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

2007 NY Slip Op 32807(U)

July 27, 2007

Supreme Court, Kings County

Docket Number: 0013086/2006

Judge: Larry D. Martin

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At an IAS Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 27th day of July 2007.

P R E S E N T:

HON. LARRY D. MARTIN,

Justice.

- X

In the Matter of the Application of
CHRISTINE COUNIHAN,

Petitioner,

For a Judgment Pursuant to Article 78 of the CPLR,

- against -

Index No. 13086/06

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondents.

- and -

JAYE FOX and THOMAS ROBERTS,

Respondents-Intervenors.

- X

The following papers numbered 1 to 10 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2, 3-5
Opposing Affidavits (Affirmations)	6
Reply Affidavits (Affirmations)	7, 8, 9
______ Affidavit (Affirmation)	
Other Papers Record before DHCR	10

Upon the foregoing papers, petitioner Christine Counihan seeks judicial review, under article 78 of the Civil Practice Law and Rules, of an order issued by respondent New York State Division of Housing and Community Renewal (DHCR) on October 19, 2005, which affirmed a determination of the Rent Administrator (RA) that the subject apartment was not subject to rent control. By order to show cause, petitioner moves for an order directing the DHCR to consider new evidence in the form of a December 9, 2005 letter by a former owner of the subject property and make a new determination based thereon.

Petitioner currently resides with her mother, the tenant of record, in the subject apartment on the third floor of 29 Newell Street in Brooklyn. Petitioner alleges that she moved into the apartment with her mother and presently deceased father and brother in October 1969, and that herself and her mother had continuously resided in the apartment since taking occupancy. According to petitioner, no lease was provided to them and they were never informed whether or not the apartment was subject to rent control. At the time petitioner took occupancy in October 1969, the building was owned by Gloria Brunhard, who had purchased the property from John and Antonina Ribisz on March 30, 1968. Ms. Brunhard sold the building in January 1976 to Ronald Lazauskas and Betty Lazauskas (hereinafter referred to by her present surname "Leddick"). Respondents-intervenors Jaye Fox and Thomas Roberts purchased the building on July 22, 2004 and are the current owners. Prior to this most recent conveyance, petitioner noticed that the building was up for sale and advertised as a three family house, with one vacant apartment and two apartments with no

leases. Petitioner asserts that as a result of this discovery she became concerned as to whether the apartment was subject to any rent regulation protection.

On November 3, 2003, the DHCR received petitioner's request for an administrative determination, along with copies of various documents including tax returns, rent receipts and utility bills. In response to the DHCR's request for information, counsel for Ms. Leddick sent the RA a letter dated April 5, 2004 wherein she stated that petitioner's parents lived in the building for over thirty years, moving into the prior owner's apartment on the third floor when the building was sold, and that "[u]pon information and belief," the subject apartment was owner occupied until 1976 and was never subject to rent control. On April 28, 2004, the DHCR received from petitioner a notarized letter written by Ms. Brunhard wherein she stated:

> I . . . was the owner of [the subject premises] from 1968 to 1976. During that time, I lived in the second floor apartment and my mother lived in the first floor apartment. The Counihan family (Timothy, catherine and their two children, Timmy & Christine moved into the third floor apartment in 1969.
>
> * * *
>
> The Counihan family was my tenant in the third floor apartment [apartment #3] continuously from 1969 until 1976. When I sold the house in 1976 to Ronald and Betty Lazauskas, the Counihan family remained living the third floor apartment. At no time did they live on the first or second floor.
>
> When I purchased the building in 1968, the owner before me also lived in the second floor apartment and to my knowledge no owners have ever lived in the third floor apartment at 29 Newel (sic) Street.

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Further submissions to the DHCR included a request by Ms. Leddick to expedite the matter due to the impending sale of the building and a request from the new owners (Fox and Roberts) for an extension of time.

On July 23, 2004, the RA issued an order finding that the subject apartment is not subject to the New York City Rent and Eviction Regulations, stating that petitioner's "unreasonable delay in asserting Rent Control status precludes her from raising the claim more than forty seven (47) years after the filing of the owner's decontrol report bearing Docket No. DR-11306 filed on December 6, 1956." On August 9, 2004, petitioner filed a petition for administrative review (PAR), arguing, inter alia, that she had resided in the third floor apartment since 1969, that she never was informed that the apartment was not subject to rent control, that she never paid market rate rents during the time of her occupancy, that it "appears blatantly unfair" for the RA to reference a document from the 1950s, that the landlord's rights were never enforced and therefore waived, and that she should be "grandfathered" under the rent laws. Among the responses to petitioner's PAR is from Ms. Leddcik, the prior owner, who states that Ms. Brunhard, the previous owner, represented to her that the building was decontrolled and that she does not state any personal knowledge of occupancy of the building from 1956 to 1968 in her letter submitted in support of petitioner's application.

