M E M O R A N D U M

SUPREME COURT: QUEENS COUNTY
IA PART: 19

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In the Matter of the Application of HERMAN WEINGORD, et al.,

INDEX NO. 16751/05

BY: SATTERFIELD, J.

Petitioners,

DATED: November 18, 2005

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, etc.,

Respondent.

Re: 143-50 Hoover Avenue
Briarwood, New York 11435

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In this Article 78 proceeding, petitioners Herman Weingord and 143-50 Hoover Owners Corp. seek a judgment vacating the decision and order of respondent New York State Division of Housing and Community Renewal, Office of Rent Administration (DHCR), dated June 2, 2005, which denied Weingord's petition for administrative review and upheld a rent reduction based upon a failure to maintain services.

Petitioner 143-50 Hoover Owners Corp. is the owner and landlord of an apartment building located at 143-50 Hoover Avenue, Briarwood, New York. Petitioner Herman Weingord is the proprietary lessee and owner of the shares of stock allocated to

apartment 107 in the subject building. Rosalyn Stark is the rent-stabilized tenant in apartment 107. Mrs. Stark filed an application with the DHCR on July 6, 2004, for a rent reduction based upon a decrease in building-wide services. Mrs. Stark asserted that she was not provided with a second key to the lobby doors when the locks were changed, and that the owner sought to charge her $250.00 for a second key. Mrs. Stark stated that when she moved into the building she and her husband were each provided with a set of keys, and that she needed a second key so that her daughter could have access to the building, in the event that she was unable to get out of bed and let her in.

Mr. Weingord stated in an answer that the Rent Stabilization Code did not require that a tenant be given more than one building key, and did not require that a tenant be provided with an extra key for a non-resident. He also stated that extra keys were neither sold nor given to anyone. Mr. Weingord stated that when Mrs. Stark and her husband moved into the building 35 years ago they were each given a building key, and that no extra keys were provided. In 1999 the building installed new locks on the building entrance doors and issued new Mul-T-Lock keys for these doors. One key opened all of these doors. Mr. Weingord stated that as Mrs. Stark's husband died prior to 1999, she was issued one new key to the entrance doors. It was further stated that the building corporation's board of directors adopted a house rule which provides that building keys

are issued to residents for their use, and that extra or spare keys are not issued. It was asserted that the installation of the new locks and the issuance of keys in this manner served the purpose of improving building security. It was also asserted that a non-resident such as Mrs. Stark's daughter could gain access to the building by contacting her mother's neighbors; that her daughter could contact the members of the board of directors using the building's intercom; and that management or building employees could also provide the daughter with access to the building.

The DHCR sent a notice to Mr. Weingord on September 13, 2004 stating that "[t]his is to inform you that a tenant is entitled to a minimum of two keys per apartment. Therefore, please confirm that you have given an additional key to the subject tenant." Mr. Weingord stated in a response that Mrs. Stark is the sole occupant of the apartment, that she had been provided with two keys to the apartment door lock, and that there was no requirement that she be given two keys to the entrance door lock and, therefore, she was issued one key. He asserted that he did not have an additional building entrance key to give to her because the apartment corporation which owns and manages the building only issued one key to him for access. He further stated that Mrs. Stark was demanding an additional building entrance key for a non-resident and that this was contrary to the building owner's long-standing policy to further building

security. Mr. Weingord, therefore, asserted that he was in full compliance with all of the DHCR's requirements.

The Rent Administrator, in a decision and order dated October 26, 2004, granted Mrs. Stark's application for a rent reduction based upon the failure to maintain services, stating that "[w]hile there is a common interest in maintaining security, reasonable access to the apartment is essential. A tenant is entitled to a minimum of 2 (two) keys per apartment. The owner does not have a right to restrict access and the result of an insufficient number of keys to enter the building is a restriction of access." Mr. Weingord was directed to restore the services within 30 days of the date of the issuance of the order.

Mr. Weingord filed a petition for administrative review (PAR) with the DHCR on November 22, 2004, in which he asserted that Section 2520.6(r) of the Rent Stabilization Code does not state that two entrance keys are a required service, and that the failure to provide an extra key is a de minimis condition and, therefore, does not warrant a reduction in rent. Mrs. Stark filed an answer in opposition to the PAR response on December 24, 2004, in which she stated that she lived in the building for more than 46 years; that she chose not to purchase her apartment and remained a rent- stabilized tenant; that she is 76 years old and is disabled; that she had requested another key to the entrance door; that many other residents had more than one key to the entrance door; and that providing her with another key would not

compromise the building's security. She also stated that she had a two-bedroom apartment and that on occasion her daughter slept over in order to assist her, and that in the event of an emergency her daughter should not be required to track down unknown trustees in order to gain access to the building. Finally, Mrs. Stark asserted that the denial of an extra key was a smokescreen and bordered on harassment, and that providing her with an extra key would make her life easier, without compromising the building's security.

