

**Matter of Barmat Realty Co., LLC v New York
State Div. of Hous. and Community Renewal**

2008 NY Slip Op 32663(U)

September 26, 2008

Supreme Court, Kings County

Docket Number: 1490/08

Judge: David Schmidt

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At an IAS Term, Part 47 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 20th day of ~~May~~ *September*, 2008

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

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In the Matter of the Application of
BARMAT REALTY COMPANY, LLC,

Index No. 1490/08

Petitioner,

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

- against -

NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL,

Respondent,

YVETTE QUOW,

Respondent.

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The following papers numbered 1 to 5 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1 - 2 _____
Opposing Affidavits (Affirmations) _____	_____
Reply Affidavits (Affirmations) _____	3, 4 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers <u>Record before DHCR</u> _____	5 _____

Upon the foregoing papers, petitioner Barmat Realty Company, LLC seeks judicial review, under article 78 of the Civil Practice Law and Rules, of an order issued by respondent New York State Division of Housing and Community Renewal (DHCR) on November 19, 2007 which denied petitioner's petition for administrative review (PAR) and affirmed an order of the Rent Administrator (RA) which determined that the guidelines increase in rent to be collected by petitioner in the tenant's renewal lease must be based on the amount the tenant was paying as preferential rent and not on the legal regulated rent for the subject apartment.

Petitioner is the owner of the subject rent-stabilized apartment currently occupied by respondent Yvette Quow. On February 28, 2007, Ms. Quow filed with the DHCR a "Tenant's Complaint of Owner's Failure to Renew Lease and/or Failure to Furnish a Copy of a Signed Lease," wherein she alleged that the renewal lease provided by petitioner for the renewal term commencing May 1, 2007 reflected rent increases predicated on the legal regulated rent of the apartment instead of the preferential rent which she had paid during the previous term. Annexed to Ms. Quow's complaint was a copy of the previous two-year lease signed by Ms. Quow for the term commencing May 1, 2005 and terminating on April 30, 2007. This previous lease indicated that the legal regulated rent for the previous term was \$850.03, and that under the relevant guidelines increases, the legal regulated rent for a one-year renewal would be \$879.78 ($\$850.03 + \29.75 [$\$850.03 \times 3.5\%$]) and the legal regulated rent for a two-year renewal would be \$905.28 ($\$850.03 + 55.25$ [$\$850.03 \times 6.5\%$]).

However, the lease contained an additional typed section providing that the guidelines increases would be assessed on the preferential rent of \$733.58, with a one-year lease renewal offer for \$759.25 ($733.58 \times 3.5\%$) and a two-year lease renewal offer for \$781.26 ($733.58 \times 6.5\%$).

In response to Ms. Quow's complaint, petitioner submitted to the DHCR a March 18, 1993 rider to Ms. Quow's initial lease which provides:

Tenant acknowledges and agrees that the maximum legal regulated rent for the apartment is \$675.44. In consideration of Tenant entering into occupancy of the subject premises on or before May 1, 1993 it is hereby agreed that the maximum legal regulated rent for the apartment of \$675.44 will be adjusted down to the amount of \$575.00, which will be the monthly rent owed under Articles 3 of this lease.

Tenant acknowledges and agrees that this preferential rent of \$575.00 may be increased by orders of the Rent Guideline Board upon the renewal of this lease, if any; and at any time pursuant to orders of the [DHCR] or by mutual written agreement between the Tenant and Owner.

It is further understood and agreed that in all subsequent agreements by Tenant's successors in tenancy, Owner shall be entitled to all lawful rent increases based on the current maximum legal rent of \$675.44, increased by any order of the Rent Guidelines Board and or DHCR, or agreements between Tenant and Owner, during this preferential tenancy.

By order dated August 3, 2007, the RA concluded based on the language of the rider Ms. Quow was entitled to a preferential rent for the duration of her tenancy and directed petitioner to offer a renewal lease based on the lower preferential rent paid in the previous term. Petitioner thereafter filed a PAR wherein he cited the 2003 amendment to the Rent Stabilization Law which allowed landlords to charge the legal regulated rent upon renewal even if the previous lease charged a preferential rent. Petitioner contends that at the time the rider was drafted, under the provisions of a 1987 amendment to the Rent Stabilization Code, a preferential rent charged in a lease would be the new base rent until there is a vacancy, at which point the higher legal regulated rent could be charged, and the lease renewal clause referring to the successor tenancies was intended to “preserve rights via contract, in addition to the 1987 amendment to the RSL (sic), to prevent any possible conflict later, if challenged. It in no way was put in to add additional rights to the tenant, but to put the tenant on notice and future tenancies on notice of the Owner[’]s intent to collect the legally regulated rent in the future.” In her answer to petitioner’s PAR, Ms. Quow swore that she never signed the 1993 rider, a contention that petitioner stated it would be willing to adopt assuming that the DHCR does not see the merit in petitioner’s interpretation of the rider.

By order dated November 19, 2007, the Deputy Commissioner denied petitioner’s PAR, stating that since petitioner drafted the 1993 rider, any ambiguity in the language must be interpreted in a manner least prejudicial to Ms. Quow. The Deputy Commissioner questioned why, if petitioner intended to retain the right to charge Ms. Quow a higher rent,

would petitioner specify that Ms. Quow's successors could be charged a higher legal regulated rent and not so specify that as to Ms. Quow. The Deputy Commissioner stated that if petitioner intended to limit the preferential rent to Ms. Quow's initial lease, there would be no need to refer to successor tenants. The Deputy Commissioner further found that the question of whether Ms. Quow signed the rider is "more of a distraction than a relevant issue," and that so long as the document is signed by the party to be charged with adherence to it, it is binding on that party, especially after both parties have acted to fulfill their obligations under that agreement. The instant article 78 proceeding ensued.

This court is limited by CPLR article 78 to a review of the record before the DHCR and to the question of whether its determination was arbitrary and capricious (*Matter of Windsor Place Corp. v DHCR*, 161 AD2d 279, 280 [1990]; *Mazel Real Est. v Mirabal*, 138 AD2d 600 [1988]; *Matter of Bambeck v DHCR*, 129 AD2d 51, 55 [1987], *lv denied* 70 NY2d 615 [1988]; *Villas of Forest Hills v Lumberger*, 128 AD2d 701, 703 [1987]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and . . . without regard to the facts" (*Matter of Pell v Board of Ed.*, 34 NY2d 222, 231 [1974]).

Rent Stabilization Law § 26-511(c)(14) became effective on June 6, 2003 and provides in part that:

"Where the amount of rent charged to and paid by the tenant is less than the legal regulated rent for the housing accommodation, the amount of rent for such housing accommodation which may be charged upon renewal or upon

vacancy thereof may, at the option of the owner, be based upon such previously established legal regulated rent, as adjusted by the most recent applicable guidelines increases and other increases authorized by law.”

This provision “was not intended to obviate the terms of a lease agreement where both the landlord and the tenant are aware that the rent charged could legally be higher, but agree, under a specific set of circumstances, to allow the tenant to pay less, either for a specified period of time or for the duration of the tenancy” (*Pastreich v DHCR*, ___ AD3d ___, ___ ; 2008 NY Slip Op 03120, *2 [1st Dept 2008] citing *Matter of Missionary Sisters of Sacred Heart, Ill. v DHCR*, 283 AD2d 284, 287 [2001]; see *Colonnade Mgt., LLC v Warner*, 11 Misc 3d 52, 53 [2006])[“(d)espite its seemingly broad sweep, the 2003 amendment was not intended to preclude the parties to a lease or stipulation from agreeing to a rent preference that would endure beyond the terms of the lease into renewal periods][citation and internal quotation marks omitted]). Thus unless there is a clear agreement between the landlord and tenant that a preferential rent will be charged for the duration of a tenancy, the landlord may charge on a renewal lease an amount up to the legal regulated rent, plus any applicable guidelines increases which have accumulated thereon.

In this matter, the DHCR was arbitrary and capricious in finding that the language of the rider should be interpreted as an agreement by petitioner to charge a preferential rent to Ms. Quow for the duration of her tenancy. A plain reading of the rider clearly provides that successors to Ms. Quow’s tenancy may be charged a rent based upon the legal regulated rent and not any preferential rent which was being paid by Ms. Quow. However, contrary to the

findings of the RA and Deputy Commissioner, the statement in the rider regarding successor tenants being charged a higher rent does not lead to the conclusion that the landlord expressly agreed to grant Ms. Quow a preferential rent upon every renewal of the lease. The rider “must be read ‘in the light of the circumstances existing at its making’” (*Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 [1983] quoting *Becker v Frasse & Co.*, 255 NY 10, 14 [1930]). Indeed, the language of the rider reflects the provisions of the former section 2521.2(b) of the Rent Stabilization Code (RSC) which was in effect at the time the rider was drafted. This former regulation stated: “[w]here the legal regulated rent is established and a rent lower than the legal regulated rent is charged and paid by the tenant, upon vacancy of such tenant, the legal regulated rent previously established plus the most recent applicable guidelines increases, plus such other rent increases as are authorized pursuant to section 2522.4 of this Title [Adjustment of legal regulated rent], may be charged a new tenant.”

The court in *Missionary Sisters* ultimately rejected the DHCR’s reading of the former RSC § 2521.2(b) as entitling the tenant a preferential rent (plus relevant increases) in every subsequent renewal lease, stating:

“as opposed to the interpretation set forth by the DHCR, [former section 2521.2(b)] does not dictate the exclusive point at which the legal regulated rent can be charged if a concession has been granted, and there is nothing in its terms which indicates such a restriction was intended. Rather, [former] section 2521.2 (b) provides guidance in those situations where no written agreement controls and/or where the rent concession is open-ended or where the tenant, and possibly the landlord also, is unaware the rent being charged is not the maximum

allowable. It was not intended, however, to obviate the terms of a lease agreement where both the landlord and the tenant are aware that the rent charged could, legally, be higher, but agree, for a limited period, under a specific set of circumstances, to allow the tenant to pay less” (*Missionary Sisters*, 283 AD2d at 286-287).

Similarly, the terms of the rider here do not “dictate the exclusive point at which the legal regulated rent can be charged if a concession has been granted” and there was no rational basis for the DHCR to conclude, solely on the basis of petitioner’s reference in the rider to successor tenants, that petitioner agreed to charge up to the legal regulated rent only to successor tenants and not to Ms. Quow during her occupancy of the apartment even in the face of a change in the Rent Stabilization Law which subsequently allows owners to charge the legal regulated rent on any renewal lease. The rider indicates that the preferential rent was given in consideration of Ms. Quow entering into occupancy on or before a certain date, and that upon renewal of the lease the preferential rent may be increased by, inter alia, guidelines increases. Thus at best, the rider serves only as a notice to Ms. Quow that the amount of the preferential rent will be increased by at least the amount allowable under the relevant orders of the rent guidelines board or other orders of the DCHR; is not an express agreement by petitioner to abstain from offering renewal leases based on the legal regulated rent.

Moreover, it was Ms. Quow’s position before the RA that she had never before seen the rider prior to this proceeding, never signed the rider, and that her purported signature on

the face of the rider was a forgery. The Deputy Commissioner irrationally brushed this issue aside, deeming it irrelevant and “a distraction,” and incorrectly concluded that even in the absence of a valid signature by Ms. Quow, petitioner was the “party to be charged with adherence” under the rider, when in fact the language of the rider sets forth that it is Ms. Quow who “acknowledges and agrees” to the terms therein. Further, taking into consideration Ms. Quow’s contention that she never saw the rider prior to this proceeding, there is no rational basis upon which the DHCR could resolve an ambiguity in her favor since there would be no evidence of Ms. Quow’s understanding of the rider’s terms (*see Unisys Corp. v Hercules Inc.*, 224 AD2d 365, 367 [1996][“[t]he interpretation of the terms of a contract is normally the province of the court, unless a provision is ambiguous, requiring parol evidence of the parties’ intent”]).

As a result, the instant article 78 petition is granted, and the orders of the RA and Deputy Commissioner are hereby vacated.

The foregoing constitutes the decision and order of the court.

ENTER,



J. S. C.

HON. DAVID I. SCHMIDT