SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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221 AVENUE A, LLC,

Petitioner,

- v -

VISNAUSKAS RUTHANNE, DIVISION OF HOUSING AND COMMUNITY RENEWAL OF THE STATE OF NEW YORK, JULIE ASHCROFT, BREE MILLER, and MICHAEL MARTIN,

Respondents.

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INDEX NO. 150194/2019

MOTION DATE 06/18/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

ORDER

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner 221 Avenue A, LLC (motion sequence number 001) is denied and the petition is dismissed.

DECISION

In this Article 78 proceeding, petitioner 221 Avenue A, LLC (landlord) seeks a judgment to overturn an order of the co-respondent New York State Division of Housing & Community Renewal (DHCR) as arbitrary and capricious (motion sequence number 001).

Findings of Facts

Landlord is the owner of a rent-regulated apartment building located at 221 Avenue A in the County, City and State of New York (the building). The individually named co-respondents Julie Ann Ashcroft, Bree Christine Miller and Michael Martin are the tenants of record of, respectively, rent-stabilized apartment units 20, 10 and 15 in the building (together, tenants). The co-respondent DHCR is the administrative agency charged with oversight of all rent-regulated apartment units located inside of New York City, and Ruthanne Visnauskas is the agency's commissioner.

On March 6, 2017, the above-named tenants and other tenants filed an application for a rent reduction order with the DHCR. *See* return, exhibit A-1. Tenants and landlords both made documentary submissions to the DHCR, a building inspection was conducted, and a hearing was held.

On November 14, 2017, a DHCR rent administrator issued an order that granted tenants' rent reduction application (the RA's order). Landlord thereafter filed a petition for administrative review (PAR) of the RA's order with the DHCR commissioner's office on December 7, 2017. Once again, the DHCR accepted evidentiary submissions and conducted a hearing, and on November 1, 2018 the DHCR commissioner's office issued a decision that denied landlord's application (the PAR order).

In relevant part, the PAR order found as follows:

"During the proceeding, the [RA] requested an agency inspection of the conditions complained about. On November 6, 2017, the Agency's inspection was conducted. According to the inspector's report, the following conditions were not maintained: the wooden molding of the main exterior door was rotten at the bottom and there was a hole/gap in the main entry door frame and wall on the top left side; the lobby floor tiled were cracked in various areas; and there was inadequate janitorial service on the 6th floor and bulkhead stairs handrail and bannisters, Thus, the [RA] granted the tenants a rent reduction and directed the restoration of services.

"The Commissioner notes that the conditions noted in the rent reduction order are not minor, as claimed by the owner. Although, concerning the lobby floor, the inspector noted that the floor was not collapsing and did not require painting as it was covered by ceramic tiles, and that there was no evidence of a trip hazard, the cracks as evinced by photographic evidence indicated that the cracks were not minor, thus constituting a diminution of services.

"Based on the foregoing, the Commissioner finds that the owner has failed to establish a basis to modify or reverse the [RA's] order."

Aggrieved, landlord commenced this Article 78 proceeding on January 7, 2019. The DHCR originally filed an answer on March 12, 2019, and later submitted an amended answer on March 19, 2019.

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. See Matter of Pell v Board of

Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222 (1974); Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal, 232 AD2d 302 (1st Dept 1996). A determination is only considered arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." See Century Operating Corp. v Popolizio, 60 NY2d 483, 488 (1983), *citing* Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference. Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d at 231-232. Here, landlord's petition asserts three arguments as to how the PAR order was arbitrary and capricious. After a review of this record, the court must reject landlord's contentions.

First, landlord asserts that the PAR order "arbitrarily disregarded that one of the original three tenants with standing had responded by *agreeing* with the petitioner's PAR request!" This statement is inaccurate. The third paragraph of the PAR order plainly acknowledges that "[o]ne tenant responded to the owner's PAR and was in agreement with the owner that the owner's PAR should be granted." Thus, the administrative record clearly

shows that the DHCR commissioner did consider the subject tenant's statement, but chose to disregard it after reviewing the other evidence. Therefore, the court rejects landlord's first contention.

Next, landlord asserts that the RA's order found that "eleven (11) of the items complained of by the tenants were found to be in fact properly maintained by the petitioner." This statement is also inaccurate, since the third paragraph of the PAR order plainly recites this observation as well. Thus, the administrative record again makes it clear that the DHCR commissioner considered landlord's allegation, but nevertheless rejected it after reviewing the other evidence. Therefore, the landlord's second contention is unfounded.

Finally, landlord asserts that "[o]nly three (3) matters were found technically not in compliance . . . [and] it is submitted that these are minor, non-rent-impairing violations, and therefore do not warrant the severe sanction of a rent reduction." The DHCR disputes landlord's characterization of the violations that were recorded on the inspector's report. The Appellate Division, First Department, has long recognized that "'. . . [t]he question of what constitutes a required service and whether such service [i]s being maintained [i]s a factual issue to be determined by' DHCR." See Matter of Classic Realty v New York State Div. of Hous. & Community

Renewal, 298 AD2d 201, 202 (1st Dept 2002); quoting Matter of Missionary Sisters of Sacred Heart v Div. of Hous. & Community Renewal, 288 AD2d 16, 17 (1st Dept 2001). The Appellate Division, Second Department, has found that conditions identical to those in the building's lobby did not constitute de minimis violations, and that documentary evidence in the administrative record that showed that such violations had been recorded after a building inspection afforded a rational basis to uphold a DHCR rent reduction order. See Matter of Clarendon Mgt. Corp. v New York State Div. of Hous. & Community Renewal, 271 AD2d 688 (2d Dept 2000). Landlord cited no case law to support its argument, but instead referred to inapposite provisions of the Rent Stabilization Code that concerned sidewalk cracks, failure to wax floors and failure to dust. This is plainly insufficient to overcome the clear precedent that the DHCR cited. Therefore, the court finds that there was a rational basis for the DHCR commissioner's determination that "the conditions noted in the rent reduction order are not minor, as claimed by the owner."

Accordingly, the court dismisses landlord's final contention and concludes that landlord has failed to establish that the PAR order was an arbitrary and capricious ruling.

10/8/2019
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE