Sopko v New York State Div. of Hous. & Community Renewal
2013 NY Slip Op 32191(U)
September 12, 2013
Supreme Court, New York County
Docket Number: 101049/12
Judge: Michael D. Stallman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]
SCANNED 9/18/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

BETH SOPKO, AMOS MIZRACHI, LINDA MIZRACHI, ELIZABETH RUF; SARAH MCFADDEN; LEONARD BANKS; CARMEN HERNANDEZ AND ACE BUHR,

Petitioners,

- v -

THE NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL and 299 B & C REALTY, LLC,

Respondents.

INDEX NO. 101049/12

MOTION DATE 5/16/13

MOTION SEQ. NO. 001

The following papers, numbered 1 to 9 were read on this Article78 petition

Notice of Petition–Verified Petition— Exhibits A-F	No(s). 1-2
Verified Answer—Affirmation — Exhibit A	No(s). 3-4
Amended Notice of Petition–Verified Petition— Exhibits A-G	No(s). 5-6
Answer and Opposition — Exhibit A; Amended Verified Answer–Amended Answering Affirmation—Exhibit A	No(s). 7; 8-9

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

Respondent's (DHCR) counsel shall make arrangements to retrieve the two volume return (administrative record) without delay from the Clerk of IAS Part 21, Room 278, 80 Centre St. (Mr. Wallace Kemper — [646] 386-3758).

Copies to all counsel.

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: 9/12/13
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: IAS PART 21

----------X

In the Matter of the Application of
BETH SOPKO, AMOS MIZRACHI, LINDA
MIZRACHI, ELIZABETH RUF, SARAH
MACFADDEN, LEONARD BANKS, CARMEN
HERNANDEZ and ACE BUHR,

Petitioners,

For a Judgment Pursuant to Article 78

-against-

Index No. 101049/12

THE NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

DECISION AND
JUDGMENT

Respondent,

-and-

299 B & C REALTY, LLC,

Respondent.

----------X

HON. MICHAEL D. STALLMAN:

Petitioners, rent stabilized tenants of the building located at 299 East 8th Street in Manhattan (Building), bring this Article 78 proceeding to annul that part of the December 2, 2011 order and opinion (Order) of the Deputy Commissioner of respondent New York State Division of Housing and Community Renewal (DHCR) which affirmed the January 18, 2011 order of the Rent Administrator (RA) granting respondent 299 B & C Realty, LLC's (Owner) application for a building-wide major capital improvement (MCI) rent increase for a new roof, pointing and waterproofing, and installation of a new boiler. The Order also affirmed the RA's order denying Owner's application for an MCI rent increase for repair or replacement of the cornice, and repair of the sidewalk and steps in front of the

Building.

Rent Stabilization Law § 26-511 (c) (6) (b) provides that, when a building owner establishes that it has made a building-wide MCI, the owner is entitled to pass the cost of such improvement on to the tenants of the building through a permanent building-wide rent increase. *See also* Rent Stabilization Code (RSC) § 2522.4 (a) (2) (1). Petitioners argue that the Order is flawed in that the roof of the Building was not replaced, a new boiler was not installed, and pointing and waterproofing were either not performed at all, or performed inadequately.

Petitioners' argument about the roof fails because petitioners assume that a roof needs to be replaced in order for funds expended on a roof to qualify for an MCI rent increase. *See* amended verified petition, ¶ 24 and petitioner Elizabeth Ruf's letter opposing Owner's application. Return, A-8. However, RSC § 2522.4 (23) provides that either "complete replacement or roof cap on existing roof installed after thorough scraping and levelling as necessary" qualifies as an MCI. The work proposal of Jabal Contracting Corp. was to repair and level the roof, create a pitch to prevent water from standing, and install a new rubber roof atop the repaired roof. Petitioners have not shown that this work was not performed. Indeed, one nonparty tenant in the Building, complaining that there was no new roof, stated that there was "only [a] new top seal put on the existing roof." Return, A-8.

Petitioners submitted, first to the RA and then with their petition for administrative review (PAR), copies of certain undated

photographs of the roof to show that the roof remained in poor condition. The Order states that the photographs "are not conclusive evidence that the owner did not make the MCI installations." Order, 3. DHCR's evaluation of factual evidence is entitled to deference. *Matter of 333 E. 49th Assoc., LP v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 40 AD3d 516, 516 (1st Dept) *affd* 9 NY3d 158 (2007); *Matter of Wembly Mgt. Co. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 205 AD2d 319 (1st Dept 1994).

Petitioners also contend that such work as was done on the roof was defective inasmuch as, subsequently, there were leaks in several apartments. DHCR states, however, and petitioners do not dispute, that the apartments reported to have had leaks are not on the top floor, and that the leaks, therefore, are not attributable to defects in the roof.

The contention of some of the petitioners, that the boiler was not replaced in 2006, rests entirely upon a notice of violation that was placed upon the boiler two years later. Inasmuch as that notice refers to the earlier installation as having been made without the necessary approvals, it is persuasive evidence that that installation was performed. Indeed, petitioners know full well that Owner installed a new boiler. *See* petition, exhibit C at 1. Moreover, petitioners know that the New York City Department of Buildings subsequently legalized the boiler. *See* petition, exhibit D at 1.

The claim that Owner did not have the building pointed and

waterproofed rests largely upon petitioners' assertion that no sidewalk bridge was erected at the relevant times. Petitioners presented no evidence that the pointing and waterproofing could not have been performed without the installation of a sidewalk bridge. Indeed, petitioners Carmen Hernandez and Leonard Banks expressly did not contest Owner's claimed expense for pointing and waterproofing. See, respectively, Return, A-8 and A-10. Moreover, petitioners failed to raise that argument to the RA, and, accordingly, they are barred from raising it here. *Matter of Featherstone v Franco*, 95 NY2d 550 (2000); *Matter of 985 Fifth Ave, v Div. of Hous. & Community Renewal*, 171 AD2d 572 (1st Dept 1991).

More generally, petitioners contend that no work could have been performed on the building, because there is no record of any governmental approvals for such work. That contention is refuted, in part, by a September 4, 2007 "Certificate of Approval for Oil Burning Installation" from the New York City Department of Buildings and, although it does not pertain to an approved expense, a sidewalk construction permit from the New York State Department of Transportation. To the extent that certain work may have been performed without a required permit, the remedy is not within the purview of DHCR. For purposes of this proceeding, it suffices to say, that it was hardly irrational for DHCR to grant, in part, Owner's application for an MCI rent increase, in view of evidence that proposals for performing work were submitted to Owner, and that Owner paid for such work.

Finally, petitioners contend that, because DHCR dismissed an earlier proceeding brought by Owner, DHCR should not have considered Owner's second application. For reasons best known to Owner, Owner filed two applications for an MCI rent increase with DHCR, covering the identical installations. Accordingly, DHCR dismissed one of the applications as duplicative of the other. Because that dismissal was not on the merits, DHCR was free to consider the remaining application.

Accordingly, it is hereby

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

Dated: September 12, 2013

New York, NY

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).