

**Matter of C72 LLC v New York State Div. of Hous. &
Community Renewal**

2023 NY Slip Op 34316(U)

December 7, 2023

Supreme Court, New York County

Docket Number: Index No. 159492/2022

Judge: Nancy M. Bannon

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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. NANCY M. BANNON **PART** **42**

Justice

-----X

INDEX NO. 159492/2022

In the Matter of the Application of

MOTION DATE _____

C72 LLC,

MOTION SEQ. NO. 001

Petitioner,

For a Judgment Pursuant to CPLR article 78

- v -

**DECISION + ORDER ON
MOTION**

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL and NAOMI GREENBERG,

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23

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

I. INTRODUCTION

In this proceeding pursuant to CPLR article 78, the petitioner, C72 LLC, owner of cooperative units in the residential building at 344 West 72nd Street in Manhattan, appeals the determination by respondent New York State Division of Housing and Community Renewal (DHCR) which denied its Petition for Administrative Review ("PAR") of its order which granted a rent reduction on one of the petitioner's rent-controlled units based on a purported reduction in required services. The respondents answered the petition. The petition is granted.

II. BACKGROUND

Respondent Naomi Greenberg is the tenant of Apartment 10I, a unit at the subject residential building that is rent-stabilized pursuant to the Rent Stabilization Law (RSL). The petitioner is the shareholder and proprietary lessee of certain cooperative units at the building, including Greenberg's unit. The main entrance to the building is located at 72nd Street, where a 24-hour doorman, concierge and building porters are stationed. There is an additional entrance on 71st Street, which the petitioner claims has always been a service entrance, used for deliveries, garbage removal and entry and exit of contractors and workers. It is currently

accessible through a bell system connected to the lobby desk. Between 2014 and 2020, the building was in the process of converting to cooperative ownership and undergoing extensive renovations. During this time, the rear door was sporadically attended by an employee of the general contractor, NAF Construction Management LLC, mostly during business hours when construction was taking place. The attendant was placed at that door to facilitate delivery of construction materials, and to provide a safe and convenient entry and exit for the construction workers without having to leave the door propped open. The rear door was otherwise locked.

On March 22, 2021, Greenberg filed an Application for Rent Reduction Based Upon Decreased Services (the Application) with the DHCR, claiming that the petitioner failed to maintain the services of an attendant at the entrance on 71st Street. Specifically, the Application identifies the owner as “HFZ Capital Group, 60 Madison Ave., N.Y., N.Y. 10022”, apparently a prior owner, and, in regard to the door attendant, states only that “the entrance on 71st Street no longer has an attendant. It is locked and an alarm goes off if one tries to exit from within.” In the same Application, Greenberg also complained of dirty hallways and elevators.

According to the DHCR, on May 6, 2021, the Rent Administrator sent a Notice and Transmittal of Tenant’s Complaint (the Notice of Complaint) to the petitioner regarding Greenberg’s application. The DHCR maintains that it sent the Notice of Complaint to the petitioner and its registered agent at their address at 3 Columbus Circle, 15th Floor, N.Y., N.Y. 10019. The document, contained within NYSCEF Doc. 19, identifies the “owner/owner’s Rep.” as “RSP Management, LLC” at that address. No proof of service is attached. The Notice of Complaint included language that “[f]ailing to file an answer WITHIN SIXTY (60) DAYS ... shall be considered a default” and “[t]he [DHCR] will presume that you do not dispute the allegations in the tenant’s complaint to which you have not responded.” According to the DHCR, it has no evidence showing that the owner ever responded to the Notice of Complaint or that it was returned as undeliverable. The petitioner maintains that it never received the Notice of Complaint. Because the petitioner failed to respond within the allotted time, the Rent Administrator deemed Greenberg’s allegations as admitted.

On August 17, 2021, an inspector from the DHCR conducted an inspection of the building and reported that no attendant was posted at the 71st Street entrance, but the entrance had a properly operable locked alarm door.

On December 9, 2021, the Rent Administrator issued an Order Reducing Rent (Rent Reduction Order) (Docket No. JO 410017 B), determining that the owner had failed to maintain the services of an attendant at the 71st Street entrance and reducing the rent for the unit “to the level in effect prior to the most recent guidelines increases for the tenant’s lease which commenced before the effective date of this order.” The mailing address of the owner on the face of the Rent Reduction Order is “First Service Residential, Inc., at 622 Third Avenue, 14th floor, N.Y., N.Y. 10017.”

