SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:
HON. THOMAS P. PHELAN,
Justice.

TRIAL/IAS PART 5
NASSAU COUNTY

In the Matter of the Application of
ASHLAND PROPERTIES, LLC,

Petitioner,

ORIGINAL RETURN DATE: 09/12/08
SUBMISSION DATE: 10/15/08

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

Index No. 015314/08

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

MOTION SEQUENCE #1

Respondent.

RE: Admin. Rev. Dkt. No.: WD-710029-RO
D.R.O. Dkt. No.: VI-710153-R
Apartment: 3D
Premises: 1 Ash Place
Great Neck, New York

The following papers read on this motion:

Notice of Petition.....	1
Answering Papers.....	2
Reply.....	3
Memorandum of Law.....	4
Return.....	5

Article 78 petition granted and proceeding remanded to the Nassau County Rent Administrator for recalculation of the award as directed in this decision.

This Article 78 petition,in the nature of mandamus to review an order of the Deputy Commissioner of the New York State Division of Housing and Community Renewal ("DHCR"), was commenced on August 18, 2008. The order denied administrative review of an order issued by the Nassau County Rent Administrator finding that the landlord had

collected excess rent on the subject premises.

Petitioner Ashland Properties, LLC is the owner of a multi-family dwelling located at One Ash Place in Great Neck. On January 13, 2004, Elite Properties, who was then the landlord, leased Apartment 3D to Dorothy Fleschner for a term of 1 year and 5 months, commencing February 1, 2004, at a monthly rental of $1,350. The lease was stamped, "This apartment is not subject to any regulations such as rent control, rent stabilization or Division of Housing and Community Renewal." However, there is no dispute that the apartment was, in fact, subject to rent regulation.*

Pursuant to § 2503.5 of the Emergency Tenant Protection Regulations (ETPR), at least 90 days but no more than 120 days prior to the end of the lease term, the landlord is required to notify the tenant by certified mail of the date of termination of the lease and offer to renew the lease at the legal regulated rent (9 NYCRR § 2503.5(a)). The notice of renewal must be on a form prescribed by the DHCR and is known as an RTP-8. It provides that the tenant has the option of renewing the lease for a one- or two-year term and sets forth the monthly rent for a 1-year or 2-year renewal lease.

Petitioner has submitted no proof that it sent the tenant an RTP-8 by certified mail at least 90 days before the termination of the lease on June 30, 2005. Nevertheless, on September 26, 2005, the owner and tenant each signed an RTP-8, providing for a 1-year renewal, commencing July 1, 2005, at a monthly rental of $1,407.38. The notice of renewal was dated January 28, 2005, which was more than 120 days before the end of the lease term.

Petitioner similarly submits no proof that it mailed a notice of renewal at least 90 days before the termination of the lease on June 30, 2006. In any event, a month-to-month tenancy ensued, and the rent was not increased for the period July 1, 2006, to June 30, 2007. On June 29, 2007, the tenant signed a notice of renewal form, providing for a 1-year renewal, commencing July 1, 2007, at a monthly rental of $1,439.05. The form was dated May 9, 2007, and signed by the owner on July 5, 2007. As to this renewal as well, petitioner submits no proof that it mailed a notice of renewal at least 90 days before the end of the lease term, that is June 30, 2007.

On September 28, 2007, the tenant filed a complaint of rent overcharge with the Nassau District Rent Office. The tenant's basis for claiming an overcharge was that the landlord had overcharged other tenants. On November 21, 2007, the rent administrator sent a "notice of transmittal of tenant's complaint" to the owner, requesting a complete rental history for the

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* It is unclear why the lease stated that the apartment was not subject to regulation by DHCR. However, the court notes that in her complaint the tenant asserted that she lived in a cooperative apartment. Housing accommodations owned as a cooperative are ordinarily not subject to rent regulation (See Unconsolidated Laws § 8625(a)[14]).

apartment, including proof of certified mailing of lease renewal offers to the tenant. In its answer, the owner asserted that the rent was lawful and proper, based upon the rent in effect on the base date, that is four years prior to the tenant's complaint. As noted, proof of certified mailing of the lease renewal offers was not submitted to the administrator.

On March 27, 2008, the district rent office sent Elite Properties a Final Notice to Owner-Imposition of Treble Damages on Overcharges. The final notice stated that rent overcharges had been caused by the owner's failure to offer lease renewals pursuant to § 2503.5(a) of the Emergency Tenant Protection Regulations (9 NYCRR § 2503.5(a)). The notice indicated that the overcharge was willful and that a penalty of three times the amount of excess rent collected for two years prior to the complaint would be imposed. The notice granted the landlord a final opportunity to submit evidence to rebut the finding of an overcharge and the finding that it was willful.

On April 7, 2008, the owner submitted a response, stressing that the tenant had not disputed receiving the notices of renewal and that the documents submitted were all properly executed. The owner also noted that the rent in effect on the base date was $1,470, an amount higher than the rent which had been paid at any time by the tenant.

On April 9, 2008, the district rent administrator issued an order and determination, finding that the owner "failed to comply with Section 2503.5(a) of the Emergency Tenant Protection Regulation (ETPR) with regard to lease renewal offers" and that "any lease renewal which was not offered pursuant to [the regulation] is improper and invalid." (R.A-9 ¶1) The finding that the owner had failed to serve timely notices of renewal was based upon the owner's failure to submit proofs of certified mailing, the signing of the first renewal by owner and tenant after the lease commenced and the owner's signing of the second renewal after the commencement date.

The administrator further found that the building had been placed on the D-1 List for the period October 1, 2004, to September 30, 2005, due to the owner's failure to submit income and maintenance schedules to "this agency," apparently referring to the DHCR. The administrator determined that the owner was not entitled to a guidelines increase for any lease which was renewed during that period because it failed to submit the required schedules. Thus, failure to submit the required schedules served as an alternative basis for a denying a rent increase for the period July 1, 2005, to June 30, 2006.

Although the monthly rent on the base date was $1,470, the administrator found, based on the waiver rule, that the "collectible rent" was the amount provided in the initial lease, or $1,350 per month. The rent administrator found that the overcharges totaled $2,445.72. After trebling the overcharges and allowing for interest and excess security deposit, the rent administrator granted a total award of $7,124.53. The owner was also directed to offer the tenant a renewal lease pursuant to ETPR § 2503.5(a).

On April 22, 2008, petitioner filed a petition for administrative review with the DHCR. Petitioner argued that it was improper for the rent administrator to request proof of service because the tenant had not alleged that she did not receive the RTP-8 forms in a timely manner. Petitioner further argued that the rent administrator was not authorized by ETPR § 2503.5 to invalidate the lease renewal where the form had been signed by the tenant. Finally, petitioner argued that failure to file income and maintenance schedules did not render the owner ineligible for rent increases where the administrator had not advised the owner that the premises had been placed on the D-1 list.

In an order dated July 3, 2008, the Deputy Commissioner denied the petition for administrative review. The Deputy Commissioner determined that the rent administrator was entitled to request proof of service of the renewal forms because it was incumbent upon the owner to retain lease history documentation and provide copies to the agency to establish the lawfulness of the rent which was charged. The Deputy Commissioner further determined that because a provision of a lease purporting to waive a tenant's rights under the act was void, the tenant's signing of the renewal was not a waiver of the owner's failure to serve notice of renewal in a timely manner (See Unconsolidated Laws § 8631).

Despite the rent administrator's reference to "this agency," the Deputy Commissioner construed the administrator's order as denying a rent increase based on noncompliance with local filing requirements (R.B-6, p.3). The Deputy Commissioner noted that the subject property was on the Nassau County D-1 list issued on November 1, 2004, which set forth the buildings for which Property Maintenance and Operations Cost Survey Schedules had not been submitted to the Nassau County Rent Guidelines Board. The Deputy Commissioner further noted that Nassau County Rent Guideline No. 39, certified on October 27, 2004, provided that an owner who failed to file data in response to the board's request was not entitled to the rent guideline increase established by the board. Additionally, the Deputy Commissioner noted that the owners had been served with a Rent Guidelines Board notice in the spring of 2004, advising them of the consequences of failure to file the schedules. Thus, the Deputy Commissioner determined that the rent administrator properly afforded "preclusive effect" to the D-1 list by denying a guidelines increase.

Petitioner asserts that the DHCR order, finding a rent overcharge and directing the owner to offer a renewal lease, was arbitrary, capricious and contrary to law. Petitioner argues that it was improper for the Administrator to request proof of service of the notices of renewal. Petitioner further argues that having elected to sign the renewals, rather than bringing a complaint based on the untimely offer of a renewal lease, the tenant waived any claim that the offer was improper. Finally, petitioner argues that ETPR § 2503.5 does not authorize the administrator to invalidate the leases but only grants the tenant certain options with respect to the commencement date.

The Emergency Tenant Protection Regulations provide that in each county, wherein a city having a population of less than one million or any town or village has determined the existence of an emergency requiring the regulation of residential rents, there shall be created a rent guidelines board (Unconsolidated Laws § 8624(a)). The board is to set annual guidelines for rent adjustments based upon the economic condition of the real estate industry in the affected area, the cost of living and such other data as may be available (Unconsolidated Laws § 8624(b)). No owner shall charge or collect any rent in excess of the initial legal regulated rent, or adjusted initial legal regulated rent, until such time as a different legal regulated rent shall be authorized pursuant to guidelines adopted by the board (Unconsolidated Law § 8626[a]). However, the owner may apply to the DHCR for an increase, in excess of the rent adjustment authorized by the guidelines board, based upon hardship (Unconsolidated Laws § 8626(d)(4)). The DHCR may grant such an individual adjustment upon a finding that the guideline adjustment is not sufficient to maintain the same ratio between operating expenses and gross rents as prevailed over the preceding five-year period (Id.).

An owner of a housing accommodation in a village as to which an emergency has been declared, who, upon complaint of a tenant, is found by the DHCR, after a reasonable opportunity to be heard, to have collected an overcharge above the authorized rent, shall be liable to the tenant for a penalty equal to three times the amount of the overcharge (Unconsolidated Laws § 8632(a)). If the owner establishes by a preponderance of the evidence that the overcharge was neither willful nor attributable to his negligence, the DHCR shall establish the penalty as the amount of the overcharge plus interest payable at the judgment rate (Id.).

Pursuant to Unconsolidated Laws § 8630, the DHCR is empowered to implement the act by appropriate regulations. The regulations may encompass such "speculative or manipulative practices or renting or leasing practices" as the DHCR determines are likely to cause circumvention of the act (Unconsolidated Laws § 8630). The regulations shall require owners to grant a new one-year or two-year vacancy or renewal lease at the option of the tenant (Id.).

As noted above, ETPR § 2503.5 requires the landlord to offer the tenant a renewal lease by certified mail within 90 days prior to the expiration of the lease term. The regulation further provides that the landlord must give the tenant 60 days from the date of mailing of the notice to renew the lease and accept the offer (9 NYCRR § 2503.5(a)). Where the owner fails to offer a renewal lease in accordance with subsection (a), the tenant shall have the option of choosing whether the term of the renewal lease shall commence on the date it would have commenced had a timely offer been made or whether the term shall commence on the first rent payment date commencing 90 days after the date that the owner does offer the lease on the prescribed form (Id.). In either case, the guidelines rate shall be "the rate in effect on the first day subsequent to the expiration of the last lease or the rate in effect when the lease is renewed, whichever is lower" (Id.).

In an adjudicatory proceeding, all parties must be given reasonable notice of the hearing, which shall include a reference to the particular sections of the statutes and rules involved and a short and plain statement of matters asserted (State Administrative Procedure Act § 301). The court concludes that the Final Notice to Owner gave petitioner sufficient notice that it was being charged with rent overcharges based upon its failure to serve timely notices of renewal as required by ETPR § 2503.5(a). Although the complaint made no reference to the owner's failure to serve timely notice of renewal, it was prepared by the tenant who is not expected to know all the factors which could give rise to an overcharge. Moreover, the final notice gave the owner an opportunity to submit evidence to rebut the preliminary finding that timely notices of renewal had not been served and that the overcharge was willful. Because the Final Notice to Owner served as the operative notice, there is no issue as to whether petitioner was deprived of a substantial right based upon uncharged misconduct (*Block v. Ambach*, 73 NY2d 323, 332 [1989]).

Unconsolidated Laws § 8632-a provides that each housing accommodation which is subject to the act shall be registered by the owner with the DHCR upon forms prescribed by the Commissioner. The data to be provided on the registration includes the name and address of the building, the number of housing accommodations, the rent charged on the registration date and the services provided (Unconsolidated Laws § 8632-a(a)). The statute further provides that the owner shall file an annual statement containing the current rent for each unit and such other information contained in subdivision (a) as shall be required by DHCR (Unconsolidated Laws § 8632-a[f]). The 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 accommodation was required to have been filed (9 NYCRR § 2503.7(a)). The owner is also required to permit inspection and copying of records as the DHCR may require from time to time (9 NYCRR § 2506.6(a)).

Since ETPR §2503.5(a) requires the landlord to serve notice of renewal by certified mail, proof of service of the notice of renewal is a record relating to rents because notice of renewal must be served on the tenant in order to renew the lease. Such record is required to be maintained by the owner and produced for the DHCR upon request. Thus, the Rent Administrator was entitled to request production of the proofs of mailing of the notices of renewal pertaining to the apartment.

Section 2503.5(b) provides that if notice of renewal is not timely served by certified mail, the guideline rate shall be the rate in effect "on the first day subsequent to the expiration of the last lease" or the rate in effect when the lease is renewed, whichever is lower. Because petitioner did timely serve notice of renewal for the term July 1, 2005, to June 30, 2006, the guidelines rate was the rate in effect on the first day subsequent to expiration, July 1, 2005, or the rate in effect when the lease was renewed, September 26, 2005, whichever is lower. There is no dispute that the rate in effect on July 1, 2005, was $1,407.38 per month. Since there is no evidence that the rate in effect on September 26, 2005, was any lower than the rate

on July 1, $1,407.38 per month was the guideline rate applicable to the renewed lease. In view of the plain meaning of § 2503.5, the rent administrator was not permitted to treat the renewed lease as a nullity and disallow any increase for the July 1, 2005, to June 30, 2006, term (See *South Park Associates v. Toledano*, 259 AD2d 306 [1st Dep't 1999]; New York City Rent Stabilization Law). As the rent charged for this term was the collectible rent, the administrator's finding that there was an overcharge, based on the failure to serve a timely notice of renewal, is contrary to law.

Because the rent applicable to the renewed lease continued after the lease expired on June 30, 2006, petitioner was similarly entitled to rent of $1,407.38 per month for the period July 1, 2006, to June 30, 2007, when the month-to-month tenancy was in effect. Thus, the rent administrator also erred by disallowing any increase for that period and finding an overcharge.

Because petitioner did not timely serve notice of renewal for the term July 1, 2007, to June 30, 2008, the guidelines rate was the rate in effect on the first day subsequent to expiration of the last lease or the rate in effect when the lease was renewed, July 5, 2007, whichever is lower. Since there was no lease in effect from July 1, 2006, to June 30, 2007, the first day subsequent to the expiration of the last lease was July 1, 2005. Thus, the collectible rent for the period July 1, 2007, to June 30, 2008, continued to be $1,407.38 per month. Although there was, in fact, an overcharge for that period, it is less than that calculated by the administrator.

The court will now consider whether a guidelines increase was properly denied for the period July 1, 2005, to June 30, 2006, for failure to submit maintenance and operations cost schedules. As noted, Unconsolidated Laws § 8632-a(f) requires that the owner file an annual statement containing the current rent for each unit and other subdivision (a) information required by the DHCR, such as the services provided in the lease. The failure to file a proper and timely annual registration statement bars the owner, until such time as a proper statement is filed, from applying for or collecting any rent "in excess of the legal regulated rent in effect on the date of the last preceding registration statement. . ." (Unconsolidated Law § 8632-a(e)). Since the legal regulated rent on the date of the last registration statement is unlikely to be higher than the current rent, the effective penalty for failure to file a registration statement is denial of a rent adjustment. As there is no requirement that DHCR notify the owner that a registration statement has not been filed, the sanction is self-executing.

While respondent suggests that Unconsolidated Laws § 8624 authorizes a rent guidelines board to deny a rent increase to an owner who fails to submit requested information to the board, the statute provides no such authorization. Section 8632-a provides authorization for a sanction for failing to provide information to the DHCR, not any other agency. The maintenance and operations schedules which an owner is required to file with the Nassau County Rent Guidelines Board include such information as real estate taxes, insurance premiums, interest expense, fuel and labor costs (Ans. Ex. C. pp. 4-5). DHCR asserts that annual surveys,

containing information similar to that in the Board's maintenance and cost schedules, are required to be submitted to DHCR's Research and Analysis Unit. Nevertheless, § 8632-a provides a sanction only for failure to file a registration statement. While the data required by the Rent Guidelines Board is undoubtedly helpful to the board in setting guidelines for rent adjustments, it exceeds the information required to be produced by statute. The court concludes that the rent administrator erred by disallowing a guidelines increase based upon petitioner's failure to file with the Board the maintenance and operations cost schedules.

Accordingly, the Article 78 petition is granted. The order of the Deputy Commissioner of DHCR, denying administrative review of an order of the Nassau County Rent Administrator, is annulled. The underlying order of the Rent Administrator is also annulled, except to the extent that it directed petitioner to offer the tenant a renewal lease with commencement dates as provided in ETPR § 2503.5. The proceeding is remanded to the Nassau County Rent Administrator for recalculation of the overcharge for the period July 1, 2007, to June 30, 2008, and determination of an appropriate award, depending upon whether the overcharge was willful or attributable to petitioner's negligence.

This decision constitutes the order of the court.

Dated: 11-3-08

HON THOMAS P. PHELAN

THOMAS P. PHELAN, J.S.C.

ENTERED

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NASSAU COUNTY
COUNTY CLERK'S OFFICE

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