[* 1]

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

PRESENT: HON. NICHOLAS FIGUEROA
Justice

PART 46

Index Number : 106138/2008

541 - 142 LLC

VS.

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

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. 106138/08

MOTION DATE 6/26/08

MOTION SEQ. NO. 001

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2, 3
Answering Affidavits — Exhibits	4, 5
Replying Affidavits	6, 7

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

See accompanying decision and judgment.

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

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: October 20, 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: PART 46

In the Matter of the Application of
541-142 LLC,

Petitioner,

For a Judgment under CPLR Article 78 Overturning a Decision of the State of New York Division of Housing and Community Renewal Office of Rent Administration under Administrative Review Docket No. VL 410008RO and Rent Administrator's Docket No. UI 410080R.

- against -

STATE OF NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Index No. 106138/08

DECISION AND JUDGMENT

Nicholas Figueroa, J.:

Petitioner seeks a judgment, pursuant to CPLR Article 78, reversing and annulling respondent's March 5, 2008 final determination that petitioner was liable for $123,895 for rent overcharges and treble damages. The final order by respondent's Deputy Commissioner denying the Petition for Administrative Review (PAR), affirmed the respondent's Rent Administrator's October 29, 2007 order.

The tenant, who is not a party to this proceeding, filed a rent overcharge complaint on September 19, 2006, alleging that the initial rent the owner charged when she took occupancy of the apartment on November 1, 2003 was an overcharge because the prior tenant had been paying $424 monthly.

After respondent received the complaint, it gave petitioner an opportunity to respond by submitting the lease in effect on the base date, September 19, 2002. This is the date four years prior

to the complaint, the period covering the applicable rent history used in determining whether the current rent is lawful.

In its January 15, 2007 answer, petitioner alleged that the overcharge "claim isn't true". In support of its denial, petitioner submitted an invoice for renovations made by the prior owner, before the tenant occupied the apartment. The renovations cost $42,000; therefore, petitioner asserted, using the permitted one-fortieth of that amount, $1050, and adding it to the rent of $424, the total is $1,474, an amount larger than petitioner was charging.

The invoice, dated September 5, 2003, listed the work done; however, it did not give the dates for each task and did not give the cost of each renovation. Rather, it listed a total of $42,000 "For All Material and Labor."

On January 22, 2007, respondent sent petitioner a "Request for Additional Information/Evidence" stating that petitioner's submission was insufficient. The notice stated that petitioner failed to submit cancelled checks, paid invoices, bills for the materials used, the labor costs and the equipment the contractors used. The notice also told the petitioner to submit the itemized cost breakdown of each renovation made.

On March 14, 2007 respondent sent petitioner a "Final Notice to Owner-Imposition of Treble Damages on Overcharge". The notice contained respondent's proposed findings, and informed petitioner that it could submit additional evidence and arguments. The notice stated that petitioner failed to submit a rental history, in the form of leases or rent ledgers, from the September 19, 2002 base date. It also stated that petitioner did not adequately substantiate its claimed improvement costs and that the claim would be disallowed.

On May 30, 2007, petitioner, after receiving a final notice that respondent would impose treble damages, wrote to respondent and stated that it had requested checks for the renovation costs

from the prior owner but that the prior owner told it that it would take "a few weeks since this check was written in 2003". Petitioner also asked respondent to "...take into consideration that tenant is receiving Nycha/Sec8[sic] subsidy."

On June 10, 2007, petitioner wrote to respondent and stated that there was no lease for the prior tenant; however, the rent registration statements maintained by respondent showed that the rent in effect as of April 1, 2002 was $424 and that the next increase effective April 1, 2003, was to $1338 and that this increased to $1348 on November 1, 2003. These increases were after the renovation. The documents show that the rents for other units in the building were essentially the same as the tenant's rent; however, nothing in the documents demonstrate whether the other apartments were similar or the same size as the tenant's.

In an undated letter to respondent, which it received on August 10, 2007, petitioner stated it had not been able to contact the prior owner or the contractor that performed the renovations. Petitioner stated the only document was the November, 2003 rent ledger. The letter stated, "We are very sure that if there was no renovation, the old landlord would not be able to bring the rent from $424 to $1348...Unfortunately, we do not have the cancelled check because we were not able to contact with [sic] the old landlord."

Petitioner submitted a September 26, 2007 letter from the prior landlord. Although the letter is notarized, it was not sworn to, in affidavit form. The letter does not address the apartment's rental history or state why the applicable lease was not available. Rather, the letter stated that there was "a complete overhaul" of the apartment, but that the cancelled check could not be located, because of a move in office locations, and that efforts to contact the contractor were unsuccessful, as "it seems they are no longer in business."

The Rent Administrator issued her decision on October 29, 2007.

The Rent Administrator found that despite being given an opportunity to submit the lease in effect on September 19, 2002, or the rent ledger, petitioner failed to do so. Using respondent's default method, the Rent Administrator found that the legal regulated rent is $265, and that there was an overcharge for the period between November 1, 2003 and May 31, 2007. The Rent Administrator imposed treble damage and held that petitioner was liable for $123,895. The Rent Administrator also held that this amount must be paid jointly to the tenant and The New York City Housing Authority, Section 8 Leased Housing Department. The Rent Administrator did not discuss the alleged apartment renovations.

In its PAR, petitioner, discussing the renovations, alleged that under respondent's own rule, DHCR Policy Statement 90-10, proof of an apartment's improvement cost must be supported by adequate documentation including at least one of the following: cancelled checks contemporaneous with the completion of the work, an invoice receipt marked paid in full contemporaneous with the completion of the work, a signed contract for the work, and the contractor's affidavit indicating that the installation was completed and paid in full.

Petitioner alleged that he submitted the documentation in its possession, the contractor's September 5, 2003 invoice marked paid. In addition, petitioner stated that it was now submitting an affidavit from Ronald Clarke, the prior owner's managing agent's affidavit.

Clarke asserts that his office tendered a check to the contractor, as soon as it completed the work. He asserted that the renovation cost of $42,900 divided by forty, plus the $424 rent in effect, would have allowed a rent of $1474.

Clarke states that the current owner contacted his office "seeking to obtain either the cancelled checks tendered in payment of the contractor's invoice or any other documentation pertaining to the renovation that would substantiate the individual apartment rent increase." Clarke

asserts that despite a "diligent search", his office could not "locate the documents sought." He added that "our office has requested that our bank provide copies of cancelled checks tendered to [the contractor], but our bank has not yet provided the copies."

Although Clarke does not mention prior leases, including the applicable one, in his affidavit, petitioner's PAR alleges that prior management cannot locate the documents.

Respondent's Deputy Commissioner issued the order denying the PAR on March 5, 2008.

The order applied the default formula because of petitioner's failure to provide the lease or rent ledger in effect on the September 19, 2002 base date. Because respondent applied the default formula, it did not consider the alleged improvements made prior to the time the complaining tenant took occupancy.

The Deputy Commissioner found that "by not submitting the requisite base date rental history, the owner failed to refute the tenant's complaint of overcharge." Continuing, the Deputy Commissioner wrote that "By not submitting evidence upon which DHCR could determine, in the petitioner's words, 'whether the owner had reason to know that the amount it was charging was in excess of the lawful rent', the owner failed to establish that the overcharge found was not willful."

Continuing, the Deputy Commissioner noted that "Pursuant to Section 2523.7 of the Rent Stabilization Code, an owner is required to maintain records relating to rents of housing accommodations for four years prior to the date the most recent registration for such records was required to have been filed." Therefore, it was "incumbent" on petitioner to obtain the full rental history, prior to taking title to the building.

The Deputy Commissioner held that the overcharge was wilful and affirmed the Rent Administrator's order.

Respondent correct applied its default formula in determining that there was a rent overcharge. Petitioner failed to provide the lease or rent history showing the rent on September 19, 2002, the rent charged prior to the complaint date (see *Thornton v. Baron*, 5 NY3d 175). However, the question remains! Was the overcharge wilful, entitling the tenant to treble damages?

The tenant's complaint concedes that the prior rent was $424, as of December 31, 2002. The 2002 Registration Rent Roll Report effective 4/1/2002, maintained by respondent shows that the lease was in effect from January 1, 2001 to December 31, 2002.

Assuming petitioner did not submit the 2002 lease and did not submit sufficient evidence that the alleged repairs cost the amount charged in the invoice or were actually paid by the prior owner, the record does not establish that petitioner acted willfully.

Although petitioner apparently failed to obtain the 2002 lease, it had documented facts it could rely on, the previously-maintained Rent Roll Registration showing rent of $424 in effect until December 31, 2002. Therefore, petitioner had a "good faith basis" for believing that was the applicable rent (*Matter of Round Hill Management v. Higgins*, 177 AD2d 256). Given the information available to petitioner, coupled with the complaining tenant's concession as to the prior rent "...no rational basis exists for respondent's finding that the overcharge was wilful" (*Matter of Round Hill Management Company v. Higgins, id.*).

Moreover, respondent's finding in the instant case is remarkably similar to the deficient finding in *Round Hill* that "the failure to obtain a full rent history from the prior owner was no excuse for its 'default' in submitting same at the overcharge proceedings since it should have been aware of its responsibility to obtain and submit such records when it purchased the building..." In rejecting that reasoning, the First Department stated that the determination of treble damages should not depend on the mechanical application of formulas designed to protect tenants, but instead should

be determined by a finding that the owner had reason to know that the rent charged was excessive (*id.* at 258). Moreover, while petitioner did not supply proof of the cost of the renovations that satisfied respondent, the invoice available to it gave it a rational basis for concluding that the repairs were made and justified the current rent.

The preponderance of the evidence in this case demonstrates that petitioner did not willfully overcharge the tenant (*id.*). Therefore, it is necessary to remand this proceeding to respondent to determine the amount of the overcharge without imposing treble damages and to issue a revised determination.

Petitioner's contention that the tenant is not entitled to a refund has not been preserved, as it was not raised during the administrative proceedings. However, the respondent's determination on remand must provide for the reimbursement of the Housing Authority's payment to it, so that petitioner does not unlawfully receive money she is not entitled to.

Accordingly, it is

ADJUDGED that the petition is granted to the extent that the matter is remanded to respondent for proceedings consistent with this judgment.

This constitutes the decision and judgment of the court.

Dated: October 20, 2008

ENTER

J.S.C.