To be argued by
RICHARD HARTZMAN
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NEW YORK SUPREME COURT
APPELLATE DIVISION—SECOND DEPARTMENT

114 FENIMORE ASSOCIATES,

Petitioner-Appellant,

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

against

94-06999

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent-Respondent.

Brief for Respondent-Respondent Division of Housing and Community Renewal

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BRIEF FOR RESPONDENT STATE OF NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL

PRELIMINARY STATEMENT

This is an appeal by petitioner-appellant from a judgment of the Supreme Court, Kings County (Kramer, J.) entered in the office of the Clerk of the County of Kings on June 21, 1994. The order dismissed appellant's ("owner") Article 78 petition challenging an order issued by respondent-respondent State of New York Division of Housing and Community Renewal ("DHCR"). The DHCR order denied appellant's application for major capital improvement rent increases with respect to the rent-stabilized tenants in the subject building.

STATEMENT OF QUESTIONS PRESENTED

Is a determination by the Deputy Commissioner of DHCR denying an application for major capital improvement rent increases for rent stabilized tenants, rationally based in the law and record where the evidence submitted to DHCR shows that the application was filed more than two years after completion of the installation?

The Court below answered in the affirmative.

STATEMENT OF THE NATURE OF THE CASE

The owner of the subject building challenges an order issued by DHCR which denied an application for major capital improvement ("MCI") rent increases for rent-stabilized tenants. The application concerned new windows, pointing/waterproofing, and a boiler/burner installation. It was denied because the application was not filed with the agency within two years of completion of the installation as required by the Rent Stabilization Code. The MCI application was granted for the rent-controlled tenants because the rent control regulations, unlike the Rent Stabilization Code, do not contain a limitation on time for filing MCI applications.

The sole issue raised is whether DHCR's conclusion as to the untimeliness of the MCI application with regard to the rent stabilized tenants was rationally based in the law and the record.

The owner claims that the application was filed in October 1988, and therefore was timely filed. However, this claim was never made during the administrative proceeding but only put forth for the first time in the Article 78 petition. In its PAR, the

owner stated that the application was originally filed in June 1989 and refiled in July 1989. Either of those two dates render the application untimely in its entirety.

It is settled law that claims and evidence not presented during administrative proceedings, but only presented for the first time on judicial review, may not be considered. Thus, the claim that the application was filed in October 1988 must be disregarded. But even if that claim were considered, not only is the reliability of the proferred evidence in question (the Court below found that "the 1988 application was apparently fabricated"), but the MCI application would still have been untimely for at least two of the three installations.

Other documentation in the administrative record also appears to have been doctored, with dates in later submitted documents having been changed with white-out fluid from those contained in earlier submitted documents.

Given the nature of the evidence submitted, the Commissioner was well within the province of his role as finder-of-fact in deciding what evidence should be given credit. The DHCR determination, as found by the Court below, is well grounded and entitled to judicial affirmance.

Indeed, given the frivolous nature of the underlying Article 78 proceeding, as well as this appeal, and the waste of time involved, the Court should consider imposing sanctions, or at a minimum, awarding costs and disbursements to DHCR.

COUNTER-STATEMENT OF THE FACTS

This proceeding involves the building located at 114 Fenimore Street, Brooklyn, New York. The owner applied for a major capital improvement rent increase for the installation of new windows, pointing/waterproofing, and a new boiler/burner. The administrative record shows that the installations were completed as follows: (1) pointing/waterproofing on July 7, 1986; (2) windows in 1986; and (3) boiler/burner prior to January 7, 1987.

The administrative record also shows, as conceded by the owner in its PAR (Return: B-1), that the MCI application was initially filed on June 19, 1989, and refiled on July 7, 1989. The owner stated in its PAR that:

> Application was originally filed on 6/19/89 and refiled on 7/7/89.

Since this was the owner's only allegation during the administrative proceeding as to the date of filing, and since both dates are more than two years after completion of the installations, the MCI rent increase application was denied by order of the Deputy Commissioner for Rent, issued on October 22, 1993.

ARGUMENT

THE COMMISSIONER'S ORDER RATIONALLY CONCLUDED THAT THE OWNER'S MCI APPLICATION WAS UNTIMELY.

