| **Caceras v New York State Div. of Hous. & Community Renewal** |
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| 2019 NY Slip Op 33684(U) |
| December 18, 2019 |
| Supreme Court, New York County |
| Docket Number: 152531/19 |
| Judge: Lynn R. Kotler |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8
**DECISION/JUDGMENT**
INDEX NO. 152531/19

MIGUEL CACERAS and GLORIA CELA

MOT. DATE

- v -

MOT. SEQ. NO. 001

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL

The following papers were read on this motion to/for Art 78

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s).
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s).
Replying Affidavits NYSCEF DOC No(s).

In this Article 78 proceeding, petitioners challenge respondent's grant of rent increases for individual apartment improvement ("IAIs") in their apartment which was formerly rent-stabilized. The IAIs led to petitioners' apartment being deregulated. Petitioners reside at the building located at 559 West 156 Street, Apartment 46, New York, New York (the "building") in apartment 46 (the "apartment'). They moved into the apartment in February 2013. Respondent is New York State Division of Housing and Community Renewal ("DHCR"). Respondent maintains that its determination was not arbitrary or capricious and was rational.

The challenged determination

Petitioners filed a petition for administrative review ("PAR") challenging a Rent Administrator's order denying petitioners' rent overcharge complaint. The PAR was denied in an order dated January 8, 2019 by respondent's Deputy Commissioner Woody Pascal ("DC Pascal"). DC Pascal found that the IAIs were substantiated based upon the owner's affidavit from the contractor who performed and itemized the work done, a letter and invoices from the owner's "expediter" in connection with NYC Department of Buildings ("DOB") filings, and a DHCR inspector's observations and conclusions about the work done.

Specifically, DC Pascal stated: "it was reasonable for the Rent Administrator to rely on the observations of an agency inspector in determining the validity of the IAIs. The observations of the agency inspector, who is non-biased and is specifically training (sic) in performing apartment inspections and recognizing the age of work performed, rebut the tenants' assertions against the improvements." DC Pascal compared photographs taken by the agency inspector to photos from petitioners, finding that the former substantiated the IAIs while the latter did not rebut them. DC Pascal further noted that the prior tenant had resided in the apartment for 28 years and therefore "it was not unreasonable for the owner to perform renovations at the total cost claimed."

Dated: 12/18/19

HON. LYNN R. KOTLER, 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

DC Pascal rejected petitioners' contentions regarding the owners' cash payment, finding that even under heightened scrutiny, such payments were properly considered given the contractor's sworn affidavit and the inspector's observations. Finally, DC Pascal rejected petitioners' claim that multiple DOB permits suggested that the underlying work was performed in multiple apartments and/or commercial space as unsubstantiated and speculative.

The record before DHCR

The record before DHCR has been provided to the court. It contains a notarized letter by David Mandel, president of Triple J&R Inc. ("J&R"). The letter asserts that the facts contained therein are true and to the best of Mandel's knowledge. Mandel states that he entered into a contract with Pagis Realty LLC ("Pagis"), the prior owner of the building, to perform demolition and removal of the floors, removal and replacement of sheetrock and plumbing fixtures, electrical fixtures, doors, etc. He further states that he provided all labor and materials to perform the renovations, which included putting in a new bathtub, shower body, faucets, toilet, medicine cabinet, sheet rock, flooring, ceramic tiles, countertop, kitchen sink, stove, refrigerator, built in closets and wood flooring throughout the apartment. Mandel claims that he was paid $50,060 in cash for the work, which began in April 2012 and was completed in August of that same year.

The owner also submitted a notarized letter affidavit from Abraham Lebovits, president of Building Solutions Services, Inc., who represents that he was the "registered filing representative" hired by Pagis in connection with the renovation of the apartment. Annexed to his affidavit are three invoices for his services and copies of the plan/work approval application, work permit application and work permit issuance date and plans filed with the DOB. J&R is listed on the permit application and the description of work on the permit provides in relevant part: "INTERIOR RENOVATIONS TO APARTMENT 46 ON 4TH FLOOR (NEW WALLS, FLOORS, AND CEILINGS.) FINISHES ONLY. NO CHANGE IN BULK, EGRESS, PLUMBING OR USE ON THIS APPLICATION."

In their written opposition to the owner's submission, petitioners argued in relevant part that only cosmetic work was performed "to mask the various water leak (sic)". They admitted that "sheet rocking, painting of wall and installation of compressed wood floor" was the extent of the renovation. They denied receiving new appliances, instead maintaining that the appliances they had were "worn and defective." Petitioners otherwise argued that the owner's proof was insufficient because of procedural defects with the letter affidavits, the contractor did not itemize his costs, he was paid in cash only, and the work cost more than $29,000 as estimated on the DOB permit application. Petitioners also submitted a number of photos with various notations indicating that the wood floor was "peeling", the pipes under the kitchen sink were "old" and evidence of water leaks vis-à-vis stains on the ceiling.

In a subsequent submission, the owner argued, *inter alia*, that to renovate a four-bedroom apartment consisting of 1,200 square feet for $50,060 is a "very reasonable price."

