

**Matter of VAS LLC v State of New York Div. of
Hous. and Community Renewal**

2007 NY Slip Op 32143(U)

June 13, 2007

NCRM, Queens County

Docket Number: 0022351/2006

Judge: James P. Dollard

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD IA Part 5
Justice

In the Matter of the Application x of VAS LLC	Index Number <u>22351</u> 2006
- against -	Motion Date <u>March 6,</u> 2007
STATE OF NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL, et al.	Motion Cal. Number <u>30</u>
x	Motion Seq. No. <u>1</u>

The following papers numbered 1 to 6 read on this application by petitioner VAS Realty, LLC (Owner) which seeks a judgment pursuant to CPLR article 78 annulling, reversing and setting aside the order and opinion of respondent Division of Housing and Community Renewal (DHCR) dated August 14, 2006, which denied the petition for administrative review (PAR) filed by petitioner to contest the Rent Administrator's order determining that petitioner had overcharged tenants Francisca and Ibrahim Abdelsalm (tenants) the amount of \$5,396.89, including treble damages.

	<u>Papers Numbered</u>
Notice of Petition - Petition - Exhibits	1-3
Answering Affidavits - Exhibits	4-6

Upon the foregoing papers it is ordered and adjudged that the petition is determined as follows:

Petitioner is the owner of a rent-stabilized apartment building located at 43-38 39th Place, Long Island City, New York. On January 5, 2006, the subject tenants of apartment 23 filed a rent overcharge complaint with the DHCR stating that they had been overcharged for their apartment rent which had been increased from

\$600.92 to \$735.73 per month despite a service reduction order which barred the owner from any rent increases. The owner defaulted. DHCR sent owner a Final Notice of Imposition of Treble Damages on Overcharge to which the owner responded that although the underlying rent reduction order had been in existence for five years, the overcharge was not willful for the reasons that the subject tenants had failed to challenge the annual rent registration, the rent reduction was complied with as to other tenants, and that the failure to adjust the subject tenants' rent was due to a clerical error.

By order issued April 12, 2006, the Rent Administrator held that a rent overcharge had occurred and imposed treble damages, finding, inter alia, that the rent reduction order froze the rent and barred the owner from taking any rent increases.

The owner filed a PAR on May 15, 2006 in which the owner reasserted the arguments before the Rent Administrator, contended that the records provided to the current owner by the prior owner were incomplete thereby causing a clerical error, and offered the subject tenants a refund of the overcharge amount.

The Deputy Commissioner of the DHCR issued the subject decision and order dated August 14, 2006, which denied the petitioner's PAR and affirmed the Rent Administrator's order. With regard to the imposition of treble damages, the Deputy Commissioner held, in pertinent part, as follows:

"Section 2526.1(a)(1) of the Rent Stabilization Code provides ... that, where a rent overcharge is found, the rent overcharge will be presumed willful, and treble damages will be imposed, unless the owner establishes by the preponderance of the evidence that the rent overcharge was not willful. The RA found that the record lacked the requisite preponderance of the evidence that the overcharge was not willful. As to the purported lack of complete rent records provided to the petitioner-owner at the time of purchase, the Commissioner notes that it was incumbent upon the owner to obtain complete rent records from the prior owner. In any event, the owner provided no evidence to support such claim. While the owner argues that other tenants in the building were given

the rent reduction, no evidence was submitted to support this either. The record does show that the owner did not even respond to the DHCR's initial notice of the tenant's overcharge complaint, which was mailed to the owner on 01/10/2006, and that the owner's first response in this overcharge proceeding was submitted only after the DHCR subsequently notified such owner of pending treble damages via the Division's notice, dated 03/08/2006. In view of the foregoing, the Commissioner determines that the petitioner in the appeal has not established that the RA's decision to impose treble damages due to the lack of the requisite preponderance of the evidence of non-willful rent overcharge was incorrect. Therefore, the Commissioner is constrained to uphold the triple penalty in this case."

Petitioner thereafter commenced the within Article 78 proceeding seeking a judgment vacating the DHCR's decision and order of August 14, 2006 on the grounds that it is arbitrary and capricious, and without a rational basis in law or fact. The DHCR, in opposition, asserts that its decision and order of August 14, 2006 was neither arbitrary nor capricious and has a reasonable basis in the law and the record.

It is well settled that the court's power to review an administrative action is limited to a review of the record which was before the DHCR and to the question of whether its determination was arbitrary and capricious and without a rational basis (see Matter of Colton v Berman, 21 NY2d 322 [1967]; Matter of 36-08 Queens Realty v New York State Div. of Hous. & Community Renewal, 222 AD2d 440 [1995]). In the case at bar, the court finds that the DHCR's decision and order of August 14, 2006, which found that the owner failed to establish by a preponderance of the evidence that the overcharge was not willful has a reasonable basis in the law and record and is neither arbitrary nor capricious.

An administrative agency's interpretation of applicable statutes and regulations shall be given due deference where such construction is not irrational or unreasonable (see Salvati v Eimiche, 72 NY2d 784 [1988]; Matter of Albano v Kirby, 36 NY2d 526 [1975]; 985 Fifth Ave., Inc. v State Div. of Hous. & Community Renewal, 204 AD2d 630 [1994]). In the instant case,

there is adequate support and a rational basis in the record for DHCR's finding that petitioner failed to establish the nonwillfulness of the overcharge and thus, treble damages were properly imposed (Matter of Century Tower Assocs. v State of N.Y. Div. of Hous. & Community Renewal, 83 NY2d 819 [1994]; Yorkroad Assocs. v N.Y. State Div. of Hous. & Cmty. Renewal, 19 AD3d 217 [2005]; Matter of Hawthorne Gardens, LLC v State of New York Div. of Hous. & Community Renewal, 4 AD3d 135 [2004]; Adria Realty Inv. Assocs. v New York State Dept. of Hous. & Community Renewal, 270 AD2d 46 [2000]; 985 Fifth Ave., Inc. v State Div. of Housing & Community Renewal, *supra*).

Accordingly, petitioner's application is denied and the petition is dismissed.

Dated: June 13, 2007

J.S.C.