Matter of Lenox Terrace Assoc. of Concerned Tenants v New York State Div. of Hous. & Community Renewal
2014 NY Slip Op 31832(U)
July 14, 2014
Supreme Court, New York County
Docket Number: 100354/14
Judge: Cynthia S. Kern

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100354/2014
LENOX TERRACE ASSOCIATION
vs
NYS DIVISION OF HOUSING
Sequence Number : 001
ARTICLE 78

PART _____

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

is decided in accordance with the annexed decision.

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

Dated: 7/14/14

_____ PK _____, 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
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

LENOX TERRACE ASSOCIATION OF CONCERNED TENANTS and WALLACE FORD,

Petitioner,

Index No. 100354/14

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondents.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Reply Affidavits	3
Exhibits	4

Petitioners Lenox Terrace Association of Concerned Tenants (the "Tenants Association") and Wallace Ford ("Mr. Ford") (hereinafter referred to as "petitioners") bring the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") challenging the Order issued on January 27, 2014 by respondent New York State Division of Housing and Community Renewal ("DHCR") which granted a Major Capital Improvement ("MCI") rent increase to the owner of a building in which petitioners' members rent apartments. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. The Tenants Association is an unincorporated, voluntary association of rent stabilized tenants living within the housing complex known as Lenox Terrace, which is comprised of six buildings located in and around Harlem. Mr. Ford is a resident of Lenox Terrace and President of the Tenants Association. First, Second, Third, Fourth, Fifth and Sixth Lenox Terrace Associates (the "Owner") is the Owner of the subject premises and petitioner alleges that the Owner is an affiliate of the Olnick Organization, Inc. ("Olnick").

In or around October 2007, the Owners applied to respondent for an MCI rent increase for the cost of the installation of new apartment windows, window screens, sidewalk bridges, project management, security services, painting and porters in all six buildings of Lenox Terrace. The Owner also submitted supporting documentation, such as, *inter alia*, contracts, invoices and affidavits from some of the contractors on the project. In opposition to the MCI applications, the Tenants Association raised numerous objections, including, *inter alia*, that the Owners submitted false and misleading statements regarding their interest in one of the contractors hired to do the work, that the Owners failed to submit certain contracts for the work and that the claimed costs are excessive and unsubstantiated. Specifically, the Tenants Association asserted that the Owner failed to disclose that Richard S. Lane, the Owner's Head Officer, is also the CEO of Premier Housing Development Corporation ("Premier Housing"), the entity retained as project manager on the window installation project; that the address of Premier Housing is identical to that of the Owner; and that the President of Olnick is the person designated for process service for Premier Housing. The Tenants Association asserted that this proves that Premier Housing is a sham entity set up by the Owner to issue checks to itself. In its response, the Owner denied the Tenants

Association's allegations and stated, *inter alia*, that Olnick did not own or manage any part of Lenox Terrace, that the Owner was owned by various members of the Olnick family or family trusts, that Premier Housing was owned by three members of the Olnick family, that one member of the Olnick family was both a partner in the Owner and a 3.75% shareholder in Premier Housing, that said relationship was *de minimis* and was not fully disclosed on that basis and provided copies of the deeds for each of the six buildings in the Lenox Terrace complex, none of which listed Olnick as an owner.

On December 7, 2009, respondent granted a portion of the MCI rent increases, exlcuding a portion of the costs for windows, sidewalk bridges, painting and window screens and denied the total amount for the cost of project management, security and porters on the basis they were not eligible for an MCI increase. On or about January 7, 2010, the Tenants Association filed six separate Petitions for Administrative Review ("PARs") against the MCI Orders. In the PARs, the Tenants Association asserted, *inter alia*, that the Owner's misrepresentation regarding its relationship with Premier Housing required respondent to deny the MCI applications in their entirety. The Owner also filed its own PARs in which it asserted that the costs of the project management should be allowed as it was necessary to the MCI work being performed and that any failure to disclose its relationship to Premier Housing required only "heightened scrutiny" and not a denial of the MCI *in toto*.

On or about January 27, 2014, respondent issued its Order resolving the PARs. Specifically, the Order states:

> The tenant association's claim in its petition that the entire MCI should be denied is without merit. The owner's initial failure to disclose the identity of interest between one of the individuals sharing a partial ownership interest in the premises and the entity which

> performed project management for the window work does not warrant a complete denial of the MCI, especially in light of the fact that the project management services have been excluded. The tenants' further claim that the owner provided false information regarding the ownership of the premises is unsupported by DHCR records, which show that the entities identified as the owners in the applications are the registered owners...With regard to the claim that contracts were not submitted for the sidewalk bridges, screens and painting, the approved costs for these items have been properly substantiated with copies of invoices or signed proposals and copies of canceled checks.

The Tenants Association then brought the instant Article 78 proceeding challenging respondent's Order.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v. Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); *see Pell v. Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell*, 34 N.Y.2d at 231 (internal citations omitted). 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

increase in order to encourage owners to properly maintain, preserve and upgrade their properties. It is left to the discretion and authority of the DHCR to determine what improvements constitute MCIs and what expenses are eligible for an MCI rent increase based on such improvements. *See Versailled Realty Co. v. DHCR*, 76 N.Y.2d 325 (1990). Rent increases for rent-stabilized apartments for MCIs are authorized by Rent Stabilization Code ("RSC") § 2522.4, which specifies that the improvement must be building-wide, depreciable under the Internal Revenue Code, other than for ordinary repairs, required for the operation, preservation and maintenance of the structure and replaces an item whose useful life has expired. Additionally, necessary repair work performed in connection with and directly related to the MCI is also included if it improves, restores or preserves the quality of the structure and the grounds and if it is completed subsequent to, or contemporaneous with, the completion of the MCI. *See* RSC § 2522.4(a)(2)(ii)(a)-(b). In reviewing MCI applications, the DHCR investigates the nature and extent of the work performed and has the discretion to determine which documents are necessary for the inquiry and to require that the Owner produce them. *See Sanders v. DHCR*, 40 A.D.3d 440 (1st Dept 2007).

As an initial matter, this court finds that the DHCR's determination that the window installation and related costs, such as sidewalk bridges, screens and painting, constitute MCIs was made on a rational basis. In processing an application for an MCI rent increase, the DHCR requires that any proposed improvement cost be supported by adequate documentation which should 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; or (4) contractor's affidavit indicating that the installation was completed and paid in full. If the DHCR determines that the claimed

cost warrants further inquiry, the processor of the MCI application may request that the owner provide additional information. Here, the Owner filed sufficient documentation, including invoices and canceled checks, to show that the Owner installed new windows and screens in various apartments, that these windows were operable and any defects were removed. Additionally, the Owner submitted the window installation contract with Skyline Windows ("Skyline") and the invoices associated with the installation of the windows and screens, the proposal for the sidewalk bridges and invoices, along with the invoices and work orders for painting in individual apartments, which are sufficiently detailed to show how the cost of the work was computed. Petitioner's assertion that MCI increases for the related costs should be denied in their entirety because not all of the contracts for said work were provided is without merit as petitioner has failed to put forth any evidence that the other documentation, such as cancelled checks and invoices, is insufficient to prove said costs.

Additionally, this court finds that the DHCR's determination granting the Owner the MCI rent increase was rational despite the relationship between the Owner and Premier Housing. Pursuant to the DHCR's Policy Statement, DHCR is not required to automatically deny MCI rent increases based solely on familial or business relationships between an owner and a contractor. Rather, such relationship requires DHCR to use heightened scrutiny to ensure that the reported costs, which will cause a permanent increase in base rent, are accurate and were paid for in an arms' length business transaction. If it is found that there is an equity interest or an identity of interest between the contractor and the building owner, then additional proof of cost and payment, specifically related to the installation, may be requested. Here, although the Owner did not initially report its relationship with Premier Housing as required in the MCI application, the Owner did comply with the duty to disclose to the Rent Administrator. *See* RSC § 2525.1. In

disclosing, the Owner fully explained the corporate structure stating that Olnick did not own or manage any part of Lenox Terrace, that the Owner was owned by various members of the Olnick family or family trusts, that Premier Housing was owned by three members of the Olnick family and that only one Olnick family member was both a partner in the Owner and a 3.75% shareholder in Premier Housing. Additionally, the Owner submitted deeds for each of the buildings at issue showing that Olnick did not own any of them. Based on the above information, the DHCR then rationally used heightened scrutiny to determine whether the reported costs were accurate and properly paid for. Specifically, DHCR required the Owner to submit sufficient documentation to explain the scope of the MCI work and how the MCI costs were computed. The record contains invoices which match the amounts paid in cancelled checks so that the DHCR was able to determine the legitimacy of the Owner's entitlement to the MCI rent increase and appropriately assess the costs. In addition, all checks for payment to contracts on the window installation project were drawn from the accounts of Lenox Terrace Associates and not Olnick. However, even if the relationship between the Owner and Premier Housing was more significant, or the Owner failed to provide sufficient documentation of such relationship, which it did not, DHCR excluded the costs associated with Premier Housing, the project manager, including the salary of the porters and additional security personnel, finding that the Owner failed to show that these expenditures were necessary to accomplish the window installation and thus were not entitled to an MCI increase.

Petitioner's assertion that DHCR's MCI rent increase should be revoked in its entirety on the ground that there is evidence of fraud is without merit. Petitioner's reliance on cases such as *Vesy v. New York City Rent and Rehabilitation Admin.*, 26 A.D.2d 922 (1st Dept 1966) and *Lucot, Inc. v. Gabel*, 20 A.D.2d 94 (1st Dept 1963) for the proposition that any fraud in an MCI

application is grounds for revoking the application in its entirety is misplaced as such cases are distinguishable. In both *Vesy* and *Lucot*, the evidence established that the Owner of the buildings at issue submitted fraudulent bills since the invoices reflected costs in excess of the prices actually paid. Here, there is no such discrepancy between the billing and payment, as evidenced by the invoices and checks submitted to the DHCR. Further, there is no evidence that the Owner fraudulently omitted the relationship between it and Premier Housing but only that it did not believe the relationship to be significant enough to warrant disclosure.

Finally, to the extent petitioner asserts that the Owner's initial denial of a business relationship with Premier Housing rose to the level of harassment under RSC § 2525.5, such assertion is without merit. As an initial matter, such argument is not properly made before this court as it was not brought before the DHCR in its MCI rent increase review. Furthermore, the adjudication of a harassment charge must be done in a separate prosecutorial proceeding which is properly commenced by a written complaint to the DHCR's enforcement unit, at which time a full investigation is commenced, and if warranted, the DHCR then serves on the Owner formal written charges along with a notice of appearance at a mandatory full evidentiary hearing. *See Mago, LLC v. Joy Singh*, 47 A.D.3d 772 (2d Dept 2008); *see also* RSC § 2526.2(c)(2).

Accordingly, the petition is denied in its entirety. This constitutes the decision and order of the court.

Dated: 7/14/14

Enter: _____
J.S.C.