

**Matter of 245 Sullivan Ave. LLC v New York State  
Div. of Hous. & Community Renewal**

2024 NY Slip Op 34326(U)

October 8, 2024

Supreme Court, Kings County

Docket Number: Index No. 524550/2023

Judge: Richard Velasquez

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 8<sup>th</sup> day of October, 2024.

P R E S E N T:  
HON. RICHARD VELASQUEZ  
Justice.

-----X  
In the Matter of the Application of  
245 SULLIVAN AVENUE LLC,

Petitioner,

Index No.: 524550/2023

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

Decision and Order

NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL

Respondents.

-----X  
The following papers numbered 2 to 31 read on this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Cross-Motion/Order to Show Cause	
Affidavits (Affirmations) Annexed_____	2-19
Opposing Affidavits (Affirmations)_____	24-29
Reply Affidavits (Affirmations)_____	31

After having heard oral argument on April 10, 2024 and a review of the foregoing submissions, the Court finds as follows:

Petitioner moves for a judgment pursuant to Article 78 of the Civil Practice Law and Rules Section 7803(3), directing the New York State Division of Housing and Community Renewal (hereinafter "DHCR") to reverse, modify, or remand the instant proceeding to the DHCR for further processing. (MS#1). Respondents oppose the same.

### ARGUMENTS

This proceeding involves an application for a finding a substantial rehabilitation for a building located at 245 Sullivan Place Brooklyn NY 11225.

Petitioner contends DHCR arbitrarily and capriciously failed to properly determine that the subject premises was substantially deteriorated despite the overwhelming evidence; DHCR arbitrarily and capriciously failed to properly determine that 75% of the existing building wide systems were replaced at the subject premises; DHCR arbitrarily and capriciously failed to properly consider the evidence presented by the Petitioner to support a claim that the subject premises was substantially rehabilitated; DHCR arbitrarily and capriciously failed to credit proofs offered in support of the Petitioner's claims that the building systems of the subject premises were fully renovated and replaced; DHCR arbitrarily and capriciously diverged from its prior precedent; DHCR arbitrarily and capriciously has de facto created a new standard for evaluation of substantial rehabilitation which is being improperly applied retroactively; DHCR arbitrarily and capriciously failed to provide Petitioner due process; DHCR arbitrarily and capriciously determined the status of the units of the building; and the DHCR failed to properly consider and weigh the evidence presented to it.

Respondent contends the PAR Order denied the Owner's petition and affirmed the underlying RA Order that the Owner had not shown that renovation work conducted on a rent-stabilized building qualified it for a substantial rehabilitation exemption, and it was not arbitrary or capricious.

### ANALYSIS

CPLR § 217 provides in pertinent part; "Proceeding against body or officer; actions complaining about conduct that would constitute a union's breach of its duty of fair

representation; four months 1. Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or **officer must be commenced within four months after the determination** to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its ..." NY CPLR 217 (McKinney).

Pursuant to CPLR § 7803 "The only questions that may be raised in a proceeding under this article are: ... 3. whether a 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, including abuse of discretion as to the measure or mode of penalty or discipline imposed; ...". N.Y. C.P.L.R. 7803 (McKinney).

In the present case, the issue before this court is whether or not the determination by DHCR was affected by an error of law or was arbitrary and capricious or an abuse of discretion. The Court of Appeals explained the nature of the arbitrary and capricious standard in *Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 1974, 34 NY2d 222, 356 NYS2d 833, 313 NE2d 321: "**Arbitrary action is without sound basis in reason and is generally taken without regard to the facts.**" *Id.* at 231, 356 NYS2d at 839, 313 NE2d at 325. The question, said the Court, is whether the determination has a "rational basis." *Id.*

"Another aspect of the arbitrary and capricious test is that the reasonableness of the agency's determination must be judged solely on the grounds stated by the agency at the time of its determination. If those grounds are arbitrary and capricious, the court may not uphold the determination even if the agency proffers a proper, alternative ground in the Article 78 proceeding." *Scherbyn v. Wayne-Finger Lakes Bd. of Co-op. Educational*



*Services*, 1991, 77 NY2d 753, 758, 570 NYS2d 474, 478, 573 NE2d 562, 566. Similarly, the court is not permitted to consider facts or claims that were not presented at the agency level. *Fanelli v. New York City Conciliation and Appeals Bd.*, 1982, 90 AD2d 756, 757, 455 NYS2d 814, 816 (1st Dep't), affirmed for reasons stated below, 1983, 58 NY2d 952, 460 NYS2d 534, 447 NE2d 82. See also *Kelly v. Safir*, 2001, 96 NY2d 32, 39, 724 NYS2d 680, 684, 747 NE2d 1280, 1284 (review of administrative determination is limited to "facts and record adduced before the agency"). NY CPLR 7803 (McKinney).

In the present case, the record reflects the PAR Order denied the Owner's petition and affirmed the underlying RA Order finding that the Owner had not shown that renovation work conducted on a rent-stabilized building qualified it for a substantial rehabilitation exemption. The RA Order noted that a Notice of Commencement for this proceeding was not served on the current tenants, that the Owner had not established that the building was substandard or 80% vacant when the rehabilitation work commenced in accordance with DHCR Operational Bulletin 95-2, and that the Building remains subject to regulation. This information that RA based their order on was provided by the petitioner as a response to information request wherein the owners stated 11 units remained occupied during the renovations that does not meet the 80%. The PAR Order denied the Owner's petition and affirmed the underlying RA Order that the Owner had not shown that renovation work conducted on a rent-stabilized building qualified it for a substantial rehabilitation exemption. In the PAR order the Deputy Commissioner found that the Owner failed to show that 75% of required systems were replaced, and also determined that the Owner was not denied due process as all arguments and evidence submitted by the Owner was considered on PAR, that the DHCR was not obligated to help the Owner meet its burden of showing that the Subject Premises was substandard,

and, that the Owner was on notice of this requirement as per the requirements noted in OB 95-2.

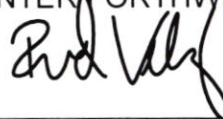
Here, petitioner fails to demonstrate that DHCR's determination was arbitrary and capricious or an abuse of discretion or unlawful. As previously stated above **"Arbitrary action is without sound basis in reason and is generally taken without regard to the facts."** *Id.* at 231, 356 NYS2d at 839, 313 NE2d at 325. The question, said the Court, is whether the determination has a "rational basis." *Id.* In the present case, it is clear from the record that DHCR rationally based their determination on facts, information requests and invoices submitted by the petitioner to DHCR which were contradictory with affidavits submitted and did not support their claim that the improvements qualify for a substantial rehabilitation exemption, nor was the 80% vacancy level met, among other issues, as such DHCR's upholding of the par was not arbitrary or capricious and does have a rational basis. In the PAR decision all arguments made by the petitioner were addressed. There is nothing contained in the record before this court that the PAR order was arbitrary, capricious or an abuse of discretion or unlawful.

Accordingly, Petitioner's Article 78 is hereby denied in its entirety, for the reasons stated above.

This constitutes the Decision/Order of the Court.

Date: October 8, 2024

ENTER FORTHWITH:



RICHARD VELASQUEZ, J.S.C.

**Hon. Richard Velasquez, JSC**

**OCT 08 2024**