Paul Roldan, the Deputy Commissioner of the DHCR, issued a decision and order dated June 2, 2005, in which he denied the PAR and upheld the finding of a reduction in essential services and the imposition of a rent reduction. The Deputy Commissioner rejected the owner's claim that the failure to provide Mrs. Stark with a second key for the building entrance door was a de minimis condition, stating that the agency's November 10, 1995 memorandum concerning de minimis conditions has been codified in Sections 2523.4(e) and (f) of the Rent Stabilization Code, and that the schedule of building-wide conditions does not list the failure to provide a second entrance door key as a de minimis condition. He further stated that although certain other conditions may be de minimis in nature, such conditions "are those which have a minimal impact on tenants, are not hazards to health, do not affect the use and enjoyment of the premises and may exist despite regular

maintenance of services. In this instance, agency opinion letters and court decisions have held that a tenant is entitled to a minimum of two keys and one for each occupant of permissible age (10 years old). Thus, the failure to provide the tenant with two keys cannot be considered de minimis. Additionally, Section 2523.4(f)(1) of the Code holds, where more than four years have passed between the date the change occurred and the date of the complaint, there is a presumption that the condition is de minimis. Here, however, the file is silent as to the exact date the door lock was changed and, therefore, no presumption has been created. (The presumption created by Section 2523.4(f)(1) is a rebuttable presumption)." The Commissioner, therefore, found that the tenant was entitled to an additional key and that the Rent Administrator was entitled to reduce the rent.

Petitioners Herman Weingord and 143-50 Hoover Owners Corp. thereafter commenced the within Article 78 petition and seek a judgment annulling the DHCR's decision and order of June 2, 2005 on the grounds that it is not supported by the facts or the law and, therefore, is arbitrary and capricious. Petitioners assert that the DHCR's finding that providing two keys per apartment is a required service is erroneous. Petitioners assert that each resident is provided with one key and, therefore, as Mrs. Stark is the sole occupant of her apartment, the owner was not required to provide her with more than one key to the entrance door. It is also asserted that in order to have a

successful security program in the subject building, strict adherence to the key policy is necessary and extra keys are not provided to any resident. Petitioners further assert that the DHCR's finding that the failure to provide more than one key per apartment is not de minimis, is erroneous. It is asserted that Section 2523.4 of the Rent Stabilization Code provides that " changes in door-locking devices, where security or access is not otherwise compromised" constitutes a de minimis condition which does not rise to the level of a failure to maintain a required service. In addition, it is asserted that as the PAR alleged that the door locks were changed in 1998, and as no complaint was thereafter filed within four years, the Commissioner should have applied the presumption that the condition complained of was de minimis, pursuant to Section 2523.4(f) of the Rent Stabilization Code.

Respondent DHCR, in opposition, asserts that its decision and order of June 2, 2005 is neither arbitrary nor capricious and has a reasonable basis in the record and the law and, therefore, should be upheld.

It is well settled that the court's power to review an administrative action is limited to whether the determination was warranted in the record, has a reasonable basis in law and is neither arbitrary nor capricious. (Matter of Colton v Berman, 21 NY2d 322 [1967]; Matter of 36-08 Queens Realty v New York State Div. of Hous. and Community Renewal, 222 AD2d 440 [1995].) In

the case at bar, the court finds that the DHCR's decision and order of June 2, 2005, which denied the owner's PAR, and upheld the finding of a decrease in services and the imposition of a rent reduction, has a reasonable basis in the law and record and is neither arbitrary nor capricious, nor an abuse of discretion and, therefore, will be upheld.

It is well settled that "it is for the [DHCR] to determine what constitutes a required service and whether that service has been maintained." (Matter of Sherman v Commissioner, New York State Div. of Hous. and Community Renewal, 210 AD2d 486, 487 [1994], quoting Matter of Rubin v Eimicke, 150 AD2d 697, 698 [1989]; see also, Clarendon Mgmt. Corp. v N.Y. State Div. of Hous. & Cmty. Renewal, 271 AD2d 688 [2000]; Matter of Oriental Blvd. Co. v New York City Conciliation and Appeals Bd., 92 AD2d 770 [1983], affirmed 60 NY2d 633 [1983]; Matter of Fresh Meadows Associates v Conciliation and Appeals Board, 88 Misc 2d 1003 [1976], affirmed 55 AD2d 559[1976], affirmed 42 NY2d 927 [1977].)

