

**Matter of Pastreich v New York State Div. of Hous. &
Community Renewal**

2006 NY Slip Op 30568(U)

August 14, 2006

Supreme Court, New York County

Docket Number: 101965/06

Judge: Lottie E. Wilkins

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PRESENT: Lottie E. Wilkins

PART 18

Index Number : 101965/2006

PASTREICH, YITZHAK

vs

NEW YORK STATE D.H.C.R.

Sequence Number : 001

ARTICLE 78

INDEX NO.

101965/06

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

_____ ~~is referred on this motion to/for~~ art. 78

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

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

Petition (sequence 001), pursuant to CPLR article 78, to annul a determination of respondent, DHCR, is denied in accordance with the attached decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: Aug 14, 2006
AUG 14 2006

Lottie E. Wilkins J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
In the Matter of the Application of YITZHAK
"JAMES" PASTREICH,

PART 18

Index No. ~~101965/06~~ 101965/06

Petitioner,

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

DECISION

- against -

THE NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent,

- and -

251 CPW HOUSING LLC,

Intervening Respondent.
-----X

Lottie E. Wilkins, J.:

In sequence 001, petitioner Yitzhak "James" Pastreich seeks an order annulling the determination of respondent Division of Housing and Community Renewal (DHCR) which denied petitioner's rent overcharge complaint against his landlord. In sequence 002, the landlord, 251 CPW Housing LLC, moves to intervene as an additional respondent in this proceeding and offers opposition to the petition. In deciding this matter, the Court considered the notice of petition and petition dated February 9, 2006; the landlord's notice of motion to intervene and dismiss the petition

and the accompanying affidavit dated March 29, 2006; the verified answer and opposition from DHCR dated April 25, 2006; petitioner's reply affirmation dated April 27, 2006; and the reply affirmation from 251 CPR Housing dated May 1, 2006.

Petitioner is the lessee of Apartment 3C at 1 West 85th Street in Manhattan. Petitioner and the proposed additional respondent, 251 CPW Housing LLC (hereinafter "landlord"), first entered into a rent stabilized lease for the premises in August 1991. The legal rent at the time for the apartment was \$5, 747.62 per month, however, the initial lease contained a preferential rent rider which, in relevant part, provided:

- 1) Tenant is given this Preferential Lease under condition of accepting Apartment in "as is" condition....
- 3) The term of this Preferential Lease is for a period of two (2) years beginning October 1, 1991 and ending September 30, 1993.
- 4) For the term of this Preferential Lease, Tenant is to pay a preferential rent of \$3,000.00 per month plus \$160.00 per month for parking space, due on the first day of each month.
- 5) At the end of the term of this initial Preferential Lease, Tenant has the option to renew Preferential Lease. The new monthly preferential rent will be \$3,000.00 adjusted by the corresponding RSA rent guidelines. This apartment is rent stabilized.

The lease was renewed several times in the intervening years, each time utilizing the preferential rate as the basis for increases. In 2004, the landlord offered petitioner a two-year lease renewal with a monthly rent of \$7652.26, which was obviously based on the legal rent as opposed to the preferential rate established in the initial lease.

Petitioner challenged the landlord's right to raise the rent in this fashion. What makes this dispute somewhat more complicated, however, is that the both sides each brought aspect of their dispute before different forums: petitioner went before DHCR in a rent overcharge proceeding while the landlord commenced a holdover proceeding in the Housing Court.

On November 23, 2004, petitioner filed a rent overcharge complaint with DHCR. On May 27, 2005, a Rent Administrator denied the complaint, holding that, pursuant to statutory amendment, the landlord had the right to discontinue the preferential rate upon renewal of the lease.¹ On December 14, 2005, a DHCR Deputy Commissioner denied the petition for administrative review (PAR) on similar grounds. This article 78 proceeding stems directly from denial petitioner's claim at the administrative level.

However, while petitioner raised the dispute before DHCR, the landlord raised the same issues at Housing Court in the context of a holdover proceeding. The landlord commenced the proceeding on January 2, 2005. When the landlord moved for summary judgment, the Housing Court denied the motion finding an issue of fact as to whether the parties' intended the lower rate to be a concession or a preferential rate

¹ In 2003 the Legislature amended the Rent Stabilization Law of 1969 to provide that landlords could offer lease renewals at the legal regulated rent notwithstanding the existence of a preferential rent rider in the original lease (see, L 2003, ch 82, § 6; Administrative Code of the City of New York § 26-511 [c] [14]).

(see, 251 CPW Housing LLC v Pastreich, Civil Ct, NY County, May 9, 2005, Lansden, J.).

