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

PRESENT: KERN Justice PART 55

98 RIVERSIDE DRIVE, LLC

INDEX NO. 101285/13

MOTION DATE

-V-

N.Y.S. DIVISION OF HOUSING AND COMMUNITY RENEWAL

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on 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

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

Dated: 12/2/13

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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In the Matter of the Application of

98 RIVERSIDE DRIVE, LLC,

Petitioner,

Index No. 101285/13

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL and 98 RIVERSIDE DRIVE TENANTS ASSOCIATION,

Respondents.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmations in Opposition	2,3
Replying Affidavits.....	4
Exhibits.....	5

Petitioner 98 Riverside Drive, LLC commenced the instant Article 78 proceeding seeking to challenge a determination made by respondent the New York State Division of Housing and Community Renewal ("DHCR") denying petitioner's Petition for Administrative Review ("PAR") which sought to vacate the DHCR's Rent Administrator's ("RA") order reducing the rent in a particular apartment based on the finding that petitioner had discontinued electric inclusion in that apartment. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner is the owner of the residential apartment

building located at 98 Riverside Drive, New York, New York (the "building"), which houses both rent controlled and rent stabilized units. Prior to March 2011, petitioner utilized a master metering system for electricity whereby it paid the bill for electric usage for the entire building and each tenant's base rent included electricity. Subsequent to March 2011, the tenants in the building began receiving electrical bills directly from Consolidated Edison ("Con Ed") without a decrease in the legal base rent for their apartments. On or about May 13, 2011, petitioner filed an Application for Termination of Rent Inclusion of Electricity with DHCR. However, on or about July 5, 2011, petitioner withdrew that Application "in order to reevaluate its course of action."

On or about July 15, 2011, 69 tenants in the building (23 rent-controlled tenants and 46 rent-stabilized tenants) filed an application to reduce their rent with DHCR alleging various service reductions and conditions, including a claim that prior to March 2011, electricity was included in their rent, that petitioner unilaterally and without prior approval from DHCR switched over from master metering to direct metering and that in March 2011, Con Ed began billing each tenant directly despite the fact that the tenants continued to pay the same rent. In its response, dated December 16, 2011, petitioner admitted that it upgraded the metering system but claimed that Con Ed erroneously began billing the tenants; that it was trying to correct the billing issue; and that it sent a letter to the tenants offering to reimburse the electrical bills by crediting the tenants' next rent bills, requiring each tenant to pay both the full rent and the electrical bill each month, turn over the electrical bill to the owner and wait for the owner to credit the tenants in the following month's rental bill. The tenants rejected the owner's proposed plan as a hardship and more onerous than paying just their rent and many stated that they were not properly credited for their electrical payments.

On October 12, 2012, the DHCR's Rent Administrator ("RA") issued an order reducing the total rent $12.00 plus an additional 7.5% for certain rent-controlled tenants, effective November 1, 2012, due to petitioner's conversion to direct metering and for other conditions in the building which were eventually corrected by the owner. Specifically, the RA stated:

> [T]he Owner acknowledged that it had changed the electric service in the building and installed individual meters in each apartment. The Owner indicated that it had filed an application for approval of Termination of Rent Inclusion of Electricity with DHCR....However, the Owner subsequently withdrew the application....Therefore, the Owner has removed the service of electrical inclusion without approval of DHCR as required by [RSC §] 2522.4(d)...and [NYRER §] 2202.16.

On or about November 13, 2012, petitioner filed a PAR challenging the RA's rent reduction order on the grounds that, *inter alia*, there was no reduction in services; Con Ed erroneously billed the tenants directly; and that petitioner was planning to reimburse the tenants for any money paid toward their electric bills. Additionally, on or about March 20, 2013, petitioner filed a second Application for Termination of Rent Inclusion of Electricity with DHCR, which is currently pending.

On or about August 14, 2013, DHCR's Commissioner confirmed the RA's rent reduction order finding, *inter alia*, that the uncontroverted evidence established that the tenants became responsible for the payment of electric service supplied to their respective apartments in March 2011 notwithstanding their prior enjoyment of an electrical inclusion in their rents pursuant to the terms of their respective leases; that despite petitioner's claim that it did not authorize Con Ed to bill the tenants directly, Con Ed's action was the direct result of petitioner's admitted "overhaul and upgrade" to the building's electrical system; and that it is significant that the record is devoid of any evidence showing petitioner was successful in having Con Ed discontinue the improper

billing of the tenants. Additionally, DHCR's Commissioner noted that petitioner had filed an Application for the Approval of Termination of Rent Inclusion of Electricity on May 13, 2011 and that an order was issued on February 23, 2012 terminating the proceeding due to petitioner's withdrawal of the Application. DHCR's Commissioner further found that the RA properly rejected petitioner's offer of reimbursement as an "inadequate stop gap measure" and that the newly imposed duties upon the tenants were not minor inconveniences equating to a *de minimis* service decrease.