On January 11, 2022, the petitioner filed a Petition for Administrative Review (PAR) challenging the Rent Reduction Order as “arbitrary and capricious and illegal” as “the owner of the unit was not served with the complaint.” The petitioner listed its address as 3 Columbus Circle, 15th floor, N.Y., N.Y. 10019.” In the PAR, the petitioner argued that since it was never served with the Notice of Complaint, it did not have an opportunity to file an appropriate answer and was thus denied due process. The petitioner alleged that “First Service Residential, Inc.” was neither the owner nor managing agent for Greenberg’s unit. The petitioner also argued that as the owner of only several units of the building, it did not have exclusive control over building employees or staffing decisions.

The respondents, DHCR and Greenberg, submitted responses opposing the PAR. On February 8, 2022, respondent Greenberg submitted an answer to the PAR in which she states that “since 2014, construction implemented a security officer sitting at the door (working hours)” until “1.5 years ago” when management installed a “blaring alarm” that went off when the door was opened, and that some tenants were provided keys and some, including her, were not. She also set forth the difficulties experienced by other tenants since the alarm was installed and accused the owner of giving preference to “wealthy coop owners.” In an additional response date-stamped by DHCR on March 10, 2022, respondent Greenberg further stated that “HFZ” hired the contractors in 2013, that the contractor maintained its office “right next to the West 71st Street door” and it was the contractor who hired the attendant to sit by that door from 8:00 a.m. to 5:00 p.m. She also again complained of the alarm noise, her unsuccessful attempts to obtain a key to that door and the difficulties of other tenants. She concluded that “If I am given a key, I would be TOTALLY OK WITH THAT ARRANGEMENT.” [caps per Greenberg].

On September 9, 2022, the Deputy Commissioner of the DHCR issued an Order and Opinion denying the petitioner’s PAR (Final Order) (Docket No. KM-410014-RO), upholding the Rent Administrator’s Order, citing in part the petitioner’s failure to rebut Greenberg’s assertion

that it failed to maintain the services of a rear door attendant. The Deputy Commissioner determined that the petitioner was, in fact, served with Greenberg's complaint and failed to timely respond, and that the petitioner's "contention that there was no evidence provided to support that an attendant was once provided to the tenants is merely self-serving." The Deputy Commissioner did not address the petitioners' contention that the attendant was provided, not by any owner or managing agent, but by the construction contractor that had completed its work in 2020, but merely concluded, without support, that this former attendant was a "required service" that the petitioner, an owner of only several units in the building, was required to continue unless it successfully applied to the DHCR to reduce the service pursuant to the Rent Stabilization Law. This instant CPLR article 78 proceeding ensued.

III. DISCUSSION

"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 Peckham v Calogero, 12 NY3d 424, 431 (2009); see CPLR § 7803(3). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." Id.; see Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 (1974). In an article 78 proceeding, "the reviewing court is limited to consideration of evidence and arguments raised before the agency when the administrative determination was rendered." Matter of 333 E. 49th Partnership, LP v NY State Div. of Hous. & Community Renewal, 165 AD3d 93, 99 (1st Dept. 2018); see Fanelli v New York City Conciliation & Appeals Bd., 90 AD2d 756 (1st Dept. 1982).. However, where there is no indication that an agency made a factual determination necessary for its decision, its determination is "without sound basis in reason and without regard to the facts." Firstmark Dev. Co. v NY State Div. of Hous. & Community Renewal, 283 AD2d 274 (1st Dept 2001).

The petitioner seeks an order "revoking and reversing" DHCR's Final Order pursuant to CPLR 7806. It submits, *inter alia*, the Rent Reduction Order, the PAR, and the Final Order denying the PAR. DHCR submits an affirmation of counsel in opposition to the petition by which it argues that determinations of the Rent Administrator and the Deputy Commissioner were proper and the petition should be denied. In her affidavit in opposition, Greenberg does not dispute the petitioner's contention that the rear door attendant was not a required service provided by the owner, calling it a "red herring" issue, but complains anew that other tenants

were provided keys to the rear door and she was not, and that this constituted an improper “elimination of an essential service.” The respondents improperly submit variously unlabeled documents, photographs, emails, handwritten notes and other items, a total of 86 pages, as a single document at NYCEF Doc. No. 19, identifying the submission as “Transcript of Proceedings.” This alone is a basis to disregard their opposition as in violation of Rule 22 of the Rule of Part 42.

In reply, the petitioner submits an affidavit of Luis Torres, the building manager for 29 years, who also lived in the building for most of those years, roughly 30 feet from the rear entrance. He states that “there has never been a doorperson or attendant assigned to assist building residents at the 71st Street service entrance. Instead, during periods of construction, contractors working in the building have employed a security officer at the 71st Street entrance in order to allow deliveries and construction workers to enter and exit the building safely and without disrupting building staff.” Torres added that the entrance had also been made available as an entrance for handicapped persons. He further states that he did not recall the DHCR inspector visiting and denied ever stating, as was alleged in the inspector’s report, that a door attendant would be returned to the 71st Street entrance at any point. Torres notes that the building conversion and renovation had been concluded in 2020 and no construction was ongoing at the time of the inspection and report on August 17, 2021.

As stated, the court may not consider factual allegations the petitioner presents for the first time in this proceeding, the affidavit of Luis Torres, or Greenberg’s responses to the PAR, including her admission that the alleged attendant at the 71st Street entrance was in fact a security guard posted by the general contractor of the renovation project. See Matter of 333 E. 49th Partnership, LP v NY State Div. of Hous. & Community Renewal, supra; Nonetheless, the record before the Deputy Commissioner did not support his determination upholding the Rent Administrator’s Rent Reduction Order pursuant to Section 2523.4 of the RSC. As such, the court finds that he was acted arbitrarily or capriciously in denying the petitioner’s PAR.

Under the Rent Stabilization Code, the DHCR may reduce the rent of rent-stabilized housing accommodations “for the period for which it is found that the owner has failed to maintain required services.” 9 NYCRR 2523.4(a). Required services are “those services which the owner was maintaining or was required to maintain on the applicable base dates set forth [in subsection (r)(4)]” and “services provided or required to be provided thereafter by applicable law.” 9 NYCRR 2520.6(r)(1).

Here, the Deputy Commissioner had before him no proof in the administrative record to show that the petitioner ever previously provided the service of an attendant at the 71st Street entrance. See 9 NYCRR 2520.6(r)(1). In the Application, Greenberg alleged no more than that “the entrance on 71st Street no longer has an attendant.” Later, when the inspector gave his report, the inspector also found no more than that “there was no attendant at the 71st street entrance at the time of inspection.” This proof showed merely that there may have been an attendant posted at the 71st Street entrance previously, but it did not show that the attendant was posted by the petitioner. Where the DHCR simply made no factual determination at all as to an element required for rent reduction, the Deputy Commissioner acted “without sound basis in reason or regard to the facts.” Firstmark Dev. Co. v NY State Div. of Hous. & Community Renewal, supra.

The respondents argue that the DHCR did not act arbitrarily and capriciously in relying on its inspector’s report and in crediting Greenberg’s allegations, given the petitioner’s failure to respond to the Notice of Complaint. However, in light of the several discrepancies in the record concerning the proper identification of the unit owner and owner’s address, the Deputy Commissioner acted arbitrarily and capriciously in summarily rejected the petitioner’s contention of lack of service. Moreover, while the DHCR is empowered to make judgments regarding credibility and weight to be afforded to evidence (Jane St. Co. v State Div. of Hous. & Community Renewal, 165 AD2d 758 [1st Dept. 1990]), neither the inspector’s report nor Greenberg’s allegations showed that the petitioner previously provided an attendant at the 71st Street entrance or that the attendant was otherwise was a “required service” within the meaning of 9 NYCRR 2520.6(r)(1). Further, while the DHCR has broad discretion in determining inferences to draw from factual data, such inferences must nevertheless be based on specific factual findings and data to support its determinations. See, e.g., Matter of Croes Nest Realty LP v NY State Div. of Hous. & Community Renewal, 92 AD3d 402 (1st Dept. 2012); Wemply Mgt. Co. v NY State Div. of Hous. & Community Renewal, 205 AD2d 319 (1st Dept. 1994). To the extent that the DHCR inferred that the petitioner previously provided attendant service at the 71st Street entrance to the building, such an inference was not based in factual findings or data to support that determination.

For these reasons, the court finds that the Deputy Commissioner acted “without sound basis in reason or regard to the facts”, and therefore arbitrarily and capriciously, in denying the petitioner’s PAR and affirming the Rent Reduction Order. See Matter of Peckham v Calogero, supra; see Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of

Scarsdale & Mamaroneck, Westchester County, supra; CPLR § 7803(3). Consequently, the petition is granted and the Final Order of the Deputy Commissioner is annulled and vacated, and the matter is remanded to the DHCR for further proceedings. See CPLR 7806.

IV. CONCLUSION

Accordingly, it is

ORDERED and ADJUDGED that this petition pursuant to CPLR article 78 is granted, and the determination of the Deputy Commissioner of the respondent New York State Division of Housing and Community Renewal dated September 9, 2022, which denied the petitioner's' Petition for Administrative Review of an Order of the Rent Administrator dated December 9, 2021, which granted a rent reduction to respondent Naomi Greenberg based on a purported reduction in required building services, is annulled and vacated and the Petition for Administrative Review is granted, and the matter is remanded to the respondent New York State Division of Housing and Community Renewal for further proceedings consistent herewith, it is further

ORDERED that the Clerk of the court shall enter the judgment accordingly.

This constitutes the Decision, Order, and Judgment of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

12-7-23

	DATE		
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED <input checked="" type="checkbox"/> GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION <input type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER