

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER

~~PA~~ **IA** PART 16

Index Number : 111584/2009
APTHORP ASSOCIATES LLC
 vs.
N.Y.S.D.H.C.R.
 SEQUENCE NUMBER : 00
 ARTICLE 78

FILED
 APR 19 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion Article 78 petition

is denied and the proceeding is dismissed in accordance with the reasons stated on the record on this date. This constitutes the decision and judgment of this Court. The Clerk shall proceed accordingly.

APR 07 2010

Dated: April 7, 2010

Alice Schlesinger

 ALICE SCHLESINGER, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: TRIAL TERM PART 16
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APTHORP ASSOCIATES, LLP,
Petitioner,
INDEX NUMBER:
- against - 111584/09

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,
Respondent,
APTHORP TENANTS ASSOCIATION,
Respondent-Intervenor

----- X
60 Centre Street
New York, New York
April 7, 2010
DECISION

BEFORE:
HONORABLE ALICE SCHLESINGER, Justice

APPEARANCES:
HORING WELIKSON & ROSEN, PC
Attorneys for the Petitioner
11 Hillside Avenue
Williston Park, New York 11596
BY: DANIEL ROSKOFF, ESQ.,
RANDI B. GILBERT, ESQ., Of Counsel

NEW YORK STATE DEPARTMENT OF HOUSING
AND COMMUNITY RENEWAL
Office of Legal Affairs
25 Beaver Street
New York, New York 10004
BY: CAROLINE M. SULLIVAN, ESQ., Of Counsel

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NEW YORK
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APPEARANCES: (Continued)

HIMMELSTEIN, MCCONNELL, GRIBBEN,
DONOGHUE & JOSEPH
Attorneys for Respondent-Intervenor
15 Maiden Lane
New York, New York 10038
BY: DAVID S. HERSHEY-WEBB, ESQ., Of Counsel

Myron Calderon
Official Court Reporter

Decision

AFTERNOON SESSION.

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3 THE COURT: This has been an extremely technical
4 argument as to the petitioner's application for an MCI.

5 What we have is an Article 78 by the owner of a
6 building located at 2211 Broadway also known as 390 West
7 End Avenue. It is a complicated proceeding, and the
8 reason for that is because the rewiring, which forms the
9 predicate for the request for a MCI increase, was
10 arguably done in four different phases going back to a
11 prior ownership, going back to something like 2000, many,
12 many years, and also what is at issue here is whether or
13 not there was compliance with a significant document
14 called a Prior Opinion Letter dated April 18, 2003.

15 At that time Phase 1 had already been completed
16 and this is when the prior owner had begun the work. I
17 think there are something like four buildings in the
18 complex, and since some of those units in this complex
19 were now not subject to regulation, the owner wanted an
20 opinion from DHCR as to whether or not the exclusion of
21 what they called seven nonregulated apartments would
22 somehow prevent them from applying for a MCI at the
23 appropriate time. So they asked that in essence and DHCR
24 on April 18, 2003, did respond and did say that it was
25 all right to exclude those seven apartments, but there
26 were specific requirements that had to be met. For

Decision

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2 example, and this is Item 2 under A, that new electrical
3 capacity with risers and feeders had to be installed
4 building wide, and then Item 3 that new copper rises and
5 feeders must extend from proper box to box in each
6 accommodation. In other words each unit; and then Item
7 4, with regard to the capacity that the circuits or the
8 wiring had to have, and then in Part B of the Prior
9 Opinion Letter it talks about the fact that, and this is
10 specifically under 3B, "to account", and I am reading now
11 "for the two year completion period, the owner must
12 include all work orders per apartment which must indicate
13 the dates and exact work done in each apartment."

14 So even though the Prior Opinion Letter did not
15 absolutely grant a MCI, it did specify what requirements
16 would have to be complied with if a successful
17 application could ultimately be made by the owner.

18 So it was essentially an advisory letter but the
19 information provided of restrictions were serious ones
20 and obviously it was up to the owner to seriously accept
21 those conditions and/or restrictions.

22 The owner then went on to Phase 2 after
23 receiving that prior Opinion Letter, which began in July
24 of '03 and Phase 3 began in December of '03 and Phase 4
25 began in 11/04 and then I believe it was some time in '06
26 that -- yes, March 13th of 2006 the prior owner of the

Decision

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2 premises filed an application for a MCI rent increase
3 with DHCR.

4 At that time the owner said they had spent
5 somewhat over \$2,900,000 and that that application for
6 the MCI excluded, the price of the work performed in the
7 seven deregulated apartments which were the subject of
8 the Prior Opinion.

9 The rent administrator heard this matter and
10 received information from the Tenants Association, asked
11 for additional information from the owner at that time
12 the Rent Administrator found out for the first time that
13 it wasn't only the seven nonregulated apartments or
14 unregulated apartments that was not a part of the current
15 rewiring project, but also that there were 48 other
16 apartments which were unregulated and arguably that
17 rewiring work had been done during the '90s as far as
18 upgrading in those apartments. This then added a whole
19 new dimension to what work was done actually here and
20 whether any of those cost were included in this
21 \$2,900,000.

