Matter of W 36th Villa LLC, v New York State Div. of Hous. & Community Renewal
2023 NY Slip Op 34198(U)
November 6, 2023
Supreme Court, Kings County
Docket Number: Index No. 509154/23
Judge: Karen B. Rothenberg

At an IAS Term, Part 35, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 6th day of November, 2023.

P R E S E N T:

HON. KAREN B. ROTHENBERG,
Justice.

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In the Matter of the Application of
W 36th VILLA LLC,

Petitioner,

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

-against- Index No. 509154/23

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent,

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The following e-filed papers read herein:	NYSCEF Nos.:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	21
Affidavits/ Affirmations in Reply	23

Upon the foregoing papers, petitioner W 36th Villa LLC seeks judicial review, under CPLR article 78, of a decision by respondent New York State Division of Housing and Community Renewal (DHCR) which denied petitioner's petition for administrative review (PAR) and affirmed a decision of the Rent Administrator (RA) finding that petitioner failed to prove a substantial rehabilitation of the subject building so as to

exempt the building from rent regulation under the Rent Stabilization Law (RSL) and Code (RSC).

Petitioner is the owner of a residential building at 2846 West 36th Street in Brooklyn. According to the instant petition, from December 2020 until July 2021, comprehensive rehabilitation work was performed to the building which included replacement of eleven of the buildings' fifteen systems, and repair and refurbishment of the other four systems which petitioner alleges were structurally sound and thus not in need of replacement. On November 5, 2021, petitioner filed an application with the DHCR to determine whether the subject building is exempt from regulation based on a substantial rehabilitation. By order dated September 15, 2022, the RA denied the application, noting that the evidence presented did not substantiate petitioner's claim that 75% of building-wide and individual apartment systems (including common areas) were replaced. In particular, the RA indicated that "[a] review of the file reveals that the petitioner has not submitted the necessary information and evidence for proper examination and a DHCR determination, such as: DOB Letter of Completion and/or new Certificate of Occupancy, cancelled checks, work contracts, invoices, the initial and final cost affidavit (PW3) and a current tenant list."

Petitioner thereafter filed a PAR, wherein it argued that the evidence submitted was sufficient to prove that 75% of the building-wide and apartment systems were replaced; and that the RA erred in denying petitioner's request for additional time to submit documentation and in denying the application with prejudice. Petitioner cited to DHCR's Operational Bulletin 95-2 regarding documentation of "the scope of work

actually performed" for substantial rehabilitation, which "may include" contractors' statements and contracts for work and "may require[]" "[p]roof of payment by the owner." Petitioner argued that "may be required" indicates that "an exemption application will [not] be categorically denied if an owner fails to provide said documentation." Petitioner maintained that its evidence, including copies of approved plans related to the work from the Department of Buildings (DOB), sworn affidavits from petitioner's principal and engineer, and before and after photographs, was sufficient to prove the substantial rehabilitation. Petitioner stated that following a Request for Additional Information issued by the RA on March 4, 2022, it asked for multiple extensions of time but that the RA issued the decision denying the application without warning. With its PAR, petitioner included a DOB Letter of Completion issued on September 27, 2022, shortly following the issuance of the RA's determination.

By order dated January 24, 2023, the Deputy Commissioner denied petitioner's PAR. The Deputy Commissioner stated:

> The Commissioner rejects petitioner's contention that the [RA] should have held the proceeding in abeyance. The owner decided to file its application on November 5, 2021 and would be expected at that time to submit sufficient evidence to prove a substantial rehabilitation. See Matter of Underhill-Washington Equities LLC v Div. of House. & Community Renewal, 47 Misc. 3d 1215[A], 1215[A](sic), 2015 NY Slip Op 50632[U], *3 [Sup Ct , Kings County 2015)(sic) (agency did not abuse its discretion when it determined to move forward with a proceeding). Indeed, the [RA] gave [petitioner] ample opportunity to produce necessary evidence to support a finding of substantial rehabilitation and the [RA] is not required to keep the owner's application open for an indefinite period while the owner searches for evidence to support the claim.

> The record is devoid of contractor invoices, cancelled checks and work contracts. The Commissioner finds that the owner should have been in possession of such documents given that the work was recently done in 2021 and therefore it was reasonable, under such circumstances, for the [RA] to require [petitioner] to produce such evidence in this case. These documents were necessary to supplement the affidavits and establish the scope of the work and to prove that the costs were paid by [petitioner] as claimed in [its principal's] affidavit.
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> The Commissioner need not consider the new evidence (DOB Letter of Completion) submitted for the first time on appeal. See Rent Stabilization Code §2529.6. However, even if considered, the Letter of Completion does not itself prove the substantial rehabilitation given the lack of the other evidence as discussed above. Moreover, even on PAR [petitioner] offers that 75% of the required systems were not replaced. Indeed, [petitioner] argues that while two of the listed 17 systems in Operational Bulletin 95-2 did not exist, only 11 of the remaining 15 systems were actually replaced. [Petitioner] states that the roof, elevator, fire escapes and interior stairways were "repaired" so that they were made structurally sound and therefore are an exception and do not require replacement. The Commissioner finds no such exception exists. Under Operational Bulletin 95-2, an owner must demonstrate that a system was "recently installed or upgraded" so that it is structurally sound and therefore need not be replaced as part of the substantial rehabilitation. There is no such proof in this case with regard to the roof, elevator, fire escapes and interior stairways, and therefore they are not exempted from the required percentage.

The instant Article 78 proceeding ensued.

A court's function in an Article 78 proceeding is to determine, upon the proof before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d

222, 230-231 [1974]). "'Arbitrary action is without sound basis in reason and is generally taken without regard to the facts'" (*Matter of 1437 Carroll, LLC v New York State Div. of Hous. & Community Renewal*, 150 AD3d 1224, 1224 [2d Dept 2017], quoting *Matter of Pell*, 34 NY2d at 231). If a rational basis exists for its determination, the decision of the administrative body must be sustained (*Matter of Pell*, 34 NY2d at 230; *Matter of Tener v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 159 AD2d 270 [1st Dept 1990]). If the determination is rational, it must be upheld, even though the court, if viewing the case in the first instance, might have reached a different conclusion (*see Matter of Mid–State Mgt. Corp. v New York City Conciliation & Appeals Bd.*, 112 AD2d 72 [1st Dept 1985], *affd* 66 NY2d 1032 [1985]). Stated simply, this court "may not substitute its judgment for that of the [DHCR]," so long as the agency's decision is rationally based in the record (*Matter of 85 E. Parkway Corp. v New York State Div. of Hous. & Community Renewal*, 297 AD2d 675, 676 [2d Dept 2002]).

RSC § 2520.11 (e) exempts from rent stabilization housing accommodations in buildings completed or buildings substantially rehabilitated as family units on or after January 1, 1974. For a building to be exempt from rent stabilization due to a substantial rehabilitation, it must meet certain criteria under the regulation and Operational Bulletin (OB) 95-2. Among the criteria is that at least 75% of certain building-wide and apartment systems must each have been completely replaced with new systems, and that the rehabilitation must have been commenced in a building that was in a substandard or seriously deteriorated condition. For good cause shown, on a case-by-case basis, limited

exceptions to the stated criteria regarding the extent of the rehabilitation work to be effectuated building-wide or as to individual housing accommodations may be granted where the owner demonstrates that a particular component of the building or system has recently been installed or upgraded so that it is structurally sound and does not require replacement, or that the preservation of a particular component is desirable or required by law due to its aesthetic or historic merit (OB 95-2 [I] [A]). The DHCR requires the following documentation from owners in support of a claim of substantial rehabilitation: "Records demonstrating the scope of the work actually performed in the building. These may include an itemized description of replacements and installations, copies of approved building plans, architect's or general contractor's statements, contracts for work performed, appropriate government approvals, and photographs of conditions before, during, and after the work was performed. Proof of payment by the owner for the rehabilitation work may be required; owners are advised to maintain records related to the rehabilitation. For rehabilitation projects completed before issuance of the Operational Bulletin, where undue hardship or prejudice would otherwise result, consideration will be given to the documentation which may be required.

In its Article 78 petition, petitioner argues that the Deputy Commissioner's order must be reversed or remanded to the DHCR for further proceedings based upon the following grounds: a) The DHCR arbitrarily and capriciously failed to properly consider whether 75% of the existing building wide systems were replaced at the subject premises; b) the DHCR arbitrarily and capriciously denied the owner's request for an extension of time to submit additional documentation, even though such an extension

would not cause any prejudice to any of the occupants of the subject building or the DHCR; c) the DHCR arbitrarily and capriciously denied petitioner's applications based, in part, on a lack of a DOB Letter of Completion; d) the DHCR arbitrarily and capriciously failed to consider the DOB Letter of Completion on the PAR on the basis that the evidence was submitted for the first time on appeal, despite the fact that the DOB Letter of Completion was issued after the issuance of the RA's order; e) the DHCR arbitrarily and capriciously determined that petitioner did not complete a substantial rehabilitation based on petitioner not producing certain documentation; f) the DHCR arbitrarily and capriciously failed to specifically deny petitioner's application without prejudice in order to give the owner an opportunity to refile its application when certain additional documentation became available to the owner; g) the DHCR arbitrarily and capriciously diverged from its prior precedent; and h) the DHCR arbitrarily and capriciously failed to properly consider and weigh the evidence presented to it.

The RA's denial of petitioner's application was premised upon the failure to provide adequate documentation, including a DOB Letter of Completion and/or new Certificate of Occupancy, cancelled checks, work contracts, invoices, the initial and final cost affidavit (PW3) and a current tenant list. Petitioner argues that while items such as cancelled checks "may be required" under OB 95-2, their absence should not be dispositive of whether an application is granted, given that other evidence such as an engineer's affidavit was offered. However, with respect to fact-based inquiries, an administrative agency may determine the type of documentation necessary or appropriate (*see Matter of Rodriguez v County of Nassau*, 80 AD3d 702, 702 [2d Dept 2011]; *Matter*

of 2084-2086 Bronx Park E. v New York State Div. of Hous. & Community Renewal, 303 AD2d 315, 316 [1st Dept 2003]; *Greystone Mgt. Corp. v Conciliation & Appeals Bd.*, 94 AD2d 614, 616 [1st Dept 1983], *affd* 62 NY2d 763 [1984]). Importantly, "an agency has great discretion in deciding which evidence to accept and how much weight should be accorded particular documents or testimonial statements, and its determination in that respect is subject only to the legal requirement that the administrative finding be rationally based" (*Kogan v Popolizio*, 141 AD2d 339, 344 [1st Dept 1988]). "Moreover, where, as here, the determination of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, [a court] must accord such determination great weight and judicial deference" (*Palmer v New York State Dept. of Envtl. Conservation*, 132 AD2d 996, 997 [4th Dept 1987]; *see Matter of Brusco W. 78th St. Assoc. v State of N.Y. Div. of Hous. & Community Renewal*, 281 AD2d 165, 165 [1st Dept 2001]). Thus, "in an Article 78 proceeding, the reviewing court may not weigh the evidence, choose between conflicting proof, or substitute its assessment for that of the administrative fact finder" (*Matter of Porter v New York City Hous. Auth.*, 42 AD3d 314, 314 [1st Dept 2007]). It is for the DHCR, and not the court to weigh the evidence in the record (*see Matter of Marisol Realty Corp. v New York State Div. of Hous. & Community Renewal*, 154 AD3d 463, 464 [1st Dept 2017]; *Matter of Jane St. Co. v State Div. of Hous. & Community Renewal*, 165 AD2d 758, 758-759 [1st Dept 1990], *lv denied* 77 NY2d 801 [1991]).

Here, petitioner is essentially asking the court to conduct its own analysis of the evidence presented to the DHCR and substitute its judgment for that of the agency, which

is improper in an Article 78 review. The court does not find that the DHCR's determination was otherwise arbitrary or capricious or without a proper basis in the record. RSC § 2520.11 (e) expressly authorizes the DHCR, "at its 'discretion,' to implement the criteria for substantial rehabilitation by operational bulletin" and "the validity of the Operational Bulletin has [ ] been [repeatedly] upheld by the Appellate Division" (*Cassorla v Foster*, 2 Misc 3d 65, 67 [App Term, 1st Dept 2004], citing *Matter of H.M. Vil. Realty v New York State Div. of Hous. & Community Renewal*, 304 AD2d 346 [1st Dept 2003]; *see Matter of Pavia v New York State Div. of Hous. & Community Renewal*, 22 AD3d 393 [1st Dept 2005]). While petitioner is at odds with the Deputy Commissioner's statements regarding exceptions to the replacement of systems deemed "structurally sound," the court finds that the RA's rejection of petitioner's application was nonetheless rational in light of the absence of OB 95-2 documentation in the record (e.g., proof of payment, work contracts and invoices), as well as the absence of the DOB Letter of Completion, to substantiate the averments in the engineer's affidavit that the alleged work was actually performed and completed.

Moreover, petitioner has not set forth any regulation or other authority obligating the RA to grant further extensions of time (in addition to the two extensions granted) for petitioner to obtain the DOB Letter of Completion, and the Deputy Commissioner was not obligated to consider the DOB Letter of Completion for the first time on the PAR as his review was limited to the facts and evidence before the RA (*see* RSC § 2529.6; *Matter of Charles Birdoff & Co. v New York State Div. of Hous. & Community Renewal*, 204 AD2d 630, 631 [2nd Dept 1994]). RSC § 2529.6 provides that "[w]here the

petitioner submits with the petition certain facts or evidence which he or she establishes could not reasonably have been offered or included in the proceeding prior to the issuance of the order being appealed, the proceeding ***may*** be remanded for redetermination to the rent administrator to consider such facts or evidence" (emphasis added). By the clear language of the regulation, remand to the RA to consider newly offered evidence was at the discretion of the Deputy Commissioner. In short, even if one could characterize the RA's refusal to grant any further extensions for petitioner to supplement the record, the RA's refusal to deny the application "without prejudice" and/or the Deputy Commissioner's refusal to consider the DOB Letter of Completion as austere, such actions do not rise to the level of arbitrary or capricious.

As a result, the instant Article 78 petition is denied, and this proceeding is hereby dismissed.

The foregoing constitutes the decision, order and judgment of the court.

E N T E R,

J. S. C.