

First NY, LLC v New York State Div. of Hous. & Community Renewal

2021 NY Slip Op 32236(U)

November 9, 2021

Supreme Court, New York County

Docket Number: Index No. 155909/2021

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL EDMEAD PART 35

Justice

-----X

FIRST NY, LLC,

Petitioner,

- v -

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL, GREG MARSHALL

Respondent.

-----X

INDEX NO. 155909/2021

MOTION DATE 09/15/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner First NY LLC (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED AND ADJUDGED that the Clerk of the Court shall enter judgment dismissing this proceeding; and it is further

ORDERED that counsel for respondent State of New York Division of Housing and Community Renewal shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

In this Article 78 proceeding, petitioner First NY LLC (First NY) seeks a judgment to overturn an order of the respondent State of New York Division of Housing & Community Renewal (DHCR) as arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

FACTS

First NY is the owner of a residential apartment building located at 352 East 86th Street, a/k/a 1651 First Avenue, in the County, City and State of New York (the building). *See* verified petition, ¶ 7. Co-respondent Greg Marshall (Marshall) is the building's sole remaining tenant, and resides in apartment 3C, a rent stabilized unit. *Id.*, ¶ 8. The DHCR is the administrative agency charged with overseeing all rent stabilized housing located within New York City. *Id.*, ¶ 9. This proceeding arises out of First NY's contested application to demolish the building.

On January 24, 2019, First NY filed an "Owner's Application for an Order Granting Approval to Refuse Renewal of Lease and/or to Proceed for Eviction" with the DHCR regarding apartment 3C. *See* verified petition, ¶ 16; administrative return ("return"). Exhibit A-1. On September 10, 2020, a DHCR rent Administrator (RA) issued an order denying First NY's application. *Id.*, ¶ 25; return, exhibit A-11. First NY thereafter filed a petition for administrative review (PAR) to challenge the RA's order on October 9, 2020. *Id.*, ¶ 32; return, exhibit B-1. The DHCR accepted submissions from First NY and Marshall, and, on April 21, 2021, the Deputy Commissioner's Office issued an order denying the PAR (the PAR order). *Id.*, ¶ 36; return, exhibit B-4. The relevant portion of the PAR order found as follows:

"The Commissioner, having reviewed the entire evidentiary record, finds that the PAR should be denied, and the Rent Administrator's order should be affirmed.

"The Commissioner finds the petitioner's [i.e., First NY's] demolition plan is insufficient in terms of the scope of the 'undertaking' and financial ability to complete same. The efforts to distinguish the clear holding of *118 Duane LLC* and prior similar

decisions is not persuasive. Any reasonable interpretation of the term ‘undertaking’ as it pertains to a demolition which would evict a rent-regulated tenant includes post-demolition plans. This is true even though the term ‘. . . and constructing a new building’ was removed from the RSC. As noted by the courts, ‘financial ability to complete such undertaking’ inherently implies more than just demolition. *118 Duane LLC* states:

‘While the legislature did not explicitly provide such a requirement under the RSL, petitioner’s refusal to divulge its plans post-demolition, and the DHCR’s inability to fairly and reasonably determine a cost estimate of the project and/or if the petitioner had the financial ability to complete its undertaking, provide(s) a rational basis for the denial of petitioner’s application.’

“The owner’s failure to provide approved post-demolition planning for the site and segregation of the funding for same warranted denial of its application.”

Id., exhibit B-4.

Aggrieved, First NY commenced this Article 78 proceeding to challenge the PAR order on June 17, 2021. *See* verified petition, affidavit of service. The DHCR and Marshall filed separate answers on August 11, 2021 and August 13, 2021, respectively. *See* verified answer (DHCR); verified answer (Marshall). With the filing of First NY’s reply papers, this matter is now fully submitted (motion sequence number 001).

DISCUSSION

The court’s role in an Article 78 proceeding is to determine whether, upon the facts before an administrative agency, a challenged agency 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. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination will only be deemed “arbitrary and capricious” if it is “without sound basis in reason, and in disregard of the . . . facts.” *See Matter of 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 the opposite is the case, then there is a “rational basis” for the

agency's determination, and 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.

First NY argues that the PAR order was arbitrary and capricious because the portion of it in which the DHCR Deputy Commissioner's construed Rent Stabilization Law (RSL) § 26-511 (c) (9) (a) and its implementing regulation, Rent Stabilization Code (RSC) § 2524.5 (a) (2) (i), was "affected by an error of law." *See* verified petition, ¶¶ 29-48. First NY specifically asserts that the cited RSL and RSC provisions "do not reference future post demolition construction plans," and that those provisions were, in fact, amended in 2000 to remove any reference to "future post-demolition projects or requirements." *Id.*, ¶ 28-32. As a result, First NY contends that the Deputy Commissioner was incorrect, as a matter of law, to deny its PAR on the basis that it "fail[ed] to provide approved post-demolition planning for the site and segregation of the funding for same." *Id.*; return, exhibit B-4. The DHCR and Marshall both respond that the Deputy Commissioner's interpretation of the statutes was reasonable, as was his decision. *See* respondent's mem of law (DHCR) at 12-14; respondent's mem of law (Marshall) at 4-8. The court agrees that the PAR order was rationally based, but finds that the parties' respective arguments miss the mark.

The relevant portion of RSL § 26-511 provides as follows:

"(c). A code shall not be adopted hereunder unless it appears to the [DHCR] that such code

* * *

"(9) provides that an owner shall not refuse to renew a lease except:

"(a) where he or she intends in good faith to demolish the building and has obtained a permit therefor from the department of buildings; . . ."

RSL § 26-511 (c) (9) (a). The relevant portion of RSC § 2524.5 provides as follows:

"(a) The owner shall not be required to offer a renewal lease to a tenant or continue a hotel tenancy, and shall file on the prescribed form an application with the DHCR for

authorization to commence an action or proceeding to recover possession in a court of competent jurisdiction after the expiration of the existing lease term, upon any one of the following grounds:

* * *

“(2) Demolition.

“(i) The owner seeks to demolish the building. Until the owner has submitted proof of its financial ability to complete such undertaking to the DHCR, and plans for the undertaking have been approved by the appropriate city agency, an order approving such application shall not be issued.”

RSC § 2524.5 (a) (2) (i). To effectuate RSC § 2524.5, the DHCR issued Operational Bulletin 2009-1, which requires that:

“An owner must state in the application that recovery of possession of the housing accommodations is being sought for the purpose of demolishing them. No demolition application will be accepted by DHCR unless the owner has submitted proof to the DHCR of financial ability to complete such undertaking, and plans for the undertaking have been approved by the appropriate governmental agency. Evidence of financial ability to complete the project may include a Letter of Intent or a Commitment Letter from a financial institution, or such other evidence as DHCR may deem appropriate under the circumstances.

* * *

“Unless the owner has submitted proof of its financial ability to complete the undertaking to the DHCR, and plans for the undertaking have been approved by the appropriate agency, the owner's application will not be accepted, but instead, will be rejected without being docketed.”

See verified answer (DHCR), exhibit C.

There has been scant judicial review of the above provisions. However, in a trial order in *118 Duane LLC v New York State Div. of Homes and Community Renewal* (2020 NY Slip Op 30912(U) [Sup Ct, NY County 2020]), this court (James, J.) denied a landlord's application for certificates of eviction that it had requested as part of an alleged plan to demolish the building.

Judge James reasoned as follows:

“Here, as part of the application process, petitioner filed a PW1, as well as an amended PW1, which included a \$1,200,000.00 demolition proposal. Also included in the application was a bank statement dated December 24, 2015, which indicated funds in the sum of \$4,850,007.00 were available in petitioner's account. Despite petitioner's subsequent submission of additional bank account statements, the commissioner noted that the petitioner did not provide a letter from a financial institution, nor a letter from the bank indicating (1) the funds for the project had been specifically segregated for the

demolition project; and (2) petitioner had the financial ability to complete such undertaking (PAR Order p.6). In its order, the commissioner stated that the term ‘undertaking’ is not limited to the demolition itself but rather the term undertaking includes any new construction or any other project that is planned for the site (*Id.*).

“Here, petitioner, has failed to provide the DHCR with bank statements indicating liquid funds were segregated for the sole purpose of the demolition. Therefore, petitioner has not demonstrated its financial ability to complete the demolition. On that basis, the court concludes that no part of the commissioner's finding in the PAR Order on the issue of financial ability was arbitrary or capricious.

“Finally, the commissioner determined that petitioner failed to proceed in good faith in its applications for demolition because it failed to include evidence of its future plans for the demolition site, unlike the owner in the *Matter of Baba*, supra. While the legislature did not explicitly provide such a requirement under the RSL, petitioner's refusal to divulge its plans post-demolition, and the DHCR's inability to fairly and reasonably determine a cost estimate of the project and/or if the petitioner had the financial ability to complete its undertaking, provide(s) a rational basis for the denial of petitioner's applications. In the instant case, the DHCR cited to its own Operational Bulletin 2009-1, to establish that ‘such undertaking’ is not limited to the demolition itself. The DHCR had a rational basis for requiring the petitioner to show good faith in its application, not only to demolish the premises, but to set forth plans for the future site. As the agency has set forth a rational basis for its denial, and the court cannot substitute its own judgment for that of the agency, such judgment shall not be disturbed.”

2020 NY Slip Op 30912(U) *12-*14 (emphasis added). Judge James upheld the DHCR’s denial of the landlord’s application for certificates of eviction in *118 Duane LLC* because there was a rational basis to support the Deputy Commissioner’s finding that the landlord had failed to satisfy the second requirement set forth in Operational Bulletin 2009-1; i.e., evidence of funds placed into a segregated bank account that were to be used for the sole purpose of completing demolition work. By failing to present such documents, the landlord failed to demonstrate its financial ability to complete the demolition, and thereby fell afoul of RSC § 2524.5 (a) (2) (i), which justified the PAR’s denial of the landlord’s request for certificates of eviction. In the current case too, the PAR order found that First NY’s “failure to provide approved post-demolition planning for the site *and segregation of the funding for same* warranted denial of its application.” *See* administrative return, exhibit B-4 (emphasis added). As a result, the same results are warranted in this case. Therefore, the court finds that there was a rational basis in the

instant PAR order for the Deputy Commissioner's decision to uphold the RA's denial of First NY's request for certificated of eviction. Accordingly, the court concludes that the PAR order was not an arbitrary and capricious ruling. This is a sufficient ground on which to dismiss First NY's Article 78 petition.

As a result of this finding, the court need not consider the bulk of First NY's arguments, and of the DHCR's opposition, both of which are directed to the issue of whether the agency's inquiry into a landlord's "good faith intention to demolish a building" (pursuant to RSL § 26-511 [c] [9] [a]) encompasses requiring the landlord to provide "plans to complete the undertaking" (pursuant to RSC § 2524.5 [a] [2] [i] and Operational Bulletin 2009-1). *See* verified petition, ¶¶ 40-54; respondent's mem of law (DHCR) at 3-12; plaintiff's reply mem at 3-14. The court notes that these arguments are largely semantic, and mainly center on supposedly significant distinctions between the statutory definitions of the terms "demolition" and "undertaking." The court also notes that Marshall's opposition papers take a different, more illuminating approach by reviewing the case law which has analyzed the rationales for the policies behind the RSL's and RSC's grants of authority to the DHCR to conduct inquiries into landlords' demolition plans. Of particular value were the following observations by the Appellate Division, First Department, in its 1955 decision in *Matter of Asco Equities, Inc. v McGoldrick* (285 App Div 381 [1st Dept 1955], *aff'd* 309 NY 738 [1955]):

"From a reading of the statute, the first proposition that is apparent is that in substance a landlord has a right to withdraw his property from the rental market. But his intention must be actual and genuine. The requirement that he obtain certificates of eviction with the prior approval of the State Rent Commission [now, the DHCR] is to assure that the withdrawal from the rental market is genuine and not a subterfuge to remove occupant tenants.

"Obviously the rent commission has the burden and the responsibility of determining the good faith of the intention expressed by the landlord. It would be senseless to hold that the rent commission is bound by the landlord's bare assertion. That would be an illusory control indeed. Consequently, the rent commission must be

satisfied, on objective grounds, that a landlord intends as he says. The good faith of that expressed intention is easily established by showing immediate and compelling necessity, economic or other hardship, or other extraordinary circumstances which, in a rational framework, justify or explain or make understandable the landlord's conduct in withdrawing his property from the rental market. While it may be that a landlord has a constitutional or statutory right to be economically perverse, the rent commission has the right to assume that that is not the general state of affairs with landlords. Hence, the rent commission has the power to use objective standards of intention, so long as those standards are comprehensive and accord with economic and social experience in the real estate field. In exercise of that power, it has the right to promulgate a regulation . . . which articulates these objective standards, so that all may know the bases upon which the rent commission will determine the absence or presence of good faith.

“If the foregoing analysis be sound, then the landlord may not prevail unless it shows that, on the basis of the regulation or other equally valid and objective standards, its good faith has been demonstrated. If the landlord can show such objective basis outside the questioned regulation, then the regulation is inadequate, and therefore, invalid, because it does not comprehend the scope of the statute which defines the limit of its power. For the landlord to merely assert ‘I intend thus and you cannot prove that I do not’ is not enough. Law is much too experienced to give such finality to the words of mortal men. It may look to the circumstances and see whether the assertion is credible in the light of those circumstances. It cannot search the subjective mind, but it can require that the assertion made with respect to the subjective mind meets the tests of practical reality, before it is to be believed. The regulation does no more than that. It, in effect, requires that the landlord show some basis in economics, or in psychological or social needs, for the action he proposes. This is not in order to approve or justify that purpose, as sound or proper, but to give credit to the announced purpose or assigned reason.

“Any other view of the matter would entail the serious risk that landlords would, on the asserted intention of withdrawal from the market, procure the eviction of tenants for one improper cause or another, only to replace the premises on the market a short time thereafter. For this there would be only a doubtful money remedy to the evicted tenant, and no way of restoring the housing accommodation to him.”

285 App Div at 384-386 (internal citations omitted). That decision was affirmed by the Court of Appeals and has never been overturned. Although there have been intervening changes to the controlling statutes and to the agency’s jurisdiction and authority, the court believes that the First Department’s policy analysis in *Matter of Asco Equities, Inc.* remains persuasive. However, as previously noted, the court need not measure the parties’ arguments herein against those policies, since there is no question that the DHCR Deputy Commissioner correctly affirmed the finding that First NY violated RSC § 2524.5 (a) (2) (i) by failing to provide sufficient financial documentation.

Accordingly, for the foregoing reasons, the court concludes that First NY's Article 78 petition should be denied as meritless, and that this proceeding should be dismissed.

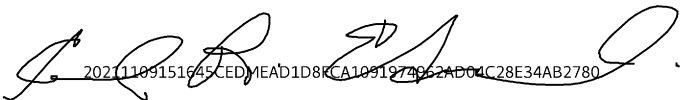
DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED AND ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner First NY LLC (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED AND ADJUDGED that the Clerk of the Court shall enter judgment dismissing this proceeding; and it is further

ORDERED that counsel for respondent State of New York Division of Housing and Community Renewal shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.



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11/9/2021
DATE

CAROL EDMEAD, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE