

**Matter of Columb Realty LLC v State of N. Y.  
Div. of Hous. and Community Renewal**

2008 NY Slip Op 30779(U)

March 17, 2008

Supreme Court, New York County

Docket Number: 0114038/2007

Judge: Kibbie F. Payne

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

PRESENT: KIBBIE F. PAYNE PART 4  
*Justice*

In the Matter of the Application of  
COLUMB REALTY LLC

INDEX NO. 114038/07

MOTION DATE 12-13-07

- v -

MOTION SEQ. NO. 001

STATE OF NEW YORK DIVISION OF HOUSING  
AND COMMUNITY RENEWAL, et al.

MOTION CAL. NO. \_\_\_\_\_

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

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 special proceeding is decided as indicated.

**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).

Dated: March 17, 2008

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 4

-----X  
In the Matter of the Application of  
COLUMB REALTY LLC

Petitioner,

For a Judgment Pursuant to Article 78 of  
the Civil Practice Law and Rules

Index No. 114038/07

-against-

Judgment/Decision

STATE OF NEW YORK DIVISION OF  
HOUSING AND COMMUNITY RENEWAL,  
OFFICE OF RENT ADMINISTRATION,

Respondent,

DONALD MAXWELL,

Respondent-Intervenor.

Administration Review Docket No.: VA410010RT

Rent Administrator's Docket No.: UH410081RV

Premises: 534 West 47<sup>th</sup> Street  
Apartment #1-R  
New York, NY 10036

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1415).

-----X  
Kibbie F. Payne, J.:

In this CPLR article 78 proceeding, petitioner Columb Realty, LLC seeks a judgment annulling the determination of respondent New York State Division of Housing and Community Renewal that reversed a decision which provided the owner with the right to terminate a preferential rent upon renewal.

These proceedings arise from a rental renewal for Apartment 1R located at 534 West 47<sup>th</sup> Street, New York, New York. In May 7, 1994 petitioner's predecessor as owner landlord and the tenant

Donald Maxwell, respondent-intervenor, entered into a two year rent stabilized lease agreement. In a rider to the lease, the parties acknowledged the legal rent and expressly permitted the tenant to pay his landlord a preferential rent rather than the higher legal rent. The lease rider expressly provided:

Landlord and tenant acknowledge that the legal rent for this apartment is \$1188.00. During the term of this lease landlord agrees to accept the amount of \$950.00 per month as full payment for rent. Upon renewal of this lease landlord will base the increase calculation of the reduced amount.

The landlord, however, continuously registered the apartment with respondent agency listing both the legal and preferential rents. In 2006, the new owner petitioner advised the tenant that the renewal lease would be based upon the higher legal rent rather than the preferential rent. On August 30, 2006, the tenant filed a lease violation complaint with the respondent agency claiming, after a twelve year residency in the apartment, the landlord refused to issue a renewal lease with his wife's name added to it and that the landlord failed to offer a renewal lease with the preferential rent of his expired lease. On December 8, 2006, the rent administrator issued an order directing the landlord to add the wife's name to the renewal lease. In that order the rent administrator further wrote: "In this case the legal regulated rent was previously established in the 2003 annual rent regulation served on the tenant. Therefore,

\* 4 ]  
the owner no longer has to give the tenant a preferential rent."

The following month, the tenant filed a Petition for Administrative Review (PAR) seeking reversal of the December 8, 2006 order and an order requiring the landlord to offer a renewal lease based upon the preferential rent. In that administrative appeal, the tenant for the first time submitted his initial 1994 lease with the rider. In support of his claims, the tenant argued that the rent administrator's order was contra to Matter of Sugihara v DHRC, 13 Misc3d 1239A. The tenant argued the terms of the rider were unambiguous and that the tenant had the right to renewal leases at the preferential rent in accordance with the terms and conditions of the initial lease and rider. The tenant further claimed that prior owner acknowledged lease renewals at the reduced rent in its 2004 admission. "Due to prior leases or renewals to you not having properly disclosed the legal rent your current renewal will be based upon the lower reduced rent." (See PAR exhibit C)

Petitioner opposed the tenant's application, claiming that a reading of the rider clearly indicates that the preferential rent was not required to last the life of the tenancy, and to carry over into subsequent renewal leases. Petitioner, additionally, argued that where the lease rider does not provide for extended preferential rates throughout the tenancy then the landlord may limit preferential rate to the one renewal term. (Citing Aijaz v

[\* 5]  
Hillside Place, LLC, 8 Misc3d 73, 76 [App Term 2<sup>nd</sup> Dept 2005]).

Following an administrative review, on September 18, 2007, respondent agency modified the December 8, 2006 order holding that the prior determination permitting the owner to terminate a preferential rent on renewal was incorrect. Petitioner owner, thereafter, commenced this instant article 78 proceedings contending the agency's September 18, 2007 determination was arbitrary and capricious and should therefore be reversed.

It is well-settled that judicial review in an article 78 proceeding is limited to whether the determination was rationally based (see Matter of Hughes v Doherty, 5 NY3d 100, 107 [2005]; Matter Pell v Bd. of Education, 34 NY2d 222, 231 [1974]; Matter of DiMaggio v DHCR, 248 AD2d 533, 534; Matter of Bambeck v DHCR, 129 AD2d 51, 54). Here, the deputy commissioner reviewed the provisions of the rider and found the provisions to be ambiguous. The deputy commissioner opined the language in the rider could be reasonably interpreted not only in favor of the tenant but also in favor of the owner. Since the lease and rider were prepared by the former owner, the deputy commissioner resolved the ambiguity in favor of the tenant and found that the owner and successors were bound to calculate the renewal rent based upon the lower preferential rate (see Petitioner's Exhibit D at 5).

This court is unpersuaded the agency's determination lacked a rational basis. The commissioner properly exercised his

discretion to resolve the rental issue in favor of the tenant. The agency reviewed the initial lease and its rider, the rent administrator's December 8, 2006 determination and counsel's arguments with their supporting cases. Where as here, a rational basis exists the determination of the deputy commissioner should not be disturbed.

It is not the function of a court to substitute its judgment for a rational determination of the agency's even when the court believes its interpretation is superior. In this case however, there is ample basis to support respondent's decision. The agency's determination may be annulled only where the determination was arbitrary, capricious or irrational (CPLR 7803[3]; also Matter of Hughes v Doherty, 5 NY3d, supra at 105) Accordingly, it is hereby

**ADJUDGED** that the application is denied and petition is dismissed.

The foregoing constitutes the decision and judgment of this court.

Dated March 17, 2008



Kibbie F. Payne

J.S.C.

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