SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50Q

In the Matter of the Application of

UPTOWN REALTY UNLIMITED L.L.C.,

Petitioner,

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

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

Index Number 113960/04
Decision, Order & Judgment

RE: Dkt. SJR-10,614 (EF-530015-OM)

ZWEIBEL, J.:

This is a proceeding brought, pursuant to Civil Practice Law and Rules("CPLR") section 7803(3), by petitioner Uptown Realty Unlimited L.L.C., as owner of the premises known as and located at 128 Fort Washington Avenue, New York, New York, Apartment 5 ("Premises"), challenging an Order issued by the New York State Division of Housing and Community Renewal's ("DHCR") Deputy Commissioner Paul Roldan on August 4, 2004 under Docket Number SJR 10,614. The August 4, 2004 Order affirmed the Deputy Commissioner's Order dated May 17, 2002, which reinstated the District Rent Administrator's ("DRA") grant of petitioner's Major Capital Improvement ("MCI") Application pursuant to Order EF-530015-OM dated July 14, 1992. According to petitioner, the challenged Order should be modified to the extent of reinstating

the original effective date for the MCI increases to October 1, 1990.

BACKGROUND

On June 1, 1990, the prior owner, 128 Ft. Washington Partners, filed an MCI application with the DHCR. The application was for $189,458.70 worth of improvements. The improvements included work on the apartment windows, a new roof, a water tank and insulation of pipes. On May 25, 1990, Ira Kellman, a partner in the former owner 128 Fort Washington Partners, signed on behalf of the former owners, the following statement in the application:

> I am maintaining all required services and will continue to provide such services. I affirm that there are no current immediately hazardous violations on the premises issued by any municipality, county, state or federal agency. However, if there still is a violation of record, the violation has been corrected; if it is a Tenant induced violation, I believe it should be waived for the purposes of this application.
>
> 2. I affirm under the penalties provided by law that the contents of this application are true to the best of my knowledge.

In August and September of 1990, various tenants raised issues with repairs in their Answers to the MCI Application. The tenant Answers were not served on the former owner until March 19, 1992. On April 10, 1992, the former owner responded to the tenant complaints and notified DHCR of its follow-up.

On May 20, 1992, the DHCR forwarded a Request for Additional

Information/Evidence to the former owner. On June 8, 1992, the former owner responded to the DHCR's request.

On June 16 and 19, 1992, the DHCR conducted its own inspection. The "[i]nspections conducted on 6/16/92 and 6/19/92 revealed that the tenants' complaints were not valid."

On July 14, 1992, the DHCR granted the owner's MCI application. In July and August of 1992, several tenants filed Petitions for Administrative Review.

On December 30, 1992, petitioner purchased the building from a receiver. On December 24, 1993, Lloyd Temes, P.E., a licensed engineer signed a notarized "affidavit of violation clearance for architects and engineers" regarding petitioner's J-51 tax abatement application, Docket Number 1054/92, certifying that the "C" violations were cured. On December 27, 1993, Florence Edelstein, who is one of petitioner's officers, also signed an sworn affidavit that the "C" violations had been cured. On February 7, 1994, petitioner signed a consent order in DHPD v. Uptown Realty Unlimited, Co., Index Number HP 1471/93. On October 24, 1994, the DHPD issued a Certificate of Eligibility granting the petitioner a J-51 tax abatement.

Five years later, on September 20, 1999, DHCR Deputy Commissioner Paul Roldan issued Order GG-510289-RT, revoking the MCI's granted seven years ago, retroactive for nine years. Deputy Commissioner Roldan based his revocation of the MCI Order

on a review of HPD records which revealed that at the time of the owner's MCI application was filed, there were 107 Class "C" immediately hazardous violations and that the Rent Administrator ("RA") erred in not addressing the existence of these hazardous violations during the processing of the MCI application. He also noted that Policy Statement 90-8 requires the owner to correct the violations within a reasonable time before DHCR considers the MCI application.

