268 Bowery Realty Inc. v New York State Div. of Hous. & Community Renewal
2023 NY Slip Op 33282(U)
September 22, 2023
Supreme Court, New York County
Docket Number: Index No. 160559/2022
Judge: Nicholas W. Moyne
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NICHOLAS W. MOYNE** **PART**

Justice

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268 BOWERY REALTY INC.,

Petitioner,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, MARTHA DIAMOND, CARMEN CICERO, MARY ABELL CICERO

Respondent.

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INDEX NO. 160559/2022

MOTION DATE 12/11/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 32, 33, 34, 35, 36, 37, 38, 39, 40

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

Upon the foregoing documents, it is

In this Article 78 proceeding, petitioner 268 Bowery Realty Inc., seeks review of an order issued on October 19, 2022, by respondent New York State Division of Housing and Community Renewal ("DHCR"). The DHCR order at issue consolidated and denied the petitioner's two administrative appeals (termed a Petition for Administrative Review, "PAR") which challenged two orders of the DHCR's Rent Administrator ("RA"), issued on April 22, 2022, concerning the housing accommodations known as Apts. 3 and 5 located at 268 Bowery Street, New York, NY. The RA's determinations denied the petitioner's application for an order granting approval to refuse renewal of the subject lease and approval to proceed to evict the residential tenants on the ground that the petitioner intended to demolish the subject building. Petitioner argues that the denial of the PAR was arbitrary and capricious.

DHCR found that to grant an Owner's application based upon "Demolition", the project must, at a minimum, "include a complete gutting of all interior space in the building from the ground floor up through the roof, including the removal of such roofs and all internal building systems." DHCR noted that after the deconstruction part of a project is completed, one needs to be able to "see the sky" if standing on the ground floor. Id. The RA further found that the application failed to meet that criteria. In affirming the RA decision, DHCR found:

The Commissioner is of the opinion that these PARs must be denied.

First, it is not contested that a "demolition" in the instant context can be something less than the full razing of a building. There is therefore no need to analyze the many cases cited by the owner* that support this contention. However, contrary to the owner's contention, under Section 2524.5(a)(2) of the RSC, "demolition" refers to "the building" at issue and not to only the residential portion (or "housing accommodations "). Further, the general standard for determining whether an owner's plan meets the definition of a "demolition" under the RSC is whether, at the least, the interior of the building at issue will be totally gutted and one can "stand in the cellar and look up to the sky". In the instant case, the owner's plan falls far short of this standard. The owner seeks to demolish three of six levels, demolishing the top three residential floors and leaving the basement and first and second floors intact. By any standards, this cannot be considered to be a situation in which, as required by RSC Section 2524.5(a)(2), " [t]he owner seeks to demolish the building. " Further, whether the owner's plan leaves 51% or just under 41% of the floor space undisturbed, the fact that such a substantial portion of the floor will not be disturbed, the fact that the owner plans to continue uninterrupted commercial operations in half of the building (the cellar and first and second floors), and the fact that half of the six usable floors of the premises will not be disturbed, clearly supports the RA's determination that the owner's plan does not meet the requirements of a "demolition" under the RSC, and that the owner's application must accordingly be denied.

While the owner cites several Agency decisions and court cases, none of these support the owner's position that the work proposed by the owner's plan meets the definition of "demolition" under the RSC, as explained above. Mahoney v Altman, 63 Misc2d 1062 (S Ct NY County 1970), was based on the Rent Control Law and Regulation in effect in 1970, which stated that a "demolition" in this context is "where the landlord seeks in good faith to recover possession of housing accommodations for the immediate purpose of demolishing them (emphasis added) (See Section 58 of the 1970 City Rent Regulations). The Mahoney Court found that, pursuant to this Section, only the housing accommodation portions of a building need be demolished to satisfy the requirements of a "demolition". However, the RSC has a different standard, the standard that applies herein, and which standard clearly requires that "[t]he owner seeks to demolish the building (emphasis added)." It is noted that the Schneider decision (Agency

Order TB420052RT), cited by the owner, was also made under the Rent Control Laws and Regulations, and not under the Rent Stabilization Law and Code which apply herein.

Peckham v Calogero, 12 NY3d 424 (Ct App 2009), does indeed, as contended by the owner, state that a "demolition" need not be the total razing of a building. This is not, however, at issue, because, as outlined above, this contention is established. Peckham found that there was in fact a "demolition" in that case based on the fact that the entire interior of the premises at issue in that case were to be demolished. These facts are substantially different from the instant case in which half of the interior, namely half of the usable floors, are to remain undisturbed. Peckham, therefore, does not in any way support the owner's position that the Rent Administrator was in error in finding that the proposed work herein does not meet the definition of a. "demolition" under the RSC.

Contrary to the owner's contention that the Dalabar decision (CAB decision ARL04567-L) found that a demolition can leave commercial parts of a building intact, said decision simply stated that the Rent Administrator had been in error to find that the owner's plan to renovate the residential parts of a building should be denied on its face, finding that further fact finding was required. Dalabar made no ruling or finding regarding whether commercial portions of a building could be undisturbed by work that finally qualifies as a "demolition".

The Duane case is analogous to the instant case. Duane also cites the general principle that a "demolition" under the RSL and RSC is accomplished by "the total gutting of a building's interior, or, as the test is sometimes characterized, being able to stand in the cellar and look up to the sky " (citing CAB Order Villas of Forest Hills, Opinion Number 15,680 (1981)). Duane found no demolition in that case because more than 50% of the floor space was to remain intact, because the cellar and first floor were not to be disturbed, and because commercial ventures located on the cellar and first floors were to remain in operation. In the instant case the owner proposes to leave 41-51% of the floor space undisturbed, to leave the cellar and first and second floors undisturbed, and to maintain commercial operations uninterrupted in the cellar and first and second floors. Like Duane, therefore, the RA in the instant case was correct to find that the owner's plans did not meet the definition of a "demolition" under the RSL and RSC. it is noted

that, while the issue of the landmark status of the building in Duane was raised by the owner, the Duane decision in no way relied on this status.

It is noted that, while OB 2009-1 does refer to demolition of "all of the apartments in the subject building", this reference does not change the requirements of a "demolition" under RSC Section 2524.5(a)(2), which, as mentioned above, defines a "demolition" as the demolition of "the building". While OB 2 009-1 explicitly requires demolition of all apartments in the building at issue, it does not thereby lessen the requirements of the RSC, which demands the substantial demolition of the entire building itself.

The April 13, 2001 Opinion Letter cited by the owner states that is not a substitute for a formal agency order issued upon prior notice to all parties and with all parties having been afforded an opportunity to be heard." Said Letter also states that "DHCR may grant a demolition application [under RSC Section 2524.5(a)(2)] where the outer walls and structural supports of the building remain intact, with only the entire interior being gutted (emphasis added)." The Letter also advises that the work at issue in that circumstance may also qualify as a "substantial rehabilitation". Therefore, although the Letter does opine that leaving intact a single commercial floor of a building that is the subject of a proposed demolition, while substantially demolishing the rest of that building, may qualify as a "demolition", that Letter states that it is not a substitute for a formal proceeding leading to a formal order (such as the instant one), that generally the entire interior of a building must be gutted to qualify as a "demolition" and that the owner might be better served by filing a substantial rehabilitation application. The Opinion Letter is therefore not binding on the instant matter. Nor are the facts at issue in said Letter analogous to the instant case in that the demolition plan under consideration herein calls for work that leaves at least half of the interior of the subject building intact.

Petitioner then commenced this Article 78 proceeding to challenge the denial of the PAR.

CPLR § 7803 provides that a court's review of a determination by an agency, such as DHCR, consists of whether the determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed (*see* CPLR § 7803[3]; *Matter of Montefusco v New York State Div. of Hous. & Community Renewal,* 22 Misc 3d 1131(A), [Sup Ct NY County

2009]; *Matter of Windsor Place Corp. v New York State Div. of Hous & Community Renewal, Off. of Rent Admin.*, 161 AD2d 279 [1st Dept 1990]; *Matter of Mazel v Mirabal*, 138 AD2d 600 [2d Dept 1988]; *Matter of Bambeck v New York State Div. of Hous & Community Renewal, Off. of Rent Admin.*, 129 AD2d 51 [1st Dept 1987], lv den 70 NY2d 615 [1988]). In reviewing an administrative agency determination, courts must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious (*see Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 652 [2013][citation omitted]); *Matter of Peckham v. Calogero*, 12 NY3d 424, 431 [2009], *quoting Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002]). It is well settled that a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts." (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Even though the court might have decided differently were it in the agency's position, the court may not upset the agency's determination in the absence of a finding supported by the record, that the determination had no rational basis (*see Matter of Mid-State Mgt. Corp. v New York City Conciliation & Appeals Bd.*, 112 AD2d 72, 76 [1st Dept 1985], affd 66 NY2d 1032 [1985]).

After reviewing the arguments and the administrative record, the Court finds that the determination by DHCR to deny the PAR had a rational basis and was not arbitrary or capricious. Petitioner argues that its application and submitted plans clearly met the standard for demolition set forth in the Rent Stabilization Code ("RSC") and that DHCR has previously approved demolition applications where, as is the case in the instant matter, the owner proposes to leave intact the sole commercial space, while substantially gutting the reminder of the building including all the residential apartments. The Court agrees that these opinions are clearly distinguishable for the reasons given by DHCR and stated in its determination quoted above. Most notably, many of the determinations cited by the owner did not involve the standard for demolition under the RSC, a standard that substantially differs from the standards for demolition pursuant to other rent regulations such as the Rent Control Laws.

It is also clear from the record that DHCR carefully analyzed the proposed demolition plan and reasonably concluded that they did not constitute a plan to fully gut the interior of the building. Both the architect's affidavit and the plans indicate that the demolition work would only occur on the upper three floors of the five-story building. The remainder of the building, including the cellar, first and

second floors would remain intact and be utilized by the owner to operate its commercial businesses. Such a plan is certainly not at all equivalent to a plan that would permit a person to be able to stand in the cellar and look up at the sky. While it may not be necessary to raze the entire building to the ground, it is certainly not irrational to conclude, as DHCR did in this case, that the entire or at least a substantial part of the interior be gutted in order to effectuate a demolition within the meaning of the Rent Stabilization Code (*see Matter of 118 Duane LLC v New York State Div. of Hous. & Community Renewal*, 212 AD3d 401[1st Dept 2023]).

Accordingly, the petition is dismissed. The forgoing constitutes the decision and order of this court.

9/22/2023
DATE

NICHOLAS W. MOYNE, J.S.C.

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

APPLICATION: [ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER
[ ] SETTLE ORDER [ ] SUBMIT ORDER

CHECK IF APPROPRIATE: [ ] INCLUDES TRANSFER/REASSIGN [ ] FIDUCIARY APPOINTMENT [ ] REFERENCE