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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MICHAEL D. STALLMAN
Justice

PART 21

Index Number : 116069/2010
36 GRAMERCY PARK
vs.
N.Y.S.D.H.C.R.
SEQUENCE NUMBER : 002
MODIFY ORDER/JUDGMENT

INDEX NO. 116069/10
MOTION DATE 2/2/12
MOTION SEQ. NO. 002

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____ | No(s). 1-9
Answering Affidavits — Exhibits ____ | No(s). 10, 11
Replying Affidavits ____ | No(s). 12-13

Upon the foregoing papers, it is ordered that this motion is denied as per the annexed Memorandum Opinion (Decision and Order).

FILED
MAY 21 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

HON. MICHAEL D. STALLMAN

Dated: 5/15/12

, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: Petitioner's ...MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

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

Index No. 116069/10

Petitioner,

Decision and Order

- against -

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

Respondents.

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HON. MICHAEL D. STALLMAN, J.:

Petitioner, Tenants Committee of 36 Gramercy Park (the Tenants), moves for an order modifying the September 20, 2011 Decision and Judgment of this court[1] in order to remand this matter to respondent New York State Division of Housing and Community Renewal (DHCR) to consider evidence that was not before the agency, but that has been submitted for the first time in this Article 78 proceeding, or on this motion. The respondents oppose the motion.

Background

The facts of this matter are set forth in this court's September 28, 2011 Decision and Order, familiarity with which is assumed. The Tenants seek remand so that DHCR may review additional evidence concerning restoration work done on, or planned for, the facade of a building (the Building) owned by respondent 36 Gramercy Park Realty Associates, LLC (the Owner).

[1] Although the caption of the memorandum opinion denominated it as "Decision and Order," the decretal language "ADJUDGED that the petition is denied and the proceeding is dismissed." The County Clerk correctly entered it as a judgment.

This work was performed, or is to be performed,[2] approximately a decade after the performance of prior building restoration work, for which DHCR granted the Owner a Major Capital Improvement (MCI) rent increase in February 2004.[3]

The submitted evidence consists of diagrams for work to be performed on the Building (the Plans) dated September 2010. The Plans are dated before the DHCR rendered its determination on the Tenants' Petition for Administrative Review (PAR), and were before this court previously, as they were submitted by the Owner with its Answer in this Article 78 proceeding, in response to the Tenants' filing of the petition. The Tenants also submit: (1) what they state is a signature page of a cost affidavit, which is dated November 15, 2010 (Cost Affidavit); (2) the Owner's application with the New York City Department of Buildings that indicates that it was filed on December 10, 2010 (the DOB Application);[4] and (3) a permit from the Landmarks Preservation Commission that states that it was issued February 7, 2011 (the Landmarks Permit).[5] None of these three documents is dated prior to the October 14, 2010 DHCR order (the Order) that is the subject of this Article 78 proceeding.

Discussion

The parties dispute the nature of this motion. The Tenants contend that they have

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[2]The Tenants contend that at the time that they made this motion, work that the Owner's counsel stated was done in 2010 had not yet been performed (*see* Kleinberg Aff., ¶ 11).

[3]The work for which the MCI was granted occurred over several years prior to the grant.

[4]This document provides for an estimated total cost of $250,000 for the work.

[5]This document states that the proposed work "will protect the building from damage due to water infiltration and will aid in the long-term preservation of the building" (Tenants Mov. Aff. [Kleinberg Aff.], Exh. D, at 1). It also states that it that concerns alterations to the Building as proposed in the Owner's January 26, 2011 application.

demonstrated a reasonable excuse and shown good cause for the late submission of the aforementioned evidence, and represent that they simply request that the court modify the Order to remand the matter to DHCR to allow the Tenants to seek appropriate redress based on this evidence, as well as related evidence that was previously before DHCR. The respondents contend that this motion is one for reargument and renewal, in disguise.

