Matter of Bazile v Rubin
2016 NY Slip Op 33031(U)
April 21, 2016
Supreme Court, Queens County
Docket Number: 12896/2015
Judge: Thomas D. Raffaele

Short Form Order and Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS D. RAFFAELE IA 13

----------X

In the Matter of the Application of

Index Number 12896/2015

LYSON BAZILE, ANDREY BEBURSHVILI, GIOVANY CAMPOS, YELENA G. BHAKHALOVA, VIVIANA BRAVO, SHAKAY CHAHINIAN, ROBERTA CROSLEY, JAIME DEGAETANO, LISA A. GOLBERG, IRINA GURZHIEVA, DAVID JACOBS, JENNIFER LAURON, FANG LIN, ISAK MASTOV, PETER MONTE, ANGIT NAROTAMA, CARLOS PUELLO, ROSA I. REVERON, DAVID RINGELHEIM, DEBRA RINGELHEIM, JOY GORDON RINGELHEIN, LARISA SADIYAEV, SHERI SPRINGER, ROMINA STUTMAN, ELICHI TAKAMURA, TIMOTHY A. UNISA III, PENELOPE VAISLAKIS, TAHIRA VOLODINA, MERYL WIENER, and RAKHMIN YAKUBOV,

Motion Date : 1/25/16

Motion Seq. No. 1

Petitioners,

-against-

JAMES S. RUBIN, as Commissioner of New York State Homes and Community Renewal and New York State Division of Housing and Community Renewal and CALIFORNIA LEASING, LP,

Respondents.

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

----------X

The following papers read on this Article 78 proceeding for a judgment vacating and annulling the order issued by respondent James S. Rubin, Commissioner of the New York

State Division of Housing and Community Renewal (DHCR) dated August 28, 2015, which denied the petition for administrative review (PAR) and upheld the Rent Administrator's order permitting the property owners California Leasing LP (California) to modify services and substitute a part-time lobby attendant with a 24-hour/7 day operational video surveillance system; directing respondent California to continue doorman service at the subject premises; and awarding attorney's fees pursuant to CPLR 8601.

	Papers Numbered
Notice of Petition-Verified Petition-Exhibits.....	1-4
Verified Answer-Exhibits.....	5-7
Reply Affirmation.....	8-9
Memorandum of Law.....	

Upon the foregoing papers the petition is determined as follows:

Petitioners are 30 rent stabilized tenants at an apartment building located at 64-20 Saunders Street, Rego Park, New York. Said apartment building is owned by respondent California and contains 151 rent stabilized apartment units and one employee unit.

On August 2, 2013, California filed an application to modify or substitute part-time lobby attendant services at the entrance to the subject premises and replace said services with 12 security cameras covering the common areas of the premises and the immediate exterior of said premises. The subject premises have a single main entrance, with a standard intercom system in a locked vestibule. Visitors are admitted by residents via the intercom system, and are unable to access the service entrance, a side entrance, two entrances from the garage and a courtyard entrance. The premises have a lobby attendant Friday, Saturday and Sunday from 7:00 a.m. through 4:00 p.m., with one hour off, and Monday through Sunday from 4:00 p.m. through 1 a.m., with one hour off. There are two people employed as lobby attendants or doormen, who work a total of 80 hours. There are no doormen or lobby attendant services Monday through Thursday until 4:00 p.m., and there is no doorman or lobby attendant services between 1:00 a.m. and 7:00 p.m., Monday through Sunday.

California's counsel stated in its application that it was the sole duty of the lobby attendant on duty to sit in the lobby, hold doors for tenants, and clean the glass and floor in the lobby; that the lobby attendant does not have an established station and sits in a chair near the entrance door; that the lobby attendant is not a security guard; that there is

no log book for visitors; that the lobby attendant does not have the duty of physically preventing someone from entering the premises, and has no ability to stop visitors from entering if they are permitted to enter by residents, via the intercom system. California proposed removing the lobby attendants, and installing a security camera system that would permit the owner to monitor the common areas on the first floor, including the service entrance, side entrance, elevator lobbies, lobby interior, entrances from the garage, main entrance exterior, garage doors and courtyard entrance. It was stated that monitors would be in place that would permit the on-site super to conduct a periodic viewing of what was being recorded; that the owner would also connect the system to its management company's off-premises central security system; and that recordings would exist that could be turned over to the police in the case of criminal activity. The owner also proposed that signs would be installed in the building that would read " Premises Under Surveillance"; that the lobby attendant's cleaning duties would be performed by the existing porter; and that a concerted effort would be made to find the lobby attendant a position elsewhere.

