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Desser v Pascal

2020 NY Slip Op 31367(U)

May 13, 2020

Supreme Court, New York County

Docket Number: 152686/2017

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. NANCY M. BANNON** **PART** **IAS MOTION 42EFM**

Justice

---X

STUART DESSER

Petitioner,

- v -

WOODY PASCAL, DEPUTY COMMISSIONER, STATE OF NEW YORK, DIVISION OF HOUSING AND COMMUNITY RENEWAL, OFFICE OF RENT ADMINISTRATION,

Respondents.

---X

INDEX NO. 152686/2017

MOTION DATE 04/17/2019

MOTION SEQ. NO. 003

DECISION, ORDER, AND JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52

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

In this CPLR article 78 proceeding, the petitioner, a rent-stabilized tenant residing at 145 East 16th Street in Manhattan, seeks to challenge a determination by the respondent, the Division of Housing and Community Renewal (DHCR), dated January 24, 2017, which denied his petition for administrative review (PAR) of a rent administrator's order denying the petitioner's application for a rent reduction based upon decreased building-wide services. By a decision and order dated July 21, 2017, this court dismissed the petition, without prejudice, upon the parties' stipulation of settlement dated February 23, 2017, pursuant to which they agreed that the matter was to be remitted to the respondent for further proceedings. By Petition dated December 17, 2018, the petitioner now seeks to annul DHCR's revised disposition dated October 31, 2018, and renew his original petition for a judgment annulling, vacating, and reversing the determination of DHCR dated January 24, 2017. In the alternative, the petitioner seeks a judgment annulling, vacating, and reversing the October 31, 2018, revised determination. DHCR answers and opposes the petition. The petition is granted to the extent discussed herein.

The petitioner filed his application for a rent reduction based on decreased building-wide services with DHCR on July 24, 2014. In his application, the petitioner averred that his landlord,

145 East 16th Street, LLC (the landlord), had implemented an unwritten policy whereby the building staff discontinued their acceptance, on behalf of tenants, of deliveries of "large electronic goods." The petitioner further stated that he had arranged for delivery of a shipping carton measuring approximately 15 x 16 x 15 inches, containing a printer worth $200.00, but that his shipment was turned away by lobby staff pursuant to the unwritten policy. The petitioner noted that package acceptance on behalf of tenants, including acceptance of large electronic goods, had been a base service provided by the landlord, and is therefore a required service pursuant to the Rent Stabilization Code, such that a reduction in the service requires a commensurate reduction in rent paid by the tenants.

The respondent, in their October 31, 2018 revised determination, found that the building's unwritten policy discontinuing the signing for and acceptance of large electronics was a *de minimis* reduction in overall services, and therefore a rent reduction based upon a building-wide decrease in services was not warranted. The DHCR relied on the following facts when upholding its previous ruling that the reduction in services was *de minimis*: 1) the new policy only prohibits the acceptance of large packages clearly containing electronic goods, which by their intrinsic nature are valuable, 2) the petitioner, and other tenants generally, did not regularly receive large electronic goods, and 3) there is no evidence that any of the other tenants in the building joined in the petitioner's complaint regarding the new policy. The respondent also credited the building's argument that the acceptance of large electronic packages for tenants was done as a courtesy to the tenants and was not a required service under the Rent Stabilization Code.

The function of the court upon an application for relief under CPLR article 78 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. See Pell v Bd. of Educ., 34 NY2d 222 (1974); see also Hushes v Doherty, 5 NY3d 100 (2005). Disposition of the proceeding is limited to "the facts and record adduced before the agency" when the administrative determination was rendered. See Fanelli v New York City Conciliation & Appeals Bd., 90 AD2d 756, 757 (1st Dept.1982). Therefore, the court must determine whether the administrative record rationally supports DHCR's decision to uphold its prior order. See Sun Wei Chung, Inc. v NYS Div. of Housing and Community Renewal, No. 154659/2019, 2019 WL 4569918, at *1 (Sup Ct, NY County 2019).

At the outset, the court recognizes the petitioner is correct in his contention that the respondent is concurrently asserting inconsistent theories inasmuch as it states that the service of signing for “large electronics” is not a required service, and that the reduction of that service is *de minimis*. RSC 2523.4(e) of the Rent Stabilization Code, relating to *de minimis* reductions in service, applies only to reductions in required services. If accepting large packages was in fact a non-required service, then its wholesale elimination would be permitted without any need for a *de minimis* finding.

However, the landlord’s acceptance of packages was a required service. DHCR Fact Sheet #3 “Required and Essential Services” (Revised June 19, 2020). Although the ‘acceptance of package deliveries’ was not set forth by the owner of the building in the Initial Apartment Registration or the Initial Building Services Registration, practice and precedent can constitute a basis for determining a ‘base service’ required under a lease. A base service “may include services that were provided but not registered by the owner on the Initial Apartment Registration (DHCR Form RR-1(i)) or the Initial Building Services Registration (DHCR Form RR-3(i))”. DHCR Fact Sheet #3 “Required and Essential Services” (Revised June 19, 2020). In this instance, the staff at the building, at the time the lease was signed, signed for and accepted larger packages that could contain expensive items, and continued to accept larger packages, including those obviously marked as electronics, up until the change in policy. As such, the signing for and acceptance of larger electronic devices was a base service required under the lease.

Turning to the portion of the DHCR’s determination stating that the refusal to accept larger clearly marked electronic goods is *de minimis*, such a determination is not rationally supported by the administrative record. As correctly argued by the petitioner, the landlord’s policy does not fit within any category determined to be *de minimis* under 2523.4(e) of the Rent Stabilization Code. Although the list is non-exclusive, it generally denotes issues that would either be considered aesthetic in nature (non-dangerous cracks, peeling paint, or changes to decorations, etc.), or ineffectual to the overall quality of services (less staff – same service, no live-in super – same service, etc.), whereas here there is a clear reduction in the overall quality of service. Of the categories under 2523.4(e) that could arguably be considered a reduction in overall services, the respondents argue that the reduction of package acceptance services in this case are equivalent to, or less detrimental than, a discontinuance of storage space or recreational roof access. However, the petitioner correctly observes that those reductions, and all the *de minimis* categories under 2523.4(e), do not require a tenant to alter their regular

activities, while a landlord's refusal to accept larger electronics would require a tenant to schedule around delivery times or pick up and transport the large electronics themselves.

Moreover, the DHCR did not adequately consider the extent to which the landlord's new policy was rationally tailored to aid in the reduction of liability for electronic devices. The DHCR does not dispute that smaller packages or unlabeled packages of any size can also contain expensive electronic devices. Furthermore, the DHCR fails to articulate the scope or parameters of the landlord's new policy and, when specifically asked by the court at oral argument, the DHCR could not explain exactly what guidance or instruction a landlord might provide to building staff regarding implementation of the new policy or identify written guidelines.

Furthermore, the DHCR's reliance on the irregularity of the petitioner's receipt of deliveries of large electronic goods and the lack of evidence of other tenants complaining about the change, while relevant to determining what constitutes *de minimis*, do not alone constitute a rational basis for denying the petitioners PAR. The irregularity of an occurrence does not mean that a landlord can eliminate the services related to such occurrence as *de minimis*, as such reasoning would allow landlords to reduce important, yet seldom used services in the building without issue, or, as the petitioner contends in this case, identify and discontinue small portions of a required service, effectively eliminating a required service piecemeal. In much the same way, the respondent's contention that a lack of evidence of widespread negative impact is not sufficient basis to justify reduction of a service. See Leonard St. Properties Grp., Ltd. v. New York State Div. of Hous. & Cmty. Renewal, 178 AD3d 92 (1st Dept. 2019) (loss of elevator service affecting only one tenant not *de minimis*).

Accordingly, it is,

ORDERED and ADJUDGED that the petition is granted to the extent that DHCR's revised determination dated October 31, 2018, is hereby annulled and the original petition for a judgment annulling, vacating, and reversing the determination of DHCR dated January 24, 2017 is further granted, and the petitioner's application for a rent reduction is remitted to the DHCR for a decision consistent with this determination; and it is further,

ORDERED that the petitioner shall serve a copy of this decision, judgment, and order upon the respondent within 20 days hereof.

This constitutes the Decision, Order, and Judgment of the Court.

NANCY M. BANNON, J.S.C.

5/13/2020		HON. NANCY M. BANNON
DATE		

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