Matter of London Terrace Gardens v Division of Hous. & Community Renewal
2006 NY Slip Op 30806(U)
August 1, 2006
Supreme Court, New York County
Docket Number: 115758/2005
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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IN THE MATTER OF THE APPLICATION OF
LONDON TERRACE GARDENS,

Petitioner,

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

-against-

DIVISION OF HOUSING AND COMMUNITY RENEWAL

Respondents.

Re: Docket No: Admin. Review: QG 430069 RT
Rent Administrator's Docket No.: NL 430115 OM
Premises: 415, 425, 435, 445 and 455 West 23rd
Street; 420, 430, 440, 450, and 460 West 24th
Street New York, New York 10011

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Mtn Seq. 001

FILED
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NEW YORK
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WALTER B. TOLUB, J.:

By this Article 78 application, petitioner seeks reversal and/or modification of the order issued by Respondent, the New York State Division of Housing and Community Renewal ("DHCR") issued on October 13, 2003, under Administrative Review Docket No: QG 430069 RT (Rent Administrator's Docket No. NL 430115 OM). Reversal and modification is sought on the grounds that the order is arbitrary and capricious.

Petitioner is the owner and landlord of the housing complex comprised of buildings known as 415, 425, 435, 445, and 455 West 23rd Street, as well as 420, 430, 440, 450, and 460, West 24th Street in Manhattan. In 1999, petitioner filed an "Application for Rent Increases Based on Major Capital Improvements" (the "MCI

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Application") based on the installation of new heating equipment (burners, fuel storage tank, pump) and the related cost of removing the old equipment. The application indicated that the four new oil burners and related equipment were over twenty-five years old, and had exceeded their useful life. Petitioner never indicated on any of the submitted forms that an emergency existed requiring the replacement of any equipment.

By order dated June 11, 2002, respondent DHCR approved $154,350 of the $283,750 cost claimed by petitioner. This included an allocation of $125,600 for the installation of the oil burners, which were noted as not being beyond the "useful life". Based on the approved costs,[1] respondent approved a rent increase for all stabilized and rent controlled apartments of $0.71 per room, per month (Petition, Exhibit B).

In July, 2002, London Terrace Gardens tenant Edrie Cote filed a Petition for Administrative Review challenging the DHCR's determination to approve the claimed costs for the installation of the burners and the subsequent rent increase. The PAR challenge was predicated specifically upon the grounds that the useful life of the oil burners had not yet expired. On October 13, 2005 after three years of submissions from the parties, the DHCR modified its original determination, concluding that the

[1] The approved costs in the original assessment amounted to a total of $154,350.00. The net approved cost was $148,422.96

installation of new burners did not constitute a valid MCI because the prior burners had not exceeded their useful life and the owner had not applied for a waiver of the useful life requirement. The overall result was a reduction of petitioner's approved MCI claimed costs to $26,250,00 and approval of a rent increase, of $0.12 per room, per month (Petition, Exhibit F).

Petitioner then commenced the instant application challenging the DHCR's October, 2005 decision. The instant challenge is twofold: first, petitioner argues that the MCI should be allowed, albeit on a pro-rated fashion, because the replacement of the boilers was necessary as a result of an emergency: the tanks had failed, notwithstanding the fact that their "useful life" as established under the Rent Stabilization Code had not yet expired. Second, petitioner argues that Edrie Cote, the tenant who filed the PAR, although claiming to be the tenant representative for the tenant's association, did not meet the requirements set forth under either the Rent Stabilization Code Section 2529.1 or Operational Bulletin 84-1. Petitioner therefore argues that this failure prevents respondent from assessing a rent reduction against any tenant other than Edrie Cote, and therefore, the order directing the reduction of the claimed expenses and recalculation of rent increase to affect all rent stabilized and rent controlled tenants was arbitrary, capricious, and in error. Petitioner thus argues that

restoration of the June 11, 2002 DHCR is warranted.

Discussion

As with any Article 78 proceeding, the only inquiry before this court is whether the actions taken by the DHCR are without reason, without basis in fact, or affected by error of law (see, CPLR 7803[3]; see also, Council of City of New York v. Bloomberg, 6 N.Y.3d 380 [2006]; see generally, Barr, Altman, Lipshie and Gerstman; *New York Civil Practice Before Trial* [James Publishing 2005] §33:240 *et seq.*). It is this court's opinion that contrary to petitioner's arguments, the decision by the DHCR to modify the approved amount of the MCI sought by petitioner in the decision dated October, 2005 was not arbitrary, capricious or an abuse of discretion.

The Rent Stabilization Code, in its present incarnation, allows for an MCI whenever the item being replaced satisfies the requirements of the DHCR's "useful life schedule". If the item being replaced does not comply with the schedule, an MCI will not be approved unless the "useful life" of the item is waived by the DHCR (Rent Stabilization Code 2522.4. See also, Elghanayan v. New York State Div. of Housing and Community Renewal,181 A.D.2d 638 [1st Dept. 1992]). An owner seeking a waiver of the useful life requirement must apply to DHCR for the waiver prior to commencing the work (Rent Stabilization Code 2522.4(a)(1)(e)(1)). However, if the work that is done is the result of an emergency,

i.e. to remedy a situation "dangerous to human life and safety or detrimental to health", the waiver of the MCI useful life requirement may be made at the time of the submission of the MCI rent increase application (*id.*).

The instant application arises in connection with the replacement of oil burners in petitioner's buildings, the useful life of which, as established by the Rent Stabilization Code, is 20 years. Although petitioner's MCI application claims that the replaced burners were in excess of 25 years in age (see, Petition, Exhibit A), the burners had in fact not exceeded their useful life prior to replacement. In the absence of an application of a waiver prior to the commencement of the work, or some kind of indication that the replacement was done due to an emergency, neither of which is reflected in the record, respondent had no obligation to approve the total requested MCI, and the decision to reduce the claimed cost sought by petitioner was neither arbitrary, capricious, or an abuse of discretion.

Moreover, the DHCR did not abuse its discretion when it accepted the PAR filed by Edrie Cote as representative of the other tenants. Ms. Cote, a member of the Board of the London Terrace Tenant's Association and head of the London Terrace Tenant's Association MCI Committee, filed the PAR on behalf of the other tenants. Even without the required documentation identified under the Rent Stabilization Code (see, RSC,

2529.1(b)(2)), the DHCR did not abuse its discretion in allowing the PAR to be deemed representative of all of the other tenants (see, 427 West 51st Street Owners Corp. v. Division of Housing and Community Renewal, 3 N.Y.3d 337 [2004]).

Lastly, the second reduction of the petitioner's MCI application based upon the PAR submission was not arbitrary and capricious. The PAR challenged the DHCR's assessment of an MCI for the installation of equipment that had not exceeded its useful life. Notwithstanding petitioner's arguments, the record is devoid of any information that supports the contention that the original burners were in such disrepair so as to constitute an emergency situation. As the DHCR possesses the authority to determine whether an item qualifies as an MCI and which expenses are eligible for a rent increase (see, Ansonia Residents Assoc. v. New York State Division of Housing and Community Renewal, 75 NY2d 206 [1989]), this court sees no reason, under present circumstances of this application, to disturb the determination.

As such, petitioner's application is denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 8/1/06

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HON. WALTER B. TOLUB, J.S.C.