Matter of NJR Associates v New York State Div. of Hous. and Community Renewal

2008 NY Slip Op 32941(U)

October 14, 2008

Supreme Court, New York County

Docket Number: 110959/07

Judge: Joan A. Madden

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SCANNED ON 10/20/2008

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

PRESENT: HON. JOAN A. MADDEN J.S.C. Justice

PART 11

Index Number : 110959/2007

NJR ASSOCIATES

VS.

NYS DIV. HOUSING & COMMUNITY RENEWAL

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 110959-07

MOTION DATE

MOTION SEQ. NO. #001

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	

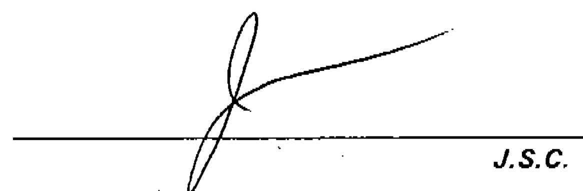
Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 petition is determined in accordance with the annexed decision, order + 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

Dated: October 14, 2008



J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 11

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In the Matter of the
Application of

NJR ASSOCIATES & NICOLE TAUSEND,

Petitioners,

Index No. 110959/07

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

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL (D.H.C.R.),

Respondent.

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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

Joan A. Madden, J.:

This is an Article 78 proceeding arising in connection with a rent-stabilized apartment located at 44 East End Avenue in New York City. For the reasons stated below, the petition is dismissed.

On November 6, 2005, the occupant of the apartment, Terenzio al Cantara, filed a complaint with the Division of Housing and Community Renewal (DHCR), alleging, essentially, that he was the victim of a scheme by the owner of the apartment to collect an unlawful rent. Specifically, Mr. al Cantara alleged that he became the occupant of the apartment in September of 2003, pursuant to a sublease with petitioner Nicole Tausend, who purported to be the tenant of the apartment. He alleged that Tausend was not in fact a tenant, but rather that she had an ownership interest in the apartment along with petitioner NJR Associates. Tausend's purported

tenancy was allegedly a ruse to circumvent the rent stabilization law.[1]

Tausend and NJR submitted responses to the DHCR regarding the complaint. Thereafter, the DHCR sent both Tausend and NJR a Request for Additional Information/Evidence, requesting that both parties submit evidence to support their assertion that Tausend was in fact the primary tenant of the apartment.

On August 10, 2006, the DHCR served Tausend and NJR with a "Final Notice to Owner-Imposition of Treble Damages on Overcharge". The purpose of this notice was to provide the parties with an additional opportunity to demonstrate, among other things, that Tausend was the primary tenant of the apartment.

On October 24, 2006, the Rent Administrator issued an order finding that Tausend's purported tenancy was "an 'illusory tenancy' about which the owner had full knowledge...." Based on that determination, the Rent Administrator found that Mr. al Cantara was the tenant, rather than the subtenant, of the apartment as of the date of his initial occupancy.

The Rent Administrator's findings were based in part on the failure by NJR or Tausend to submit any documentary evidence to demonstrate that Tausend had actually lived in the apartment. The Rent Administrator had sought items such as utility bills, motor

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[1] According to petitioners, NJR is the owner of the apartment and Tausend is a limited partner in NJR.

[* 4]

vehicle records, copies of voting records and any other items which would demonstrate that Tausend had resided in the apartment.

The Rent Administrator determined that the legal rent for the apartment was $779.39 per month and found Tausend and NJR jointly liable for overcharges and penalties totaling $33,526.06, including interest. There was no award of treble damages.

Thereafter, NJR filed a petition for administrative review (PAR) challenging the Rent Administrator's order. Mr. al Cantara filed a PAR, seeking treble damages. Tausend did not file a PAR and did not submit an answer responding to Mr. al Cantara's PAR.

In an order dated June 13, 2007, the Deputy Commissioner denied NJR's PAR and affirmed the Rent Administrator's finding that Tausend's tenancy was illusory. The Commissioner granted Mr. al Cantara's PAR to the extent of imposing treble damages. The Commissioner's decision noted that NJR and Tausend had failed to submit any documentary evidence to the Rent Administrator to demonstrate that Tausend resided in the apartment.

The Commissioner also affirmed the Rent Administrator's determination that the legal rent for the apartment was $779.39 per month. The Commissioner found, however, that the Rent Administrator should have credited Mr. al Cantara with certain rent payments made from June 15, 2005 to August 15, 2005. Based on that finding, the Commissioner recalculated the amount which Tausend and NJR were responsible for repaying to Mr. al Cantara. The Commissioner also

[* 5]

imposed treble damages on Tausend and NJR, which increased their overall penalties to $83,035.19.

Tausend and NJR commenced the instant Article 78 proceeding in August of 2007, seeking to vacate and annul the June 13, 2007 decision. The amended petition sets forth six causes of action.

The first cause of action asserts that Tausend was denied due process of law because the DHCR did not conduct an oral evidentiary hearing but instead, as set forth above, requested written submissions, including documentary evidence, to determine whether Tausend was the apartment's primary tenant.

This cause of action is dismissed. First, it is undisputed that Tausend did not file a PAR. "Where [an] aggrieved party fails to file a PAR, a proceeding pursuant to CPLR article 78 is premature and should be dismissed for failure to exhaust administrative remedies." Welch v New York State Div of Housing and Community Renewal, 287 AD2d 725, 726 [2d Dept 2001]; see, Rutherford v Bee Gee Excelsior Management, Inc, 300 AD2d 34 [1st Dept 2002]. Here, Tausend has failed to exhaust her administrative remedies and this Article 78 proceeding is premature with respect to her claims.

In any event, Tausend has not demonstrated that an oral evidentiary hearing was required. It has been held that the DHCR is not required to hold an evidentiary hearing in all circumstances, such as when the record is complete through evidentiary

submissions. See, DeSilva v New York State Div of Housing and Community Renewal Office, 34 AD3d 673, 674 [2d Dept 2006]; see also, Dupont Associates v New York State Div of Housing and Community Renewal, 261 AD2d 204 [1st Dept 1999]. Here, it is undisputed that Tausend was afforded an opportunity to submit evidence to the Rent Administrator to demonstrate that she was the primary tenant, which she failed to do. Under such circumstances, it cannot be said that Tausend was denied due process.

The second cause of action asserts that the DHCR lacked the jurisdiction to determine that Tausend's tenancy was illusory and that Mr. al Cantara was the prime tenant rather than the subtenant. "As a general rule, judicial review of an administrative determination is limited to the record adduced before the agency... and in a proceeding pursuant to CPLR article 78, a specific objection to an order of the DHCR should not be considered by the court unless the objection has been first presented to the agency." Mott v New York State Div of Housing and Community Renewal, 191 AD2d 566 [2d Dept 1993], citations omitted; see, Matter of Yonkers Gardens Co v State of New York Div of Hous & Community Renewal, 51 NY2d 966 [1980]; 374 Eastern Parkway Conmar Owners Corp v New York, 300 AD2d 670 [2d Dept 2002]; Muller v New York State Div of Housing & Community Renewal, 263 AD2d 296, 307 [1st Dept 2000]. Here, petitioners did not assert this argument to the Rent Administrator

[* 7]

or the Commissioner in the proceedings below. Therefore, the issue is not properly before this court for consideration.[2]

Petitioners' third cause of action asserts that the DHCR's August 10, 2006 "Final Notice to Owner-Imposition of Treble Damages on Overcharge" was addressed only to Tausend and, as such, it failed to provide NJR with adequate notice of the possible imposition of treble damages. The DHCR asserts that NJR is precluded from asserting this claim because it did not raise the issue of notice in its PAR and the issue was therefore not reviewed by the Commissioner.

