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SUPREME COURT OF THE STATE OF NEW YORK- NEW YORK COUNTY PRESENT:
Hon. DORIS LING-COHAN, Justice PART 36

37-41 W. 86th Street Tenants

-v-

NYS Division of Housing

ORDER

INDEX NO. 102445/12
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL.NO.

The following papers(1 to 6) were read on this ~~motion to/for~~ Article 78

Papers	Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4, 5, 6
Replying Affidavits	

Cross-Motion: [ ] Yes [ ] No

Upon the foregoing papers, it is ordered that this Article 78 proceeding is granted in accordance with the attached memorandum decision.

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

FILED

JAN 09 2013

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/8/13

_____, J.S.C.
DORIS LING-COHAN

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
COUNTY OF NEW YORK: IAS PART 36

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In the Matter of the Application of
37-41 West 86th Street Tenants Association,

Petitioner,

-against-

State of New York Division of Housing and
Community Renewal and EQR – 41 West 86th LLC,

Respondents.

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Index No.: 102445/12

DECISION/ORDER

Motion Seq. No. 001

HON. DORIS LING-COHAN, JSC:

In this Article 78 proceeding, petitioner 37-41 West 86th Street Tenants Association seeks a judgment overturning an order of respondent State of New York Division of Housing and Community Renewal (DHCR), which denied the petition for administrative review ("PAR"), filed by petitioner, challenging an earlier DHCR order. For the following reasons, the petition is granted and this application is remanded to DHCR.

FACTS

This proceeding concerns DHCR's determination that improvements made to 37-41 West 86th Street, New York, New York ("Building"), performed by Parc Coliseum ("Owner"), constitutes a major capital improvement ("MCI"). Following this finding, DHCR granted a rent increase on rent stabilized units in the Building, pursuant to Part 2522 of the Rent Stabilization Code ("RSC"). Thereafter, petitioner filed a PAR, opposing the rent increase on the following grounds: (1) the work performed on the roof terrace is not an MCI because the roof terrace is not part of the roof, and thus, does not benefit all tenants, a requirement which must be satisfied for any improvement to be considered an MCI, *see* RSC §2522.4(a)(2)(i)(c); (2) an engineer report, submitted by petitioner, stated that there are defects in

the improvements which should invalidate such improvements as an MCI; (3) MCI status should not be granted without an inspection by DHCR, or an independent engineer report from Owner to disprove petitioner's claim of defects; (4) the purported cost of the improvements was not substantiated by Owner; and (5) the architect's fee should not have been included as part of the improvement costs.

In an administrative decision by DHCR, dated February 12, 2012 (Administrative Decision), petitioner's PAR was denied. In such decision, DHCR found the roof terraces to be part of the roof, such that improvements made to the roof terraces were valid MCIs. DHCR further found that any defects existing at the time petitioner filed the PAR, had been remedied by Owner, and no further defect was claimed by any tenant of the Building in relation to the MCI. Moreover, DHCR stated that it has discretion to decide whether an inspection should be conducted before an MCI is granted. DHCR considered the invoices provided by Owner to be reasonably substantiated, and that architect fees were properly included in the cost of the MCI increase.

Petitioner brought this Article 78 proceeding to challenge DHCR's Administrative Decision. Thereafter, Owner moved to intervene in this proceeding; a motion which was granted by Order and Decision of this Court, dated June 12, 2012. Owner opposes the petition, and DHCR submits a verified answer refuting petitioner's allegations.

DISCUSSION

The standard for judicial review of an administrative determination is whether the decision was made arbitrarily or without a rational basis. *Greystone Mgt. Corp. v Conciliation and Appeals Bd.*, 94 A.D. 2d 614 (1st Dept 1983). An administrative determination should not be disturbed unless the agency's action was arbitrary, in violation of lawful procedure, or in excess of its jurisdiction. *Matter of Pell v Board of Educ.*, 34 N.Y. 2d 222 (1974). Moreover, it is well settled that the interpretation given a statute by the agency charged with its enforcement will be respected by the courts if not irrational or unreasonable. *See Matter of Fineway Supermarkets, Inc. v State Liq. Auth.*, 48 NY2d 464, 468 (1979);

Matter of Howard v Wyman, 28 NY2d 434, 438 (1971); *Matter of Lower Manhattan Loft Tenants v New York City Loft Bd.*, 104 AD2d 223, 224 (1st Dept 1984), *affd* 66 NY2d 298 (1985).

