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

PRESENT: HON. LOUISE GRUNER GANS PART 61

*Justice*

Vendone

Index Commissioner

of DHCR Art 78

INDEX NO. 114071-00

MOTION DATE

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~~ petition is

determined and dismissed for

reasons set forth on the

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/18/01

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

HON. LOUISE GRUNER GANS

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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In the Matter of the Application of
NINO VENDOME,

Index No.
114071/00

Petitioner,

-against-

Motion No.
001

JOSEPH B. LYNCH, as
Commissioner of the New York State
Division of Housing and Community Renewal,
and BLOSSOM ESAINKO,

Respondents,

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

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**GANS, LOUISE GRUNER, J.:**

Petitioner Nino Vendome seeks an order declaring that the respondent New York State Division of Housing and Community Renewal's ("DHCR") determination dated April 25, 2000, denying the petitioner-owner's Petition for Administrative Review ("PAR"), was arbitrary, capricious, and an abuse of discretion. The Order of respondent DHCR determined that unit 2 was a rent controlled apartment, and set the rent at $75.00 per month. For the reasons stated below, the petition is denied and the proceeding is dismissed.

Nino Vendome ("petitioner") is the owner and landlord of the building located at 322 Spring Street, New York, New York ("the building"). The housing accommodation involved in this Article 78 proceeding is unit 2 ("unit 2"), a complete loft floor located

on the third floor of the building, allegedly used historically for commercial purposes.

**History**

On April 24, 1986 the tenant of unit 2, Blossom Esainko ("tenant") filed a rent overcharge complaint with the DHCR. She has lived in unit 2 since 1966. Petitioner was sent a copy of the complaint and given an opportunity to respond, which he did, claiming that the building had been decontrolled and was no longer subject to regulation pursuant to an Order issued by DHCR on December 22, 1961 ("December 22, 1961 Order").

DHCR then requested a copy of the December 22, 1961 Order from petitioner, which petitioner submitted on August 1, 1986. Based on the petitioner's submission, the Rent Administrator ("RA") issued an Order on October 23, 1986 denying the tenant's complaint. Subsequently, the tenant, by her attorney, submitted a request for reconsideration, noting that the December 22, 1961 Order, which exempted unit 2, due to a change from non-housing to housing use, pertained to another unit located on the top floor of the building, not to the unit occupied by the tenant. On May 11, 1987 on the tenant's request DHCR reopened the proceeding, and requested evidence with respect to the apartment occupied by the tenant Ms. Esainko.

The tenant thereafter submitted additional evidence regarding the building, arguing that Department of Buildings

records showed that the third floor apartment (unit 2) occupied by Ms. Esainko had always been residential in character. She annexed copies of the records on file showing that the building was once occupied as a warehouse, but was converted to residential use in 1895; that the second, third and fourth floors contained one family per floor; that in 1920, only the second floor was converted to a private office; and that in 1947, an opening was made at the first floor into the building next door. No other records were on file.

On November 24, 1986 while the request for reconsideration was pending the tenant had filed a timely PAR challenging the RA's October 23, 1986 Order denying her rent overcharge complaint. However based on the RA's reopening of the proceeding based on the tenant's allegations regarding the applicability of the December 22, 1961 Order to her apartment, on September 13, 1990, the Commissioner issued an Order remanding the tenant's PAR for further consideration.

Thereafter, by a Notice dated October 11, 1990 the parties asked to submit evidence on unit 2, and whether the December 22, 1961 Order related to another apartment in the premises.

On November 9, 1990, the tenant's attorney submitted an answer reiterating that the December 22, 1961 Order relied on by the RA covered the top floor apartment, not the apartment occupied by the tenant on the third floor.

After several requests for extensions, petitioner was given a final opportunity to submit evidence. Petitioner responded, claiming that the building was exempt from regulation, and attached an affidavit from the previous owner describing the commercial use of the building during the period 1953 to 1986. Petitioner also based his claim of decontrol on the fact that there was an alleged commercial use of Ms. Esainko's unit 2, because the tenant entered into a lease for its use as an art studio, and because from 1953 until 1960, the third floor was used as a locker room for a manufacturer. Further, while conceding that the December 22, 1961 Order only mentioned the top floor, petitioner argued that the Order should be read to apply to the rest of the building since the Order refers to a "Housing Accommodation", and as defined in the City Rent Control Law Section Y51-3.0e(1)(a), a "Housing Accommodation" refers to the entire building or structure.

In response, the tenant argued that the building was not used commercially on February 1, 1947 as required by the statute, and submitted as proof another copy of the Building Department plans previously submitted.

After additional requests by DHCR for evidence, petitioner countered the tenant's submission, claiming that the tenant's assertion regarding the use of the building in 1947 was "purely speculative," again arguing its commercial use.

On July 29, 1998, the RA issued an Order revoking the October 23, 1986 Order, which had denied tenant's over charge complaint because her apartment was not rent controlled. The July 29, 1998 order noted that the issue of status and maximum rent would be determined in another proceeding and requested the submission of further evidence.

Petitioner thereafter argued that the tenant's lease indicated that unit 2 was leased for the purpose of an art studio. The tenant responded by enclosing a copy of her original September 4, 1963 lease, arguing that it was clear that she both lived and painted in the apartment, and that no one disputed her residential occupancy. She also submitted copies of rent receipts from the time of the initial lease, when she was paying $75.00 per month.

On August 17, 1998, the parties were asked to submit evidence/information regarding the rental history of the subject unit. Thereafter, on July 13, 1999 the agency issued a Notice of Proposed Order which would establish the rent at $75.00 per month as of the initial date of occupancy. On September 17, 1999 the RA issued an Order finding that the premises were residential as of February 1, 1947, and setting the maximum rent of $75 a month as of the initial date of occupancy.