DHCR performed an inspection of the apartment on February 28, 2017 to specifically ascertain whether the following was installed and/or completed in 2012:

1. The stove and refrigerator
2. New sub-floor, ceramic tiles and countertop in the kitchen
3. Subflooring work performed throughout the apartment
4. Shower body and faucets, toilet, sink, vanity, medicine cabinet and wall tiles installed in the bathroom
5. Plumbing & fixtures were installed in the bathroom
6. Wood floor installed in the apartment
7. Apartment door (or) just painted old door
8. Light fixtures in the apartment (except bedroom) installed.

The report, prepared by Jordan Grullon, indicates that only the tenant was present at the inspection despite notice to the owner. Grullon confirmed that everything on the aforementioned list had been installed and/or replaced in 2012 other than the refrigerator which the "tenant" stated was hers as she had returned the one the owner had provided. Grullon's report is supported by photographs of the apartment and the appliances and fixtures.

The owner thereafter provided a notarized letter to respondent dated April 24, 2018 from Kobi Zamir, the owner's managing member. Zamir represented that the owner purchased the building in May 2014 after renovations were made to the apartment. He asserted that the owner was unable to find Pagis or its principals and had no way of contacting them. According to Zamir, after the owner purchased the building, "approximately 50%-60% of the tenants came to the management office to pay in cash and [the owner] turned them away indicating that our policy for rent payments are to be made by check or money order...." Zamir proposed this as an explanation for why Pagis payed J&R in cash.

Zamir stated that there was no record of the prior owner filing RPIEs for 2012 or 2013 but objected to DHCR's request for proof that Pagis withdrew $50,060 from their account to pay J&R as unreasonable. He further stated "[t]o ask for documents beyond the current owners (sic) capabilities is unfair."

Other issues

After this petition was marked submitted, it was calendared for oral argument. The court thereafter granted the parties leave to file surreplies.

In his surreply, petitioners' counsel reiterates that DHCR's determination should be reversed or annulled because of the failure of proof by the owner. Alternatively, petitioner's counsel contends that the court should remand the matter for further consideration after obtaining copies of any IRS Form 8300 that should have been filed by the landlord or the contractor because of the cash payments greater than $10,000.

Both sides argue as to whether the recent enactment of the Housing Stability and Tenant Protection Act of 2019, Chap. 36, L. 2019 (hereafter, "HTPSA") has a bearing on this proceeding.

Respondent otherwise maintains that DHCR's determination was not arbitrary or capricious, was rationally based on the record and was in accordance with the existing law

**Discussion**

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion (CPLR § 7803 [3]). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. "[Tlhe proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after *quasi*-judicial hearings required by statute or law" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck. Westchester Countv*, 34 NY2d 222, 231 [1974]) (emphasis removed); *see also Matter of Colton v. Berman*, 21 NY2d 322, 329 (1967).

Petitioners have not met their burden here. While petitioners' proffer their own version of the condition of the apartment, as DC Pascal noted, they have not come forward with evidence which rebuts Grullon's findings or otherwise warrants a different result. Assuming *arguendo* that Pagis and J&R failed to file necessary tax forms with IRS in connection with cash payments for the work done, that failure does not mandate a finding that the payments were not made.

Here, DHCR's determination was supported by its agency inspection which verified the work which Mandel swore he performed. That DHCR verified the work was performed lends credibility to Mandel's

claim that he was paid $50,060 for such work. Petitioners attempt to attack Mandels' affidavit is unavailing. While the work he claimed to have performed is not delineated with line amount amounts for the cost of labor and materials provided, that does not mandate a finding that his affidavit is incredible as a matter of law.

Petitioners speculate that the work was not performed and failed to offer any proof to DHCR in support of that contention. The claim that the appliances were "worn and defective" is vague and conclusory. How were the appliances worn? How were they defective?

DHCR's determination is further supported by the fact that the apartment was 1,200 square feet and contained four bedrooms. The work Mandel described constitutes a gut renovation and the DOB permit application and permit itself substantiate that description.

It is of no moment that the work estimate was $29,000. Estimates are not guarantees and do not otherwise constitute *prima facie* evidence of what petitioner's claim, to wit, fraud.

Petitioners' other claims were properly deemed speculative by DHCR, such as that the work Pagis' expediter performed covered other apartments.

On this record, the court must deny the petition.

Finally, to the extent that petitioners contend that the HSTPA warrants a different result, that argument fails. While luxury deregulation no longer exists prospectively, the statute specifically ex ludes any unit that was lawfully deregulated prior to June 14, 2019.

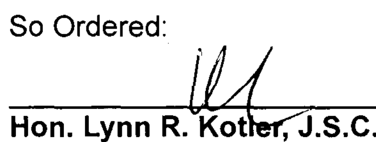
Accordingly, it is hereby **ADJUDGED** that the petition is denied and this proceeding is dismissed; and it is further

**ADJUDGED** that respondent is directed to retrieve the DHCR the record from the Part 8 Clerk at 80 Centre Street, Room 278.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Judgment of the court.

Dated: 12/18/19
New York, New York

So Ordered:



**Hon. Lynn R. Kotler, J.S.C.**