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Cabrini Realty LLC v New York State Div. of Hous. & Community Renewal
2022 NY Slip Op 33017(U)
September 7, 2022
Supreme Court, New York County
Docket Number: Index No. 154988/2021
Judge: Alexander Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER TISCH **PART** 18

Justice

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CABRINI REALTY LLC,

Petitioner,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

----------X

INDEX NO. 154988/2021

MOTION DATE 05/21/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

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

Upon the foregoing documents, petitioner, Cabrini Realty LLC, brings this special proceeding pursuant to CPLR Article 78, requesting that the Court reverse and annul the determinations of the New York State Division of Housing and Community Renewal (hereinafter "DHCR"), which granted the petition for administrative review (hereinafter "PAR") submitted by the tenants of 220 Cabrini Boulevard, and thereby reversed an order which granted petitioner a major capital improvement (hereinafter "MCI") rent increase for pointing and waterproofing to certain sides of the building.

Background

Petitioner Cabrini Realty LLC is the owner of the premises located at 220 Cabrini Boulevard, New York, New York. In or around September of 2013, petitioner filed an MCI application with DHCR pursuant to 9 NYCRR § 2522.4, for the alleged pointing and waterproofing work that was completed within certain areas of the building between May 2012 and June 2013 (NYSCEF Doc. No. 9, PAR). By completing such work, petitioner sought a rent

increase of $15.45 per room (NYSCEF Doc. No. 9, PAR). Within the MCI application, petitioner alleged that the building's pointing prior to the improvement was "approximately 30 years" and that the improvement was needed because the previous items exceeded the useful life requirements. In response to petitioner's MCI application, the tenants of 220 Cabrini Boulevard filed letters on or about December 23, 2013, objecting to the rent increase, arguing that the work performed by petitioner was not free of defects as the building had many alleged deficiencies and complaints that were not resolved. The tenants also argued that the costs incurred by petitioner exceeded the construction industry standards for the type of work performed, and the tenants also requested an extension of time to respond to petitioner's MCI application (NYSCEF Doc. No. 6, Tenant's Objection). Nevertheless, an order granting the rent increase was issued on January 26, 2016, resulting in an increase of $11.99 per room. On or about March 8, 2016, the DHCR served petitioner's MCI consultants with a copy of the tenants' PAR, in which the tenants challenged the DHCR rent administrator's order, that granted petitioner the rent increase. In the PAR, the tenants argued that the order was improper, as the useful life schedule of the work was not considered, and the decision was an error in facts and law. In opposition to the tenants' PAR, petitioner objected to the new arguments raised on appeal for the first time, and the untimely filing of the PAR, amongst other material. On November 5, 2020, the DHCR granted the tenants' PAR and vacated the order granting petitioner a rent increase (see NYSCEF Doc. No. 1, Petition).

Parties' Contentions

Petitioner argues that the tenants filed an untimely appeal and failed to properly serve petitioner with the challenged order. Petitioner also argues that DHCR deviated from standard procedure and, therefore, erred in granting a new argument on appeal. In opposition, DHCR argues that the petitioner's Article 78 proceeding is untimely and should be dismissed. Moreover, DHCR

argues that the petitioner's claim that it rebutted any presumption of delivery by tenants is false and should be rejected, and that DHCR properly considered the issue of useful life as it was not raised for the first time on appeal.

Discussion

Pursuant to CPLR 7803(3) and the Rent Stabilization Code (RSC) § 2530.1, the Court may review a final order of the DHCR, and its inquiry is "limited to whether the determination is arbitrary and capricious, or without a rational basis in the record and a reasonable basis in law" (Matter of Delillo v New York State Div. of Hous. and Community Renewal, 45 AD3d 682, 683 [2d Dept 2007] ["An agency's interpretation of the statutes and regulations that it administers is entitled to deference, and must be upheld if reasonable"]; see also Gilman v New York State Div. of Housing and Community Renewal, 99 NY2d 144, 149 [2002]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (Matter of Duverney v City of New York, 57 Misc 3d 537, 539 [Sup Ct, NY County 2017]; see id. at 542 ["An agency's failure to follow its own procedure or rules in rendering a decision is arbitrary and capricious"]).

