2024-08-21

Levy v. NYS Div. of Hous. & Community Renewal

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

----------x

SAMUEL LEVY,

Petitioner,

-against-

NYS DIVISION OF HOUSING AND COMMUNITY RENEWAL

Respondent.

----------x

Mot. Seq. #s 3, and 4

Index # 507268/2023

DECISION AND ORDER

HON. LISA S. OTTLEY

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this Article 78 petition and Notice of Motion for default judgment submitted on March 7, 2024.[1]

Papers	Numbered
Notice of Motion and Affirmation [Seq.#3]	1&2[Exh. A-Z; AA-AC]
Affirmation in Opposition	3[Exh.A]
Memorandum of Law	4
Affirmation in Reply	5
Notice of Motion and Affirmation [Seq.#4]	1&2[Exh. A-F; A-C]
Affirmation in Opposition	3[Exh. A]
Reply Affirmation	4

Petitioner moves for an order pursuant to CPLR Article 78 seeking judicial review of the determination made by the respondent, NYS Division of Housing and Community Renewal (DHCR), in its Order and Opinion denying his Petition for Administrative Review (second PAR order), dated October 4, 2023, under Administrative Review Docket No. LQ210026RT, on the grounds that such determination was arbitrary and capricious, unsupported by the record, and without rational basis. Said Par order affirmed DHCR's Rent Administrator's (RA) Order, dated April 28, 2023, under Docket No. KM210006RP, which determined that petitioner was not overcharged for rent. Respondent opposes the motion

[1] On 3/8/23, the petitioner filed an Article 78 petition (motion seq # 1) seeking mandamus relief to compel DHCR to issue an order and determination of the petitioner's rent overcharge complaint. While this Article 78 petition was pending and prior to the return date, the Rent Administrator (RA) issued an Order on 4/28/23 terminating the petitioner's overcharge complaint. The Petitioner then filed a petition for Administrative Review (PAR) challenging the termination of the overcharge complaint. DHCR cross moved (motion seq # 2) to dismiss the Article 78 petition as moot based on the 4/28/23 order. While the petition and cross-motion were pending, on 10/4/23, the Deputy commissioner issued a PAR order denying the Petitioner's appeal. Petitioner then filed another motion (motion seq 3), which included a second Article 78 petition challenging the denial of this administrative appeal. By stipulation, dated 2/29/24, the petitioner was permitted to amend the petition to remove the cause of action sounding in mandamus relief and to add a cause of action sounding in certiorari to challenge on the merits the order issued by DHCR. The petitioner's second petition was deemed the amended petition.

on the grounds that the PAR order determination is not arbitrary and capricious and is entitled to be affirmed.

Petitioner also moves for an order pursuant to CPLR § 3215 seeking the entry of a default judgment against the respondent on the grounds that the petitioner failed to submit an answer as per the stipulated date of April 8, 2024. Respondent opposes the motion on the grounds that its answering papers were filed on April 18, 2024, which complies with the time to serve answering papers under CPLR 7804(c).

Petitioner is currently a tenant at 426 Eastern Parkway, Apt. 6I, Brooklyn, NY 11225. The subject apartment is subject to regulation under the Rent Stabilization Law (RSL) and Rent Stabilization Code (RSC). Citadel Estates LLC/Franklin Tower 26, LLC is the owner of said apartment. Mendel Rabkin owns Citadel Estates/Franklin Tower. The tenant filed a rent overcharge complaint on September 19, 2018, alleging that the owner increased the rent based on false claims of individual apartment improvements (IAIs). On October 29, 2021, the RA under Docket No. GU210040R, found that the tenant took occupancy on July 1, 2018; the owner was entitled to rent of $3,700.00 per month, which was increased from the previous tenant based, in part, on $1,941.66 in IAIs; the total cost of apartment renovations was $116,500.00; there was no evidence of an identity of interest between the owner and contractor who performed the IAIs; all rent adjustments have been lawful; and there has been no rent overcharge.

The tenant filed an initial PAR alleging that there was an identity of interest between the owner and the contractor; the owner and contractor had the same ownership, same mailing and street address, and also share an immediate family connection; a 2011 permit request filed with the New York Department of State was signed by David Sputz as the owner of Maldov Contracting LLC. (subject contractor) and in 2009, Mr. Sputz signed a different permit request with the New York Department of Buildings as the owner of Citadel Estates, LLC; and the owner's IAI costs should be more carefully scrutinized in light of the identity of interest between the owner and the contractor. On January 18, 2022, under Docket Number JW210040RT (initial PAR order), the Deputy Commissioner remanded the matter back to the RA to further investigate the claims of identity of interest between the owner and the contractor.

The RA re-opened the matter under Docket Number KM210006RP and reopening notices were served on the parties on February 9, 2022. On February 14, 2022, the owner replied to the re-opening notice by submitting affidavits from David Sputz and Ruchama Abel. Mr. Sputz affirmed that he is the managing agent for the owner; he has signed and submitted numerous permit applications to the NYC Department of Buildings on behalf of the owners he manages for; he erroneously inserted the name of the contractor in a PW3 Cost affidavit on a job being performed by Maldov Contracting for another owner Fortress PA, LLC; and he had no financial interest in Citadel Estates/Franklin Tower, Fortress PA LLC or Maldov Contracting. Ms. Abel affirmed that she is a certified public accountant working for Sid Borenstein & Company; this company is the accountant for Citadel Estates/Franklin Tower; based on corporate records, Mendel Rabkin owns 100% of Citadel Estates/Franklin Tower; her company is also the accountant for Maldov Contracting; based on corporate

records Alejandro Rubenstein is a 99% owner of Maldov Contracting and Toby Rubenstein is a 1% owner of Maldov; there is no common ownership or financial connection between Citadel Estates/Franklin Tower and Maldov Contracting; and David Sputz has no ownership interest in Citadel Estates/Franklin Tower or Maldov Contracting. The owner acknowledged that the owner of Citadel, Mendel Rabkin, and Alejandro Rubenstein are brothers-in-law, but that they have no financial connection and neither one has a financial interest in the other's company. The owner asserted that a familial connection has no bearing on any type of financial interest. The owner acknowledged that Mr. Rabkin is listed as an "authorized person" on the Biennial Statement of Maldov Contracting, but that this was simply because Rabkin filed the form on behalf of his brother-in-law with the New York Division of Corporations and that same is not evidence of a financial connection.

Pursuant to the Order, dated April 28, 2023, the RA found that although there is an identity of interest between the owner and the contractor, there was no evidence that there was any common ownership or financial connection between the owner's business and the contractor's business as required by DHCR Operational Bulletin 2016-1 (OB 2016-1) issued in May 2016. The prior order under Docket Number GU210040R was affirmed, and the proceeding was terminated.

The tenant then filed a second PAR which is subject to judicial review. As reflected in the second PAR order, October 4, 2023, DHCR's deputy commissioner found that the identity of interest between owner and the contractor, who performed the relevant IAIs on the property, did not evidence the common ownership or financial connection as required by OB 2016-1. A slight familial relationship existed between the owner and contractor, but such relationship was insufficient under the administrative record to warrant barring the owner from collecting a rent increase. The owner's denial of an identity of interest in the initial RA case was not evidence of fraud. Notwithstanding the owner disclosing the familial relationship for the first time in the reopened proceeding, he has always maintained, and the evidence has shown, that there is no financial connection between the two companies. The Deputy Commissioner further found that the RA examined additional evidence and undertook additional scrutiny of the IAI costs and payments and found that they should be sustained as per the prior order. Although the landlord and the majority owner of Maldov are brothers-in-law, there was no evidence that there is a financial connection or co-mingling of assets between the two companies. The fact that the owner's sister owns 1% of Maldov was insufficient to create a financial nexus between the owner and Maldov. The owner and his sister owning another property together was also irrelevant to any claimed financial interest between the owner and Maldov pertaining specifically to the IAIs in this case. The owner has provided two sworn affidavits, one from the managing agent and one from the owner and Maldov's accountant, each of which establishes that there is no common ownership between the owner and the contractor and no shared financial interest between the two companies. The tenant's evidence, including that of the aforementioned sister and the two companies sharing an address and the owner filing documents for the Maldov with the New York Division of Corporations were insufficient to establish the required financial nexus which could invalidate the IAIs. There was no evidence that the owner was paying himself for the IAIs or receiving any money back from Maldov or sharing in Maldov's profits.

The second PAR order further held that the owner has provided an itemized invoice from the contractor which details the scope of the work performed, including a new kitchen, new bathroom, new subflooring/flooring, new lighting, new windows and new closet doors. Each of the areas of work is itemized and there are nine checks payable to the contractor totaling $116,500.00. The Deputy Commissioner found that the checks are contemporaneous with the work and match the total sum charges from the contractor invoice. The checks need not reference specific items from the Maldov invoice, and the Commissioner finds that it is not unusual for owners to pay off IAIs with a series of checks after the initial deposit. The fact that the checks do not reference the subject apartment does not invalidate them as proper payment evidence for the IAIs given that they were contemporaneous to the work and that payment in full was acknowledged by Maldov. There was no requirement that the RA had to request additional evidence from the owner or Maldov in terms of payroll records or invoices from outside vendors or suppliers. The Maldov invoice indicates that the contractor would supply all materials and there is no evidence that a subcontractor or outside vendor was used for any part of the IAI work. The payroll records of the contractor are not necessary and payroll records are normally only requested where the owner is paying an employee to do IAI work to prove that he was paid money for the IAIs that was in addition to his regular salary. There was no requirement that an owner had to use a licensed contractor to perform IAIs. There was also no requirement that before and after photographs had to be provided to sustain the IAI rent increase or that permits had to be obtained. The claims that certain items were not installed is not supported. The Deputy Commissioner found that all items claimed as IAIs were properly allowed given the scope of the renovations performed herein. As to claims regarding inflation of costs, the agency has long found that owners are not limited to use the lowest cost contractors or supplies when performing IAIs. The tenant then commenced this Article 78 proceeding based on the denial of his second PAR.

After careful review of the moving papers and opposition thereto, the court finds as follows:

Judicial review of an administrative determination is generally limited to whether the 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. See, *CPLR 7803*; *Matter of CHT Place, LLC v New York State Div. of Hous. & Community Renewal*, 219 A.D.3d 486, 194 N.Y.S.3d 122 (2nd Dept., 2023). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. See, *Matter of Peckham v Calogero*, 12 N.Y.3d 424, 883 N.Y.S.2d 751 (2009). If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency. See, *Matter of McCollum v City of New York*, 184 A.D.3d 838, 126 N.Y.S.3d 490 (2nd Dept., 2020). In reviewing a determination of the DHCR, the court is limited to a review of the record which was before the DHCR. See, *Matter of 65-61 Saunders St. Assoc., LLC v New York State Div. of Hous. & Community Renewal*, 154 A.D.3d 930, 63 N.Y.S.3d 455 (2nd Dept., 2017). An agency's interpretation of the statutes and regulations that it administers is entitled to deference, and must be upheld if reasonable. See, *Matter of Ellis v Division of Hous. & Community Renewal of State of N.Y.*, 45 A.D.3d 594, 845 N.Y.S.2d 407 (2nd Dept., 2017). The court may not substitute its judgment for that of the

DHCR. See, *Matter of Buchanan v New York State Div. of Hous. & Community Renewal*, 163 A.D.3d 961, 83 N.Y.S.3d 497 (2nd Dept., 2018).

Here, the Deputy Commissioner's determination, in effect, upholding the RA's determination had a rational basis and was not arbitrary and capricious. The RA applied the DHCR Operational Bulletin 2016-1 (OB 2016-1) issued in May 2016, which requires that the costs for an IAI paid to a person organization sharing an identity of interest with the owner or managing agent may require additional evidence relating to cost and payment. In applying OB 2016-1, the RA examined additional evidence, such as affidavits, itemized invoices, and checks, and undertook additional scrutiny of the IAI costs and payments and found that they should be sustained as per the prior Order. This court finds the DHCR's determination reasonable and based on evidence and facts in the record.

In addition, the court finds that the respondent has complied with CPLR 7804(c) by filing its answering papers on April 18, 2024, which was at least five (5) days before the amended petition return date of April 29, 2024, irrespective of the date contained in the stipulation. See, *CPLR 7804(c)*; *Matter of Schachter v State of N.Y. Div. of Hous. & Community Renewal, Office of Rent Admin.*, 14 A.D.3d 615, 787 N.Y.S.2d 893 (2nd Dept., 2005). Furthermore, public policy favors the resolution of cases on the merits, and in this case there was a relatively short period of delay, a possible meritorious defense, no evidence of prejudice to the respondent, and no willfulness by the respondent. See, *Sippin v Gallardo*, 287 A.D.2d 703, 732 N.Y.S.2d 62 (2nd Dept., 2011).

Accordingly, petitioner's Article 78 petition and motion for default judgment are denied in their entirety.

This constitutes the decision and order of this court.

Dated: Brooklyn, New York
August 21, 2024

HON. LISA S. OTTLEY, J.S.C.

HON. LISA S. OTTLEY

KINGS COUNTY CLERK
FILED
2024 AUG 30 A 10:16