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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ PART 21

Justice

Index Number : 113218/2011
GOLD, DAVID
vs.
NYS DIVISION OF HOUSING
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 2, were read on this motion to/for Art 78

Notice of ~~Motion/Order to Show Cause~~ — Affidavits — Exhibits Petition - Exhibits | No(s). 1

~~Answering Affidavits~~ — Exhibits | No(s). 2

Replying Affidavits | No(s). _____

Upon the foregoing papers, it is ordered that this ~~motion is~~ Article 78 proceeding is determined as per the annexed memorandum decision and judgment.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/6/12

_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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In the Matter of the Application of
DAVID GOLD, as Court Appointed Receiver
of 654 Broadway, New York, New York,

Petitioner,

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

DECISION AND
JUDGMENT

-against-

Index No. 113218/11

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL, and LLOYD
MCNEIL,

Respondents.

---------- X

HON. MICHAEL D. STALLMAN, J.S.C.:

Petitioner David Gold, as Court Appointed Receiver of 654 Broadway, New York, New York (the Building), commenced this Article 78 proceeding to annul, in part, the September 23, 2011 determination by the deputy commissioner of respondent New York State Division of Housing and Community Renewal (DHCR), which denied petitioner's petition for administrative review (PAR) of the district rent administrator's (R.A.) June 8, 2010 order reducing respondent Lloyd McNeil's maximum legal regulated rent. McNeil, the rent-stabilized tenant of apartment 2-R (the

Apartment) in the Building, commenced the DHCR proceeding by filing an Application For A Rent Reduction Based Upon Decreased Service(s) including, insofar as is relevant here, the claim that his former landlord had transferred to him the cost of providing hot water by removing the Building's boiler and installing in the Apartment an electric-powered hot water tank. On the basis of the landlord's failure to maintain various services, other than the provision of hot water, the R.A. reduced McNeil's maximum legal regulated rent to the rent that had been charged prior to the then most recent rent guideline adjustment. In addition, as a remedy for the landlord's failure to provide hot water to the Apartment at his own expense, the R.A. directed McNeil to reduce the regulated rent by the amount of his electric bill, until such time as the landlord assumed the cost of providing hot water, and invited him to file an overcharge complaint seeking to recover the cost of his electric bills for the four years preceding such a complaint.

The petition seeks an order directing DHCR to modify the rent reduction order by removing therefrom the provision requiring petitioner to pay the cost of providing hot water to the Apartment. Alternatively, the petition requests an order directing DHCR to modify the rent reduction order by removing the

provision directing McNeil to deduct the entire amount of his electric bills prospectively and allowing him to file an overcharge complaint to recover the entire cost of his electricity for the preceding four years.

At the outset, the Court notes that petitioner is the court-appointed receiver of the Building. *See CIT Lending Serv. Corp. v 654 Broadway Partners LLC*, Sup Ct, NY County, Oct. 9, 2009, Edmead, J., Index No. 112833/09. Although petitioner cannot be personally faulted for the acts of the previous owner, he is considered, with exceptions that are not here relevant, an "owner" for purposes of the Rent Stabilization Code (RSC). RSC § 2520.6 (i). The Court uses the word "owner," here, to refer to the receiver, the previous owner of the Building, and the defaulting mortgagor, who apparently remains the fee owner of the Building.

A court reviewing an administrative determination may consider only those arguments that were made in the administrative proceeding. *Silberzweig v Doherty*, 76 AD3d 915 (1st Dept 2010); *Matter of Molloy v New York City Police Dept.*, 50 AD3d 98 (1st Dept 2008). Accordingly, the following two arguments that petitioner urges here, but did not raise in his PAR, or in the August 11, 2010 supplement thereto, may not be

considered now: (1) that the provision of hot water at no expense to the tenant is not a required service, because such service was not provided on the base date, that is, the date upon which the Apartment first became rent- stabilized; and (2) that the failure to provide hot water at no cost to the tenant is de minimis, within the meaning of RSC § 2523.4 (f) (1), and therefore, does "not rise to the level of failure to maintain a required service for the purpose of this section." *Id.*

The Court notes that, even had petitioner raised these arguments in his PAR, they would fail. RSC § 2520.6 (r) (1) defines "required services" as "those services which the owner was maintaining *or was required to maintain* on the applicable base dates ..." (emphasis added). Since well before the inception of McNeil's tenancy, section 27-2031 of the Administrative Code of the City of New York has required landlords of multiple dwellings, or of tenant occupied one- or two-family houses, to provide hot water "from a central source of supply." As to the second argument, RSC § 2523.4 (f) (2) provides that "services required to be provided by laws or regulations other than the [Rent Stabilization Law] and [the RSC] shall not be subject to this subdivision." Accordingly, an owner's failure to provide hot water cannot be de minimis.

