

**Matter of Riverside Equities, L.L.C. v New York State
Div. of Hous. & Community Renewal**

2007 NY Slip Op 33990(U)

December 4, 2007

Supreme Court, New York County

Docket Number: 0106001/2007

Judge: Lewis Bart Stone

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

PRESENT: HON. LEWIS BART STONE
Justice

PART 508

*In the matter of the application
of Riverside Properties, LLC*

INDEX NO. 106001/07

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

*NYS Division of Housing
and Community Renewal*

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

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is granted in accordance with the annexed decision and order*

FILED
DEC 10 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: _____

[Signature]
HON. LEWIS BART STONE, J.C.C.

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: PART 50

-----X	
In the Matter of the Application of	:
RIVERSIDE EQUITIES, L.L.C.,	:
	:
Petitioner,	DECISION AND ORDER
	:
For a Judgment Pursuant to Article 78	:
of the Civil Practice Law and Rules,	INDEX NUMBER 106001/07
	:
-against-	:
	:
NEW YORK STATE DIVISION OF HOUSING	:
AND COMMUNITY RENEWAL,	:
	:
Respondent.	
-----X	

Hon. Lewis Bart Stone:

This proceeding was commenced by Riverside Equities, L.L.C. ("Riverside") by Order to Show cause, issued on May 3, 2007, to review and set aside, pursuant to Civil Practice Law and Rules ("CPLR") Article 78, a decision of Respondent, New York State Division of Housing and Community Renewal ("DHCR"), issued on March 8, 2007 (the "Decision") which granted a Petition for Administrative Review ("PAR"), sought by Respondent William A. Brown ("Brown"), which Decision found that rent charged Brown by Riverside for Apartment 4, (the "Apartment"), 920 Riverside Drive, New York, NY (the "Building") was improper and awarding Brown

overcharges, treble damages and interest. The Apartment was subject to the Rent Stabilization Law ("RSL").

On April 30, 2000, the lease of then tenant of the Apartment Jose Leger ("Leger"), expired and Leger moved out. After Leger moved out, Riverside asserts that it performed certain renovations to the Apartment (the "Work"), pursuant to a Contract with Mat's Co. ("Mat's") dated May 16, 2000 (the "Contract"), which specifically referenced the Apartment. Thereafter, on August 1, 2000, John Lopez and Linda Albuga (collectively "Lopez") became tenants of the Apartment until they moved out in April 2001. On May 1, Brown moved in and became the tenant of the Apartment and remained in the Apartment until May 31, 2004 when he moved out.

Leger's rent stabilized rent of \$356.91 per month was registered in 2000 with DHCR. Lopez' rent stabilized rent of \$975.25 per month was registered with DHCR in 2001. Brown's rent was set forth in his lease at \$1,150.79, less a \$165.79 monthly rent credit, resulting in a net rental payment of \$985.00 per month, which Brown paid for most of the months he was a tenant of the Apartment.

On May 16, 2001, DHCR granted Riverside a Major Capital Improvement ("MCI") rent increase for the Building, authorizing a rent increase for apartments in the Building, and for the Apartment of \$15.12 per month, retroactive to May 1, 1998. Brown refused to pay this increase. Because Brown had also by then bounced a

number of rent checks, Riverside on April 16, 2004 commenced a non-payment proceeding in Housing Court to evict Brown. The overcharge complaint which is the subject of this proceeding was filed by Brown with DHCR about two weeks after Riverside's non-payment proceeding was commenced.

On April 30, 2004, Riverside responded to Brown's overcharge complaint by providing various documentation, and alleged that Brown's complaint was retaliatory and that Brown should be required to pay his arrears and the MCI increase.

