

**Matter of 20 Fifth Ave. LLC v New York State Div. of
Hous. & Community Renewal**

2012 NY Slip Op 32446(U)

September 20, 2012

Supreme Court, New York County

Docket Number: 109920/2011

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 109920/2011
20 FIFTH AVENUE, LLC
vs.
DIVISION OF HOUSING
SEQUENCE NUMBER : 002
RENEWAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

FILED

SEP 24 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

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

Dated: 9/20/12



HON. EILEEN A. RAKOWER, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: 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 — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER

PART 15

Justice

In the Matter of the Application of
20 FIFTH AVENUE LLC,

Petitioner,

INDEX NO. 109920-2011

MOTION DATE _____

- v -

MOTION SEQ. NO. 2

THE NEW YORK STATE DIVISION OF HOUSING AND

MOTION CAL. NO. _____

COMMUNITY RENEWAL, and 20 FIFTH AVENUE
TENANTS ASSOCIATION,

Respondents.

FILED

SEP 24 2012

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

**NEW YORK
COUNTY CLERK'S OFFICE**

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1, 2

Answer — Affidavits — Exhibits _____

3, 4

Replying Affidavits _____

Cross-Motion: Yes No

Respondent, The New York State Division of Housing and Community Renewal ("DHCR") brings this motion to renew the decision of this Court dated December 21, 2011, pursuant to CPLR §2221(e), because new case law allegedly changes the prior determination. DHCR asserts that subsequent to the prior determination, the Court of Appeals issued a determination in *Terrace Court v. DHCR*, 18 NY3d 446, 940 NYS2d 549 (2012), which necessitates that this proceeding be renewed and heard again.

This Court issued a Decision and Order dated December 21, 2011 granting the petition of 20 Fifth Avenue, LLC, finding the DHCR's June 30, 2011 Order

and Opinion was arbitrary and capricious and contrary to law, and remanding the matter to DHCR for further action. The central issue was whether an MCI rent increase for work done to the exterior of a building was properly granted, temporarily exempting certain apartments, and then, in reconsidering its policies, rescinded.

The original MCI application was brought before DHCR in 2001 for “the performance of exterior restoration work at the Building at a cost of \$547,410.04.” Inspections of the building yielded water infiltration into a number of apartments. Originally, the MCI rent increase was approved, but temporarily exempted apartments affected by water infiltration until completion of the repairs to those affected apartments. This order was approved upon a Petition for Administrative Review. The Tenant’s Association commenced an Article 78 proceeding challenging that Order of Affirmance, at which time DHCR cross-moved to remit the matter back to the administrative level “to review its Order and evaluate [its] policy concerning the granting of MCI rent increase applications where problematic conditions exist in individual apartments and/or common areas, stemming from the MCI work in question.” On June 30, 2011, DHCR revoked its prior determination, and disallowed the entire exterior restoration work as “unworkmanlike.” The June 30, 2011 determination was the subject of this Court’s prior review.

This Court noted DHCR precedent, consisting of denying or revoking MCI rent increases pertaining to the individual apartments affected, and not building-wide, and cited to *inter alia*, *Terrace Court, LLC v. DHCR*, 2010 NY Slip Op 9560 (1st Dept. 2010). This Court found that DHCR failed to evaluate its policy concerning the granting of MCI rent increase applications where problematic conditions existed in individual apartments stemming from the MCI work in question. This Court relied on *In re Charles A Field Delivery Serv.*, 66 NY 2d 516 (1985):

[W]hen an agency determines to alter its prior stated course it must set forth its reasons for doing so. Unless such an explanation is furnished, a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision ...

Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made *Id.*, at 520.

Ultimately, this Court found the revocation Order, which was contrary to its own 2010 Order of Affirmance, to be arbitrary and capricious and contrary to law.

Respondent now seeks to renew based on the Court of Appeals affirmance of *Terrace Court v. DHCR*.

CPLR §2221(e)(2) provides that a motion for leave to renew,

shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.

The Court of Appeals, in affirming *Terrace Court*, specifically considered “whether the [DHCR] is authorized to grant a major capital improvement rent increase while at the same time permanently exempting particular apartments from the obligation to pay additional rent when circumstances warrant.” The Court held that “DHCR has been granted such authority and, on this record, it was not arbitrary or capricious for DHCR to permanently exempt five apartments.”

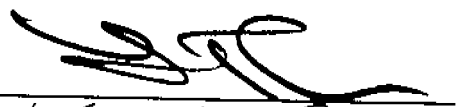
Presumably, the “policy” DHCR sought to reevaluate when it cross-moved to remit the matter back to the administrative level in 2010, found some validity in the Court of Appeals’ affirmance of *Terrace Court*. However, the issue in *Terrace Court* was not the issue before this Court in its December 21, 2011 decision. Rather, it was the deficiency in DHCR’s record in failing to set forth its reasons for altering its prior stated course that resulted in this Courts’ finding that the Revocation Order was arbitrary and capricious and contrary to law.

Wherefore, it is hereby,

ORDERED that DHCR’s motion to renew is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: September 20, 2012


HON EILEEN A. RAKOWER
J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

FILED
SEP 24 2012
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