Matter of Tenants Comm. of 36 Gramercy Park v New York State Div. of Hous. & Community Renewal

2011 NY Slip Op 32521(U)

September 20, 2011

Sup Ct, NY County

Docket Number: 116069/10

Judge: Michael D. Stallman

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SCANNED ON 9/26/2011

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN, *Justice* PART 21

In the Matter of the Application of
TENANTS COMMITTEE OF 36 GRAMERCY PARK,

Petitioner,

- against -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL and 36 GRAMERCY PARK REALTY ASSOCIATES, LLC,

Respondents.

INDEX NO. 116069/10

MOTION DATE 6/30/11

MOTION SEQ. NO. 001

The following papers, numbered 1 to 6 were read on this Article 78 petition

Notice of Petition — Verified Petition — Exhibits A-U	No(s). 1-2
Verified Answer; Affirmation — Exhibits A-S; Answer	No(s). 3; 4; 5
Replying Affirmation — Exhibits A-E	No(s). 6

Upon the foregoing papers, it is ordered that this Article 78 petition is decided in accordance with the annexed memorandum decision and judgment.

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).

HON. MICHAEL D. STALLMAN

Dated: 9/26/11
New York, New York

, J.S.C.

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

1. Check one: .... X CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate: ....PETITION IS: ☐ GRANTED X DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate: .... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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HON. MICHAEL D. STALLMAN, J.:

Petitioner, Tenants Committee of 36 Gramercy Park (the Tenants), seeks a judgment annulling a determination of respondent New York State Division of Housing and Community Renewal (DHCR) that granted respondent 36 Gramercy Park Realty Associates, LLC (the Owner) a Major Capital Improvement (MCI) rent increase. In the alternative, the Tenants seek an order remanding this matter to DHCR to investigate whether the Owner committed fraud.

Background

On February 27, 2004, the Owner filed an MCI application for a rent increase for tenants with rent-stabilized and rent-controlled apartments in the building located at 36 Gramercy Park in Manhattan (the Building). The application states that the MCI was requested for "Pointing and Other Exterior Restoration" (Tenants' Reply Aff., Exh. A, at 3).[1] The description of the

[1]The application also states that the MCI improvement was pointing, waterproofing, masonry and balcony restoration of a landmark building with scaffolding and engineering services (*id.*, at 2).

improvement is "Pointing, ETC of a Landmark Building" (*id.* at 4). The application states that the area waterproofed and pointed was approximately 4,700 square feet (*id.* at 5), and that the contractor was Sammy's Restoration, Inc. (Sammy's). The record contains Sammy's January 2, 2004 notarized statement that "[b]ased upon an examination of all exposed sides of the building before any pointing/waterproofing work was performed, pointing/waterproofing was done as necessary on all sections of each exterior wall where such work was required only" (Pet. Exh. D, at 1). The record also contains a diagram from Sammy's, showing work on the west, street-side (Front) elevation of the Building, and a cost breakdown for the work. The breakdown indicates that pointing and waterproofing was performed on 4,700 square feet of the building for a total of $240,000, that masonry work was done on 2,500 square feet for $138,525.00 and that "Other - Balconies etc." work was done for 10 units for $50,000 (*id.* at 2).

By letter dated August 4, 2004, the Tenants responded that the application should not be granted because the work performed was in the nature of repair work that was required due to decades of neglect and failure to maintain the Building's exterior, which had resulted in falling masonry. The Tenants submitted evidence of a Department of Buildings (DOB) violation for failure to maintain the exterior Building wall and argued, among other things, that an MCI rent increase should not be granted because the work performed by the Owner was limited to the Front elevation, while, they believed, the rest of the Building needed repair (Owner Op., Exh. C, at 2, 5). The Tenants also submitted the report of an architecture firm, Santoriello Architects, which states:

> "<u>EXTERIOR WALLS</u>
> On the non-street facades, especially in the upper areas, there is a pattern of worn, spalling and porous brickwork and washed out mortar joints. Some brickwork appears loose and fractured, posing a hazard to anyone in the yards below, and

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> there have been reports of falling bricks. I consider this a hazardous condition due to the water penetration in these areas and the pedestrian hazard posed"

(Petition, Exh. E, at 2 [the Santoriello Report]). The Santoriello Report is based on inspections of the Building done no later than September 1998. Submitting a July 20, 2004 work order for support, the Tenants also stated that a wall of Apt. 12 E (Apt. 12E), contiguous with the Building's non-street facade, had severe leaks resulting from a hole in the Building's wall.

The Owner replied that the MCI rent increase application was for exterior renovation work, including pointing, waterproofing and masonry performed by Sammy's, which meet the Rent Stabilization Code's (RSC) criteria for an MCI, that there were no hazardous "C" violations recorded at DOB, and that the Apt. 12E complaint had been resolved. On September 15, 2005, the DHCR Rent Administrator (RA) granted the Owner's MCI rent increase application.

The Tenants filed a Petition for Administrative Review (PAR), dated October 7, 2005, requesting that DHCR reverse the RA's order. Among other things, the Tenants asserted (1) that the MCI work performed was not building-wide, but was restricted to the Front elevation; (2) that DHCR overlooked the Tenants' argument that the work was not done building-wide; (3) that the Owner had recently commenced pointing and waterproofing on the rear facade, in 2005 (the 2005 Work), thereby making the job piecemeal; (4) that post-work leaks demonstrated that the installation was not performed in workmanlike (skillful) manner; and (5) that there were outstanding class "C"violations which should have precluded the granting of the MCI. Concerning their argument that the work was not done building-wide, the Tenants quoted from their submission to the RA that only the Front elevation of the Building was worked on, despite that other sides needed work, and that brickwork appeared to be loose and fractured.

In its Answer to Notice And/Or Application (Answer), dated January 17, 2006, the Owner

objected to the Tenants' having raised new issues at PAR, and argued that the Building was free of hazardous violations, and the work was done building-wide. The Owner maintained that its MCI application was fully substantiated by copies of signed contracts, canceled checks and required permits, including a statement from the contractor, Sammy's. Regarding Apt. 12 E, the Owner stated that this was the only tenant complaint of problems with the work during the application's processing, and that the problem was fixed. As to the alleged ongoing work, the Owner noted that it was aware of the useful life of the approved improvements, and that it could not obtain duplicate billing during the period. The Owner also stated that the Building is old, requiring constant maintenance and repair.

The Owner submitted a later Answer to DHCR, on December 22, 2006, in which it argued that the only issues raised by the Tenants before the RA related to claims that the waterproofing work was not done properly and regarding scaffolding, and not piecemeal repairs. The Owner addressed the Tenants' allegations about work performed in 1998, stating that it only included a minor area of waterproofing in a roofing job. The Owner stated that it was not applying for an MCI rent increase for rear facade work, but that the pointing/waterproofing was performed, as required, following an inspection of all facades, including the rear.

The Tenants made other submissions, including on March 22, 2006 and November 16, 2007.[2] These submissions concerned their contentions about piecemeal work and leaks, which the Tenants believed were further evidence of the lack of repair of the entire building.

The Owner filed another Answer with DHCR, in May 2008, which was not served on the

[2]Whether or not discussed, all of the submissions in this record have been reviewed.

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Tenants. In this extensive submission, the Owner argued that the MCI work consisted of making several renovations to the Building's exterior between January 1999 and November 2002, with the Owner requesting approval for the costs of pointing, waterproofing, scaffolding and engineering service as part of the project (Owner Op., Exh. H, at 4). The Owner maintained that the Tenants submitted no evidence to show that repair or maintenance work was necessary at the Building's rear exterior at the time of the MCI project, and that the pointing and waterproofing work that comprised the MCI was fully completed by August 2002. Regarding the 2005 Work, the Owner stated that, in August 2005, it had applied to the DOB to renew a permit for work. The description of the proposed work, listed on an attached DOB "Work Permit Data" statement, is "to rebuild parapet and install railing at north and east elevations install cladding on chimney at roof side as per plans" (*id.* [Exhibit H to May 2008 Answer]). The Owner contended that this work was commenced three years after the completion of the MCI pointing and waterproofing installation, and had nothing to do with it.

Deputy Commissioner (Commissioner) Leslie Torres issued an order, dated September 3, 2008 denying the PAR, except as to a matter not raised here. Among other things, Commissioner Torres noted that the MCI was for exterior restoration (Owner Op., Exh. B, at 4-5), and that "the granting of an MCI for an exterior restoration contemplates that the building facade, except for normal maintenance and repairs, will be structurally sound and watertight for the twenty-five year useful life of the work" (*id.*). Commissioner Torres addressed the Tenants' contention concerning partial parapet work by commenting that partial replacement does not satisfy the requirement of a MCI, unless the work was performed as part of an exterior restoration (*id.* at 3). The Commissioner noted that, although the Tenants raised the issue of leakage in Apt. 12W, one

of 56 apartments in the Building, this was raised for the first time at PAR, the Tenants submitted no evidence of leakage in that apartment, or otherwise, and DHCR records did not show existing rent reduction orders or pending service complaints relating to the MCI (*id.* at 4).

