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

PRESENT: HON. SHIRLEY WERNER KORNREICH PART 54

Index Number : 115750/2007
HELGASON, BERNHARD CHRISTIAN
vs.
DIV. OF HSG. COMMUNITY RENEWAL
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 115750/07
MOTION DATE 4/2/08
MOTION SEQ. NO. 1
MOTION CAL. NO.

his motion to/for Article 78

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | 1 |
| Answering Affidavits — Exhibits | 2,3 |
| Replying Affidavits | 4 |

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion



**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.**



Dated: 7/16/08

HON. SHIRLEY WERNER KORNREICH
J.S.C.

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

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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Bernhard Christian Helgason,

Petitioner (pro se),

Index No.: 115750/07

- against-

**DECISION and ORDER**

New York Division of Housing and Community Renewal

Respondents.

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KORNREICH, SHIRLEY WERNER, J.:

Pro se petitioner Bernhard Christian Helgason, a tenant in a rent-stabilized apartment at 233 E. 89th St., New York, NY, brings this Article 78 proceeding. He seeks a judgment: 1) repealing the Division of Housing and Community Renewal's (DHCR) order granting a Major Capital Improvement (MCI) rent increase; 2) compensating him for the alleged violation of his due process, equal protection and free speech rights; 3) ordering DHCR to apologize to him; 4) ordering an internal review by DHCR and an external review of DHCR by both the Governor's and the Attorney General's offices; 5) exempting him from future Petitions for Administrative Review (PAR) and permitting him to approach the DHCR directly; 6) granting tenants a full 30 days to respond to DHCR orders, rather than 30 days from the mailing date of a notice; 7) ordering future fines imposed by DHCR to go directly to the injured party, not DHCR; 8) ordering DHCR to create a new, less deferential standard for evaluating MCI requests; and 9) granting costs and disbursements. Respondent, DHCR, opposes.

*I. Facts*

On August 23, 2006, Jammel Associates, LLC, owner of 233 E. 89th Street, New York, NY, (Jammel) filed an Owner's Application for Rent Increase Based Upon MCI's. Jammel applied for the rent increase following the completion of pointing and waterproofing on the building's roof in 2004, which cost $14,508.00. Jammel submitted descriptions of the work done, the agreement between it and the contractor, proof of checks paid to the contractor and a diagram of where the work was done.

Following Jammel's application, DHCR sent a September 7, 2006, letter to petitioner informing him of the owner's application for a rent increase. The letter detailed the requested rent increase per room per month. DHCR invited comments on the back of the application, and asked that they be submitted within 30 days of September 7. The letter also explained that a tenant could use the back of the form to request an extension if more than 30 days was needed. DHCR informed the tenants of the opportunity to request an "Access to Records" form so they could review the MCI application in the Queens DHCR office.

Petitioner requested the "maximum extension for opportunity to review," using the back of the letter. He also sent DHCR a letter detailing why he wanted the extension and requested that DHCR let him review the relevant files at a Manhattan branch rather than the Queens office. Petitioner sent both notifications for an extension by certified mail, return receipt requested, on October 3, 2006. The mail was received and signed for on October 5, 2006.

Petitioner did not receive a response to his request for an extension or his request to access the records from a Manhattan location. Instead, DHCR sent the petitioner

another letter, dated October 16, 2006, confirming that the MCI rent increase was granted and stating that "THERE WERE NO TENANT RESPONSES."

Following DHCR's approval of the MCI rent increase, petitioner filed a PAR on November 1, 2006, and requested that the order be cancelled so the application could be made anew. Along with the PAR form, petitioner attached a letter detailing DHCR's error in ignoring his request for time to review the MCI application, and he provided proof of receipt of his letter requests.

