

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

(Continued on next page.)

**FILED**  
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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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2  
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.

17           (Continued on next page.)

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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