By letter, dated October 8, 2008, the Tenants requested reconsideration of the DHCR order and its revocation due to fraud. It is undisputed that the Tenants had not been served with the Owner's May 2008 Answer. For this reason, DHCR re-opened the matter, permitting the Tenants to reply. In doing so, the Tenants submitted a report prepared by the Owner's engineer, dated January 26, 2000, (the KRA Report), that had been submitted by the Owner to the DOB as required pursuant to New York City Local Law 11 of 1998 (Local Law 11). Local Law 11 requires building owners to periodically inspect exterior building walls for safety and needed repairs, and to file a report with DOB concerning the results.

The KRA Report lists various types of work to be performed on all sides of the Building's exterior. The engineer that completed the report, KRA Associates, Inc. (KRA) stated that there were no hazardous conditions observed on the Building's exterior and deemed the Building "safe with a repair and maintenance program" (Pet. Exh. C, at 2). The KRA Report states that the Building was inspected during five visits, conducted from September 24, 1999 to January 11, 2000 (*id.*).

The Tenants claimed that they obtained the KRA Report from DOB, after completion of proceedings before the RA, and that the Owner fraudulently concealed it by not submitting it to DHCR with the MCI rent increase application. The Tenants argued that the report contradicts Sammy's affidavit and a diagram, dated May 2000, submitted by the Owner, that indicate that the only necessary work was on the Building's Front elevation. The Tenants asserted that since

issuance of the RA order, three additional jobs were performed on the Building's facade which, when considered with the Santoriello Report, demonstrated that work was required on all sides of Building. The Tenants further asserted that the record contained evidence of unskillful, piecemeal work that was not performed building-wide. The Owner objected to the Tenants' submission of the KRA Report.

By order dated October 14, 2010 (the Final Order), Commissioner Woody Pascal reduced the rent increase slightly, but otherwise affirmed the RA's grant of the MCI. In the Final Order, Commissioner Pascal stated that the RA's order granted an MCI rent increase for pointing, waterproofing and exterior work. The Commissioner characterized the nature of the Tenants' original PAR as their request for reversal of the RA's order because pointing and waterproofing was not building-wide, but restricted to the Front elevation. The Commissioner characterized the reconsideration request as the Tenants' claim that the MCI work done on the Front elevation fell short of the scope of work indicated as necessary for all sides of the Building in the KRA Report.

The Commissioner stated that DHCR's established position is that comprehensive pointing and waterproofing as necessary constitutes an MCI which may warrant a rent increase. The Commissioner also stated that building-wide comprehensive exterior renovation, which may include pointing, waterproofing, masonry, parapets, etc., constitutes an MCI for which a rent increase may be warranted, but that piecemeal and ordinary maintenance and repair do not.

Regarding the Tenants' contention that the work was not building-wide, the Commissioner opined that the Owner is not required to perform the work on the entire exposed exterior facade, but must perform the work in a skillful manner, so that upon completion the premises shall remain free from water seepage for a reasonable period of time. The

Commissioner noted that the granting of an MCI rent increase for such work contemplates that the building facade, except for normal maintenance and repairs, will be structurally sound and watertight for the twenty-five (25) year useful life of an exterior restoration. The Commissioner stated that the record revealed that the Owner submitted contracts, invoices, contractors' affirmations, a contractor's statement and diagram, and canceled checks, which indicated that the Owner correctly complied with the applicable procedures for an MCI increase.

The Commissioner acknowledged the Tenants' claims that the KRA Report demonstrated that the Owner's submissions were misleading in indicating that work was only required on the Front elevation and that the Owner had fraudulently concealed that the MCI work done on the Front elevation was short of that indicated as necessary on the report. He also determined that these allegations were not sufficient to warrant revocation of the MCI. The Commissioner noted that the MCI application described the work performed as "pointing and other exterior restoration" and indicated that it was performed on the Building's Front elevation and stated that the KRA Report

> "outlines exterior façade restoration work for the [Front] elevation as well as the north, south and east elevations, and also stated that work on the north and east elevations was underway at that time. While the owner acknowledges that subsequent work, which it described as parapet replacement, railing installation and the cladding of the chimney was performed on the building in 2005, the KRA [R]eport does not mention these items of work."

(Petition, Exh. A, at 5).

The Final Order also notes that there were no DHCR records indicating that the Owner filed an MCI application for the work on the north and east elevations, or for work performed in 2005 or 2007, and that the KRA Report indicated that work was then, in 2000, underway on the north and east elevations of the Building. In addition, the Commissioner stated that DHCR's

records indicated that the Owner had, in January 2010, filed an MCI application for "restoration work, chimney stack and rewiring" (*id.*).

The Final Order states that, absent waiver under the RSC, the Owner would be prohibited from obtaining a rent increase for any work of a similar nature, specifying that such work was "any work performed to make the building structurally sound and watertight, for the entire duration of the [25-year] useful life of the subject exterior restoration" (*id.* [emphasis in original]). Regarding the Tenants' contention that the MCI work remained ongoing, the Commissioner noted that the Owner had acknowledged in a response that it was aware of the 25-year RSC useful life of the approved improvements and that duplicate benefits were not available during that period (*id.*).

Regarding the allegations of leaks in Apt. 12E, raised before the RA, the Commissioner stated that the Tenants indicated the problem was corrected by the Owner in July 2004, citing a work order they submitted in the original PAR. In addition, the Commissioner determined that the Owner established before the RA that all "C" building violations had been cleared. The Commissioner noted that the Tenants' PAR contention, that the Building's Front elevation was *still* leaking in another apartment, Apt. 12W, was not raised before the RA. The Commissioner stated that the Tenants submitted a printout of reported violations that they asserted were due to water damage from the exterior for apartments 12W, 11S and Apt. 12E, but that the printout indicated that the Owner certified that those violations, none of which were "C" violations, were corrected. Regarding the Tenants' newly submitted photos of ceiling damage in apartment 12W, and the related complaints filed, in July 2010, with the Department of Housing Preservation and Development (HPD) and photos that the Tenants asserted were of exterior facade damage to the

Building in August 2010, the Commissioner noted that HPD printout showed complaints, not violations. The Commissioner determined that the MCI rent increase was properly granted because the one complaint of leakage was corrected and all "C" violations, including those related to the leakage complaints, had been cleared when the RA's order was issued.

The Commissioner denied the petitioners' request for a hearing, stating that the submissions were sufficient to render a determination, and that the Tenants had been provided with ample opportunity to participate in the proceeding and to be heard.

Discussion

Pursuant to CPLR Article 78, a court is limited to a review of the record before the agency and the question of whether the determination made was arbitrary and capricious and without rational support (*Matter of Greco v New York State Div. of Hous. & Community Renewal*, 207 AD2d 321, 322 [1st Dept 1994]). An action is arbitrary and capricious, or an abuse of discretion, when taken "without sound basis in reason and . . . without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). "[T]he court's scope of review is limited to an assessment of whether there is a rational basis for the administrative determination without disturbing underlying factual determinations" (*Matter of Heintz v Brown*, 80 NY2d 998, 1001 [1992]). If there is a rational basis, a court has no alternative but to confirm the determination, and may not instead substitute its own judgment (*Paramount Communications v Gibraltar Cas. Co.*, 90 NY2d 507, 514 [1997]; *Pell*, 34 NY2d at 231). The burden is on the petitioner to demonstrate entitlement to Article 78 relief (*see Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, 321 [1st Dept 2006]; *Matter of Miggins v City of New York*, 286 AD2d 258, 258 [1st

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Dept 2001]).

In the petition, the Tenants argue that the Final Order is arbitrary, capricious, and demonstrates an abuse of discretion, because when the Owner applied for the MCI rent increase it did not demonstrate that the work done on the Front elevation was not required on the rest of the Building's elevations. The Tenants maintain that they have demonstrated that all sides of the Building needed restoration work. The Tenants also argue that DHCR did not follow precedent, but irrationally construed RSC 2522.4 to include work which had not been performed building-wide and did not inure to the benefit of all of the tenants. In the alternative, the Tenants argue that DHCR's failure to investigate whether the Owner committed fraud requires annulment of the Final Order and remand. The Tenants' position is that, in light of the 25-year useful life for pointing under the RSC, any work necessary under Local Law 11, as shown in the KRA Report, should be considered necessary under the RSC.