Petitioner filed a PAR on September 2, 1998 challenging the RA's July 29, 1999 Order, again arguing that the building was not

subject to rent regulation due to its commercial usage since 1953. The tenant was notified of petitioner's filing, and given the opportunity to respond. On April 25, 2000, the Commissioner denied petitioner's PAR.

On October 22, 1999, petitioner had also filed a PAR against the RA's Order of September 17, 1999, again arguing that the building was not subject to control, and that the December 22, 1961 Order should have operated to decontrol the entire building.

The tenant was also notified of this filing, and she responded on January 6, 2000, stating in part that the commercial enterprises in the building were never legal after the building was converted from a warehouse to residential usage, and that the residential premises were not decontrolled under the for State Rent and Eviction Regulation Section 9 Subdivision 4.

After affording the owner an opportunity for comment, the Commissioner issued the April 25, 2000 Opinion and Order. The Commissioner found that the petitioner had failed to establish that the building was used for a non-housing use prior to February 1, 1947 and had failed to satisfy his burden of establishing that the building was decontrolled. The Buildings Department records showed that the subject premises had a housing use prior to February 1, 1947, and as shown by a 1960 Building

Department Notice of Violation, any non-housing use was illegal. The Commissioner ruled that restoration to residential usage did not constitute a creation of a new residential unit. This order is the subject of the present Article 78 proceeding.

**Discussion**

The functions of judicial review in an Article 78 proceeding is not to weigh the facts and merits de novo and substitute the court's judgment for that of the agency's determination, but to decide if the determination can be supported on any reasonable basis. *Matter of Clancey-Cullen Storage Co., Inc. v Board of Elections in the City of New York*, 98 AD2d 635, 637 (1st Dept 1983).

In its first argument, the petitioner contends that in making its determination of April 25, 2000, DHCR erred in finding that the tenant of unit 2 is entitled to protection under the Rent Control Laws, and in establishing the maximum legal rent for the subject apartment in conformance therewith. In *Lord Management Corp. v Weaver*, 11 NY2d 180 (1962), the Court of Appeals determined that premises which were residential prior to February 1, 1947, and which were leased for a non-housing use (physician's office) for the period October 1, 1948 to January 31, 1957, created no new housing accommodation in the sense contemplated by the statute, but merely had the effect of restoring the space to its original status, and so found the

premises were not decontrolled under the State Rent and Evictions Regulations Section 9, subdivision 4. *See, Eckert v McGoldrick*, 284 AD 810 (2nd Dept 1954).

In order to prevent landlords from executing spurious commercial leases to avoid the rent control laws applicable to residential accommodations, Section 13 of the Rent and Eviction Regulations was promulgated. Under said section, apartments leased after May 1, 1955 remained subject to control unless and until a rent agency order was issued exempting it from control during a period of occupancy by the particular tenant who had entered into a bona fide commercial lease. *Sipal Realty Corporation*, 8 AD2d 355, *mod on other grounds* 8 NY 2d 319. In *Sipal*, the Court of Appeals found that the predecessor provision to Section 2100.11, Section 13 of the Rent and Eviction Regulation applies, even to residential space actually converted to commercial use, and residential space continues to be subject to jurisdiction until an exemption is issued. Thus in the instant case, petitioner's reliance on the fact that the unit was used for a period of time as a locker room is not persuasive, and does not remove the unit from regulation. Moreover, the only Order issued by the rent agency, the December 22, 1961 Order under docket no. R40110, was found not applicable to unit 2, since the Order covered another unit in the building. Accordingly, unit 2 was always residential, and no order

decontrolling it was ever issued. Petitioner's argument that the December 22, 1961 Order decontrolled the entire building is not persuasive. The Order is clear that it applies solely to another unit, and petitioner fails to submit any other evidence to establish that the December 22, 1961 Order decontrolled the entire building.

The Courts have repeatedly held that it is the function of the Rent Commissioner, as the trier of facts, to determine in the first instance whether the dual uses of a mixed use apartment are severable, and if not, which use is predominant. *Confederated Properties v Nosek*, 2 AD2d 383 (1st Dept 1954); *Arbeitman v Goldman*, 10 AD2d 874 (2nd Dept 1960). Further, in *Phillips v Weaver* (7 AD2d 927 [2nd Dept 1959]), the court held that the trier of fact is not bound by the terms of the lease. Therefore, in the instant case, even though the tenant had signed a loft lease, DHCR was correct in its determination since it was supported by a rational basis in the law and record.

Petitioner's argument that there is a four-year Statute of Limitations, and his reference to CPLR 213-a as amended by the Rent Regulation Reform Act, also fails in the instant case. DHCR's determination, that the regulations cited apply only to apartments regulated under the Rent Stabilization Laws and not to apartments under the Rent Control Laws, is fully supported by the record and the law.

It is well settled that the Courts function is accomplished when it finds the agency's determination is supported by a rational basis in the record. *Mid-State Management Corp. v CAB*, 112 AD2d 72 (1st Dept 1985), *aff'd* 66 NY2d 1032 (1985).

The record in the instant case clearly shows that the Commissioner's determination that the subject unit is subject to the Local Emergency Housing Rent Control Law was in all aspects rational, and fully supported by the record and the law.

Petitioner's request for legal fees is denied since he has not prevailed.

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied, and the proceeding is dismissed.

Dated: 3/18/01

ENTER:

J.S.C.
HON. LOUISE GRUNER GANS