Matter of Teboul v State of New York Div. of Hous. & Community Renewal
2006 NY Slip Op 30787(U)
October 18, 2006
Supreme Court, New York County
Docket Number: 110745/05
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of
EDDIE TEBOUL,

Index No. 110745/05

Petitioner-Tenant,

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

DECISION/ORDER

-against-

STATE OF NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent,

and

140-42 ORCHARD STREET CORPORATION,

Respondent-Intervenor.

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CAROL R. EDMEAD, J.:

MEMORANDUM DECISION[1]

In this Article 78 proceeding (motion sequence 001), petitioner Eddie Teboul ("petitioner") challenges an order dated June 2, 2005 of respondent New York State Division of Housing and Community Renewal ("DHCR"), which denied his petition for administrative review and confirmed a DHCR Rent Administrator's order. The Rent Administrator found that petitioner had not been charged in excess of the legally-permissible rent. Petitioner argues that the June 2, 2005 order is arbitrary and capricious, and is in violation of the Rent Stabilization Law and Code, and, thus, must be vacated and annulled. Alternatively, petitioner seeks a

[1]The court consolidates motion sequence 001 and motions sequence 002 for decision herein.

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judgment remanding this matter to the Rent Administrator for further consideration.

DHCR cross-moves, pursuant to CPLR 306-b, to dismiss the petition on the ground that petitioner failed to timely serve DHCR with the notice of petition and petition. DHCR also answered the petition, contending that the June 2, 2005 order is in all respects rational.

By separate motion (motion sequence 002), 140-42 Orchard Street Corporation (the "owner") seeks to intervene as a respondent in this proceeding, and to have its answer considered in opposition to the petition.

DHCR and petitioner have consented to the owner's motion. Therefore, the owner is permitted to intervene in this proceeding, and the caption is amended accordingly.

Background

Petitioner is a rent-stabilized tenant of 140-42 Orchard Street, apartment #6 (the "subject premises"). Petitioner took occupancy of the subject premises on September 1, 1999 pursuant to a two-year lease of that date, at a monthly rent of $1,300.

Prior to petitioner's tenancy, the tenant of record in the subject premises was Ahmed Bashir. Mr. Bashir's registered rent for the apartment was $550. He occupied the subject premises from September 1991 through March 1, 1999, when the apartment was substantially damaged by a fire. The fire also caused damage to two other apartments and common areas in the building. Mr. Bashir abandoned the apartment after the fire. Following the fire, the owner renovated the subject premises.

On April 22, 2002, petitioner commenced an administrative proceeding before DHCR alleging that he had been overcharged. In his rent overcharge complaint, petitioner contended, among other things, that the owner was collecting a monthly rent of $1,300 from him, despite the

fact that the last registered rent for the subject premises was $550 in 1993. He also argued that no major capital improvements had been made to the building, except for the installation of mail boxes and replacement of the front door.

The owner filed an answer to petitioner's overcharge complaint, contending that the $1,300 monthly rent was justified, because substantial improvements had been made to the subject premises to repair the damage caused by the fire. It asserted that the repairs were "in excess of $51,000 which was $36,000 over and above the insurance proceeds received for the repairs." According to the owner, the rent was calculated by utilizing the last registered rent of $550 per month, adding a vacancy increase of $110 per month, and adding a 1/40th increase for the cost of improvements or $910.15 per month ($51,258.52 less insurance proceeds of $14,852.25 for a total of $36,406.27, divided by 40). Thus, the legal regulated rent was $1,570.15. Because petitioner was charged less than this amount, the owned argued, he was not overcharged. An affidavit submitted by the owner averred that the owner had received $31,119.03 from its insurance company, and not the $14,852.25 it claimed in its answer. In an addendum, the owner stated that the total cost to repair petitioner's unit was $50,361.25, of which $16,477.08 was paid with insurance proceeds and $33,884.17 was paid out of the owner's funds.

On September 30, 2003, the DHCR Rent Administrator, Jadwiga Krawczyk, issued an order denying petitioner's overcharge complaint. He determined that "[a]ll rent adjustments subsequent to the base date, for the complainant, have been lawful according to the Rent Stabilization Law and Code." According to the Rent Administrator, the owner proved the cost of the installation of new equipment, including "kitchen cabinets, countertop, plumbing, kitchen

sink, faucets, floor tiles, stove, refrigerator, walls, bathtub, shower, vanity, medicine cabinet, sink, toilet, doors, and sheet rocking throughout the entire apartment," totaling $43,250 for the apartment. The Rent Administrator found that the owner was entitled to the difference between $43,250 and $16,477.08 in insurance proceeds, for a total allowable cost of $26,772.92. The owner was entitled to a rent increase of 1/40th of that amount – which was found to be $669.32 per month. Consequently, the Rent Administrator determined that petitioner had not been overcharged.

Petitioner subsequently filed a petition for administrative review of the Rent Administrator's determination. In an amended petition, petitioner contended that the repairs were illegal since there were no work permits issued by the Department of Buildings. By order dated December 17, 2003, DHCR's Deputy Commissioner, Paul A. Roldan, remanded the matter back to the Rent Administrator to resolve the discrepancies in the amount of insurance proceeds the owner had received and to clarify the proportion that was applied to petitioner's apartment.

After the owner submitted additional evidence concerning the insurance proceeds, on June 22, 2004, the Rent Administrator again concluded that petitioner had not been overcharged. The Rent Administrator stated that the owner submitted documentation substantiating that it had received $33,119.03 from its insurance company. The total cost of improvements in petitioner's apartment was 53.01% of the total amount spent in the building ($43,250 out of $81,589.73). Applying the 53.01% ratio to the total amount of insurance proceeds, the amount of insurance expended on petitioner's apartment was $17,556.40. Thus, the total cost of renovating petitioner's apartment was the difference between $43,250 and $17,556.40, or $25,693.60. The owner was entitled to a rent increase of 1/40th of that difference, or $642.34 per month. As a

result, petitioner had not been overcharged. Additionally, the Rent Administrator noted that the owner had filed registration statements for the period 1998 through 2003 on March 31, 2003.

Petitioner once again sought administrative review of the Rent Administrator's order. On June 2, 2005, DHCR's Deputy Commissioner denied the petition for administrative review, noting that the Rent Administrator properly allowed a rent increase of $642.34. The Deputy Commissioner only considered issues that were erroneously omitted from his prior order, but declined to consider issues that were outside the scope of the remand or were omitted from the first petition for administrative review. He rejected petitioner's argument that renovations done to an apartment after a fire do not qualify for an increase under the Rent Stabilization Code. In addition, the Deputy Commissioner rejected petitioner's argument that certain labor costs should not be included in the rent increase computation.

Petitioner commenced this proceeding by filing a notice of petition and petition with the New York County Clerk on August 2, 2005. DHCR was allegedly not served until November 28, 2005. Thereafter, petitioner filed a substitution of counsel.

DISCUSSION

Untimely Service (CPLR 306-b)

DHCR moves for dismissal of this proceeding, contending that petitioner failed to timely serve the notice of petition and petition. According to DHCR, it was served on November 28, 2005, nearly four months after the statute of limitations expired and the initiatory papers were filed with the New York County Clerk. The owner also argues that this proceeding should be dismissed, because DHCR was not timely served. In opposition, petitioner makes an application to this court to extend the time to serve the notice of petition and petition *nunc pro tunc*.

The statute of limitations for commencing an Article 78 proceeding challenging a DHCR determination is 60 days from DHCR's denial of a petition for administrative review (Administrative Code of the City of New York § 26-516 [d]; 9 NYCRR 2530.1; *see also Guerre v New York State Div. of Hous. & Community Renewal*, 214 AD2d 346, 347 [1st Dept 1995]). CPLR 306-b, as amended, provides that:

> [W]here the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires. If service is not made upon a defendant within the time provided in this section, the court, upon motion, shall dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service.

Here, DHCR's denial of the petition for administrative review is dated June 2, 2005. Petitioner filed a copy of the notice of petition and petition with the New York County Clerk on August 2, 2005. Petitioner does not dispute that it did not serve DHCR until November 28, 2005, which is well beyond the 15-day grace period for service of process as provided by CPLR 306-b. Thus, the issue is whether there is "good cause" to extend the time for service, or whether service should be extended in the "interest of justice."

Petitioner has not shown good cause to extend the time for service, as he makes no claim that he was "reasonably diligent" in attempting service (*see generally* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C306-b:3). Nor is the court persuaded that extending petitioner's time for service is in the interest of justice. For the interest of justice standard, the "court may consider diligence, or lack thereof, along with any other relevant factor in making its determination, including expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a

plaintiff's request for the extension of time, and prejudice to defendant" (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]). The delay in service here is over three months from the grace period. Petitioner only made an application for an extension of time to serve DHCR after receiving its cross motion to dismiss. Moreover, petitioner provides no excuse for failing to timely serve DHCR, a state agency that does not evade service. Therefore, petitioner's failure to timely serve DHCR should not be excused here, and DHCR's cross motion to dismiss the petition for failure to comply with CPLR 306-b is granted.