Tenants' PAR

Petitioner argues that the tenants' PAR should have been dismissed because it was not filed within 35-days of the rent administrator's order, which granted the MCI increase. The MCI order was granted on January 26, 2016. Petitioner claims that tenants' PAR contains a date stamp of March 4, 2016, three (3) days after the 35-day filing period to challenge the MCI order and thus untimely. In opposition, DHCR argues that the tenants' PAR was timely, as the PAR contained a United States Postal Service postal meter date of March 1, 2016, while bearing a date stamp that it was received by DHCR on March 4, 2016, and seemingly mailed to opposing counsel on March

8, 2016. Nevertheless, the Court will treat the tenants' PAR as timely as petitioner failed to challenge the timeliness in their response to the tenants' PAR before the DHCR, and it is clear that arguments not submitted to the reviewing agency may not be considered by the reviewing court (Nelson v New York State Div. of Hous. & Cmty. Renewal, 95 AD3d 733, 734 [1st Dept 2012]); (Gilman v New York State Div. of Hous. & Cmty. Renewal, 99 NY2d 144, 150 [2002]).

Challenged Order and Proof of Service

DHCR argues that petitioner's CPLR Article 78 proceeding is untimely and should be dismissed as it was commenced after the expiration of the sixty-day (60) statute of limitations. Petitioner argues that DHCR failed to properly serve the challenged order, which gave rise to their late filing. Moreover, petitioner argues that DHCR's "order mailing transmittal" is wholly inadequate to prove that DHCR properly served petitioner with the challenged order.

Petitioner argues that DHCR failed to properly serve the challenged order by offering the affidavit of Sewpersaud Chanchall, a managing member of Realty Program Consultants, LLC, a consulting firm that provides the service of filing MCI applications. Within the affidavit, Chanchall provides a detailed account of the company's process in adhering to deadlines and managing an MCI application. Though the reason remains unknown, Chanchall states that he never received the challenged order, and cites to possible mishaps regarding the delivery of mail in relation to the Covid 19 pandemic and the 2020 presidential election, which seemed to cause a general slowdown in mail delivery as Chanchall speculates (NYSCEF Doc No. 4, Chanchall Affidavit, at 12). To demonstrate that it properly served petitioner with the challenged order, DHCR provides the affidavit of Harris Cataquet, the director of administrative services for DHCR. Within the affidavit, Cataquet provides the procedures for the mailing of correspondence, like orders deciding PARS, and the agency's routine. DHCR also offers their order transmittal form, which details the date in

which DHCR mailed to challenged order, in addition to a copy of an order or re-opening notice that is marked for delivery to Cabrini Realty's address.

> Courts have "long recognized [that] a party can establish that a notice or other document was sent through evidence of actual mailing or...by proof of a sender's routine business practice with respect to the creation, addressing, and mailing of documents of that nature. Evidence of 'an established and regularly followed office procedure' (Matter of Gonzalez (Ross), 47 NY2d 922, 923 [1979]) may give rise to a rebuttable 'presumption that such a notification was mailed to and received by [the intended recipient]'" (CIT Bank N.A. v Schiffman, 36 NY3d 550, 556 [2021]).

Furthermore, the documents provided by DHCR are admissible as reliable business records, as they are clearly well documented procedures (Le Havre Tenants Ass'n, Inc. v New York State Div. of Hous. & Cmty. Renewal, 17 AD3d 368 [2d Dept 2005]). In reply, petitioner fails to offer material that rebuts the presumption of delivery on behalf of DHCR. For these reasons, the Court finds that DHCR met their burden in demonstrating a presumption of delivery of the challenged order, therefore, petitioner's Article 78 proceeding is untimely. The Court declines to address the remaining arguments.

Accordingly, it is hereby ORDERED and ADJUDGED that the petition is denied and dismissed.

This constitutes the decision and order of the Court.

9/7/2022
DATE

ALEXANDER TISCH, J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE