Matter of 250 Riverside Dr. Tenants' Assoc. v New York State Div. of Hous. & Community Renewal
2013 NY Slip Op 32178(U)
September 16, 2013
Sup Ct, New York County
Docket Number: 104002/12
Judge: Michael D. Stallman
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

Index Number : 104002/2012
250 RIVERSIDE DRIVE TENANTS
vs.
N.Y.S.D.H.C.R.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 104002/12

MOTION DATE 7/11/13

MOTION SEQ. NO. 001

The following papers, numbered 1 to 16 were read on this Article 78 petition

Notice of Petition— Verified Petition — Exhibits A-H; Affirmation of Service	No(s).	1-2; 3
Verified Answer—Affidavit—Exhibits A-C —Affidavit of Service	No(s).	4-6
Reply Affirmation — Exhibits A-D—Affirmation of Service	No(s).	7-8
Supplemental Notice of Petition—Amended Verified Petition—Exhibits A-H	No(s).	9-10
Verified Answer—Affirmation of Service; Answering Affidavit —Affirmation of Service	No(s).	11-12; 13-14
Reply Affirmation — Exhibits A-D—Affirmation of Service	No(s).	15-16

Upon the foregoing papers, 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: 9/16/13
New York, New York

, J.S.C.

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

1. Check one: ..... ■ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... PETITION 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: PART 21
----------X

In the Matter of the Application of

250 RIVERSIDE DRIVE TENANTS' ASSOCIATION and MATTHEW BEGUN,

Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

Index No. 104002/12

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, and DEBORAH ASSOCIATES,

Decision and Judgment

Respondents.

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Hon. Michael D. Stallman, J.:

Petitioner 250 Riverside Drive Tenants' Association represents tenants of rent-regulated apartments in the premises located at 250 Riverside Drive, New York, New York (premises); petitioner Matthew Begun is an individual rent-regulated tenant in the premises (both petitioners together, petitioners). Petitioners bring this Article 78 proceeding to overturn a determination of respondent New York State Division of Housing and Community Renewal (DHCR), which granted a Major Capital Improvement (MCI) rent increase to respondent Deborah Associates (Deborah), which was the owner of the premises, and petitioners' landlord. Petitioners also seek to overturn the denial of their

Petition for Administrative Review (PAR).

Background

Commencing in 2006, and concluding in 2007, Deborah claims to have had extensive exterior restoration work performed on the premises, including the removal and replacement of all of the premises' parapet walls, repair and replacement of balustrades on several balconies on the premises, and waterproofing and pointing where necessary, including some waterproofing work on the bulkhead and roof. Deborah also installed a new security camera monitoring system in the premises.

The work on the exterior of the premises was performed by L&Z Restoration Corp. (L&Z), pursuant to a proposal, dated May 1, 2006 (Petition, Ex. C), which listed a lump sum of $525,085 for all of the work delineated. The proposal was signed by L&Z's president, Zbigniew Jacubiak (Jacubiak), and accepted by Deborah. The proposal is the only contract between Deborah and L&Z. The cost of the security system was $6,704, and was performed by another contractor in 2006.

In 2008, Deborah filed an application with DHCR for an MCI rent increase for the premises, based on the totality of the exterior work, and for the security camera monitoring system. Deborah supported its application with the proposal, cancelled checks for the work performed, and a "Supplement 1 - Owner and Contractor/Vendor Affirmation" (Contractor Affirmation), in which

Jacubiak affirmed that L&Z had performed all of the work, and had been paid in full. The Contractor Affirmation also included a diagram of the exterior footprint of the premises, indicating, apparently, that work was performed on the parapets of all of the exterior walls; Department of Buildings (DOB) permits; and documentation that DOB had signed off on the work. The application also requested an MCI rent increase based on architectural fees and expediting services. Evidence for the installation of the security camera monitoring services was included, for a total overall expenditure by Deborah of $548,775. Deborah also provided, upon request of DHCR, a cost breakdown for the project.

Petitioners objected to the MCI application in June 2008. They complained that the documentation did not support the performance of extensive exterior restoration work, and that some of the work on portions of the building was incidental, and not the kind of building-wide repairs as required for an MCI. Petitioners also objected to the MCI request regarding the security cameras, in that the system did not replace an already existing system, and did not improve the existing intercom system.

Petitioners made numerous objections to L&Z's proposal, claiming, essentially, that it was not specific enough to show where the work was to be performed. Petitioners also brought to

DHCR's attention a perceived flaw in the MCI application, in that several documents allegedly signed by Jacubiak each appeared to have been signed by a different hand.[1] Petitioners also objected to the cost breakdown provided by Deborah as incomplete and speculative, as it allegedly did not include all the work allegedly performed, and included things which were not done, such as scaffolding.

DHCR apparently misplaced the file in this matter, and asked the parties to reconstruct their respective paperwork. When Deborah resubmitted its Supplement 1 form, the words "exterior restoration work" had been replaced with the words "exterior restoration work, including parapet replacement."

DHCR's Rent Administrator issued an order granting the MCI increase on May 20, 2010, based on the exterior restoration work performed and the installation of the cameras. DHCR granted Deborah a rent increase in the amount of $19.42 per room per month for each apartment.

Petitioners filed their PAR on June 15, 2010, raising the same objections as they had in the proceeding before. The PAR was denied on August 16, 2012, for the reasons given by the rent

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[1]Petitioners claim that there is evidence of at least four different signatures attributable to Jacubiak; however, to the untrained eye, there are only three signatures that appear to be by differing hands. The fourth is arguably similar to one of those three signatures. The three signatures are, however, markedly dissimilar.

administrator below. This proceeding ensued.

Discussion

The standard for review of administrative determinations of DHCR has been specifically addressed by our courts. In a case involving a DHCR determination, the Court of Appeals has said:

> "Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable it will be upheld."

Matter of Ansonia Residents Association v New York State Division of Housing and Community Renewal, 75 NY2d 206, 213 (1989), quoting *Kurcsics v Merchants Mutual Insurance Company*, 49 NY2d 451, 459 (1980). The determination will be upheld if it was rationally based on the record before DHCR, and was not arbitrary or capricious. *Matter of SP 141 E 33 LLC v New York State Division of Housing and Community Renewal*, 91 AD3d 575 (1st Dept 2012). The court may not substitute its judgment for that of the agency. *Matter of West Village Associates v Division of Housing and Community Renewal*, 277 AD2d 111 (1st Dept 2000).

The landlord bears the burden of proving a right to an MCI rent increase. *Matter of Ador Realty, LLC v Division of Housing and Community Renewal*, 25 AD3d 128 (2d Dept 2005). The determination of DHCR concerning the outcome of an application

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for an MCI increase is just such a determination as involves the expertise of the DHCR. *Matter of West Village Associates v Division of Housing and Community Renewal*, 277 AD2d 111. In the present proceeding, the question is whether DHCR's determination that Deborah had provided enough evidentiary proof to warrant the MCI was rationally based.

As petitioners point out, DHCR's own Policy Statement 90-10 (June 26, 1990) (Petitioners' Reply, Ex. A), requires that an MCI rate increase application include at least one of the following: "(1) Cancelled check(s) contemporaneous with the completion of the work; (2) Invoice receipt marked paid in full contemporaneous with the completion of the work; (3) Signed contract agreement; (4) Contractor's affidavit indicating that the installation was completed and paid in full." In the present matter, there is a signed contract (the proposal), checks, and an affirmation signed by L&Z. Petitioners challenge the sufficiency of all of these documents.

This court finds that DHCR had evidence before it sufficient to grant Deborah's application for an MCI rent increase, and that its decision to do so was not irrational. DHCR had before it all of the information which it requested, including a contract, an affirmation of the contractor that the work was completed, diagrams showing the outside perimeter of the building (presumably, representing the roof line) where the parapets were

replaced, and a cost breakdown of the project. Petitioners' dissatisfaction with Deborah's presentation does not make DHCR's reliance on that presentation irrational.

The matter of the disparate signatures is puzzling, but not determinative of anything. Petitioners cannot argue that Jacubiak's signature on the Affirmation by Contractor/Vendor of the completion of the work is the signature which is, allegedly, not his, and there is no evidence to suggest that it is not. Therefore, the differing signatures are a non-issue. Similarly, the alteration made to the Affirmation by Contractor/Vendor to add the words "parapet replacement" does not change the fact that Deborah always claimed that the parapet walls were part of the renovation; the addition is immaterial.

Further, petitioners' charge that parts of the work, such as pointing and waterproofing in various parts of the building, do not in and of themselves amount to work significant enough to qualify as MCIs is irrelevant. However, the spot waterproofing and pointing, where needed, and the work on some balustrades, was integral to the overall work to waterproof the entire premises, which, together with the major work on the parapet walls, qualifies as a building-wide MCI.

Lastly, petitioners argue that Deborah conducted repair to the parapets in 1997, and that the "useful life" of the parapets had not expired, so that replacing them would not warrant an MCI

at the later date. They provide a 1997 Notice of Violation from the DOB concerning parapet rebuilding, in which a stop work order was issued, as proof that parapet work was done at that time. However, although this notice appears to have been included in among petitioners' paperwork in the original proceeding and PAR, petitioners never used the notice to make a "useful life" argument before the agency, and, therefore, cannot do so now. *Matter of West Village Associates v Division of Housing and Community Renewal*, 277 AD2d at 113 (disposition of a proceeding before the court is limited to the record before the agency). In any event, no MCI increase was sought from the 1997 work, and application for an MCI rent increase now should not be affected by any earlier work on the premises.

Petitioners have failed to make any case for the denial of an MCI rent increase based on the installation of the security camera monitoring system. They have not shown that such a system is not eligible as an MCI merely because it is not a video intercom system that the tenants can use.

Conclusion

Accordingly, it is

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

Dated: September 16, 2013

New York, NY

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

UNFILED JUDGMENT

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