The Rent Stabilization Law and Code permit rent increases in excess of standard rent increases only under limited circumstances, one of those being when there has been a major capital improvement

(hereinafter "MCI"). An owner is not entitled to an MCI rent increase unless it has been approved by DHCR. He must make an application to DHCR for such an increase in accordance with the requirements of Section 2522.4(a) of the Rent Stabilization Code.

Subdivision (8) of Section 2522.4(a) requires that an application for an MCI rent increase be filed within two years of the completion of the installation:[1]

> No increase pursuant to paragraphs (2) and (3) of this subdivision (a) shall be granted by the DHCR, unless an application is filed no later than 2 years after the completion of the installation or improvement unless the applicant can demonstrate that the application could not be made within 2 years due to delay, beyond the applicant's control, in obtaining required governmental approvals for which the applicant has applied within such 2 year period....

DHCR determinations denying MCI rent increases for failure to timely file an MCI application within the two year period have been upheld in Athineos v. State Div. of Hous. and Community Renewal, Index No. 1605/93, n.o.r., N.Y. Sup. Ct., Kings Co., Dowd, J., Jun. 21, 1993; and Alef Realty Co. v. State Div. of Hous. and Community Renewal, Index No. 29203/92, n.o.r., N.Y. Sup. Ct., N.Y. Co., Tom, J., Apr. 21, 1993. (Copies of those court decisions are annexed to Richard Hartzman Affirmation in Opposition, dated February 2, 1994, as Exhibits "A" and "B", respectively; part of the Court record on appeal.) The validity of the two year limitation itself was upheld

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[1] There is no time limitation in the rent control regulations for filing MCI rent increase applications. Therefore, in the case at bar, the MCI was granted for the rent controlled tenants in the subject building.

in Community Hous. Improvement Program, Inc. v. New York State Div. of Hous. and Community Renewal, N.Y.L.J., Apr. 28, 1993, at 21, col. 6 (N.Y. Sup. Ct., Queens Co., Golar, J.).

In the case at bar the administrative record shows that the installations were completed as follows: (1) pointing/waterproofing on July 7, 1986; (2) windows in 1986; and (3) boiler/burner prior to January 7, 1987. However, the administrative record also shows that, as conceded by the owner in its PAR (Return: B-1), that the MCI application was initially filed on June 19, 1989, and refiled on July 7, 1989. The owner stated in its PAR that:

> Application was originally filed on 6/19/89 and refiled on 7/7/89.

Since this was the owner's only allegation as to the date of filing, and since both dates are more than two years after completion of the installations, the MCI rent increase application was properly denied.

At the outset, before addressing the issues raised by the owner as to the completion dates for the three improvements, the allegation concerning the date of filing of the MCI application must be disposed of. The owner, for the first time in this Article 78 proceeding, alleged that the MCI application was filed on October 19, 1988, not June or July of 1989. The evidence which purportedly establishes this allegation - Exhibit "C" to the Article 78 Petition (a copy not of the MCI application but only of the boiler/burner contract with a DHCR date stamp) - is also submitted for the first time in this Article 78 proceeding.

The MCI rent increase application and supporting documents which are in the administrative record, including the boiler/burner contract (Return: A-1), do not have this October 1988 date stamp.

Whatever the truth of the allegations and evidence as to the date of filing, and whatever bearing those allegations and evidence may have had on the outcome of the administrative proceeding had they been presented during the proceeding, the fact remains that they were not submitted to DHCR for consideration during the administrative proceeding. A copy of the MCI application with the October 1988 date stamp was not even submitted with the Article 78 petition.[2] It is axiomatic that a court may not consider arguments or evidence not contained in the administrative record, but must determine whether an agency's determination is rational on the basis of the administrative record before the agency. As the Appellate Division, Second Department held in Klaus v. Joy, 85 A.D.2d 603, 444 N.Y.S.2d 69 (2nd Dept. 1981):

> In an article 78 proceeding, a specific objection to an order of the city rent agency cannot be considered by the court unless such objection has been first presented to the agency in the tenant's protest of the order (Administrative Code of the City of New York, Section YY51-9.0, subd. a, par. 2; Matter of La Russo v. McGoldrick, 232 App. Div. 720, 127 N.Y.S.2d 410). Petitioner's claims that (1), the order in question is violative of the equal protection clause of the United States Constitution and the New York State Constitu-

[2] The owner claimed in its reply papers in this litigation, that copies of the MCI rent increase application along with supporting papers, all having the October 19, 1988 date stamp, were attached to an earlier Article 78 petition seeking mandamus relief in the within administrative proceeding.

> tion; and (2) the District Rent Director was equitably estopped from issuing the order, appear nowhere in the petitioner's protest and therefore are not properly before this court.

Likewise the Appellate Division, First Department held in Fanelli v. Conciliation and Appeals Board, 58 N.Y.2d 952, 460 N.Y.S.2d 534 (1983), aff'g, 90 A.D.2d 756, 455 N.Y.S.2d 814 (1st Dept. 1982), rev'g, N.Y.L.J., January 11, 1982, p. 7, col. 3, (Sup. Ct., N.Y. Co., Blangiardo, J.), that:

> Likewise improper was Special Term's reliance upon factual matter which had not been adduced before the CAB. The function of the court upon an application for relief under CPLR Article 78 is to determine, upon the proof before the administrative agency whether the determination had a rational basis in the record or was arbitrary and capricious. Disposition of the proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered (See Matter of Levine v. New York State Liquor Authority, 23 N.Y. 2d 863, 298 N.Y.S. 2d 71, 245 N.E. 2d 804). The claim, advanced for the first time at Special Term that in December, 1980, a resolution had been passed to dissolve the corporate owner, was not made before the CAB. Accordingly, although we are in agreement that the issue is without legal effect here, the proof dehors the record should not have been considered by the Special Term.(455 N.Y.S. 2d at 816).

In Rozmae Realty v. State Division of Housing and Community Renewal, 160 A.D.2d 343, 553 N.Y.S.2d 738, 739 (1st Dept. 1990), lv. to appeal den., 76 N.Y.2d 712, 563 N.Y.S.2d 768, the Court held that, with regard to an issue raised for the first time during the court proceedings:

> This contention, however, was not raised in the administrative proceedings before DHCR, and may not be considered for the first time in the judicial review of those proceedings

> pursuant to CPLR Article 78 (Matter of Klaus v. Joy, 85 A.D.2d 603, 444 N.Y.S.2d 691).

See also, Plaza Realty Investors v. CAB, 110 A.D.2d 704, 487 N.Y.S.2d 607 (2nd Dept. 1985); Lynch v. New York City Employees Retirement System, 64 N.Y.2d 1103, 490 N.Y.S.2d 165 (1988); rev'g 103 A.D.2d 695, 478 N.Y.S.2d 620 (1st Dept. 1984); Yonkers Gardens Co. v. State Division of Housing, 51 N.Y.2d 966, 435 N.Y.S.2d 706 (1980). Mid-State Management Co. v. CAB, 66 N.Y.2d 1032, 499 N.Y.S.2d 398 (1985), aff'g 112 A.D.2d 72, 491 N.Y.S.2d 634 (1st Dept. 1985).

The owner in its reply papers in the Court below made two erroneous new arguments in an improper attempt to get the Court to consider the documents with the October 1988 date stamp: (1) that DHCR is required to consider in an administrative review proceeding ("PAR proceeding") exhibits attached to an Article 78 proceeding in the nature of mandamus to compel a determination of that PAR proceeding; and (2) that "DHCR is estopped from arguing that it does not consider court papers from a prior Article 78 proceeding that compelled them to make the PAR determination."

The owner offered no authority in support of such propositions. Indeed, there is none. With regard first to the estoppel argument, the argument does not even allege the minimal elements necessary to conform to the basic concept of estoppel; that there be reliance on some representation or action of one party to the detriment of the complaining party. The owner neither has nor can show any reliance on a representation or action of DHCR to its detriment. DHCR has nowhere made any representation that it would

consider the substantive claims made in the owner's prior mandamus proceeding. The action taken by DHCR, settlement of that mandamus Article 78, was limited to an agreement to determine the PAR within a specified period of time. There was no agreement to consider any particular substantive arguments or any documents attached to the mandamus petition. (See, the Stipulation of Settlement, attached to Richard Hartzman Supplemental Affirmation in Opposition, dated February 8, 1994, as Exhibit "A"; part of the Court record on appeal.) Indeed, as a general practice, in mandamus proceedings seeking to compel an administrative determination within a specific time period, DHCR's Litigation Unit does not transmit court papers to the Office of Rent Administration except for the final stipulation of settlement or court order. There having been no reliance by the owner on any representations or actions made by DHCR, estoppel cannot apply.

