SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL GEORGE FEINMAN PART 52

Justice

In/o
Manhattan Triad Associates, LLC

-v-

NYS DCH-CR

INDEX NO. 101739/08

MOTION DATE 4-25-08

MOTION SEQ. NO. 001

MOTION CAL. NO. 4

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

The following papers, numbered 1 to _____ were read on this motion to/for _____.

	PAPERS NUMBERED
Notice of Motion/Petition — Affidavits — Exhibits	1
Answering Affidavits — Exhibits (Memo)	2,3
Replying Affidavits (Reply Memo)	4
Agency Record	5

FILED
JUL 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is

ORDERED that this ~~motion~~ (petition) is ~~granted~~ (denied) ~~(granted in part and denied in part)~~ in accordance with the annexed decision and order ~~(decision, order~~ and judgment); and it is further

~~(☐ ORDERED that the parties shall appear by counsel on _____ at _____ for: ☐ a Compliance Conference in the DCM Courtroom, Room 103, 80 Centre Street; ☐ a Compliance Conference in the Part 52 Courtroom, Room 289, 80 Centre Street; ☐ Early Settlement Conference, Room 103, 80 Centre Street; ☐ Mediation I, Room 106, 80 Centre Street; ☐ for trial in Part 40, Room 242, 60 Centre Street; and it is further)~~

ORDERED that the movant shall serve a copy of this decision and order ~~[decision, order~~ and judgment] on all parties with notice of its entry and upon ☑ the Clerk of the Court, 60 Centre St., Basement; ☐ the Trial Support, 60 Centre St., Room 158; ☐ and the DCM Clerk, 80 Centre Street, Room 102.

Dated: 7-21-08

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

☐ DO NOT POST ☐ REFERENCE

☐ TRANSFER TO NON-CITY PART; CITY NO LONGER A PARTY OR NOT REPRESENTED BY CORPORATION COUNSEL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X
In the Matter of
MANHATTAN TRIAD ASSOCIATES, LLC,
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.
----------X

Index Number 101739/2008
Mot. Submit Date April 25,2008
Mot. Seq. No. 001
Mot. Cal. No. 4

DECISION, ORDER AND JUDGMENT

For the Petitioner:
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General Counsel
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Papers considered in review of this petition to annul:

Papers	Numbered
Notice of Petition and Affidavits Annexed	1
Answering Affidavits, Memo of Law	2, 3
Reply Affirmation	4
Record of Agency Proceedings	5

PAUL G. FEINMAN, J.:

In this Article 78 proceeding, petitioner seeks to annul respondent's order denying a Petition for Administrative Review (PAR). For the reasons which follow, the petition is denied.

Petitioner is the owner of the premise known as 222 West 16th Street, New York, New York. Respondent New York State Division of Housing and Community Renewal (DHCR), is the administrative agency responsible for administering and implementing New York's rent regulation laws. Petitioner seeks Article 78 review of respondent's August 14, 2007 order

reducing the rent for Thomas Sciacca, a rent-stabilized tenant in petitioner's building, based on failure to provide certain necessary services, specifically the failure to provide a level floor throughout the tenant's apartment (Pet. Ex. B). Petitioner's request for a PAR was denied by Order and Opinion dated November 30, 2007 (Pet. Ex. A). Its request for reconsideration, made in the form of three letters dated December 10 and 11, 2007 (Pet. Ex. F), was denied by letters dated December 21, 2007, and January 11, 2008 (Pet. Ex. G, H).

Petitioner timely commenced the instant proceeding. It argues that the denial of the PAR was arbitrary and capricious based on several reasons: that the condition of a sloping floor existed prior to the commencement of the tenant's tenancy in 2004 and was *de minimus* in nature; that the tenant's complaint was retaliatory and the New York City Department of Buildings (DOB) should be the agency to determine whether the floor's condition was substandard; that the proper administrative procedures were not adhered to, in particular that petitioner did not receive copies of the tenant's July 16, 2007 "reply to landlord's papers" (see Agency Record Ex. A-7), or his October 11, 2007 "answer to landlord's petition" (see Reply Aff. Ex. B); and that it will be an economic hardship to repair the sloping floor.