California's counsel also stated in the application that the proposed system would be more than an adequate substitute for the existing lobby attendant system, as it would provide a full-time video presence at all entrances; that it would be in place 24 hours a day, 7 days a week; that it would monitor the building's common areas and not just the lobby; that all cameras would be connected to a DVR, that would digitally record any trespass and criminal activity, and enable the owner to assist in any identification or prosecution. California submitted a proposal from a company that would supply the video surveillance system which included a diagram showing where the security cameras would be located.

On August 30, 2013, the DHCR notified the tenants at the subject premises of the owner's application. Seventy-two tenants submitted objections to the owner's proposal, and asserted that the video surveillance system was not an adequate substitute service. The objecting tenants stated that the presence of the doormen serves to deter intruders from entering the building, and that this could not be replaced by a camera; that the doormen screens visitors to the building; that the tenants feel more secure with the doormen present in the building; that the doormen have a desk stationed in the lobby for many years that was recently removed; that the doormen receive and hold packages from Fed Ex, UPS, USPS, and that the tenants have to sign for their packages; that the doormen help tenants who use a walker or wheelchair, and open the door for them; that the doormen deliver rent bills, show empty apartments and assist EMS personnel in locating apartments; that the doormen clean the glass, the elevators and lobby area, shovel snow, sweep and mop the lobby floor, and put out floor mats when it rains or snows; that the landlord had already begun to install security cameras and was providing new key

fobs.

Two tenants who are Jewish and religiously observant stated that the doormen opened the door for them on the Sabbath and Jewish holidays and pressed the elevator buttons for them. Many of the tenants stated that they moved into or continued to reside at the premises because there was a doorman. The objecting tenants asserted that these services provided by the doormen could not be provided by the proposed video surveillance system. The tenants also asserted that as there were some 400 tenants in the three connected buildings, the two porters and one superintendent were insufficient to perform the additional services provided by the doormen.

On September 13, 2013, the DHCR requested that the owner provide additional information as to "[w]hat will happen with the lobby attendant who is providing 80 hours of lobby attendant service." The owner's counsel, in a response dated September 18, 2013, stated that the owner would make a concerted effort to find employment for the two lobby attendants, who each provided 40 hours of service. He stated that the management company manages over 40 buildings in Queens and Kings Counties, and that "the owners of those buildings, although separate and apart from the ownership of the subject building, and from each other, are related enough to the extent that the current lobby attendant of the subject building can be referred for employment at another building." Counsel stated that as the proposed camera installation was an adequate substitute for the lobby attendant, there was no need for the lobby attendants to continue to be employed at the subject building once the requested change occurred, and that as the other buildings are owned by different entities, the lobby attendant's future employment cannot be considered a condition for approval of the owner's application.

On October 1, 2013, the DHCR requested that the owner respond to the following tenant concerns: to "who will sign for tenant packages"; "who will shovel snow, sweep or put out mats"; "who will help in an emergency situation such an ambulance (to locate an apartment)" and "when it's the shabbat who will open the door".

In a response dated October 7, 2013, the owner's counsel stated that the lobby attendant does not have a duty to accept packages; that it is not within his job description, and as he is not on duty Monday through Thursday until 4:00 p.m., any packages delivered before that time are not accepted by him, nor can that be done on his days off. It was asserted that if the lobby attendant accepted packages in the past, it was without the knowledge or permission of the owner, and that the super and full time porter can sign for any packages delivered by Fed Ex, UPS or USPS. With respect to crime deterrence, it was asserted that the lobby attendant is not a security guard, has no training as such, and has never been asked by the owner "to intervene in any trouble." It was asserted that it

would be extremely improper and dangerous to ask the attendant to do so, or for the tenants to expect that to happen. In addition, the lobby attendant is never present 24 hours a day; although the proposed security system would be in place 24/7.

Counsel for the owner further stated that the lobby attendant did not "cover" for the super, or perform any tasks of the super, as a covering super is always used on days that the super is off; that the super and full time porter have always, and will continue to shovel snow, sweep and place mats; that the on-site super has always and will continue to assist in all emergencies, including locating an apartment for an ambulance arrival; that the building agent and field superintendent are also on call for emergencies; and that while the premises currently has a metal key system, which Sabbat observers are permitted to use, the owner is able to provide proper special "Shabbat Keys" for any Shabbat observer who would like one.