On September 11, 2013, DHCR received petitioner's request for reconsideration which asserted that DHCR's August 2013 Order was arbitrary and irrational as the "premature" billing by Con Ed did not rise to the level of a reduction in required/essential services because petitioner would eventually credit the tenants' rent for their electrical usage payments. In a letter dated September 20, 2013, DHCR denied petitioner's request for reconsideration finding, *inter alia*, that DHCR's Commissioner's authority to reopen a proceeding is strictly limited to situations where the order was the direct result of illegality, irregularity in a vital matter or fraud; that a review of the record establishes that petitioner received full due process; and that DHCR's order was issued based upon petitioner's failure to maintain a required service without obtaining prior approval from DHCR and was therefore not illegal or fraudulent. Petitioner then filed the instant Article 78 petition.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v. Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had

a rational basis." *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); *see Pell v. Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell,* 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, the petition must be denied as respondent's decision had a rational basis. Pursuant to the Rent Stabilization Law ("RSL") and its implementing regulations set forth in the Rent Stabilization Code ("RSC"), an owner of a rent-stabilized building must maintain and continue all services provided to tenants of the building. *See* RSL § 26-514; *see also* RSC §§ 2520.6(r)(1) & (3) and RSC §§ 2522.4(d) & (e). DHCR is required to reduce the rent for rent-stabilized tenants if an owner improperly reduces, eliminates or inadequately maintains a service. *See* RSL § 26-514; *see also* RSC § 2523.4(a). Rent control tenants enjoy similar protections for the continuation of essential services. *See* RCL § 260495[h](2); *see also* New York City Rent and Eviction Regulations ("NYRER") § 2202.22(a). Pursuant to both rent control and rent stabilization laws, the owner must obtain prior permission from DHCR to change from a master metering system, whereby the owner pays for all electrical use and it is included in each tenant's rent, to an individual metering system whereby the tenants pay for their own electrical usage. Specifically, the owner must file a specialized application to reduce services, known as an "Application for Termination of Rent Inclusion of Electricity." *See* RSC § 2522.4(d)(3). If

DHCR grants an owner's application to exclude electricity from the rent, the legal base rent is then lowered in accordance with appropriate guidelines set forth in DHCR's Operational Bulletin and Updates. In the instant case, it is undisputed that petitioner changed the master metering system in the building and installed direct individual tenant metering and that petitioner did not obtain DHCR's approval before doing so. Although petitioner asserts that it filed an application to exclude electrical charges from rent, the first application was withdrawn and the second application was not filed until March 20, 2013 and is still pending. Therefore, it was rational for the DHCR to find that petitioner improperly reduced services to the building by failing to comply with the requirements of the RSL and RSC. Additionally, it was rational for DHCR to find that the reduction in service was not cured by petitioner's reimbursement plan as it improperly put the onus on the tenants to keep track of unwanted account statements from Con Ed, to make timely payment of bills to avoid a shut-off of electricity and to follow up with petitioner's offices for a monthly reimbursement. Petitioner's assertion that it "had no intention of converting the Building to direct metering...until ***after*** [it] obtained DHCR's permission to exclude electric charges from the legal rents of the affected regulated Tenants" is immaterial as it is undisputed that petitioner expended over $1,100,000.00 to upgrade and overhaul the building's electrical system prior to obtaining DHCR's permission and that this is why Con Ed began billing the tenants directly.

Although petitioner has submitted copies of e-mails to support its claim that Con Ed erroneously billed the tenants and that petitioner tried to correct the billing issue, these are facts and information that were not before the DHCR when it made its final determination. "The role of a court in reviewing a decision of an administrative agency...is limited with the standard of

review being whether the administrative determination was in violation of a lawful procedure or was affected by an error of law or was arbitrary and capricious and without a rational basis in the administrative record." *Rowan v. NYC HPD*, 21 Misc.3d 1235 at *3 (Sup. Ct. N.Y. Ct., 2011); *see also Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974). "The court cannot conduct a de novo review of the facts and circumstances or substitute the court's judgment for that of the agency's determination" as judicial review of administrative determinations is confined to the facts and record adduced before the agency. *Rowan*, 21 Misc.3d *3; *see also Greystone Management Corp. v. Conciliation and Appeals Bd.*, 94 A.D.2d 614, 616 (1st Dept 1983), *affd.* 62 N.Y.2d 763 (1994). However, even if the court could consider the additional documents, they only confirm that petitioner directed Con Ed to remove the metering system before petitioner filed the appropriate application with DHCR to exclude electricity. Further, petitioner's claim that it told Con Ed "electricity only" is without merit as that is not a clear directive to the utility company to continue charging all electricity bills to petitioner rather than to the tenants.

Finally, as this court has denied the petition in its entirety, petitioner's request for a stay of DHCR's order denying petitioner's PAR is denied as moot.

Accordingly, the petition is denied in its entirety. This constitutes the decision and order of the court.

FILED

DEC 04 2013

NEW YORK
COUNTY CLERK'S OFFICE

Date: 12/2/13 Enter: _____ J.S.C.