A motion for leave to reargue must be "based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion," and may not be used to advance arguments different than those presented on the prior motion (CPLR 2221 [d] [2]). A motion for leave to renew must be based on new or additional facts and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221 [e] [3]; *Cuccia v City of New York*, 306 AD2d 2 [1st Dept 2003]; *Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988]).

While the Tenants do not argue that the court has misapprehended anything, they request a change in the outcome of the prior adjudication, arguing that the new evidence, considered with the existing record, shows that the Owner continues to perform restoration work for which the MCI rent increase was granted, demonstrating that the work has been done piecemeal, over years. Alternatively, the Tenants argue that the evidence shows that the work is being redone, which, they claim, demonstrates that it was not skillfully performed in the first place.[6] In the Article 78

[6]The Tenants argue that the evidence is highly relevant to the Agency's determination as to whether the MCI work was complete "as necessary." In other words, the Tenants claim that the evidence shows that the Owner did not perform all of the work that was required on the Building when the MCI work was performed, thereby making the granting of the MCI inappropriate. This ties in with the Tenants' argument that the work was done in a piecemeal manner, as they claim that work was continually done on the Building, over the years since 2004, because all the work that was initially required was not performed.

proceeding, the Tenants also argued that the Order was arbitrary and capricious because the work was performed in a piecemeal manner or not skillfully done. In addition, the Tenants cite to case law discussed in the Article 78 proceeding, and their motion is predicated partially on the Plans, which were previously addressed, as well as the other evidence that they submit here. Consequently, the court deems the motion as one for reargument and renewal. Furthermore, based on the Tenants' assertions about the availability of the evidence to them, including that they did not have access to the Plans prior to the Article 78 petition filing deadline, leave to reargue and renew is granted (*see Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376 [1st Dept 2001]).

Acknowledging that this court is limited in its power to review evidence that was not in the record before DHCR, the Tenants argue that they seek remand alone, as opposed to adjudication on the merits based on the evidence. The Tenants contend that DHCR's record was incomplete, for reasons beyond their control, and that the agency's determination was flawed where it conducted its review without the benefit of a complete record.

"Judicial review of administrative determinations is confined to the facts and record adduced before the agency [interior quotation marks and citation omitted]" (*Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of West Vil. Assoc. v Division of Hous. & Community Renewal*, 277 AD2d 111, 113 [1st Dept 2000]). Consequently, the Tenants are not permitted to supplement the Article 78 record with additional facts or circumstances that arose after the agency's determination was made (*see Matter of Rizzo v New York State Div. of Hous. & Community Renewal*, 6 NY3d 104, 111 [2005]).

In addition, generally, a court cannot remand a matter to the DHCR to review evidence

that came into being after the Petition for Administrative Review (PAR) was adjudicated (*id.* at 111). The Tenants offer no evidence to demonstrate that the Landmark Permit, the DOB Application and the Cost Affidavit existed prior to DHCR's issuance of the October 14, 2010 PAR determination, but state that the "documents followed the . . . filing of the Article 78 proceeding" (Kleinberg Aff., ¶ 7). Therefore, the basis for the Tenants' contention that the record that was before the DHCR was not complete without these documents, when they did not then exist, is unclear. In any event, as discussed further below, the Tenants have not demonstrated that remand is appropriate on this record.

As the Tenants point out, remand may be appropriate in certain instances. However, the cases to which the Tenants cite involve those instances where the "agency has made the type of substantial error that constitutes an 'irregularity in vital matters [citation omitted]'" (*Matter of Peckham v Calogero*, 54 AD3d 27, 28 [1st Dept 2008], *affd* 12 NY3d 424 [2009]), or where the agency's order was the result of illegality or fraud (*cf. Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 204 [1st Dept 2011]; *see* 9 NYCRR 2527.8; *Matter of Sherwood 34 Assoc. v New York State Div. of Hous. & Community Renewal*, 309 AD2d 529, 532 [1st Dept 2003] [DHCR's motion to remit on Article 78 concerning existence of two diametrically opposed decisions regarding whether the same building was subject to the Rent Stabilization Law should have been granted as the decisions constituted an irregularity in vital matters]). The Tenants do not demonstrate that these factors exist here.

In addition, while the Tenants state that the Owner filed documents with agencies, such as the New York City Department of Buildings, late, and accuse the Owner of improper "maneuvering," they provide no evidence of the Owner's fraudulent or improper conduct. In

fact, the Tenants do not demonstrate that any of the documents were actually filed late, that is, beyond a required deadline. The Tenants also do not provide authority to support the contention that the Owner had an affirmative duty to disclose the submitted documents to them or DHCR. This includes the Plans, which are dated prior to the PAR determination issuance, but concern work to be performed years after the MCI for the challenged work was granted in 2004.

The Tenants seek the opportunity to open the DHCR record to introduce evidence, either discovered, or created, after the PAR, concerning work that has been, or will be, performed on the Building a substantial number of years after performance of the work for which the agency granted the MCI rent increase. Implicit in the Tenants' argument is that, should they determine or believe that new evidence supports their contentions about the MCI work, the DHCR record should be re-opened and augmented, seemingly for the MCI useful life period, here 25 years, and despite the agency's final determination, so that the Tenants may continue to litigate. However, the Tenants' belief or assertion that the Plans demonstrate incomplete or unskillful work performed approximately a decade ago is conclusory and insufficient to support their request.[7] Moreover, remand of this nature would simply subject DHCR's "rulings to the prospect of . . . endless review, based on submissions by tenants or by landlords as to postdetermination events" (*Rizzo,* 6 NY3d at 110). Irrespective of whether or not, before the PAR determination was issued, DHCR might have been able to permit review of the Plans (*see Matter of Gilman v New*

[7]In moving, to demonstrate that the recent work is either a completion or a redoing of the challenged MCI work, the Tenants provide only a comparison chart created by their attorney, submitted in the Article 78 proceeding, and their contention that the recent work was required when the MCI work was performed, or is duplicative of the MCI work (*see* Kleinberg Aff., ¶ 15). While the Tenants submit an architect's affidavit, they do so only for the first time only in reply, and the court is precluded from considering it (*see 627 Acquisition Co., LLC v 627 Greenwich, LLC*, 85 AD3d 645, 646 [1st Dept 2011] [rejecting evidence submitted in reply papers]).

York State Div. of Hous. & Community Renewal, 99 NY2d 144, 150 [2002] [stating that "good cause provisions" in the Rent Stabilization Code permit DHCR to accept late filings prior to the Commissioner's entry of final order]), on this record, the Tenants have not sufficiently demonstrated that they are entitled to remand for review of that evidence, or the other evidence submitted here.

The Tenants mention a lack of due process due to an incomplete record below. However, they do not argue that they were not afforded "reasonable notice of the administrative proceeding and an opportunity to present [their] objections" before DHCR (*Matter of Stavisky v New York State Div. of Hous. & Community Renewal*, 204 AD2d 462, 463 [2d Dept 1994]).

To support remand, the Tenants also rely on the September 28, 2011 Decision and Order in which this court stated:

> "[m]oreover, 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 because it had not been submitted before the agency, or to apply for a rent reduction based on leakage or otherwise, if warranted"

(*id.* at 19-20). This statement was intended only to ensure that nothing in the Decision and Order would be interpreted as precluding any of the Tenants from seeking further relief from DHCR to which they collectively or individually may be entitled, such as a rent reduction based on leakage, if warranted. It was not intended to provide for the relief that the Tenants seek here.

Conclusion

In light of the foregoing, it is

ORDERED that the motion is denied.

Dated: May 15, 2012
New York, NY

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

FILED
MAY 21 2012
COUNTY CLERK'S OFFICE
NEW YORK