The DHCR denies that its decision was arbitrary or capricious. It notes that under the Rent Stabilization Code, the landlord is obligated to maintain the premises and make repairs, and if it does not, a rent reduction is called for until services are restored (Ans. ¶¶ 13-15). It argues that a defense of economic unfeasibility is not proper under the rent laws, and that petitioner may file a separate application to decrease services or to modify or substitute required services at no change in the legal rent (Ans. ¶¶ 18). It additionally argues that a tenant's state of mind when filing a complaint is irrelevant to a landlord's statutory duty to maintain the premises (Ans. ¶ 4)..

Although it concedes that it did not provide petitioner with a copy of the tenant's October 11, 2007 answer to the petition, it contends that its denial of the PAR was "not in any way" based on the contents of the tenant's answer, but was rather based on the results of inspection of the tenant's apartment undertaken as part of the processing of the complaint, and on the findings of the Commissioner in response to the owner's arguments seeking a PAR (see Pet. Ex. H, DHCR Letter of 1/11/08, p. 2; Ans. ¶ 7).[1] It further argues that whether or not the floor of the apartment sloped "on the base date of May 31, 1968," or at some point thereafter and prior to the tenant's tenancy, is irrelevant under the law, given the landlord's statutory duty to properly maintain the premises (Ans. ¶ 8).

The agency record in this matter shows that the tenant wrote a letter to his landlord, petitioner, on January 29, 2007, stating that as long as he had been given a preferential rent, he had been willing to accept the problems, but with his rent increased to the legal rate, he would complain about a variety of issues with the building and his apartment, in particular that the floor in his apartment is "crooked" and that "all of my furniture must be propped-up for it to be level." (Agency Record Ex. A-1 [Sciacca Letter 1/29/07 to Manhattan Triad]). On February 27, 2007, he sent a copy of the letter along with his application for a rent reduction, to the Jamaica, New York office of DHCR (Agency Record Ex. A-1). DHCR notified petitioner of the complaint on March 18, 2007 (Agency Record Ex. A-2).

Petitioner's answer was received by DHCR on May 23, 2007 (Agency Record Ex. A-4).

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[1]Petitioner's discovery that it had not been forwarded a copy of the tenant's July 16, 2007 reply, was made only after commencement of this proceeding (cf., Pet. ¶¶ 68-76; Favilukis Reply ¶ 6).

The answer contained several defenses: that the Department of Buildings was the better equipped agency to determine whether the floor met the structural safety specifications required by law; that any slope to the floor was *de minimus*, that the tenant accepted the flawed floor without complaint for three years, thus showing the *de minimus* nature; and that the complaint is facially deficient because by claiming that the floors are "crooked," it failed to provide sufficient notice to the petitioner of the nature of the problem or whether it affects the use and enjoyment of the apartment by the tenant.

The DHCR mailed the tenant a copy of the petitioner's answer (Agency Record Ex. A-5). On the date it mailed the answer to the tenant, it requested an inspection of the floor in the apartment, and directed specifically that it should be checked to see if it is level, and what locations were defective and the extent to which they were defective (Agency Record Ex. A-6). An inspector visited the tenant's apartment on July 17, 2007, and found that the floor was not level throughout the apartment. The condition was "not [a] trip hazard just not level." (Agency Record Ex. A-8). The inspector noted that, using a three-foot long straight edge and a level, "for each three feet in length, it slopes 1 and 1/2 inches, from the west wall to the east wall."

The day after this inspection, the DHCR received the tenant's July 16, 2007 response to petitioner's answer (Agency Record Ex. A-7). The tenant more fully articulated his complaint, including that the slope caused a gap between the floor and the wall, allowing vermin to more freely enter, that the furniture had to be propped up to be level which stressed the furniture, and that the flaw was not only cosmetic but also interfered with his ability to enjoy his apartment. There is nothing in the record to show that a copy of this response was mailed to petitioner.

Thereafter, on August 14, 2007, respondent issued an order reducing the rent to be paid

by the tenant, effective April 1, 2007, based on petitioner's failure to provide a service, namely a level floor throughout the tenant's apartment (Agency Record Ex. A-9).

Petitioner then filed a Petition for Administrative Review (Agency Record Ex. B-1). It again argued that the DOB was the proper or better agency to determine the safety or the *de minimus* nature of the floor, that the DHCR order did not articulate what the effect the sloping floor has on the apartment, and did not consider the expense required to fix the problem, nor did it note that there were no DOB violations for that apartment.[2]

The agency notified the tenant on October 1, 2007, that petitioner had filed a PAR (Agency Record Ex. B-2). The tenant filed a response to the PAR on October 11, 2007 (Agency Record Ex. B-3). He noted that the landlord did not respond to his arguments previously set forth in his reply to the landlord's papers, and argued that the relative burden of complying with the statute, as well as the age of the building, should not be at issue. There is nothing in the record showing that a copy of the tenant's response was mailed to petitioner.

The DHCR issued its order and opinion denying the PAR on November 30, 2007 (Pet. Ex. A). It outlined petitioner's arguments. It noted that the "economic" argument was not raised in petitioner's initial papers before the Administrator and could not be raised for the first time on review. It disagreed with petitioner's claim that the Department of Buildings is the proper agency to judge the floors, because the structural integrity of the building is not at issue. It quoted the findings of the July 17, 2007 inspection report, and expressly contradicted the argument by petitioner "that the floor was not level by 1 1/2 inches," by concluding that the

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[2]One of the exhibits attached to the PAR was the September 12, 2007, affidavit by petitioner's project architect, Timothy Rice (Agency Record Ex. B-1 [ex. C]).

inspector found that the floor "sloped 1 1/2 inches every three feet in length throughout the apartment." (Pet. Ex. A, Order Denying PAR, p. 2). It found that the floor's condition evidenced a decrease in service, based on the tenant's right to have level or "nearly level" floors. Significantly, it found that the condition was not *de minimus*, noting the conditions described by the tenant in his July 16, 2007 reply, namely that the sloping caused damage to the furniture, and the gap between the wall and floor allowed vermin to enter (Pet. Ex. A, Order & Opinion Denying PAR, p. 2).

Petitioner sought reconsideration (Pet. Ex. F; Agency Record Ex. C-1 [Letters of December 7, 2007 and two from December 11, 2007]). It argued that the proceeding was improper as petitioner had not been mailed a copy of the tenant's response to its September 18, 2007 petition, which DHCR was required to do pursuant to section 2529.5 of the Rent Stabilization Code. It also argued that the Deputy Commissioner took into consideration arguments newly put forth by the tenant in his response to the petition, namely that the habitability of the apartment was compromised because the slope caused a gap which allowed vermin to enter, and caused damage to his furniture. Petitioner argued that it was accordingly only fair that the Commissioner address the "new" issue of economic hardship which petitioner had not raised based on its presumption that the condition was *de minimus*, given that the condition had not previously been an issue with the tenant. Moreover, according to petitioner, it was only when it was ordered to fix the floor, did it discover how involved and how costly the repairs would be. The request for reconsideration was denied by respondent in letters dated December 21, 2007, and January 11, 2008 (Pet. Ex. G; Agency Record Ex. C-2). The earlier letter simply stated that reconsideration was only made when there was illegality, irregularity in a

vital matter, or fraud. The second letter summarized petitioner's arguments for seeking reconsideration, before stating that the PAR order did not rely on the tenant's October 11,2007 reply, but rather relied on the inspection results, and upon the Commissioner's findings in response to the owner's arguments in its petition. It also found unpersuasive petitioner's argument that it did not raise the claim of economic unfeasibility because it believed in good faith that the problem was *de minimus*.

Legal Analysis

The Rent Stabilization Code (9 NYCRR §§ 2220-2531) requires that property owners make necessary repairs and continue to maintain the premises (9 NYCRR § 2520 [6] [r] [1]). The DHCR is statutorily vested with the authority to determine whether services are properly maintained and whether conditions created by a lack of a required service negatively impact a premise's habitability (9 NYCRR §§ 2520.1; 25206 [r]). It is for the agency to determine what constitutes a required service and whether the service has been maintained (*Matter of 230 East 52nd Street Assocs. v State Div. of Hous. and Comm. Renewal*, 131 AD2d 349, 350 [1st Dept. 1987]). It has broad discretion in evaluating factual data, and its interpretation will be upheld as long as it is not irrational or unreasonable (*Matter of 333 East 49th Assocs., LP v New York State Div. of Hous. and Comm. Renewal*, 40 AD3d 516, 516 [1st Dept.], *affd* 9 NY3d 982 [2007]).

Under the Rent Stabilization Code, the agency's scope of review of a petition brought by a party aggrieved by the order of a rent administrator, is limited to the facts or evidence before the rent administrator as raised in the petition (9 NYCRR § 2529.6). If a petition submits facts or evidence which could not reasonably have been offered or included in the proceeding prior to the issuance of the order being appealed, the proceeding can be remanded for determination to the

district rent administrator to consider such facts or evidence (9 NYCRR § 2529.6). Upon the final determination by the commissioner to grant, deny, or dismiss the PAR, an aggrieved party may commence an Article 78 proceeding (9 NYCRR §§ 2529.8; 2530.1).

It is a well-settled rule that Article 78 review by the courts of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]).

The decision of an administrative agency is entitled to deference by the courts (*see, Samiento v World Yacht Inc.*, 10 NY3d 70, 79 [2008] ["construction given statutes and regulations by the agency responsible for their administration, 'if not irrational or unreasonable,' should be upheld"] [quoting *Matter of Chesterfield Assoc. v New York State Dept. of Labor,* 4 NY3d 597, 604, [2005]). The test of whether a decision is arbitrary or capricious is "'determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). An arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Matter of Pell*, at 232).

Here, petitioner sufficiently establishes that it did not receive the tenant's July 16, 2007 and October 11, 2007 communications sent to the agency and was unaware of their existence during the course of the administrative proceeding. Thus, when filing its PAR, petitioner was

somewhat hobbled in its ability to articulate all of its arguments as to why a rent reduction was inappropriate. Petitioner brought this to respondent's attention in its December 2007 letters seeking reargument, because the commissioner had referred to the tenant's October 11, 2007 document when discussing the diminished quality of life in the tenant's apartment.

There is no doubt that petitioner was on notice that the tenant complained of sloped floors and the need to prop up furniture. There is no claim that petitioner was unaware of the inspection report. Indeed, the affidavit of petitioner's architect states that it is not uncommon in buildings as old as the one at issue to have floors with a slope of 1 1/2 inches (see, Pet. Ex. I, Rice Aff. ¶ 5). Notably, the architect's affidavit, which focused on the amount of work involved to rehabilitate the premise's floors, did not contest the findings of the agency inspector, nor suggest that the description of the inspection was incorrect, nor offer a different interpretation of the findings of the inspector (*see*, Pet. Ex. I, Rice Aff. ¶¶ 7-12). Nowhere in the petition is there proper evidence contradicting the findings of the agency inspector. Even without having a copy of the tenant's July 16, 2007 answer which spelled out in detail the nature of the problem, petitioner had sufficient opportunity to investigate the apartment floor and to bring to the attention of the rent administrator any discrepancies it found. Petitioner was not prejudiced by its failure to receive the tenant's documents because it had essential notice of the condition at issue (*see, Matter of Weinreb Mgt. v New York State Div. of Hous. & Community Renewal*, 24 AD3d 269, 269 [1st Dept. 2005] , *lv denied* 7 NY3d 709 [2006] [holding that agency's failure to send tenants' answers to the petitioner was not a violation of due process because the DHCR determination to deny a rent increase did not depend on any new arguments made by the tenants in their answers]).

Reviewing courts are "not empowered to substitute their own judgment or discretion for that of an administrative agency merely because they are of the opinion that a better solution could thereby be obtained." (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept. 1984]). The DHCR determined that level or nearly level floors was an essential service, that the condition of the floors in the tenant's apartment was more than a *de minimus* violation, and the defective condition affected the habitability of the space. Although petitioner argues otherwise, the agency's determination was not made arbitrarily or capriciously, nor made without a rational basis. Moreover, petitioner's suggestion that the only solution involves inordinate expense rings hollow, in particular given respondent's statement that under the Rent Stabilization Code, petitioner can file an application to decrease services or to modify or substitute a service (Ans. ¶ 18, citing 9 NYCRR § 2522.4[d] and [e]). Ultimately the petitioner asks the court to reconsider the evidence and substitute its judgment for that of the agency, which is precisely what the court should not and cannot do. Therefore, it is

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

This is the decision, order and judgment of this court.

Respondent shall promptly contact the Clerk of Part 52 at 646-386-3742 to arrange for return of the record of the proceedings before the agency.

ENTER:

Dated: July 21, 2008
New York, New York

Paul G. Feinman
J.S.C.