Moreover, it is well settled that estoppel does not lie against the State or its agencies. Hamptons Hospital & Medical Center v. Moore, 52 N.Y.2d 88, 436 N.Y.2d 239 (1981). That a party may have relied upon incorrect information from State agency personnel has been held not to be a basis for invoking the doctrine of estoppel. In Gavigan v. McCoy, 37 N.Y.2d 548, 375 N.Y.S.2d 858 (1975), the Court of Appeals said:

> It has often been held that estoppel does not lie against the State, a municipality or their agencies were, as here, the governmental body was exercising it statutory or regulatory duty, and this is true irrespective of any representation or opinion by any of that body's officers or employees.

In claiming that DHCR was required to consider the attachments to the mandamus Article 78 petition, the owner was in essence asserting that it can amend or supplement its Petition for Adminstrative Review without going through the procedures required by the agency. The situation is exactly analagous to a party bringing a mandamus proceeding against a judge of the Supreme Court to compel a decision in a matter before the judge; and then claiming that all substantive claims or evidence attached to the mandamus papers would automatically have to be considered by that judge in deciding the matter without those claims or evidence having been brought before the judge through normal procedures.

Just as there are procedures for amending or supplementing pleadings and for bringing evidence and arguments before a court of law, so there are procedures for doing the same before the decision makers in an administrative agency. The procedures for doing so before DHCR are set forth in the Rent Stabilization Code, and were spelled out in detail in Advisory Opinion 92-1, issued on May 20, 1992. (A copy of the Advisory Opinion is annexed to Richard Hartzman Supplemental Affirmation in Opposition, dated February 8, 1994, as Exhibit "B"; part of the Court record on appeal.)

The short of it is that the owner was required to make an application in writing to the Chief of the Bureau processing the PAR to supplement or amend its PAR "for good cause shown". There having been no such application there was no reason for DHCR to consider anything other than the materials submitted by the owner as part of its PAR, in which the owner stated that the MCI

application was filed in June 1989. The burden was on the owner to follow the proper procedures and seek leave to amend or supplement its PAR. An administrative agency is not required to consider substantive issues raised willy-nilly in an Article 78 proceeding which seeks mandamus relief to compel a deterimination and which was commenced well over a year after the PAR was filed with DHCR.

Were an administrative agency required to consider issues and evidence raised in a mandamus proceeding - which only concerns the demand to render a determination, not the substance of that determination - the administrative process would be significantly disrupted. In a large number of mandamus proceedings, the fact-finding phase of the administrative processing is already concluded. The fact-finding phase would have to be reopened, files from the mandamus proceeding sent to the processing unit, new notices given to other parties, and further answering and reply papers allowed if due process requirements were to be satisfied. This is not the simple kind of situation which appellant tried to make it appear in the Court below. The Court below properly rejected appellant's argument.

Turning to other issues, the Court should not consider the January 31, 1994 affidavit of Brenda Berkowitz, which was also submitted with appellant's reply papers in this litigation. It was a further attempt to have the lower Court consider evidence which is not in the administrative record. The controlling authority which precludes such consideration has been reviewed above.

Appellant erroneously argues that DHCR was obligated to search it records to ascertain the allegedly true filing date, relying upon a number of agency PAR decisions in other proceedings. Only one of those decisions states that DHCR has an obligation to search its own records, Adm. Rev. Dckt No. AJ-410421-RO, and that involves a situation in which a prior DHCR order granting an MCI rent increase was not taken into account in computing the lawful rent, a situation which is materially different than the one in the case at bar.

In the case at bar, the appellant makes the absurd argument that DHCR should have searched its records for an application with an earlier date stamp - October 1988 - than the one in its files, even though appellant made no claim during the administrative proceeding that it had filed the application in October 1988. DHCR cannot be held to any obligation to search records which were not even alleged to have existed. Furthermore, unlike the PAR decisions cited by appellant in which there would be a clear place in which DHCR could locate rent control records or the prior MCI rent increase order, in the case at bar there is no indication as to where DHCR might search for the alleged earlier application than in the very files in this proceeding. DHCR has no obligation to search records in situations like the one in the case at bar.

While the allegations as to the October 19, 1988 filing cannot be considered by the Court, it should be noted that if the issue were properly before the Court, the MCI application would nevertheless still have been untimely for at least two of the three

installations. The point/waterproofing was completed on July 7, 1986, and the windows were substantially completed in June 1986, these dates being more than two years before October 19, 1988.