On February 21, 2007, with the PAR still unresolved, petitioner filed an Article 78 action. Petitioner made many of the same requests that he makes presently. DHCR moved to dismiss because petitioner had not exhausted his administrative remedies, and for failure to state a cause of action. The court (Kahn, J.) construed petitioner's claims as: 1) a mandamus application seeking review of the administrative determination, and 2) a request for an order directing DHCR to rule on the PAR in a timely fashion. The court declined to review the administrative determination because it was not yet finalized, and granted DHCR's motion to dismiss in part. However, the court did order DHCR to determine the PAR within 60 days from service of the order. Finally, the court noted that it did not have proper jurisdiction to determine petitioner's actions for compensatory and punitive damages, as such relief may only be granted by the Court of Claims. Petitioner served DHCR with the ruling on July 31, 2007.

Following the judgment, DHCR sent petitioner an administrative file on August 14, 2007, containing a copy of the MCI application and relevant documents as well as copies of correspondences between petitioner, DHCR, and the Supreme Court. While the file did not contain petitioner's original request for the maximum extension, it did

contain copies of his correspondences, which included verified proof that DHCR received the original request. On August 17, 2007, DHCR sent a letter to petitioner encouraging him to review the file and comment on it within 20 days.

Petitioner then sent DHCR a "Notice of Intent to Demand DHCR Submit to Judicial Notice Which Petitioner Anticipates May Be Necessary to Request of the Court" (demand notice) on September 4, 2007, expressing frustration with the 20-day limit for response. Petitioner also alleged inadequacies in the documents provided by the owner in the MCI application, including illegible signatures and diagrams that were not detailed enough. This demand notice stated that petitioner would give DHCR time to cure the alleged inadequacies before submitting an actual demand to the court. DHCR did not respond to petitioner's demand notice.

Petitioner also instituted an action with the Court of Claims for compensatory and punitive damages, as well as other relief. The Court of Claims granted DHCR's motion to dismiss for lack of jurisdiction, and petitioner is currently appealing that ruling.

DHCR issued an Order and Opinion Denying the PAR on September 28, 2007. The DHCR Commissioner acknowledged that the agency mishandled petitioner's request and violated his due process rights, but stated that this was done neither purposefully nor was it covered-up afterward. The Commissioner apologized on behalf of DHCR for this error. In addition, the Commissioner found that, given the court order to issue a decision in 60 days, the 20-day limit for petitioner's review was the maximum allowable time for review because DHCR had to afford the owner a chance to respond and allow some time for a possible rebuttal by petitioner. Finally, the Commissioner noted that the quality of the owner's submissions for the MCI application were acceptable and in keeping with

DHCR's general standards. Following this ruling, petitioner initiated this Article 78 proceeding.

*II. Arguments*

Petitioner argues that because his due process rights were violated in the initial MCI rent increase, both that determination and the ensuing PAR are illegal. Due to their alleged illegality, petitioner urges the court to undo those proceedings and require the owner to re-apply for the MCI rent increase. Petitioner contends that ignoring his request for the maximum extension amounted to a violation of his due process, free speech and equal protection rights.

Aside from petitioner's procedural claims, he contends that DHCR's standards are inherently unjust and too deferential to owners. He alleges that the materials submitted by Jammel in the MCI application lacked detail and proper assurance as to the necessity of the work. As such, petitioner asserts that DHCR could not reasonably conclude that the work done was required and that the price paid was appropriate.

DHCR acknowledges its procedural deficiencies in the treatment of petitioner's request for the maximum extension. Nevertheless, it argues that these procedural errors have since been corrected by affording petitioner an opportunity to comment during the PAR. According to DHCR, the maximum opportunity to respond has been granted. As for the substantive elements, DHCR maintains that the owner's application for the MCI rent increase met DHCR's standards and, therefore, was adequate. Finally, DHCR argues that it does not have the authority to review applications to the extent petitioner requests. DHCR asserts that it cannot order owners to consult tenants before making improvements; it can only review applications after the improvements have been made.

Further, DHCR argues that it has no authority to assess whether the price paid was fair. DHCR maintains that it only has the power to allow a rent increase in accordance with the amount actually paid by the owner.