22 So the Rent Administrator asked for more
23 information and the owner provided some information. On
24 September 28, 2007, the Rent Administrator denied the
25 MCI, by finding that the landlord was unable to show that
26 the rewiring work was performed building wide and that

Decision

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2 also the owner failed to comply with the requirements
3 alluded to in the Prior Opinion letter which I have dealt
4 with.

5 A timely PAR, this time the new owner who had
6 taken over, was filed. This PAR with more information
7 was submitted to the Deputy Commissioner. On June 25,
8 2009, the Deputy Commissioner decided to affirm the Rent
9 Administrator's order and by so doing, denied the owner
10 the MCI it was seeking and that was the subject of the
11 PAR. This is now the subject of this Article 78
12 petition.

13 Now the role of the Court here is a relatively
14 straight forward one. It is not for me to spend multiple
15 hours going through every possible document to see
16 whether or not I agree with the ultimate decision by
17 DHCR. That is not my role.

18 My role is to read the decision, read the
19 accompanying exhibits at least, in part to see if they
20 make sense and to see essentially whether or not DHCR,
21 which is the Agency entrusted with interpreting the Rent
22 Stabilization Code, whether they have made a rationale
23 decision or put another way a decision which is not
24 arbitrary and/or capricious by in this case denying the
25 MCI.

26 So that is what I have done. The decision

Decision

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2 essentially finds, similar to what the Rent Administrator
3 found, that there simply was a failure to prove
4 entitlement to the MCI by the owner. The decision points
5 to very specific things which were simply not shown or
6 not done. A very basic thing here is whether or not
7 these risers and feeders were provided to all of the
8 units which is required.

9 We are talking now about all the regulated units
10 and DHCR finds via the Deputy Commissioner's opinion that
11 there was even a failure of proof as to how many units
12 there actually are in this building complex.

13 Specifically on page 15 of the Respondent's
14 Answer, it is pointed out that despite the fact that the
15 petition says that there are only 162 units; that all of
16 the other documents submitted belie that fact. Because
17 it is the petitioner's contention here that work was done
18 in 155 apartments; and if you add the seven unregulated
19 apartments, you get 162. So that is an important number
20 for them.

21 But DHCR says there is no documentation which
22 supports the number of 162 apartment units. Again in
23 Paragraph 26 of their Answer they point out that the
24 application itself shows 169 apartments, that the rent
25 role attached to the application listed 169 apartments,
26 that the punch list submitted by the current owner in

Decision

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2 July of 2007 listed 169 apartments. Also the current
3 owner advised the Rent Administrator on August 16, 2007,
4 that there were 169 apartments including four
5 professional units and that there simply is no
6 justification other than somewhat self-serving statements
7 that there really are 162 apartments. That number is
8 critical for figuring out whether or not all of the
9 regulated units received the feeders and risers that they
10 were required to if in fact this MCI were to be approved.

11 The Commissioner again denied the application,
12 in part indicating that contrary to the Prior Opinion
13 letter that the petitioner had to prove that the cost of
14 upgrading the electrical service of the seven deregulated
15 apartments could not be included in this 2.9 million
16 dollars and here the Commissioner finds that simply was
17 not shown. Also again, pursuant to that Prior Opinion
18 that it was the landlord's obligation to specifically
19 spell out all the work done in each of the apartments
20 with dates and the exact work done. That was not shown
21 either.

22 What made all this confusing is the fact that as
23 I indicated earlier, the work done was in four different
24 phases and another problem that DHCR had, as reflected in
25 the decision, is that Phase 3 and Phase 4 were not broken
26 down to show which specific work was performed on which

Decision

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2 individual apartments during each of those phases.

3 So what we have here, at least according to the
4 decision denying the MCI and affirming the Rent
5 Administrator, is a failure of proof by the owner to
6 justify its request for a MCI. It should be pointed out
7 that if a MCI is approved, that means that the rent for
8 each room in every unit is increased by a certain amount
9 of money and that that amount is perpetuated through the
10 life of that apartment as long as that particular tenant
11 remains there and all future increases are based on that
12 new elevated rent.

13 There is no question but that in some cases
14 owners are entitled to these things, but there are
15 stringent requirements and they really get down to a
16 matter of proof which DHCR is scrupulous in observing.

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Decision

I find in this case that the Commissioner was scrupulous in demanding that the landlord prove what had to be proven, which it did not, to entitle them to this benefit and I would be loathe to say their decision was arbitrary and capricious. Therefore, based on that, the Article 78 petition is dismissed and this decision constitutes the judgment of this court.

CERTIFIED TO BE A TRUE
AND CORRECT TRANSCRIPT



MYRON CALDERON
OFFICIAL COURT REPORTER