Matter of LG Real Estate Conversions LLC v Rubin
2018 NY Slip Op 31239(U)
June 21, 2018
Supreme Court, New York County
Docket Number: 153637/18
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

LG REAL ESTATE CONVERSIONS LLC,

Petitioner,

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

Index No.: 153637/18
DECISION/ORDER

-against-

JAMES RUBIN, as Commissioner of the New York State Division of Housing and Community Renewal, JEFFREY WOLK and SAMUEL WOLK,

Respondents.

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HON. CAROL R. EDMEAD, JSC:

In this Article 78 proceeding, petitioner LG Real Estate Conversions LLC (LG) seeks a judgment to overturn an order of the respondent New York State Division of Housing and Community Renewal (DHCR), while co-respondents Jeffrey Wolk and his son, Samuel Wolk (the Wolks), cross move for an order to enforce that DHCR order (motion sequence number 001). For the following reasons, the petition is denied, and the cross motion is granted.

FACTS

Jeffrey Wolk is the tenant of record of rent stabilized apartment unit 16B in a building (the building) located at 201 East 17th Street in the County, City and State of New York. *See* petition, ¶ 3. His son, Samuel Wolk, resides in the apartment with him. *See* notice of cross motion, Wolk aff; exhibit C. Petitioner LG is the building's owner and landlord. *See* petition, ¶ 1. The DHCR is the New York State agency charged with overseeing the registration of all rent-regulated apartments located inside of New York City. *Id.*, ¶ 3. The DHCR Commissioner,

James Rubin, is named as a respondent in this proceeding; however, since it is clear that he bears no personal liability for any of the agency's actions, this decision will only refer to the DHCR.

The Wolks allege that "there have been service issues related to [apartment 16B] dating back as far as May 2007" resulting from LG's failure and/or refusal to perform proper maintenance work in the unit. *See* notice of cross motion, Tomanio affirmation, ¶ 6. As a result, on September 27, 2016, Samuel Wolk filed a rent reduction application with the DHCR[1]. *Id.*, ¶ 8; exhibit A. The DHCR inspected apartment 16B on March 8, 2017, and a DHCR Rent Administrator (RA) thereafter issued a rent reduction order on April 6, 2017 (the RA's order). *Id.*, ¶ 11; exhibit D. LG consequently filed a petition for administrative review (PAR) on May 9, 2017. *Id.*, ¶ 12; exhibit E. On February 23, 2018, the DHCR Commissioner's office issued an order that denied LG's PAR (the PAR order). *Id.*, ¶ 15; exhibit G. The PAR order stated, in pertinent part, as follows:

> "Pursuant to RSC [Rent Stabilization Code] Sections 2520.6 (r) and 2523.4, the DHCR is authorized to order a rent reduction, upon application by the tenant, where it is found that an owner failed to maintain required or essential services.
>
> "The record below includes the report of and inspection which was conducted on March 8, 2017. At that time, the inspector reported that the kitchen cabinets were stained and did not close properly; that the kitchen countertop is separating from the kitchen wall; that the windows apartment-wide slid down when lifted to open, were not locking, and lacked screens; that plastering and painting was needed apartment-wide, as evidenced by the observations of: cracks and pealing paint on the walls of the master bedroom, stains on the wall of the bathroom shower, stains on the walls of the living room and kitchen, in addition to the tenant's statement that the apartment had last been painted over ten years ago; that there were loose floor moldings throughout the apartment, same having been found to be stained and separating from the walls; that there were stains on

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[1] The Wolks note that they have never withheld rent, and have paid it in full during the pendency of this proceeding. *See* notice of cross motion, Tomanio affirmation, ¶ 7.

> the bottom of both sink/basin cabinets (there are two bathrooms in the apartment); and, that the heating/air-conditioning unit is missing from the master bedroom. Since this evidence verified the tenant's complaints before the DHCR and established that the apartment was not being maintained, it supported the [RA's] decision to implement a rent reduction based on a decrease in services.
>
> "The owner-petitioner's claims about tenant-caused damage to certain of the conditions in question were not raised before the [RA] in the proceeding below and therefore cannot be considered for the first time on appeal due to the Scope of Review.
>
> "The rent reduction shall remain in effect until such time as all repairs are made and the DHCR approves a restoration of rent, upon application by the owner."

Id., exhibit G. LG nevertheless argues that the PAR order was an arbitrary and capricious act by the DHCR, since the maintenance work in apartment 16B involved either: 1) de minimis conditions; or 2) acts of vandalism perpetrated by the Wolks themselves. *See* Petition, ¶¶ 12-66. LG accordingly commenced this Article 78 proceeding via service of a petition and notice of petition on April 18, 2018. *See* petition. Rather than answer, the Wolks submitted a cross motion to dismiss LG's petition on May 9, 2018. *See* notice of cross motion. These two applications are now before the court (motion sequence number 001).

DISCUSSION

"It is a long-standing, well-established standard that the judicial review of an administrative determination is limited to whether such determination was arbitrary or capricious or without a rational basis in the administrative record." *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 428 (1st Dept 2007), *affd* 11 NY3d 859 (2008), *citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231

(1974). "Moreover, it is also well settled that an agency's interpretation of the statutes and regulations it is responsible for administering is entitled to great deference, and must be upheld if reasonable." *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d at 429, *citing New York City Campaign Fin. Bd. v Ortiz*, 38 AD3d 75, 80-81 (1st Dept 2006). Here, after reviewing the governing legal standards, the court determines that neither of LG's arguments can be sustained.

LG first asserts that the PAR order should be reversed because "the conditions are de minimis." *See* petition, ¶¶ 13-57. LG specifically argues that the conditions listed in the PAR order do not constitute "failure[s] to maintain a required service," pursuant to DHCR regulations, because there is no indication that those any of those conditions actually resulted in a measurable decrease in such "required services." *Id.* LG also presents a copy of DHCR Fact Sheet # 37, which sets forth examples of common de minimis conditions, and concludes that the conditions recited in the PAR order should have been deemed de minimis, since they closely resemble the examples on the Fact Sheet. *Id.* However, the Appellate Division, First Department, has long recognized that:

> "What constitutes essential or required services within the meaning of the rent laws and whether they have been reduced are factual questions to be determined by DHCR. That is certainly no less the case where, as here, DHCR deems such questions to depend largely on witness credibility and holds a hearing."

Matter of 140 W. 57th St. Corp. v New York State Div. of Hous. & Community Renewal, 260 AD2d 316, 316 (1st Dept 1999). Here, neither the RA nor the DHCR Commissioner's office relied on witness credibility, but instead based their decisions on the results of the March 8, 2017 inspection report. This court has reviewed those inspection results and Fact Sheet #37 (which

were both part of the administrative record below), and agrees that the conditions listed on the report and thereafter recited in both DHCR orders are *not* among the examples listed on the Fact Sheet. Therefore, the court concludes that the portion of the PAR order that upheld the rent reduction order on the grounds of service reductions comported with both the applicable DHCR regulations, and the governing case law (which gives the DHCR the authority to determine factual questions regarding the application of those regulations). As a result, the court rejects LG's first argument.

LG also argues that the PAR order should be reversed because "the conditions [were] directly caused by the Wolks." *See* petition, ¶¶ 58-66. LG offers no evidence to support this allegation apart from their attorney's self-serving statement that "the majority of the conditions [listed in the inspection report] . . . clearly and evidently do not simply occur on their own." *Id.*, ¶ 63. However, the Appellate Division, First Department has long recognized that "conclusory statements by an attorney having no personal knowledge of the facts are of no probative value whatever" in an Article 78 proceeding. *See Matter of Ruiz v City of New York*, 98 AD2d 645, 645-646 (1st Dept 1983). As a result, the court rejects LG's second argument, and concludes that LG's petition lacks merit. The court also concludes that the PAR order had a sound basis in the administrative record and was reasonably arrived at; it was *not* an arbitrary or capricious act.

The Wolks' cross motion seeks an order to dismiss LG's petition, and an order to compel LG to: 1) refund their excess rent payments; 2) commence repairs; and 3) pay legal fees; all pursuant to the PAR order. The court grants the first portion of the Wolks' cross motion for the reason stated above; i.e., that LG's Article 78 petition is meritless. With respect to the second portion of the Wolks' cross motion, the court's role in reviewing a disputed agency determination

in an Article 78 proceeding "is limited to whether such determination was arbitrary or capricious or without a rational basis." *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d at 428. However, enforcement of such agency determinations is not within the court's purview. Instead, the responsibility for enforcing a DHCR rent reduction order lies with the DHCR itself, and the mechanism for doing so is set forth in Rent Stabilization Code (RSC) § 26-514. NYCRR § 26-514. Therefore, the court denies the second portion of the Wolks' cross motion, and directs them to return to the DHCR to apply for the relief that they seek pursuant to the above RSC provision.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition, pursuant to CPLR Article 78, of petitioner LG Real Estate Conversions LLC (motion sequence number 001) is denied and the proceeding is dismissed, with costs and disbursements to respondent; and it is further

ORDERED that the cross motion of respondents Jeffrey Wolk and Samuel Wolk (motion sequence number 001) is granted solely to the extent that the petition is dismissed in its entirety as against said respondents, with costs and disbursements to said respondents as taxed by

the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said respondents, but is otherwise denied; and it is further

ORDERED that counsel for the Wolk respondents shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all counsel.

Dated: New York, New York
June 21, 2018

ENTER:

Hon. Carol R. Edmead, JSC
HON. CAROL R. EDMEAD
J.S.C.