In Uptown Realty Unlimited, L.L.C. v. NYS DHCR, Index Number 123428/99, petitioner challenged on numerous grounds, including due process, the Commissioner's Order under Docket Number GG-510289-RT in Supreme Court, New York County. On March 28, 2000, the DHCR cross-moved to remit the proceeding for further processing. On May 19, 2000, the Court issued its decision, granting the cross-motion to remit the matter to DHCR for further proceedings relating to the "C" violations in question. Pursuant to the order of the Supreme Court, on July 25, 2001, the "Notice of Opportunity to Present Further Information" was issued by DHCR under the remand Docket Number OJ-430015-RP. The Petitioner submitted numerous responses. On May 17, 2002, the Challenged Order was issued, re-instating the MCI increases but changing the effective date of the increase by almost 3 ½ years of increases, an approximate loss of $110,283.03. The Deputy Commissioner, in his May 17, 2002 Order found "under these unique circumstances

wherein a possible due process failure existed, that the immediately hazardous violations were cured within a reasonable time, and therefore, based upon the equities, the subject MCI application may be granted." However, the effective date of the MCI increase was changed to March 1, 1994, the first rent payment date after the date of the February 7, 1994 Civil Court Consent Order, which conclusively established that the immediately hazardous violations had been rectified.

Thereafter, two Article 78 proceedings were commenced; one by the tenants and one by the owner which were both consolidated and remitted on February 5, 2003 pursuant to a "Stipulation to Remit" the matter.

On August 4, 2004, the DHCR issued the Challenged Order Docket Number SJR 10,614 stating:

> Additionally, the owner in response to the reopening notice included the contention that the effective date of the MCI increase in the Commissioner's order under Docket No. OJ430015RP is incorrect and should be the original effective date of the MCI order EF530015OM. This issue does not fall within the scope of the reopening notice, however, the Commissioner notes the various documents the owner claims show when the violations were corrected were already presented during the remand proceeding and will not be addressed in this limited reopening...

The instant Article 78 proceeding ensued.

CONCLUSIONS OF LAW

It is well settled that judicial review of DHCR's interpretation of the statutes it administers is limited, and if DHCR's interpretation is not unreasonable or irrational, it is entitled to deference (see Matter of Ansonia Residents Assn. V. New York State Div. Of Housing & Community Renewal, 75 N.Y.2d 206 [1990]; Matter of Salvati v. Eimicke, 72 N.Y.2d 784 [1989]). If there is a rational basis for the determination and it is not arbitrary or capricious, it must be affirmed by the Court. The Court is limited to a review of the record which was before DHCR (see Matter of 36-08 Queens Realty v. New York State Division of Housing and Community Renewal, 222 A.D.2d 440, 441 [2d Dept. 1995]). Here, after reviewing the record before DHCR, the court concludes that DHCR's determination, changing the effective date of the MCI increase from that set by the RA, was neither arbitrary nor capricious, that it has a reasonable basis in law and is supported by the record (see Matter of Pell v. Board of Education, 34 N.Y.2d, at 231-32).

At the outset, this Court notes that it is well within DHCR's scope of authority to determine whether or not to grant a MCI increase and to set the effective date of that increase (see RSL §§ 26-511[c][6][b], 512; Versailles Realty Co. v. DHCR, 76 N.Y.2d 1009 [1990], aff'g 154 A.D.2d 540 [1st Dept. 1989], re-arg. den. 76 N.Y.2d 890 [1990]; Wesley Ave. Associates v. DHCR,

