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

PRESENT: EILEEN A. RAKOWER J.S.C. PART Part 5

Justice

Index Number : 112071/2008

61 WEST 8TH STREET LLC.

VS.

N.Y.S.D.H.C.R.

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2 3
Replying Affidavits	

Ex 4

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
NOV 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 11/13/08

EILEEN A. RAKOWER J.S.C.

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 5

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In the Matter of the Administrative Appeal of
61 WEST 8TH STREET LLC

Petitioner,

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL

Respondents.

112071/08

DECISION
and ORDER

Mot. Seq. 001

For an Order and Judgment Pursuant to CPLR Article 78

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HON. EILEEN A. RAKOWER:

Petitioner 61 West 8th Street LLC (owner), moves for a judgment under Article 78 reversing, annulling, and setting aside the order of Respondent New York State Division of Housing and Community Renewal ("DHCR") issued on October 26, 2006 as arbitrary, capricious, in violation of the law and in violation of Petitioner's right to due process. In the alternative, petitioner requests that the matter be remanded to the DHCR for further proceeding with a stay of the rent overcharge ordered.

DHCR received a "Tenant's Complaint of Rent and/or Other Specific Overcharges in Rent Stabilized Apartments" on April 25, 2006 which was filed by Keith Pruitt ("the tenant"). Specifically, the tenant claimed that he was being overcharged for "repairs resulting from a fire in my apartment. The owner has also charged me rent while I was actually evicted from my apartment for (3) months." On August 9, 2006, a "Final Notice to Owner - Imposition of Treble Damages on Overcharge" was issued by the Rent Administrator. It contained a tentative finding of a rent overcharge and "...[afforded] the owner a final opportunity to show that there was no overcharge and/or that the overcharge was not willful." The owner did not respond. Thereafter, DHCR issued an order dated October 26, 2006 which found a

rent overcharge with respect to Apartment 4R located at 61 West 8th Street in the County and State of New York. On November 15, 2006, owner filed a Petition for Administrative Review ("PAR"). In its PAR, owner argued that the Rent Administrator had improperly addressed the issue of tenant's legally regulated rent *sua sponte* and that, since the fire was due to the tenant's own negligence, owner was entitled to charge him $785.00 for the cost of boarding up the windows of the apartment.[1]

In response, DHCR issued an Order and Opinion Denying Petition for Administrative Review ("denial letter") dated March 15, 2007. In its denial letter, DHCR states, in relevant part:

> The Commissioner will not consider petitioner's arguments, as to whether the Administrator should have determined the legal rents and consequent overcharges herein and whether those determinations are correct, because the owner submitted nothing to the Administrator - - even after being invited to object to unfavorable tentative findings - - pertaining to those issues.

"Judicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy-Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [First Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination

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[1]Owner bases his claim of negligence on a statement contained in a Fire Department of New York Incident Report, in which it states "the cause of the fire was smoking carelessness as per admission made by Mr. Keith Pruitt." However, as part of his rent overcharge application, tenant submitted a report by an independent investigator who stated that the fire was caused by "the overheating of the defective electrical system in Mr. Pruitt's bedroom." His attorney stated that tenant was severely injured when he made the statement and does not remember making it. A review of the receipts submitted by owner reveals that a significant portion of the repair cost includes a rewiring of the electrical system.

"arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]). Additionally, if a penalty is imposed by the agency, "the sanction must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." (*Featherstone v. Franco*, 95 NY2d 550, 554 [2000]).

Petitioner now contends that it never received the Final Notice or the Order denying PAR. Petitioner states that, it sent a written request (the "FOIL request") to DHCR seeking copies of "mailing certificates/records" regarding this proceeding. The FOIL request is dated in or about June 2007. Petitioner also sent a second FOIL request, dated July 10, 2007, requesting "all mailing certificates/records with respect to the underlying DHCR proceeding."

Despite Petitioner's contentions, DHCR has submitted three affidavits explaining the office mailing procedures that were followed in sending petitioner notice of the PAR. DHCR submits the affidavit of Ms. Violence Bien-Aime, a DHCR employee , stating that she mailed the PAR determination in accordance with DHCR procedures. The affidavit of Mavie Davis, another DHCR employee, states that, per her usual course of business, she took the mailings to the mail room because Ms. Bien-Aime is unable to walk. Finally, the affidavit of Lance Bolan, an employee in the DHCR mail room, states that nine pieces of mail were brought to him from the PAR Overcharge section on the day in question and that he followed standard procedures, depositing the mail in a canvas bag to the loading dock which has been designated by the USPS as its pick up spot from DHCR. Petitioner's mere denial of receipt fails to rebut the presumption of receipt. (*Dowling v. Holland*, 245 AD2d 167[1st Dept. 1997], [where tenants' denial of receipt of the deregulation order was insufficient to overcome the presumption of receipt established by DHCR's evidence, consisting of affidavits of its employees concerning its routine mailing practices]).

DHCR cross-moves for an order dismissing the petition on the ground that the proceeding was commenced after the expiration of the 60 day period for instituting an Article 78 proceeding against the Commissioner's order as set forth in §26-516(d) of the Administrative Code of the City of New York and Rent Stabilization Code §2530.1. DHCR claims that, according to the court file, the first Notice of Petition, which was filed on December 17, 2007, was untimely as it has shown that the denial letter was mailed on March 15, 2007. The second Notice of Petition was not brought until September 4, 2008.

§CPLR 217(1) states in pertinent part that "Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding on the petitioner..." An administrative determination becomes "final and binding" when the petitioner seeking review has been aggrieved by it. *(Matter of Yarborough v. Franco*, 95 NY2d 342 [2000](*Id.* at 366, *citing Yarborough*). Here, respondent points out that the Administrative Code of the City of New York and Rent Stabilization Code provides for the shorter statute of limitations.

DHCR has submitted affidavits showing that the denial letter was mailed and petitioner has failed to rebut the presumption of receipt. Thus, the petition is untimely. Still, it cannot be said that DHCR's decision was arbitrary, capricious or an abuse of discretion in light of petitioner's failure to respond to the agency's requests. While petitioner asserts it did not receive the Administrator's request, it did respond to certain later requests, providing the Administrator with copies of bills for repairs and other documentation. Accordingly, the petition must be denied.

Wherefore, it is hereby

ORDERED that petitioner's Article 78 petition is denied; and

ORDERED that respondents' cross- motion to dismiss is granted.

This constitutes the decision and order of the court.

All other relief requested is denied.

Dated: November 13, 2008

EILEEN A. RAKOWER, J.S.C.