As for the boiler/burner, it would be uncertain whether or not the application was timely were it permissible to consider October 19, 1988 as the date of filing. A Certificate of Operation was issued by the New York City Department of Environmental Protection on January 7, 1987. Since the installation would have been completed before the Certificate of Operation was issued and there are no records indicating exactly when the installation was physically completed,[3] it cannot be determined whether or not the application would have been considered timely had the question of the October 19, 1988 filing date been raised during the administrative proceeding.

Turning to the owner's claims as to the dates that the various improvements were completed, the administrative record shows that none of those claims bear up under scrutiny. A comparison of the completion dates for each improvement as found by DHCR and as alleged by the owner is as follows:

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[3] DHCR has consistently ruled that the date from which the two year period is to run is the date the physical installation is completed, not the date of governmental approvals. See, Alef Realty Co. v. State Div. of Hous. and Community Renewal, Index No. 29203/92, n.o.r., N.Y. Sup. Ct., N.Y. Co., Tom, J., Apr. 21, 1993 (annexed to Richard Hartzman Affirmation in Opposition, dated February 2, 1994, as Exhibit "B"). See also, DHCR Admin. Rev. Dckt. Nos. EG 430076-RO; EL 210007-RT et al and EL 630365-RO.

	DHCR	Owner
Windows	June 1986	Dec. 4, 1987
Pointing/Waterproofing	Jul. 7, 1986	Nov. 11, 1986
Boiler/Burner	Before Jan. 7, 1987	Dec. 15, 1987

Note that with regard to pointing/waterproofing, even were the owner's date accepted, the application was untimely, given the June 1989 filing date.

What the Commissioner's order and this brief makes manifest is that the evidence presented by the owner with regard to the dates of completion is riddled with inconsistencies and is based upon documentation of a questionable nature.

With regard to the window installation, the affidavit of Lawrence Bernstein annexed to the Article 78 petition alleges without any merit that DHCR improperly relied upon "one contract submitted and ignored an 'amended and restated contract' submitted." What Mr. Bernstein apparently is referring to is the "amended contract" annexed as Exhibit "E" to the Article 78 petition. This alleged contract from Thermal Profiles is not contained in the administrative record of this proceeding. This may be because it was not submitted to the proper DHCR office. The copy contained in the exhibit has a February 8, 1993 date stamp from the Brooklyn Rent Office of DHCR. As of that date the owner's PAR had been pending almost a year in DHCR's Central Office in Queens. The PAR was originally filed by the owner with the Queens office and any subsequent submissions with regard to the PAR should

likewise been submitted to Queens. Moreover, the copy of this allegedly amended contract has no indication of a docket number. The local Brooklyn Office would have had no way to know that this document bore any relation to a PAR pending in the Central Office in Queens.

Since, this document was not part of the administrative record, it was not considered in the determination; nor as pointed out above, can the court now consider it for the first time upon judicial review. Furthermore, given the 1993 date on the document, had it been properly submitted to the Central Office during the PAR proceeding, it would have been properly disregarded by the agency in rendering its PAR determination. It is well settled that the Commissioner is not required to consider information submitted for the first time during administrative review unless it could not reasonably have been offered at the Rent Administrator's level. Gramercy Park Company v. DHCR, 188 A.D.2d 371, 590 N.Y.S.2d 888 (1st Dept. 1992); 985 Fifth Ave, Inc. v. DHCR, 171 A.D.2d 572, 567 N.Y.S.2d 657 (1st Dept. 1991), lv. to app. den., 78 N.Y.2d 861, 576 N.Y.S.2d 219. There is no reason why this allegedly amended contract was not submitted to the Rent Administrator.

But even if the allegedly amended contract were considered, its very authenticity is suspect. If the contract had been amended on August 8, 1986, why was the earlier version dated November 6, 1985 submitted with the owner's application on July 7, 1989, almost three years after the alleged amendment? And why did the supplement to the July 7, 1989 application submitted by the owner

indicate that the contract was "executed" on "10[sic]/6/85"? Was the owner suffering from amnesia?

Furthermore, the contract provides for a "Deposit on signing this Agreement." The unamended contract provides for a deposit of $8,200, while the allegedly amended one provides for a deposit of $12,621. A review of the checks paid to Thermal Profile, the window contractor, shows that there was a check for $250.00 paid on November 6, 1985, the contract date of the unamended version, with a follow-up check of $8,000.00 paid on January 16, 1986, almost eight months before the contract was allegedly amended. (Return: A-1) This amounts to $8,250.00, basically the deposit agreed to in the unamended version. An additional payment of $3,080.00 was made on June 2, 1986, more than two months before the alleged amendment; and another payment of $1,541.00 was made on August 8, 1986, the date of the alleged amendment. This adds up to $12,871.00, i.e., $250.00 more than the deposit amount stated in the allegedly amended contract. It would appear that the $12,621 down payment stated in the allegedly amended contract left out the initial payment of $250.00 made on November 6, 1985, and was thus pulled out of a defective bag of tricks.

While on the subject of the suspicious nature of the documents relied upon by appellant, it should be noted that one of the documents which was submitted by appellant's predecessor with its PAR is apparently doctored. Attached to the PAR is an alleged photocopy of the back side of the MCI rent increase application, the RA-79 form. (Return: B-1) However, in comparing the photocopy

attached to the PAR with the original (Return: A-1), it is plain that the schedule of completion dates was altered on the copy submitted on PAR. For the windows the original gives a completion date of June 5, 1986; the PAR copy indicates December 4, 1987. For the pointing the original gives a completion date of July 7, 1986; the PAR copy indicates November 11, 1986. Only for the boiler/burner does the date remain unchanged, a date which would fall within the two year limitation for filing the MCI application.

It is also apparent from the copy of the document attached to the PAR that white-out fluid was used in the area of the completion dates. The dates upon which the appellant relies in this appeal are the same altered dates which are set forth in the doctored document.[4]

With regard to the date of completion for the window installation, the PAR determination focussed on inconsistencies and white-outs in the initial papers, not the photocopy attached to the PAR:

> The owner's MCI application contains an obvious discrepancy in the completion date for the window installation: the RA-79 lists the completion date as (June 5, 1986) however, the RA-79 Supplement I lists the completion date as December 4, 1987. In addition, an alteration with white correction fluid is evident on the RA-79 Supplement I, Side One, under column (A), in the three spaces provided for

[4] The copy of the application with the October 19, 1988 date stamp which was purportedly annexed to the mandamus the Article 78 petition, again has the altered completion dates with the appearance of the use of white-out fluid. However, the alteration in this version differs even from that in the version attached to the PAR. A copy of this third version is annexed to Richard Hartzman Supplemental Affirmation in Opposition, dated February 2, 1994, as Exhibit "C"; part of the Court record on appeal.

> "Date Contract Executed" (October 6, 1985), "Date Work Commenced" (December 8, 1986), and "Date Work Completed" (December 4, 1987). The RA-79 further reflects a chronological discrepancy: the completion date for the window installation (June 5, 1986) is listed as occurring six months prior to the commencement date (December 7, 1986). Moreover, various tenants dispute the dates offered by the owner on the application and offer an earlier completion date (January 1986) for the window installation.

Lawrence Bernstein's litigation affidavit falsely claims that the June 5, 1986 completion date referred to in the Commissioner's order "was never submitted by the owner or the registered managing agent". In fact, that date is the completion date entered on the owner's original MCI application. It is not the date which appears on the subsequent doctored documents.

The PAR order, after listing the dates and amounts for payments on the window installation, reached the following finding:

> It is clear from the above-noted payment schedule that the first monthly payment after the deposit had been paid occurred on June 2, 1986, which, according to the plain terms of the contract, was to be made upon substantial completion of the installation.

Clearly, there is ample evidence in the administrative record to support the Commissioner's determination that the window installation was completed in 1986. It is a well settled principle of administrative law that issues as to the credibility and weight of the evidence are for the administrative body to determine as the trier of fact. The duty of weighing the evidence, where either of two conflicting inferences may be drawn, rests solely upon the administrative body. A court may not weigh the evidence and

substitute its judgment for that of the administrative body where the evidence is conflicting and room for choice exists. In Stork Restaurant Inc. v. Boland, 282 N.Y. 256, 26 N.Y.S.2d 247, the Court of Appeals said:

> [w]here there is a conflict in the testimony produced *** where reasonable men might differ as to whether the testimony of one witness should be accepted or the testimony of another witness be rejected, where from the evidence either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests upon the [administrative agency].The court may not weigh the evidence or reject the choice made by [such agency] where the evidence is conflicting and room for choice exists.

In the case at bar, it was rational for the Commissioner to weigh the conflicting and inconsistent evidence as he did. The Commissioner's conclusion as the trier of fact is well grounded in the record and is entitled to affirmance.

With regard to the boiler/burner installation, the PAR order reached the following finding:

> With regard to the boiler/burner installation, the commencement date (March 16, 1986) and the completion date (December 15, 1987) on the RA-79 and RA-79 Supplement I forms, although consistent on its face, is inconsistent with the owner's supporting documentation, i.e., the payment schedule provided by the boiler/burner contract which required full payment by March 29, 1987 (at least nine months earlier than the completion date listed on either form) and the issuance date January 7, 1987 of the Certificate of Operation issued by the City of New York Department of Air Resources, a fairly accurate representation of the date the boiler/burner was completed and in actual operation.
>
> Furthermore, the Commissioner rejects as not credible the owner's contention that it took

> one year and nine months to complete the installation, especially considering the size of the subject building (42 units), and the fact that the premises would be without adequate heat and hot water for that lengthy time frame. Accordingly, the Commissioner also finds that the Administrator correctly denied the owner an MCI rent increase due to the owner's failure to file its application within two years of the completion of the boiler/burner installation.

Lawrence Friedman's litigation affidavit takes issue with the Commissioner's determination, in falsely and for the first time in this Article 78 proceeding alleging that the Certificate of Operation from the City's Department of Environmental Protection was a "temporary" operating certificate; and claiming that a final certificate "would have issued had not more work been necessary." To the contrary, there is nothing on the Certificate of Operation which would indicate that it is temporary. (Return: A-1) It was issued for the standard three year period for which regular operating certificates are issued. If this were a temporary certificate, it would not have been issued for the standard three year period.

In any case this allegation, being raised for the first time in this litigation cannot be considered by the Court. In Alef Realty, supra, the owner similarly claimed for the first time in the Article 78 proceeding that additional work had been needed to complete the boiler installation after the specified date. The Court correctly declined to consider the issue. (See, Exhibit "B" annexed to Richard Hartzman Affirmation in Opposition, dated February 2, 1984; part of the Court record on appeal.)

Finally, as to the pointing/waterproofing, the prior owner's original application plainly indicates July 7, 1986 as the date of completion. (Return: A-1) This date was altered to read 11/11/86 in the copy of the application submitted with the owner's PAR. As already noted, even with this later date, the application, based upon the June 1989 filing was still untimely.

In support of the owner's contention that the completion date was November 11, 1986, Lawrence Friedman's affidavit alleges that the "actual completion date [for the pointing/waterproofing] was Nov. 11, 1986, and a sworn signed affidavit of the prior owner was submitted to the DHCR with the original MCI increase application." The affidavit referred to is apparently the one signed by Adam Adem on May 31 with no year of execution appearing on the affidavit. (Return: A-1) This affidavit being inconsistent with the completion date contained in the application form itself, and there being a doctored document using the later date, the Commissioner acted well within his authority as the trier of fact in determining the completion date as he did.

It is well settled that where there is a rational basis in the record to support an administrative determination, it should not be disturbed. Thus, the court cannot substitute its judgment for that of the administrative agency. See, Matter of Fresh Meadows Associates v. New York City Conciliation and Appeals Board, 88 Misc. 2d 1003, 390 N.Y.S.2d 351 (Sup. Ct., N.Y.Co., 1976, aff'd 55 A.D.2d 559, 390 N.Y.S.2d 69 (1st Dept. 1976), aff'd, 42 N.Y.2d 925, 397 N.Y.S. 2d 1007 (1977); Matter of Pell v. Board of Education, 34

N.Y.2d 222, 230, 356 N.Y.S.2d 833 (1974); Colton v. Berman, 21 N.Y.2d 322, 287 N.Y.S.2d 647 (1967).

As the determination herein has ample ground in the evidence of record, it is entitled to judicial affirmance.

CONCLUSION

For the foregoing reasons, the Court below properly dismissed the Article 78 petition in its entirety. This Court should affirm the judgment of the Court below, consider the imposition of sanctions, and award costs and disbursements for this appeal to DHCR.

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