Matter of Surat Realty v New York State Div. of Hous. & Community Renewal
2021 NY Slip Op 30890(U)
March 22, 2021
Supreme Court, Kings County
Docket Number: 515290/2019
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
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Index No.: 515290/2019
Motion Date: 12-7-20
Mot. Seq. No.: 1

In the Matter of the Application of
SURAT REALTY,

Petitioner,

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

- against –

DECISION/ORDER

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

Re: Docket Nos. GQ210021RO through GQ210025RO
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The following e-filed documents, listed by NYSCEF as item numbers 1- 43, were read on this petition:

The petitioner, SURAT REALTY, commenced this CPLR article 78 proceeding for a judgment (i) vacating five nearly identical Orders of the New York State Division of Housing and Community Renewal ("DHCR") issued on May 16, 2019, under Docket Nos. GQ210021RO through GQ210025RO, as arbitrary, capricious and contrary to law. The Orders upheld the Rent Administrator's determination that some of the tenants in petitioner's building were entitled to a rent reduction pursuant to RSL 26-514 when a new building erected next to petitioner's building blocked some of the windows in their apartments.

Background:

Petitioner is the owner of a six-story residential apartment building with 154 apartments located at 400 Herkimer Street, Brooklyn, New York. When the tenants took possession of their apartments, there was an empty lot immediately adjacent to petitioner's building on the east side known as 412 Herkimer Street, Brooklyn, New York, which is owned by 412 Herkimer II LLC ("412 LLC"), an entity completely unrelated to petitioner. In about 2017, 412 LLC filed plans with the New York City Department of Buildings to construct a seven-story building on the lot. After the plans were approved, 412 LLC erected the building which was completed in 2018 and

was constructed to the lot line of petitioner's building. The new building at 412 Herkimer partially obstructs air and light from certain windows in the "S" and "T" lines of petitioner's building. None of the obstructed windows have been bricked up and there remains a distance of approximately eight inches between the window-panes and the new building at 412 Herkimer.

Apartments 1T and 3T at the Building, located in the "T" line of apartments, are one-bedroom units. The adjacent building at 412 Herkimer obstructs the air and light from one window in the bedroom. There are also two larger windows in the bedroom which are entirely unobstructed by the adjacent building as well as two large unobstructed windows in the living room -- all of which continue to provide light and air to the apartments.

Apartments 1S, 3S and 4S at petitioner's building, located in the "S" line of apartments, are two-bedroom units. The adjacent building at 412 Herkimer partially obstructed the air and light in the small kitchen window and one window in the master bedroom. There are two other windows in the master bedroom which are unobstructed by the adjacent building. There remain five unobstructed windows and a terrace door with large windows in each of these apartments - all of which continue to provide light and air to the apartments.

Proceedings Before the DHCR :

In October 2017, tenants of apartments 1S, 1T, 3S, 3T and 4S filed individual complaints with DHCR alleging a diminution of required services. DHCR assigned docket nos. FV2102985, FV210299S, FV210288S, FV2102975 and FV2102865 to the complaints. In their complaints, tenants of apartments 1T and 3T complained that the side window in their bedroom was blocked by the construction of the building at 412 Herkimer. The tenants of apartments 1S, 3S and 4S complained that their kitchen window and the side window in one of their bedrooms was blocked by the new building at 412 Herkimer.

Petitioner filed answers with DHCR to each of the aforementioned complaints. Petitioner's answer cited a DHCR Opinion Letter which stated "DHCR policy is that reduction in light and air due to construction of additional stories on an adjacent building does not constitute a reduction of services within the meaning of the Rent Stabilization Code." Petitioner's answer also attached copies of the tenants' leases which expressly provided "Owner will not be liable for

any interference of light, air or ventilation on a permanent basis caused by construction on any parcel of land not owned by Owner."

In orders issued April 9, 2018 and April 17, 2018, DHCR's Rent Administrator found that petitioner was not maintaining the complained of windows. In each of the orders, the Administrator found that a lot line window in the bedroom is obstructed by the adjacent building. For apartments 1S, 3S and 4S, the Administrator also found that the lot line kitchen windows are obstructed by the adjacent building. Based thereon, the Administrator reduced the rent for each of the tenants' apartments. In May 2018, petitioner filed PARs with DHCR's Commissioner, challenging the April 9, 2018 and April 17, 2018 Administrator's orders.

The Final Determination:

In orders issued May 16, 2019, DHCR's Deputy Commissioner denied petitioner's PARs challenging the April 9, 2018 and April 17, 2018 Rent Administrator orders stating:

> Pursuant to Section 2523.4 of the Rent Stabilization Code (the "Code"), the Rent Administrator is authorized by law to direct the restoration of services and grant a rent reduction, upon application by a tenant where it is determined that required services have not been maintained. Here, it is not disputed by the parties that the construction of a building on an adjoining lot decreased the light and air that the tenants previously received…."

The Deputy Commissioner rejected the petitioner's argument that the lease provisions precludes the tenants from receiving a rent reduction reasoning that it is up to DHCR, who was not a party to the lease agreements and not bound by them, to determine if a tenant is entitled to a rent reduction and that under Section 2520.13 of the Rent Stabilization Code, the tenants may not waive a benefit they are entitled to under the rent laws.

With respect to the opinion letter cited in petitioner's answer in the proceedings before DHCR, the Deputy Commissioner held that such is insufficient to disturb the Rent Administrator's Orders and that it was not a substitute for a formal agency order issued upon prior notice to all parties, such parties having been afforded an opportunity to be heard.

Finally, the Deputy Commissioner held that the construction of the adjacent building deprived the tenants of light and air and that since the petitioner has a continuing duty to

maintain required services, regardless of whether a third party caused the deficiencies, the tenants were entitled to a rent deduction after the erection of the building next door deprived them of light, ventilation and a view.

Discussion:

The principal issue determined by the DHCR was whether the tenants of Surat Realty had sustained a reduction in a "required service" as defined by the Rent Stabilization Law of 1969 (Administrative Code of City of New York § 26–514)[1]. Specifically, the issue determined by the agency was whether there had been a reduction in the amount of air and light that came into the tenants' apartments resulting from the erection of the new building in the adjacent lot which blocked some of the windows in the tenants' apartments.

"The question of what constitutes a required service presents a factual issue which is to be determined by the * * * administrative agency" (*Fresh Meadows Assoc. v. New York City Conciliation & Appeals Bd.*, 88 Misc.2d 1003, 1004, 390 N.Y.S.2d 351, *affd.* 55 A.D.2d 559, 390 N.Y.S.2d 69, *affd.* 42 N.Y.2d 925, 397 N.Y.S.2d 1007, 366 N.E.2d 1361). The DHCR made its determination after reviewing the evidence, which included an inspection report which

[1] RSL 26-514, entitled "Maintenance of Services", in relevant part, provides:

> In order to collect a rent adjustment authorized pursuant to the provisions of subdivision d of section 26-510 of this chapter an owner must file with the state division of housing and community renewal, on a form which the commissioner shall prescribe, a written certification that he or she is maintaining and will continue to maintain all services furnished on the date upon which the emergency tenant protection act of nineteen seventy-four becomes a law or required to be furnished by any state law or local law, ordinance or regulation applicable to the premises. In addition to any other remedy afforded by law, any tenant may apply to the state division of housing and community renewal, for a reduction in the rent to the level in effect prior to its most recent adjustment and for an order requiring services to be maintained as provided in this section, and the commissioner shall so reduce the rent if it is found that the owner has failed to maintain such services. The owner shall also be barred from applying for or collecting any further rent increases. The restoration of such services shall result in the prospective elimination of such sanctions. . . .

demonstrated the construction of the adjacent building deprived the tenants of light and air. The petitioner does not refute this.

It was not irrational for the DHCR to conclude that the providing of light and air through a window is a service within the meaning of RSL 26-514. Thus, DHCR'S determination had a rational basis and was not arbitrary and capricious (*see, Matter of Bambeck v. State Div. of Hous. & Community Renewal, Off. of Rent Admin.,* 129 A.D.2d 51, 55, 517 N.Y.S.2d 130; *Villas of Forest Hills v. Lumberger,* 128 A.D.2d 701, 703, 513 N.Y.S.2d 116; *Matter of Plaza Realty Investors & Queens Blvd. Props. Co. v. New York City Conciliation & Appeals Bd.,* 111 A.D.2d 395, 396, 489 N.Y.S.2d 603).

Further, for the same reasons given by the Deputy Commissions, the lease agreements and the prior opinion letter is not a basis to grant the petition. For the above reasons, the petition must be denied.

The Court is well aware that DHCR's determination effectively bestows upon the tenants a permanent rent reduction and forever bars the petitioner from obtaining a rent increase. In this regard, a rent reduction order pursuant to RSL § 26-514 imposes a continuing duty on the owner to charge and collect the reduced legal regulated rent until the DHCR finds that all required services are being provided and a rent restoration order is issued authorizing the owner to charge and collect the actual legal regulated rent (*see* RSL § 26– 514; Rent Stabilization Code [9 NYCRR] § 2523.4[a] [1]; *Atsiki Realty LLC v. Munoz*, 48 Misc. 3d 33, 35, 13 N.Y.S.3d 770, 772; *Jenkins v. Fieldbridge Assoc., LLC,* 65 A.D.3d 169, 877 N.Y.S.2d 375, *lv. dismissed* 13 N.Y.3d 855, 891 N.Y.S.2d 688, 920 N.E.2d 92). Since the only action that can be taken to unblock the windows is the removal of the building on the adjacent lot, which would be virtually impossible, the rent reductions will remain in effect indefinitely and never again will the landlord qualify for a rent increase. While this result is indeed harsh in the circumstances of this case and one that the City Council likely did not intend in enacting RSL 26-514, only a legislative remedy can provide the petitioner with a remedy.

Accordingly, it is hereby

ORDRED that the petitioner is **DENIED**, and the proceeding is dismissed.

This constitutes the decision and order of the Court.

Dated: March 22, 2021

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020