Matter of Kostro v New York State Div. of Hous. And Community Renewal
2019 NY Slip Op 30569(U)
March 7, 2019
Supreme Court, New York County
Docket Number: 158174/18
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

THOMAS KOSTRO,

Petitioner,

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

Index No.: 158174/18
DECISION/ORDER

-against-

THE NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent,

-and-

370 FORT WASHINGTON AVENUE, LLC,

Respondent-Intervenor.

---X

HON. CAROL R. EDMEAD, JSC:

In this Article 78 proceeding, petitioner Thomas Kostro (Kostro) seeks a judgment to overturn an order of the respondent New York State Division of Housing and Community Renewal (DHCR) as arbitrary and capricious (motion sequence number 001). For the following reasons, this petition is denied and this proceeding is dismissed.

FACTS

Kostro is the tenant of apartment 403 in a building located at 370 Fort Washington Avenue in the County, City and State of New York (the building). *See* verified petition, ¶ 18. The building is owned by the respondent-intervenor 370 Fort Washington Avenue, LLC (the landlord). *Id.*, ¶ 6. The respondent DHCR is the state agency charged with registering all rent-stabilized apartment units in buildings that are located in New York City, and with overseeing

and enforcing the Rent Stabilization Code (RSC). *Id.*, ¶ 3.

Kostro initially took possession of apartment 403 via a non-rent-stabilized lease that ran from June 1, 2010 through May 31, 2011 with a monthly rent of $2,495.00. *See* verified petition, ¶ 18; return, exhibit A-1. Kostro researched apartment 403's rent history at the DHCR, however, and came to believe that the apartment was actually a rent-stabilized unit that the landlord had illicitly deregulated. *Id.*, ¶ 20. As a result, Kostro fell into a dispute with the landlord, who refused to offer Kostro a renewal lease when the initial lease ran out. *Id.*, ¶ 19. Consequently, on June 3, 2011, Kostro filed a rent overcharge complaint with the DHCR, and continued to occupy apartment 403 as a month-to-month tenant. *Id.*, ¶ 24.

On August 21, 2015, a DHCR Rent Administrator issued an order that denied Kostro's rent overcharge complaint (the RA's order). *See* return, exhibit A-25. Kostro thereafter filed a Petition for Administrative Review (PAR) with the DHCR Commissioner's office on September 24, 2015. *Id.*, exhibit B-1. On July 6, 2018, the DHCR Commissioner issued an order that denied Kostro's PAR (the PAR order). *Id.*, exhibit B-6. That order is the subject of this proceeding. The first portion of the PAR order discussed the legal standards governing Kostro's rent overcharge claim, and quoted from the text of Rent Stabilization Code (RSC) § 2520.11, and the Court of Appeals' holding in *Altman v 285 W. Fourth LLC* (31 NY3d 178 [2018]). *Id.* The PAR order then recited the rule that, where an apartment's legal regulated rent is $2,000.00 per month (or greater) at the time of the vacancy which precedes a complaining tenant's occupancy, that apartment is no longer rent-stabilized. *Id.* The PAR order noted the landlord's allegation that the deregulation of apartment 403 was proper, since the landlord was entitled to raise the apartment's rent over the $2,000.00 limit by adding a permanent "Individual Apartment

Improvement" (IAI) rent increase equal to 1/40th of the $55,000.00 total that it had expended to renovate the unit before Kostro's lease commenced. *Id.* Finally, the PAR order addressed the proofs of payment that the landlord submitted to support its claimed IAI rent increase, and found:

> "In the instant case, the owner gave adequate proof of the installation and costs of over $55,000.00 in IAI's in the subject apartment prior to the complaining tenant's occupancy. The owner submitted . . . [copies of four sets of invoices from, and cancelled checks to, a contractor and three suppliers]. It is noted that, contrary to the tenant's allegation that there was only some new paint and a few new appliances in the apartment when he moved in, the architect acting as the tenant's expert stated that the 'renovations that [he] observed would have required DOB [i.e., New York City Department of Buildings] filings including . . . a DOB alteration application, a plumbing filing and an electrical filing.'
>
> "Submission of itemized invoices, and of proof of payment for those invoices for items and work done in the subject apartment prior to the complaining tenant's taking possession of the apartment, is sufficient evidence pursuant to OB 2016-1 to show that the IAIs referenced by such invoices were in fact performed and paid for. The owner has therefore proven that the IAIs were performed in the subject apartment, prior to the complaining tenant's tenancy, at a cost of more than $55,000.00. The [RA] was therefore correct to allow $55,000.00 in IAI costs to be calculated into the tenant's vacancy rent, and to find that, including such costs, the legal rent for the subject apartment was over the threshold for deregulation at the time that the complaining tenant took occupancy.
>
> "The fact that some of the above-referenced checks are not signed, and/or state that they are non-negotiable, does not render them unreliable. The important fact in this regard is that each of the above-referenced checks was in fact deposited by the payee, as shown by the owner's evidence. This is sufficient to show that payments were in fact made by the owner, and received by the contractors/vendors-payees.
>
> * * *
>
> "The [RA] properly confined his investigation regarding the IAIs into whether such IAIs were in fact performed and paid for (and at what cost), which they were, as explained above. Issues of whether the parties who performed the IAIs were properly licensed, and whether the owner obtained necessary permits to perform such IAIs, are not relevant to whether the IAIs were performed or paid for. The owner's alleged failure to hire licensed professionals, and/or to obtain relevant permits and permissions, should be addressed to the authorities overseeing these

matters.