On October 19, 2005, the Deputy Commissioner issued an order denying petitioner's PAR. The Deputy Commissioner noted that "the subject apartment's rent registration card

indicated that a prior landlord of the subject building filed a decontrol report on December 6, 1956, under Docket No. DR11306, based upon owner occupancy of the subject apartment," and the DHCR's records indicate that "this decontrol report has not been disputed in more than forty-seven years, which included more than thirty-four years in which the subject tenant's family had resided in the subject apartment." The Deputy Commissioner further noted that the apartment was never treated as rent controlled by the prior owners and the tenants paid rent increases which were not based on the rent control law and regulations, and that petitioner does not provide a reasonable explanation for the thirty-four delay in seeking the rent regulated status of the apartment, especially since the building had been previously sold in 1976 to a new owner. Citing the case of *Olszewski v DHCR*, 277 AD2d 386 [2000]), the Deputy Commissioner found that the delay resulted in undue prejudice to the landlord, who should be expected to rely on the decontrol report filed in 1956, and thus petitioner should have been precluded from maintaining the administrative determination proceeding based on the doctrine of laches. The instant article 78 proceeding ensued.

This court is limited by CPLR article 78 to a review of the record before the DHCR and to the question of whether its determination was arbitrary and capricious (*Matter of Windsor Place Corp. v DHCR*, 161 AD2d 279, 280 [1990]; *Mazel Real Est. v Mirabal*, 138 AD2d 600 [1988]; *Matter of Bambeck v DHCR*, 129 AD2d 51, 55 [1987], *lv denied* 70 NY2d 615 [1988]; *Villas of Forest Hills v Lumberger*, 128 AD2d 701, 703 [1987]). An arbitrary

and capricious action is that which is taken without regard to the facts and without sound basis in reason (*Pell v Bd. of Educ.*, 34 NY2d 222, 231 [1974]).

In this matter, the court finds that the DHCR's determination finding that the subject apartment is decontrolled based on the existence of a 1956 registration card associated with the filing of a decontrol report by a prior owner, which report is no longer in existence, combined with the failure of petitioner to challenge the decontrol report during her thirty-four year tenancy is arbitrary and capricious and must be set aside. "A report of decontrol is not an adjudication by a state agency but is 'a mere unilateral declaration' by the landlord (*Buxbaum v Tessier*, 19 AD3d 629, 630 [2005] quoting *Coyle v Gabel*, 21 NY2d 808, 809-810 [1968]; *see Forbes v Lomazow*, 22 AD2d 800, [1964] ["(w)hile the statute (§ 2, subd. 2-a) does require the filing of a report of decontrol, such filing is not the act which effectuates the decontrol"). Moreover, the decontrol report is no longer in existence, and there is no way of guaranteeing that the registration card is even accurate. Thus the agency could not rationally find that the apartment was decontrolled based on the mere presence of the registration card, as such does not constitute a determination or adjudication that the apartment was in fact decontrolled.

Further, the DHCR is irrational in its finding that petitioner is barred by the doctrine of laches from seeking a determination as to the rent control status of the apartment solely because the decontrol report was never challenged during her tenancy. "[C]overage under a rent regulatory scheme is governed by statute and may not be created or destroyed by

laches, waiver and estoppel" (*In re Jo-Fra Properties, Inc.*, 27 AD3d 298, 299 [2006]). Unlike the tenant in *Olszewski*,* there is no allegation here that petitioner was ever made aware of the decontrol report. The court has an obligation to scrutinize agency determinations and proceedings to ensure due process and fundamental fairness (*see Barrett v Lubin*, 188 AD2d 40, 45 [1993]). Here, not only is there no indication that petitioner had notice of the decontrol report during her tenancy, there is no indication in the record that she was ever appraised of the report during the proceeding before the RA and given the opportunity to respond to the report.

Apartments in buildings containing three or more units that were completed prior to February 1, 1947 and have been continuously occupied by the same tenant since July 1, 1971 are subject to rent control (N.Y. City Rent and Rehabilitation Law [Administrative Code of City of NY] § 26-403[e]; NY City Rent and Eviction Regulations [9 NYCRR] § 2200.2[e]). There appears to be no determination by the DHCR that petitioner's occupancy did not otherwise meet these statutory requirements. Further, petitioner has recently procured a letter by Ms. Ribisz wherein she states that the subject apartment was not owner occupied at the time the 1956 decontrol report was filed, but occupied by a tenant. Petitioner has

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*It is noted that the *Olszewski* court determined that the tenant was precluded from seeking succession rights as a rent-controlled tenant because she did not live in the apartment for two consecutive years before her mother's death. The court's further statement that the tenant's unreasonable delay precluded her from raising the claim that her apartment was subject to rent control is mere dicta.

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demonstrated a reasonable excuse in failing to procure the statement during the time the proceedings were at the RA level.

As a result, the instant article 78 petition and petitioner's motion to direct the DHCR to consider the new evidence in the form of the December 9, 2005 letter by Ms. Ribisz are both granted, and this proceeding is remanded to the DHCR for further proceedings with respect to the rent control status of the apartment.

The foregoing constitutes the decision and order of the court

E N T E R,

J. S. C.

HON. LARRY D. MARTIN
Justice of the Supreme Court