DHCR reviewed Riverside's response and on July 7, 2005 conducted an inspection of the Apartment to ascertain what Work if any, had been done at the Apartment. As an owner of a rent stabilized apartment is authorized under the Rent Stabilization Law ("RSL") to increase the rent they may collect for such apartment by performing certain improvements in the apartment, the cost of the Work was relevant to the legality of the rent for the Apartment. After considering Riverside's submission, the inspection report and all parties' responses to the inspection report, the DHCR Rent Administrator ("RA") dismissed Brown's overcharge complaint on December 29, 2005, finding that the rent charged to Brown was significantly below the maximum legal rent for the Apartment under the RSL, as shown on a calculation sheet annexed to the RA's decision. Central to this calculation was a rent increase allowance of \$525 to reflect the Work.

On March 3, 2006, Brown filed a PAR challenging the dismissal of his overcharge complaint by the RA. DHCR made no further inspection while considering the PAR. In its Decision, DHCR found that discrepancies in the record required it to conclude that although work was performed, “without valid proof of the improvements, the entire cost must be disallowed.” As it disallowed the entire allowance for improvements, the Decision found the maximum legal rent to be from \$506.66 to \$631.72 during various portions of the term of Brown’s tenancy. As the rent charged Brown was higher, the DHCR found an overcharge, and also awarded treble damages because of the “submission of inaccurate and misleading evidence.” Riverside here seeks to vacate the Decision.

The RSL authorizes two separate and independent ways for an owner to increase the legal regulated rent of a rent stabilized apartment by reason of improvements made. One is for building MCI improvements and one is for apartment specific improvements, the so called “Fortieth” program.¹ The rules authorizing rental increases under the two programs differ materially, recognizing the nature and extent of improvement projects and the realities of making improvements in New

¹ The Fortieth program authorizes the owner to increase the legally regulated rent by one fortieth of the cost of capital improvements to an apartment provided that if the improvements are made at the time the apartment is tenanted, such improvements are authorized by the tenant. In this case Riverside contends that the Work was performed while the Apartment was vacant in July, 2000.

York City apartments. Riverside sought by new investments in the Building to increase rent under both programs. Although Riverside was granted MCI Building wide increases which also increased the legal rent for the Apartment, such increases are not at issue in this proceeding, notwithstanding they may have been the event which precipitated Brown's overcharge complaint. Although the RSL requires extensive tests and conditions for an MCI increase, for Fortieth increases, the RSL only requires that money be actually spent on improvements to an apartment. There are no requirements that it be wisely spent, that the improvements be of any particular quality, spent pursuant to a contract, or spent on a licensed contractor, a contractor which is a corporation, partnership or an individual or whether the contractor is qualified to do business in New York, or if an individual contractor, whether such contractor was a citizen or alien or any requirement that a contractor be insured or any constraint on how payment may be made. While other laws may regulate some of these issues, the RSL does not, and does not authorize DHCR to consider such matters.

Further, under the MCI program, where an owner may not claim an increase for work done to replace existing building improvement prior to the end of their useful life, DHCR may not concern itself as to whether a Fortieth improvement was made prior to the end of the useful life of an existing improvement as long as the

improvements for which the Fortieth increase is sought was actually made and paid for to an unrelated party who installed or performed such improvements. Similarly, unlike for MCI increases, where DHCR may impose some minimal standards of workmanship as a condition to the grant of an increase, there is no workmanship standard for a Fortieth improvement. As the vast majority of Fortieth increases relate to work in vacant apartments, effective control on the quality of the installation is reserved to the market and the new tenant who can accept the changes by signing the lease or seek accommodations elsewhere. No new tenant has a right to require an owner to make Fortieth improvements or concomitantly to object to DHCR, as to the nature or quality of improvements made before he became a tenant.²

Because this is a proceeding under CPLR Article 78, this Court has limited jurisdiction to review the Decision. Riverside asserts that such grounds, i.e. that the Decision “was arbitrary, capricious and demonstrates an abuse of discretion” is based on seven reasons, viz:

- 1) DHCR erred in holding that the Petitioner willfully overcharged the tenant;
- 2) DHCR erred in concluding that the Petitioner submitted “false evidence” in the record;

² If building code violations exist, the tenant may, of course seek Building Department action, and if an “improvement” reduces required services, the tenant may otherwise complain to DHCR.

