

**Matter of Shemiran Co. v Division of Housing and
Community Renewal**

2002 NY Slip Op 30075(U)

January 3, 2002

Supreme Court, New York County

Docket Number: 0114937/2001

Judge: Paula J. Omansky

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

PRESENT: **PAULA J. OMANSKY,**

Justice

PART 47

INDEX NO.

114937/01

MOTION DATE

11/7/01

MOTION SEQ. NO.

001

MOTION CAL. NO.

169

Shemiran Co

-v-
Division of Housing and Community
Renewal of the State of New York

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

SCANNED

JAN 15 2002

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*Motion decided in accordance with
accompanying memorandum.*

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: _____

1/3/02

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

-X

In the Matter of the Application of
SHEMIRAN CO.

Petitioner

Index No. 114937/01
ORDER AND JUDGMENT

For a Judgment under Article 78
of the Civil Practice Law & Rules,

-against-

DIVISION OF HOUSING AND COMMUNITY RENEWAL
OF THE STATE OF NEW YORK,

Respondent.

-X

PAULA J. OMANSKY, J.:

Petitioner landlord challenges a determination of the respondent DIVISION OF HOUSING AND COMMUNITY RENEWAL OF THE STATE OF NEW YORK (DHCR) which awarded treble damages for willful overcharge and for excess security.

FACTS

In February and March of 1996 when the subject apartment was vacant, the landlord claims to have performed extensive renovations including sheetrocking of the kitchen, the installation of a new kitchen floor and subfloor, all new cabinetry, a new sink and piping, a new electrical outlet, a new light fixture, new bathroom fixtures and painting and plastering, which allegedly cost \$13,500. In response to the tenant's overcharge complaint, the

landlord submitted documentation to substantiate the alleged improvements to the premises. The tenant, Jose Lopez, claimed that the majority of the alleged improvements had not been made, and submitted photographs to the Rent Administrator to document his position. In response to the owner's submission of invoices and cancelled checks to Fung Shing Construction Company (Fung Shing), the tenant pointed out that the cancelled checks totalled only \$11,500, and that Fung Shing had been dissolved in 1994, prior to the alleged performance of the work.

On January 20, 1999, The Rent Administrator (RA) issued an order finding an overcharge and awarded treble damages; specifically, the RA found that the landlord was entitled to an increase based upon all alleged improvements except for painting and plastering, which are considered repairs, not improvements, and that the dissolution of Fung Shing was irrelevant. The RA imposed treble damages for the overcharge. Both the landlord and the owner filed PARs. In its PAR, the petitioner argued that the overcharge was not willful, and that it should not be penalized for an obvious mistake, i.e., the inclusion of painting and plastering in the claim for an increase based upon improvements.

On June 5, 2001, the Commissioner granted the tenant's PAR and denied the petitioner's. The Commissioner found that the owner had overcharged the tenant in the amount of \$40,239.88. The Commissioner found that based upon photos and other evidence submitted, that no sub-flooring and saddle had been installed in the kitchen as claimed; that no new electrical outlet for the stove

had been installed; that no new light fixture was installed in the kitchen; that no new medicine cabinet, toilet or flushometer had been installed in the bathroom; that no new oak flooring had been installed throughout the apartment; that based upon this finding, the Commissioner concluded that "no credence can be given to any of the items listed or the cost claimed on the invoice and the owner is not entitled to any rent increase for the listed items", granting the owner only an MCI based upon the installation of a new stove and a new refrigerator.

DISCUSSION

In establishing entitlement to an increase based upon improvements, the burden is on the landlord to document each specific improvement (see, *Matter of Charles Birdoff & Co v DHCR*, 204 AD2d 630, 631 [2nd Dept. 1994]).

Here, Lopez claimed that many of the claimed improvements were not done, and that some of the work which was done, was done BY him with the help of others who submitted affidavits to that effect. Lopez submitted invoices for the kitchen cabinets, which he claimed he himself had installed. Most tellingly, Lopez submitted more than 50 photographs, an examination of which clearly supports the conclusion of the Commissioner that no new subflooring or saddle was installed in the kitchen; that no electrical outlet for the stove was installed; that the medicine cabinet, toilet and flushometer in the bathroom were not new; and that no new oak

flooring had been installed. Even taking into account the landlord's argument that the improvements had been done three years before the tenant's complaint, an examination of the photos indicates that the equipment and fixtures shown are not merely suffering from normal wear and tear, but are indeed quite old. Thus, the conclusion of the Commissioner that the listed items were not worthy of credence, and thus constituted an overcharge, has a rational basis in the record.

That the landlord submitted cancelled checks is not dispositive of the matter. DHCR policy statement 90-10 requires an affidavit from the contractor indicating that the work was completed and paid in full, an invoice receipt marked paid in full contemporaneous with the completion of the work and a signed contract agreement (see, Ex B to Respondent's Memo of Law). Here, the invoice submitted lists charges of \$13,500, while the checks total \$11,500. Further, none of the other policy statement requirements have been met.

As to the imposition of treble damages for willful overcharge, ~~there is~~ a presumption of willfulness attaches to an overcharge, and the burden is on the landlord to establish by a preponderance of the evidence that the overcharge is not willful (see, *Wai Leung Chan v DHCR*, 207 AD2d 552 (2d Dept. 1994)). Willfulness need not contain an element of maliciousness; rather, the overcharge must have been imposed merely with the knowledge "that the act is being done" (see, *Lavanant v DHCR*, 148 AD2d 185, 189 (2d Dept. 1989)). Here, the landlord has not met its burden of establishing that the

overcharge was not willful.

Under the circumstances, the court denies the landlord's application to vacated the DHCR determination (see, *Matter of Charles Birdoff & Co v DHCR*, supra; *Lavanant v DHCR*, supra *Wai Leung Chan v DHCR* , supra).

Therefore, it is

ORDERED that the clerk is directed to enter judgment in favor of the respondent DIVISION OF HOUSING AND COMMUNITY RENEWAL OF THE STATE OF NEW YORK, dismissing the petition.

This constitutes the order and judgment of ~~the~~ court

DATED: 1/3 , 2002



PAULA J. OMANSKY
J.S.C.