It is undisputed that NJR failed to raise the issue of notice as to the possible imposition of treble damages in its PAR. Therefore, as set forth above, that issue is not properly before this court for consideration. See, Muller v New York State Div of Housing & Community Renewal, 263 AD2d 296, 307 [1st Dept 2000].[3]

The fourth cause of action asserts that Tausend was denied due process because the DHCR's August 10, 2006 "Final Notice to Owner-Imposition of Treble Damages on Overcharge" did not notify Tausend

[2] In any event, petitioners have not demonstrated that the DHCR is precluded from determining whether a given tenancy is an illusory one. See, Partnership 92 LP v State Div of Housing and Community Renewal, 46 AD3d 425 [1st Dept 2007] (upholding DHCR's determination of illusory tenancy); see also Badem Bldgs v Abrams, 70 NY2d 45 [1987].

[3] In any event, it is undisputed that the August 10, 2006 notice was served on NJR. Moreover, the DHCR points out that NJR responded to the August 10th notice in a letter dated August 28, 2006 and did not object to such service at that time.

that her tenancy rights would be terminated upon a finding of an illusory prime tenancy. However, as set forth above, Tausend's failure to file a PAR and present this argument to the DHCR constitutes a failure to exhaust her administrative remedies. As such, assertion of this claim here is premature. Therefore, this cause of action is dismissed.

Petitioners' fifth cause of action asserts that the Rent Commissioner's order should be vacated because Mr. al Cantara withdrew his complaint. Petitioners rely on a March 14, 2006 letter to the Rent Administrator in which Mr. al Cantara stated that he was withdrawing his complaint because he felt that he had not received "fair and due process" from the DHCR and believed that the agency was biased in favor of the landlord. Specifically, he complained that the Rent Administrator had given the landlord an extension of time to answer the complaint. He also complained that he had done much of the investigatory work in the matter on his own.

First, as above, this argument was not raised in the proceeding before the Commissioner and is therefore not properly raised for the first time here. See, Matter of Yonkers Gardens Co v State of New York Div of Hous & Community Renewal, 51 NY2d 966 [1980]; Muller v New York State Div of Housing & Community Renewal, 263 AD2d 296, 307 [1st Dept 2000].

[* 9]

In any event, it is undisputed that the Rent Administrator responded to Mr. al Cantara in a letter dated April 26, 2006, stating that the DHCR would honor his request upon receipt of written confirmation that he wished to withdraw the complaint. Instead of providing such confirmation, Mr. al Cantara continued to prosecute the complaint through numerous submissions of documents throughout 2006 and through the filing of his PAR on November 1, 2006. Therefore, petitioners have not demonstrated that the complaint was, in fact, withdrawn.

Petitioners' sixth cause of action asserts that the Commissioner's order is not rationally related to the record below. Specifically, petitioners assert that the record does not support a finding of an illusory tenancy and that the DHCR erred in establishing the lawful rent for the apartment by applying the "default formula" set forth in Thornton v Baron, 5 NY3d 175 [2005].

"It is a long-standing, well-established standard that the judicial review of an administrative determination is limited to whether such determination was arbitrary or capricious or without a rational basis in the administrative record." Partnership 92 LP v State Div of Housing and Community Renewal, 46 AD3d 425 [1st Dept 2007]. Here, the petition fails to set forth any facts to demonstrate that the finding of an illusory tenancy was arbitrary or capricious or without a rational basis in the record. As set forth above, petitioners failed to submit any evidence to

demonstrate that Tausend was the primary tenant of the apartment despite being afforded the opportunity to submit such evidence. Based on the record below, the DHCR reasonably concluded that Tausend's tenancy was illusory and that she was not the primary tenant of the apartment. Petitioners have also failed to demonstrate that the DHCR erred in setting the lawful rent according to the formula set forth by the Court of Appeals in Thornton v Baron, 5 NY3d 175 [2005].

Accordingly, it is

ORDERED AND ADJUDGED that the petition is denied and dismissed.

This constitutes the decision, order and judgment of the Court.

DATED: October 14, 2008

ENTER:

J.S.C.

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).