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[*1]

Matter of Joralemon Realty Co. LLC v New York State Div. of Hous. & Community Renewal
2008 NY Slip Op 52508(U)
Decided on December 16, 2008
Supreme Court, Kings County
Starkey, J.
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Decided on December 16, 2008

Supreme Court, Kings County

In the Matter of the Application of Joralemon Realty Company, LLC, Petitioner,

against

New York State Division of Housing and Community Renewal, Respondent(s).

19719/08

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James G. Starkey, J.

FACTS AND PROCEDURAL BACKGROUND

Petitioner, Joralemon Realty Company LLC, seeks judicial review pursuant to Article 78 of the Civil Practice Law and Rules of an order issued by respondent New York State Division of Housing and Community Renewal which affirmed a prior order of respondent dated April 14, 2003. This prior order modified the determination of the Rent Administrator granting a Major Capital Improvement (hereinafter "MCI") rent increase for certain alleged improvements to petitioner's premises, and eliminated various items which were to be included in the calculation of the MCI rent increase.

Petitioner owns a five building complex in Brooklyn Heights located at the following addresses: 20-28 Joralemon Street, 2-6 Columbia Place, 8-12 Columbia Place, 16-26 Columbia Place and 28-34 Columbia Place. The buildings consist of residential apartments which are subject to either Rent Stabilization or Rent Control. On June 21, 1989, the prior owner of the complex applied to respondent for an MCI rent increase based on capital improvements totaling $1,951,393.66. On May 29, 1997, the rent administrator granted an MCI rent increase based on approved costs of $866,478.16, including those expenditures for

pointing/waterproofing, removal of debris, electrical rewiring, scaffolding, and exterior renovation. The order allowed for a rent increase of $38.34 per room, per month. The tenants of the building thereafter filed a petition for administrative review challenging the rent administrator's determination. On April 14, 2003, respondent's Deputy Commissioner granted the tenant's petition in part, disallowing the portions of the MCI rent increase relating to pointing/waterproofing, debris removal, rewiring/electrical services, and exterior renovations, resulting in the reduction of the allowable rent increase to $9.95 per room, per month.[FN1] Petitioner thereafter commenced an Article 78 proceeding, which resulted in the parties entering into a stipulation to remit the matter to respondent for further review and processing.

After five years, respondent's Deputy Commissioner issued an order dated May 13, 2008 which affirmed the prior April 14, 2003 order. In the order issued following remand, the Deputy Commissioner noted as an initial matter that petitioner did not challenge the revocation of the MCI rent increase with respect to the scaffolding. The Deputy Commissioner stated, in part:

"[P]ointing and waterproofing. . .constitutes a major capital improvement provided the owner submits to the Division the requisite contractor's statement certifying that the building was inspected prior to the installation. The Commissioner notes that the owner did not submit any evidence or explanation as to why the contractor's statement was not submitted, even though instructions appearing on the MCI application requests submission of the contractor's statement. . .In lieu of the required contractor's statement', the owner submitted a statement by an architect [*2]who was not involved in the MCI project

* * *

The requirement of a detailed diagram and contractor's statement has been recognized as necessary proof of the comprehensive nature of the pointing and waterproofing in order for the agency to determine whether the work done was more than a mere repair that justifies a permanent MCI rent increase.

* * *

Concerning the debris removal the Commissioner notes that the MCI rent increase was

properly revoked as this item could not be distinctively linked to any specific MCI item (s) qualifying for an MCI rent increase. This item cannot be attributed to the roof installation because the roof contract includes debris removal by the roof contractor. Further, it can not be attributed to the window installation because the dates are inconsistent. The debris removal was specifically between 1985 and 1987, while the window work was between 1986 and 1987. Finally, there is no documentation as to the exact nature or description of the debris removal.

* * *

As for the rewiring/electrical service, the evidence does not support the owner's application, and although the owner conceded that only one of the buildings in the premises was adequately rewired (i.e. 46 out of 156 apartments in the premises of five buildings), the owner chose to file an application for the complex, and not the individual building where adequate rewiring was supposedly performed. Clearly it is inequitable to spread an MCI rent increase to tenants of the other four buildings where adequate rewiring was not performed."

In this second Article 78 proceeding, petitioner avers that when it purchased the premises in November 2002, it requested that respondent consider, in lieu of required documentation it did not possess, a slide show presentation which would show the extent and quality of the pointing and waterproofing. Respondent, according to petitioner, "cavalierly" dismissed such offer by petitioner. Without specific explanation, petitioner further contends that it was arbitrary and capricious for respondent to revoke the rent administrator's inclusion of the claimed debris removal towards the MCI rent increase. With respect to the electrical wiring, petitioner cites a determination by respondent in a separate proceeding (24-24 44 Street DHCR Adm. Rev. Dckt. No. PG 130024 RT) in which the building owner was granted an MCI rent increase where it did not rewire the entire electrical system in its building, but merely added outlets and fuse boxes in various apartments and installed copper risers and feeders from the property box in the basement to meters in certain apartments. Petitioner further points to the eleven year period between the initial determination of the rent administrator granting the MCI rent increase and the order affirming the revocation of the MCI rent increase which is being challenged herein, arguing that had the proceeding been processed in a timely fashion petitioner would have adjusted the rent at an earlier date and not be burdened with refunding overcharged rent to the

tenants.

LAW AND APPLICATION

Pursuant to CPLR Article 78, the court is limited to a review of the record before respondent and to the question of whether its determination was arbitrary and capricious and without rational support. See *Matter of Mazel Real Estate v. Mirabal*, 138 AD2d 600, 601, 526 NYS2d 183 (2nd Dept. 1988). Arbitrary action is without sound basis in reason and is generally [*3]taken without regard to the facts. See *Matter of Pell v Bd. of Educ.*, 34 NY2d 222, 231, 356 NYS2d 833, 313 NE2d 321 (1974). If there is a rational basis to support a determination by an administrative agency, a court has no alternative but to confirm the determination. *Id.* at 231. An administrative agency's application of its regulations, as well as its interpretation and construction of the statute under which it functions, are entitled to the greatest weight. See *Chessin v NY City Appeals Bd.*, 100 AD2d 297, 301, 474 NYS2d 293 (1st Dept. 1984).

The burden of establishing entitlement to an MCI rent increase rests upon the owner. See *Matter of Ador Realty v. DHCR*, 25 AD3d 128, 138, 802 NYS2d 190 (2nd Dept. 2005). Respondent's Policy Statement 90-10 clearly delineates its processing methods for confirming costs on MCI or individual apartment improvement rent increase applications. Under this Policy Statement, any claimed MCI rent increase must be supported by adequate documentation which should include at least one of the following:

1) Cancelled check(s) contemporaneous with the completion of the work;

2) Invoice receipt marked paid in full contemporaneous with the completion of the work;

3) Signed contract agreement;

4) Contractor's affidavit indicating that the installation was completed and paid in full.

Whenever it is found that a claimed cost warrants further inquiry, the processor may request that the owner provide additional documentation. If it is found that there is an equity interest or an identity of interest between the contractor and the building owner, then

additional proof of cost and payment, specifically related to the installation, may be requested. Where proof is not adequately substantiated, the difference between the claimed cost and the substantiated cost will be disallowed.

A determination by respondent that an alteration constitutes an MCI necessarily entails the agency's expertise in evaluating factual data and is entitled to deference if it is not irrational or unreasonable. See *West Village Assoc. v Div. of Hsg.*, 277 AD2d 111, 112, 717 NYS2d 31 (1st Dept. 2000). Under respondent's procedure, the requisite documentation includes a contractor's statement that the premises were inspected before and after all necessary work was actually performed, with a diagram indicating the location of the necessary work. These documents enable respondent to determine whether the work merits a building-wide increase. *Id.* at 113.

Respondent's determination that the prior owner failed to establish its entitlement to the MCI rent increase for pointing and waterproofing was not arbitrary or capricious as the prior owner did not submit the required contractor's statement and diagram. Further, it was not irrational for respondent to revoke that portion of the MCI rent increase relating to debris removal, as such debris removal costs can only be considered when it is done in conjunction with qualified capital improvements. Here, the prior owner was unable to show that the debris removal costs were distinctively linked to a qualified capital improvement. And with respect to the electrical rewiring, respondent's determination that the work was not sufficiently comprehensive to be a qualified capital improvement for the whole complex was not without basis in fact. The new risers and new electrical service affected only one building of the five buildings in the complex, or 46 out of 156 total apartments. The finding that it would be inequitable to increase the rent of those apartments which did not receive the benefit of the new [*4]electrical service cannot be considered irrational. Nevertheless, it also would be inequitable to deny petitioner an MCI increase assessed against the 46 apartments that concededly received the benefit of the electrical capital improvement. Therefore, the matter is remanded to respondent for reconsideration as to petitioner's MCI request for the electrical improvements.

Finally, it was not arbitrary or capricious for respondent to reject petitioner's proposal to present a "slide show" purporting to establish the extent of the pointing and waterproofing. The Commissioner's review is limited to the facts and evidence before the

rent administrator during the proceeding. See *Birdoff & Co. v. New York State Division of Housing and Community Renewal*, 204 AD2d 630, 631, 612 NYS2d 418 (2nd Dept. 1994). Further, any display of the purported work as it progressed would not establish the scope of the work that was needed to begin with. Hence, the necessity of a contractor's statement specifying the needed work with a diagram. With respect to petitioner's argument concerning the delay of the underlying proceeding, no significant prejudice has been demonstrated and the mere passage of time in rendering an administrative determination will not, standing alone, justify its annulment. See *Bd. of Educ. v. Donaldson*, 41 AD3d 1138, 1139, 839 NYS2d 558 (3rd Dept. 2007).

When petitioner purchased the building in November 2002, it was aware or, with due diligence, should have been aware that an administrative review was pending concerning the MCI rent increase granted to the prior owner, and that such a review could result in reversal of the rent increase thereby requiring petitioner to refund a portion of the rents it would collect as the new owner.

CONCLUSION

In light of the above, the petition is granted to the extent that the matter is remanded to respondent for reconsideration as to petitioner's MCI request for the electrical improvements, and otherwise denied. This constitutes the decision of the court. Petitioner to settle order on notice in accordance with this decision.

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J.S.C.

Footnotes

Footnote 1: Except for seven apartments not subject to certain window improvements, for which the increase was only $1.32 per room, per month.

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