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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Index Number : 107141/2007

462 AMSTERDAM, LLC

vs

STATE OF NEW YORK D.H.C.R.

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered ... to _____ ... 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~~ Article 78 proceeding is determined in accordance with the annexed decision, order and judgment.

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: April 15, 2008

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: I.A.S. PART 11

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In the Matter of the Application of 462 AMSTERDAM, LLC, INDEX NO. 107141/07

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules,

-against-

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

Respondent.

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JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner 462 Amsterdam LLC, (462 Amsterdam) seeks an order annulling the March 20, 2007 order of the New York State Division of Housing and Community Renewal (DHCR), determining that petitioner overcharged the tenants and imposing an award of treble damages.

Petitioner 462 Amsterdam is the owner of the building located at 462 Amsterdam Avenue, New York, New York. On June 3, 2005, the tenants in Apartment 4S of the building, Stephen Campbell Bridges and Tracy Baker, filed a rent overcharge complaint with the DHCR. Alleging that they moved into the apartment with a one-year lease on April 1, 2004, at an initial rent of $1,750, the tenants requested that the DHCR examine the lease history for the apartment, going back four years from the date of filing of their complaint to determine the lawful stabilized rent. The tenants stated that there was no information on the 2004 registration to explain why the apartment was listed as exempt due to high rent vacancy.

At that time, Rosolino Mangano and Anna Mangano were the owners of the building and the operating agent was "B M Group, Inc." The Manganos' son, Sam Mangano, was an officer of B M Group and submitted an answer on behalf of the owners, contending that the rent charged to the tenants was legal. They alleged that on the base date of June 2001, the tenant in occupancy, Marcia Lane was charged a monthly rent of $566.84. After Lane vacated the apartment, the rent was increased due to an 18% vacancy increase ($102), plus a longevity increase of .6% times 16, since Lane had signed the original lease 16 years earlier ($54). After Lane left, the owners made improvements to the apartment, which also entitled them to an increase. The Manganos alleged that they spent $57,000 on improvements and were therefore entitled to a rent increase based on 1/40th of the amount paid ($1,400). The owners further alleged that another tenant, James Rhyu, had occupied the apartment after the improvements were made. They submitted his lease with their answer which indicated that the lease commenced on May 1, 2003 and was to end on April 30, 2004, with a monthly rental of $2,000. The owners alleged that Mr. Rhyu had left the premises on January 9, 2004.

On March 9, 2004, the owners entered into a lease with the complaining tenants, which ran from April 1, 2004 through March 31, 2005, at a monthly rent of $1,750. The owners alleged that the $1,750 rent amount was less than they were entitled to due to market conditions. They also alleged that when the vacancy and apartment improvement rent increases were added to the base rent, the apartment was de-regulated and the rent for the complaining tenants was proper.

In subsequent submissions to the DHCR, the tenants raised three objections to the rent amount in their lease. First, they challenged the actual cost of the alleged improvements and submitted an engineer's report concluding that the estimated cost of the improvements was

$31,249, as opposed to $57,000. The engineer asserted that some of the work was maintenance and not renovation, the owners' invoice listed some items more than once, and some of the claimed work had not been done. Second, the tenants questioned whether Mr. Rhyu was a bona fide tenant in that he did not appear to have his own electric bill. Third, the tenants claimed that the owners had failed to properly reduce the collectible rent as required by the DHCR's rent reduction order No. JB430091 B, issued on September 28, 1995.

On April 24, 2006, the DHCR Rent Administrator (RA) issued an order denying the tenants' rent overcharge complaint, but nonetheless finding that the apartment was subject to the Rent Stabilization Law and that the tenants were entitled to a rent stabilized renewal lease. In calculating the legal regulated rent, the RA used a base rent of $566.84 to determine the rent increases from June 30, 2001. To the $566.84 amount, she added a 4% increase in October 2002, an 18% vacancy increase and a 9.6% longevity increase on May 1, 2003, and a 17% vacancy increase on April 1, 2004. Relying on the tenants' expert's opinion and on a physical inspection of the apartment conducted by the DHCR, the RA reduced the $51,000[1] total value of claimed improvements to $36,890, and found that the owner was entitled to a rent increase based on 1/40th of that amount, or $922.25 per month.[2] The RA concluded that when all the legal rent

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[1]While the owners originally asserted that the improvements cost $57,000, in their September 7, 2005 submission to the DHCR they admitted that they had made a mistake in counting a $5,000 payment twice, and that the actual amount was $51,000.

[2]Specifically, the RA's rent calculation chart noted that the DHCR's inspection determined that no new doors were installed, and that existing floors were refinished and not newly installed. In reducing the $51,000 to $36,890, the RA adjusted the owners' claimed costs as follows:

(1) The $9,000.00 claimed cost for carpentry was adjusted to $3,890.00 as per tenant's engineering report.

increases were added to the base rent, the tenants' rent was less than the legal rent amount, so the legal rent was determined to be the amount actually charged to the tenants, or $1,750 per month. The RA's order did not address the issue raised by the tenants as to the effect of the June 1995 rent reduction order on the calculation of the legal rent.

On May 22, 2006, the tenants filed a Petition for Administrative Review (PAR) asserting that they were overcharged and were entitled to treble damages. Specifically, the tenants argued that: 1) the RA failed to factor into her calculations the effect of the 1995 rent reduction order; 2) the RA failed to resolve the question as to the bona fides of the prior tenant, Mr. Rhyu; and 3) the RA failed to adhere to the applicable law and procedures in assessing the allowable costs of the improvements. In response, the owners asserted that they had submitted sufficient documentary evidence establishing the costs of the improvements, and that they were entitled to a increase based upon the $51,000 figure.

On March 20, 2007, Deputy Commissioner Paul A. Roldan issued an Order and Opinion granting in part, the tenants' PAR and modifying the RA's order. While the Deputy Commissioner determined that a reasonable basis existed for finding that the value of the apartment improvements was $36,890 and that Mr. Rhyu's tenancy was not illusory, he

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(2) The $3,000 claim cost for plumbing is disallowed as duplicated claim and is part of the bathroom claimed costs.
(3) The $7,000 claimed cost for floor installation is disallowed as an item of repair and maintenance as floors were only refinished.
(4) The $3,000.00 claimed costs for painting is adjusted to $850.00 as per tenant's engineering report.
(5) The $5,000.00 claimed costs for electrical work is adjusted to $2,240.00 as per tenant's engineering report.

concluded that the tenants had been overcharged and were entitled to treble damages. In determining the overcharge, Deputy Commission relied on the rent reduction order issued by DHCR on June 1, 1995, and which remained in effect until December 1, 2004. Based on the 1995 rent reduction order, the Deputy Commissioner found that the most that the owners could have charged the tenants, up to and including November 30, 2004, was an amount equal to the sum of the base rent plus a vacancy allowance and longevity increase due under the prior tenant's vacancy lease, plus the vacancy allowance due under the complaining tenants' vacancy lease. Calculating the collectible rent as of April 1, 2004, when the complaining tenants moved in, the Deputy Commissioner concluded the legal regulated rent was $846.25.[3] Subtracting this amount from the actual rent paid in the amount of $1,750, he found a monthly overcharge of $903.75, and multiplying that amount by the eight months of overcharge, he found a total overcharge of $7,230. The Deputy Commission also awarded the tenants treble damages in the amount of $21,690, reasoning as follows:

> In light of the fact that the owners themselves and/or their principals have been in title continuously since before the rent reduction order was issued and in the absence of any evidence submitted by the owners, either below or on appeal, addressing the issue of willfulness (particularly as it relates to the rent reduction in question), the Commissioner find that treble damages must be imposed herein.

On May 23, 2007, the owners commenced the instant Article 78 proceeding, challenging the DHCR's disallowance of the some of the costs associated with the renovation of the apartment, and the DHCR's refusal to apply the value of those improvements to the legal rent

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[3]Specifically, the Deputy Commissioner took the base date (June 3, 2001) rent of $566.84, added an 18% vacancy allowance and a longevity increase (16 years x .6%) to calculate the rent on May 1, 2003 as $723.29. He then added a vacancy allowance (17% of $723.29) to determine the rent on April 1, 2004 as $846.25.

and thereby deregulate the apartment based upon the high rent vacancy decontrol statute. The owners also object to the DHCR's finding of rent overcharge and the imposition of treble damages. Specifically, the owners argue that the 1995 rent reduction order does not change or modify the legal rent, but merely bars them from applying for, or collecting any further rent increases.

