

**Matter of Bondam Realty Assocs., L.P. v New York  
State Div. of Hous. & Community Renewal**

2008 NY Slip Op 33148(U)

November 19, 2008

Supreme Court, New York County

Docket Number: 105871/2008

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN  
*Justice*

PART 5212

Index Number : 105871/2008  
**BONDAM REALTY ASSOC,**  
vs.  
**NEW YORK STATE D.H.C.R.**  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. 105871/2008  
MOTION DATE 10/29/08  
MOTION SEQ. NO. 001  
MOTION CAL. NO. 12

on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1, 2, 3  
4, 5  
6

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

PETITION IS DENIED IN ACCORDANCE WITH  
THE ANNEXED DECISION, ORDER 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 a certified copy, the interested representative must  
appear at the County Clerk's Desk (Room  
1000) with the judgment Clerk's Desk (Room

Dated: 11/20/08

[Signature]  
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: CIVIL TERM: PART 12

-----X  
In the Matter of the Application of BONDAM  
REALTY ASSOCIATES, L.P., and  
506-524 W. 173 LLC,

Petitioners,

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

-against-

NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL and RAFAEL  
VICENTE,

Respondents.  
-----X

Index Number 105871/2008<sup>1</sup>  
Submission Date Oct. 29, 2008  
Mot. Seq. No. 001  
Mot. Cal. No. 12

**DECISION, ORDER AND  
JUDGMENT**

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Papers considered in review of the petitions for Article 78 relief:

<b>Bondam Petition</b>	<b>Papers</b>	
	Notice of Petition and Amended Petition	1, 2, 3, 4
	DHCR Amended Memo of Law	3
	Vicente Memo of Law in Opp	4
	DHCR Verified Answer	5
	Petitioner's Reply Affirmation	6
<b>506-524 Petition</b>	Notice of Petition	1
	Vicente Verified Answer & Memo of Law	2, 3
	DHCR Verified Answer, Memo of Law	4, 5
	Petitioner's Reply Affirmation	6

DHCR Case File

**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

<sup>1</sup>This decision reflects the consolidation of Index No. 105943/2008 into the above-  
indicated Index Number by decision and order dated August 5, 2008.

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**PAUL G. FEINMAN, J.:**

In these consolidated petitions seeking Article 78 relief, petitioners seek to annul the February 28, 2008 determination by respondent New York State Division of Housing and Community Renewal, pursuant to CPLR 7803 (3). Respondent Vicente opposes and seeks attorney's fees. For the reasons which follow, the petitions are granted in part. Respondent's request for attorney's fees is denied.

*Factual and Procedural Background*

Petitioner 506-524 W. 173 LLC ("506-524") took title to the property located at 524 West 173<sup>rd</sup> Street on February 12, 2007. Petitioner Bondam Realty Associates, L.P., is the former owner, and had ownership from about February 26, 1993 until February 12, 2007. Respondent Rafael Vicente is the tenant in apartment 3B in the premises. The apartment is subject to the Rent Stabilization Law. Respondent New York State Division of Housing and Community Renewal (DHCR) is the agency charged with administering the Rent Stabilization Law and Rent Stabilization Code.

In October 2006, Vicente filed a rent overcharge complaint with the DHCR. After seeking information from the tenant and both the current and former owners, neither of whom provided the rent ledger or lease in effect on the base date, the DHCR issued an order on July 17, 2007, finding that subsequent to the base date of October 25, 2002, four years prior to the filing date of the complaint, there had been an overcharge of rent for the apartment (DHCR Record A-27). Because of the lack of records other than the rent registration, the DHCR Rent Administrator determined the initial rent using the default method in which the rent is calculated as being the

same as the lowest stabilized rent for the same sized apartment in the same building. The order froze this recalculated rent until the expiration of Vicente's current lease. It noted that the tenant had been issued a refund check by the current owner in the amount of \$6,000.<sup>2</sup> It stated erroneously, as explained below, that the current owner had commenced litigation against the former owner regarding access to the rent records, and that therefore both the former and current owners were to be held jointly and severally liable for the repayment, with the amounts refunded to be apportioned between them. Treble damages were assessed on the overcharge beginning two years before the filing of the complaint because the parties had not established that the rent overcharge was not willful.<sup>3</sup>

Bondam Realty filed a Petition for Administrative Review (DHCR Record B-1), as did 506-524 (DHCR Record C-1). Bondam argued in essence that it was denied due process because, although it had responded to the agency's initial request for information by directing it to the current owner (see, letter of March 2, 2007 from Rosenberg & Estis to DHCR), it should nonetheless have been kept apprised as to the investigation, and thus could have corrected the misapprehension by the agency concerning the litigation which was not between Bondam and 506-524, but between Bondam and the former managing agent who had refused to turn over the rental records for the building as part of a fee dispute. 506-524's Petition for Administrative Review faulted the agency's use of the default method for calculating the base rate, noting that

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<sup>2</sup>Vicente informed the DHCR in his answer dated October 10, 2007, that he returned the check (DHCR Record C-4).

<sup>3</sup>The Rent Administrator determined that from September 2006-February 2007, the prior owner collected an overcharge totaling \$15,975.90 which includes the treble damages, and that for March 2007, the current owner collected an overcharge totaling \$3,550.20, similarly calculated. (DHCR Record A-27).

the tenant had not challenged the rent registration and that it was therefore improper for the Rent Administrator not to base its calculations on the rent registration. It also argued that the agency should have credited the owner for longevity and vacancy allowances when calculating the correct rent. It additionally contended that the Rent Administrator failed to take into account 506-524's voluntary recalculation and reduction of the rent, and its refund to Vicente of \$6,000, all done prior to interposing an answer to the overcharge complaint.<sup>4</sup> It argued that there was no evidence that it had attempted to justify an illegal rent and that it was therefore improper for the agency to assess treble damages. Lastly, it argued that as the new owner, it had never acquired the rent records so as to establish Vicente's base rent, and that it was unfair and improper for the DHCR not to grant a further extension in addition to the two granted, so that it could seek intervention in the litigation brought by Bondam against the former managing agent in order to obtain the records. It contended that Vicente would not be prejudiced by an extension as it had already reduced his rent and issued a refund.

The DHCR denied both petitions on February 28, 2008 (DHCR Record B-5, C-9). The Order and Opinion noted that Bondam never responded to the tenant's complaints on the merits but merely referred the agency to the current owner, and thus disagreed with Bondam's argument that its due process rights were violated, although acknowledging that the Rent Administrator had been incorrect in stating that the current owner had commenced a court action against Bondam regarding the rent records. The Order found that the Rent Administrator had given the current owner ample time to submit the rent records, and that 506-524 had not established what

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<sup>4</sup>The new owner mailed Vicente a check for \$6,000 by letter dated May 10, 2007, and noted that it had not accepted his rent check for the month of April 2007, and that he need not pay rent for May 2007 (DHCR Record B-4, ex. A [letter from 506-224 to Vicente]).

efforts it had actually made to obtain the records or shown that it had moved to intervene in the litigation. It concurred with the use of the default method to establish the base rent because of the absence of a rent ledger or lease. It upheld the conclusion that the calculations by 506-524 of the proper rent were incorrect, and that both its reduction and refund were insufficient and untimely. It also upheld the imposition of treble damages and that the two parties are jointly and severally liable for the overcharge, based on the failure of either party to submit evidence of their efforts to obtain the rent records and based on the insufficient attempt by 506-524 to remedy the overcharge.

Bondam and 506-524 independently sought judicial review pursuant to CPLR Article 78. Their petitions, brought pursuant to CPLR 7803 (3), were consolidated for determination. Tenant Vicente opposes, as does the DHCR.

#### *Analysis*

It is a well-settled rule that judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1<sup>st</sup> Dept. 1983]). The test of whether a decision is arbitrary or capricious is “determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.” (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609).

Under the Rent Stabilization Code, the owner of a regulated housing accommodation is

required to “maintain records relating to the 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 § 2523.7 [b]). The owner bears the burden of proving that rents charged are proper from the base date through the date of the filing of the overcharge complaint. A new owner may be excused from providing records concerning activities prior to the acquisition of the property only in certain circumstances, such as where the property was acquired through a judicial sale, none of which are at issue here (see 9 NYCRR § 2523.7 [c] [1]). An owner is not excused from responding fully to the requests by the DHCR for information merely because it has not been able to obtain a rental history from the previous owner (*see, Matter of S.E. & K. Corp. v Division of Hous. & Community Renewal*, 239 AD2d 123 [1<sup>st</sup> Dept. 1997]; *Matter of 4947 Assoc. v New York State Div. of Hous. & Community Renewal*, 199 AD2d 179 [1<sup>st</sup> Dept. 1993]; *Matter of E. 163<sup>rd</sup> St. LLC v New York State Div. of Hous. & Community Renewal*, 4 Misc. 3d 169 [Bronx County 2004]).

The current owner will be held responsible for its rent overcharges as well as those of the prior owner, and for resulting penalties (9 NYCRR § 2526.1 [f] [2]; *Matter of DiMaggio v Division of Hous. & Community Renewal*, 248 AD2d 533, 535 [2d Dept. 1998]). Under the Code, an overcharge is presumed willful, and will warrant a treble damage award pursuant to New York City Administrative Code § 26-516 (a), unless the owner can establish by a preponderance of the evidence that the overcharge was not willful (*Matter of Hargrove v Division of Hous. & Community Renewal*, 244 AD2d 241, 242 [1<sup>st</sup> Dept. 1997]). Where the overcharge is found not to have been willful, the agency will impose interest which accrues from the date of the first overcharge (9 NYCRR § 2526.1 [a] [1]; *Matter of 425 3<sup>rd</sup> Ave. Realty Co. v*

*New York State Div. of Hous. & Community Renewal*, 29 AD3d 332, 333 [1<sup>st</sup> Dept. 2006]). An overcharge will be deemed willful when “an owner submits no evidence or where the evidence is equally balanced” (*Matter of E. 163<sup>rd</sup> St. LLC v New York State Div. of Hous. & Commun. Renewal*, 4 Misc. 3d at 174 [quoting DHCR Policy Statement 89-2]; see *Goldstein v New York State Div. of Hous. & Community Renewal*, 226 AD2d 722 [2d Dept. 1996]).

Bondam’s argument for annulment of the agency’s determination centers on its claim that the DHCR should have verified the statements by 506-524 concerning the nature of the litigation, and should have requested further information about the litigation’s progress instead of finding that Bondam purposefully withheld the documents. This argument carries little weight, given that the Rent Stabilization Regulations provide only that a landlord is to be given a reasonable opportunity to be heard (9 NYCRR § 2506.1), which was given to Bondam, but does not require the agency to seek out the landlord’s case. The burden remains on the landlord to establish its compliance with the rules and regulations and that there was no willfulness as to the overcharge (see, *Matter of Miller v Division of Hous. & Community Renewal*, 289 AD2d 20 [1<sup>st</sup> Dept. 2001], *lv denied* 98 NY2d 604 [2002]). Bondam also argues that there is no requirement that an owner maintain “duplicate records” of all the documents possessed by a managing agent. The argument overlooks the clear requirement under the Rent Stabilization Regulations that rent records are to be maintained by “the owner” for the period of four years prior to the date of the most recent registration was required to be filed (9 NYCRR § 2523.7). Finally, although Bondam includes documents from the litigation filed against its former managing agent in Supreme Court, New York County, by which it seeks to show that it does not have the rent documents and that they

have been sought (Bondam Pet. Ex. C - F),<sup>5</sup> none of these documents were apparently provided to the DHCR during the administrative proceeding, and thus cannot be considered by the court.

506-524 offers several arguments for reversal and annulment. As a new owner, it argues ignorance of the overcharge, and points to its attempt to repay the overcharge as calculated from the rent registration records. It argues that because the DHCR arbitrarily determined that rent registrations cannot be used to establish the base rent, its calculations were found deficient and the presumption of willful overcharge was not rebutted.

Contrary to the reasoning by the DHCR, there is nothing in the regulations that state that rent registrations are insufficient to establish a base rent. As noted by 506-524, the verified answer by DHCR concedes that the rent registration records concerning the apartment in question “establish that [the former tenant] was the tenant . . . and the last rent paid by him was \$483.50,” and “the registrations filed . . . show that there was a lease in effect on the base date. . . .” (Shaw Reply Aff. ¶¶ 3, 4, citing DHCR Ver. Ans. ¶¶ 34, 37). Thus, it is arbitrary for the DHCR Rent Administrator to have determined that the contents of the rent registration were insufficient to establish Vicente’s base rent. DHCR relies on the discussion of the insufficiency of rent registrations in the unpublished decision, *Matter of Newport Partners, LLC v New York State Div. of Hous. & Community Renewal—Office of Rent Admin.* (Supreme Court, NY County [Cahn, J.], Index No. 112525/2006, attached as Ex. B of DHCR Memo of Law), however the use of rent registrations to establish the base rent has been approved, at least in situations where the rent registration pertains to the period concerning the base rent date, in *Matter of Silver v Lynch*,

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<sup>5</sup>The litigation is entitled, *Eliot C. Nisenbaum, et al. v Magaw Mgmt., LLC and Onix A. Sosa*, Supreme Court, N.Y. County, Index No. 112492/2006, and is pending before another justice of this court.

283 AD2d 213 (1<sup>st</sup> Dept. 2001), and *Matter of PWV Acquisition LLC v Division of Hous. & Community Renewal and Gary Wilson*, 2007 NY Slip Op. 30623 (U) (Supreme Court, NY County [Feinman, J.]).<sup>6</sup> In addition, if the rent registration is utilized to determine the base rent, rather than calculating by the default method, then according to the reasoning used in the DHCR's memorandum of law, there is no reason not to calculate vacancy and longevity allowances (DHCR Memorandum of Law at 22).

In sum, the court finds that the DHCR arbitrarily and capriciously chose not to rely on the rent registration to establish the base rent on Vicente's apartment, and then found that 506-524 under-calculated the amount of overcharge that should be refunded to Vicente, which partly led to the conclusion that the owner was acting willfully rather than in good faith. In addition, the DHCR Rent Administrator arbitrarily overlooked the fact that the agency granted two extensions to 506-524 so that it could investigate and answer the complaint, and that 506-524 tendered its refund check to Vicente prior to the final date granted to it to answer, further suggesting good faith attempts to rectify the overcharge error. The determination is therefore remanded to the agency for reconsideration and recalculation in accordance with this decision. Notably, however, the agency's finding that the overcharge was willful, and that treble damages should be awarded at least as to the months when Bondam owned the property, will not be disturbed by the court, as it can be rationally found that petitioners failed to show otherwise by a preponderance of the evidence (9 NYCRR § 2526.1 [a] [1]).

Tenant Vicente's arguments concerning the deference to be given to the decisions by the

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<sup>6</sup>According to the attorney for DHCR, *PWV Acquisition LLC* is being appealed (DHCR Memo of Law, at 23).

DHCR are noted, and incorporated as set forth above. His request for attorney's fees is improperly made in the context of this Article 78 proceeding, which is limited to review of administrative decisions, and is therefore denied without prejudice to the commencement of a separate proceeding.

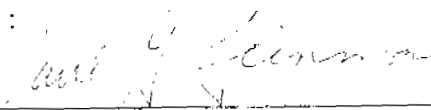
It is

ORDERED and ADJUDGED that the petition is granted to the extent that the proceeding is remanded to the DHCR for recalculation of the base rent based on the rent registration on record, and reconsideration as to whether the overcharge by 504-526 was willful, and is otherwise denied.

This constitutes the decision, order and judgment of this court. The DHCR is directed to contact the Part 12 Part Clerk (646-386-3273) to retrieve the Record of proceedings before the agency.

Dated: November 19, 2008  
New York, New York

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 1415).