Matter of Weinreb Mgt. LLC v New York State Div. of Hous. & Community Renewal
2023 NY Slip Op 33922(U)
November 3, 2023
Supreme Court, New York County
Docket Number: Index No. 157523/2022
Judge: Lori S. Sattler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LORI S. SATTLER** **PART** **02TR**

Justice

----------X

IN THE MATTER OF THE APPLICATION OF WEINREB MANAGEMENT LLC,215 EAST 80TH STREET ASSOCIATES, LLC

Petitioner,

- v -

THE NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

----------X

INDEX NO. 157523/2022

MOTION DATE 08/09/2023

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 32, 33, 34

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

In this Article 78 proceeding, Petitioners 215 East 80th Associates LLC ("Sponsor") and Weinreb Management LLC ("Weinreb") (collectively "Petitioners"), seek an order vacating and annulling Respondent New York State Division of Housing and Community Renewal's ("DHCR") Order and Opinion dated July 29, 2022, which denied Petitioners' Petition for Administrative Review ("PAR"). DHCR opposes the petition.

This action stems from an Application for a Rent Reduction filed by Edward Maloney, a rent stabilized tenant at 215 East 80th Street. His application was joined by other rent stabilized tenants in the building. The building in question was converted to a condominium in 2002 (NYSCEF Doc. No. 4) and the rent stabilized apartments are owned by the Sponsor. Weinreb is the Sponsor's managing agent. The tenants requested a rent reduction because they claim that the storage space offered to them was reduced from the storage previously available during their tenancy.

Maloney relies on the building's Certificate of Occupancy and the 2012 DHCR registration which indicate that there was storage in the building (NYSCEF Doc. No. 29). There appears to be no dispute that the tenants had access to two communal storage rooms totaling 1860 square feet that had no bins and were not partitioned for individual use. After the condominium conversion, the Condominium Board decided to convert one of those rooms into a meeting room and the other into a room with storage bins for purchase. In addition, one of two bike rooms was eliminated. An additional room was converted for rent stabilized tenant storage with shelving installed. The room is 165 square feet. Correspondence between the tenants' lawyer and the Condominium Board as well as minutes from a board meeting reflect that the Board was not initially aware of the tenants' legal right to storage and that Petitioners did not raise the issue at the meeting in which the storage space conversion was first proposed. The Board was later informed of this right by the tenants themselves.

In a decision dated September 1, 2016, the DHCR issued an Order Reducing Rent for Rent Stabilized Tenants (NYSCEF Doc. No. 10). The Order found that storage space service was not maintained and that no rent increase could be collected after August 1, 2015. The Sponsor filed the PAR and, in an Order and Opinion dated July 29, 2022 (NYSCEF Doc. No. 11, "PAR Order"), the DHCR denied the PAR and affirmed its September 1, 2016 Order. The Sponsor argued that neither it nor Weinreb own or manage the building, maintained that the Civil Court had previously ruled that Petitioners had no control over the storage space, and contended that there was not a decrease in services in light of the addition of shelving. In the PAR Order, Deputy Commissioner Woody Pascal did not accept these arguments. He found that the registrations for the property on April 1, 2015 and April 1, 2016 listed the Sponsor as the

building owner and Weinreb as the property manager and that even the April 1, 2021 registration listed the Sponsor and Weinreb in those capacities.

The PAR Order further found that the record supported a finding that the storage space was a required ancillary service because it was listed in the building's initial registration with the DHCR and therefore could not be found to be *de minimis*. The Deputy Commissioner found that "[o]nce an ancillary service is provided by the owner, it must continue to be provided, and may only be reduced or modified, upon approval by the Agency, where it establishes that such modification or reduction in services is not contrary to the Rent Stabilization Law" (*id.*). The PAR Order further noted that there was no evidence demonstrating that the Sponsor had filed any modification or reduction application with respect to the storage space.

Article 78 proceedings provide for judicial review of administrative determinations based on a claim that a determination was made in violation of lawful procedure, arbitrary and capricious, affected by an error of law, or an abuse of discretion (CPLR § 7803[3]; *Gilman v N.Y. State Div. of Hous. & Community Renewal*, 99NY2d 144, 149 [2002]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Pell v Bd. of Educ.*, 34 NY2d 222, 231 [1974]). The Court must review the entire record and "determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated" (*Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]).

In this proceeding, the Sponsor and Weinreb raise the same issues raised before the DHCR. They assert that the PAR Order contained errors, namely that it incorrectly concludes that the Sponsor is the owner or has control of the common area renovations and storage space. They further assert that the DHCR fails to address their contention that each rent regulated tenant's space was only reduced from 12.6 to 12 square feet based on their having installed

shelves in a 165 square foot room as compared with the 1860 square feet of unallocated storage space available prior to the space's conversion. The Sponsor and Weinreb also point to a Civil Court of the City of New York decision dated December 5, 2014 (NYSCEF Doc. No. 9), which they contend demonstrates that they had no control over the storage space.

The DHCR opposes, claiming that storage space was a required ancillary service since it was offered in the initial registration, and it was provided for many years before the service was modified and decreased. It contends that an ancillary service cannot be decreased or modified without DHCR approval, and that Petitioners never sought that approval at any point. It further asserts that Petitioners do not demonstrate that the decrease in service was *de minimis* and that the lack of control argument fails because the Sponsor and Weinreb are registered as the owner and managing agent in a 2015 registration (NYSCEF Doc. No. 25). Lastly, the DHCR indicates that there was "significant evidence" in the record demonstrating that the tenants were legally entitled to storage before it was taken away, as multiple documents confirmed that the Condominium Board was aware of the tenants' entitlement to storage (NYSCEF Doc. Nos. 22-24).

The Court finds that upon a review of the record there is no basis to disturb the DHCR's determination that storage is an ancillary service and as such could not be modified or decreased in the absence of their approval. Rent Stabilization Code § 6520-6(r)(1) defines required services as "[t]hat space and those services which the owner was maintaining or was required to maintain thereafter by applicable law." Under § 6520-6(r)(3), ancillary service is defined as "[t]hat space and those required services not contained within the individual housing accommodation which the owner was providing . . . and any additional space and services

provided or required to be provided thereafter by applicable law. These may include, but are not limited to, garage facilities, laundry facilities, recreational facilities, and security."

The DHCR's determination that the storage provided to the tenants was an ancillary service has a rational basis, as storage provided to the tenants was advertised as a service in the building's initial rental brochure (NYSCEF Doc. No. 21) and was also listed as a service in the initial DHCR registration (NYSCEF Doc. No. 20). Tenants had access to the two separate storage rooms and bike rooms for years. Photographs of the rooms show that building tenants and apartment owners could store large items in the two rooms. Where a service was readily reachable by a tenant and listed as an amenity in the rental brochure, a finding that it is a required ancillary service is supported (*Matter of 501 E. 87th St. Realty Co., L.L.C. v. New York State Div. of Hous. & Community Renewal*, 22 AD3d 294, 295 [1st Dept 2005] [finding that a swimming pool provided primarily for the use of tenants in the building is a required ancillary service]).

Nor can the DHCR's determination that the service was not *de minimis* be found to be arbitrary and capricious given the size of the storage rooms in question and the length of time the service had been provided. The Court finds that the record supports that there was 1860 square feet of storage to which tenants had full access. It is uncontroverted that storage was reduced to a room of 165 square feet. The addition of shelving does not increase the amount of storage available to tenants, nor does the record support the Sponsor's creative calculations that the tenants only had 12.6 square feet of storage each prior to the two storage rooms being taken away.

Petitioners have further maintained that a 2014 Civil Court decision supports their position that they were not in control of the storage space and not responsible for any purported reduction in the amount of space. In that licensee proceeding, *Board of Managers 215 East 80*

Condominium v 215 East 80th Assoc LLC et al (L&T 90889/13), the Condominium Board sought a possessory judgment of four basement storage bins from the Sponsor and Maloney. Maloney cross moved for summary judgment claiming that the action belonged in the residential housing part and sought a declaration that the bin space was an integral benefit or service protected under the rent stabilization laws. The Board's motion was denied, and that Court found there were triable issues of fact concerning Maloney's purported interest in the storage. The Order states:

> That portion of Maloney's pleading seeking a form of declaratory relief concerning the status of the bins vis-à-vis a Rent Stabilized tenant like Maloney and others situated like him in the Building is to be brought before a forum, unlike the Civil Court, that has the jurisdiction to entertain it. In view of the co-defendant sponsor's unequivocal + undisputed lack of possessory interest in the bins, whatsoever, any and all claims + cross claims against it are dismissed.

(NYSCEF Doc. No. 26).

Petitioners claim that this Order establishes that it was the Condominium Board and not Petitioners that made the decision to convert the storage rooms, and indeed it is undisputed that the Condominium Board made the determination to change the storage arrangement in the building. However, a finding that the Sponsor lacks a possessory interest in certain storage bins does not address the ramifications of the reduction in storage services from the standpoint of the Rent Stabilization Law. The Civil Court decision clearly indicates that issues regarding the rent stabilized tenants' interest in the storage bins was not properly raised in that proceeding.

The Court further finds that although the Sponsor disputes any ownership interest in the building despite the registrations relied on by the DHCR, even without an ownership interest, the Rent Stabilization Law requires an application to diminish a service. No such request was made to the DHCR. In the absence of a request to decrease an ancillary service as required, the DHCR's determination cannot be found to be arbitrary and capricious or lacking a rational basis.

Accordingly, it is hereby,

ADJUDGED that the application is denied and the petition is dismissed, with costs and disbursements to Respondent.

All other relief sought not addressed herein is denied.

11/3/2023
DATE

LORI S. SATTLER, J.S.C.

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