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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

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In the Matter of the Application of
FRONTIER REALTY LLC,

Petitioner,

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

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent.

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INDEX No.108984/08

001

DECISION AND JUDGMENT

JANE S. SOLOMON, J:

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence one, petitioner, Frontier Realty, LLC ("Frontier"or "owner"), the owner of an apartment building located at 508 West End Avenue in Manhattan ("the building"), moves pursuant to CPLR Article 78 to annul the April 30, 2008 decision of respondent, New York State Division of Housing and Community Renewal ("DHCR") that upheld the November 11, 2007 decision of the Rent Administrator which found that apartment 4B ("the subject apartment") in the building is subject rent regulation.

In motion sequence two, Jody Prusan ("Prusan" or "tenant"), tenant in the subject apartment, moves to intervene in this proceeding.

BACKGROUND

The facts of this case are not in dispute. In May, 2002, Prusan moved into the subject apartment and signed a one year lease with a rent stabilization rider. The rent for the apartment was $1,500 per month. Page 2 of the 2002 lease states that the $1,500 is a preferential rent and

paragraph 5 of the rider to the lease states that this preferential rent "is lower than the legal registered rent filed with the New York State Division of Housing and Community Renewal" (Petition, Ex. B). However, neither the lease nor the rider state the amount of the DHCR legal registered rent and neither document indicates that the apartment was subject, or would be subject, to a high rent exemption that would remove the apartment from rent regulation.

Prusan remained in the subject apartment, paying $1,500 per month until December, 2005, when Frontier, the new building owner, offered her a new lease that increased her rent to $1,700 per month and changed the terms of the prior rent stabilized lease by giving the owner the right to cancel or terminate the lease on 120 days notice.

Prusan accepted the new lease, but in October, 2006, she filed separate rent overcharge and lease violation complaints with DHCR. The complaints were consolidated and, in March, 2007, DHCR's Rent Administrator issued an order finding that in 2002, when Prusan took occupancy, the legal rent for the apartment was $2,396.50 and that, pursuant to Section 2520.11(r)(4)(8) of the Rent Stabilization Code ("RSC")[1] the subject apartment was not subject to the Rent Stabilization Law ("RSL") (Return, Ex. A-11).

Prusan filed a Petition for Administrative Review ("PAR") arguing, *inter alia*, that she did not receive a copy of the owner's answer to her complaints and did not have an opportunity to reply. On May 30, 2007 Prusan's PAR was granted and the matter was remanded to the Rent Administrator who provided both parties with an opportunity to file additional documentation.

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[1] RSC Section 2520.11(r)(4)(8) states that apartments which become vacant with a legal rent of more than $2,000, whether or not the next tenant actually pays more than $2,000 per month, are not subject to the Rent Stabilization Law.

On November 9, 2007 the Rent Administrator issued an order reversing his prior determination. Relying on Section 2521.2(b)(1) and (2)[2] of the RSC, the Rent Administrator stated that where the owner is charging a preferential rent in order to collect the higher legally regulated rent, the owner must have "previously established" the legal regulated rent by stating the amount of the legal regulated rent in the vacancy lease or by serving the tenant with the annual registration statement. The Rent Administrator found that in this case, the owner had never "previously established" the higher rent because it failed to include the amount of the legal regulated rent in the 2002 lease and because there was no proof that it had served the tenant with the 2003 registration statement that included the amount of the legal regulated rent. Accordingly, the Rent Administrator held that "the $1,500.00 rent paid by the tenant on October 19, 2002, the base date, was the legal regulated rent and the apartment remained subject to rent regulations" (Return, Ex. D-12, p.2).

The owner filed a PAR and on April 30, 2008, the DHCR Deputy Commissioner issued an order denying the PAR on the ground that the Rent Administrator did not err "by finding that the subject apartment continued to be subject to rent regulation since the higher 'legal regulated rent' on the base date could not be 'previously established' in accordance with the provisions of RSC Section 2521.2(a); (b)(1) and (b)(2) . . . ."

Thereafter, Frontier filed this Article 78 proceeding and Prusan filed an order to show cause to intervene.

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[2] Section 2521.2(b)(1) and (2) of the RSC provide that the legal rent is previously established where it is set forth in the renewal lease or set forth in an annual rent registration served upon the tenant.

CONTENTIONS

In support of the petition, Frontier argues that DHCR's decision was arbitrary and capricious. It claims that the subject apartment became exempt from regulation upon the commencement of the vacancy lease because the legal rent at that time was greater than $2,000 per month[3] and that the vacancy lease clearly states that the $1,500 was a preferential rent. He also contends that Prusan had an opportunity to review the 2003 registration statement so she was aware that the legal rent was more than $2,000 per month. Moreover, the owner argues that DHCR's reliance on the owner's alleged failure to "previously establish" the legally regulated rent is misplaced because Section 2521.2 of the RSC only sets forth the criteria that an apartment owner must comply with if it wishes to stop charging a preferential rent and start charging the higher legal rent. According to the owner, RSC Section 2521.2 does not vitiate the legal rent and cannot be used to deny an exemption once the owner has met the criteria set forth in RSL 26-504.2.

As to Prusan's intervention motion, the owner claims that Prusan has failed to set forth any ground upon which the motion should be granted.

In opposition to the petition, DHCR contends that the Deputy Commissioner's decision was rational because the owner failed to "previously establish" a legal regulated rent of more than $2,000 which would exempt the subject apartment from rent regulation.

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[3] Frontier cites section 26-504.2 of the Rent Stabilization Law ("RSL") which exempts from regulation apartments that became vacant on or after April 1, 1997 and which had a legal rent of $2,000 or more per month at the time of the vacancy.

DISCUSSION

Motion Sequence 002 Intervention

Prusan's motion seeking to intervene in this proceeding is granted. There is no question that Prusan, as tenant in the subject apartment, has a real and substantial interest in the outcome of this proceeding (*Bernstein v. Feiner,* 43 A.D.3d 1161 [2nd Dept 2007]). Moreover, Frontier has failed to demonstrate that it will be prejudiced by the intervention (*Poblocki v. Todoro,* 2008 WL 4445629 [4th Dept]).

Motion Sequence 2 Article 78

On judicial review of an agency action under CPLR Article 78, the courts must uphold the agency's exercise of discretion unless it has no rational basis or the action is arbitrary and capricious (*Pell v. Bd. of Ed. Union Free School District,* 34 N.Y.2d 222, 230-231[1974]). "The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Pell,* 34 N.Y.2d at 231). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. The court's function is completed on a finding that a rational basis supports the agency's determination (*see, Howard v. Wyman,* 28 N.Y.2d 434 [1971]). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see, Mid-State Management Corp. v. NYC Conciliation and Appeals Board,* 112 A.D.2d 72 [1st Dept 1985], aff'd 66 N.Y.2d 1032 [1985]). Moreover, an agency's interpretation of the statutes and regulations it is responsible for administering is entitled to great deference (*Partnership 92 LP v.*

DHCR, 46 A.D.3d 425 [1st Dept 2007]; *see also, 900 West End Tenant's Ass'n v. DHCR,* 53 A.D.3d 436 [1st Dept 2008]).

Pursuant to the RSL, an owner may only terminate a "preferential" rent if the legal regulated rent has been "previously established" (RSL 26-511[c][14]). Pursuant to RSC 2521.2, the regulated rent is "previously established": where it is either (1) specifically listed in the lease agreement or, for a lease prior to 2003, (2) the rent is registered with DHCR and the owner notifies the tenant of the registered rent by serving the tenant with a copy of the rent registration. More importantly for the controversy before the court, under RSC 2520.11(r)(9), an owner who charged a preferential rent is only entitled to claim that an apartment is exempted from rent stabilization based on high rent if the owner "previously established" the higher legal regulated rent in compliance with the criteria delineated in RSC 2521.2. RSC 2520.11(r)(9) states:

> where pursuant to section 2521.2 of this Title, a legal regulated rent is established by record within four years before a rent lower than such legal rent regulated rent is charged and paid by the tenant, and where pursuant to such section, upon the vacancy of such tenant, a legal regulated rent previously established by record within four years prior thereto, as lawfully adjusted pursuant to the RSL or this Code may be charged, and where such previously established legal regulated rent, as so adjusted, is $2,000 or more per month, such vacancy shall qualify the housing accommodation for exemptions under this subdivision.

Moreover, the owner's duty to "previously establish" a legally regulated rent of $2,000 or more is underscored in DHCR's Fact Sheet #36 (Doti Aff, Ex. C) which provides that an apartment will qualify, "for decontrol upon vacancy by the tenant, where a preferential rent of less than $2,000 per month is charged and paid and a higher legal regulated rent has been established."

In this case, the owner's predecessor rented apartment 4B to Prusan in 2002, for a preferential rent of $1,500. The owner has failed to come forward with a scintilla proof to demonstrate that it "previously established" a rent in excess of $2,000 as required by the statutes and regulations. The 2002 lease did not satisfy RSC Section 2521.2(b)(1)'s requirement that the lease state both the preferential and the legally regulated rent (*Les Filles Quatre v. McNeur,* 9 Misc. 3d 179, 185 [Civ. Ct. N.Y. County 2005]; *Auto Park, Inc. V. Bugdaycay,* 7 Misc.3d 292, 298 [Civ. Ct. N.Y. County 2004]), and the owner is unable to prove that it served Prusan with the 2003 registration statement in accordance with the RSC Section 2521.2(b)(2).

Accordingly, since the 2002 lease did not state the amount of the legal regulated rent, and the owner cannot prove that Prusan was served with the 2003 registration statement, DHCR's finding that the "subject apartment continued to be subject to rent regulation since the higher 'legal regulated rent' on the base date could not be "previously established" in accordance with RSC Section 2521.2(a); (b)(1) and (b)(2)" is affirmed as it was rationally based on both the facts and the law.

Accordingly, it is ORDERED that Prusan's motion to interevene in this proceeding is granted and answer is deemed served in the form annexed to the moving papers (Vernon Aff, Ex. E); and it is further

ORDERED that Frontier Realty LLC's motion pursuant to Article 78 for a judgment annulling the April 30, 2008 decision of DHCR is denied and the petition is dismissed.

This decision constitutes the order and judgment of the court.

DATE: October 21, 2008

ENTER:

J.S.C.