2024-08-07

Matter of Friedman v New York State Div. of Hous. & Community Renewal

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2024 NY Slip Op 32757(U)
August 7, 2024
Supreme Court, New York County
Docket Number: Index No. 156849/2023
Judge: Shahabuddeen Abid Ally

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHAHABUDDEEN ABID ALLY **PART 16TR**
Justice

In the Matter of the Application of MOISHE FRIEDMAN, individually, and as representative of the 325 WEST 42ND STREET TENANTS' ASSOCIATION,

Petitioners,

For a Judgment Under Article 78 of the Civil Practice Law and Rules

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL and 321-323-325 WEST 42ND STREET LLC,

Respondents.

INDEX NO. 156849/2023
MOTION DATE 10/27/2023
MOTION SEQ. NO. 001

DECISION & ORDER

The following e-filed documents, listed by NYSCEF document number, were read on this motion (Seq. No. 1) to/for **CPLR ARTICLE 78 (BODY OR OFFICER)**:

In this Article 78 proceeding, petitioners seek judicial review of respondent NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL's ("DHCR") May 11, 2023 denial of petitioners' petition for administrative review ("PAR") of the Rent Administrator's order, dated October 13, 2022, granting respondent 321-323-325 WEST 42ND STREET LLC's ("Owner"; and, together with DHCR, "Respondents")[1] application for a determination that the apartment building located at 325 West 42nd Street, New York, NY (the "Premises") was exempt from the Rent Stabilization Law. Petitioners initiated this proceeding by Verified Petition and Notice of Petition filed on July 10, 2023. Respondents filed answers and opposition on September 28, 2023. Petitioners filed a reply on October 26, 2023. For the reasons discussed below, the Verified Petition and Notice of Petition are **DENIED**.

[1] As explained below, the application was originally filed by Owner's predecessor in interest. Owner assumed ownership of the subject premises on or about April 5, 2023, shortly before DHCR issued its decision denying the PAR hereunder review.

A. Background

Petitioner 325 WEST 42ND STREET TENANTS' ASSOCIATION ("325 West") is an unincorporated, voluntary association of the tenants residing in the rent stabilized apartments at the Premises. Petitioner MOISHE FRIEDMAN (together with 325 West, "Petitioners") is an individual tenant at the Premises. Owner owns the Premises. The Premises' apartments were governed by the Rent Stabilization Law, the Rent Stabilization Code, and related other City provisions and regulations. DHCR is the agency charged with the administration and enforcement of the relevant laws and regulations.

On September 20, 2018, Owner's predecessor in interest, Thera Realty LLC ("Thera"), filed an application with DHCR for a determination that the Premises was exempt from the Rent Stabilization Law due to substantial rehabilitation completed approximately 23 years earlier. The renovation allegedly constituting the substantial rehabilitation commenced on or about March 14, 1995, and concluded on or about June 25, 1995, and allegedly replaced the following systems: (1) plumbing; (2) heating; (3) gas supply; (4) electrical wiring; (5) intercom system; (6) windows; (7) roof; (8) kitchens; (9) bathrooms; (10) floors; (11) ceilings and wall surfaces; (12) pointing or exterior surfaces; and (14) doors and frames. Thera supported its application with: (1) the New York City Department of Buildings (the "DOB") job folder for the work allegedly completed; (2) approved DOB plans for the renovation; (3) cost affidavits; (4) architectural plans; (5) an affidavit from the licensed architect, Panagis Georgopoulos, who designed and oversaw the renovation; (6) letters from Mr. Georgopoulos to the DOB certifying that the work had been completed; and (7) a new certificate of occupancy, dated August 9, 2004,[2] stating that the renovation work had been completed. Thera also submitted prior DHCR orders finding that the adjoining apartment building, also owned by Owner, was exempt from the Rent Stabilization Law based on similar renovation work, as well as an order from the Honorable Arlene P Bluth, J.S.C., denying the Article 78 petition challenging that DHCR determination.