*III. Conclusions of Law*

A court's role in an Article 78 proceeding is to determine whether the challenged administrative conduct had a rational basis or whether it was an arbitrary and capricious action. *Matter of Fanelli v. New York City Conciliation and Appeals Bd.*, 90 A.D. 2d 756, 757 (1st Dept. 1982), *affd* 58 N.Y.2d 952 (1983). The court must judge the propriety of an administrative action solely on the reasons cited by the agency. *Scherbyn v. Wayne-Finger Lakes Bd. Of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). The administrative action must be upheld unless it "shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000)

Under the Rent Stabilization Law of 1969, § 26-511(c)(6)(b), an owner of a building with rent-stabilized units may apply to DHCR for permission to increase rent after making an MCI. Rent Stabilization Code § 2522.4 (Code) establishes criteria for MCI rent increases. Among other things, the improvement must be deemed depreciable under the Internal Revenue Code, it must be intended for the operation, preservation, and maintenance of the structure, and it must be an improvement that directly or indirectly benefits all tenants. Pointing and waterproofing are explicitly listed in the Code as improvements that may merit a rent increase. The Code also establishes that an adjustment of regulated rent must consider "all factors bearing on the equities involved," including hardship for a tenant and the return of the *actual* cost of the improvement to the

owner. (Emphasis added).

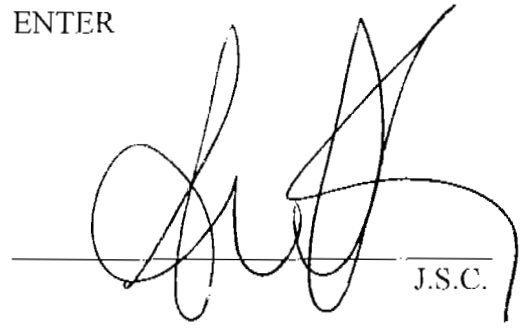
In keeping with *Scherbyn*, the court must determine whether there is a rational basis for DHCR's determination. *See also Matter of Sanders v. State of New York Div. of Hous. & Cmty. Renewal* 40 A.D.3d 440 (1st Dept. 2007) (where tenants challenged adequacy of documents in owner's MCI application, court found that only question to resolve was whether DHCR had rational basis in finding submissions adequate). As such, the court defers to DHCR's assessments to petitioner's substantive complaints about the inadequacy of the MCI application. The application met DHCR's standards, and it is not the court's place to substitute its own standards. *See Ansonia Residents Ass'n. v. New York State Div. of Hous. & Cmty. Renewal*, 75 N.Y.2d 206 (1989). Petitioner's claims as to the illegibility of signatures and vague nature of the documentation are not persuasive enough to enable the court to substitute its judgment for DHCR's expertise. *See Howard-Carol Tenants' Ass'n. v. New York City Conciliation and Appeals Bd.*, 64 A.D.2d 546 (1st Dept. 1983), *aff'd* 48 N.Y.2d 768 (1979). There may be cases where further documentation by the owner is warranted, but DHCR did not request anything more from the owner nor did petitioner demonstrate any good reason why DHCR should have done so. *Maxwell-Kates, Inc. v. New York State Div. of Hous. & Cmty. Renewal*, 196 A.D.2d 456 (1st Dept. 1993).

Moreover, DHCR's reluctance to investigate whether the work done on Jammel's building could have been accomplished for less than the $14,508.00 is rational. The expense and time such inquiry would consume is substantial. Any change in DHCR procedure regarding MCI's or PAR relief is beyond this court's jurisdiction. *West Village Assocs. v. Div. of Hous. & Cmty. Renewal*, 277 A.D.2d 111 (1st Dept. 2000).

correct its mistake, DHCR fought petitioner ever step of the way in these proceedings. Much of this could have been avoided if DHCR had immediately sent petitioner a copy of the administrative file upon the filing of his PAR or if DHCR had given petitioner access to the files in Manhattan. While this would have gone beyond DHCR's duties to petitioner, it also would have been a helpful step toward correcting the problem that DHCR created through its mishandling of the original extension request. Nevertheless, DHCR's determinations do not shock the judicial conscience. Accordingly, it is

ORDERED and ADJUDGED that the application by petitioner seeking to vacate and annul the determination by respondent, and for other relief, is denied and the proceeding is dismissed. The clerk shall enter judgment accordingly.

ENTER



J.S.C.

DATE: July 16, 2008
New York, NY