206 A.D.2d 378 [2nd Dept. 1994]). Where an owner performs a major capital improvement, the owner is entitled to a permanent, building-wide rent increase (see Matter of Ansonia Residents Assn. V. New York State Div. Of Housing & Community Renewal, 75 N.Y.2d 206). The monthly amount of that rent increase is based upon the cash purchase price of the improvement, amortized over a seven year period (see RSL § 26-511[c][6][b]). To qualify for an MCI rent increase, an owner must have made an installation or performed work which meets the requirements set forth in the Rent Stabilization Code (see Garden Bay Manor Assocs. v. DHCR, 150 A.D.2d 378 [2nd Dept. 1989]). Policy Statement 90-8 and RSC § 2522.4(a)(13), states that no rent increase shall be granted, in whole or in part, if there are current immediately hazardous violations of any municipal, county, state or federal law against the premises at the time the MCI application is pending.

The burden of proof is on the owner seeking an MCI rent increase to establish its entitlement by sufficient documentary evidence in support of its application (see Henschke v. DHCR, 249 A.D.2d 204 [1st Dept. 1998]; Weinreb Mgt. v. DHCR, 204 A.D.2d 127 [1st Dept. 1994]). Based on the applicable law, DHCR has the discretion, and the right, to refuse to grant an owner a rent increase for major capital improvements where the owner was not maintaining all required services or where there are outstanding hazardous violations (see RSL § 2522.4[a][13]; 9 NYCRR §

2522.4(a)(13); DHCR's Policy Statement 90-8 [March 23, 1990]; 251 West 98th Street Owners, LLC v. DHCR, 276 A.D.2d 265 [1st Dept. 2000]; Residential Management v. DHCR, 234 A.D.2d 154 A.D.2d 154 [1st Dept. 1996]).

The issue in this case is whether the Commissioner of DHCR properly and reasonably determined the effective date of the MCI rent increase. Here, the RA granted an MCI rent increase for work done to the building including apartment windows, a new roof, a water tank and insulation of pipes, totaling approximately $190,000.00 in costs. The RA's Order set the effective date of the rent increase as October 1, 1990. The Commissioner's Order, upon determining that the Owner had not cleared all Class"C" violations by the effective date set forth in the RA's original order, changed the effective date of the increase to March 1, 1994 which was the first month following the date that DHCR was able to confirm all outstanding "C" violations had been removed from the building. Petitioner argues that by changing the effective date of the MCI rent increase, DHCR went beyond its authority and is unjustifiably penalizing petitioner.

As DHCR argues, the pendency of the Class "C" violations combined with the legal prohibition against granting an MCI increase in the face of such violations constitute a rational basis to deny the MCI rent increases outright. However, DHCR considered the submissions and chose to grant the MCI, but

postponed the effective date of the increase to a date where DHCR was satisfied that the "C" violations were cured. Given the conflicting evidence presented by the tenants throughout the proceeding, HPD's report showing Class "C" violations during the pendency of the MCI application, the Engineer's and Owner's affidavits signed December 23, 1993 and the February 7, 1994 Civil Court Consent Decree, the ruling was favorable to petitioner and reasonable under the circumstances. The Commissioner's Order modifying the effective date of the MCI increase was neither arbitrary nor capricious and in accordance with the rent laws.

The bottom line is that the Commissioner chose to grant the increases from the date of March 1, 1994 as opposed to October 1, 1990 due to the owner having had immediately hazardous Class "C" violations on a New York City Housing Preservation and Development ("HPD") Office of Code Enforcement report during the pendency of the MCI proceedings. As respondent notes, there was a deluge of evidence by both sides that included statements by tenants, photographs submitted by tenants and affidavits from the owner. There were two different remands in this case from previous Article 78 proceedings brought by both sides. Each side was allowed to respond to evidence that they had previously claimed to have never received. DHCR relied on the Civil Court Consent Decree to conclusively establish the date when the

violations were cleared. DHCR's reliance on that Consent Decree is infinitely reasonable.