The Rent Administrator, in an order issued on October 25, 2013, stated that the applicable regulation was Section 2522.4 of the Rent Stabilization Code; set forth the owner's proposal and claims as stated in its application; noted that numerous tenants had responded and provided reasons why the doormen should be kept; and provided the owner's responses, to the September 16, 2013 and October 1, 2013 requests for further information. The Rent Administrator stated that "pursuant to the Rent Regulatory Regulations, an owner may file an application to modify or substitute required services at no change in the legal regulated rent on grounds that such modification or substitution is not inconsistent with the Rent Stabilization Law and Code", and concluded that "the owner's application for permission to eliminate 80 hours of lobby attendant (two attendants/40 hours each) service and substitute it with the installation of 12 security cameras as mentioned above is not inconsistent with the above provisions" and granted the owner's application. The Rent Administrator further stated that if the owner failed to meet the requirements "provided above", the tenants could file for a rent reduction if the facts so warrant.

Zainab A-Rahman, a tenant at the subject building filed a PAR on November 13, 2013, and objected to the owner's assertions, and stated in pertinent part, that the "presence of a doorman deters criminals, allowing the residents to feel safe and secure"; and that "the super is often busy and not around when packages are delivered. He cannot sign for a package if he taking care of an issues [sic] somewhere else in the building. The doorman receives and signs for packages for the residents while they are at work."

David and Joy Ringelheim, tenants in the subject building for 26 years, also filed a PAR on November 29, 2013, stating that the landlord had informed the tenants that a new door locking system would be installed and operating by July 2013; that the tenants had to

give personal information in order to obtain the new key fobs; and that to date this system was not operational. They also stated that the roof doors and one side entrance door do not lock; that the door bells on their side of the building do not work; and that they have discussed the matter with the superintendent and main office and since July no one attempted to fix these problems.

The Ringelheims stated that while they realized that the door person is not a security guard, he is a deterrent to crime and "to people who do not belong in the building. Also when they are on duty it prevents any unwanted person from ringing all the bells just to get in. This happens all the time when they are not on duty". The Ringelheims stated that management removed the doorman's desk and chair even before seeking approval of the application; that the doormen perform many other functions "such as sweeping the sidewalks in the front and sides of all entrances, shovel snow, put out mats when weather warrants, show empty apartments, deliver monthly rent bills to all tenants, take in packages for tenants from UPS, USPS and Fed-Ex. Management states that this is not part of their job, however, management provides a package sign sheet", and has done so all of the years they lived in the subject building.

Mr. Ringelheim stated that he felt safer knowing that there was someone watching the lobby when his wife and 8 year old son enter or exit the building, and that he is disabled and that the doormen are a major help when he enters or exits the building. The Ringelheims state that the proposed video system cannot stop intruders or prevent crime, and that the superintendent and porters have duties to perform that are not in the lobby and cannot possibly handle all of the services provided by the doormen. The Ringelheims submitted a copy of a "Doorperson's Package Log" for certain dates in September and October 2013.

Various tenants, represented by the same counsel, submitted a PAR on November 29, 2013. These 64 tenants contended that the Rent Administrator's determination that the surveillance system would provide a service identical to that provided by the doormen was incorrect; that the doormen provided services far in excess of those provided by a surveillance system and could only be provided by a live person; that the services provided by the doorman could not be replicated by an electronic system; that many of the tenants moved into the building based upon the owner's representation that it is a "doorman" building, and that the elimination of the doormen will diminish the value of their leaseholds; and that the owner advertises the building as having a doorman.

The tenants stated that there was a free standing doorman's desk located in the center of the lobby which was removed only in the last month; that the presence of the doorman is a visible deterrent to would be intruders, vandals and others, and is present

during hours when most crime occurs; that a security camera can be easily disabled; that it is disingenuous for the landlord to claim that the superintendent who is already responsible for maintenance and a union employee will take on additional duties outside of his job description; that the doorman provides real time security while a DVR recording of a crime only records something after the fact; and that the doormen and the superintendent are union employees. The tenants further argue that the owner's claim that the doormen do not provide any security services is false.

Counsel for said tenants submitted a photograph depicting a doorman at a desk in the lobby; a copy of the collective bargaining agreement between Local 670 and various apartment house owners; a copy of a 2007-2009 agreement between Local 670 and respondent California; a copy of pages from the delivery log book for certain periods in 2011, 2012 and 2013; a copy of a rental advertisement which lists a part-time doorman as one of the building's features and amenities; and New York State licensing requirements for persons who install, service or maintain security systems. Some of these tenants also submitted statements in which they asserted the owner had misrepresented the services provided by the doorman.

