Matter of 5523 Wash. Ave & St. James Brooklyn LLC v New York State Div. of Hous. & Community Renewal

2023 NY Slip Op 34606(U)

December 27, 2023

Supreme Court, Kings County

Docket Number: Index No. 509298/23

Judge: Richard J. Montelione

At an IAS Term, Part 99, 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

DEC 27 2023

PRESENT:

HON. RICHARD J. MONTELIONE,
Justice.

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In the Matter of the Application of

5523 WASHINGTON AVE & ST. JAMES BROOKLYN LLC,

Petitioner,

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

ORDER / Judgment

-against-

Index No. 509298/23

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

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The following e-filed papers read herein: NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	2-1
Opposing Affidavits (Affirmations)	20, 38
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Acronym	Name
DHCR	Division of Housing and Community Renewal
HPD	Housing Preservation and Development
LDA	Land Disposition Agreement
MHA	Mohawk Housing Association
PAR	Petition for Administrative Review
PHFL	Private Housing Finance Law
RA	Rent Administrator
RSC	Rent Stabilization Code
RSL	Rent Stabilization Law
UDAAA	Urban Development Action Area Act

UDAAP	Urban Development Action Area Project

Upon the foregoing papers, petitioner 5523 Washington Ave & St. James Brooklyn LLC 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 a series of identical orders by the Rent Administrator (RA) finding that petitioner's building complex was not exempt from the Rent Stabilization Law (RSL) and Code (RSC) as "substantially rehabilitated" pursuant to RSC § 2520.11 (e).[1]

Petitioner is the owner of a five-building housing complex, historically known as the Mohawk Hotel, located at 369-379 Washington Avenue and 76-84 St. James Place in Brooklyn. Petitioner took title to the property by deed dated March 31, 2016 from former owner Mohawk Housing Associates (MHA), which had acquired the then vacant and dilapidated property from the City of New York (City) by deed dated November 1, 1985. In conjunction with MHA's acquisition of the property, MHA and the City entered into a Land Disposition Agreement (LDA), dated November 1, 1985, and a separate amendment to the LDA, also dated November 1, 1985 (LDA Amendment). The LDA recites that the property has been designated as a "Disposition Area" pursuant to the Urban Development Action Area Act (UDAAA) (General Municipal Law [GML] article 16) and contained the

[1] RSC § 2520.11 (e) excepts from Rent Stabilization "housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January 1, 1974 [which meet certain criteria specified in the regulation], except such buildings which are made subject to this Code by provision of the RSL or any other statute."

following "WHEREAS" clauses pertaining to the financing of the property's agreed upon rehabilitation:

> "WHEREAS, the Developer has made application to [the New York City Department of Housing Preservation and Development (HPD)] for partial financing of the rehabilitation and development of the Disposition Area through the City's Participation Loan Program (hereinafter referred to as the 'Participation Loan Program') in an amount for the City's share not to exceed One Million Four Hundred Thousand and 00/100 Dollars ($1,400,000.00) pursuant to the provisions of the RFP; and
>
> "WHEREAS, the Developer intends to obtain the remainder of the proposed Six Million and 00/100 Dollars ($6,000,000.00) financing for the rehabilitation and development of the Disposition Area from other sources . . ."

In section 403 (page 14) of the LDA, MHA agreed that "its purchase of the Disposition Area, and its other undertakings pursuant to this Agreement, are, and will be used, for the development of the Disposition Area as a Project for housing of persons and families of low income." Under the LDA, MHA was to purchase the property for $405,000.00, payable by a deposit check in the amount of $81,000.00 and by certified, teller's or cashier's check or bank draft in the amount of $324,000.00.

Under the LDA Amendment, the purchase price was increased from $405,000.00 to $1.8 million and that "all of the financing is to be obtained by [MHA] from private sources and the [City] will not have any obligation of any nature whatsoever to loan or advance monies for the rehabilitation and development of the Disposition Area, pursuant to its Participation Loan Program or otherwise." The LDA Amendment also stated that $1.4 million of the increased purchase price was payable by delivery of a purchase money note

secured by a purchase money mortgage on the property, at market interest, and permitted MHA, if so advised, to convert the property into a cooperative or condominium. In addition to the conveyance from the City and execution of the LDA and LDA Amendment, MHA executed a mortgage in favor of Reilly Mortgage Group, Inc. (Reilly) to secure a $6,154,600.00 loan, a purchase money mortgage in favor of the City (acting by and through HPD) in the amount of $1.4 million and a "Third Money Mortgage" in favor of the City/HPD in the amount of $125,000.00 securing an additional series of notes related to the purchase.

Following the closing of the November 1, 1985 transaction, the property was developed into residential apartments. According to the instant Article 78 petition, the City did not require any regulatory agreement, and took no part in setting initial rents; the property was made subject to rent stabilization through a J-51 tax abatement, which benefits expired in 2006; and initial stabilized rents were set at market level. Petitioner also states that while the Reilly mortgage was insured by the Department of Housing and Urban Development (HUD) and had an accompanying HUD regulatory agreement, that agreement was cancelled in 1997, and the City never sought to enforce any provision in the LDA following the execution of the LDA Amendment, which recognized that there would no longer be any subsidized financing and no participation loan.

On July 29, 2021, petitioner filed five applications with the DHCR (one for each building on the property) seeking a declaration that the property is exempt from rent stabilization pursuant to RSC § 2520.11 (e) as a result of the rehabilitation of the property

by its predecessor, MHA. In separate orders, DHCR's RA denied petitioner's applications, finding that based on the evidence, which included copies of the LDA, LDA Amendment, deed and new Certificate of Occupancy, the subject property remained subject to regulation. The DHCR RA stated:

> "After careful consideration of all the information and evidence in the file the Rent Administrator finds that the subject building was rehabilitated under NYC Urban Development Action Area Project (UDAAP) on Vacant City-owned Buildings, and that the rehabilitation was accomplished by means of a government loan made pursuant to City's Participation Loan Program and under the agreement with NYC that the Disposition Area would be used for the purpose of persons and families of low income which precludes the deregulation of the building based on the renovation."

Petitioner subsequently filed a PAR, wherein it contended, among other things, that the rehabilitation was not accomplished by means of a participation loan; that there was no evidence that any conditional financing under the UDAAA was ever provided or used in the rehabilitation; that there was no regulatory agreement with the City; that although the original LDA contemplated the issuance of a participation loan, the LDA Amendment altered the structure of the transaction, increased the purchase price from $405,000.00 to $1.8 million, required the owner to obtain funding from private sources, absolved the City of any loan obligation for the rehabilitation, and allowed MHA to convert the buildings into condominium or co-ops without any restrictions as to the income or asset level of any future purchasers of units; that MHA obtained private financing from Reilly; that none of the agreements at issue included any restrictions on rent or tenant selection, or any other covenants involving affordable housing or rent stabilization; that relevant sections of the

UDAAA do not require rent stabilization coverage, and, in any event, there was no UDAAA financing of the rehabilitation; and that the record makes clear that neither MHA nor the City itself treated the premises as a low-income housing facility, which is reflected by the LDA Amendment, by the absence of any regulatory agreement, and by the high rents charged in 1987.

By order dated January 26, 2023, the Deputy Commissioner denied petitioner's PAR. The Deputy Commissioner stated, in part:

> "While it is uncertain whether [Participation Loan Program] funds were used in purchasing the premises, it is clearly established that $1.4 million was provided to MHA by HPD as a purchase money mortgage, that a private rehabilitation loan of $6.15 million to MHA was insured by HUD, that the LDA requires that the housing units in the subject buildings be used for low-income persons or families, that there was no amendment to such requirement, that MHA and subsequent owners (including [petitioner]) are bound by these requirements at the least for the duration of the LDA, and that the LDA remains in effect. Accordingly, the RA correctly determined that the subject premises are precluded from deregulation. It is noted that, while UDAAA § 696-a (2) does not apply because there is no evidence that the kind of loan set forth by such Section was taken by MHA for the rehabilitation at issue, and because the loan was received prior to passage of said Section, UDAAA § 691 (enacted in 1979), which is the authority for the UDAAP herein, states that the policy and purpose of a rehabilitation of an area such as the one at issue, is to create (in the instant case) residential use, which 'is a public use and public purpose essential to the public interest, and for which public-funds [such as the HPD and HUD-backed funds] may be expended.' Therefore, deregulating the subject premises would also be contrary to the purpose and policy of the UDAAA and of the UDAAP herein."

The instant Article 78 petition ensued.

In a CPLR article 78 proceeding to review a determination made by an administrative agency such as the DHCR, "the court's inquiry is limited to whether the determination is arbitrary and capricious, or without a rational basis in the record and a reasonable basis in law" (*Matter of ATM One, LLC v New York State Div. of Hous. & Community Renewal*, 37 AD3d 714, 714 [2d Dept 2007]; *see* CPLR 7803 [3]; *Matter of Velasquez v New York State Div. of Hous. & Community Renewal*, 130 AD3d 1045, 1046 [2d Dept 2015]; *Matter of Gomez v New York State Div. of Hous. & Community Renewal*, 79 AD3d 878, 878-879 [2d Dept 2010]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 652 [2013] [internal quotation marks omitted]; *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, 231 [1974]; *Matter of 9215 Realty, LLC v State of N.Y. Div. of Hous. & Community Renewal*, 136 AD3d 925 [2d Dept 2016]).

In its petition, petitioner notes that the DHCR found it "uncertain" whether a participation loan was given and petitioner asserts that there is no citation to any document, in the record or anywhere else, establishing any basis even to speculate that there might have been a participation loan. Petitioner maintains that it was error for the DHCR to rely on the clause in the LDA requiring MHA to provide housing to persons of low income as the sole basis to uphold the RA's order. Petitioner contends that since rent stabilization coverage cannot be created by any form of waiver or estoppel, or by private agreement, but

is created strictly by statute and no acts or omissions can create coverage that does not otherwise exist, the fact that the LDA calls for low-income housing cannot mandate rent stabilization coverage.

Petitioner also points out that while the language calling for low-income housing was not removed by the LDA Amendment, considering the increase in the purchase price, from $405,000 to $1.8 million, together with the elimination of subsidized financing, the project required initial market rents to be viable. Petitioner asserts that the LDA recites the consideration the City intended to pay to induce the creation of low-income housing, but that such consideration was not paid in the ultimate transaction, and the City readily acquiesced to the initial rents set at market rates. Petitioner maintains, in sum, that there is "simply no statutory, regulatory or even contractual basis to hold" that the property is not exempt from rent stabilization and that the DHCR cannot "invent coverage where it does not otherwise exist."

Examining the record before the DHCR, the court finds no indication that the DHCR considered petitioner's submissions in support of substantial rehabilitation, with the agency instead determining that the property could not be exempted from rent stabilization due to section 403 in LDA (which was not altered by the LDA Amendment), wherein MHA represented that the property would be used for housing of persons and families of low income, and section 511 of the LDA (also not amended), which provided that the "grantee, its successor and assigns to the land conveyed...shall devote such land to the uses specified in the UDAAP." However, RSC § 2520.11 (e) excepts from rent stabilization "buildings

completed or buildings substantially rehabilitated as family units on or after January 1, 1974, **except such buildings which are made subject to this Code by provision of the RSL or any other statute**" (emphasis added). Thus, so long as the rehabilitation meets the specified criteria set forth in the regulation, the rehabilitated building can only be subject to rent stabilization based upon the application of a statutory provision mandating coverage.

While the agency may have been intuitively inclined to deny petitioner's applications for deregulation given the low-income housing representations made to the City in the LDA and LDA Amendment, the DHCR does not articulate any provision in the RSL or any other statute where rent stabilization coverage may be mandated purely upon representations in a land disposition agreement between an owner and the City, regardless of whether the property was otherwise substantially rehabilitated according to the criteria set forth in RSC § 2520.11 (e).[2] The only statutory authority invoked by the DHCR in its determinations is the UDAAA and Private Housing Finance Law [PHFL] article XV (§§ 800 to 806) pertaining to participation loans. However, neither of these statues are applicable to this matter.

The Deputy Commissioner acknowledged that UDAAA § 696-a (2) does not apply because there is no evidence that the kind of loan set forth by such section was taken by MHA for the rehabilitation at issue, and because the loan was received prior to the

[2] To the extent MHA/petitioner are in breach of the low-income housing provisions of the LDA and LDA Amendment, only the City has the right to enforce those provisions under sections 502 and 514 of the LDA (*see Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783 [2006]).

enactment of said section. There is otherwise no provision in the UDAAA directing that the rehabilitated property be subject to rent stabilization, or any other UDAAA provision or any other statute cited by the DHCR precluding a building rehabilitated pursuant to the UDAAA from being exempted from rent stabilization under RSC § 2520.11 (e).

Moreover, although PHFL § 804 mandates that rental properties constructed or rehabilitated using participation loans be subject to rent stabilization, there is nothing in the record to establish that the subject rehabilitation was financed using a participation loan.[3] The $1.4 million purchase money mortgage was given to the City by MHA in conjunction with the purchase of the property (and thus cannot be deemed a participation loan financing rehabilitation), and the Deputy Commissioner stated that "it is uncertain whether PLP funds were used in purchasing the premises." In concluding the PAR determination, the Deputy Commissioner noted that "UDAAA § 691 (enacted in 1979), which is the authority for the UDAAP herein, states that the policy and purpose of a rehabilitation of an area such as the one at issue, is to create (in the instant case) residential use, which 'is a public use and public purpose essential to the public interest, and for which public funds [such as the HPD and HUD-backed funds] may be expended,'" and found that "[t]herefore, deregulating the subject premises would also be contrary to the purpose and policy of the UDAAA and of the UDAAP herein," However, policy and purpose

[3] PHFL article XV governs participation loans to private owners, which are municipal loans made for (i) the rehabilitation of such existing multiple dwellings or for the conversion of such non-residential property or for the construction of new multiple dwellings on such vacant land, (ii) provision of site improvements or (iii) provision for other costs of developing housing accommodations (PHFL § 802).

statements contained in a statutory article, while useful in the interpretation of the sections within such article, cannot mandate coverage under a separate statutory and regulatory scheme which otherwise would not apply. At any rate, MHA rehabilitated a dilapidated property for residential use, which therefore comported with the aforementioned UDAAA purpose and policy.

Accordingly, the court finds that the DHCR's determinations are not rationally grounded in law and fact and are therefore arbitrary and capricious. As a result, the orders of the RA and Deputy Commissioner are hereby vacated, and this proceeding is remanded to the DHCR for further proceedings to determine the merits of petitioner's application for deregulation based on a substantial rehabilitation.

The foregoing constitutes the decision and order of the court.

ENTER,

Hon. Richard J. Montelione
J. S. C.