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

HON. PAUL G. FEINMAN

PART 52

P Index Number : 108954/2006

PWV ACQUISITION LLC

vs

HOUSING & COMMUNITY RENEWAL

Sequence Number : 001

ARTICLE 78

INDEX NO. 108954/06

MOTION DATE 10/18/06

MOTION SEQ. NO. 001

MOTION CAL. NO. 13

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

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

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is denied in accordance with the annexed decision, order + judgment.

JUDGMENT

This judgment must be entered by the County Clerk and notice of entry given as indicated hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1/8/07

J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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In the Matter of the Application of
PWV ACQUISITION LLC,
Petitioner,

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

-against-

DIVISION OF HOUSING AND COMMUNITY
RENEWAL and GARY WILSON,
Respondents.

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Index No. 108954/2006

Submission Date Oct. 18, 2006

Mot. Seq. No. 001

Mot. Cal. No. 13

DECISION, ORDER & JUDGMENT

For the Petitioner:
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For the Respondent:
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Papers considered in review of this petition pursuant to Article 78 to annul:

Papers	Numbered
Notice of Petition and Annexed Affidavits	1
Respondent's Verified Answer and Memo of Law	2, 3
Reply Affirmation and Exhibit	4

PAUL GEORGE FEINMAN, J.:

In this Article 78 proceeding the petitioner PWV Acquisition LLC ("landlord") seeks a judgment annulling and vacating the order and opinion of the Division of Housing and Community Renewal ("DHCR"), which denied its petition for administrative review ("PAR") and affirmed the order of the Rent Administrator.

Factual Background

PWV became the owner of 792 Columbus Avenue, New York, New York sometime in February 2000. PWV leased apartment 11J, in the building, to Gary Wilson (hereinafter

"tenant"), commencing May 1, 2002, at a monthly rental of $1,750. The subject apartment is subject to New York City Rent Stabilization Law and Code. On September 23, 2003, the tenant filed a complaint with DHCR alleging a rental overcharge.

The landlord answered the complaint submitting various documents which all indicated that the subject apartment had previously been vacant and that the last rent was $991.79. These documents included a copy of the DHCR rent registration for 2000; a copy of the rent roll, dated February 23, 2000, prepared by the prior owner; and a copy of a rent ledger page, dated February 29, 2000. Additionally, the landlord submitted proof of the costs of improvements made to the subject apartment.

After the Rent Administrator's order, the landlord attempted to submit new evidence consisting of the Social Security Death Index for Paul Ganapoler, the prior tenant of the subject apartment, listed in DHCR rent registration, which indicated he died on November 29, 1999 and, at that date, was residing at a zip code identical to the location of the subject building.

DHCR found that the landlord failed to document the rent for the subject apartment as of September 23, 1999, the base date, which is four-years prior to the filing of the tenant's overcharge complaint. Therefore, DHCR applied the default formula utilized by the Court of Appeals in *Thornton v Baron*, 5 NY3d 175 (2005), to determine the legal rent on the base date. The default formula establishes the legal rent as the lowest rent for the same-sized apartment in the subject building.

Using the default formula, DHCR found the base date rent should be $547.96, the rent charged for Apartment 3K, a comparable apartment in the same building. This resulted in DHCR finding an overcharge to the tenant, in the sum of $46,464.51, inclusive of treble damages.

Parties' Contentions

There is no dispute that the landlord failed to produce the base date lease or any other rent records showing the September 23, 1999 base date rent for the subject apartment. The landlord, however, maintains that the evidence it submitted makes it apparent that Paul Ganapolar, a tenant in the subject apartment since 1984, was a tenant on the base date September 23, 1999, pursuant to a renewal lease, and was charged $991.79 per month and that he resided in the subject apartment until his death in November of 1999.

DHCR argues that the above position is speculative and that since there is no actual evidence of the lawful rent, for the subject apartment, as of the base date September 23, 1999, the default formula must be utilized.

Landlord further contends that even if there is no actual evidence of the lawful rent as of the base date, instead of applying the default formula, the legal rent should be the rent reflected in the annual registration statement filed on July 26, 1999, for the period April 1999 through March 31, 2000, which indicated the rent as $972.34.

DHCR asserts that the registration statement filed on July 26, 1999, may not be considered as the rent record predates the overcharge complaint by more than four years.

Legal Analysis

The Rent Regulation Reform Act of 1997 (RRRA) (L1997, ch 116) clarified and reinforced the four-year statute of limitations applicable to rent overcharge claims (see Rent Stabilization Law of 1969 [Admin. Code of the City of NY §26-516[a]) by limiting examination of the rental history of the housing accommodations prior to the four-year period preceding the filing of the overcharge complaint (*Thornton v Baron*, 5 NY3d 175, 179 [2005], citing *Matter of*

Gilman v New York State Div. of Hous. & Community Renewal, 99 NY2d 144, 149 [2002]).

The fact that a rent registration statement was filed on July 26, 1999, more than four years prior to the overcharge complaint, would not preclude consideration of this rent registration as long as it indicated the rent for the base date of September 23, 1999. The Appellate Division First Department, in the case of *Matter of Silver v Lynch*, 283 AD2d 213 (1st Dept. 2001), where tenant filed an overcharge complaint on April 2, 1997, used a rent registration filed on July 13, 1992 to determine base rent of April 2, 1993. Here, however, the problem for the landlord is that the rent registration indicated a lease beginning August 1, 1997 and ending July 31, 1999, approximately two months prior to the base date. Therefore, the rent registration failed to indicate the base rent and any rental housing prior to September 23, 1999, may not be considered.

In light of the above, the next issue is how the rent should be calculated for the base date when there is no evidence of the legal rent on the base date. The landlord contends that the default method is limited to those situations where there is no valid rent registration statement on file, as of the base date, relying upon the language contained in *Levinson v 390 W. End Assoc., LLC*, 22 AD3d 397, 401 (1st Dept 2005).

In both *Levinson* and *Thornton*, there was a finding that the rent actually charged on the base date was unlawful, while in this proceeding, there was no evidence of the actual base date rent. While the landlord contends the default formula should be limited to situations where the base date rent is illegal, the fact that there may have been a valid rent registration on file does not eliminate the landlord's burden of proving the rent as of the base date. This landlord failed to meet this burden and the law is clear that the rental history before September 23, 1999, four years from the filing of the overcharge complaint, may not be examined. Therefore, DHCR properly

used the default formula to calculate the overcharge.

While this result may be harsh, given that here there is no showing that the landlord has done anything improper, DHCR nevertheless has the discretion to disregard the circumstantial evidence offered by the landlord, and its determination that landlord had failed to meet its burden of proving rent on the base date was clearly neither arbitrary nor capricious nor an abuse of discretion.

The argument by the landlord, that the default formula of Rent Stabilization Code §2522.6(b), rather than the *Thornton* formula, should have been utilized is without merit as the former is applicable only where the current owner acquired the property since the base date through a judicial sale, bankruptcy proceedings, or a mortgage foreclosure (*Levinson,* at 401).

Further, landlord's claim that the overcharge was miscalculated is without merit. Whether the overcharge is calculated on a month to month basis, which was done by DHCR, or by averaging over the seventeen months, as desired by the landlord, it results in the same overcharge calculation.

The next issue is whether consideration should be given to capital improvements and to a vacancy allowance, where the default formula is employed. DHCR alleges that such should not be considered but offers no support for its position. Landlord provided evidence of capital improvements, however, DHCR never made any determination as to landlord's entitlement. Accordingly, this court finds DHCR's determination not to consider capital improvements and a vacancy allowance to be arbitrary and capricious and an abuse of discretion.

Additionally, this court also remands the issue of treble damages. DHCR's determination that the tenant is entitled to treble damages is arbitrary and capricious and abuse of discretion.

The landlord met its burden of establishing the rent overcharge was not willful. This was not an attempt by a landlord to justify an illegal rent on a basis it knew to be contrary to the facts. Not only did the landlord produce credible evidence of improvements, it also relied upon a valid rent registration and other documentation in setting the rent for the subject apartment (*cf., Matter of Mangano v DHCR*, 30 AD3d 267 [1st Dept 2006]). Therefore, it is

ORDERED and ADJUDGED that the landlord's Article 78 proceeding is granted to the extent of remanding to the DHCR for further proceedings to:

(1) Recalculate the rent to be set taking into consideration the capital improvements and a vacancy allowance based upon the evidence previously presented; and

(2) Recalculating the overcharge without treble damages; and it is further

ORDERED and ADJUDGED that the remainder of the petition is denied.

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

Dated: January 8, 2007
New York, New York

ENTER:

J.S.C.

2007 Pt 52 D&O 1089954_2006_001

...by the County Clerk ...based hereon. To ...representative must appear in person at the Judgment Clerk's Desk (Room 141B).