It is well settled that the court's review of the action of an administrative agency, such as the DHCR, is limited to whether the agency's determination is arbitrary and capricious, or without a rational basis in the record and a reasonable basis in the law. See CPLR 7803(3); Classic Realty LLC v. New York State Division of Housing & Community Renewal, 2 NY3d 142 (2004); Matter of Pell v. Board of Education of Union Free School District No. 1, 34 NY2d 222 (1974); Matter of Partnership 92 v. State of New York Division of Housing & Community Renewal, 46 AD3d 425 (1st Dept 2007). If the challenged determination is rational, it must be upheld, even if the court when viewing the case in the first instance, might have reached a difference conclusion. See Mid-State Management Corp. v. New York City Conciliation & Appeals Board, 112 AD2d 72 (1st Dept), aff'd 66 NY 2d 1032 (1985). Moreover, "'[j]udicial review of the propriety of any administrative determination is limited to the grounds invoked by the agency in making its determination.'" Matter of AVJ Rlty. Corp. v New York State Division of Housing & Community Renewal, 8 AD3d 14, 17 (1st Dept 2004)(quoting Matter of Missionary Sisters of the Sacred Heart v State of New York Division of Housing & Community Renewal, 283 AD2d 284, 288 [1st Dept 2001]).

Here, the DHCR's determination regarding the owners' claimed costs for improvements to the apartment was clearly rationally based. The rent calculation chart attached to RA's

determination indicates that she disallowed or reduced the costs of certain items that she found were duplicated or were for work that was not done, based upon the DHCR's inspection report and photographs, and the report of the tenants' engineer. For example, the RA disallowed the owners' claimed cost of $7,000 for new floor installation based upon a finding, supported by the inspection report and photographs, that the floors had merely been refinished. She further found that this was a non-qualifying item of maintenance and repair. See BN Realty Assoc. v State of New York Division of Housing & Community Renewal, 254 AD2d 7 (1st Dept 1998), lv app den, 93 NY2d 806 (1999).

The owners also argue that the rent reduction order should not have resulted in a refusal to deregulate the apartment based upon the high-rent vacancy decontrol statute. Citing to DHCR Fact Sheet # 36, the owners assert that the rent reduction is just factored into the legal "collectible" rent. This argument is without merit, as it is dependant upon adding to the rent 1/40th of $51,000, the owners' claimed costs of improvements, which would have brought the legal rent to more than $2,000 per month. However, as determined above, the DHCR's reduction of the costs of the improvements to $36,890 was rationally based. The addition of 1/40th of that amount to the monthly rental, does not place the apartment within the high-rent vacancy decontrol statute. Moreover, the provision the owners rely on specifically provides that they are not entitled to high-rent vacancy decontrol: "*High-rent vacancy decontrol will also not result where the vacancy occurs during the period of effectiveness of a rent-reduction order* issued as a result of a finding that an owner failed to maintain required or essential services, that lowers the legal regulated or maximum rent below $2,000 per month" (emphasis added).

Finally, the imposition of treble damages was also rationally based, and not arbitrary and

capricious. The owners failed to meet their burden to overcome the presumption of willfulness attending the overcharge finding by a preponderance of the evidence that the overcharge was neither willful nor attributable to the owners' negligence. See H.O. Realty Corp. v. State of New York Division of Housing & Community Renewal, 46 AD3d 103 (1st Dept 2007); Matter of Yorkroad Assocs v. New York State Division of Housing & Community Renewal, 19 AD3d 217 (1st Dept 2005); Matter of Tockwotten Assos, LLC v. NewYork State Division of Housing & Community Renewal, 7 AD3d 453 (1st Dept 2004); Matter of Sterling Apartment v. Division of Housing & Communitiy Renewal, 269 AD2d 266 (1st Dept 2000); Artnor Realty Co. v. New York State Division of Housing & Community Renewal, 265 AD2d 183 (1st Dept 1999). Under the circumstances presented herein, where the owner claimed more than $14,000 in inflated and improper improvement costs, and where, as the DHCR Deputy Commissioner noted, the ownership of the property had remained continuous, so the owner should have been and was in fact aware of the 1995 rent reduction order, since it applied in 2004 for a rent restoration order, the DHCR had a rational basis for concluding that the owners failed to establish that the overcharge was not willful or negligent. See Matter of Tockwotten Assocs, LLC v. New York State Division of Housing & Community Renewal, supra. Thus, the DHCR's imposition of treble damages may not be set aside.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is denied and dismissed

DATED: April 15, 2008 ENTER:

J.S.C.