2022-12-08

250 E. Houston Invs. L.P. v. State of N.Y. Div. of Hous. & Community Renewal

250 E. Houston Invs. L.P. v State of N.Y. Div. of Hous. & Community Renewal
2022 NY Slip Op 34165(U)
December 8, 2022
Supreme Court, New York County
Docket Number: Index No. 159503/2021
Judge: William Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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250 EAST HOUSTON INVESTORS L.P.,

Petitioner,

- v -

STATE OF NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL, ROBERT CONDON

Respondent.

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INDEX NO. 159503/2021

MOTION DATE 10/18/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 7, 8, 9, 12, 13, 14, 15, 16, 17, 22, 23, 24

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

In this Article 78 proceeding, petitioner 250 East Houston Investors L.P. (landlord) seeks a judgment to overturn an order of the respondent New York State Division of Housing and Community Renewal (DHCR) as arbitrary and capricious (motion sequence number 001).

FACTS

Landlord is the owner of a residential, rent-stabilized apartment building located at 250 East Houston Street in the County, City and State of New York (the building). *See* verified petition, ¶ 2 (NYSCEF document 1). Co-respondent Robert Condon (Condon) is the tenant of apartment 8J in the building. *Id.*, ¶ 4. The DHCR is the New York State agency charged with overseeing rent- stabilized housing accommodations located inside of New York City. *Id.*, ¶ 3.

On March 26, 2019, Condon filed a rent reduction application with the DHCR based on an alleged building-wide service decrease; specifically, landlord's imposition of a service charge for roof deck access which had previously been a free amenity provided to all building tenants.

See verified petition, exhibit A (NYSCEF document 2). A DHCR rent administrator (RA) received evidence and testimony from both parties, and on August 12, 2020 the RA issued a decision that granted Condon's rent reduction application (the RA's order). *Id*., exhibit C (NYSCEF document 4). Landlord then filed a petition for administrative review (PAR) of the RA's order, and the DHCR deputy commissioner's office issued its decision on August 19, 2021 that upheld the RA's order and dismissed the PAR (the PAR order). *Id*., exhibit A (NYSCEF document 2). The relevant portion of the PAR order found as follows:

> "After careful consideration of the entire evidence of record, the Commissioner is of the opinion that the petition should be denied.
>
> "Pursuant to Section 2523.4 of the Rent Stabilization Code (the 'Code'), DHCR is authorized to order a rent reduction, upon application by a tenant, where it is found that an owner has failed to maintain required or essential services. Section 2520.6 (r) of the RSC defines required services as that space and those services which the owner was maintaining or required to maintain on the applicable base dates . . ., and any additional space or services provided or required to be provided thereafter by applicable law. Required services also include ancillary services which are defined under Section 2520.6 (r) (3) as that space and those required services not contained within the individual housing accommodation which the owner was providing on the applicable base dates . . ., and any additional space and services provided or required to be provided thereafter by applicable law, including recreational facilities. Further, under Section 2523.4 (e) of the Rent Stabilization Code, the recreational use of a roof for activities such as sunbathing is a de minimis condition, unless the tenant's lease provides that the tenant may use the roof or the owner provides formal facilities, such as a solarium, for the tenant's use of the roof.
>
> Here, the record supports that tenants were able to use the roof for recreational use prior to the owner obtaining a permit for renovations for the roof on July 11, 2018. The tenant asserted that prior to the renovations, there were chairs on the roof in at least May 2017, and the tenant also provided emails from the owner to the tenant dated January 25, 2018 and March 1, 2018, stating that the roof access 'will be unavailable until further notice due to renovations.' Furthermore, in the PAR, the owner asserted that tenants used the roof to sunbathe, and that, as provided by the owner, there were renovations to the roof, including the installation of a new deck, which the Commissioner finds constitutes a formal facility, and thus, an ancillary service.
>
> "Further, although there is no express mention of access to the roof in the tenant's lease as provided by both the tenant and the owner, the tenant's lease states, 'If Owner permits You to use any storeroom, laundry or any other facility located in the building but outside of the Apartment, the use of this storeroom or facility will be furnished to You free of charge and at your own risk, except for loss suffered by You due to Owner's negligence' (emphasis added; *see* page 2, paragraph 13 'Services and Facilities' of the Standard Form of Apartment Lease).

> "In addition, the record is devoid of any evidence indicating that the owner submitted a response in accordance with the Agency's request to respond to the tenant's August 21, 2019 response on no less than three occasions.
>
> "In sum, the Commissioner finds that the Administrator properly relied on the evidence contained in the record and as such, the petitioner-owner has not set forth any basis to revoke or modify the rent administrator's order. The Commissioner notes that the owner may file an application to modify or substitute required services. The owner may also file an application to restore services, if the facts so warrant.
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> "THEREFORE, in accordance with the applicable provisions of the Rent Stabilization Law and Code, it is
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> "ORDERED, the petition is denied, and the Rent Administrator's order is affirmed."

Id.

Landlord commenced this Article 78 proceeding to vacate the PAR order on November 3, 2021. *See* verified petition; aff of service (NYSCEF documents 1, 7). After stipulating to an extension of time to reply, the DHCR filed an answer on January 18, 2022. *See* verified answer (NYSCEF document 18). This matter is now fully submitted (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the 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 found 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 there is a rational basis for the administrative determination, 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.

Here, landlord raises three arguments to support its claim that the PAR order was an arbitrary and capricious ruling. First, landlord argues that "discontinuance of the use of the roof is a de minimis condition," and that the PAR order was therefore incorrect to uphold the RA's finding that said discontinuance amounted to a failure to maintain an essential building service. *See* verified petition, ¶¶ 24-30 (NYSCEF document 1). This argument is unavailing. As the DHCR notes, the pertinent portions of the controlling regulation, Rent Stabilization Code (RSC) Section 2523.4, provide as follows:

> "(e) Certain conditions complained of as constituting a decrease in a required service may be de minimis in nature, and therefore do not rise to the level of a failure to maintain a required service for the purposes of this section. Such conditions are those that have only a minimal impact on tenants, do not affect the use and enjoyment of the premises, and may exist despite regular maintenance of services.
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> "The following schedule sets forth conditions that will generally not constitute a failure to maintain a required service. However, this schedule is not intended to be exclusive, and is not determinative in all cases and under all circumstances. Therefore, it does not include all conditions that may be considered de minimis, and *there may be circumstances where a condition, although included on the schedule, will nevertheless be found to constitute a decrease in a required service*.
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> * * * *
>
> "9. Roof--discontinuance of recreational use (e.g., sunbathing) *unless a lease clause provides for such service, or formal facilities (e.g., solarium) are provided by the owner*; . . .."

9 NYCRR § 2523.4 (emphasis added); *see* respondents' mem of law at 10-15. The PAR order found that the RA had correctly identified one of the two exceptions to the regulation's rule that recreational use of a building's roof is generally a de minimis service; i.e., that landlord had previously provided "formal facilities" for recreational roof use to the building's tenants. *See* verified petition, exhibit A (NYSCEF document 2). The PAR order also noted that the RA based this finding on evidence submitted by Condon which included photographs, building advertising and emails from management. *Id*.; *see* verified answer, exhibit 1 (return), exhibit A-7; exhibit 2

(NYSCEF documents 17, 20, 21). The PAR order finally noted that landlord failed to respond to three requests to provide its own evidence to rebut the material that Condon had submitted. *Id.*; *see* verified answer, exhibit 1 (return), exhibits A-8, A-9, A-10 (NYSCEF documents 17, 20). Under these circumstances, the court agrees that the PAR order's determination that recreational roof access is a building-wide "required service" was rationally based on evidence contained in the DHCR's administrative record. *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. Landlord's reply papers cite case law attempting to demonstrate that the discontinuance of roof access is always to be deemed a de minimis service reduction as a matter of law. *See* Dreiblatt reply aff, ¶¶ 4-14. However, New York law recognizes that "'it is for the [DHCR] to determine what constitutes a required service and whether that service has been maintained . . .'" *Matter of 219 W. 81st Residential Holdings, LLC v New York State Div. of Hous. & Community Renewal*, 193 AD3d 444, 444 (1st Dept 2021), quoting *Matter of Sherman v Commissioner, N.Y. State Div. of Hous. & Community Renewal*, 210 AD2d 486, 487 (2d Dept 1994). In any case, landlord does not address the evidentiary findings upheld in the PAR order. Instead, landlord relies solely on the legal argument that Condon's lease did not contain a specific roof access clause. *See* verified petition, ¶¶ 24-30 (NYSCEF document 1). This is a misplaced and insufficient argument. Therefore, the court rejects it and concludes that the PAR order was rationally based.

Next, landlord argues that "roof luxury amenity space did not exist on the base date." *See* verified petition, ¶¶ 31-35 (NYSCEF document 1). However, landlord bases this argument on factual contentions that it failed - three times - to substantiate in response to requests from the RA that it do so. *See* verified answer, exhibit 1 (return), exhibits A-8, A-9, A-10 (NYSCEF

documents 17, 20). Having failed, landlord may not now make those contentions to this court in an Article 78 proceeding. *See e.g., Matter of Peckham v Calogero*, 12 NY3d 424, 430 (2009), quoting *Matter of Yonkers Gardens Co. v State of N.Y. Div. of Hous. & Community Renewal*, 51 NY2d 966, 967 (1980).

Finally, landlord argues that it "is entitled to charge . . . [a] modest fee." *See* verified petition, ¶ 36 (NYSCEF document 1). However, as was noted in the PAR order, "the owner may file an application to modify or substitute required services . . . [and] may also file an application to restore services, if the facts so warrant." *Id*., exhibit A (NYSCEF document 2). To date, landlord has not done so. Therefore, the court rejects its final argument as mere surplusage.

Accordingly, having rejected all of landlord's arguments and determined that the PAR order was supported by substantial evidence, the court concludes that landlord's Article 78 petition should be denied and that this proceeding should be dismissed.

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the application (motion sequence number 001) is denied, and the petition is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED that respondent recovers from petitioner, 250 East Houston Investors L.P., costs and disbursements in the amount as taxed by the Clerk, and that respondent have execution therefor.

12/8/2022
DATE

WILLIAM PERRY, 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