Although this is a sufficient basis to dismiss this proceeding, because DHCR filed an answer and fully briefed the merits without waiting for a ruling on its motion to dismiss (CPLR 404 [a]), the court shall consider petitioner's arguments in support of the instant proceeding (*see Guerre*, 214 AD2d at 347 [court considered merits of Article 78 proceeding challenging DHCR's denial of petition for administrative review, which was also barred by statute of limitations]).

The Merits of the Article 78 Proceeding

CPLR 7803 provides that the standard of review of an agency's determination, such as DHCR, is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803 [3]). The "arbitrary and capricious" standard, defined by the Court of Appeals in *Pell v Board of Educ.* (34 NY2d 222 [1974]), "relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact" (*id.* at 231 [internal quotation marks omitted]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts . . . . [T]he proper test is whether there is a rational basis for the administrative orders" (*id.* [internal quotation marks omitted]). If the agency's decision is

rational, it must be upheld, even though the court might have reached a different conclusion upon viewing the matter in the first instance (*Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101, 107 [1st Dept 2003] [internal quotation marks omitted]).

Pursuant to the Rent Stabilization Code, an owner may not charge in excess of the established base rent plus applicable guideline increases, except under certain enumerated exceptions (*985 Fifth Ave. Inc. v State Div. of Hous. & Community Renewal*, 171 AD2d 572, 574 [1st Dept], *lv denied* 78 NY2d 861 [1991]). One of these exceptions is for installation of new equipment or improvements with the consent of the tenant in occupancy, otherwise known as an "Individual Apartment Increase" (IAI) (*see* 9 NYCRR 2522.4 [a] [1]). The Rent Stabilization Code provides that "[a]n owner is entitled to a rent increase where there has been a substantial increase, other than an increase for which an adjustment may be claimed pursuant to paragraph (2) of this subdivision, of dwelling space or an increase in the services, or installation of new equipment or improvements, or new furniture or furnishings, provided in or to the tenant's housing accommodation" (*id.*).

The allowable increase is 1/40th of the total cost of renovation including installation costs (*id.* at [a] [4]). The burden of establishing entitlement to an increase is on the owner (*Adria Realty Inv. Assocs. v New York State Div. of Hous. & Community Renewal*, 270 AD2d 46 [1st Dept 2000]; *Charles Birdoff & Co. v New York State Div. of Hous. & Community Renewal*, 204 AD2d 630 [2d Dept 1994]). DHCR's Policy Statement 90-10 provides that any IAI 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(s) marked paid in full contemporaneous with the completion of the work; (3) a signed contract

agreement; or (4) a contractor's affidavit indicating that the installation was completed and paid in full.

A DHCR determination that an alteration constitutes a sufficient alteration for an IAI increase necessarily entails DHCR's expertise in evaluating factual data and is entitled to deference if it is not irrational or unreasonable (*see West Village Assocs. v Division of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000]). Here, DHCR's Deputy Commissioner remanded the proceeding after the first petition for administrative review to allow the owner to submit additional documentation concerning the amount of insurance proceeds and how those proceeds were spent. The proof submitted by the owner showed that it rebuilt the bathroom and installed new tiles, a sink vanity, a new toilet, and fixtures. The owner upgraded the wiring and plumbing throughout the apartment, replaced windows that were broken in the fire, and installed new appliances and kitchen cabinets. The owner's president, Nathan Nelson, submitted an affidavit indicating that Demar Plumbing performed the bathroom work, which cost $1,683.29, and that its independent contractor, Gregory Duran, was paid $43,250 for his work on petitioner's apartment. The owner submitted contemporaneous cancelled checks for renovation work and invoices for new equipment. In addition, the owner submitted an affidavit from a licensed engineer who averred that the cost of "gut rehabilitation" to a residential unit in Manhattan was between $140 and $190 per square foot. In view of this evidence, it cannot be said that DHCR's conclusion that this documentation was sufficient to establish the IAI increase was arbitrary or capricious (*see Mayfair York Co. v New York State Div. of Hous. & Community Renewal*, 240 AD2d 158 [1st Dept 1997]). The court will not second guess DHCR's determination that Mr. Duran was the owner's independent contractor, and, thus, that his labor

costs should be included in the IAI calculation.

It equally cannot be said that DHCR's conclusion that petitioner was not overcharged was arbitrary or capricious. The rent on the base date of April 22, 1998, four years before petitioner's filing of the rent overcharge complaint, was $550. The owner was entitled to a 20% vacancy increase of $110 after the prior tenant vacated the apartment. The IAI increase was found to be $642.34. Thus, the legal regulated rent is the sum of $550, $110, and $642.34, or $1,302.34, which is greater than petitioner's monthly rent of $1,300 (*see* Administrative Code § 26-511; 9 NYCRR 2522.4).

Petitioner's remaining contentions are unpersuasive. First, petitioner cites no authority to support his argument that work to make an apartment habitable after a fire cannot be the basis for an IAI increase. The Rent Stabilization Law and Code do not specifically exclude work to repair damage to an apartment caused by fire (*see* Administrative Code § 26-511 [c] [13]; 9 NYCRR 2522.4 [a] [1]). Rather, the determinative factor is whether an owner's repairs went beyond mere normal maintenance and repair, and constitute an actual improvement (*Charles Birdoff & Co.*, 204 AD2d at 630-631). As previously noted, DHCR's conclusion that the owner established its entitlement to the IAI increase was not arbitrary and capricious.

Second, as for petitioner's assertion that the owner improperly allocated insurance proceeds to the work performed, this claim is also without merit. Petitioner relies on *Nagobich v New York State Div. of Hous. & Community Renewal* (200 AD2d 388 [1st Dept 1994]). In *Nagobich*, the Appellate Division, First Department held that it was rational for DHCR to disallow IAI increases where the increase was *wholly* paid for by insurance proceeds. The Court noted that the "statutory scheme permits a rent increase only for an 'improvement', and rationally

does not include repairs paid for by insurance policies already financed by the rents collected" (*id.*). This case is distinguishable because the increase was not wholly paid for by insurance proceeds. DHCR has interpreted 9 NYCRR 2522.4 as allowing increases partially paid by insurance, to the extent that they are based upon the owner's out-of-pocket costs (Smith Affirm., Exh. E [DHCR Opinion Letter by Charles Goldstein dated 12/3/99]). DHCR's interpretation of a regulation that it promulgated is entitled to deference if it is not unreasonable (*Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]). The court finds that this interpretation is reasonable, because the amount not covered by insurance represents an outlay of new capital by the owner. Since the owner did not wholly pay for the improvements out of the insurance proceeds, and used some of its own funds to renovate the apartment, DHCR did not arbitrarily permit the IAI increase.

Third, petitioner has not demonstrated that the owner's failure to file registration statements with DHCR precludes the IAI increase. Although section 26-517 (e) of the Rent Stabilization Law provides that "[t]he failure to file a proper and timely initial or annual registration statement shall . . . bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement," late filing can entitle the owner to the increase under that same subdivision as long as all "increases in the legal regulated rent were lawful except for the failure to file a timely registration" (*BN Realty Assocs. v State of New York Div. of Hous. & Community Renewal*, 254 AD2d 7 [1st Dept 1998], *lv denied* 93 NY2d 806 [1999]; *see also* 9 NYCRR 2528.4 [a] ["an owner, upon the service and filing of a late registration, shall not be found to have collected a rent in excess of the legal regulated rent at any time prior to the filing of the late registration"]). It is undisputed that the

owner filed the registration statements for the building for the years 1998 through 2003 on March 31, 2003, which encompassed the dates of petitioner's tenancy. Petitioner has failed to show that the increase was otherwise unlawful.

Fourth, the Deputy Commissioner properly refused to consider petitioner's arguments concerning the owner's failure to obtain Department of Buildings permits. Absent good cause for failing to provide such documentation, review by the Commissioner is limited to the facts and evidence before the Rent Administrator (9 NYCRR 2529.6; *see also Charles Birdoff & Co.*, 204 AD2d at 631). Petitioner does not argue that this information could not have been obtained at the Rent Administrator stage. In any event, petitioner has not identified any provision of the Rent Stabilization Law or Code requiring that an owner obtain Department of Buildings approval for work in order to be entitled to an IAI increase (*see* 9 NYCRR 2522.4 [a] [1]).

Finally, petitioner has failed to demonstrate that he is entitled to an administrative process other than the type that he received.

Accordingly, it is

ORDERED that the motion by 140-42 Orchard Street Corporation for leave to intervene as a respondent in this proceeding and to amend the caption is granted; and it is further

ORDERED that the cross motion by respondent New York State Division of Housing and Community and Renewal to dismiss for failure to timely serve it is granted; and it is further

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

Dated: October 4, 2006

ENTER:

Carol Robinson Edmead, J.S.C.

CLERK