Matter of SH Harman LLC v New York State Div. of Housing & Community Renewal
2021 NY Slip Op 32205(U)
November 4, 2021
Supreme Court, Kings County
Docket Number: Index No. 505537/21
Judge: Ingrid Joseph
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At an IAS Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 4th day of November, 2021.

P R E S E N T:

HON. INGRID JOSEPH,
Justice.

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In the Matter of the Application of
SH HARMAN LLC,

Index No. 505537/21

Petitioner,

JUDGMENT

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

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent.

RE: DHCR Dkt. No. IV-210004-RO (GW-210004-UC)

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The following e-filed papers read herein:	NYSCEF Nos.:
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Upon the foregoing papers, petitioner, SH Harman LLC ("petitioner") seeks judicial review, under Article 78 of the Civil Practice Law and Rules, of an order by respondent, New York State Division of Housing and Community Renewal (DHCR), which denied petitioner's Petition for Administrative Review ("PAR") and affirmed an order by the Rent Administrator ("RA") dated August 28, 2020, who found that the petitioner failed to prove substantial

rehabilitation of the building at 287 Harman Street, Brooklyn, New York, so as to exempt the building from rent regulation under the Rent Stabilization Law ("RSL") and Code ("RSC").

Petitioner is the owner of the subject building at 287 Harman Street in Brooklyn. On November 21, 2018, petitioner filed an application with the DHCR to determine whether the subject building is exempt from regulation based on a substantial rehabilitation. Petitioner alleged that a gut renovation was performed to the vacant building under Department of Buildings (DOB) Alteration Job # 321245274 at a cost of $860,037.64, which renovation included the complete replacement of all building-wide and individual apartment systems. Among other documentation, petitioner submitted a sworn statement of architect Shawn Erica Stiles who filed the plans with the DOB and listed the following as being completely replaced under DOB Job #321245274: entire plumbing and heating systems; electrical wiring; intercoms; windows; roof; fire escapes; interior stairways; kitchens; bathrooms; all floors; ceilings and wall surfaces; exterior repair and pointing; and all doors and frames.

On August 28, 2020, the RA issued an order denying petitioner's application for substantial rehabilitation, determining that petitioner failed to demonstrate that the building was in substandard condition or at least 80% vacant when the renovation commenced. The RA noted that in a statement dated July 27, 2020, petitioner conceded that there were tenants living in the building when construction started on the first floor but they moved out before work began on the other floors. The RA noted that DOB records indicated that the DOB granted approval on February 8, 2016, under DOB Job # 321245274, for petitioner to renovate the existing residential building; to install new plumbing fixtures and new hot water heaters; to correct ECB Violation No. 35176701L and ECB Violation No. 35140547X, by capping/removing the existing boiler; and to obtain a new certificate of occupancy. According to the cost affidavit submitted to the

DOB by petitioner, the RA further noted that cost for interior renovations totaled only $62,900.00. The RA indicated that petitioner failed to adequately explain why DOB records did not support all the claimed replacements and that petitioner failed to provide verifiable evidence that at least 75% of the building-wide and individual apartment systems, including common areas, were completely replaced. The RA also found that petitioner failed to demonstrate that the renovations which may have been done complied with all applicable building codes and requirements.

Petitioner thereafter filed a PAR challenging the RA's order. Petitioner contended that the building was entirely vacant when the substantial rehabilitation was completed, and the Petitioner represented that the tenant of apartment 2L, who was in occupancy when the substantial rehabilitation commenced, signed a stipulation and temporarily moved out of the subject premises during the renovations. Additionally, Petitioner represented that apartment 2L was the only apartment that had a prior tenant reoccupy their apartment after the substantial rehabilitation was complete. Petitioner maintained that it was entitled to a presumption that the subject building was substandard, because the building was 83.33% vacant with only one tenant still in possession out of six units.

