Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT Justice

IAS Part 14

In the matter of an application of Hillside Place LLC

Petitioner,

For a judgment pursuant to Article 78 of the Civil Practice Laws and Rules

-against-

New York State Homes and Community Renewal

Respondent.

Index No. 4262 2012

Motion Date April 17, 2012

Motion Cal. No. 13

Motion Seq. No. 1

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In this Article 78 proceeding, petitioner Hillside Place LLC seeks a judgment setting aside and annulling the determination of respondent New York State Division of Housing and Community Renewal (DHCR), s/h/a New York State Homes and Community Renewal, dated December 30, 2011, to the extent that it denied its Petition for Administrative Review (PAR) and affirmed the Rent Administrator's determination that petitioner was not entitled to assess a rent surcharge, commencing as of November 2005, against a tenant for a washing machine located in her apartment in the building known as 87-50 167th Street, Jamaica, New York.

Dalila Lara, a rent stabilized tenant, purchased a room air conditioner unit in July 1991, and originally installed it in her apartment 8F in the subject building. In June 1995, Ms. Lara moved to apartment 11G in the same building and installed the same air

conditioning unit in said apartment. In July 1999, Ms. Lara purchased a washing machine, and installed it in her apartment shortly thereafter. Petitioner acquired the premises pursuant to a deed dated March 1, 2000, and also collected surcharges. Petitioner and the prior owner both sought to collect surcharges for the air conditioning unit and the washing machine.

On May 14, 2010, petitioner filed a request with the DHCR for an administrative determination as to whether it could assess the tenant a monthly surcharge for the air conditioner, and whether it could assess the tenant a surcharge for the washing machine in her apartment. In its application, petitioner referred to a prior letter from the DHCR's enforcement unit, dated August 5, 2008, which disallowed both surcharges. With respect to the washing machine, the enforcement unit determined that petitioner had waived collection of the surcharge as it did not collect it until at least five years after it acquired title to the premises. Petitioner thus asserted that it had a right to collect the surcharge for the washing machine pursuant to 9 NYCRR § 2522.9 (b) (1) and Operational Bulletin 2005-1.

In December 2000, the Rent Stabilization Code was amended to permit landlords to prospectively collect a surcharge from a tenant who has installed a washing machine (9 NYCRR § 2522.9 [b] [1]). In the March 24, 2005 Operational Bulletin, the DHCR announced that a surcharge of $13.62 would be permitted for tenants who had installed washing machines, dryers and/or dishwashers. In November 2005, petitioner began billing Ms. Lara for the washing machine. Ms. Lara filed a harassment complaint based on improper billing and, following a conference on July 30, 2008, the enforcement unit issued its letter of August 5, 2008, in which it stated that petitioner had waived the right to collect the surcharge for the washing machine. Petitioner argued that the imposition of a waiver wrongfully deprived it of its right to charge and collect a surcharge for the washing machine. In opposition, Ms. Lara asserted that this issue was previously determined by the DHCR enforcement unit, and requested that petitioner's application be dismissed.

The Rent Administrator, in an amended order issued on October 22, 2010, stated that, notwithstanding the provisions of Operational Bulletin 2005-1, the Commissioner had previously issued a PAR order on March 14, 2008 in another case entitled *Matter of Administrative Appeal of Stamford Property Corp.*):

> "affirming that considerations of waiver limiting collectability of surcharges also apply for washing machine installations.
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> "In that proceeding the tenant had a washing machine installed in the subject apartment, in plain view, for a period of approximately fifteen (15) years prior to the alleged discovery by the owner's superintendent. Consequently, the Commissioner found that the owner impliedly consented to the use of the

> washing machine within the tenant's apartment by refusing to take any action to have it removed or by imposing a surcharge, effectively waiving the owner's entitlement to collect the surcharge."

Relying on *In re Stamford*, the Rent Administrator found that "the period of approximately five (5) years that the tenant had the washing machine installed and operational in the subject apartment, before the owner's discovery, constitute a reasonable period of time for the owner to have discovered the appliance. The owner's failure to institute a surcharge during said period of time, constitute a waiver of it's [sic] entitlement to collect a surcharge for the washing machine in accordance with the aforementioned Order issued on March 14, 2008 . . ." The Rent Administrator determined that petitioner was not entitled to assess the tenant surcharges for either the washing machine or the air conditioner, and directed petitioner to remove all such monthly surcharges.

Petitioner filed a PAR on November 12, 2010 and, with respect to the washing machine, asserted that it was irrational for the Rent Administrator to conclude, on the basis of the criteria set forth in *In re Stamford*, that it had waived its rights to collect the surcharge. Petitioner argued that, in *In re Stamford*, the washing machine was in plain view and used on a regular basis, while the record before the Rent Administrator was void of any factual evidence that the washing machine installed in the subject apartment was in plain view so that an employee of petitioner must have observed it while performing routine maintenance in the subject apartment. In addition, petitioner asserted that Ms. Lara infrequently used the washing machine based upon a letter she sent to the enforcement unit dated October 7, 2008. Ms. Lara was given notice of the PAR and did not file an answer.

The Deputy Commissioner of the DHCR, in an opinion and order issued on December 30, 2011, denied the PAR, and affirmed the Rent Administrator's order. With respect to the washing machine, the Deputy Commissioner stated as follows:

> "An owner's right to collect a washing machine surcharge is set forth by Operational Bulletin 2005-1, however the DHCR has recognized that considerations of waiver may limit the collectability of such surcharge under certain circumstances, as set forth by the PAR Order and Opinion . . . issued March 14, 2008. It was observed in this Order and Opinion that, although the Rent Stabilization Code does not define 'waiver' in terms of how much time must elapse between the owner's expressed or implied consent for the use of a washing machine within an apartment and the collection of a surcharge therefor, under certain circumstances the tenant may not be subject to a surcharge for such use.

> "The evidence of record discloses that the tenant installed the washing machine in the subject apartment in July 1999, and that neither the prior owner (from July 1999 to February 2000) nor the current owner (from March 2000 to November 2005) imposed a surcharge. The Commissioner finds that under the circumstances of this case the Rent Administrator properly concluded that the five years that the tenant had the machine in her apartment constituted a reasonable period of time for the current owner to have discovered the appliance, and on that basis, correctly determined that the owner's failure to avail itself of its rights - by imposing a surcharge, or in the alternative directing that the appliance be removed - constituted a waiver of its entitlement to collect a surcharge.
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> "The owner's claim about the tenant's admitted use of the washing machine once every six weeks is duly noted. However, the fact of infrequent use cannot be equated with the appliance's absence from plain view. Clearly, it would be difficult, if not impossible, for a tenant to hide a sizable appliance such as a washing machine from the owner's agents who enter the apartment for repairs and/or periodic routine inspections. No evidence was presented in the proceeding below or on appeal to show or suggest that the tenant had attempted to conceal the washing machine at the time it was allegedly first discovered in November 2005, or at any time prior thereto."

Petitioner then commenced this Article 78 petition on February 28, 2012, and seeks a judgment vacating the DHCR's decision and order of December 30, 2011. Petitioner asserts that the Rent Stabilization Code (9 NYCRR §2522.9 [b] [1]) permits owners to collect surcharges prospectively and does not expressly provide for a waiver. It is asserted that the waiver criteria imposed by the DHCR goes beyond the provisions of the statute and therefore is an abuse of authority and irrational, as it effectively amends the Rent Stabilization Code without complying with the notice provisions set forth in the Administrative Code of the City of New York § 26-511(b) (i), (ii), and (iii). Petitioner, therefore, seeks a judgment reversing the DHCR's decision and order and directing that the agency issue a new order granting its application to impose a surcharge for the washing machine. It is further asserted that, even if the DHCR properly relied on the *In re Stamford* PAR order, the facts set forth by petitioner do not support a finding that it waived its right to the washing machine surcharge.

In opposition, the DHCR asserts that its determination is consistent with the provisions of 9 NYCRR § 2522.9, which permit rent stabilized owners to collect a surcharge for washing machines installed by tenants. It is asserted that, where there is a prior installation of a washing machine, this section does not vitiate an owner's prior acquiescence of a tenant's use of a washing machine and that, based on the record, it is reasonable to

conclude that petitioner herein had acquiesced in Ms. Lara's use of a washing machine she had purchased in July 1999. It is asserted that petitioner knew or should have known of the existence of the washing machine within a reasonable time after it acquired ownership of the apartment on March 1, 2000, and that, by failing to seek a surcharge until November 2005, it had acquiesced in the tenant's use of the washing machine, and was not entitled to collect a surcharge.

The court's power to review an administrative action is limited to whether the determination was warranted in the record, has a reasonable basis in law and is neither arbitrary nor capricious (*Matter of Colton v Berman*, 21 NY2d 322, [1967]; *Matter of 36-08 Queens Realty v New York State Div. of Hous. and Community Renewal*, 222 AD2d 440, [1995]). An agency's interpretation of its own regulations "is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 549, [1997]; *see Samiento v World Yacht Inc.*, 10 NY3d 70, 79, [2008]). "Put another way, the courts will not disturb an administrative agency's determination unless it lacks any rational basis" (*Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal*, 10 NY3d 474, [2008]; *see Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002]).

Prior to December 20, 2000, an owner of a rent stabilized housing unit could not collect a surcharge for a washing machine installed by a tenant in her apartment. Where the lease prohibited the installation of a washing machine, the landlord could either acquiesce in the installation and use of the appliance, require the tenant to remove the appliance, or seek to evict the tenant for breach of the lease. In eviction proceedings, where the landlord knew or should have known of the existence of a washing machine and accepted rent, the courts held that the landlord had acquiesced in the use of the machine and had waived its remedial rights (*see Fanchild Investors, Inc. v Cohen*, 43 Misc 2d 39 [1964]; *see also Binaku Realty Co. v Penepede*, 2001 NY Misc Lexis 454 [2001]; *601 W. Realty LLC v Grigoroff*, 2000 NY Misc Lexis 670 [2000]). Section 2522.9 of the Rent Stabilization Code (9 NYCRR § 2522.9) was amended on December 20, 2000, and provides as follows:

> "Surcharge for the installation and use of washing machines, dryers and dishwashers
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> "(a) Where a tenant requests permission from the owner to install a washing machine, dryer or dishwasher, whether permanently installed or portable, and the owner consents, the owner may collect surcharges, without notification to or approval by the DHCR in an amount specified in an operational bulletin to be issued by the DHCR pursuant to section 2527.11(b) of this Title. The

surcharges authorized by this section shall not be part of the legal regulated rent.

"(b)(1) Where a prior installation by a tenant of a washing machine, dryer or dishwasher comes to the attention of the owner and the owner consents to the continued use of the washing machine, dryer or dishwasher, the surcharges provided for in this section shall only be available prospectively.

"(2) Under no circumstances shall servicing or replacement of such washing machine, dryer or dishwasher become a service required to be provided by the owner pursuant to this Code.

"(3) Where there is in effect a prior practice of charging for installation of a tenant-owned washing machine, dryer or dishwasher, the owner may continue the charge, which may also continue to be included in the legal regulated rent, if such was the prior practice."

Contrary to petitioner's assertions, the DHCR's interpretation of Section 2522.9 (b) (1) does not constitute an improper attempt to amend the statute. Admittedly, section 2522.9 does not expressly provide for the waiver of the owners right to collect a surcharge nor does it set forth a time period in which an owner is required to start collecting a surcharge upon learning that the tenant previously installed a washing machine, and acquiesced in its installation. The DHCR, however, has broad discretion in interpreting the provisions of the Rent Stabilization Code.

Here, it is undisputed that Ms. Lara purchased the washing machine in July 1999 and installed it shortly thereafter. Petitioner became the deed owner of the subject apartment building on March 1, 2000, and, pursuant to Section 2522.9, was entitled to collect a surcharge as of December 20, 2000. Petitioner, however, did not seek to collect a surcharge until November 2005. Following complaints made by the tenant, the DHCR enforcement unit issued a letter denying petitioner's imposition of the surcharges in August 2008. Petitioner did not file an application for an administrative determination until May 14, 2008.

Petitioner, in the proceedings before the DHCR, stated that it determined that Ms. Lara had a washing machine in her apartment and that it began billing her for said appliance in November 2005, subsequent to the effective date of Operational Bulletin 2005-1. Petitioner, however, offered no explanation as to why it did not seek to collect a surcharge for the washing machine for nearly five years after it acquired ownership of the building, after Section 2522.9 was implemented. Petitioner did not state when it first learned of the washing machine in Ms. Lara's apartment, and did not claim that the tenant made any effort

to conceal said appliance. In addition, petitioner did not claim that its employees or agents did not enter Ms. Lara's apartment to perform routine maintenance, repairs, or inspections during this five year period. Ms. Lara's infrequent use of the washing machine had no bearing on whether the owner was entitled to collect a monthly surcharge. The DHCR's determination that petitioner knew or should have known of the existence of the appliance during this five year period and thus had waived the surcharge, thus, has a rational basis in the record.

Under the circumstances presented here, the DHCR's determination that petitioner had acquiesced in Ms. Lara's prior installation of the washing machine, without seeking to collect a surcharge for a period of nearly five years, constituted a waiver of the surcharge is neither irrational nor unreasonable, and is not an abuse of discretion. The DHCR's interpretation of Section 2522.9, therefore, will not be disturbed (*see Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal*, *supra*; *Matter of Gaines v New York State Div. of Hous. & Community Renewal*,*supra*; *see also Arias v Pascal*, 2010 NY Misc Lexis 6642, 2010 NY Slip Op 33732U [2010] [the determination that a landlord must collect the surcharge within a reasonable amount of time, or it is waived, is a reasonable interpretation of the section 2522.9, "in light of the statute's history and purpose").

Accordingly it is hereby

ORDERED and ADJUDGED that petitioner's application to vacate respondent's determination of December 30, 2011 is denied, and the petition is dismissed.

Dated: June 25, 2012

J.S.C.