Petitioner's claim that its affidavits submitted by the owner and various employees claiming that the violations were either never present or cured should be credited was opposed by the tenants who claimed that the owner had previously submitted false certifications to HPD that resulted in HPD filing an action in Housing Court against the owner for filing false certifications. Given the he said/she said argument between the owner and the tenants, the Commissioner reasonably chose to rely on a record of HPD's Office of Code Enforcement that showed the presence of "C" violations in the building, a practice previously approved by the Appellate Division, First Department (see e.g. 370 Manhattan Ave. Co., L.L.C. v. NYSDHCR, 11 A.D.3d 370 [1st Dept. 2004]; 251 West 98th St. Owners, L.L.C. v. DHCR, 276 A.D.2d 265, 265-66 [1st Dept. 2000]; Weinreb Mgt. v. DHCR, 204 A.D.2d 127 [1st Dept. 1994]). Moreover, DHCR set the effective date of the MCI increase based on the date the violations were proven cleared by New York County Civil Court Consent Order, Index Number 1471/93, dated February 7, 1994. Again, DHCR's reliance on that Consent Order is not irrational.

"In reviewing the finding of an administrative agency, the construction placed on the statute and implementing regulations by an agency is entitled to great weight and is to be upheld if

reasonable (Matter of Johnson v. Jay, 48 N.Y.2d 689)" (Matter of Barklee Realty Co. v. New Yrok State Div. of Hous. & Community Renewal (159 A.D.2d 416 [1st Dept.], lv. denied 76 N.Y.2d 709 [1990]). This Court is not persuaded that DHCR's decision to reconsider its original finding was an irrational application of Rent Stabilization Code § 2527.8 and the applicable Policy Statements.

Additionally, since DHCR is empowered to modify or revoke orders rendered in proceedings governed by the present or prior rent stabilization laws, regardless of whether or not there is a PAR or CPLR Article 78 proceeding, the Deputy Commissioner could rationally conclude that the presence of the Class "C" violations required the contested modification (see Matter of Laub v. New York State Div. of Hous. & Community Renewal, 176 A.D.2d 560, 561 [1st Dept. 1991]; Matter of Popik v. New York State Div. of Hous. & Community Renewal, 162 Misc.2d 814, 821 [Sup. Ct. N.Y.Co. 1994]).

The Court finds that DHCR Order appears to be soundly based on the governing law as applied to the facts in the record before DHCR. The fact that DHCR also did its own inspections does not mean that DHCR could not rely on HPD's findings of Class "C" violations.

In sum, the administrative record in this case provides ample support for DHCR's actions in this case. It cannot be said

that the decision is irrational or unreasonable.

Finally, the Court feels compelled to comment on petitioner's complaint that this matter has been pending for over fifteen years and that DHCR's latest Orders reflect DHCR's reliance on advances in technology rather then relying on its own inspections. While it is unfortunate that this case has been going on for fifteen years, it is not because of any negligence on DHCR's part. It is the result of two CPLR Article 78 proceedings in Supreme Court and two remits as a result of those proceedings. The fact that DHCR utilized advances in technology in deciding this case not available during the original proceeding does not affect the underlying soundness of the contested decision. Petitioner wishes to benefit from the fact that it was not as easy years ago to obtain a copy of a HPD violation report. However, the Appellate Division, First Department, has already determined that DHCR can rely on those reports as well as consider violations throughout the pendency of the MCI application and administrative review process (see 370 Manhattan Ave. Co., L.L.C. v. NYSDHCR, 11 A.D.3d 370 [1st Dept. 2004]). Here, the application was remitted because of due process violations. Accordingly, it was "pending" for consideration of the Class "C" violations through 2004, when the contested order was issued. Because DHCR was entitled to rely on HPD records and the Civil Court Consent Order to determine the

existence of Class "C" hazardous violations and the date those violations were cured.

Accordingly, the petition is denied and this proceeding is dismissed.

This constitutes the decision, order and judgment of the court.

ENTER:

RONALD A. ZWEIBEL, J.S.C.

Dated: December 5, 2005

Clerk