Stuyvesant Town-Peter Cooper Vil. Tenants Assn. v New York State Div. of Hous. & Community Renewal
2023 NY Slip Op 30034(U)
January 5, 2023
Supreme Court, New York County
Docket Number: Index No. 154097/2021
Judge: Frank P. Nervo

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANK P. NERVO** **PART** **04**

Justice

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STUYVESANT TOWN-PETER COOPER VILLAGE TENANTS ASSOCIATION, SUSAN STEINBERG,

Plaintiff,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, BPP ST OWNERS, LLC,BPP PCV OWNERS, LLC

Defendant.

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INDEX NO. 154097/2021

MOTION DATE 04/28/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 39, 40, 41, 42, 48, 49, 50, 51, 52, 53, 54, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73

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

Upon the foregoing documents, and following oral argument of September 12, 2022, the Court issues the following decision and order.

Petitioner seeks to annul and vacate several orders issued by respondent New York State Division of Housing and Community Renewal (hereinafter "DHCR") on February 26, 2021, which, inter alia, granted the owner's rent increase applications based upon major capital improvements (commonly referred to as "MCI").[1]

[1] The petition seeks to reverse and annul orders of the DHCR dated February 26, 2021, under Docket Nos. EU410046RT, EU410047RT, EU410048RT, EU410054RT, FS410011RT, FS410034RT, FV410011RT, FV410038RT, FX410022RT, GM410050RT, GN410043RT, GN410044RT, GN410045RT, GN410046RT, GN410047RT, GN410057RT, GR410031RT, GR410032RT, and GS410048RT.

The instant petition relates to the Stuyvesant Town – Peter Cooper Village complex, a development comprising 110 apartment buildings and over 11,000 apartments. As relevant here, certain façade work was performed across the complex, as periodically required by local law. Thereafter, the owner submitted applications for major capital improvement (MCI) and concomitant rent increases following such expenditures. The petition raises four issues:

1. whether respondents' properly determined the work performed on the subject buildings was depreciable consistent with Internal Revenue Service (IRS) standards;[2]

2. whether the two-year statute of limitations to file a major capital improvement application is calculated from the date of completion of work for an individual building or the date of completion of work in other buildings in the same complex;

3. whether respondents properly accepted the building owner's statement that insurance proceeds received as a result of damage from Hurricane Sandy did not overlap with the major capital improvement (MCI) work without substantiating documentation; and finally

[2] To the extent that petitioner asserts, as a separate issue, respondents' alleged failure to consider evidence submitted on the MCI applications, the Court addresses this issue within the context of the Major Capital Improvement – Depreciable Standard.

4. whether respondent correctly calculated the allocation between commercial and residential spaces under RSC § 2522.4(a)(16).

APPLICABLE ARTICLE 78 STANDARD

The standard of review of an agency determination via an Article 78 proceeding is well established. The Court must determine whether there is a rational basis for the agency determination or whether the determination is arbitrary and capricious (*Matter of Gilman v. New York State Div. of Housing and Community Renewal*, 99 NY2d 144 [2002]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Peckham v. Calogero*, 12 NY3d 424 [2009]; *see also 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]). When an agency determination is supported by a rational basis, this Court must sustain the determination, notwithstanding that the Court would reach a different result than that of the agency (*Peckham v. Calogero*, 12 NY2d at 431). "The court may not substitute its judgment for that of the DHCR" (*Matter of 85 E. Parkway Corp. v. Division of Hous. & Community Renewal*, 294 AD2d 675 [2d Dept 2002])

MAJOR CAPITAL IMPROVEMENT – DEPRECIABLE STANDARD

Rent Stabilization Law (RSL) § 26-511(c) and Rent Stabilization Code (RSC) § 2522.4(2)(1)(a) provide that to qualify as a major capital improvement (MCI) the work performed on a building must be depreciable under the Internal Revenue Code. RSC § 2522.4(a)(3)(19) further provides that rent increases may be granted for an MCI addressing "pointing and waterproofing – as necessary on exposed sides of the building". Petitioners allege that respondents have dispensed with the depreciable requirement with respect to façade pointing work, as respondents have applied the "as necessary" standard in RSC § 2522.4(a)(3)(19) without addressing whether the improvement was depreciable, as required by RSL § 26-511(c) and RSC § 2522.4(2)(1)(a).

The Tax Court of the United States' decision in *Universal Mills v. Commissioner* is instructive (7 TCM 886 [United States Tax Court 1948] [internal citation omitted]). There, the Tax Court differentiated between non-depreciable repairs and depreciable improvements:

> In determining whether an expenditure is a capital one or is chargeable against operating income, it is necessary to bear in mind the purpose for which the expenditure was made. To repair is to restore to a sound state or to mend, while a replacement connotes a substitution. A repair is an expenditure for the purpose of keeping the property in an ordinarily efficient

> operating condition. It does not add to the value of the property, nor does it appreciably prolong its life. It merely keeps the property in an operating condition over its probable useful life for the uses for which it was acquired. Expenditures for that purpose are distinguishable from those for replacements, alterations, improvements or additions which prolong the life of the property, increase its value, or make it adaptable to a different use.

There can be no argument that respondent DHCR's determination regarding the MCI did not address depreciably. Instead, DHCR found the work performed was "[c]omprehensive pointing and waterproofing on all exposed sides of the building as necessary and thereby met the requirements of a major capital improvement" (NYSCEF Doc. No. 3). Applying the "as necessary" standard under RSC § 2522.4(1)(3)(19) without determining whether the work performed amounts to a depreciable improvement is contrary to, inter alia, RSL § 26-511(c) and RSC § 2522.4(2)(1)(a).

Further evidence that respondent DHCR failed to address whether the work performed was a depreciable improvement, is the omission of the facts discussed by the Tax Court of the United States in *Universal Mills*, *supra*. There, the Tax Court found that the waterproofing at issue was depreciable because it was, inter alia: performed for the first time; improved the building by

creating something entirely new; and was of a significant scale. Here, there is no evidence that the respondents considered these factors. Furthermore, had respondents considered these factors, it is inescapable that the factors weigh against finding a depreciable improvement – the pointing and waterproofing were part of regular periodic work under Local Law 11 performed every five years (Façade Inspection Safety Program, "FISP"), the work amounted to a less than a single percent of the façade, and the building owner was not left with something new or "something that it had not had before" (*see Universal Mills*, *supra*).

Respondents are unable to provide support for their position that an "as necessary" or "comprehensive" standard may supplant the depreciable standard required under the RSL or RSC; the cases cited by DHCR are inapposite on the issue. Accordingly, the Court finds respondent DHCR's policy applying an "as necessary" standard to determine whether work performed amounts to an MCI violates the plain statutory language of RSL § 26-511(c) and RSC § 2522.4(2)(1)(a), which require an MCI be depreciable under the Internal Revenue Code; the petition must be granted on this basis ("[i]f the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight" *Kurcsics v. Merchants Mut. Ins. Co.*, 49 NY2d 451, 459

[1980]; *see also Roberts v. Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]). Stated another way, it is only after determining the work performed is depreciable under the Internal Revenue Code, and therefore amounts to an MCI, may DHCR then consider a rent increase based upon comprehensive façade pointing and waterproofing completed as necessary. The failure of DHCR to determine whether the instant work was first depreciable before determining whether the work was completed as necessary requires annulment and vacatur of same.

Assuming, *arguendo*, that respondent DHCR's application of the "as necessary" standard in place of "depreciable" standard was not violative of the RSL and RSC, respondents' determination that the instant work was comprehensive must nevertheless be reversed on these facts.

DHCR's determination involving its expertise is ordinarily entitled to deference; however, no deference is afforded the agency if its determination is irrational or unreasonable (*West Village Assoc. v Division of Hous. & Community Renewal*, 277 AD2d 112 [1st Dept 2000]). Respondent DHCR found that the work performed was "comprehensive". Notwithstanding this finding, it is undisputed that as little as 150 square feet of façade work was

performed on some of the fifteen story buildings with façades comprising approximately 1,000,000 square feet (NYSCEF Doc. Nos. 13 – 16). Where a landlord has performed work which, at best, amounts to less than a single percent of the façade, same cannot be said to be "comprehensive" (*see* Merriam Webster Dictionary defining comprehensive as "covering completely or broadly"; *cf. Matter of 430 E 86th St. Tenants Comm. v Division of Hous. & Community Renewal*, 254 AD2d 41 [1st Dept 1998] replacement of 80% of building's parapets and masonry repairs comprehensive). To the extent that respondents contend the entirety of the façades were inspected, a dearth of support has been proffered for the proposition that routine local law 11 façade inspection (FSIP), performed every five years as required by statute, constitutes repair or improvement work for the purposes of an MCI. Accordingly, and even assuming respondent DHCR was permitted to utilize an "as necessary" or "comprehensive" standard to find work constitutes an MCI without addressing whether same is depreciable, DHCR's determination that the instant work was comprehensive is irrational and unreasonable; the petition granted on this basis.

STATUTE OF LIMITATIONS

The next issue raised by this petition is whether the two-year statute of limitations for an owner to submit an MCI application is calculated from the

date of completion of work on an individual building or the date of completion of other buildings in the same complex.

RSC § 2522.4(a)(8) provides, in relevant part,

> No increase [in rent] shall be granted by the DHCR, unless an application is filed no later than two years after the completion of the installation or improvement unless the applicant can demonstrate that the appl8ciations could not be made within two years due to delay, beyond the applicant's control, in obtaining required governmental approvals for which the applicant has applied within such two-year period.

Petitioners allege that seven orders[3] of respondent DHCR failed to apply the two-year statute of limitations provided by RSC § 2522.4(a)(8), as the work performed on those buildings was completed more than two-years before the owner submitted the MCI applications. Respondent DHCR denied the petitioners PAR request regarding same finding, "[i]t is the established position of the Division that in instances where an owner has contracted for a complex-wide exterior restoration with one contractor, and payment for the work was made on a complex-wide basis, the date of completion for the work in the

[3] EU410047RT, EU410048RT, FS410011RT, FX410022RT, GN410045RT, GN410046RT, and GN410057RT.

complex is considered to be the date on which all work performed under the complex-wide MCI contract was completed." (NYSCEF Doc. No. 63 at p. 19)

It is undisputed that the MCI applications at issue were submitted to respondents separately, and that respondent DHCR then considered the date of completion of other buildings within the complex as the operative date by which to calculate the statute of limitations. While DHCR's consideration of the complex-wide work for purposes of calculating the statute of limitations may have been efficient, neither caselaw nor statute provides support for respondents' contention that the statute of limitations should be calculated by a date other than that of an individual application's submission.

Indeed, DHCR's own prior precedent has held, in direct contravention to the position it now advances in this proceeding, that where an owner submits individual building MCI applications for a single project comprising complex-wide work, the MCI applications must be processed for each individual building (*see In the Matter of the Administrative Appeal of 200-216 West 99th Street Tenants' Assoc.*, Administrative Review Docket No. EU 430036RT [July 29, 2020], NYSCEF Doc. No. 19). It is beyond argument that DHCR is bound by its own precedent *(Matter of Charles A. Field Delivery Serv. (Roberts)*, 66

NY2d 516 [1985] "Stare decisis is no more an inexorable command for administrative agencies than it is for courts"; *see also Matter of Hakim v. Division of Hous. & Community Renewal*, 273 AD2d 3 [1st Dept 2000]). Furthermore, the Appellate Division, First Department has approved respondent DHCR's interpretation that the MCI application must be filed within two-years of the "*physical completion* of the MCI work;" DHCR cannot now interpret the same statute to the contrary (*Metropolitan Life Ins. Co. v. Division of Hous. & Community Renewal*, 235 AD2d 354 [1st Dept 1997] [emphasis supplied]).

In today's era where the high court of this country capriciously abandons its own precedent without hesitation, it bears repeating that the fundamental principle underscoring the rule of law, legitimacy of our courts, and way of self-government is *stare decisis*. The law must be applied uniformly to similarly situated litigants; the fairness of proceedings demands nothing less. Therefore, having previously held that individual building MCI applications within a single project comprising complex-wide work must be processed individually, that is building-by-building and not at the completion of the complex-wide project, respondent may not now hold otherwise.

Accordingly, respondent DHCR's determination that these applications were timely, despite having been submitted more than two-years after the physical completion of the work at issue, fails to follow its own precedent and statutory interpretation and is, therefore, arbitrary.

OVERLAP OF MCI WORK WITH HURRICANE SANDY DAMAGE

The petition next contends that respondents improperly accepted the building owner's statement that insurance proceeds received as a result of damage from Hurricane Sandy, and winter storm Nemo to a lesser extent, did not overlap with the MCI work without requiring substantiating documentation from owner's insurer.

It is well established that one can recover but once for damage (*Fisher v. Qualico Contracting Corp.*, 98 NY2d 534 [2002]; *see generally*, CPLR § 4545). As such, where one receives insurance proceeds to cover building repairs, one may not seek double recovery of same by an MCI rent increase. In recognition of this, the MCI application requires disclosure of any insurance proceeds (*see e.g.* NYSCEF Doc. No. 18 item 1[c]). Respondent DHCR has determined, in other matters addressing MCIs with potential overlap with insurance proceeds, that

> [i]t has been long-standing DHCR policy, upheld by the courts, that in order to determine the approved cost of a claimed MCI, any amounts reimbursed from other sources such as insurance proceeds must be deducted from the substantiated cost of an eligible improvement...
>
> ... the Administrator properly requested that the owner submit a statement from the insurance company evidencing the amount of proceedings disbursed for specific items of work ... Absent the required statement from the insurance company, the owner's claim, that the insurance proceeds only covered ... [part of the work]... for which the MIC is being claimed is unsubstantiated.

(*In the Matter of the Administrative Appeals of Cathy Michaelson; Fraydun Realty Corp.*, Administrative Review Docket Nos. DO410044RT & DO410044RO, NYSCEF Doc. No. 32 at p.2).

Bills were submitted to the owner which unquestionably relate, in some part, to damage caused by the hurricane and winter storm (*see* NYSCEF Doc. No. 27 inspection work following winter storm; *see also* NYSCEF Doc. No. 30 "Contractors Application for Payment" item 8 with handwritten annotation next to "current payment due 106,262" "80,715.50 Sandy related being referred to Karen Greismann Invoice #CO-1"). However, petitioners have not pointed to any portion of the MCI application which contains bills associated with either storm. Notably, and as found by respondent DHCR, the contracts at issue

setting forth the required façade work were executed prior to either storm, and the additional work necessitated by the storms was not included in the costs listed in the MCI applications. Given that the storm damage repair was contracted and billed separately from the contracts and bills contained in the MCI application, and further given that the contracts setting forth the scope of work to be completed as part of the contemplated MCI were executed prior to either storm, respondent DHCR's determination that proof of insurance proceeds were not necessary is neither arbitrary nor capricious. Accordingly, vacatur or annulment of respondent's determination on this basis is not warranted.

ALLOCATION OF COMMERCIAL AND RESIDENTIAL SPACES

Finally, the petition alleges that respondent DHCR incorrectly calculated the allocation of rent increases between the commercial and residential spaces within the complex buildings under RSC § 2522.4(a)(16). RSC § 2522.4(a)(16) provides that where a building contains both residential and commercial spaces benefited by the MCI improvement, DHCR shall allocate the rental increase between the residential and commercial spaces according to the relative square feet of each. *In essentia*, petitioners contend that DHCR improperly allocated

hallways and common areas within the building as residential square footage, thereby comparatively increasing the rent increase on residential tenants.

The Court finds respondent DHCR's calculation of relative square footage neither arbitrary nor capricious. Common areas of a building are inextricably linked to residential tenants' rent (RSC § 2522.4[d]), and as a practical matter, the common areas of the buildings at issue here are necessary for the usual function of residential tenants' apartments. Therefore, attributing the square footage of these areas to the residential units is rational and supported by the record. Accordingly, vacatur or annulment of respondent's determination on this basis is not warranted.

CONCLUSION

The Court finds that the instant determinations[4] must be annulled and vacated as respondent DHCR's determination is wholly silent on whether the work at issue was depreciable, a finding required by Rent Stabilization Law (RSL) § 26-511(c) and Rent Stabilization Code (RSC) § 2522.4(2)(1)(a) before approving finding performed work amounts to a major capital improvement, and that the as necessary standard set forth in RSC § 2522.4(1)(3)(19) does not vitiate the requirement that the work performed be depreciable. Furthermore,

[4] Excepting for: EU410047RT, EU410048RT, FS410011RT, FX410022RT, GN410045RT, GN410046RT, and GN410057RT, discussed *infra*.

the Court finds, assuming respondent DHCR was permitted to utilize an "as necessary" or "comprehensive" standard to find work constitutes an MCI without addressing whether same is depreciable, DHCR's determination that the instant work comprising less than one percent of the façade to be comprehensive is irrational and unreasonable. Accordingly, the determinations of the DHCR are remanded to the agency for determination of whether the improvements are depreciable, in accordance with RSL § 26-511(c) and RSC § 2522.4(2)(1)(a), incorporating by reference the Internal Revenue Code's definition of depreciable as determined by the United States Tax Court.

The Court further finds that the seven orders listed in footnotes three and four must be annulled and vacated as respondent DHCR failed to correctly apply the two-year statute of limitations provided by RSC § 2522.4(a)(8) in contravention of its own precedent. Given that the MCI applications giving rise to these orders were filed beyond the statute of limitations, remand of these seven orders to respondent DHCR for further consideration is unwarranted and any MCI rent increase based on same must be vacated.

The Court finds respondent DHCR's determination finding no overlap between the MCI rent increase sought and insurance proceeds is neither arbitrary nor capricious.

Finally, the Court finds respondent DHCR's determination regarding the rent increases relative to the square footage of residential and commercial space in the subject buildings is neither arbitrary nor capricious.

Accordingly, it

ORDERED that respondent DHCR's orders under EU410047RT, EU410048RT, FS410011RT, FX410022RT, GN410045RT, GN410046RT, and GN410057RT granting MCI rent increases are annulled and vacated, and any such increased rent returned to tenants, as these MCI applications were filed beyond the two-year statute of limitations; and it is further

ORDERED that respondent DHCR's remaining orders at issue are annulled and vacated, as DHCR failed to determine whether the subject work was depreciable, and those matters are remanded to DHCR for further determination in accordance with this Decision and Order; and it is further

ORDERED that any requested relief not otherwise addressed herein has nevertheless been considered and is hereby denied.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

01/05/2022
DATE

HON. FRANK P. NERVO
J.S.C.

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