- 3) DHCR's objective inspection on July 7, 2005 confirming the majority of improvements should have been sufficient to validate the scope of the improvements;
- 4) Petitioner/Owner provided adequate supporting evidence including the required contract and cancelled checks;
- 5) DHCR failed to hold a hearing prior to nullifying the contract;
- 6) Petitioner/Owner made diligent efforts to locate the contractor, Mat's Co.;
- 7) Petitioner/Owner provided an affidavit from a registered architect and another contractor to substantiate the cost of the improvements.

As this controversy involves work Riverside claims to have performed in July 2000 while the Apartment was vacant, Brown, being neither the tenant before nor immediately after such period (having moved in about a year later) is in no position to know when any particular improvements had been made to the Apartment. Accordingly, except as to the physical condition of the Apartment during his tenancy, Brown's assertions and allegations as to when and how such Work was done and how it may have changed the physical aspects of the Apartment are mere speculation, and thus cannot constitute evidence which may be relied upon by DHCR.

The dispute was initially heard before the RA who reviewed Riverside's submissions and Brown's objections thereto. Among the materials Riverside submitted to support the Work being done were a copy of the Contract and copies of the fronts and backs cancelled checks to the order of "Mat's Co.," showing their deposit and payment by the owner's bank. Riverside also submitted an affidavit of an architect that all Contract items except for parquet floor, granite countertops and oak panel doors were installed.

The Contract "scope of work" ran to eleven paragraphs (see Petition Exhibit E). To determine what Work had been actually done, the RA directed an inspection by a DHCR employee who, after inspecting the Apartment on July 27, 2005, reported that most of the specified items in the Contract were "fairly new."³ The inspector found that the countertop was laminate, not granite, a new apartment door was not installed, that the new floor was wood strip instead of parquet and that the new closet doors were pine, not oak.

The substitution of laminate for a granite countertop relates to a single item of the many specifications of paragraph seven of the Contract which provided:

"Install new kitchen, including new cabinets, new granite countertop (as per sample), new ceramic tile backsplash,

³ As such inspection occurred almost five years after the Work was done, this finding was fully consistent with Riverside's position.

new appliances, and new ceramic tile floor (as per sample). The kitchen will have a new dropped arch, with new hi-hat recessed lighting.”

The inspection found no other item in paragraph seven missing.

Item 9 of the Contracted provided:

“Provide and install new oak panel doors and new door frames throughout with all new door hardware.”

The inspector found that pine was substituted for oak but found no other item in paragraph 9 missing.

Both sides submitted their comments on the report of the inspector. The owner contended that the hardwood floors installed were more expensive than the specified parquet floors and balanced out the savings by reason of the substitution of laminate for granite countertops.⁴

Brown challenged the interest and bias of Riverside, and its architect, and questioned when the Work seen by the inspector was done and speculated Riverside could have made adjustments to the Apartment after he vacated.

⁴ While a substitution of a large laminate countertop for a large granite countertop would represent a substantial difference in cost such is not true here. The countertop in the Apartment according to Brown was 12" x 14," or 1.1666 square feet. Consumer Reports in August 2007 reported that granite countertops currently cost between \$40 and \$100 per square foot installed and laminate countertops cost between \$10 and \$30 per square foot installed. This, in 2007 dollars the differential in costs between granite and laminate in the Apartment would have ranged from \$11.66 to \$92.33. In 2001 when the Work was done, prices and thus the difference would have been substantially less,

After considering these arguments and submissions, the RA asked Riverside to submit a breakdown showing the cost of each aspect of the installation. Riverside, noting that it had already advised that it could not find Mat's, the contractor, submitted instead for such purpose a certificate of an architect which had Riverside used for other work in the building and was familiar with the building conditions. Such architect, after inspecting the Apartment estimated the cost of the Work which it found have been performed to be \$31,400. Riverside also submitted an affidavit of a different contractor who inspected the Apartment, estimated the cost of the Work it found to have been performed to be \$22,350. Both estimates exceeded the amount claimed by Riverside to have been spent on the work.

After considering all of the above, the RA discounted the cost of the apartment door (\$500) and found Riverside to have spent \$21,500 on the improvement, which, after applying the Fortieth formula, more than supported the rent charged Brown and dismissed the overcharge claim.

Brown's PAR argued that the RA's order should be reversed for various reasons: viz:

1. The owner claimed preferential rent.
2. The owner collected excess security.
3. The owner didn't claim the rent was based on improvement until receiving treble damage notice.

4. The owner didn't establish the cost of improvement or payments.
5. The owner didn't obtain necessary permits.
6. The owner did "similar" work in the building for less.
7. The work done didn't apply to his apartment as the certificate owner of the insurer is not the Riverside.
8. That some of the work was not done.
9. The Rent Administrator should not rely on the inspection report as it only reported what was in the apartment and not when it was installed.
10. That the Rent Administrator allowed an increase for work that was unlawfully performed.

DHCR in its Decision on the PAR reversed the RA, finding that although there was indeed Work done, without proof of the improvements, the entire cost must be disallowed.

The Decision states that it is based on a series of "discrepancies" - the substitution of strips for parquet floor, the change in countertop material, the check dates and the absence of an endorser on certain checks, the name of the insured, and the "convenient disappearance of the contractor." The Decision also found that "the submission of false evidence to support a rent is tantamount to wilfulness for which treble damages must be awarded.

The RA was faced with a controversy as to whether and how much Work was performed in the Apartment, had an inspection made, asked the parties to comment

on the inspection, and sought additional documentation. After a full review of this material, the RA dismissed the overcharge complaint. The Decision, however, reversed the RA, effectively disagreeing with each factual finding of the RA, and further made its own finding, without further factual hearing, that treble damages were awardable.

This Court may only review of the Decision under CPLR Article 78 to the extent it was arbitrary or capricious or violates some rule or law or procedure to which the DHCR is bound. One reason for this limited review is because DHCR is presumed to have a special expertise. The reasons proffered by DHCR for reversing the RA's decision, however, raise questions as to whether the person writing the Decision for DHCR was aware what occurs in real construction life in the New York City rent stabilized market, the economic realities applicable to such market and the legal structure of regulation established by the legislature, and the New York City Council.

While the RSL authorizes the Fortieth rent increases to incent owners to upgrade their buildings over time, Owners rarely use this program to increase rents in a tenanted apartment as a tenant in residence must consent to a Fortieth increase, and few tenants want rent increases. The Fortieth program is therefore primarily used during a vacancy as it was here. A rational landlord will not spend any more money

than the amount needed to raise an apartment's rent to market, as spending more makes no economic sense; such expense would be an investment without return.⁵ Accordingly, Brown's arguments that DHCR should properly consider what amounts may have been spent in other apartment upgrades elsewhere in the Building can never be a relevant factor which may be properly considered by DHCR. Although the Decision did not expressly indicate DHCR's reliance on this argument, Brown's argument was acknowledged and not rejected by DHCR as an improper consideration. Accordingly DHCR may well have considered such argument in its speculative conclusion that the Contract may have applied to another apartment.⁶ That Riverside seems to have rationally evaluated the amount of improvement costs needed to allow it to raise the Apartment's rent to market, is supported by the fact that two unrelated tenants, Lopez and Brown chose to rent the Apartment at the proffered rent over other housing options.

Brown also complained of Riverside's "failure" to use an architect or to obtain building permits or use a licensed contractor in connection with the Work, assessing contended that the fact that Riverside did not use such architect to do the Work was

⁵ Assuming the expenditure was not required for code compliance or to make the apartment rentable.

⁶ Brown also made this contention but offered no proof. While the Commissioner recites that it was Brown's contention, he adopts such speculation to support his finding that the contract does not apply to the apartment.

relevant to show that the Work had not been done. However, Riverside had no obligation to use an architect for renovations which under the New York City Building Code do not require permits. Further, its decision not to use an architect for the Work was economically rational as an architect would have had to coordinate with the contractor, a factor which could have delayed the desired completion of the work in the one month window. A review of the New York City Print Out of building permits issued for other work in the Building from 1994 to 2003, submitted by Brown (the "Print Out") further illustrates the irrelevancy of Brown's argument. Because economics drive owner decisions as to how to make Fortieth improvements and because an unrented apartment does not generate income, it was in Riverside's interest that Fortieth renovations to the Apartment be made quickly to return the Apartment to an income generation as soon as possible. To the extent the need for building permits and inspections delay such process, Riverside's interests were best served by limiting the Fortieth improvements to the Apartment to those which required neither permits nor inspections.⁷ While the Print Out listed permits which related to the division of apartments, new partitions and moving of plumbing fixtures

⁷ The delays in obtaining building permits, final inspections and sign-offs in New York City are well understood. As the Contract was by its terms to begin in a month and a half after its date and the Work was to be completed within a month thereafter, the Work was clearly structured to avoid the need for permits and the concomitant inspections and sign-offs, and yet still qualify for Fortieth improvements.

in the Building, such work does require a building permit and therefore the participation of an architect.

The Print Out instead fully supports Riverside's contentions rather than those of Brown and DHCR as it shows that Riverside obtained permits where the work to be done in other apartments in the Building required permits, unlike the Work under the Contract, which was designed to avoid the need for permits. Further, the implication that because a permit was needed for work under the Contract, the Contract might have been for work in a different apartment as DHCR speculated is directly contradicted by the Print Out itself which showed only one permit being issued between the time Leger moved out and Lopez moved in, - Job No. 102613281, which related to the removal of old partitions and their replacement of new partitions in apartment 3, work inconsistent with the size of the Apartment.⁸ The Print Out further shows that work in Apartment 3 was not signed off by the City until April 30, 2003, long after Brown took occupancy of the Apartment, and after payments to Mat's Co, as shown by the cancelled checks, were completed. Accordingly, such permit clearly related to work other than that specified in the Contract.

⁸ The record roughly describes the Apartment as a single room, 400 square foot apartment.

Accordingly, the conclusion, advanced by Brown, recited in the Decision and apparently considered and not rejected by DHCR, that the building permit history of the Building was relevant, is without merit and the failure of DHCR to once stating the contention to expressly reject such contention outright lends belief that DHCR improperly considered the argument and the Print Out in its speculation that the Contract related to a different apartment. Reciting the argument that permits were required for the work without rejecting it indicates that DHCR may have improperly considered that the lack of a building permit for the Work in the Apartment also supported its finding that the Contract referred to a different apartment. Such consideration of such arguments and material were arbitrary and capricious.

The Contract terms are fully consistent with the economic and timing imperatives faced by Riverside. The Contract required Work to be performed between July 1 and July 31, 2000, reciting in capital letters, that time was of the essence, a timing fully consistent with the end of Leger's lease at the end of April, 2000 and commencement of Lopez' tenancy on August 1, 2000, and there is no rational basis to believe that the performance of the Work, as observed by the inspector and as attested to by the affidavits of architect and contractor submitted by Riverside, would have occurred at any other time.

It is inconceivable that the Work observed by the inspector was not performed before Leger moved out. Leger's rent was \$356.91 per month. No rational owner would have performed the Work observed by the inspector for a tenant paying such rent. As Lopez paid a market rent for a renovated apartment, it was clear the Work had been completed before Lopez moved in, and not after Lopez moved out. As Lopez moved out in April 2001 and Brown moved in the next day, on May 1, 2001, the Work could not have been performed between such tenancies.

Brown submitted a list of thirteen items which he asserts were not performed under the Contract. The last six of such items only challenged the quality of Work performed, thus confirming that such items of Work were indeed performed.

Brown complained that the Apartment only had six outlets while the Contract called for electric outlets "throughout." Such contention proves nothing. The Apartment is only 400 square feet in an old building. As Brown was not in the Apartment before the Work was performed, he could not know what the prior wiring configuration was in the Apartment, and can only speculate that the presence of six outlets was not a substantial improvement over the prior condition.

Brown complains that the Contract provides for a dropped arch in the kitchen, and there was none. However, the photos submitted to DHCR by Riverside show a ceiling delineation or "arch" around the kitchen area. This arch is also attested to by

the architect's affidavit. As Brown's tenancy began after the Work was completed, he can only speculate that such arch was not installed as part of the Work. Brown also complains about the "inexpensive plain Sheetrock around the windows," but the Contract only requires wood sills in the bathroom, and says nothing about window surrounds or other windows. Brown further complained that the Contract called for "Bathroom-installed marble throughout." Such assertion is incorrect. The Contract only requires "wonder board and marble throughout" the bathroom. Nothing in any record nor the inspection indicates that the contractor did not exercise his option to use wonder board, and the architect's affidavit indicates that he found wonder board installed.

At the end of the day, the only clear deviation from the Contract are the deviations conceded by Riverside - the substitution of laminate for a granite countertop, the substitution of strip for parquet in the new floors and the substitution of pine for oak in the interior doors (the "Three Deviations") and the lack of a new apartment door.⁹ The Three Deviations are minor, and understandable in the context of a one month renovation of a small apartment where time was of the essence, where securing the preferred materials might have caused delay, leading the contractor to

⁹ The RA discounted the installation of this door and Riverside has not contested such finding.

substitute. Riverside further asserts these differences balance out, and the affidavits of the architect and contractor, attesting to a higher cost, support such contention. Thus, as the vast majority of the Work was performed in substantial completion of the Contract and the changes represented reasonable substitutions, any conclusions that the Work was not performed and that the Contract related to another apartment was arbitrary and capricious.¹⁰

A principle ground given by DHCR for its decision to reverse the RA and impose treble damages is based on its speculation that Mat's, the contractor, didn't exist. Part of this conclusion is stated to be based on the date of the last two checks. That the final checks to Mat's were dated early September 2000, a month and a half after the Work was completed, is fully consistent with usual and proper business practice of owners to hold back final payments to contractors as a retainage to assure that the work to be done under the contract was completed to the owners' satisfaction and to assure that the contractor would fix punch list and other items that turned out to need fixing. It was therefore arbitrary and capricious (as well as apparently untrue - although not so ascertained at the time of the Decision) to rely on this fact to assume

¹⁰ Any person familiar with renovations to existing apartments in New York City knows that perfection in performance is an impossible dream. The law of construction contract performance recognizes this reality by addressing controversies over performance in terms of substantial compliance and substantial completion, resolving deviations from perfection in a fair and equitable manner under the circumstances.

the contractor did not exist.

It is no business of DHCR that Mat's may not have been licensed or had a place of business in New York at the time of the proceeding before DHCR which was not commenced until years after the Work was performed. Neither Riverside or any other owner has an obligation to use a licensed contractor or one who must maintain a New York address for any period after Work was performed to be entitled to a Fortieth. It was clear from DHCR's inspection, the Contract, and the cancelled checks that the Work in the Contract was substantially performed and that payments were made in a period substantially contemporaneous with the Work.

No contractor has an obligation to stay in New York, and a contractor is permitted to retire to Florida. Having the temporary inability to find the contractor, Riverside submitted evidence of both an architect and another contractor as to the value of the Work, based on their separate inspections. Although they differed, both attested to the fact that the value of the work exceeded the Contract price.¹¹

Accordingly, the decision of DHCR must be set aside and the matter must be returned to DHCR for further proceedings, at which only relevant arguments and

¹¹ The Fortieth is not a test of value, but of expenditure. Accordingly, the difference in the amounts in the estimates of the professionals cannot be the basis of DHCR concern as these estimates were submitted and were admissible to support Riverside's contention that the Contract related to the Apartment. While independent findings that the work was worth far less than the amount claimed might raise red flags, a finding that its value was higher certainly could not.

issues, as set forth above may be considered by DHCR, including whatever proof may be proffered by Riverside from the “missing contractor” (who has now been found) to determine whether DHCR’s speculation that Mat’s Co. did not exist is based on real evidence rather than on speculative conjecture.

Treble Damages

The RSL provides that in a Fortieth case, the owner has the burden of establishing its entitlement to a Fortieth increase. The RSL also provides that treble damages may be imposed for willful overcharges. Here, the Decision found that “it is clear that renovations were done but without proof of the improvements, the entire cost must be disallowed.” Thus the Decision deemed Riverside’s failure to establish the full amount of the Fortieth Work the basis to deny Riverside any Fortieth credit for the Work, DHCR acknowledges was actually performed in the Apartment as well as finding, ipso facto, that the failure to prove the full amount of the Fortieth required a finding of willful overcharge for the entire amount.

While in an appropriate case, an owner which has not made its case to support the cost of improvements may be denied the right to increase rent by the Fortieth for those expenditures such owner could not sustain, to translate such a failure of proof to per se wilfulness without further ado is improper. If it were, the RSL would have provided that treble damages applied to all overcharges and not just willful ones.

Further, a treble damage penalties are punitive measures designed to deter a malefactor by increasing the ante for wilfulness, it is not a license for DHCR to go beyond the amount of the violation. H.O. Realty Corp. v. DHCR, ___AD3d ___, NYLJ v. 238, No 78 p. 18, (1st Dep't 2007). Thus, even if DHCR found that Riverside had not established (because it was its burden) the proof of all expenditures claimed, and was wilful in doing so, the only statutory basis for a penalty would be a tripling of the amount by which Riverside's wilfulness had increased Brown's rent over what Riverside was entitled to. Even though Riverside, under the RSL, had the obligation to establish it was not wilful, to avoid the penalty, due process neither permits a quasi penal finding to be made by implication, especially without an opportunity to determine the extent of Riverside's wilfulness, nor permits DHCR carte blanche to determine the amount of the penalty. H.O. Realty Corp., supra. DHCR, to the extent it makes a finding of wilfulness, must therefore limit the tripling penalty to the excess claimed over the amount of work performed, and may not use Riverside's mere failure to establish its case for the full Fortieth as proof of wilfulness. Thus, even if DHCR were to properly deny Riverside the full Fortieth claimed by reason of lack of full proof and thus to require Riverside to disgorge the excess amount collected, treble damages may only relate to the amount of the excess which was wilfully charged. Thus, for such reason alone this

Court must set aside the Decision and remand the matter to DHCR to independently and properly determine not only the amount of the overcharge which was not supported by Work actually done and paid for, but also which was wilful and not merely a result of Riverside's evidentiary failure to establish its entitlement to the Fortieth for those Apartment renovations which the Decision concedes "were done."

Riverside's motion is granted and the Decision is set aside and this matter is remitted to DHCR for further proceedings to reconsider the PAR in accord with this Decision and Order.

This is the Decision and Order of the Court.

DATED: DECEMBER 4, 2007
NEW YORK, NEW YORK



Hon. Lewis Bart Stone
Justice of the Supreme Court

FILED
DEC 10 2007
COUNTY CLERK'S OFFICE
NEW YORK