The owner's counsel answered the PAR on February 28, 2014, and asserted that the tenants' contentions regarding the "alleged import of the Door Personnel guidelines" and the submission of said document could not be considered for the first time on appeal; that the tenants cannot rely on said document, as it is an internal document of the landlord, and not some sort of contract between the landlord and tenants; that the language of said document cited by the tenants, that "there is no better visual deterrent" was written many years ago and has been outpaced by technology, which was why the owner is proposing to install the 24/7 camera system, whose superiority is explained in the application. Counsel reiterated the same assertions made by the owner's prior counsel in support of the application, and asserted that the proposed security system is an adequate substitute for the existing system. Counsel also asserted that a similar application has been granted by the DHCR, and referred to *Matter of Shahid v New York State Division of Housing and Community Renewal* (84 AD3d 822 [2d Dept 2011]).

The owner's counsel also asserted that the tenants have not demonstrated that the elimination of the lobby attendant position is contrary to the union contract; that other staff members are available to shovel snow and sign for packages; that the existing advertisement from a website that mentions a lobby attendant during the PAR period merely demonstrates that the owner is continuing to provide services pending the determination of the PAR; and that the tenants have not demonstrated any deficiency in the contractor selected to install the cameras.

The Deputy Commissioner of the DHCR, in a order and opinion issued on August 28, 2015, determined that the tenants' appeals lacked merit and the denied the tenants' PARs. The Deputy Commissioner found that the Rent Administrator properly granted permission to modify services, stating as follows:

> "It has been long-standing DHCR policy that an application for modification of services may be granted when it is determined that the proposed modification is an adequate substitute for the existing service. DHCR granted permission in the past to substitute live doormen or lobby attendants with video surveillance systems which offered an equivalent level of building security. In this case, the tenants do not dispute the fact that the current lobby attendant is only on duty part-time, and that there is no attendant present at the building for more than half the hours of each week. The proposed video surveillance system will be operational 24/7 and will monitor areas in an around the building which the lobby attendant cannot observe. The surveillance will be monitored on-site by building staff as opposed to remote monitoring. In view of these facts, the Commissioner finds that the proposed video surveillance system will offer an equivalent level of security as the existing part-time lobby attendant, and there was thus no error by the Administrator in determining that the proposed surveillance system is an adequate substitute for the existing lobby attendant service. The petitioners have not established that the other services currently performed by the lobby attendant, including package receipt, cannot be performed by other building staff, as proposed by the owner. The inherent value of the tenant's leaseholds is not a factor in determining whether a proposed modification is an adequate substitute for an existing service. The owner is not required to submit documentation of contractor licensing in order to apply for and be granted permission to modify services. The alleged maintenance issues raised by petitioner Ringelheim, which are unrelated to the proposed modification of services, offer no relevant basis for revoking the Administrator's order".

Petitioners commenced the within Article 78 proceeding on October 27, 2015, and seek a judgment vacating and annulling the Deputy Commissioner's order of August 28, 2015 on the grounds that it arbitrary and capricious, an abuse of discretion, and violated

the Rent Stabilization Code; directing respondent California to continue doorman service at the subject premises; and awarding attorney's fees pursuant to CPLR 8601.

Petitioners assert that the maintenance of the doormen is a required ancillary service mandated by Rent Stabilization Code §2520.6(r)(3). Petitioners state that the doormen are present in the building's lobby 80 hours a week; 7 days a week from 4pm until 1am; and on Friday, Saturday and Sunday from 7am to 4pm. They allege that up until October 2013, after the owner submitted its application, the doormen were provided with a lobby desk; that the doormen help tenants come in and out of the building, sign for and hold packages from UPS and FedEx, and keep an eye on the lobby area to make sure no intruders enter the building. It is alleged that the doormen also assist numerous religiously observant tenants who cannot operate electrical devices on the Sabbath. Petitioners assert that all of these services cannot be replicated by a video camera system that will sit unattended day and night; that the landlord proposed to hire no employees to replace the doormen; that the doormen and superintendent are union employees; and that the owner's manual for door personnel detail the doormen's duties with respect to security. It is alleged that only a live person can act as a visual deterrent and provide real time security and prevent crime from occurring.

Petitioners also allege that the receipt of packages is part of the doormen's duties; that the owner did not provide for any replacement for this service other than to claim that the superintendent would now pick up packages when he was available; and that said offer does not constitute an adequate replacement for service currently provided.

Respondents Commissioner and DHCR, in opposition, assert that its determination denying the various PARs and upholding the Rent Administrator's determination, was neither arbitrary nor capricious, nor an abuse of discretion, nor erroneous, nor contrary to law. It is asserted that the agency's determination is rationally based in the law and the record, and therefore no basis exists for vacating the subject order or remanding the matter to the agency.

Respondents assert that a lobby attendant is an ancillary service within the meaning of Rent Stabilization Code §2520.6(r)(3); that pursuant to Rent Stabilization Code §2522.4(e) the owner applied to modify or substitute the lobby attendant service without any change in the rent; and that the owner demonstrated its proposed modification of eliminating the lobby attendant and providing a 24/7 video surveillance system, utilizing 8 security cameras, constituted an adequate substitute. It is further asserted that the tenants failed to the rebut the owner's claims that the additional services currently provided by the lobby attendant cannot be performed by other building staff, as proposed by the owner. It is also asserted that although the collective bargaining

agreement and door personnel manual should not have been presented for the first time on the PAR, neither document is dispositive and does not require a reversal of the agency's determination. Finally, respondents assert that the petitioners' request for attorney's fees pursuant to CPLR 8601 is premature.

Petitioners in their reply assert that the DHCR has not presented any rational basis to support its determination; that the agency took the owner's contentions at face value and totally disregarded all of the objections raised by the tenants, both at the Rent Administrator level and in deciding the PARs. It is asserted that such a one-sided analysis is not rational and should be annulled.

Judicial review of administrative determinations that were not made after a quasi-judicial hearing is limited to whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion (*see* CPLR 7803[3]; *Matter of Sasso v Osgood,* 86 NY2d 374, 384 [1995]; *Matter of Riverside Tenants Assn. v New York State Div. of Hous. & Community Renewal*, 133 AD3d 764, 766-767 [Dept 2015]; *Matter of London Leasing Ltd. Partnership v Division of Hous. & Community Renewal*, 98 AD3d 668, 670 [2d Dept 2012]). In such a proceeding, courts "examine whether the action taken by the agency has a rational basis," and will overturn that action only "where it is 'taken without sound basis in reason' or 'regard to the facts' " (*Matter of Wooley v New York State Dept. of Correctional Servs.*, 15 NY3d 275, 280 [2010], *quoting Matter of Peckham v Calogero*, 12 NY3d 424, 431, [2009]), or where it is "arbitrary and capricious" (*Matter of Deerpark Farms, LLC v Agricultural & Farmland Protection Bd. of Orange County*, 70 AD3d 1037, 1038 [2d Dept 2010]). "The court may not substitute its judgment for that of the DHCR" (*Matter of 85 E. Parkway Corp. v New York State Div. of Hous. & Community Renewal*, 297 AD2d 675, 676 [2d Dept 2002]). "The DHCR's interpretation of the statutes and regulations it administers, if reasonable, must be upheld" (*id* at 676; *see also Matter of Kripalani v State of N.Y. Div. of Hous. & Community Renewal,* 126 AD3d 904, 905 [2d Dept 2015]).

Taking into consideration all of the papers submitted herein, this court finds that the Deputy Commissioner's determination that the Rent Administrator was not in error, and his determination that the proposed security measures, as well as the determination that the proposed assumption of receipt and holding of packages, snow shoveling, and cleaning of the lobby by other personnel, were an adequate substitute for the services of the part-time doormen, is arbitrary and capricious. Cameras cannot adequately perform the services of a doorman and many tenants relied upon the existence of a doorman before they commenced their respective leaseholds.

Accordingly, based upon the record before this court, IT IS ORDERED AND ADJUDGED that the petition is granted to the extent of finding that the August 28, 2015 DHCR order by the Deputy Commissioner determining that the Rent Administrator was not in error by removing doorman services and replacing same by cameras is arbitrary and capricious, and in accordance therewith, IT IS FURTHER ORDERED AND ADJUDGED that the August 28, 2015 order is set aside and the matter is remanded to DHCR for further proceedings.

This constitutes the judgment of this court.

Dated: April 21 2016

Thomas D. Raffaele, J.S.C.

Audrey I. Pheffer

Clerk

ENTERED
11:34 AM
APR 27 2016
COUNTY CLERK
QUEENS COUNTY

FILED & RECORDED
APR 27 2016
COUNTY CLERK
QUEENS COUNTY