Section 2520.6(f) of the Rent Stabilization Code defines required services as including a service that was maintained on the base date or that was provided by the owner thereafter, and includes ancillary services. The DHCR issued an inter-office memorandum dated November 10, 1995, pertaining to the processing of service complaints, which stated that some conditions complained of may be de minimis in nature and do not constitute a decrease in services. These conditions were listed

by the DHCR. On December 20, 2000, the Rent Stabilization Code was amended in order to incorporate the conditions cited as de minimis in the DHCR's memorandum. Section 2523.4(e) of the Rent Stabilization Code now details the service deficiencies which may, under some circumstances, be considered de minimis. Included as a de minimis condition is: "Building entrance door-removal of canopy over unlocked door leading to vestibule; changes in door-locking devices, where security or access is not otherwise compromised" (9 NYCCR 2523.4[e][2]). This section only pertains to a change in the type of a door-locking device, and does not include a failure to provide duplicate keys for a building's main entrance door lock. The court, therefore, finds that the Commissioner properly determined that the failure to provide Mrs. Stark with a duplicate key for the building's main entrance door lock was not a de minimis condition.

The court further finds that in determining whether a de minimis condition existed, the Commissioner properly determined that the presumption contained in 9 NYCRR 2523.4(f) was not applicable here. Mrs. Stark alleged in her complaint that the door locks were changed in 1999. Petitioner Weingord in his answer to the tenant's complaint asserted that the locks were changed in 1999. In his PAR he stated that the tenant's request for a second key was denied "as building wide policy since 1998 has been that only building residents are issued building entrance keys. This is for security purposes." He also asserted

that this was a "building wide condition." Mr. Weingord, however, did not state whether this "policy" was instituted before or after the entrance door locks were changed, and presented no evidence as to the date the door locks were changed.

The court finds that the DHCR's decision and order of June 2, 2005 is consistent with prior agency decisions. It is well settled that the interpretation given by the agency to a regulation that promulgated it and is responsible for its administration, is entitled to deference, where as here, that interpretation is not irrational or unreasonable. (See Gaines v New York State Div. of Hous. & Community Rewewal, 90 NY2d 545, 549 [1997]; Matter of Versailles Realty Co. v New York State Div. of Hous. & Community Renewal, 76 NY2d 325 [1990]; Salvati v Eimicke, 72 NY2d 784, 791 [1988]; Albe Realty Co. v Division of Hous. & Community Renewal, 197 AD2d 618 [1993]). Here, the DHCR stated in its decision that agency opinion letters and court decisions have held that a tenant is entitled to a duplicate key, in addition to a key for each apartment occupant 10 years of age or older, and that the failure to provide such keys constitutes a decrease in essential services. The DHCR has submitted three agency opinions –- Matter of W. 122nd Street Associates LP (issued on December 24, 2004), Matter of Jerwin Property Corp. (issued on April 16, 2003) and Matter of 153 Avenue A Associates, L.P. (issued on August 17, 2001)–in which it determined that

where the owner previously provided the tenant with more than one key to the building's entrance door, the owner's failure to provide more than one key, after the entrance door lock was changed, constituted a reduction in essential services, that this was not de minimis, and that a rent reduction was warranted. The DHCR also submitted an agency opinion entitled Matter of Sallie Raynor (issued February 14, 2003) in which the Commissioner upheld a determination that the owner had provided the tenant with a sufficient number of duplicate front entry keys (two per apartment, plus additional keys for additional legal residents, plus other additional keys under "special circumstances"), and found that the ability of the tenants to duplicate keys is not a base-date service.

Petitioner's reliance on Matter of 153 Avenue A Associates, L.P. is misplaced. The Commissioner therein noted that an owner, for security reasons, could set limits on the number of duplicate keys provided to each tenant and could require the tenant to provide reasonable information as to the purpose of each additional key requested. However, the Commissioner determined that the owner had failed to establish a that would justify limiting to each tenant a single copy of the main entrance door key. Therefore, the DHCR required the owner to provide the complaining tenant with more than one key for the main entry door to the building. Here, the evidence presented to the agency established that Mrs. Stark resided in the subject apartment since 1958 and that she and her husband were each

provided with keys to the building's entrance doors. Petitioners failed to present any evidence in the proceedings before the DHCR which established that the number of keys provided to Mrs. Stark were limited to the number of occupants at the time she took occupancy, and failed to establish a compelling security issue that would justify a limit of a single key to each tenant. Petitioners claim that if Mrs. Stark was provided with an extra key, all of the tenants would have to be given an extra key and that this would compromise the building's security, and that non-residents would gain access to the building. This argument was rejected by the Rent Administrator and the Commissioner, and will not be revisited here. The court further finds that petitioners' reliance on the agency's opinion in Matter of Sallie Raynor is misplaced. In that proceeding, the DHCR found that the tenant was supplied with a sufficient number of duplicate keys and, thus, was not entitled to an unlimited number of duplicate keys. In the proceeding brought by Mrs. Stark, it is undisputed that the owner failed to provide her with more than one key to the building's entrance door, after the lock was changed.

In view of the foregoing, petitioners' request to vacate the DHCR's decision and order of June 2, 2005 is denied, and the petition is dismissed.

Settle judgment.

J.S.C.