351 Canal St. LLC v New York State Div. of Hous. & Community Renewal (DHCR)
2022 NY Slip Op 34156(U)
December 8, 2022
Supreme Court, New York County
Docket Number: Index No. 152314/2022
Judge: William Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

---X

351 CANAL ST. LLC,

Petitioner,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL (DHCR), ALEX MARX, LAYLA SHAAR

Respondent.

---X

INDEX NO. 152314/2022

MOTION DATE 03/17/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 32, 33, 35

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

In this Article 78 proceeding, petitioner 351 Canal St. LLC (landlord) 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).

FACTS

Landlord is the owner of a mixed-use building located at 351 Canal Street a/k/a 2 Wooster Street in the County, City and State of New York (the building). *See* verified petition, ¶ 1 (NYSCEF document 1). Co-respondents Alex Marx (Marx) and Layla Shaar (Shaar) are the tenants of rent stabilized apartment 4L in the building. *Id.*, ¶ 3. Landlord avers that apartment 4L is the building's last remaining residential unit. *Id.* The DHCR is the New York State agency charged with overseeing rent- stabilized housing accommodations located inside of New York City. *Id.*, ¶ 2.

On March 6, 2020, landlord filed an application with the DHCR for permission to terminate Marx's and Shaar's tenancy on the ground that it (landlord) intended to remove

apartment 4L from the rental market in order to convert it and the entire building into commercial premises to be used by a business that landlord owns. *See* verified petition, exhibit C (NYSCEF document 5). Marx and Shaar opposed the application in submissions to a DHCR rent administrator (RA). *Id.* On June 3, 2021, the RA issued a decision that denied landlord's application (the RA's order). *See* verified answer, exhibit D (NYSCEF document 20). Landlord then filed a petition for administrative review (PAR) of the RA's order, and the DHCR deputy commissioner's office issued its decision on January 18, 2022 that upheld the RA's order and dismissed the PAR (the PAR order). *See* verified petition, exhibit C (NYSCEF document 5). The relevant portion of the PAR order found as follows:

> "The Commissioner, having reviewed the entire evidentiary record, finds that the PAR should be denied, and the Rent Administrator's Order should be affirmed.
>
> "Pursuant to RSC §2524.5(a)(1)(i):
>
> '(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:
>
> (1) Withdrawal from the rental market. The owner has established to the satisfaction of the DHCR ...that he or she seeks in good faith to withdraw any or all housing accommodations from both the housing and non-housing rental market without any intent to rent or sell all or any part of the land or structure and:
>
> (i) that he or she requires all or part of the housing accommodations or the land for his or her own use in connection with a business which he or she owns and operates . . . [emphasis added].'
>
> "Here, the Commissioner finds that the petitioner has not satisfied the provisions of the RSC to justify the non-renewal.
>
> "As a first matter, the Commissioner finds that DHCR has the authority to request certain evidence from an owner, although there is no specific language in the RSC that requires such evidence. The statute authorizes DHCR to request such evidence to its satisfaction in order to determine petitioner's good faith in seeking eviction of a rent regulated tenant.
>
> "Secondly, the Commissioner finds that petitioner failed to submit approved DOB plans to the RA. Indeed, the petitioner submitted 'accepted' plans by the DOB, but not 'approved' plans. The Commissioner finds on the DOB's website that the architect's (Alfred Karman) submission to DOB was disapproved on November 24, 2020. Since that time up to June 3, 2021, petitioner has not submitted 'approved' architectural plans from

> the DOB. Any approval of DOB after issuance of the RA's Order is outside the scope of review on this proceeding.
>
> "Lastly, the Commissioner finds that the petitioner failed to demonstrate the funds in the bank account were solely earmarked for this project. The bank statement for the parent company indicated that the fund decreased from $537,744.10 on July 31, 2020 to $56,908.72 on August 27, 2020, which means that the funds were not solely earmarked for this project and a reasonable conclusion can be drawn that this bank account is merely used for the parent company's ordinary business transactions. Hence, the petitioner failed to provide sufficient evidence to show proper proof of financial ability.
>
> "Given the deficiencies in the petitioner's other evidence, the Commissioner need not decide on the propriety of a contractor's affidavit against a signed contract agreement.
>
> "THEREFORE, in accordance with the relevant Rent Regulatory Laws and Regulations, it is
>
> "ORDERED, that the owner's petition be, and the same hereby denied; and that the Rent Administrator's order be, and the same hereby is, affirmed."

Id. exhibit C (NYSCEF document 5). Landlord commenced this Article 78 proceeding to vacate the PAR order on March 22, 2022. *See* verified petition; aff of service (NYSCEF documents 1, 8). After counsel stipulated to several extensions of time to reply, the DHCR filed an answer on May 31, 2022. *See* verified answer (NYSCEF document 14). This matter is now fully submitted (motion sequence number 001).

DISCUSSION

The 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. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination will only be found 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 v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference.

Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d at 231-232.

Here, landlord's sole argument is that "the [RA] improperly denied the application based upon the failure to conduct a hearing." *See* verified petition, ¶¶ 28-30 (NYSCEF document 1). Landlord derives this argument from Section 2524.5 of the Rent Stabilization Code (RSC; "Grounds for refusal to renew lease or discontinue hotel tenancy and evict which require approval of the DHCR"), the pertinent portion of which provides as follows:

> "(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:
>
> > "(1) Withdrawal from the rental market. The owner has established to the satisfaction of the DHCR *after a hearing*, that he or she *seeks in good faith to withdraw any or all housing accommodations from both the housing and nonhousing rental market* without any intent to rent or sell all or any part of the land or structure and:
> >
> > > "(i) that he or she *requires all or part of the housing accommodations or the land for his or her own use in connection with a business which he or she owns and operates*; . . ."

9 NYCRR § 2524.5 (emphasis added). Landlord supports its argument by citing an unreported 2011 trial court order in *Raynier v 159 Eluji Assoc., LLC* (2011 NY Slip Op 34024[U] [Sup Ct NY County, 2011] [Trial Order], affd 92 AD3d 617 [1st Dept 2012]); however, that case dealt with the right to an award of attorney's fees and did not involve the issue of a hearing pursuant to 9 NYCRR § 2524.5 (a) (1) (i). Its holding is clearly inapposite to this case, as the DHCR notes in its opposition papers. *See* respondent's mem of law at 9-12 (NYSCEF document 26). The DHCR argues instead that "a hearing it is not required by law and is within DHCR's discretion to grant." *Id*. It cites a 2003 decision by the Appellate Division, First Department which upheld a trial court's order to quash certain subpoenas for material sought for use in a DHCR hearing on an application for certificates of eviction requested in connection with the demolition of a

building. *Calamaras v 23rd Second Ave.*, 305 AD2d 216 (1st Dept 2003). The First Department held that the RSC's hearing requirement "does not justify the fishing expedition that plaintiffs would undertake into every aspect of defendants' finances and projects." 305 AD2d at 216. However, that case involved a different provision of the RSC; specifically, 9 NYCRR § 2524.5 (a) (2) which does not include a requirement that the DHCR hold a hearing in building demolition scenarios. *Id.*; *see also Matter of 128 Hester LLC v New York State Div. of Hous. & Community Renewal*, 203 AD3d 482 (1st Dept 2022). Therefore, that decision too is inapposite. That is not sufficient for the current inquiry, however.

In *Pultz v Economakis* (10 NY3d 542 [2008]), the Court of Appeals repeated the observation that:

> "'It is fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature. The starting point is always to look to the language itself and where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning.'"

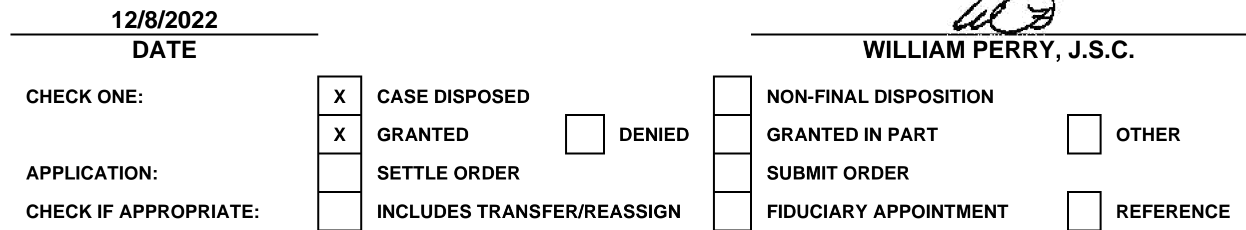
10 NY3d at 547 (internal citations omitted). *Pultz v Economakis* was a declaratory judgment action in Supreme Court rather than an Article 78 challenge to a DHCR determination. The Court found that the matter was governed by RSC § 2524.5 (a) (1) rather than RSC § 2524.5 (a) (1) (i), and that the evidence presented in support of the parties' summary judgment motions was sufficient to satisfy the landlord's burden of proof with respect to an "application to recover possession of one or more dwelling units for his or her own personal use and occupancy." 10 NY3d at 546. In a footnote, the Court acknowledged that RSC § 2524.5 includes the requirement that the DHCR hold a hearing in connection with such applications. 10 NY3d at 549. This court must do the same to "effectuate the intent of the Legislature." 10 NY3d at 547 [internal quotation marks and citation omitted]. The court is mindful that at such a hearing it is probable that Marx and Shaar will present the same evidence that is already contained in the

administrative record, and that it is possible that the DHCR will reach the same result as it did in the PAR order. Nevertheless, the language of RSC § 2524.5 (a) (1) (i) expressly includes a hearing requirement, and the case law does not support the DHCR's contention that such hearings are only held at the agency's discretion.

Accordingly, the court concludes that landlord's Article 78 petition should be granted.

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner 351 Canal St. LLC (motion sequence number 001) is granted and this proceeding is remanded to the respondent New York State Division of Housing and Community Renewal for a hearing pursuant to 9 NYCRR § 2524.5 (a) (1) (i).


12/8/2022
DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION		
	X	GRANTED		DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE