petitioner in 2007 (*see Columbus 95th Street LLC v New York State Div. of Housing and Community Renewal*, 2009 NY Slip Op 32791(U) [Sup Ct, NY Cty 2009], *affd* 81 AD3d 269 [1st Dept 2010]). In that action, petitioner sought a judgment compelling DHCR to process the applications and a decision finding the amendment to RSC § 2522.3(f) to be invalid, or to require DHCR to process the applications under RSL § 26-513(a), which does not contain the language concerning the limitation on the "unique or peculiar" requirement contained in RSC § 2522.3(f)(4). Pursuant to court order, the determination of the applications by DHCR was stayed while the court addressed the matter (*id.*).

On November 25, 2009, the Supreme Court directed DHCR to determine the applications "within 150 days of the submission of the final papers" (*id.*). The part of the petition requesting that the matter be addressed under RSL § 26-513 (a) was denied (*id.*). In reaching the decision on the validity of the amendment to RSC § 2522.3, the court found that DHCR had not exceeded its rulemaking authority in amending RSC § 2522.3; and that the amendment was not arbitrary and capricious, or unconstitutional (*id.*). There was also a determination that the 248 applications under a single docket number was proper (*id.*).

The First Department lifted the stay at the conclusion of the appeal and on its affirmance (*see Columbus 95th Street LLC v DHCR*, 81 AD3d 269, 282 [1st Dept 2010]). The RA subsequently issued an order, dated October 21, 2011, denying the applications (Pet, Exh D). That order stated that petitioner failed to establish "unique and peculiar circumstances" under DHCR regulations, and so, it was not entitled to rent increases (*id.*).

Petitioner filed its Petition for Administrative Review (PAR) on November 23, 2011, and supplemented it in May 2012, seeking the reversal of the RA's determination. In its PAR, petitioner argued that the RA had failed to address any of the facts and arguments provided by petitioner, looking at the fact that the building had been subject to Mitchell-Lama regulations before withdrawal from the program, and that that did not constitute unique or peculiar circumstances pursuant to RSC § 2522.3. Petitioner argued, as it argues here, that if RSC § 2522.3 (f)(4) provides that prior Mitchell-Lama regulation does not in and of itself constitute a unique or peculiar circumstance within the meaning of the subdivision, then, conversely, the regulation does not in and of itself constitute a reason for denying petitioner's application.

Petitioner also complained that after the appeal became final the RA failed in its duty to notify petitioner and the tenants that the RA would proceed to address the applications, preventing petitioner from further supplementing them. Petitioner also raised, once again, the argument that RSC § 2522.3 was not the governing statutory provision, and that the applications should have been addressed under RSL § 26-513(a), as well as arguing, for the first time, that RSC § 2522.3 was actually overruled before it became law by the previously enacted and existing regulatory section 2521.1 (d). The PAR was denied by an Order and Opinion dated December 20, 2013 (Answer, Exh A[1]).

Petitioner's claims here are: (1) that DHCR failed in its duties by docketing all 248 applications under one docket number; (2) DHCR deviated from its own procedures, and

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[1]Petitioner claims that a copy of the Order is attached as exhibit E to the petition. However, exhibit E deals with an order in an unrelated PAR.

failed in its duties, by failing to notify petitioner and the tenants that the proceedings would move forward after the appeal was finalized, thus failing to allow petitioners and tenants to make further submissions; (3) DHCR was required to compare petitioner's rentals with rental stock in the same zip code, and determine higher rents according to that data; (4) DHCR was required to separately docket vacant apartments or those that became vacant during litigation; (5) DHCR failed to conduct its analysis pursuant to the appropriate applicable statutes – RSC § 2521.1(d) and RSL § 26-513(a); and (6) DHCR ignored relevant facts, law, and the equities involved and only considered the building's prior Mitchell-Lama status in coming to its determination. Overall, petitioner argues that the Order "was made without and/or in excess of DHCR's jurisdiction, was made in violation of lawful procedure, was affected by an error of law and/or was arbitrary and capricious and an abuse of discretion" (Pet, ¶ 90).

Discussion

In an Article 78 proceeding, courts may not interfere with an administrative determination unless there is no rational basis for it or the action complained of was arbitrary and capricious (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]). Deference is given to the agency in interpreting the regulations it administers because of its expertise in those matters, and its determination must be upheld as long as it is reasonable (*see Chin v New York City Bd. of Standards and Appeals*, 97 AD3d 485, 487 [1st Dept 2012]). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell* at 231).

DHCR and the Tenants Association argues that some of petitioner's claims are barred by the doctrines of *res judicata* and collateral estoppel. Under the doctrine of *res judicata*, also known as "claim preclusion," "a valid, final judgment bars future actions between the same parties on the same cause of action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 347 [1999]). Once a claim has been fully adjudicated, *res judicata* prevents bringing claims based on the same transaction or series of transactions, "'even if based upon different theories or if seeking a different remedy'" (*id.* quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). A party may not "relitigate his dismissed claims by adding allegations that could have been brought earlier" (*Goldstein v Massachusetts Mut. Life Ins. Co.*, 60 AD3d 506, 508 [1st Dept 2009]).

Collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding *an issue* clearly raised in a prior action or proceeding and decided against that party . . . , whether or not the tribunals or causes of action are the same [emphasis added]" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d at 349, quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 (1984)[internal citations omitted]). In order for collateral

estoppel to apply, the issue in the second action must be identical to an issue previously raised and must have been "necessarily decided and material in the first action" (*id.* at 349). Further, the party opposing the application of collateral estoppel must have had a "full and fair opportunity to litigate the issue in the earlier action" (*id.*).

As to the claims that apartments should have been docketed separately and that if they became vacant during the litigation that also would be cause to docket them separately, the Supreme Court previously held that it was proper to assign the 248 applications – representing all the apartments, vacant or not – to a single docket number to be addressed together. The holding was affirmed by the First Department (*see Columbus 95th Street LLC v New York State Div. of Housing and Community Renewal*, 81 AD3d 269). Petitioner is barred from raising these claims here.

Petitioner once again attacked the validity of RSC § 2522.3 (f)(4), using an argument which it never raised before either in the lower court or on appeal. Petitioner made the argument that RSC § 2522.3(4)(f) is of no effect, based on the existence of a prior code section, RSC § 2521.1 (d), and that, as a result of the existence of RSC § 2521.1 (d), and DHCR's failure to revise that regulation when it promulgated RSC § 2522.3(f)(4), the amendment is "fatally flawed" (Pet's memo of law, p 38). Petitioner argued DHCR erred in law in relying on the amendment when it denied petitioner's PAR.

RSC § 2521.1 (d) states, in pertinent part, that

> [n]ot withstanding the provisions of any outstanding lease or other rental agreement, the initial legal regulated rent for a housing accommodation in a multiple dwelling for which a loan is made under the PHFL shall be the initial rent established pursuant to such law. *Such rent, whether or not the housing accommodation was previously subject to the RSL, shall not be subject to the proceeding described in section 2522.3 of this Title*

[emphasis added]. According to petitioner, this section, when considered together with RSC § 2522.3(f)(4), totally eviscerates RSC § 2522.3(f)(4). In the Order, DHCR stated that "DHCR's apparent retention of the regulatory language [in RSC § 2521.1(d)] constitutes a mere drafting oversight at the time the RSC amendment was adopted," so that it "cannot reasonably be construed as an invalidation of the RSC amendment."

Petitioner's argument on this point is baseless. First, petitioner had two opportunities, before the Supreme Court and before the First Department, to protest the validity of RSC § 2522.3 (f)(4), and failed to convince either court that the amendment was flawed. Therefore, petitioner is barred by *res juducata* and collateral estoppel from

bringing a new argument challenging the validity of the amendment. Petitioner cannot bring new proceedings challenging the validity of RSC § 2522.3 (f)(4), with different arguments. The validity and applicability of RSC § 2522.3 (f)(4) is no longer an issue having been decided by the First Department.

Turning to the remaining claims, petitioner argued that DHCR failed to properly process the applications because it failed to send notice to it and the tenants that proceedings would resume after the First Department decision. Petitioner claims that it was entitled to be renoticed pursuant to RSC § 2527.3(a)(1), which requires DHCR to notify the parties of all complaints, answers or replies by the parties. Petitioner argues that it did not know, and could not have known, that DHCR would go ahead and resolve the applications without further notice to petitioner after the stay was lifted. Petitioner insists that were it notified, it would have made additional submissions. Petitioner likewise claims that the tenants should have been renoticed, to allow them to answer and bolster the record. Petitioner claims that, in failing to notify petitioner and the tenants that the applications would now be addressed, DHCR arbitrarily went ahead with the determination without a complete record. In fact, petitioner claims that DHCR had an affirmative obligation to make an investigation of the possible unique or peculiar circumstances which might lead to a determination in petitioner's favor, and to create a record, based on RSC § 2527.5 (b). This regulation states that DHCR "may" among other things, "make investigations of the facts, conduct inspections, hold conferences, and require the filing of reports, evidence and affidavits, or other material relevant to the proceeding." Petitioner argues that such an investigation would have revealed reasons to allow petitioner rent increases under RSC § 2522.3. This court disagrees.

Petitioner admits that DHCR had previously, in a letter dated November 27, 2007, before the prior Article 78 proceeding, granted petitioner the opportunity to amend the applications to address RSC § 2552.3(4)(f), within 14 days of that letter, and thereafter granted two more extensions. In its memorandum, petitioner states that these extensions were "thereafter subsumed and further extended" by the stays which followed in the Article 78 proceeding and on appeal. Petitioner fails to explain why it did not consider and comply with DHCR's prior invitation to amend its applications to address RSC § 2522.3 (4)(f). Moreover, if the opportunity to amend its submission was "subsumed" in the stay, as posited by petitioner, then it was revived by the lifting of the stay. Petitioner had the complete record available to it as it existed preappeal, and had the opportunity to add to the record between the lifting of the stay and the issuance of DHCR's Order 10 months later, an opportunity to which it failed to avail itself. Petitioner here cannot seek to vacate the Order merely because it did not recognize the import of the lifting of the stay. DHCR acted rationally in addressing the applications as they stood when the stay was lifted.

As to petitioner claim for a "zip code analysis" it argues that DHCR was required to use data concerning "prevailing rents in the area where the building is located" to determine a "fair market rent" for the apartments in its building (Pet's memo of law, pp 17-18). The First Department in *95 Columbus Street LLC* discussed as an illustration of when a rent increase due to unique or peculiar circumstances might be justified, based, among other things, on the previous mismanagement of the premises by the owner (*95 Columbus Street LLC* at 280 citing *207 Realty Assoc. v New York State Div. of Hous. & Community Renewal*, 297 AD2d 569 [1st Dept 2002]). In the case where unique or peculiar circumstances warranted a rent increase, using the data from a comparability study was rational (*see 207 Realty Assoc. v New York State Div. of Hous. & Community Renewal*, 297 AD2d 569). However, whether rents would be calculated by zip code or any other methodology is irrelevant until such time as petitioner is granted the right to rent increases due to a showing of unique or peculiar circumstances, which, has not happened here. It is irrelevant also that DHCR's use of similar methodologies has been upheld before. In such cases, the court still starts with the premise that a rent increase is warranted (*see 207 Realty Assoc.*, 297 AD2d 569). DHCR's refusal to rely on a zip code analysis, or any other type of methodology to determine comparable rents, was rational.

Finally, as to petitioner's claim that DHCR failed to consider any of the facts or arguments raised by it in the applications. Petitioner claimed that DHCR's Order "merely robotically tracks" the language of the amendment to RSC § 2552.3, erroneously denying the applications "on the ground that the former Mitchell Lama regulation is, in and of itself, a ground for denial" (Pet's memo of law, p 16). For instance, petitioner complains that DHCR did not consider an argument it raised based on building-wide improvements made by a former owner, while the building was still under the Mitchell-Lama scheme. As required by law, a temporary rent increase was granted to the owner to recoup the costs of the improvements, under the Mitchell-Lama law. Unlike the case of major capital improvements made to rent stabilized buildings under the RSL and RSC, such rent increases in Mitchell-Lama buildings are not permanent, so that the raised rents revert to the prior rents after three years. Petitioner argued to DHCR that this occurrence was a unique or peculiar circumstance warranting rent increases.

In denying this argument, DHCR held, among other things, that

> "[t]hese temporary rent increases, like all other regulated adjustments in effect prior to March 2006, were pursuant to the strictures of the M-L law. Since the amended RSC code provision precludes prior regulation under the M-L law as constituting a U/P circumstance, it necessarily follows that any specific provision of the M-L law that was applied prior to the owners exit from the program likewise may not constitute a U/P circumstance."

(Order, p 7). This explanation is rational, and so, this court finds that the DHCR did not act irrationally in discounting the temporary rent increases as a unique or peculiar circumstance.

Petitioner maintains that DHCR failed to consider the equities involved and prejudiced petitioner by not independently seeking tenant answers. The answers might have pointed to unique or peculiar circumstances concerning individual apartments. Petitioner admits that the absence of tenant input did not "necessarily mean that the applications should have been summarily granted," but DHCR "should have given [its] applications due deference," deemed the allegations to be true, and afford it every reasonable inference (Pet's memo of law, p 20). Petitioner claims it was "substantially prejudiced" by not having answers from the tenants, which DHCR should have obtained (*id.*).

Petitioner does not provide any legal support for its argument that a PAR proceeding in which the tenants do not answer requires DHCR to give "due deference" to a petitioner's submissions, and any failure to do so was not irrational (*id.*). Petitioner's claim that it would have obtained corroboration of unique or peculiar circumstances from the tenants, and that it was DHCR's burden to obtain that evidence, is part of a larger argument that DHCR had an affirmative burden to investigate and find such "additional evidence" by allowing petitioner to amend its submissions, and by its own investigations. (*id.* at 21).

Petitioner argues that an investigation into the history of the building, by DHCR, might well have turned up some sort of mismanagement which might have caused some apartment rents to be artificially low, such as, among other possibilities, improperly filed annual income certifications. Petitioner also argues that DHCR should have investigated any possible differences between apartments, which might have been considered in arriving at a finding of unique or peculiar circumstances. Petitioner provides the court with several DHCR administrative determinations where prior circumstances in the occupancy of a Mitchell-Lama building created unique or peculiar circumstances (Pet's memo of law, Exhs 1-7).

Petitioner's speculation as to myriad possibilities of mismanagement or events that might have taken place and would have been exposed if DHCR had conducted an independent investigation on petitioner's behalf, does not convince the court that DHCR did anything wrong in reaching its determination, upon the evidence it had – that there was no unique or peculiar circumstance in existence, only the low rents occasioned by Mitchell-Lama regulation.

In sum, petitioner failed to establish that the DHCR's Order is irrational, or arbitrary and capricious. The Order was rendered based on a complete record, as petitioner failed to make such amendments to its PAR.

Accordingly, the petition is denied and the proceeding is dismissed.

Dated: March 12, 2015

Margaret A. Chan, J.S.C.