2024-01-25

# Aspenly Co., LLC v. New York State Div. of Hous. & Community Renewal

| **Aspenly Co., LLC v New York State Div. of Hous. & Community Renewal** |
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| 2024 NY Slip Op 30204(U) |
| January 17, 2024 |
| Supreme Court, New York County |
| Docket Number: Index No. 150543/2023 |
| Judge: Nancy M. Bannon |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. NANCY M. BANNON** **PART** **42**

***Justice***

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ASPENLY CO., LLC,

Petitioner,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, 45 EAST 89TH STREET TENANTS GROUP,

Respondent.

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**INDEX NO.** 150543/2023

**MOTION DATE** 1-17-24

**MOTION SEQ. NO.** 001

**DECISION, ORDER and JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 33, 36, 38, 39, 40, 41, 42, 43, 45, 50, 51, 52

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

In this CPLR article 78 proceeding, the petitioner, owner of residential property at 45 East 89th Street in Manhattan, challenges a Final Determination of the Deputy Commission of the respondent Division of Housing and Community Renewal (DHCR), dated November 21, 2022, which denied the petitioners' Petition for Administrative Review (PAR) of an order of the Rent Administrator. The Rent Administrator denied the petitioner's then pending application for Major Capital Improvement (MCI) increases, upon the passage by the New York State Legislature of the Housing Stability and Tenant Protection Act of 2019 (HSTPA). L 2019, ch 36, on June 14, 2019. The Deputy Commissioner found "'no error of law or fact in the Administrator's denial of the MCI application" and that the "record supports the Administrator's conclusion that the owner's building contained 35% or fewer rent-regulated units". The Deputy Commissioner further found that "the MCI amendments contained in Part K of the HSTPA – including the new provision that MCI rent increases are prohibited for buildings with 35% or fewer rent-regulated units – were not unjustly retroactive and were properly applied to the owner's pending MCI application during the proceeding below." The Deputy Commissioner further found that "the petitioner has not shown that the Administrator's delay in processing the application was willful or the result of negligence" and noted that the petitioner's own 18-month delay in filing the application after the improvements were made contributed to the delay.

The petitioner maintains that the retroactive application of the MCI provision of the HSTPA, including the 35% rule, was unlawful and unconstitutional, and seeks from this court an order annulling that determination and remanding the matter back to the DHCR with instructions to grant the application "without applying the MCI provisions of HSTPA." Respondent DHCR cross-moves to dismiss the petition pursuant to CPLR 7804(f). By an order dated October 16, 2023, the court granted a motion by non-party 45 East 89th Street Tenants Group to intervene and was added as a respondent (MOT SEQ 002).

In moving to dismiss the petition, the DHCR relies upon the recent decision in which the Appellate Division, First Department, had occasion to address the same issue presented by the instant petition, and ruled against that petitioner. In 4040 BA LLC v New York State Div. of Hous. and Community Renewal, 221 AD3d 440 (1st Dept. 2023), which also concerned Part K of the HSTPA and an owner's application for a rent increase based on major capital improvements (MCI), the First Department held the DHCR properly denied an application pending at the time of the enactment of HSTPA, stating that:

> "In this case, the application of the Part K (MCI) amendments did not expand the scope of petitioner's liability based on prior conduct, or impair other rights petitioner possessed in the past… When the HSTPA was enacted, petitioner had no vested right in a future MCI rent increase, or in the more beneficial pre-HSTPA law or regulations (see Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. and Community Renewal, 10 NY3d 474 [2008]; 300 Wadsworth LLC v New York State Div. of Hous. and Community Renewal, 210 AD3d 454 [1st Dept. 2022]; Matter of Schutt v New York State Div. of Hous. and Community Renewal, 278 AD3d 58 [1st Dept 2000]). Here, application of HSTPA Part K affected only the propriety of a prospective rent increase, that is, how much additional rent petitioner could charge after DHCR decided its MCA rent increase application. Application of the state had no potentially problematic retroactive effect (Regina Metropolitan, 35 NY3d at 365)."

To the extent the petitioner challenges the Final Determination here on constitutional grounds, *i.e*. that application of post-HSTPA RSL to its petition which was filed prior to the enactment of the HSTPA constitutes a retroactive application violative of its right to due process, its arguments are without merit. Regina Metropolitan Co. LLC v New York State Div. of Hous. and Community Renewal, 35 NY3d 332, 365 (2020), where the Court held that HSTPA Part F, relating to rent overcharges, could not be applied retroactively, does not control here. In

Regina, the Court of Appeals expressly limited its holding to Part F, stating that the HSTPA "is almost entirely forward-looking – only Part F's effective date provision contains language referring to prior claims." The Court noted that "Part F relates almost entirely to the calculation of overcharge claims, and any such claim that was pending at the time the HSTPA was enacted necessarily involved conduct that occurred prior to the statute's enactment. Id. at 374; see also Stuyvesant Town-Peter Cooper Vill. Tenants' Assoc., v BPP ST Owner LLC, 78 Misc3d 309 (Sup Ct, NY County 2023).

In its petition, the petitioner notes that it filed its application for MCI rent increases on December 10, 2018, approximately six months prior to the enactment the HSTPA, and was awaiting decision, as "MCI applications are routinely decided within a year at most." Where a statute has been amended during the pendency of a proceeding, the application of that amended statute to the pending proceeding is appropriate and poses no constitutional problem…. unless it can be demonstrated that the [agency] deliberately or negligently delayed processing the applications before it." St. Vincent's Hosp. & Med. Ctr. v NY State Div. of Hous. & Community Renewal, 109 AD2d 711, 712 (1st Dept. 1985] (internal citations and alterations omitted); see Matter of 160 E. 84th St. Assoc. LLC v NY State Div. of Hous. and Community Renewal, 209 AD3d 517 (1st Dept. 2022) [PAR challenging deregulation orders of the DHCR was properly denied as the "petitioner failed to make a showing that DHCR's delay in issuing the deregulation orders was caused by DHCR's negligence or willfulness."]. The petitioner fails show that the DHCR's delay in processing the application for MCI rent increases was deliberate or negligent, in anticipation of the HSTPA or for any other reason.

Judicial review of an administrative determination made without a hearing is limited to consideration whether it was made "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR 7803(3). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." Matter of Peckham v Calogero, 12 NY3d 424, 431 (2009). For the same reasons stated by the Deputy Commissioner in the Final Determination, and in light of the decision of the Appellate Division, First Department, in 4040 BA LLC v New York State Div. of Hous. and Community Renewal, supra, the court finds that the DHCR correctly implemented the mandate of HSTPA by ceasing the processing of all MCI rent increase applications effective immediately, including that of the petitioner. The petitioner fails to establish that the Deputy Commissioner acted arbitrarily,

capriciously, or in error of law in denying the petitioner's PAR and affirming the Administrator's denial of the petitioner's application for MCI rent increase. "

The court notes that the parties were granted leave to submit post-submission letters in regard to recent caselaw. The DHCR submitted several subsequent trial court decisions decided in accordance with 4040 BA LLC v New York State Div. of Hous. and Community Renewal, supra, The petitioner submitted only a trial court decision rendered before the Appellate Division decision, holding otherwise.

The petitioner's remaining contentions have been considered and found to be without merit.

Accordingly, upon the foregoing papers, it is

ORDERED and ADJUDGED that the cross-motion of respondent Division of Housing and Community Renewal to dismiss the petition is granted, the petition is denied and the proceeding is dismissed, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

1/17/2024
DATE

CHECK ONE: [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

[ ] GRANTED [X] DENIED [ ] GRANTED IN PART [ ] OTHER