In arriving at its decision, the court examined holdings in cases arising from article 78 challenges to DHCR determinations on similar disputes. Thereafter, on the landlord's motion to renew or reargue, the court stayed the proceeding pending determination of the petition for administrative review at DHCR.

In this proceeding, petitioner argues that DHCR acted in an arbitrary and capricious manner by reaching a determination without first holding a fact-finding hearing, which petitioner maintains was mandated by the Housing Court when it denied summary judgment in the holdover proceeding. Based on this alleged error, petitioner asks this Court to either remit the matter to DHCR for a hearing as to the parties' intent or to annul the DHCR determination in its entirety and allow the matter to be decided in the Housing Court. Neither remedy is warranted, however, as DHCR had jurisdiction to review the dispute in the first instance and was not bound by the Housing Court decision denying summary judgment to hold a fact-finding hearing. This was apparently the same conclusion later reached by the Housing Court when it marked the holdover proceeding off calendar pending final determination of the proceedings at DHCR.

Turning first to the motion by 251 CPW Housing to intervene as an additional respondent, said motion should be granted. The rights and obligations of

251 CPW Housing will be directly affected by the outcome of this proceeding and thus the landlord should be given an opportunity to be heard (see, CPLR 7802[d]). The caption shall be deemed amended to add 251 CPW Housing LLC as an additional respondent

With respect to the underlying dispute, any analysis must begin with the recognition that DHCR is the government agency charged with interpretation and enforcement of the Rent Stabilization Code and related laws and, as such, its rational interpretations of those rules are entitled to deference. DHCR's interpretation of its own statutory mandates, or a determination based upon such interpretations, will be upheld if it is legally consistent and has a rational basis (see, Matter of Parcel 242 Realty v New York State Div. of Housing and Community Renewal, 215 AD2d 132 [1st Dept. 1995]). As the First Department has stated, where a determination is rationally reached, "the court's function is exhausted, regardless of whether the court would have found differently" (see Matter of Fernandez v New York State Div. of Hous. and Community Renewal, 3 AD3d 366 [2004]).

The import of those well known rules of review in this particular case is that the question of whether the lease contained a preferential rent or a concession, and the question of whether the landlord had the right to discontinue the preferential rent (if that is what it indeed was), were matters for DHCR to determine in the first instance,

not the courts. In cases involving administrative oversight of government regulations, the court's function is limited to article 78 review, and then only after the agency has had an opportunity to pass on the dispute (see, Pell v Bd. of Educ., 34 NY2d 222 [1974]). This was a fact that was apparently recognized by the Housing Court when it marked the dispute off its calendar in order to give the DHCR proceedings an opportunity to conclude.

The fact that the Housing Court would not grant summary judgment without first holding a fact-finding hearing as to the parties' intent was in no way an impediment to DHCR reaching a conclusion on the dispute before it. Moreover, the fact that the agency was able to reach a conclusion without a similar hearing does not render the underlying determination arbitrary or capricious. It is precisely because agencies like DHCR are assumed to have a high level of experience and expertise in dealing with disputes in their area of oversight that the courts defer to their determinations (see, Pell, supra). Preferential rents are a by-product of the rent regulation scheme and DHCR has expertise in dealing with disputes arising from cancelled preferential rents and even has established policies for distinguishing between preferential rents and concessions (see, DHCR, Fact Sheet #40, rev. 2/06 [stating that "a prorated concession is really the same as a preferential rent and will be treated in the same manner"]).

In conclusion, the absence of a fact-finding hearing did not, per se, render

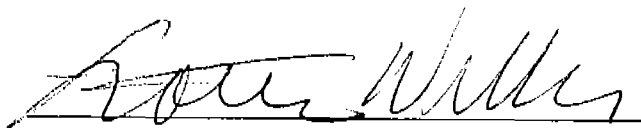
the determination by DHCR arbitrary or capricious. Moreover, the question of whether the preferential rent rider should be treated as a preferential rent or a concession was a question for DHCR in the first instance, not the courts. Inasmuch as there appears to be no other aspect of the DHCR's determination that was arbitrary or capricious, the petition should be denied. Accordingly, it is

ORDERED that the motion by 251 CPW Housing LLC to intervene is granted and the caption is deemed amended to add 251 CPW Housing LLC as an additional respondent; it is further

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

This constitutes the decision and judgment of the Court.

Dated: *aug 14, 2006*
AUG 14 2006


Lottie E. Wilkins, J.S.C.

Lottie E. Wilkins

UNRECORDED
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).