The petition, otherwise, argues that the hot-water-related provisions in the rent reduction order exceed the powers granted to DHCR by RSC § 2523.4 (a) (1), and that those provisions are, therefore, arbitrary and capricious. RSC § 2523.4 (a) (1) provides, in relevant part, that

> [a] tenant may apply to the DHCR for a reduction of the legal regulated rent to the level in effect prior to the most recent guidelines adjustment ... and the DHCR shall so reduce the rent for the period for which it is found that the owner has failed to maintain required services.

Petitioner has not cited any case, and this Court knows of none, that holds that, when DHCR finds that an owner has reduced required services, the sole remedy within its power is that set forth in RSC § 2523.4 (a) (1). Indeed, RSC § 2522.7 provides that

> [i]n issuing any order adjusting or establishing any legal regulated rent, ... the DHCR shall take into consideration all factors bearing upon the equities involved... .

As the New York Court of Appeals has repeatedly instructed, "the word `any' means `all' or `every' and imports no limitation." *Zion v Kurtz*, 50 NY2d 92, 104 (1980); *see also Raynor v Landmark Chrysler*, 18 NY3d 48 (2011). Accordingly, while DHCR is mandated to reduce rents when it finds that an owner has failed to provide required services (*Matter of Tenants of Hyde Park*

Gardens v State of New York Div. of Hous. & Community Renewal, Off. of Rent Admin., 73 NY2d 998 [1989]), DHCR is not limited to the reduction provided for in RSC § 2523.4 (a) (1). *See Matter of Lillian Goldman Family, LLC v New York State Div. of Hous. and Community Renewal* (12 AD3d 161, 162 [1st Dept 2004]) (in which the Court affirmed the lower court's denial of a petition challenging a DHCR order reducing the rent of all the rent-stabilized tenants in a building, in which elevator service had been reduced, by a uniform $15, an amount which the Court found was "reasonable"; *but see Matter of ANF Co. v Division of Hous. & Community Renewal*, 176 AD2d 518 (1st Dept 1991) (where DHCR finds a reduction in required services, it lacks discretion to reduce rent by less than one guideline adjustment). As the agency charged with enforcement of the RSL and the RSC, DHCR was well within its powers in ruling that McNeil should be compensated for having had to pay for his hot water, above and beyond the rent reduction imposed for all of the other reductions in his services.

DHCR did not act arbitrarily by reducing the rent in the amount of McNeil's total electric bills. In an administrative proceeding entitled *In the Matter of the Administrative Appeal of MBZ Associates LLC*, Administrative Review Docket No. SK410040-RO,

the R.A., citing RSC § 2522.7, determined that a reduction of the tenant's legal regulated rent by one guideline adjustment would not adequately compensate him for the cost of having paid for his heat and hot water for 38 months, after the owner had individual gas and water meters installed, and reduced the tenant's rent by 12 percent. The deputy commissioner denied the owner's PAR and explained that, while the 12 percent reduction substantially exceeded the tenant's monthly cost for heat and hot water, the total amount of the rent reduction, from the effective date of the R.A.'s order to the date of that order, was less than half of the total amount that the tenant had paid for heat and hot water in the 38 months that he had paid for them. The deputy commissioner noted that the landlord could have had the rent restored at any time after the R.A.'s order, and could still do so at any time, by assuming the cost of the tenant's heat and hot water.

RSC § 2522.4 (d) provides that

> [a]n owner may file an application to decrease required services for a reduction of the legal regulated rent ... on the grounds that:
>
> ...
>
> (4) such decrease is not inconsistent with the RSL or this Code.

Here, as in *MBZ Associates*, the owner unilaterally shifted to the

tenant the cost of providing hot water, a required service, rather than applying to DHCR for permission.

RSC § 2522.6 provides, in relevant part, that

> [w]here the legal regulated rent or any fact necessary to the determination of the legal regulated rent ... is in doubt, or is not known, the DHCR at any time ... may issue an order in accordance with the applicable provisions of this Code determining the facts, including the legal regulated rent ... .

DHCR noted that, because McNeil had been required to start paying for his hot water more than 10 years earlier, there were no pre-service-reduction electric bills that could be compared to post-reduction bills. It was not arbitrary or capricious for DHCR to affirm the R.A.'s order, pursuant to which, as in *MBZ Associates*, the monthly reduction in rent exceeds the monthly cost impermissibly foisted onto the tenant. It was not only reasonable, but also equitable (*see* RSC § 2522.7) for DHCR to place on the owner, who had avoided paying for McNeil's hot water for more than 10 years, rather than on McNeil, on whom such payments had devolved, such costs as were imposed by the uncertainty of how much of McNeil's electric bill was attributable to the operation of the hot water tank in his apartment.

It is in the owner's power to have the rent restored before

such time as the total amount of rent reduction exceeds the tenant's multi-year cost of providing a required service, by having Con Edison segregate, e.g., by submetering and separately charge to petitioner, the cost of the electricity used to operate McNeil's hot water tank.

Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed.

Respondent is directed to telephone the Clerk of Part 21 (646-386-3738 or 646-386-3342) to retrieve its bound administrative record (the "return") within 30 days.

Dated: ~~May~~ June 6, 2012
New York, New York

ENTER:

J.S.C.