Supreme Court, Richmond County.

In the Matter of the Application of BRIDGEVIEW GARDEN APARTMENTS LLC, Petitioner, For an Order and Judgment Pursuant to the Provisions of Article 78 of the New York Civil Practice Law and Rules

v.

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, Martha Sullivan, Mark O'Connor, Michele Sebesto, and Anthony Ragucci Respondents.

No. 8157/04.

Sept. 9, 2004.

[**Wenig Ginsberg Saltiel & Greene LLP**, Brooklyn (**Jeffrey L. Saltiel**, of counsel) for Respondents Martha Sullivan, Mark O'Connor, Michele Sebesto and Anthony Ragucci]

ERIC N. VITALIANO, J.

Four separate proceedings brought pursuant to Article 78 of the CPLR seeking judicial review of adverse determinations made by the New York State Division of Housing and Community Renewal ("DHCR"), which arise out of four tenancies in the same housing complex, have come on for joint hearing and disposition by way of orders to show cause. In each proceeding, the landlord, Bridgeview Garden Apartments LLC ("landlord" or "Bridgeview"), is the petitioner and seeks not only review of DHCR's adverse determinations but also "rent" or "use and occupancy" *pendente lite* from the individual tenants who had been joined as respondents with DHCR in the proceeding effecting their respective tenancy...

Litigation arising out of the Bridgeview tenancies reflects a more stupifying than usual trek through the bramble of New York law, which provides, on the one hand, for rent regulation and, on the other, tax incentives to encourage residential unit construction--all to respond to a perceived and declared housing emergency in the City of New York.

There is little dispute among the parties as to the underlying facts, though there is sharp and deep division as to their significance. Bridgeview became landlord in 2000...

Construction on the buildings which now comprise Bridgeview began in late 1972 and was completed on February 9, 1973. The owner at the time applied for a certificate of eligibility for participation in the tax abatement program and... represented that the availability of a tax abatement under the § 421 program was the "sole inducement" for the completion of construction...

During this same period of time, the Legislature enacted the Emergency Tenant Protection Act of 1974 ("ETPA"), which applied to certain residential units housed in buildings constructed on or before January 1, 1974...

Following purchase by the petitioner, the odyssey in the bramble began in earnest... The common thread implied in the resolution was DHCR's core view that the Bridgeview complex had been subject to rent stabilization solely as a result of its participation in the RPTL § 421 and § 421-a tax abatement programs and that the buildings, generally, were no longer stabilized...

In a showing of how prickly the bramble, during the pendency of the four underlying rent overcharge proceedings at DHCR, the landlord brought nonpayment proceedings in Housing Court to recover rental arrears from Ragucci, O'Connor, Sebesto and two other tenants of Bridgeview... The nonpayment proceedings were later dismissed by Housing Court, in a decision of Judge Birnbaum filed under *Bridgeview Garden Apartments v. Ragucci,* Index No. 51576/03 (Housing Court, Richmond County Oct. 31, 2003)... finding [sic] prove its participation in the tax abatement program under § 421-a of the Real Property Tax Law. Also before Housing Court, as it ultimately was before and relied upon by the Rent Administrator in the four underlying rent overcharge proceedings here, was a second and earlier certificate of occupancy establishing that construction of the Bridgeview complex had been completed in February 1973 and not in 1978. Because it had been constructed prior to January 1, 1974, Housing Court ruled Bridgeview was subject to rent stabilization on that ground too. The court further found that the landlord also had not rehabilitated the premises to the level of "substantial rehabilitation" as defined by DHCR Operation Bulletin 95-2, and, therefore, there was no basis to find destabilization on that score either. With the landlord's failure to prove participation in the tax abatement program upon which its claim of destabilization rested, the court dismissed on the defense pled by the tenants.

Paralleling the Housing Court litigation, on July 7, 2003, in a proceeding, Docket RF-320004-RK, involving one of the first Bridgeview tenants to file a rent overcharge complaint with DHCR, Georgean Copollo, a Notice of Proceeding to Reconsider Previous Order was issued based, essentially, on the newly acknowledged fact that the complex had been constructed or substantially rehabilitated prior to January 1, 1974. As a result, on September 12, 2003, DHCR revisited its orders of January 17, 2003 and did an about face... The bottom line was that the complex was subject to rent stabilization and rent overcharges had occurred.

The landlord filed a petition for administrative review (PAR) in each proceeding... While giving lip service to the revised determination originally made in Copollo that Bridgeview was subject to stabilization because the landlord had failed to prove its participation in the §421-a tax abatement program,

the orders entered upon administrative review clearly rely on the alternate basis to sustain the Rent Administator's finding of rent stabilization, that is, based on construction of the complex prior to January 1, 1974. The review opinions specifically noted that "since there was a second basis for the regulation of the subject premises, the expiration of any alleged §421-a benefits would not result in deregulation"...

USE AND OCCUPANCY PENDENTE LITE

As previously indicated, this Court determined at the time of oral argument that the landlord was not entitled to use and occupancy...

While it is true that restitution or damages can be awarded to a petitioner, CPLR 7806 limits such awards to situations where the damages awarded are "incidental to the primary relief sought by petitioner." Use and occupancy, rent or any form of compensation to the landlord were not issues in the administrative proceeding at DHCR except to determine whether the landlord had received too much. The award of use and occupancy to the landlord in that context can hardly be viewed as incidental...

THE DECISION OF HOUSING COURT

...The question is whether the landlord gets another bite out of the apple and, if so, how big?

Bridgeview seeks a new and full bite, opposing any reliance by this Court on Judge Birnbaum's decision based on procedural gripes as well as substantively...

The last procedural scuffle the landlord ignites in its battle to stave off the application of issue preclusion adds more than a pinch of irony. Not only does the landlord want another bite out of the apple, Bridgeview also wants to bite the hand it asked Housing Court to extend. Relying upon *Sohn v. Calderon,* 78 N.Y.2d 755, 768, 579 N.Y.S.2d 940, 945 (1991), which holds that DHCR has primary and, in certain instances, exclusive, jurisdiction to entertain housing matters, the landlord argues that Housing Court should have deferred to DHCR on the rent overcharge issues...

Where Bridgeview's argument flounders is that it was Bridgeview which invoked the jurisdiction of Housing Court in this dispute. It was Bridgeview which did not move to strike or defer the counterclaims and affirmative defenses of rent overcharge that were asserted in the nonpayment proceedings in Housing Court. Plus, finally, and most importantly, Housing Court never decided the rent overcharge claims pending before it anyway.

In the very nonpayment petition filed by the landlord commencing the summary proceedings in Housing Court against five Bridgeview tenants, including three now before this Court, the landlord put in issue its contention that the Bridgeview complex was not subject to rent stabilization on the ground that the units in which those tenants resided had been vacancy decontrolled. Issue was immediately joined at the threshhold when the tenants controverted the allegation that their individual units were exempt from rent stabilization... At the close of evidence, Housing Court determined construction of the buildings was completed in 1973, that there had been no rehabilitation to any of the premises reaching the level of "substantial rehabilitation" in accord with DHCR Operation Bulletin 95-2 and that the landlord had failed to prove its participation in the § 421-a program. Aside from "substantial rehabilitation", which was not raised by the landlord either at DHCR or before this Court, the other issues raised, fully and fairly litigated and then decided by Housing Court are identical to those advanced by the landlord on each of the pending Article 78 proceedings...

Accordingly, the landlord does not get another bite out of the apple. This Court is bound to apply the doctrine of collateral estoppel on the showing made by the respondents. Bridgeview, therefore, is precluded from re-litigating in these proceedings Housing Court's adverse determinations that the entire Bridgeview complex is subject to rent stabilization under the Emergency Tenant Protection Act of 1974, that any improvements made by the landlord do not rise to the level of "substantial rehabilitation" and that Bridgeview did not participate in the § 421-a program...

In accord with the foregoing determination of the facts and law, this Court finds in each of the four Article 78 proceedings before it that the petitioner landlord has failed to establish that DHCR acted in an arbitrary, capricious or unreasonable manner or that any of its conclusions of law are in any way erroneous. As a result, each of the petitions is dismissed and the findings of rent overcharge by DHCR are sustained.