> "Contrary to the tenant's allegations, the owner's submissions were properly made, and there is no evidence that such submissions were made by unauthorized persons.
>
> "Accordingly, because the legal regulated rent exceeded the threshold for deregulation at the time the complaining tenant commenced his occupancy in this case, for the reasons set forth in [the RA's order] and as affirmed herein, and pursuant to *Altman*, the complaining tenant was not a rent-stabilized tenant when he took occupancy of the subject apartment."

Id. Thereafter, on August 31, 2018, Kostro commenced this Article 78 proceeding to overturn the PAR order (motion sequence number 001). *See* verified petition. The landlord and the DHCR filed answers on November 15 and November 20, 2018, respectively. *See* verified answers (landlord and DHCR, respectively). Kostro's petition is now before the court.

DISCUSSION

Normally, a court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or 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 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. and Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination is arbitrary and capricious if it is "without sound basis in reason, and in disregard of . . . the facts." *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983); *citing Matter of Pell*, 34 NY2d at 231. If there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell*, 34 NY2d at 231-232. However, "[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts

is arbitrary and capricious." *Matter of Lantry v State of New York*, 6 NY3d 49, 58 (2005) (emphasis added); *see also Matter of London Leasing L.P. v Division of Hous. & Community Renewal*, 153 AD3d 709, 711 (2d Dept 2017). Here, Kostro raises three arguments that the PAR order was an arbitrary and capricious determination.

The middle of these arguments is the one which merits the most consideration. Kostro argues that "DHCR was bound to follow the dictates of Operational Bulletin 2016-1." *See* verified petition, ¶¶ 78-88. The DHCR promulgated that bulletin at some point in 2016 to update the agency rules that it had previously promulgated in "Policy Statement 90-10." Operational Bulletin 2016-1 provides, in pertinent part, as follows:

> "I. PROOF OF PAYMENT
>
> "A. Acceptable forms of proof:
>
> "Claimed [IAIs] are required to be supported by adequate and specific documentation, which should include
>
> "1. Cancelled check(s) (front and back) contemporaneous with the completion of the work or proof of electronic payment;
> "2. Invoice receipt marked paid in full contemporaneous with the completion of the work;
> "3. Signed contract agreement; and
> "4. Contractor's affidavit indicating that the installation was completed and paid in full.
>
> "This documentation requirement calls for a higher standard of proof than found in Policy Statement 90-10 which provided that only one of the above forms of proof was necessary unless the DHCR requested additional proof. However, actual processing has shown that more than one type of proof is the norm rather than the exception. Therefore, the owner should submit as many of the four listed forms of proof as the owner is able to provide with the initial submission/answer .

* * *

"V. WHAT QUALIFIES AS AN INDIVIDUAL APARTMENT IMPROVEMENT?

* * *

"Other Costs:

"The costs associated with the demolition or removal of the item(s) being replaced may be included in the amount eligible for the rent increase when the removal or demolition is necessary and is performed contemporaneously with the work.

"Architectural or engineering services **which are directly related to an IAI** are considered part of the allowable costs eligible to be included in calculating a rent increase when the work requires approval by a Registered Architect or Professional Engineer for the issuance of a permit by the [DOB]."

See verified petition, exhibit N (emphasis in original). Kostro filed his overcharge complaint with the DHCR on June 6, 2011. *See* return, exhibit A-1. The RA's order was issued on August 21, 2015. *Id.*, exhibit A-25. Policy Statement 90-10 was in effect during both of these filings. The PAR order was issued on July 6, 2018. *Id.*, exhibit B-6. Operational Bulletin 2016-1 was in effect at that time. In his petition, Kostro cites the 1989 decision of the Appellate Division, Second Department, in *Matter of J.R.D. Mgt. Corp. v Eimicke* (148 AD2d 610 [2d Dept 1989]), to support the argument that the DHCR "must determine a tenant's complaint for rent overcharge under the laws existing at the time of the determination and not at the time the complaint is filed." *See* verified petition, ¶ 86. The DHCR merely responded that "*J.R.D Management* is dissimilar to the case at hand," apparently because different administrative time lines were followed in each case. *See* memorandum of law in opposition (DHCR), at 5-6. This argument is unpersuasive because its logic is not apparent. However, the court''s research disclosed the 1990 decision of the Appellate Division, First Department, in *Matter of 590 W. End Assoc. v State Div.*

of Hous. & Community Renewal (166 AD2d 184 [1st Dept 1990]), which expressly *declined* to follow the Second Department's rule in *Matter of J.R.D. Mgt. Corp. v Eimicke*. The First Department held that the DHCR "would have had the option of choosing retroactive application of the less stringent requirements of the [earlier rule], if it had seen fit . . . but it was not obliged to do so." 166 AD2d at 185 (internal citations omitted). This First Department holding, which is evidently still good law, undercuts Kostro's argument, and the court therefore rejects it.

