[* 1]

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

PRESENT: BRANSTEN Justice PART 6

Index Number : 105158/2007
COD, LLC
VS.
NEW YORK STATE D.H.C.R.
SEQUENCE NUMBER : # 002
LEAVE TO INTERVENE

INDEX NO. 105158-07
MOTION DATE ~~6/26/07~~ 9/25/07
MOTION SEQ. NO. #002
MOTION CAL. NO.

...re read on this motion to/for

	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

This motion is decided in accordance with the memorandum decision included in Motion Sequence 001

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).

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

Dated: 1-3-08

HON. EILEEN BRANSTEN 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 — NEW YORK COUNTY

PRESENT: BRANSTEN PART 6

Index Number : 105158/2007

COD, LLC

VS

NEW YORK STATE D.H.C.R.

Sequence Number : 001

ARTICLE 78

INDEX NO. 105158/07

MOTION DATE ~~10/24/07~~ 9/25/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

	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

DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

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).

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

Dated: 1-3-08

J.S.C.

HON. EILEEN BRANSTEN

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART SIX

----------X

In the Matter of the Application of COD, L.L.C.,

Petitioner.

Index No.: 105158/07
Motion Date: 9/25/07
Motion Seq. Nos.: 001 & 002

for Judgment pursuant to Article 78 of the Civil Practice Law and Rules

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

----------X

PRESENT: EILEEN BRANSTEN, J:

Motion Sequence numbers 001 and 002 are consolidated for disposition.

Petitioner COD, L.L.C. ("COD") seeks a judgment pursuant to CPLR 7803(3) reversing, annulling, and setting aside the determination of respondent New York State Division of Housing and Community Renewal ("DHCR"), which found that it improperly increased the rent for the apartment leased by Ellyn Austin ("Ms. Austin"). DHCR and respondent-intervener Ms. Austin oppose the petition. [1]

---

[1] Ms. Austin's unopposed motion pursuant to CPLR § 1012 and § 1013 to intervene in the instant proceeding is granted.

BACKGROUND

Under the New York City Rent and Rehabilitation Law ("the Rent Control Law") and the accompanying DHCR-administered Rent and Eviction Regulations ("RER"), there is a two-tier process for determining the legal rent for a rent-controlled apartment. *See,* Ossi Aff at 9, ¶ 29. The maximum base rent ("the MBR") is a ceiling above which the rent for an apartment cannot be increased. *Id.*, at 10, ¶ 30. The maximum collectible rent ("the MCR") is the maximum rent an owner may actually charge for an apartment. *Id.* An owner may apply for an increase in the MBR on a building-wide basis every two years if it meets the eligibility requirements established by DHCR. If said increase is granted, the owner may increase the MCR by 7.5% that year and another 7.5% in the second year provided that the MCR does not exceed the MBR. *Id.*

However, an owner's ability to increase the MBR pursuant to DHCR's permission is conditioned on proper notice to the tenant. *Id.*, ¶ 31. RER Section 2201.6(c) 3 provides that

> "No increase in maximum rent pursuant to this section, * * * shall be collectible until the landlord shall have given proper notice thereof to the tenant on a form prescribed by the administrator."

Id.

When DHCR grants an owner permission to increase the MBR, it notifies tenants on a building-wide basis. *Id.*, ¶ 32. The owner must then serve a specific increase notice on the

individual tenant, known as an RN-26, within 60 days after DHCR sent its notice. *Id.* Within 60 days of serving the RN-26, an owner must file a Master Building Rent Schedule with DHCR. *Id.*

Arthur Austin ("Mr. Austin") was the tenant in rent-controlled apartment 2A located in 151 East 80th Street, New York, New York until his death in June 1987. Ms. Austin subsequently notified then-landlord Cooperative Development Corp. ("Former Landlord") that she was assuming the lease as his daughter and remaining family member, and asked that it be transferred to her name. *See,* Frazer Aff in Support of Ms. Austin's Petition, Ex 2 at 2-3, ¶ 9-10.

Despite her request, Former Landlord continued to file papers with DHCR in Mr. Austin's name while it accepted rent checks issued in Ms. Austin's name during the same period. *Id.*, at 3, ¶ 11-12. Nearly two years later in March 1989, Former Landlord returned two of Ms. Austin's checks because she was not the tenant of record. *Id.*, ¶ 13. Ms. Austin then filed a harassment complaint against it and Former Landlord acknowledged at the subsequent hearing that Mr. Austin passed away and agreed to transfer the apartment to Ms. Austin's name. *Id.*, ¶ 14-15. In 1994, the subject building's management was transferred from Former Landlord to COD, both of which are owned by the same parent company.

On March 27, 1996, Ms. Austin filed a rent-overcharge complaint with DHCR, alleging that COD increased her rent from 1993 to the then-present day without proper notice

and that the apartment's lease was still not in her name. *See*, Return A-1. In response, COD contended that it lawfully served Ms. Austin with all RN-26s. As proof of the notices for the 1992-1993 and 1994-1995 rent increases, it submitted two RN-26s with certified mail receipts that were addressed to Mr. Austin. *See,* Ossi Aff at 3, ¶ 6. Ms. Austin allegedly signed one of the receipts for the 1992-1993 increase. *Id.* For the 1996-1997 increase, COD submitted two RN-26s with certified mail receipts addressed to Ms. Austin as proof of notice; Ms. Austin purportedly signed one of the receipts. *Id.* Finally, it averred that pursuant to a directive it received from DHCR, the Rent Control Law did not require it to register Ms. Austin as the tenant of record unless there was a special proceeding before DHCR. *Id.; see also,* Verified Petition, Ex D.

Nearly five years later in an Order of Disposition dated May 4, 2001, DHCR's Rent Administrator ("the RA") determined that the MCR was $952.80, the amount COD charged since January 1, 1999. It also allowed all increases from 1974-2002 with the exception of certain years where it found Former Landlord made some calculation errors.[2] *See,* Return A-11

Ms. Austin then filed a Petition for Administrative Review ("PAR") with DHCR's Commissioner ("the Commissioner"), requesting that it amend the RA's order because it did

[2] It is undisputed that beginning in 1996, all RN-26s were addressed to Ms. Austin.

not address her allegation that COD did not properly serve her with the RN-26s. *See,* Return: B-1. On July 20, 2001, the Commissioner issued an Order and Opinion, finding that

> "[T]he subject tenant correctly notes that the RN-26 forms for the 1992-1993 and 1994-1995 periods [were] mailed only to her deceased father, Arthur Austin. However, the Commissioner notes that the RN-26 * * * is merely informational the main purpose of which is to inform the tenant of the legal rent * * * The Commissioner finds that as long as the landlord timely served the applicable RN-26, and that said form had been received, or should have been received * * * the service of the RN-26 is not defective.
>
> "Based upon the record and the rent agency's records, the Commissioner finds that the subject landlord served the RN-26 forms pertaining to the subject apartment for each year of the 1992-1993 period; and that the subject tenant had received those forms. The Commissioner accordingly finds that the landlord is eligible to collect the MBR increases for the 1992-1993 period, effective January 1, 1992.
>
> "The Commission finds that there is an issue whether the subject tenant had received the RN-26 for the 1994-1995 period. Accordingly, the Commissioner deems it appropriate for the [RA] to determine whether the subject tenant, or anyone else who may have resided in the subject apartment, had received or should have received the RN-26 for the 1994-1995 period, [and] to afford the parties an opportunity to reply * * *."

Return: B-4.

On September 6, 2001, the RA opened the proceedings and invited the parties to submit evidence in support of their respective positions. COD acknowledged that all RN-26s through 1995 were sent to Mr. Austin because there was no formal proceeding recognizing Ms. Austin as the tenant of record. Moreover, it alleged that Ms. Austin was aware of all increases after her father died, but refused to accept the forms in order to avoid the rent

increases. *See,* Return: C-6. Ms. Austin contended that because the notices were sent via certified mail in her father's name, U.S. Post Office policy prevented her from retrieving these from her local post office. *See,* Return C-9, C-15, and C-16.

The RA issued a new order on November 26, 2004, where it allowed the 1994-1995 increase. Ms. Austin filed a PAR in which she objected to all the rent increases, maintaining her contention that she never received the RN-26s. *See,* Ossi Aff at 6, ¶ 20. On May 10, 2006, the Commissioner denied the petition, and upheld the RA's determination. *See*, Return: D-6. Ms. Austin then commenced an Article 78 proceeding. *See*, Return: F-1 and F-2. On consent, she and COD agreed to remand the proceeding back to the Commissioner for additional review.

In an Order issued on February 16, 2007, the Commissioner found that

> "The record establishes that the owner failed to serve requisite notifications on the tenant during the period from 1988 through 1995 thereby precluding the owner's right to collect certain agency-authorized adjustments to the collectible rent. In the proceeding below, the owner submitted documentation for the subject apartment showing that transmittals of [RN-26s] * * * were effected by certified mailings to Arthur Austin.
>
> "While the subject tenant did not initiate a proceeding following the death of Arthur Austin to settle the issue of her tenancy rights, the record establishes that the tenant did take affirmative steps to address the issue with the owner. Since the evidence, taken as a whole, establishes that these steps had the effect of affording full and complete notice on the owner of the tenant's rent-control status prior to 1992, it is determined that the owner's action in failing to acknowledge Ellyn Austin's tenancy - to wit: by not serving her with the RN-

> 26s - was not appropriate under the circumstances and did not excuse the owner from its failure to serve the requisite rent adjustments to the proper party."

Return: F-3.

On April 16, 2007, COD commenced the instant Article 78 petition, averring that DHCR's final determination that it failed to provide Ms. Austin with proper notice and therefore cannot collect the rent increases was arbitrary and capricious. DHCR and Ms. Austin oppose the application, arguing that the decision is based on sound judgment and a rational interpretation of the applicable law and regulations.

DISCUSSION

Judicial review of an administrative determination pursuant to CPLR Article 78 is limited to the inquiry into whether the agency acted arbitrarily or capriciously, without any sound basis in reason. *See, Matter of Pell v. Board of Educ.*, 34 N.Y.2d. 222, 231-232 (1974); *see also, Matter of Arrocha v. Board of Educ.*, 93 N.Y.2d 361, 363 (1999). As long as there is some rational basis or credible evidence to support an administrative determination, the agency's decision must be upheld. *See*, *Matter of Guzman v. Safir*, 293 A.D.2d 281 (1st Dept. 2002) (determination was not arbitrary and capricious "because there was some credible evidence to support the Board's conclusion"), *lv. denied* 98 N.Y.2d 614 (2002). Judicial review is not intended to weigh the merits of competing professional opinions because doing so undermines the function, authority and expertise of administrative

agencies. *See, Matter of Arrocha v. Board of Educ.*, 93 N.Y.2d, at 363.

COD asks this court to review the rationality of DHCR's finding that it failed to serve Ms. Austin with proper notice of the rent increases. While DHCR previously came to a different conclusion, this in and of itself does not render its ultimate determination arbitrary and capricious. Indeed, it is not uncommon or irrational for a judicial or quasi-judicial entity to issue a decision and subsequently reconsider it and come to a different conclusion.

Here, DHCR's regulations required COD to serve RN-26s on the tenant in order to increase the rent. While Ms. Austin was not the tenant of record because a DHCR proceeding did not adjudicate her as such, she was in fact residing in the apartment since June 1987. Moreover, COD was aware of Ms. Austin's tenancy yet continued to send the RN-26s addressed to the deceased Mr. Austin until 1996. While Ms. Austin may have been aware of the rent increases, COD did not follow DHCR's regulations and notify her directly. There are indeed many requirements in the law, such as service of process, where an individual's mere knowledge of a fact does not render the corresponding action in accordance with the law. Rather, prescribed procedures must be followed in order to effectuate the desired result. *See, Macchia v Russo,* 67 NY 2d 593 (1986). DHCR reasonably concluded that COD had to follow said procedures and send Ms. Austin notices directly.

While DHCR did not conclude this case until nearly nine years after Ms. Austin filed her complaint, this extended-time frame does not justify annulling the opinion. It was not the situation where Ms. Austin filed her complaint and DHCR simply waited nine years to issue a finding. Rather, this was a process bereft with several determinations, appeals, remands, and a withdrawn Article 78 petition before DHCR issued its final determination. DHCR therefore cannot be penalized because of a lengthy process that both Ms. Austin and COD contributed to.

Accordingly, it is

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

This constitutes the Decision, Order, and Judgment of the Court.

Dated: New York, New York
January 3, 2008

ENTER:

Hon. Eileen Bransten

HON. EILEEN BRANSTEN