

118 Duane LLC v New York State Div. of Homes & Community Renewal

2020 NY Slip Op 30912(U)

March 31, 2020

Supreme Court, New York County

Docket Number: 158893/2018

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

INDEX NO. 158893/2018
MOTION DATE 05/03/2019
MOTION SEQ. NO. 001

118 DUANE LLC,
Petitioner,

For a Judgment under Article 78 of the Civil Practice Law &
Rules,

- v -

NEW YORK STATE DIVISION OF HOMES AND
COMMUNITY RENEWAL, JIM FARMER, SUSANNE
COLUMBIA, ALAN PETERS, BERNARD CHODOSH,
CONNIE CHODOSH, TED THAI, AMY BERMAN, VICTOR
GOUREVITCH, and JACQUELINE GOUREVITCH,

DECISION + ORDER ON
MOTION

Respondents.

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 36, 37, 39, 40, 41,
42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 65, 66

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

ORDER

Upon the foregoing documents, it is

ORDERED that the petition of 118 Duane LLC pursuant to Article
78 is granted only to the extent that the part of the determination
of respondent New York State Division of Homes and Community
Renewal dated July 31, 2018 that found that the plans filed by
petitioner, approved by the New York City Department of Buildings,
do not meet its definition of demolition is annulled, reversed and
vacated, as such finding was made without a rational basis and is
arbitrary and capricious, and it is further

ORDERED and ADJUDGED that the petition of 118 Duane LLC is
otherwise denied, and the proceeding dismissed; and it is further

ORDERED that respondents shall file a copy of this order with notice of entry and proof of service thereof on the petitioner with the County Clerk's Office.

DECISION

The petitioner 118 Duane LLC (petitioner) commenced this Article 78 special proceeding, pursuant to CPLR §§ 7801, 7803 (3), seeking an order (1) reversing, annulling and setting aside the July 31, 2018 order issued by the respondent, the New York State Division of Homes and Community Renewal (DHCR); and (2) granting petitioner's applications seeking approval to refuse to renew the rent stabilized tenants' leases so it may demolish the property located at 118-120 Duane Street, New York, New York (premises). Respondents DHCR and Jim Farmer, Susanne Columbia, Bernard Chodosh, Connie Chodosh, Ted Thai, Amy Berman, Victor Gourevitch and Jacqueline Gourevitch (tenants) filed verified answers. Tenants oppose the petition and DHCR files a brief in opposition.

Background

Petitioner is the owner and landlord of the premises, a five-story mixed residential and commercial use building, located at 120 Duane Street, New York, NY. Tenants are rent stabilized tenants of the premises. The DHCR is the state agency charged with overseeing all rent-controlled and rent-stabilized apartments.

Based upon its desire to demolish the premises, petitioner submitted plans to the New York City Department of Buildings (DOB) for a full demolition of the premises (NYSCEF Doc. No. 5). On July 22, 2014, the DOB approved petitioner's plans (Ibid.). Thereafter, on December 30, 2015, petitioner filed five applications with the DHCR, pursuant to the Rent Stabilization Code § 2524.5 (a) (2) (RSC), "seeking DHCR approval to evict the above-referenced tenants of record from their respective apartments because the building would be demolished" (id.).

In support of the applications, petitioner submitted a proposal from a demolition contractor, an affidavit from the project engineer, work plans, and a plan/work application (PW1). Also included in petitioner's applications was a bank statement indicating funds of \$4,850,000.00 were on deposit and sufficient to cover the demolition, as well as the estimated tenant stipends of \$2,070,000.00 (id.). Petitioner supplemented its application with additional bank statements and an amended PW1.

Tenants opposed the petitioner's applications arguing that petitioner failed to satisfy its burden of showing good faith in the commencement of a demolition proceeding because (1) the applications and plans filed with the DOB referenced a partial demolition rather than a full demolition; and (2) petitioner failed to submit plans for the construction of a new building.

On August 10, 2017, the DHCR's Rent Administrator (RA) issued five identical orders denying the applications. The RA noted that petitioner failed to set forth proof that the proposed plan met the standard for demolition as set forth in RSC § 2524.5(a)(2), and did not set forth, in good faith, future plans for the demolition site (NYSCEF Doc. No. 4; RA's August 10, 2017 order).

On September 14, 2017, petitioner filed five petitions for administrative review (PARs) with the DHCR deputy commissioner's (commissioner) office under DHCR docket nos. DX4100010E, DX410002E, DX4100030E, DX4100040E and DX4100050E, to administratively appeal the RA's August 10, 2017 order. In the PARs, petitioner argued that the RA's order was arbitrary, capricious and incorrect on the law.

On July 31, 2018, the commissioner issued an order consolidating the five PARs and affirming the RA's orders which denied petitioner's applications (NYSCEF Doc. No. 3). The commissioner upheld the denial of the approvals, concluding that (1) petitioner's proposed work did not meet the level required for demolition; (2) petitioner's submission did not meet the qualification for showing its financial ability to complete the undertaking; and (3) petitioner failed to demonstrate that it is proceeding in good faith to demolish the premises (id.).

Having exhausted all administrative remedies, petitioner filed the instant Article 78 petition seeking judicial review of the commissioner's July 31, 2018 order, on the grounds that it is arbitrary, capricious and an abuse of discretion, was affected by an error of law, and/or made in violation of lawful procedure.

Discussion

The DHCR is the state agency that administers the Rent Stabilization Laws (RSL) and enjoys broad authority to implement the law (Matter of Salvati v Eimicke, 72 NY2d 784 [1988]; Matter of Gaines v New York State Div. of Hous. & Community Renewal, 90 NY2d 545 [1997]). RSL have been enacted that require landlords to seek permission to refuse to renew rent stabilized leases and to demolish buildings that are subject to the rent stabilization code (RSC § 2524.5 [a] [2]). The RSL are designed to address the serious public emergency which exists in New York City of an acute shortage of dwellings for residence (Braschi v Stahl Assoc. Co., 74 NY2d 201 [1989]). In general, the RSC shall be

"construed so as to carry out the intent of the Rent Stabilization Law to ensure that such statute shall not be subverted or rendered ineffective, directly or indirectly, and to prevent the exaction of unjust, unreasonable and oppressive rents and rental agreements, and to forestall profiteering, speculation and other disruptive practices tending to produce threats to the public health, safety and general welfare; and that the policy herein

expressed shall be implemented with due regard for the preservation of regulated rental housing" (RSC § 2520.3).

A party aggrieved by an agency determination may file a petition for administrative review (PAR) within 35 days after the date the order was issued (RSC § 2529.2). A PAR determination is the final order of the commissioner (DHCR Office of Rent Administration Policy Statement 91-5) and is ripe for judicial review pursuant to article 78 of the CPLR (see RSC § 2530.1; Matter of 60 E. 12th St. Tenants' Assn v New York State Div. of Hous. & Community Renewal, 134 AD3d 586, 589 [1st Dept 2015]).

CPLR §7803 states that a court's review of a determination by an agency, such as DHCR, consists of 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, including abuse of discretion as to the measure or mode of penalty imposed (CPLR §7803[3]; Matter of Montefusco v New York State Div. of Hous. & Community Renewal, 22 Misc 3d 1131(A), [Sup Ct NY County 2009]; Matter of Windsor Place Corp. v New York State Div. of Hous & Community Renewal, Off. of Rent Admin., 161 AD2d 279 [1st Dept 1990]; Matter of Mazel v Mirabal, 138 AD2d 600 [2d Dept 1988]; Matter of Bambeck v New York State Div. of Hous & Community Renewal, Off. of Rent Admin., 129 AD2d 51 [1st Dept 1987], lv den 70 NY2d 615 [1988]).

“In reviewing an administrative agency determination, [courts] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious.” (Matter of Murphy v New York State Div. of Hous. & Community Renewal, 21 NY3d 649, 652 [2013][citation omitted]); Matter of Peckham v Calogero, 12 NY3d 424, 431 [2009], quoting Matter of Gilman v New York State Div. of Hous. & Community Renewal, 99 NY2d 144, 149 [2002]). It is well settled that a determination is arbitrary and capricious when it is made “without sound basis in reason and is generally taken without regard to the facts” (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, 231 [1974]). “Even though the court might have decided differently were it in the agency's position, the court may not upset the agency's determination in the absence of a finding, not supported by this record, that the determination had no rational basis.” (Matter of Mid-State Mgt. Corp. v New York City Conciliation & Appeals Bd., 112 AD2d 72, 76 [1st Dept 1985], affd 66 NY2d 1032 [1985]). Therefore, in the instant case, the court's role is limited to a determination whether or not the DHCR's determination was made without a rational basis.