RSC 2522.4 provides that:

> "(2) An owner may file an application to increase the legal regulated rents of the building . . . on one or more of the following grounds:
>
> (i) There has been a major capital improvement . . . which must meet all of the following criteria:
>
> . . .
>
> (c) is an improvement to the building . . . which inures directly or indirectly to the benefit of all tenants, and which includes the same work performed in all similar components of the building or building complex, unless the owner can satisfactorily demonstrate to the DHCR that certain of such similar components did not require improvement."

Before DHCR, the burden is upon an owner to justify an MCI increase with documentary support (*Matter of West Vil. Assoc. v Division of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000]). Where work is not done on a building-wide basis, and there are ample

tenant complaints, an MCI increase may be denied (*Matter of Cenpark Realty Co. v New York State Div. of Hous. & Community Renewal* (257 AD2d 543, 543 [1st Dept 1999]). However, work done to the facade of the Building may qualify as a building-wide improvement where only performed on a portion of the building (*see Matter of 430 E. 86th St. Tenants Comm. v State of N.Y. Div. of Hous. & Community Renewal*, 254 AD2d 41, 41 [1st Dept 1998] [upholding DHCR determination to grant MCI status to work involving 80% of the building's parapets and masonry repairs]).

It is undisputed that the waterproofing, pointing and other restoration work was performed on the Front elevation of the Building. The Tenants argue that the Owner did not meet its burden to demonstrate that work was not required on all of the Building's elevations. The Tenants contend that the KRA Report, the Santoriello Report, the evidence of leakage problems, and the performance, from 1998 through 2010, of seven jobs on the Building demonstrate that the type of work performed on the Front elevation was required building-wide prior to the Owner's 2004 MCI application submission, but was not completed prior to that time.

The Commissioner's determination that the leaks did not warrant revocation of the MCI is not arbitrary and capricious, as he found that these conditions were limited and that the Owner demonstrated that they were promptly corrected. Regarding the work performed on the Building from 1998 through 2010, the Tenants maintain that it involved pointing, waterproofing, masonry and/or parapets, and demonstrates that necessary MCI work was performed over the course of years, in a piecemeal fashion, despite that the Owner was permitted to increase rents in 2005. Any meaningful assessment of the Tenants' contentions concerning the significance of and the relationship between the KRA Report and work performed before, during and subsequent to the

Owner's MCI application submission necessarily involves the evaluation of factual data concerning building restoration that is within DHCR's expertise, for which deference to the agency by this court is required under the law (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]; *West Vil. Assocs.*, 277 AD2d at 112; *see Matter of Mayfair York Co. v New York State Div. of Hous. & Community Renewal*, 240 AD2d 158, 158 [1st Dept 1997] [determining that DHCR finding that work done to apartment was normal maintenance and repair, and not an improvement under RSC § 2522.4, entailed DHCR's "expertise in evaluating the documentation and other factual data before it concerning this work, and is entitled to deference if not irrational or unreasonable"]).

For example, the Tenants contend that the KRA Report demonstrates that the 2005 Work was required in 2000. In the Final Order, however, the Commissioner stated that the KRA Report does not mention the 2005 Work. The Tenants did not provide expert evidence before the DHCR concerning this work or the KRA Report, and the record consists of a DOB work permit for parapet, railing and chimney work, and numerous pictures of a scaffold on the outside of the Building. With this, the court may reasonably infer no more than that in 2005 work was performed on the Building,[3] but not that the Commissioner's determination that 2005 Work was not included in the KRA Report was irrational, as the court may not disturb DHCR's underlying factual determinations (*see Matter of Heintz v Brown*, 80 NY2d 998, *supra*). This includes the

[3]The Tenants argue that they have demonstrated here that the facade problems on the northeast corner of the Building were an item on the KRA Report and "so severe that in October 2005, the brick wall there had to be removed (exposing the underlying steel structure) and resurfaced" (Tenants' Reply, at 23). This is the Tenants' interpretation of the submissions, but they have not demonstrated that DHCR's interpretation of this material was irrational.

agency's findings as to what is, or is not, included on the KRA Report, which requires technical expertise.

As another example, the Tenants argue that the record proves that the Owner was doing substantial facade restoration on the Building's east elevation in 2007. In support, they submit their counsel's 2007 letter to DHCR, in which she discussed leaks in Apt. 12 E, and two others, noting that it was the Tenants' belief that this was further evidence of the lack of repair of the entire building during the period addressed in the MCI. The sole attachment to this letter is a notice from the Building's management suggesting that tenants keep their windows closed because there would be workers on the fire escape, doing work on the facade and bricks, that was expected to be finished in approximately two weeks (Pet., Exh. N). This evidence, of unspecified work that was performed on the Building facade in 2007 and the Tenants' belief about certain leaks, does not conclusively demonstrate that the 2007 work was either noted on the 2000 KRA Report or "substantial facade restoration" that should have been performed during the MCI work period (Tenants' Reply, at 8). Consequently, such evidence does not demonstrate that DHCR's determination was arbitrary and capricious or irrational.[4]

Furthermore, in addition to the KRA Report and the other submissions referenced by the Tenants, the record before the Commissioner contained the affidavit of a KRA principal, an engineer, stating that all the waterproofing and pointing necessary had been completed prior to the Owner's MCI application submission. This affidavit further states that the conditions in the KRA Report listed for the other elevations were determined to be of a lesser degree, that would

[4]The Tenants argue that the KRA Report calls for resurfacing of all exterior walls (Tenants' Reply, at 21), but this is not stated therein, but a conclusion drawn by the Tenants.

only require ordinary repairs at a later time. The record also contains a later report, prepared by KRA for submission to the DOB pursuant to Local Law 11, based on its inspection of the Building's facade. This report indicates that a complete facade restoration was performed prior to the date of the Owner's submission of its MCI application (*see* Owner Op., Exh. N [Critical Examination Report], at 4; Exh. O, at 24). The Commissioner also mentioned that the KRA Report notes that work on the north and east elevations was underway at the time that the report was written, suggesting that this work was performed prior to or while the work on the Front elevation work was being conducted.[5] While the Tenants argue that the Owner has failed to demonstrate that it met the requirements of RSC 2522.4 (a) (2) (i) (c), because it did not demonstrate that all necessary restoration work was completed prior to submission of the application, the aforementioned evidence, considered with Sammy's statement, provides a factual basis for the Commissioner's determination that the necessary restoration, waterproofing and pointing work was then completed. As previously discussed, where the record reveals a rational basis for a determination, a court is constrained to uphold the agency's determination "even though the court, if viewing the case in the first instance, might have reached a different conclusion" (*West Village*, 277 AD2d at 113 [court may not disregard rational basis standard for its own standard of fairness or interests of justice standard]).

The court agrees with the Tenants that the Owner's acknowledgment that it would not be obtaining rent increase benefits for duplicate work performed within the useful life of the 2005

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[5]If the work was performed on the other sides of the Building, at the same time that it was performed on the Front elevation, or immediately before, the Tenants have little complaint where the Owner did not attempt to pass on those costs to them.

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MCI rent increase grant is irrelevant. This, however, is not sufficient to change the result here, where the record contains evidence to support the agency's determination.

The Tenants argue that the Final Order was affected by an error of law because DHCR irrationally construed RSC 2522.4 (a) (2) (i) (c), as the restoration work on the Front elevation was not building-wide and did not inure to the benefit of all Tenants. The Tenants also argue that DHCR failed to follow precedent. The DHCR determined that granting of the MCI required the performance of work necessary to make the Building watertight and protected from seepage for a reasonable period of time, so that all of the Tenants might benefit. This is not an irrational interpretation of RSC § 2522.4 (a) (2) (i) (c) and the First Department has upheld DHCR's determination to grant an MCI for work that does not involve the entire building (*see 430 E. 86th St. Tenants Comm.*, 254 AD2d at 41 [MCI status for work involving 80% of the building's parapets and masonry repairs]; *cf.* RSC § 2522.4 [a] [3] [19] [waterproofing and pointing to be performed "as necessary on exposed sides of the building"]).

Citing to *Cenpark Realty Co.* (257 AD2d 543, *supra*) and *Matter of Rudin Mgt. Co. v New York State Div. of Hous. & Community Renewal* (215 AD2d 243, 243 [1st Dept 1995]), the Tenants also argue that DHCR did not follow its own precedent. In *Cenpark*, the First Department upheld the trial court's denial of the owner's application to annul DHCR's determination that work was not performed building-wide. This reflects the court's determination that the record revealed that DHCR had a rational basis for its determination, and that there was ample support in the record to support this determination, including continuing leaks and water damage, the contractor's statement that it worked on only a portion of the building, and that additional pointing was subsequently performed. While *Cenpark* discusses

some of the same issues involved here, it does not follow that the record in that case was similar to the record here, or that the record in this case demonstrates that the Tenants have met their burden to show that DHCR's determination was irrational.

In *Rudin* (215 AD2d 243, *supra*), the Court determined that the owner's work only on the 20th floor parapet of the Building, but not on others, was not building-wide. While *Rudin* indicates that an MCI for parapet work alone may require replacement of all parapets, this matter is distinguishable as it does not concern an MCI for parapet work alone, which constitutes a separate MCI under the RSC,[6] but for comprehensive restoration, the bulk of which consisted of waterproofing and pointing work.

In reply, the Tenants point to *Matter of the Administrative Appeals of 110 W. 86th LLC* (DHCR Docket Nos. VI430071RO, VJ430070RT [2011] [Pascal, Commissioner]), which was decided by the DHCR after the petition was submitted in this proceeding. In *110 W. 86th LLC*, the DHCR determined that the record, which included complaints of unresolved leakage problems and the owner's newsletter admission that it was hiring a contractor to re-point within three years after the MCI work was supposedly completed, warranted revocation of a previously granted restoration MCI. The Commissioner found it clear from the record that the owner did not perform comprehensive pointing/exterior renovations because additional pointing and exterior renovation work was necessary and the MCI work did not render the premises free from exterior seepage for a reasonable period of time, as shown by additional masonry repairs performed. The decision, however, also indicates that the Commissioner found that the work

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[6]RSC § 2522.4 (a) (3) (18) provides for an MCI for parapet work for complete replacement.

was not done in a skillful manner and that the tenants submitted an engineer's report which concluded that 50% of the building's facade still needed work, and that the owner did not point the square footage claimed (*id.* at 4).

In this matter, based on the record before it, DHCR drew the conclusion that the evidence did not demonstrate that the MCI rent increase should be revoked. There is no indication that the record here is essentially similar to that in *110 W. 86th LLC.* In addition, *110 W. 86th LLC* concerns the lack of skillfulness of the work performed. The Tenants' argument here, however, is that the work was not performed building-wide when required, but only in piecemeal fashion over many years. Only in their reply do the Tenants raise the issue of skillfulness, and the court is restrained from addressing those issues where they were not raised by the Tenants in the petition (*see Sanford v 27-29 W 181st St Assoc. Inc.*, 300 AD2d 250 [1st Dept 2002] [stating that generally a reply is for the limited purpose of responding to the opposition, and not for raising new arguments to which the opposing party has had no opportunity to respond]; *Rodriguez v Lloyd*, 233 AD2d 120, 120 [1st Dept 1996] [new evidence could not be considered in the Article 78 proceeding because it had not been submitted at the administrative level and improperly submitted to the court for the first time in reply]).

Also in reply, the Tenants argue that the MCI work was not skillfully performed on the Front elevation. In doing so, the Tenants rely on recent evidence, submitted here by the Owner, that was not before DHCR.[7] A court may not review evidence that was not before the agency (*West Village*, 277 AD2d at 111 [upholding DHCR's denial of pointing and waterproofing MCI

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[7]In reviewing the Tenants' contentions before the RA, they complained only of leaks in an apartment on the non-street facade, and not on the street, Front elevation.

where owner submitted only to court, but not DHCR, required statement and diagram]; *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 [1st Dept 1982], *affd* 58 NY2d 952 [1983] ["Disposition of the proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered"]), and the Tenants' petition may not be granted.

As stated by DHCR, the Owner received an MCI based on the contemplation that the building would remain watertight for 25 years. Therefore, that this Article 78 petition is not being granted does not absolve the Owner from the requirement that it ensure that the Building remain watertight throughout the 25 year MCI period and, absent waiver under the RSC, to do so without the benefit of additional rent increases for work done to make the Building watertight. Simply put, because of the landlord's receipt of the MCI, the landlord must repair all future leaks, whenever and wherever they occur, irrespective of why they occur, at the landlord's sole expense.[8] Moreover, but without ruling on what the DHCR may in its discretion consider, this denial of the Article 78 application is without prejudice to the Tenants' right to seek appropriate redress at DHCR concerning their contentions about evidence submitted here but not considered

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[8]Although an owner may receive an MCI increase only once for the subject project, this does not mean that additional work would not be needed later for additional repair and maintenance. Analogous to a contractor's obligation to perform subsequent remedial work to satisfy the requirement of a contractual guarantee, the law imposes on a landlord the obligation to ensure that the building is watertight and structurally sound for the 25 year "useful life" of the restoration MCI, to the tenants' benefit, without passing on to the tenants the additional cost of performing the subsequent work. For example, the age of the building, the effect of weather, and the requirement of local law may necessitate additional maintenance or remedial work. Although an MCI is sought for specific work during a particular period, the physical condition of the building, even after the MCI work is completed, is subject to change. Simply because additional subsequent work may be needed over time neither proves nor disproves that the MCI work had been done in a piecemeal or unworkmanlike manner.

because it had not been submitted before the agency, or to apply for a rent reduction based on leakage or otherwise, if warranted.

In the alternative, the Tenants argue that *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (15 NY3d 358 [2010]), mandates that DHCR hold a hearing that was requested by the Tenants to determine whether the Owner committed fraud in failing to reveal that pointing and waterproofing were necessary other than on the Front elevation (Pet. ¶ 36). In a related argument, the Tenants claim that the Owner committed fraud in failing to submit the KRA Report, which they claim shows that work was required on all of the Building's elevations, with its application for the MCI rent increase, instead submitting simplistic diagrams of work on the Front elevation. The Owner responds that the KRA Report should not be considered because it was not before the RA.

The Owner's contention disregards that the Tenants did not have ready access or knowledge of the Owner's DOB filings (RSC § 2529.6 [commissioner may consider facts or evidence which could not reasonably have been offered or included prior to the issuance of the RA's order]; *see Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 150 [2002] [agency is not completely foreclosed from receiving additional evidence in the course of review, where the proffering party demonstrates good cause, that the evidence could not have been provided at an earlier stage of the proceedings]). In addition, DHCR "'may issue a superceding order modifying or revoking any order issued by it . . . where [it] finds that such order was the result of illegality, irregularity in vital matters or fraud'" (*Matter of Sherwood 34 Assoc. v New York State Div. of Hous. and Community Renewal*, 309 AD2d 529, 531 [1st Dept 2003], quoting RSL § 2527.8). It follows that, in order to do so, DHCR may need to review

the submissions that a party claims demonstrate fraud or irregularity. Under the circumstances here, DHCR's decision to review the KRA Report was not improper.

In *Grimm*, upon which the Tenants rely, the Court of Appeals determined that DHCR had an obligation to ascertain whether the rent on the base date is a lawful rent where the overcharge complaint alleged fraud, and acted arbitrarily and capriciously in failing to do so "where there existed substantial indicia of fraud on the record" (*id.* at 366). The Court of Appeals stated that the mere allegation of fraud, without more, was not sufficient to require DHCR to investigate, but "[w]hat is required is evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of rent stabilization" (*id.* at 367). This is not an overcharge complaint and the Tenants do not allege the Owner's fraudulent scheme to remove an apartment from the protections of the rent-stabilization law. The Tenants' argument rests on the premise that the Owner was required to submit a Local Law 11 report in an MCI rent application proceeding and that the KRA Report demonstrates the Owner's fraud. Regarding the latter premise, the Final Order indicates that the Commissioner reviewed the KRA Report and the Tenants' contentions as to what it demonstrated, but does not suggest, that the Commissioner found fraud. As to the former, the Tenants have not demonstrated support for the contention that the Owner was required to submit the KRA Report, such as reference to DHCR rules concerning documentation for an MCI. Without comment as to whether or not a hearing might be required under other circumstances, where fraud is alleged or indicia of fraud found in an MCI proceeding, *Grimm* does not demand a hearing under the circumstances presented here.[9]

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[9]The Tenants assert that DHCR should have conducted an inspection, but DHCR "has discretion to decide if an inspection is necessary" (*Matter of 370 Manhattan Ave. Co., L.L.C. v*

[* 23]

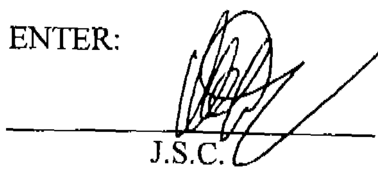
Conclusion

Accordingly, it is

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

Dated: September 20, 2011

ENTER:



J.S.C.

HON. MICHAEL D. STALLMAN

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).

New York State Div. of Hous. & Community Renewal, 11 AD3d 370, 371 [1st Dept 2004]).