Kostro had argued in the alternative that it did not matter whether the landlord's submissions were reviewed under Policy Statement 90-10 or Operational Bulletin 2016-1, because "the owner has not submitted ANY of" the acceptable forms of proof. *See* verified petition, ¶¶ 83, 88 (emphasis in original). However, this assertion is clearly belied by the administrative record, which indisputably contains copies of the invoices and cancelled checks from the landlord's contractor and vendors. *See* return, exhibits A-11, A-14, A-18, A-22, A-24. Thus, the court rejects Kostro's argument as unfounded. Instead, it is apparent that the landlord did support its IAI application with several of the regulation-approved forms of proof of payment (since several of the invoices appear to take the form of "paid in full" contracts). Therefore, the court concludes that there was a rational basis in the record to justify the DHCR Commissioner's PAR order, since the evidence in that record included "as many of the four listed forms of proof as the owner is able to provide," in satisfaction of both Operational Bulletin 2016-1 and Policy Statement 90-10. Accordingly, the court rejects this argument too.

Kostro's two other alternative arguments are easily disposed of. First, Kostro argues that "the landlord's purported improvements required licensed contractors and permits." *See* verified petition, ¶¶ 64-77. Kostro cites no case law to support this proposition. The DHCR, however,

presents copies of three recent PAR denials (issued between 2017 and today) each of which recites the agency's position that the RSC does *not* require a landlord applying for an IAI increase to demonstrate that it used licensed contractors to perform the work. *See* Lipnick affirmation in opposition (DHCR), exhibits D, E, F. Kostro's petition merely refers to RSC § 2522.4 (a) (15), which provides, in pertinent part, as follows:

> "(15) Where during the processing of a rent increase application filed pursuant to paragraph (2) of this subdivision, tenants interpose answers complaining of defective operation of the major capital improvement, the complaint may be resolved in the following manner:
>
> > "(i) Where municipal sign-offs (other than building permits) are required for the approval of the installation, and the tenants' complaints relate to the subject matter of the sign-off, the complaints may be resolved on the basis of the sign-off, and the tenants referred to the approving governmental agency for whatever action such agency may deem appropriate.
> >
> > "(ii) Where municipal sign-offs are not required, or where the alleged defective operation of the major capital improvement does not relate to the subject matter of the sign-off, the complaint may be resolved by the affidavit of an independent licensed architect or engineer that the condition complained of was investigated and found not to have existed, or if found to have existed, was corrected . . .."

9 New York City Administrative Code § 2522.4. However, this Code provision only applies where "tenants interpose answers complaining of defective operation of the major capital improvement (MCI)." It is inapplicable here because: 1) the landlord applied for an IAI rent increase, *not* an MCI rent increase; 2) Kostro's rent overcharge complaint did not allege that the landlord's IAI work was "defective," but that the landlord did not do the work; and 3) Kostro's rent overcharge complaint did not specify which items of the landlord's IAI work (if any) required a "municipal sign-off." Therefore, the court concludes that RSC § 2522.4 (a) (15) is

inapposite, and rejects Kostro's argument. The court also notes that Kostro's reference to Article V of Operational Bulletin 2016-1 is irrelevant, since that portion of the document only mentions DOB permits in the context of architectural or engineering work, neither of which the landlord included in its IAI application. *See* memorandum of law in opposition (landlord), at 12.

Second, Kostro argues that "DHCR acted arbitrarily and capriciously in permitting the owner . . . to raise the rent with no proof that the alleged renovations had been made and no proof of the cost of said repairs." *See* verified petition, ¶¶ 89-101. However, as discussed above, Kostro's assertions of "no proof" are flatly belied by the copies of the invoices and cancelled checks from the landlord's contractor and vendors that were considered by the RA and the DHCR Commissioner in their respective orders, and that are plainly contained in the administrative record. *See* return, exhibits A-11, A-14, A-18, A-22, A-24, A-25, B-6. Therefore, the court rejects Kostro's assertion as unfounded. Accordingly, the court finds that Kostro's Article 78 petition lacks merit, and that this proceeding should be dismissed.

DECISION

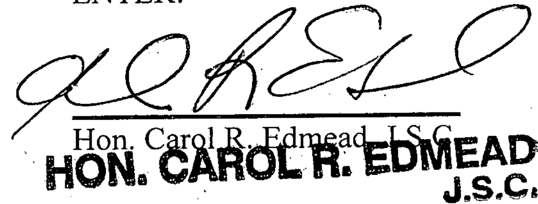
ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED and ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Thomas Kostro (motion sequence number 001) is denied and the petition is dismissed and the Clerk of the Court shall enter Judgment accordingly; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for Respondent.

Dated: New York, New York
March 7, 2019

ENTER:



Hon. Carol R. Edmead, J.S.C.
HON. CAROL R. EDMEAD
J.S.C.