Petitioner produced photographs in further support of its argument. Petitioner alleged that the photographs alone showed that the building was in substantial disrepair when the Petitioner acquired it. Petitioner claimed that the before and after photographs also revealed the extent and breadth of the renovations completed. Petitioner also submitted various proofs of payment, including checks, to prove that the substantial rehabilitation cost exceeded $860,037.64. Additionally, the Petitioner's architect, Shawn Styles, submitted affidavits in support of petitioner's application and provided the RA with an affidavit confirming that the cost

affidavit submitted to the DOB was incorrect. Petitioner contended that it produced sufficient evidence proving that at least 75% of the building-wide and individual apartment systems, including common areas, were completely replaced. Petitioner further contended that when the work commenced in the building, the owner mistakenly did work in Apartments 1L and 1R without a permit but after receiving the stop work order from the DOB, Petitioner installed a fire guard and thereafter, fully complied with DOB requirements. Petitioner maintained that it received the appropriate permits, passed inspections, complied with DOB rules and further, that based upon the issuance of a new Certificate of Occupancy and DOB sign off alone, the building was legally substantially rehabilitated.

By order dated January 8, 2021, the Deputy Commissioner denied petitioner's PAR and affirmed the order of the RA. The Deputy Commissioner found, as a threshold matter, that petitioner failed to prove that the building was at least 80% vacant of residential tenants or was otherwise in substandard or seriously deteriorated condition when the renovations commenced. The Deputy Commissioner noted that petitioner conceded that there were tenants living in the building when the construction started on the first floor and DOB records further evidence the fact that when the renovation commenced in 2016 apartments 2L and 2R (33% of the total units in the building) were occupied during the construction. Among those DOB records cited by the Deputy Commissioner were petitioner's application under DOB Job # 321245274, wherein it indicated that the subject premises remained partially occupied, as well as violations issued by DOB inspectors on March 9, 2016 and March 17, 2016 which indicated that apartments 1L, 2L and 2R were occupied during the renovations. The Deputy Commissioner stated that these violations were affirmed by the DOB after a hearing on the merits. The Deputy Commissioner further found that other evidence in the record belied the fact that petitioner met the threshold

requirement for a substantial rehabilitation and that the photographs submitted did not establish that the building was in a substandard or seriously deteriorated condition. Finally, the Deputy Commissioner stated that the record further supported the other determinations made by the RA regarding petitoner's substantial rehabilitation evidence, which the RA found was insufficient to establish that the requisite number of building-wide and apartment systems were replaced.

The instant Article 78 proceeding ensued. In its petition, petitioner contends, in sum and substance, that the DHCR was arbitrary and capricious in overlooking or ignoring proofs submitted by petitioner to support its claims that the building was more than 80% vacant when work commenced, that the building was in substandard or seriously deteriorated condition and that the requisite number of building systems were replaced. In particular, petitioner contends that the agency arbitrarily and capriciously focused on the petitioner's initial submission and denied its exemption application, despite the evidence and statements to the contrary that the petitioner produced in response to requests for additional information.

A court's function in an Article 78 proceeding is to determine, upon the proof before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious (*Pell v Bd. of Educ.*, 34 NY2d 222, 230-231 [1974]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*id.* at 231). If a rational basis exists for its determination, the decision of the administrative body must be sustained (*id.* at 230; *Matter of Tener v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 159 AD2d 270 [1st Dept 1990]). If the determination is rational, it must be upheld, even though the court, if viewing the case in the first instance, might have reached a different conclusion (*see Matter of Mid-State Mgt. Corp. v New York City Conciliation & Appeals Bd.*, 112 AD2d 72 [1st Dept 1985], *affd* 66 NY2d 1032 [1985]). Stated simply, this

court "may not substitute its judgment for that of the [DHCR]," so long as the agency's decision is rationally based in the record (*Matter of 85 E. Parkway Corp. v New York State Div. of Hous. & Community Renewal*, 297 AD2d 675, 676 [2d Dept 2002]).

Deference to DHCR's determinations may be particularly appropriate where they relate to "fact-intensive issue[s] falling within the area of [the agency's] expertise" (*Matter of Brusco W. 78th St. Assocs. v DHCR*, 281 AD2d 165, 165 [1st Dept 2001]). An agency's interpretation and construction of its own regulations and the legislation under which it functions are given special deference by the courts, if that construction is not irrational or unreasonable (*see Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008]; *Matter of Chesterfield Assoc. v New York State Dept. of Labor*, 4 NY3d 597, 604 [2005]). Regarding fact-based inquiries, an administrative agency may determine the type of documentation necessary or appropriate (*see Matter of Rodriguez v County of Nassau*, 80 AD3d 702, 702 [2d Dept 2011]; *Matter of 2084-2086 Bronx Park E. v New York State Div. of Hous. & Community Renewal*, 303 AD2d 315, 316 [1st Dept 2003]; *Greystone Mgt. Corp. v Conciliation & Appeals Bd.*, 94 AD2d 614, 616 [1st Dept 1983], *affd* 62 NY2d 763 [1984]). Importantly, "an agency has great discretion in deciding which evidence to accept and how much weight should be accorded particular documents or testimonial statements, and its determination in that respect is subject only to the legal requirement that the administrative finding be rationally based" (*Kogan v Popolizio*, 141 AD2d 339, 344 [1st Dept 1988]). "Moreover, where, as here, the determination of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, we must accord such determination great weight and judicial deference" (*Palmer v New York State Dept. of Envtl. Conservation*, 132 AD2d 996, 997 [4th Dept 1987]). Thus, "in an Article 78 proceeding, the reviewing court may not weigh the evidence, choose between conflicting proof,

or substitute its assessment for that of the administrative fact finder" (*Matter of Porter v New York City Hous. Auth.*, 42 AD3d 314, 314 [1st Dept 2007]).

RSC 2520.11 (e) exempts from rent stabilization housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January 1, 1974. A building must meet certain criteria under the regulation and Operational Bulletin (OB) 95-2 to be exempt from rent stabilization due to a substantial rehabilitation. Among the criteria is that at least 75% of certain building-wide and apartment systems must each have been completely replaced with new systems, and that the rehabilitation must have been commenced in a building that was in a substandard or seriously deteriorated condition. RSC 2520.11 (e) (3) and OB 95-2 (I) (B) provide that the extent to which the building was vacant of residential tenants when the rehabilitation was commenced shall constitute evidence of whether the building was in fact in such condition, and where the rehabilitation was commenced in a building in which at least 80% of the housing accommodations were vacant of residential tenants, there shall be a presumption that the building was substandard or seriously deteriorated at that time.

Thus, under RSC 2520.11 (e) (3) and OB 95-2 (I) (B), even where there is no question that the requisite number of building-wide and apartment systems were completely replaced, an owner must establish, as a threshold matter, that the rehabilitation was commenced in a building that was in a substandard or seriously deteriorated condition. In this matter, the court finds the DHCR's determination of this threshold issue is rationally based in the record and is neither arbitrary nor capricious.

First, the DHCR rationally found that petitioner was not entitled to the presumption that the building was substandard or seriously deteriorated based on 80% vacancy, which finding was supported by the DOB violations indicating that two or even three of the apartments in the six-

unit building were occupied during the renovations, as well as petitioner's July 27, 2020 response to the DHCR's request for additional information which stated that tenants were occupying the building when renovations commenced. Moreover, the DHCR's finding that petitioner failed to submit sufficient evidence to show that the building was substandard or seriously deteriorated is neither arbitrary nor capricious. Petitioner's proof on this issue consisted of a series of photographs of certain apartments and areas of the building taken prior to the commencement of the work. However, the DHCR weighed all of the evidence provided and made factual evaluations in the area of the agency's expertise. Thus, the court, upon review, concludes that the DHCR's rejection of petitioner's photographs to establish that the building was in a substandard or deleterious condition was not irrational.

Since the DHCR's threshold finding that the building was not in a substandard or deleterious condition at the time the renovations commenced was rationally based in the record, the agency's ultimate determination that petitioner was not entitled to deregulate the building on the ground of substantial rehabilitation is neither arbitrary nor capricious, regardless of whether the requisite number of building-wide and apartment systems were in fact replaced.

Accordingly, the instant Article 78 petition is denied, and this proceeding is dismissed.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R

HON. INGRID JOSEPH, J. S. C.