In support of its petition for an order reversing, annulling and setting aside the July 31, 2018 order issued by the DHCR, petitioner argues that (1) its application and plans

meet the DHCR's standard for demolition; (2) it has demonstrated its financial ability to complete the demolition; and (3) it is not required to present any evidence of its future plans for the demolition site.

The RSL Standard for Demolition

New York City Rent and Rehabilitation Law [Administrative Code of City of NY] (RSL) § 26-511 (c), at sub-paragraph 9(a) states:

"A code shall not be adopted hereunder unless it appears to the division of housing and community renewal that such code:

(9) provides that an owner shall not refuse to renew a lease except:

(a) where he or she intends in good faith to demolish the building and has obtained a permit therefor from the department of buildings".

Pursuant to RSL § 26-511(c) (9) (a), RSC § 2524.5 (a) (2) entitled "Grounds for refusal to renew lease or discontinue hotel tenancy and evict which require approval of the DHCR," provides in pertinent part:

"(a) The owner shall not be required to offer a renewal lease to a tenant or continue a hotel tenancy, and shall file on the prescribed form an application with the DHCR for authorization to commence an action or proceeding to recover possession in a court of competent jurisdiction after the expiration of the existing lease term, upon any one of the following grounds:

"(2) Demolition.

(i) The owner seeks to demolish the building. Until the owner has submitted proof of its financial ability to complete such undertaking to the DHCR, and plans

for the undertaking have been approved by the appropriate city agency, an order approving such application shall not be issued.

The New York City Building Code (Administrative Code of City of NY § 27-232), defines "demolition" as, "[t]he dismantling or razing of all or part of a building, including all operations incidental thereto." However, there is no definition of "demolish" or "demolition" in the Rent Stabilization Code. Without an amendment to the RSC, DHCR need not precisely or expansively interpret the word "demolition" in making its determination. (Matter of Peckham v Calogero, 12 NY3d 424 [2009]). In the Matter of Peckham v Calogero (12 NY3d 424 [2009]), the Court of Appeals upheld an owner's demolition application where the owner's plan was to remove the entire interior of the building.

In Freidman v Ontario Holding Corp. (279 App Div 23 [1st Dept 1951]), the court held that the New York City Building Code and the Business Rent Law, used the term "demolish" in its commonly accepted meaning and that the same standard of a demolition is something less than a razing of a building to the ground. (Friedman at 25).

Here, the approved plans provide for the removal of the roof, walls, apartments and/or commercial units of the premises. Notwithstanding the tenants' assertion that a significant

portion of the interior premises was to remain up to the third floor after demolition, it is clear that the existing housing accommodations and the entire interior of the premises will be demolished. The proposed plans must be considered a demolition, even though it includes a partial, temporary emergency staircase for the neighboring building. From the record before the court, it appears that one would be able to stand in the cellar and see the sky. The fact that part of the former structure is usable on a temporary emergency basis does not change the result (Jack LaLanne Biltmore Health Spa v Builtland Partners, 99 AD2d 705 [1st Dept 1984]). The tenants' claim that the applications were at some point filed with a designation of a "partial demolition", does not change the fact that petitioner's proof set forth a plan for a full demolition of the premises. Therefore, whether the commissioner acted arbitrarily and capriciously by failing to rule on the petitioner's amended PW1 is irrelevant on the issue of demolition. The commissioner's finding in the PAR order included factual determinations that "the interior of the premises was not being entirely gutted from the ground floor to the roof" (PAR Order p. 5). As the approved plans call for the razing of the building and all apartments therein to the ground, the court is satisfied that petitioner has met the standard of demolition as set forth in RSC § 2524.5 (a) (2). Thus, the DHCR's stated rationale for the denial on

the grounds that petitioner has not met the standard for demolition does not set forth a rational basis for such a determination and is arbitrary.

The court finds that the commissioner's factual findings on the issue of demolition was arbitrary and that portion of the commissioner's order is hereby annulled, reversed and set aside.

Petitioner's Intention to Complete the Undertaking

Petitioner challenges DHCR's determination that petitioner has not (1) demonstrated the financial ability to complete the demolition; and has not (2) demonstrated a good faith intent to demolish the premises. As stated above, RSL § 26-511(c)(9)(a) requires an owner show good faith in its application to demolish the premises. -

The courts defer to the agency's interpretation of a statute which it is charged with the responsibility of administering, where the agency has special expertise in that area (Matter of Gruber v New York City Dept. Of Personnel-Sweeney, 89 NY2d 225 [1996]). Here, the DHCR has special expertise in scrutinizing applications brought pursuant to RSC § 2524.5 (a) (2), therefore, the DHCR's interpretation and construction of RSC § 2524.5 (a) (2) is given deference by the court.

Operational Bulletin 2009-1, issued on February 10, 2009, which is entitled "Procedures Pursuant to the Rent

Stabilization Code for the Filing of an Owner's Application to Refuse to Renew Leases on the Grounds of Demolition, provides, in part:

"No demolition application will be accepted by DHCR unless the owner has submitted proof to DHCR of financial ability to complete such undertaking. Evidence of financial ability to complete the project may include a letter of intent or a Commitment Letter from a financial institution or such other evidence as DHCR may deem appropriate under the circumstances."

Financial Ability and Good Faith

In Calamaras v 23rd Second Avenue, LLC, 305 AD2d 216 [1st Dept 2003]), the first department held that in a proceeding in which a landlord sought permission from DHCR to evict tenants for the purpose of constructing a new building, a requisite showing of a good faith intention and financial ability to construct such new building on the part of the owner must be made. For such holding, the Calamaras court cited and relied upon Matter of Baba v 1133 Bldg. Corp, 210 AD2d 6 (1st Dept 1994), where the court found rational DHCR's determination, based upon an "exhaustive inquiry" that the owner "demonstrated the requisite good faith intention to demolish the [hotel] for the purpose of building a new commercial building on the site".

Here, as part of the application process, petitioner filed a PW1, as well as an amended PW1, which included a \$1,200,000.00 demolition proposal. Also included in the application was a

bank statement dated December 24, 2015, which indicated funds in the sum of \$4,850,007.00 were available in petitioner's account. Despite petitioner's subsequent submission of additional bank account statements, the commissioner noted that the petitioner did not provide a letter from a financial institution, nor a letter from the bank indicating (1) the funds for the project had been specifically segregated for the demolition project; and (2) petitioner had the financial ability to complete such undertaking (PAR Order p.6). In its order, the commissioner stated that the term "undertaking" is not limited to the demolition itself but rather the term undertaking includes any new construction or any other project that is planned for the site (Id.).

Here, petitioner, has failed to provide the DHCR with bank statements indicating liquid funds were segregated for the sole purpose of the demolition. Therefore, petitioner has not demonstrated its financial ability to complete the demolition. On that basis, the court concludes that no part of the commissioner's finding in the PAR Order on the issue of financial ability was arbitrary or capricious.

Finally, the commissioner determined that petitioner failed to proceed in good faith in its applications for demolition because it failed to include evidence of its future plans for the demolition site, unlike the owner in the Matter of Baba,

supra. While the legislature did not explicitly provide such a requirement under the RSL, petitioner's refusal to divulge its plans post-demolition, and the DHCR's inability to fairly and reasonably determine a cost estimate of the project and/or if the petitioner had the financial ability to complete its undertaking, provide(s) a rational basis for the denial of petitioner's applications. In the instant case, the DHCR cited to its own Operational Bulletin 2009-1, to establish that "such undertaking" is not limited to the demolition itself. The DHCR had a rational basis for requiring the petitioner to show good faith in its application, not only to demolish the premises, but to set forth plans for the future site. As the agency has set forth a rational basis for its denial, and the court cannot substitute its own judgment for that of the agency, such judgment shall not be disturbed.

3/31/2020
DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE