[* 1]

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

PRESENT: HON. CAROL EDMEAD Justice PART

Index Number : 109612/2008
RADONCIC, SKENDER
VS.
VANAMERONGEN, DEBORAH
SEQUENCE NUMBER : # 001
ARTICLE 78

INDEX NO. 109612-08
MOTION DATE
MOTION SEQ. NO. #001
MOTION CAL. NO.

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

FILED
OCT 06 2008
COUNTY CLERK'S OFFICE

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

Dated: 10/3/08

HON. CAROL EDMEAD 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 35

---x

In the Matter of the Application of
SKENDER and SADETA RADONCIC,

Petitioners,

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

-against-

DEBORAH VANAMERONGEN, as Commissioner of the New York State Division of Housing and Community Renewal and NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondents.

---x

Index No. 109612/08

DECISION/ORDER

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioners Skender and Sadeta Radoncic ("petitioners") move for an order granting a judgment pursuant to CPLR Article 78, (1) reversing the agency determination of respondent New York State Division of Housing and Community Renewal ("DHCR"), Dated May 15, 2008 (the "Determination"), which held in part that the premises known as and located at 338 East 70th Street, Apartment 2A, New York, New, New York 10021 (the "subject premises") is subject to the Rent Stabilization Law and/or Code; (2) ordering that DHCR's Determination which held in part that the rent stabilized rent for the subject premises is $1,287.69 effective February 1, 2007 is arbitrary and capricious and set aside in its entirety; or, in the alternative (3) ordering that the proceeding be remanded to DHCR for further submissions.

Background

Petitioners are the rent stabilized tenants living at the subject premises. Some time prior to the expiration of the lease dated January 4, 1979 and expiring January 31, 1981, co-tenant Skender Radoncic ("Skender") was hired by the building owner as superintendent. Skender continued as superintendent until 2007. During that period Skender was not required to pay rent. Subsequent to the termination of Skender's employment, the building owners commenced the underlying administrative proceeding seeking a determination as to the legal rent for the subject premises. By decision dated February 22, 2008, DHCR determined that the petitioners were rent stabilized tenants and that effective February 1, 2007 the legal rent for the apartment was $1,409.12. Subsequently, petitioners filed a Petition for Administrative Review ("PAR") seeking to reverse and/or modify the underlying decision. By decision issued May 15, 20087, DHCR granted the underlying petition in part and to the extent of establishing the legal rent at $1,287.69 per month effective February 1, 2007.

Petitioners' Contentions

The original DHCR decision involved herein established the legal rent at $1,409.12 based upon a sampling of only four other apartments in the building occupying the "A" line of the building. Subsequently, the rent administrator acknowledged the error in the underlying decision and expanded the agency's review to include "...the fourteen (14) rent stabilized three-room apartments." However, the use of fourteen apartments is likewise inadequate. Upon information and belief, nineteen units in the subject building are the same size: three rooms. Therefore, and in order to comply with 9 NYCRR §2522.6(b), the underlying order must be based upon the average rents of all nineteen apartments.

Further, in light of the fact that all unites in the subject building are the same size, it is submitted that all units in the building constitute "comparable housing." Therefore, and in accordance with 9 NYCRR§2522.6(b), DHCR should have required the owner to subject copies of all current lease agreements in order to "document" the rent collected for each of the comparable units in the building.

And, DHCR should have considered the equities when issuing its order adjusting or establishing the regulated rent. Herein, the petitioners' rent was increased in excess of five hundred percent, which in inequitable.

Respondents' Opposition

Beyond the arguments noted above, petitioners further argued that the Determination created an undue hardship for them because Skender was diagnosed with cancer, undergoing treatment and is unable to work. His income is severely limited and the amount set in DHCR's order did not take into consideration all factors bearing upon the equities involved. However, setting of an equitable rent does not turn on the financial situation of a tenant. The Rent Stabilization Law and Code do not permit DHCR to consider a tenant's ability to pay when establishing the legal regulated rent.

The petitioners misconstrue 9 NYCRR§2522.6(b) in arguing that the DHCR was required to obtain copies of leases from the owner because said section applies to judicial sales or in cases concerning the owner's inability to submit prior leases. Moreover, 9 NYCRR§2522.6(b)(2) provides that DHCR may use sampling methods determined by DHCR. And, it is in DHCR's discretion to determine whether to require the owner to provide copies of leases. In the instant case, DHCR properly referenced its data base of registered rents to conduct a comparability study

to determine the legal regulated rent for the subject premises.

Analysis

CPLR 7803 states that the court review of a determination of an agency, such as DHCR, consists of whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed. CPLR 7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1st Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1st Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1st Dept.1987], *lv. den.* 70 N.Y.2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts." *Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. *Matter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's function is completed on finding that a rational basis supports the DHCR'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 New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1st Dept.], aff'd 66 N.Y.2d 1032 [1985]).

Pell v Board of Ed. of Union Free School Dist. No...., 356 N.Y.S.2d 833 N.Y. 1974, is instructive on the basic standard of Article 78 review:

> In article 78 proceedings: the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence. (Cohen and Karger, Powers of the New York Court of

> Appeals, s 108, p. 460; 1 N.Y.Jur., Administrative Law, ss 177, 185; see Matter of Halloran v. Kirwan, 28 N.Y.2d 689, 690, 320 N.Y.S.2d 742, 743, 269 N.E.2d 403 (dissenting opn. of Breitel, J.)). The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals. The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious. (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460--461; see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7803.04 Et seq.; 1 N.Y.Jur., Administrative Law, ss 177, 184; Matter of Colton v. Berman, 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 650--651, 234 N.E.2d 679, 681--682).

Pell at 839.

As to the petitioners' argument that the DHCR misapplied the relevant statutes, the court is guided by the Court of Appeals in *Howard v Wyman*, 28 N.Y.2d 434 N.Y. 1971, wherein the Court stated:

> It is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld. (See, e.g., Matter of Mounting & Finishing Co. v. McGoldrick, 294 N. Y. 104, 108; Matter of Colgate-Palmolive-Peet Co. v. Joseph, 308 N. Y. 333, 338; Udall v. Tallman, 380 U. S. 1, 16-18; Power Reactor Co. v. Electricians, 367 U. S. 396, 408.) As this court wrote in the Mounting & Finishing Co. case (294 N. Y., at p. 108), "statutory construction is the function of the courts 'but where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited' (Board v. Hearst Publications, 322 U. S. 111, 131). The administrative determination is to be accepted by the courts 'if it has "warrant in the record" and a reasonable basis in law' (same citation). 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body' (Rochester Tel. Corp. v. U. S., 307 U. S. 125, 146)."

Howard at 434.

Moreover, where, as here, the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference. *See Flacke v Onondaga Landfill Systems, Inc.*, 69

NY2d 355, 363, 514 NYS2d 689, 693 (1987). Courts are required to "resolve [any] reasonable doubts in favor of the administrative findings and decisions" of the responsible agency. *Town of Henrietta v Department of Envtl. Conservation,* 76 A.D.2d 215, 224, 430 NYS2d 440, 448 (4th Dep't 1980). *See also Jackson,* 67 NY2d at 417, 503 NYS2d at 305; *City of Rome v Department of Health Dept.,* 65 A.D.2d 220, 225, 441 NYS2d 61, 64 (4th Dep't 1978), *lv. To app. denied,* 46 NY2d 713, 416 NYS2d 1027 (1979).

Conclusion

In the instant case, this court is constrained to uphold DHCR's exercise of discretion as it appears that there was a "rational basis" for its action, and said action was not "arbitrary and capricious." *Pell v Board of Ed. Union Free School District,* 34 NY2d 222, 230-31, 356 NYS2d 833, 839 (1974)

It appears that the particular action taken by DHCR should have been taken and is justified, with foundation in fact. There appears to be a sound basis in reason for the determination reached by DHCR in the instant case. *See*, 34 NY2d at 231, 356 NYS2d at 839 *See also Jackson v New York State Urban Dev Corp.,* 67 NY2d 400, 417, 503 NYS2d 298, 305 (1986) (on review of agency action under CPLR Article 78, the courts may not "second guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence").

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of Petitioners Skender and Sadeta for an order granting a judgment pursuant to CPLR Article 78, (1) reversing the agency determination of respondent New York State Division of Housing and Community Renewal,

Dated May 15, 2008, which held in part that the premises known as and located at 338 East 70th Street, Apartment 2A, New York, New, New York 10021 is subject to the Rent Stabilization Law and/or Code; (2) ordering that DHCR's Determination which held in part that the rent stabilized rent for the subject premises is $1,287.69 effective February 1, 2007 is arbitrary and capricious and set aside in its entirety; or, in the alternative (3) ordering that the proceeding be remanded to DHCR for further submissions, **is denied in its entirety, and the instant Petition is dismissed**; and it is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioners.

Dated: October 3, 2008

Carol Robinson Edmead, J.S.C.