Petitioners submitted opposition to the application on January 11, 2021. Among other arguments, Petitioners argued that Thera had failed to: (1) meet is burden to prove that a substantial rehabilitation had occurred; (2) meet threshold requirements for substantial rehabilitation

[2] In its application, Thera represented that the delay in securing the new certificate of occupancy was due to changes in ownership following completion of the renovation work. (*See* Dkt. No. 42 at 13)

under DHCR Operational Bulletin 95-2 ("OP 95-2") (*i.e.*, that all common area ceiling, floors, and walls were replaced and that all walls, ceilings, and floors within apartments were either replaced or, if not replaced, made as new); (3) completely replace 75% of the building-wide systems, as required under OP 95-2. Petitioners also argued that DHCR's decisions concerning adjacent properties were nonprecedential with regard to the Premises. Petitioners supported their opposition with an affidavit from a paralegal employed by Petitioners' counsel who visited the Premises on a single occasion on January 4, 2021. In his affidavit, the paralegal reported his personal observations of the conditions of the Premises and provided photographs that he had taken during his visit. Petitioners submitted additional photographs of the Premises to DHCR on January 21, 2021.

On April 5, 2021, Petitioners submitted to DHCR an unsworn report, dated March 30, 2021, from licensed architect Haym S. Gross. Mr. Gross visited the Premises on March 17, 2021, and visually inspected the exterior, roof, fire escapes, common areas, and a number of individual apartments. Mr. Gross also took photos, which were appended to his report, during his inspection. In his report, Mr. Gross contended that there were discrepancies between his personal observations made during his inspection and Thera's application. Specifically, Mr. Gross claimed that at least seven building-wide systems—plumbing, heating, fire escapes, floors, ceilings and walls, point and exterior surfaces, and doors and frames—had not been replaced in or about 1995 as Thera contended.

Thera filed a reply to Petitioners' opposition on April 13, 2023.

On August 4, 2021, Thera filed a response to Mr. Gross's report, arguing that it had no probative value because it only concerned the conditions of the Premises as observed in 2021 and not 26 years earlier in 1995, when the substantial rehabilitation occurred. Thera's filing also included a responsive affidavit, sworn to on July 28, 2021, from Mr. Georgopoulos further attesting, among other things, that he was present at the Premises in 1995 when the renovations were performed and thus had personal knowledge that the renovations had been completed as represented to the DOB.

On November 17, 2021, Petitioners filed a response to Thera's response to Mr. Gross's report, including a reply from Mr. Gross in which he, among other things, questioned Mr. Georgopoulos's credibility and again alleged that the Premises' heating, fire escapes, floors, ceilings

and walls, pointing or exterior surfaces, and doors and frames had not been replaced as Mr. Georgopoulos had claimed.

In an order dated October 13, 2022, the DHCR Rent Administrator granted Thera's application, finding that the Premises had been substantially rehabilitated and was thus exempt from the Rent Stabilization Law. (Dkt. No. 42 at 542-43) The order stated that "[t]he Rent Administrator has reviewed all the information/evidence in the file" and indicated specifically that Thera had submitted architectural plans, an architect's affidavit, a new certificate of occupancy, a cost affidavit, and a DOB job folder. (*Id.* at 542) It went on to state that the DOB approved Thera's plans for the renovation on January 12, 1995, under job #100949565 and that the new certificate of occupancy indicated that the work related to that job had been completed and signed off on August 9, 2004. Finally, as relevant, the order found that "[t]he scope of work described in the Architect's Affidavit indicates that at least 75% of all building-wide and individual apartment systems, including common areas, were replaced." (*Id.* at 543)

On November 21, 2022, Petitioners filed a petition for administrative review ("PAR") of the Rent Administrator's order. In the PAR, Petitioners took issue with the Rent Administrator's order on a number of grounds. One was that the Rent Administrator, according to Petitioners, appeared not to have considered Petitioners' evidentiary submissions, failing to mention Mr. Gross's reports. Another ground was that the order did not specify which systems were considered, via a line-item list with accompanying discussion of each, or what evidence specifically demonstrated the replacement of each system. Finally, Petitioners essentially reiterated their arguments that Thera's evidence did not demonstrate fulfillment of threshold requirements or that 75% of the systems were replaced.

Thera responded to Petitioners' PAR on February 17, 2023, and Petitioners filed their reply on March 17, 2023.

In an order dated May 11, 2023 (the "PAR Order"), DHCR's Deputy Commissioner denied the PAR, finding that the record supported the Rent Administrator's determination that the Premises was exempt from the Rent Stabilization Law because of substantial rehabilitation. (Dkt. No. 42 at 636-40) The PAR Order found that

> 1) the [Rent Administrator] was not required to itemize every piece of evidence in the record or articulate and summarize every party's submission

> when rendering a determination; 2) the record established that the [Rent Administrator] did consider the evidence submitted by both sides before issuing the [Rent Administrator] order; 3) the [Rent Administrator] is not required to itemize each building system before making a determination and that the evidence relied on by the [Rent Administrator], including expert statement and written records[,] demonstrated that provision of the Op. Bulletin 95-2 for building system replacement and common areas were met; 4) it was reasonable for the [Rent Administrator] to give greater weight to the owner's evidence because it was contemporaneous with the substantial rehabilitation, including the architect that filed the DOB plans and oversaw the work, over the tenants' evidence which was the results of inspections of the property and photographs taken over twenty-five years later; 5) based on the record evidence which supported a substantial rehabilitation taking place in 1995, an agency inspection was not necessary and would not render definitive conclusion on whether various areas were replaced 28 years ago; and 6) it was persuasive that two adjacent premises owned by the owner were granted substantial rehabilitation under separate agency docket numbers based upon nearly exact same evidence which was presented in this matter and Petitioner has neither responded to nor rebutted this fact.

(Dkt. No. 35, ¶ 55; see also Dkt. No. 42 at 636-40)

Petitioners subsequently initiated this Article 78 proceeding for review of the PAR Order on July 10, 2023.

B. Discussion

In an Article 78 proceeding a court reviews an agency decision to determine whether it violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. CPLR § 7803(3); *Kent v. Lefkowitz*, 27 N.Y.3d 499, 505 (2016); *W. 58th St. Coalition, Inc. v. City of N.Y.*, 188 A.D.3d 1, 8 (1st Dep't 2020). "This review is deferential for it is not the role of the courts to weigh the desirability of any action or choose among alternatives." *Save America's Clocks, Inc. v. City of N.Y.*, 33 N.Y.3d 198, 207 (2019) (internal quotation marks omitted). "[E]ven if different conclusions could be reached as a result of conflicting evidence," a reviewing court may not substitute its own judgment for that of the agency making the determination. *Partnership 92 LP v. N.Y.S. Div. of Hous. & Community Renewal*, 46 A.D.3d 425, 429 (1st Dep't 2007). "[T]he courts cannot interfere unless there is no rational basis for the exercise of discretion" or "the action is without sound basis in reason . . . and taken without regard to the facts." *Save America's Clocks*, 33 N.Y.3d at 207 (quoting *Pell v. Bd. of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Cty.*, 34 N.Y.2d 222, 231 (1974)).

As the agency charged with administration of the Rent Stabilization Law, DHCR "has broad discretion in evaluating pertinent factual data and determining the inferences to draw from it." *Hawthorne Gardens, LLC v. N.Y.S. Div. of Hous. & Community Renewal*, No. 122580/02, 2003 WL 25668637 (N.Y. Sup. Ct. N.Y. Cty. May 5, 2003) (citing *Wembly Mgmt. Co. v. N.Y.S. Div. of Hous. & Community Renewal*, 205 A.D.2d 319 (1st Dep't 1994), *lv. denied* 85 N.Y.2d 808 (1995)), *aff'd*, 4 A.D.3d 135 (1st Dep't 2004). As such, DHCR is entitled to deference as to issues of credibility and the weight of evidence. *See Marisol Realty Corp. v. N.Y.S. Div. of Hous. & Community Renewal*, 154 A.D.3d 463, 464 (1st Dep't 2017) ("[I]t was for DHCR to weigh the evidence that the parties submitted."); *Jane St. Co. v. N.Y.S. Div. of Hous. & Community Renewal*, 165 A.D.2d 758, 758-59 (1st Dep't 1990) (same), *lv. denied* 77 N.Y.2d 801 (1991); *Buckner v. 91 W.E.A. Realty LLC*, No. 107372/2008, 2008 WL 4461409, at *2 (N.Y. Sup. Ct. N.Y. Cty. Sept. 4, 2008) ("Issues of credibility and weight of the evidence are for DHCR to determine.").

Upon review of the parties' submissions, the Court concludes that Petitioner has not demonstrated that the PAR Order lacked a rational basis in the record or was without sound basis in reason or taken without regard for the facts. *Save America's Clocks*, 33 N.Y.3d at 207. Initially, Petitioners would have this Court infer from the fact that the Rent Administrator did not specifically discuss Mr. Gross's reports or the other evidence that Petitioners submitted that the Rent Administrator did not consider such evidence in reaching its determination. The Court declines to make that inference. Petitioners provide no caselaw supporting the proposition that such an inference is appropriate or required. And simply because DHCR came to a conclusion opposite of what Petitioner's sought does not necessarily mean that the agency failed to review and consider Petitioners' evidence. An agency is not required to list and discuss every piece of evidence that it reviewed and considered in reaching a determination. Regardless, however, the face of the Rent Administrator's order makes clear that Petitioners' evidence *was* reviewed and considered: it states expressly that the "Rent Administrator has reviewed all the information/evidence in the file." (Dkt No. 42 at 542) The file, as submitted to this Court, includes all of the evidence that Petitioners submitted to DHCR. Therefore, that part of the PAR Order rejecting Petitioners' contention that its evidence was not considered by the Rent Administrator has a rational basis in the record.

As for the substance of the PAR Order, there is no basis for the Court to disturb the agency's determination. The PAR Order upheld the Rent Administrator's decision that the Premises had been substantially rehabilitated within the requirements of OB 95-2. In making that determination, it cannot be said that the agency acted irrationally by assigning more weight to the DOB job folder, the new certificate of occupancy, and the sworn affidavits of the architect who designed and oversaw the rehabilitation of the Premises and was present on site during the work than to the present-day observations of Petitioners' counsel's paralegal and of an architect made based on limited, single-day visual inspections of the Premises. DHCR's credibility determinations and weighing of the conflicting evidence are entitled to significant deference—especially because the dispute concerns work that allegedly happened more than *two decades* ago[3]—and Petitioners' arguments concerning the evidence, if accepted, would effectively result in the improper substitution of the Court's judgment for that of the agency.

Petitioners also argue that the PAR Order is somehow irrational because it does not list every one of the building-wide systems that DHCR determined had been replaced and address the specific evidence that establishes replacement. Petitioners, however, do not provide a single case that supports that proposition. Nor do Petitioners point to any portion of OB 95-2 that expressly requires DHCR to set down such an analysis in writing when making a substantial-rehabilitation determination. The Court does not discern any such requirement in the text of OB 95-2. Therefore, the Court declines to create such a requirement, which, in any event, would seem to go to the form of an agency's decision and not whether it was rationally based in evidence in the record.

Petitioners next argue that DHCR's decision not to conduct an in-person inspection of the Premises before reaching its determination was illogical (*i.e.*, irrational) given the conflicting evidence. As a matter of law, "[t]he Rent Stabilization Code permit[s], but d[oes] not require, DHCR to inspect the premises before making a determination." *Marisol Realty Corp.*, 154 A.D.3d at 464 (citing 9 N.Y.C.R.R. § 2527.5(b)). The PAR Order upheld the decision not to inspect the Premises because "an agency inspection was not necessary and would not render definitive conclusions on whether various areas were replaced 28 years ago." (Dkt. No. 42 at 640) Based on this reasoning,

[3] Contrary to Petitioners' claims in the Verified Petitioner, there is no indication that DHCR held Thera/Owner to a lesser standard of proof on its application simply because the renovation work in question occurred more than two decades ago.

DHCR's decision not to inspect the Premises is not an irrational abuse of discretion, and thus Petitioners' contention is rejected.

Finally, Petitioners argue that DHCR "improperly ascribed a *res judicata* effect" to its determinations with respect to the adjoining properties also owned by Owner. The face of the PAR Order refutes this contention, however. In the PAR Order, the Deputy Commissioner expressly stated that he "finds *persuasive* the fact that two adjacent premises owned by the owner herein were granted substantial rehabilitation under separate agency docket numbers based upon nearly the exact same evidence which was presented in this matter." (Dkt. No. 42 at 640 (emphasis added)) Thus, by the Deputy Commissioner's own words, he did not apply those other DHCR determinations as preclusive of the issues in this proceeding but merely as *persuasive* evidence. Given the similarity of the buildings, ownership, and work performed, it was not irrational for DHCR to do so.

Accordingly, it is hereby:

ORDERED and ADJUDGED that the Verified Petition and Notice of Petition (Seq. No. 1) are **DENIED**, and this proceeding is **DISMISSED**; and it is further

ORDERED that Petitioners shall serve a copy of this Decision and Order upon Respondents and upon the Clerk of the General Clerk's Office with notice of entry within twenty (20) days thereof; and it is further

ORDERED that any requested relief not expressly granted herein is denied; and it is further

ORDERED that the Clerk shall mark Motion Sequence 1 decided in all court records; and it is further

ORDERED that the Clerk shall mark this proceeding disposed in all court records.

This constitutes the decision and order of the Court.

August 7, 2024
DATE

SHAHABUDDEEN ABID ALLY, A.J.S.C.

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