2022-10-03

RICHMOND HILL 108 LLC v. NEW YORK STATE DIVISION OF HOUSING And COMMUNITY RENEWAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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RICHMOND HILL 108 LLC,

Index No.: 728474/2021
Motion Sequence No.: 1

Petitioner,

-against-

NEW YORK STATE DIVISION OF HOUSING
And COMMUNITY RENEWAL,

Respondent. **DECISION AND ORDER**

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PRESENT: **HON. ULYSSES B. LEVERETT, J.S.C.**

	Papers Submitted
Petition-Complaint-Notice of Petition- Exhibits	EF 1-8
Respondent's Notice of Cross to Dismiss Petition/Complaint – Affirmation in Opposition - Exhibits	EF 13-18
Memorandum of Law to Dismiss Petition/Complaint	EF 21
Transcript/Record	EF 19-20
Petitioner's Affirmation in Opposition	EF 24
Respondent's Reply Memoranda	EF 25

Upon the above stated papers Petitioner, Richmond Hill 108 LLC, brings this hybrid Article 78 Proceeding and declaratory judgement action. In the first cause of action petitioner seeks to correct the alleged error of law contained in Respondent, New York State Division of Housing and Community Renewal (DHCR) order dated October 29, 2021 which was issued by DHCR's Deputy Commissioner. In the second cause of action, petitioner seeks a declaration that the law in effect on the date its Major Capital Improvement (MCI) rent application was filed, must be applied. Respondent DHCR by Cross-Motion seeks dismissal of the petition and complaint.

Findings of Fact

Petitioner Richmond Hill 108 LLC (Richmond LLC) is a limited liability corporation and the owner of a rent stabilized building located at 84-05 108th Street, Queens, New York (the building). Respondent New York State Division of Housing and Community Renewal is the New York State agency responsible for the administration of the rent regulatory laws of the Rent Stabilization Law of 1969 (RSL); New York City Admin Code (26-501 et seq); regulation of the Rent Stabilization Code (RSC 9 NYCRR §2520 et seq); Rent Control Laws (RCL §26-40) and amendments including the Housing Stability and Protection Act of 2019 (HSTPA).

Petitioner filed a Major Capital Improvement application (MCI application) dated June 15, 2018, requesting permission from DHCR to increase rent it may collect from the tenants for various alleged improvements including elevator upgrading, a new compactor and a new

tv/security system. On June 14, 2019, while DHCR was still processing Petitioner's application, the Legislature passed the Housing Stability and Protection Act of 2019 (HSTPA). The HSTPA amended provisions of the Rent Stabilization law and codes that related to building-wide major capital improvements (Part K). On February 23, 2021, after review of the tenant objections and petitioner responses to request for additional information, DHCRs Rent Administrator issued an order that partially denied and partially granted the petitioner owner MCI application.

The RA in partially granting the owners application applied all HSTPA amendments to the MCI program that went into effect during the pendency of the owner application proceeding, including updated amortization rate, and new provisions related to the effective date and collectability of MCI rent increases. The RA denied all costs associated with the new waste compactor, noting that the item was not listed on the Reasonable Cost schedule published by DHCR in Operational Bulletin 2020-1 in accordance with HSTPA and that the owner did not comply with DHCR requirements for requesting waiver of the Reasonable Cost Schedule by failing to submit any documentation justifying that the claimed compactor MCI costs were reasonable.

Petitioner filed a Petition for Administrative Review (PAR) of the RA's February 23, 2021 order claiming because the MCI application was filed in June of 2018 prior to the enactment of HSTPA in June of 2019, the RA erred in applying the MCI provisions in HSTPA (Part K) to the owners pending MCI application. As a result, petitioner received a smaller rent increase than it potentially could have received under the pre HSTPA formula. The Deputy Commissioner Order dated October 29, 2021, affirmed the RA Order and determined that the RA properly applied Part K in accordance with statutory text and legal precedent.

Petitioner brings this Article 78 and declaratory action, seeking an order from this Court to annul the Commissioner's Order and declare that Part K may not be applied to the MCI applications pending when HSTPA was enacted. Petitioner argues that at the time that the MCI application was filed on June 15, 2018, the applicable RSL allowed for MCI increases to be based upon the cost of work performed in the building, amortized over 84 months and divided by the number of rooms. Generally, pre HSTPA, a MCI Order would contain two components:

(i) A "prospective" component which would authorize the building owner to permanently increase the rent of each rent-regulated apartment at the building by the amount of the monthly MCI increase, generally beginning from the first day of the month following the date DHCR served the underlying MCI Application on the building's tenants; and

(ii) A "retroactive" component, which would authorize the building owner to collect an additional temporary increase in the rent of each rent-stabilized apartment at the building by an amount equal to the amount of the monthly increase times the number of months which elapsed from the date the MCI Application was filed until the commencement date of the permanent increase; and

The maximum amount of an MCI Increase per year for an apartment in the building would be limited to 6% of the apartment rent at the time the MCI

Application was filed.

On June 14, 2019, HSTPA became effective. In relevant part, the provisions of HSTPA which govern MCI applications (Part K):

(b) Eliminated all temporary retroactive MCI Increases; provided that the prospective increase would commence on the first day of the month following the date that occurs 60 days after the date the MCI Order is issued; and further provided that the prospective increase would be temporary, with a life of 30 years;

(c) Reduced the 6% cap to 2%.

Petitioner argues that DHCR's October 29, 2021 order applied the MCI provisions of HSTPA to its MCI applications that were still being processed when HSTPA was enacted. Petitioner claims that the order was arbitrary and capricious and was affected by errors of law since it: (a) ignored legislative intent; (b) violated basic principles of due process under Federal and State Constitutions; (c) failed to consider the "undue hardship" provisions of the Code; and (d) DHCR improperly delayed the processing of the MCI application until after the effective date of HSTPA.

Petitioner further asserts that the legislature specifically stated which major components of HSTPA must be interpreted as prohibiting the retroactive application of the MCI provisions. Petitioner noted that the rent overcharge claims of HSTPA Part F states that: "[this act shall take effect immediately and shall apply to any claims pending or filed on or after such date.]" However, the portion of HSTPA governing MCI proceedings set forth in Part K section 18 only states "[this act shall take effect immediately]" Petitioner concludes that DHCR improperly construed the MCI provisions of HSTPA as retroactive.

Petitioner argues that DHCR's retroactive application of the MCI Provisions of HSTPA violated state and federal constitutional due process rights by imposing undue financial burden on petitioner and its property because (1) at the time it performed capital improvements and filed its MCI application, it had a reasonable expectation that application would be processed based upon the law in effect at the time; and (2) it had no way of knowing that the laws governing MCI application would change so that petitioner could decide whether to perform improvements and seek MCI increases. Petitioner cites *Regina Metropolitan Co. LLC v. New York State Division of Housing and Community Renewal et al.*, 35 N.Y.3d 332 (2020) (dealing with increased overcharge exposure relating to owners past conduct) and *Harris v. Israel*, 191 A.D.3d 468 (1st Dep't 2021) (relating to HSTPA part 1 provisions dealing with owner use occupancy rights as impairment by increasing liability for post conduct and "imposing new duties with respect to transactions already computed" as precluding retroactive application of HSTPA Part K.)

Petitioner also cites *Landgraf v. USI Film Products*, 511 U.S. 24 (1994) three prong test to determine whether retroactive application of a statute must be struck down as a violation of the 14th Amendment due process clause of the United States Constitution. The *Landgraf* Court provided that "[s]tatutes are disfavored as retroactive when their application would impair rights a party possessed when he acted, increase a party's liability for past conduct or impose new

duties with respect to a transaction already completed"

Respondent DHCR in opposition to Petitioner's Article 78 and in support of Respondent's cross motion to dismiss the petition and declaratory action seeking a declaration that Part K of HSTPA may not be applied to MCI applications pending prior to HSTPA enactment, asserts that the Commissioner's Order is rational.

DHCR argues that it did not apply Part K of HTSPA retroactively but instead gave prospective effect to Part K by calculating Petitioner's rent increase in the future. Respondent argues that pursuant to Part K, section 18 of the HSTPA, MCI amendments were to take effective immediately (June 14, 2019) and apply to "any determination issued... after the effective date of the chapter of laws of 2019 that amended this paragraph.

Part K of HSTPA specified that in calculating the new rent increase formula DHCR was directed:

> II. [A]s to completed building-wide major capital improvements, for a finding that such improvements are deemed depreciable under the Internal Revenue Code and that the cost is to be amortized over a twelve-year period for a building with thirty-five or fewer housing accommodations, or a twelve and on-half-year period for a building with more than thirty-five housing accommodations, for any determination issued by the division of housing and community renewal after the effective date of the [] chapter of the laws of two thousand nineteen that amended this paragraph and shall be removed from the legal regulated rent thirty years from the date the increase became effective....

N.Y.C. Admin. Code §26-511 (c)(6)(b)(emphasis added).

> III. [T]he addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on and after June 14, 2019 are directed to be made immediately and completed on or before June 14, 2020 provided however that in the absence of such rules and regulations, the division shall immediately commence and continue implementation of all provisions of this act.

See 2019 N.Y. Laws ch. 36, pt. K, §18, as amended by 2019 N.Y. Laws ch. 39, pt. P, §29(emphasis added).

Respondents argue that, had the legislator intended to apply Part K only to new MCI applications filed and commenced after HSTPA's effective date it could have easily stated so as it did in other parts of HSTPA. Nor are respondent's actions retroactive simply because they apply to past conduct. Respondent argues applying Part K to Petitioner's MCI application does not impair the petitioner's rights or increase liability under *Landgraf v. USI Film Products*, and

Regina v. DHCR.

In *Regina*, the New York Court of Appeal found that it was improper for DHCR to apply Part F overcharge calculations of HSTPA to cases that were pending before DHCR because it would have a retroactive effect of impacting the owner substantive rights by increasing the amount of overcharge liability of the owner for past conduct.

Respondent argues unlike the overcharge section in Part F of the HSTPA, Part K relates to MCI proceedings and would not impair rights the owners possessed when he acted, increase an owner's liability for past conduct or impose new duties with respect to transactions already completed. Respondent disputes that the Part K new MCI provisions instituting an amended amortization rate, eliminating retroactive MCI increases, or advancing the effective date of MCI order, would imposed on petitioner a new obligation comparable to overcharge liability in *Regina.* Nor does the application of HSTPA to a pending MCI proceeding create a right to have the application adjudicated in accord with the law in effect at the time.

The judicial review of an administrative determination pursuant to Article 78 of the CPLR is limited to a review of the records before the DHCR and the question of whether its determination was arbitrary or capricious. The CPLR §7803(3) provides that "[t]he only questions that may be raised in a proceeding under this article are…whether a 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[.]"

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious, the test is whether the determination "is without sound basis in reason and in general taken without regard to the facts." *Matter of Pell v. Bd. Of Educ.*, 34 N.Y.2d 222 (1974).

DHCR is the "sole agency to administer the regulation of residential rents." 1983 N.Y. Laws 1777 ch. 403§3. The RSL also authorizes owners to submit application to DHCR for approval of a rent increase for certain major building-wide improvements. *See* 26-511(c)(6), *Ansonia Residents Association v. NY State Division of Housing and Community Renewal*, 75 N.Y.2d 206 (1989) and 9 NYCRR §2522.4

This Court finds that DHCR Deputy Commissioner Order of October 29, 2021 was rationally based and in accord with applicable law.

The DHCR application of HSTPA's Part K was prospective in that MCI calculations were made for rents that petitioner may collect for future rent increases and that such calculations are consistent determinations issued after the effective date of HSTPA's MCI amendments which was June 14, 2019. *See* 2019 N.Y, Laws ch. 36, pt. K §18 as amended by 2019 N.Y. Laws ch. 39, pt. P §29. DHCR application of Part K was consistent with the statutory construction and language of the legislature to apply HSTPA to MCI proceeding pending at the time of enactment.

The Petitioner's MCI application filed prior to the passage of HSTPA did not entitle petitioner to an automatic rent increase and did not affect Petitioner's post rental income. The change in the MCI formula had only prospective effect which have been found to be

constitutionally permissible. *See 160 E 84th St. Associated LLC v. New York State Division of Housing and Community Renewal*, 202 A.D.3d 610 (1st Dep't 2022).

Additionally, Petitioner does not have a vested right to an MCI increase to entitle it to keep a formula in perpetuity. The New York Court of Appeals in *ILFY Co. v. City Rent and Rehab Admin.*, 11 N.Y.2d 480 (1962) stated that petitioner's contention that it will earn less money is not a constitutionally guaranteed right of return. *See also Schutt v. New York State Division of Housing and Community Renewal*, 278 A.D.2d 58 (1st Dep't 2020) (where the court held rent regulation does not confer vested rights) and *Regina Metropolitan Co. LLC v. New York State Division of Housing and Community Renewal et al.*, 35 N.Y. 3d 332 (2020) (wherein the Court found that there can be no settled expectation that New York City regulated rental market RSL would remain static). Here, petitioner had no right to MCI increase based on a judgement awarded prior to HSTPA, as was found in *Harris v. Israel*, 191 A.D.3d 468 (1st Dep't 2021), but rather petitioner's right to MCI increases was determined subsequent to HSTPA. Nor was petitioner's financial obligation or liability increased by the application of Part K. Here, petitioner Richmond Hill could recoup $424,091.40 on a claimed $188,096.95 MCI investment.

Accordingly, the Court finds that the DHCR February 23, 2021 application of Part K of the June 2019 HSTPA to its subsequent MCI determination is consistent.

The Court does not consider petitioner's financial hardship contentions that DHCR failed to consider or apply RSC §2527.7 or that pursuant to RSC §2529.10 DHCR improperly delayed the processing of the MCI application until after the effective date of HSTPA or the disallowance of claimed compactor cost in that petitioner's failed to submit any waiver or documentation of the disallowance of administrative fees paid to DOB, as these issues were not presented or preserved in the administrative record. *See West Village Associates v. Division of Housing and Community Renewal*, 277 A.D.2d 111 (1st Dep't 2000).

Accordingly, the Court find that the DHCR February 23, 2021 order and application of Part K of HSTPA to petitioner's June 15, 2018 MCI application is consistent with the legislative mandate in Part K to apply the new MCI formula to determinations made after June 14, 2019. DHCR's Deputy Commissioner order of February 23, 2021 is not arbitrary or capricious and is rationally based upon the record and law.

The Court determines the Article 78 Petition and the Complaint seeking declaratory relief are dismissed in its entirety.

This is the decision and order of this Court.

Dated: 10/3/2022

Ulysses B. Leverett, J.S.C.

Hon. Ulysses B. Leverett