

**Matter of Friedman v Division of Hous. &  
Community Renewal**

2008 NY Slip Op 30906(U)

March 26, 2008

Supreme Court, New York County

Docket Number: 0114769/2007

Judge: Judith J. Gische

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

PRESENT: \_\_\_\_\_

PART 10

Justice

Kenneth F. Cannon

INDEX NO

114769/07

MOTION DATE

Division of Housing  
Community Renewal  
LARRY YALATA

MOTION SEQ NO

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

FILED  
NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

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

Dated: March 26 2008

*[Handwritten Signature]*

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  
COUNTY OF NEW YORK: PART 10**

-----X

In the matter of the application of  
**Kenneth Friedman,**  
Petitioner,

**Decision/Order**

Index No.: 114769/07  
Seq. No.: 001

For a judgment under **Article 78** of the  
Civil Practice Law and Rules

Present:  
Hon. Judith J. Gische  
J.S.C.

-against-

**Division of Housing and Community  
Renewal and Larry Yakata,**

Respondents.

**FILED**

MAR 3 1 2008

NEW YORK  
COUNTY CLERK'S OFFICE

-----X

Recitation, as required by CPLR § 2219 [a], of the papers entered in the review of  
this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
OSC w/KF pet, SG affirm, exhs .....	1
LY answer, EO'T affirm, exhs .....	2
DHCR answer, GRC affirm, exhs .....	3
LY reply w/SG affirm, exhs .....	4
DHCR "Return" .....	5
Transcript OA 1/10/08 .....	6

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an article 78 proceeding. Petitioner Kenneth Friedman is the owner and landlord of the premises located at 26 West 95<sup>th</sup> Street, New York County ("premises"). Respondents are Larry Yakata, the tenant of apartment 7 at the premises ("tenant"), and the State agency responsible for the promulgation of regulations applicable to rent regulations ("DHCR"), including the Rent Stabilization Code ("RSC") applicable to rent stabilized units in New York City. The tenant and DHCR have separately appeared and

answered the petition. Each opposes the relief sought in the petition which is the reversal, annulment or vacatur of the Order and Opinion issued by the DHCR dated October 25, 2007, denying the landlord's petition for administrative review ("PAR") of the Rent Administrator's Order issued on May 25, 2007 ("rent administrator's order").

Since the petition is timely, and seeks review of a final determination by the DHCR, the court will decide whether there are factual disputes that must be resolved at trial, or whether the petition can be decided on the record developed thus far. CPLR § 7804 (h).

### **Arguments**

The landlord contends that the DHCR's decision, to deny his PAR, was arbitrary and capricious because he disproved the tenant's claims before the Rent Administrator, that the tenant was not offered a timely renewal lease for the two-year term commencing August 1, 2005 and ending July 31, 2007. Alternatively, landlord contends that even if the Rent Administrator properly decided that the renewal lease was not offered timely, DHCR was without the legal authority to change the commencement date of the "late" renewal lease from August 1, 2005 to July 1, 2006. The July 1, 2006 commencement date is based upon the tenant having signed (dated) the lease March 22, 2006. The landlord signed the lease thereafter on April 1, 2006. Thus, it is the landlord's contention that the tenant knowingly and voluntarily signed the "August 1, 2005 - July 31, 2007" lease on March 22, 2006, essentially binding himself to a renewal lease already in progress.

DHCR opposes the petition and seeks its dismissal on the basis that the Rent Administrator's Order (and therefore its denial of the landlord's PAR) was not made in

violation of lawful procedure, is unaffected by an error of law, and it was not arbitrary and capricious or an abuse of discretion. DHCR contends that there is considerable legal authority for the Rent Administrator's Order and decision to have the renewal lease start July 1, 2006, including the express provisions of RSC § 2523.5 (a). This section requires that a notice for lease renewal be delivered to the tenant not more than 150 days and not less than 90 days before the tenant's lease term ends. Once executed by the landlord and delivered to the tenant, the lease is binding. However, "[u]pon failure of the owner to deliver a copy of the fully executed renewal lease form to the tenant within 30 days from the owner's receipt of [same], such tenant shall not be deprived of any of his or her rights under the RSL and this Code . . ." Where a landlord fails to provide a timely notice of lease renewal, RSC § 2523.5 (c) provides that the one or two year lease term selected by the tenant "shall commence at the tenant's option, either (i) on the date a renewal would have commenced had a timely offer been made, or (ii) on the first rent payment date occurring no less than 90 day after the date that the owner does offer the lease to the tenant. . ." Thus, DHCR contends the Rent Administrator, after considering all the evidence in the record before it, properly concluded that the tenant had proved his claim of a lease violation in that he had not been provided with a renewal lease at least 90 days prior to its commencement date. DHCR contends further that the Rent Administrator properly amended the lease to reflect the accurate commencement date of July 1, 2006.

The tenant agrees with DHCR and the denial of the landlord's PAR. He separately contends, however, that he did not waive his rights under RSC § 2523.5 (c) simply by the signing the renewal lease with the (wrong) renewal commencement date

of August 1, 2005 on it.

### Discussion

The standard of judicial review in an Article 78 proceeding is whether there was a rational basis for the decision rendered by the administrative body. Thus, in reviewing DHCR's order and opinion denying the landlord's PAR the only questions that may be considered by the court are whether it was made in violation of lawful procedure, was effected by an error of law, or was arbitrary and capricious or an abuse of discretion. CPLR § 7803. Where the determination is rationally based upon the administrative record, it should not be disturbed. Matter of Salvati v. Eimicke, 77 NY2d 784 (1988); Elgart v. DHCR, 2 AD3d 218 (1<sup>st</sup> Dep't 2003). While pure issues of law should be determined by the court, issues concerning the interpretation of a statute or regulation by the agency responsible for its administration should be upheld, if they are not irrational or unreasonable. Madison-Oneide Board of Compaartive Educational Servicesv. Mills, 4 NY3d 51 (2004); Allstate Ins. Co. V. Libow, 106 AD2d 110 ( 2<sup>nd</sup> dept. 1984) aff'd 65 NY2d 807 (1985).

Since this case involves the interpretation and application of the RSC, and the DHCR is the State agency responsible for the promulgation of regulations applicable to rent regulations, DHCR's interpretation of the Rent Stabilization Law is entitled to great deference by this court. I/M/O Dworman v. New York State Division of Housing and Urban Renewal, 94 NY2d 359, 371 (1999). Furthermore, because of its "specialized knowledge and understanding" of its own underlying operational practices, the DHCR is in the prime position to evaluate the facts developed before it and to draw any and all necessary conclusion therefrom that may be necessary, including making decisions

about credibility. 201 East 81st Street Associates v. New York State Div. of Housing and Community Renewal, 288 A.D.2d 89 (1<sup>st</sup> Dept 2001).

At its core, the landlord's argument is simply that the Rent Administrator should have believed his claim, that his predecessor in interest timely gave the tenant a renewal lease, but Mr. Yakata did not sign it right away. It is, however, within the province of the Rent Administrator to decide issues of credibility, based upon the record developed before it, and this claim was decided in tenant's favor. Having made that determination, the Rent Administrator also considered whether the tenant had made a conscious decision about the commencement date of the renewal that was not timely offered. This is consistent with the applicable provision of the RSC. Compare: Mohr v. Sherman, 8/18/93 NYLJ 22 (col. 6) (Civil Ct, N.Y. Co. 18-E) [dispute over commencement date of renewal notice; tenant waited two years and did not bring DHCR action]; South Park Associates, LLC v. Toledano, 259 A.D.2d 306 (1<sup>st</sup> Dept 1999) [untimely offer of renewal - tenant chooses commencement date].

Based upon the credible evidence before it, the Rent Administrator found that although the tenant agreed to accept the late renewal of his lease, he did not make any decision, let alone an informed one, about whether he wanted the renewal to start on August 1, 2005 or 90 days after it was offered. Other than his signature on the lease, the tenant did not put any other notations on the lease. In denying the PAR, the court examined the Rent Administrator's decision and found that the tenant's agreement to the renewal did not set forth "his cognizance of the commencement date options that were available to him."

The landlord's reliance on RSC § 2523.5 (c) (2) is misplaced not only because it

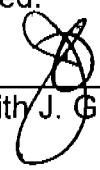
was not apparently raised before the agency, but also because he did not prevail on his claim that the tenant failed to timely renew an expiring lease, but then remained in occupancy after the lease had expired. The tenant did not pay an increased rent, and because the landlord failed to prove he offered a timely lease, he had no basis to "deem" the lease as having commenced August 1, 2005. Thus, the date of commencement a decision/ selection for the tenant to make. A belated offer of a late renewal lease cannot prejudice the tenant. 123 West 15, LLC v. Lafayette Compton, 4 Misc3d 138 (a) (App Term 2004).

The landlord has not met his burden of putting forth facts that support his claim that the denial of his PAR by DHCR was arbitrary, in violation of lawful procedure, an abuse of its discretionary power, or made in excess of its jurisdiction. CPLR § 7803; Matter of Pell v. Board of Education, 34 NY2d 222 (1974). The DHCR's denial of his PAR, and its decision to affirm the Rent Administrator's decision are supported by the record, and its interpretation of the applicable statutes applicable to the dispute. Greystone Mgmt Corp. v. CAB, 94 AD2d 614 (1<sup>st</sup> Dept 1983). Therefore, the petition is dismissed and the clerk shall enter judgment in favor of the respondents.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

Dated: New York, New York  
March 26, 2008

So Ordered:  
  
Hon. Judith J. Gische, J.S.C.

**FILED**  
MAR 31 2008  
NEW YORK  
COUNTY CLERKS OFFICE