

**Matter of 103 East 86th St. Realty Corp. v New York
State Division of Housing and Community Renewal**

2003 NY Slip Op 30199(U)

September 2, 2003

Supreme Court, New York County

Docket Number: 127645/02

Judge: Nicholas Figueroa

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

HON. NICHOLAS FIGUEROA

PRESENT: _____

PART 46

012764512002

103 EAST 86TH ST.
VS
NEW YORK STATE DIVISION

SEQ 1
ARTICLE 78

INDEX NO. 127645/02
MOTION DATE 3/21/03
MOTION SEQ. NO. no.
MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits _____	<u>3, 4</u>
Replying Affidavits _____	<u>5</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided

in the accompanying decision,
order and judgment

SCANNED
SEP 10 2003

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: September 2, 2003



Check one: FINAL DISPOSITION NON-FINAL DISPOSITION J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

In the Matter of the Application of
103 EAST 86th ST. REALTY CORP.,

Index No. 127645/02

Petitioner,

-against-

**DECISION, ORDER
AND JUDGMENT**

NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL,

Respondent.

Nicholas Figueroa, J.:

Petitioner seeks a judgment, pursuant to CPLR Article 78, vacating and annulling the final determination by respondent New York State Division of Housing and Community Renewal, denying petitioner’s application to deregulate a rent stabilized apartment. By stipulation the parties agreed that the tenant, Stacy Malin, could intervene in this proceeding. The court treats the stipulation as a motion to intervene and amend the caption, and grants that motion.

Based on petitioner’s claim that the apartment occupants’ combined yearly income exceeded \$175,000, and that the monthly rent was over \$2,000, it filed for High Rent Deregulation on May 9, 2001 for the 2001 filing period, asserting that the apartment’s monthly rent was \$3,650.29, and that the combined income of Malin and her then husband Daniel Weitzman, the tenant of record, exceeded \$175,000. Prior to petitioner’s deregulation application, Weitzman had failed to execute an income verification form sent by petitioner on March 16, 2001.

On May 29,2001, DHCR sent Weitzman a form entitled Answer to Petition and Notice to Tenant to Provide Information for Verification of Household Income. Malin, the present occupant of the apartment, answered the petition in July, 2001, alleging that Weitzman had physically vacated the apartment on February 3,2000, and was currently living at 357 East 68th Street.

On February 9,2002 DHCR sent the parties a Notice of Proposed Deregulation and Opportunity to Comment, indicating that the New York State Department of Taxation and Finance (DTF) had verified that Malin's and Weitzman's combined incomes for each of the calendar years 1999 and 2000, exceeded \$175,000.

On February 14,2002, Malin's attorney sent DHCR a response stating that Weitzman's income for the year ending 2000 should have been excluded because Malin had succeeded to the tenancy when Weitzman vacated the apartment on February 3, 2000. Malin's attorney also submitted an affidavit by Eric Krebs stating that Weitzman had been his roommate at 425 West 45th Street from February 3,2000 until September 14,2000, at which time Weitzman had moved to 357 East 68th Street. Malin's attorney also included a copy of the lease between Weitzman and the owner of his current residence on 68th Street.

Additionally, on March 7,2002, Malin sent DHCR her own affidavit stating that Weitzman left their apartment on February 3, 2000, and that although he visited the apartment to see their children, he never stayed overnight.

On March 27,2002, petitioner's attorney wrote DHCR, stating that Malin's disclosures failed to establish that Weitzman had vacated the apartment, and that in any event, he was the tenant of record through January 31,2002, based on the two year lease he signed on November

4, 1999. Petitioner next asserted that Weitzman had delayed until December 11, 2001 before sending notification of his relocation during February, 2000 thereby making Weitzman's assertions "all the more unbelievable". Continuing, the letter stated that Malin admitted that she and Weitzman were still married, and that, "If [Weitzman] vacated in February, 2000, one would think they would have filed separate returns."

On April 26, 2002 DHCR asked DTF to again verify yearly income based on the claim that Weitzman had permanently vacated the apartment. DHCR provided DTF with the names of Malin and her children, and copies of their tax returns for 1999 and 2000, in addition to sending copies of Weitzman's tax returns.

On April 30, 2002, DTF notified DHCR that the total income for the apartment's occupants for 1999 and 2000 was under \$175,000 . On May 30, 2002, DHCR notified the parties that DTF had matched Malin's tax return for 2000, and her children's returns for 1999 and 2000, and that in each of those years the total annual income was less than \$175,000. As required, DHCR gave both parties the opportunity to comment on these findings.

In response, petitioner pointed out that DTF had failed to include Weitzman's 1999 or 2000 income, in its computations, thereby making its notice defective, since Malin had not claimed Weitzman vacated in 1999. Petitioner added that since Weitzman's joint return for 1999 revealed an income over \$175,000, there was no reason not to verify his 1999 income.

Petitioner also argued that there was no proof that Weitzman had vacated on February 3, 2000, while reminding DHCR that Weitzman was the tenant of record on the November, 1999 lease, and that he had delayed until December, 2001 to notify petitioner he left the apartment and was still married to Malin. Petitioner stated, "We repeat that there is no basis [sic] to not

verifying Daniel Weitzman's income for 2000."

On August 23, 2002 DHCR's Rent Administrator issued her order denying petitioner's Petition for High Income Rent Deregulation. The Rent Administrator determined based on the evidence, including information from DTF, that the annual incomes of the tenants occupying the subject apartment as their primary residence, did not exceed \$175,000 in one or both of the preceding years.

Petitioner filed its Petition for Administrative Review (PAR) on October 21, 2002, challenging the Rent Administrator's order. Petitioner offered numerous arguments why Weitzman's income should have been included in the total household income: that Malin had failed to submit "clear documentary evidence to establish the date [he] vacated, if he ever did"; that "DHCR totally ignored its Proposed Order of Deregulation which found household income to be in excess of \$175,000 for both 1999 and 2000"; that DHCR "relied on unsupported and unproven statements that [Weitzman] the tenant of record had vacated on February 3, 2000"; that "...for 2000 [Malin and Weitzman] filed a 'Married Filing Separate' return and that the affidavit of Stacy Malin admitted that she and Daniel Weitzman were still married as of the date of her affidavit, March 1, 2002"; that "DHCR ignored the fact that [Weitzman] was the sole tenant on the lease which ran to January 31, 2001"; that "DHCR ignored the fact that Daniel Weitzman did not advise the owner until December 11, 2001 that he allegedly vacated. This was almost two years after he claimed to have vacated" (emphasis in the original)

Petitioner concluded by asserting that Weitzman's claim that he vacated the apartment on February 3, 2000 was "unbelievable" and that DHCR should have included his income in determining the total household income; or alternatively, that DHCR "should have held a hearing

to confront and evaluate the credibility of the assertions made by the tenant to determine their veracity.”

On October 30, 2002 DHCR’s Deputy Commissioner issued an Order and Opinion denying the PAR. The Deputy Commissioner found that solely the income of the persons occupying an apartment on the “relevant date” is to be considered in determining household income for the purpose of luxury decontrol under Rent Stabilization Code Section 2531.1(b). The relevant date, according to the Deputy Commissioner, is the date the income certification is served, pursuant to DHCR Operational Bulletin 95-3.

The Deputy Commissioner found, based on the evidence submitted by Malin , that Weitzman had vacated the premises before March 16, 2001, the date on which petitioner served the income certification form. The Deputy Commissioner also found that petitioner had not, in the proceeding before the Rent Administrator nor on the PAR, provided evidence proving that Weitzman had not vacated the apartment prior to the relevant date.

Next, the Deputy Commissioner noted that DTF determined that the relevant total household income did not exceed the \$175,000 limit, and that once DTF finds the income does not exceed the threshold, DHCR must issue an order denying the deregulation petition pursuant to Section 2531.5 of the Rent Stabilization Law.

Finally, the Commissioner noted that whether or not DHCR conducts a fact finding hearing “is totally discretionary.” Continuing, the Deputy Commissioner found that it was reasonable to conclude that no new relevant or probative evidence would have been adduced at a hearing; therefore, the Rent Administrator did not abuse her discretion in not requesting a fact-finding hearing.

The Deputy Commissioner held that the PAR presents no issues of law or fact warranting reversal or modification of the Rent Administrator's order, and denied the PAR while affirming the Rent commissioner's order.

The court finds that DHCR rationally arrived at its decision, and that its determination was not arbitrary or capricious (see *Pell v. Board of Education of Union Free School District No. 1*, 34 N.Y.2d 222). Nor did the agency improperly administer the law governing this proceeding (see *Rudin Management Company, Inc. v. New York State Division of Housing and Community Renewal*, 215 A.D.2d 243).

The fact that DHCR had initially issued a proposed deregulation order is not binding on it (see *Matter of Classic Realty v. New York State Division of Housing and Community Renewal*, ___ A.D.2d ___, 2003 WL 21815070). The pertinent consideration for determining total household income (Rent Stabilization Law §26-504.3(a)), is the date, March 16,2001, on which the landlord served the income certification form (*Matter of A.J. Clarke Real Estate Corp. v. New York State Division of Housing and Community Renewal*, ___ A.D.2d ___, 2003 WL 21940721).

Consequently, DHCR correctly determined, based on the evidence before it, that Weitzman vacated the apartment before petitioner served the income certification form. Factual issues are to be determined by the administrative agency (see *Matter of Oriental Boulevard Co. v. New York City Conciliation and Appeals Board*, 92 A.D.2d 470, affd 60 N.Y.2d 633). Malin's affidavits, when weighed against petitioner's speculative arguments, demonstrate the rationality of DHCR's factual determination concerning when Weitzman's ceased to occupy the subject apartment.

Finally, DHCR acted within its discretion in determining the matter without a hearing (*Matter of Classic Realty LLC v. New York State Division of Housing and Community Renewal*, id.). The court may not substitute its judgment for the agency's by interfering with its exercise of discretion (see *Matter of Ista Management v. New York State Division of Housing and Community Renewal*, 161 A.D.2d 424, 426). In any event, the Deputy Commissioner rationally found that these were no factual matters whose resolution required a hearing.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding dismissed, and it is further ORDERED that Stacy Malin's motion to intervene as a respondent is granted, and it is further

ORDERED that the caption of this proceeding is amended to include Stacy Malin as an intervenor-respondent, and it is further

ORDERED that the petitioner shall serve the Clerk of the Court and the Clerk of the Trial Support Office with a copy of this order and judgment, who, upon such service, shall mark their records to reflect the amendment.

This constitutes the decision, order, and judgment of the court.

Dated: September 2, 2003

ENTER


J.S.C.