In the instant petition, petitioner reiterates its objections to the MCI increase, which were previously stated in its PAR. Specifically, petitioner argues that work performed on roof terraces does not benefit all tenants, and therefore does not qualify as an MCI, pursuant to RSC § 2522.4(a)(2)(i)(c). Petitioner further states that the engineer report it provided suggested that there were defects with the improvements made by Owner, and therefore an MCI rent increase should not be granted without an inspection from DHCR, or an independent engineer report, submitted by Owner, to disprove the defects claimed. Petitioner alleges that invoices provided by Owner to prove the cost of the improvements were unsubstantiated and fraudulent. However, petitioner fails to proffer any evidence to establish that the invoices were fraudulent, and merely asserts conclusory allegations. Petitioner also disputes the inclusion of architect's fees in the improvement cost.

Owner opposes petitioner's Article 78 proceeding, arguing that the Administrative Decision was not arbitrary or capricious, and was based on the evidence it submitted in response to petitioner's PAR. DHCR submits a verified answer, which specifically refutes and opposes petitioner's allegations. DHCR argues that although RSC § 2522.4(a)(2)(i)(c) states that, to qualify as an MCI, improvements must be performed on all similar components of a building to the benefit of all tenants, it also states that such comprehensive improvement may be exempt if an owner can demonstrate that not all such similar components require improvement. DHCR further argues that it reasonably determined that the roof terraces are part of the roof, as petitioner's own engineer report did not dispute this point. DHCR states that improvements to the roof benefits all tenants, and thus, the improvement cost of the roof terraces were properly included in the MCI cost. However, DHCR's answering papers concede that the roof terraces do not benefit all of the tenants, but argues that its order granting the MCI reasonably held the roof terraces to be components of the roof system which benefits all tenants. Despite such argument, the

order issued by DHCR specifically states that "the following items were disallowed [in calculating the MCI increase]; 16 terrace doors, 8 terrace dividers and scrape/paint windows." Order Granting MCI Rent Increase, p. 1. Nonetheless, it appears that such items were included in the MCI calculation, and DHCR, in fact, argues in its brief that they were properly included. Thus, petitioner is correct in arguing that such improvements, made on the roof terraces, should not be included in an MCI rent increase, as it was specifically disallowed by DHCR in its own order granting the MCI rent increase based on other grounds.

While an engineer report, submitted by petitioner, is documentary evidence in support of petitioner's allegations, such report did not create a rebuttable presumption which must be refuted before an MCI rent increase could be granted. DHCR contends that it has the discretion to decide if an inspection should be conducted before an MCI rent increase should be granted, and that such inspection is not mandatory. The Appellate Division, First Department, has held DHCR "has discretion to decide if an inspection is necessary". *In Matter of 370 Manhattan Ave. Co., LLC v New York State Division of Housing and Community Renewal*, 11 AD3d 370, 371 (1st Dep't 2004). Furthermore, any defect claimed by tenants in the Building were remedied by Owner, and it is undisputed that no other complaint has been forwarded to DHCR. As such, DHCR did not abuse its discretion by not conducting an inspection prior to granting an MCI rent increase. Here, petitioner has failed to cite any authority requiring such inspection. Additionally, DHCR reasonably determined that architectural expenses, directly related to an MCI installation, qualify for a rent increase. "Since the regulatory systems authorize the DHCR to determine the qualification of installations that are the basis for an MCI rent increase application, DHCR accordingly has the authority and discretion to determine...what related expenses are eligible for an MCI rent increase." *In the Matter of 40 Park Avenue, LLC v NYS Division of Housing and Community Renewal*, 2010 NY Misc LEXIS 2303 (2010). DHCR's decision to calculate MCI rent increase based on

invoices provided by Owner, including the architect's fees, was not arbitrary and capricious, and petitioner has cited to no authority to the contrary.

However, as discussed above, petitioner has demonstrated that, pursuant to DHCR's own Order Granting MCI Rent Increase, specific improvements made on the roof terraces should not be included in the MCI calculation, and thus, the petition is granted.

DECISION

Accordingly, it is

ORDERED that the petition is granted to the extent that respondent Division of Housing and Community Renewal's Administrative Decision, dated February 12, 2012, denying petitioner's PAR, is vacated; and it is further

ORDERED that this application is remanded to the Division of Housing and Community Renewal for recalculation of the MCI increase, in accordance with this decision as improvements made to roof terraces should not be included in the MCI calculation; and it is further

ORDERED that, within thirty days of entry, petitioner shall serve upon all parties a copy of this order, together with notice of entry.

This constitutes the decision of the Court.

Dated: New York, New York
January 8, 2013

Hon. Doris Ling-Cohan, JSC

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