Matter of 450-452 E. 81st St., LLC v New York State Div. of Hous. and Community Renewal

2008 NY Slip Op 33226(U)

December 3, 2008

Supreme Court, New York County

Docket Number: 107201/08

Judge: Nicholas Figueroa

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SCANNED ON 12/4/2008

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

PRESENT: FIGUERA Justice

PART 46

450-452 EAST 81ST

-v-

NY STATE DMV

INDEX NO. 107201/08

MOTION DATE 8/7/08

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 ...	1, 2, 3
Answering Affidavits — Exhibits	4, 5, 6
Replying Affidavits	7, 8

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

See accompanying decision and judgment

UNENTERED 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).

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

Dated: DEC 3 2008

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 46

In the Matter of the Application of
450-452 EAST 81st STREET, LLC,

Petitioner,

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

- against -

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent,

-and-

BRUCE SANFORD,

Respondent.

Index No. 107201/08

DECISION AND JUDGMENT

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RE: Dkt. No. VK-410013-RO (VC-410193-R)

Nicholas Figueroa, J.:

Petitioner seeks a judgment, pursuant to CPLR Article 78, reversing and annulling the April 1, 2008 determination by respondent, New York State Division of Housing and Community Renewal (DHCR), made on petitioner's petition for administrative review (PAR), that froze the rent for respondent Bruce Sanford's apartment at $1325 and directed petitioner to refund $495 to Sanford in overcharges, after deducting $7950 in rent arrearages. The decision affirmed the Rent Administrator's determination that the apartment was subject to rent stabilization, as it was never deregulated, and awarded treble damages, based on petitioner's wilful overcharge.

Sanford filed a rent overcharge complaint on March 29, 2007, alleging that his $1475 rent was an overcharge. He alleged that he initially took occupancy of the apartment on April 5, 2004 under a one year lease at a monthly rent of $1,350 but that the last registration for the apartment showed a rent of $933.24 in 2002, and that there were no apparent improvements that would bring the rent to $2000, the amount that would deregulate the unit.

The Rent Administrator determined the base date for calculating the regulated rent as March 29, 2003, the date four years before the complaint. The Rent Administrator held that petitioner failed to establish that the overcharge was not wilful.

In affirming the Rent Administrator on the PAR, the Deputy Commissioner noted that petitioner failed to register the apartment and rejected its assertion that it made improvements to the apartment that deregulated the apartment by raising the monthly rent above $2000.

The decision noted petitioner's contention that after the March 29, 2003 base date, a vacancy lease was given to a new tenant for a one year term beginning on April 7, 2003, at a monthly rent of $1325.

Petitioner alleged that it made improvements to the apartment on November 15, 2002. The date was given in an April 16, 2007 affidavit by Paul Lettieri, the property's managing agent. Lettieri stated that he could not obtain proof from the contractor, as the work had been done five years ago. Petitioner contended that the renovations caused the apartment to be de-regulated.

The Deputy Commissioner noted that the Rent Administrator declined to consider proof of repairs because the improvements were completed prior to the base date.

The Deputy Commissioner noted that there was nothing in the rental history that suggested the actual rent on the base date was $2000 or more, and that none of the prior leases, which were for

a lower $2000 rent, stated that the rents were preferential. Further, the Deputy Commissioner stated that petitioner's registering the apartment as exempt is not sufficient to establish high rent decontrol when a significantly lower rent is charged without explanation.

The Deputy Commissioner stated that a case petitioner relied on, *Matter of H.O. Realty v. New York Division of Housing and Community Renewal*, 46 AD3d 103, held that the pre-base date rental may only be reviewed to determine if the overcharge was wilful. Again, the Deputy Commissioner noted that the November 15, 2002 lease the landlord submitted indicated that the tenant was occupying the apartment when the renovation were performed on that single day.

The Deputy Commissioner affirmed the Rent Administrator's findings that there was an overcharge and that the tenant was entitled to treble damages.

Petitioner, as it did on the PAR, now argues that the apartment is not subject to rent stabilization; that DHCR erred in failing to honor its "exit" registration; that it failed to consider the apartment renovation because it occurred prior to the base date; that DHCR failed to act in accordance with its own Policy Statement 90-10; and that DHCR erroneously held that there was an overcharge that allowed the rent to be frozen and treble damages to be imposed.

Petitioner has not met its burden of proving that it did not wilfully charge an excessive rent. The evidence it submitted regarding the rent from the base date, four years prior to the complaint, and the evidence it submitted regarding the repairs, allowed DHCR to grant the tenant's application and deny the PAR. Petitioner has not demonstrated, on this application, that the final determination was arbitrary and capricious.

The Rent Stabilization Law bars DHCR from examining an apartment's rental history more than four years prior to a rent overcharge complaint RSI §516-516). The base rent is the rent in

effect on that date. Petitioner correctly argues that respondent may examine events going back more than four years prior to the complaint.

The First Department's holding in *Matter of H.O. Realty Corp. v. New York State Division of Housing of Community Renewal, id.*, is not confined to the question of whether a landlord acted wilfully. Rather, DHCR may examine events more than four years prior to the complaint to determine if the apartment is regulated (*East Wing Renovating Company v. New York State Division of Housing and Community Renewal*, 16 AD 3d 166).

However, in the instant case, respondent reviewed the prior rentals and rent registrations, and considered the alleged repairs, although these alleged repairs occurred more than four years prior to the overcharge complaint.

The rental history does not establish that the apartment rent was above $2000. All the rents were below that amount and nothing in the prior leases indicated that the rents were preferential; that is, rents that were below the actual rent the owner was entitled to. Moreover, as DHCR notes, petitioner's registration statement does not indicate that the apartment was subject to high rent deregulation and does not reveal the last rent.

Contrary to petitioner's argument, DHCR did not fail to comply with its Policy Statement 90-10, as it examined all the rent data petitioner submitted. In fact, DHCR considered the information petitioner submitted concerning the repairs.

Policy Statement 90-10 permits the owner to prove repairs by submitting cancelled checks, invoices marked paid in full, a signed contract and a contractor's affidavit as proof of the repairs being performed and when the contractor completed the work. However, DHCR's inquiry does not end when it received the landlord's documentation (see *Matter of 201 East 81st Street Associates v.*

New York State Division of Housing and Community Renewal, 288 AD2d 89, 90).

DHCR was justified in requesting a contractor's affidavit. However, petitioner submitted its managing agent's affidavit because of its alleged inability to secure one from the contractor, as the work had been prepared five years earlier. DHCR had a rational basis for rejecting petitioner's proof, based on the facts in the record (see *Matter of Pell v. Board of Education*, 34 NY2d 222, 231; see also *Matter of Greystone Management v. Conciliation and Appeals Board of the City of New York*, 94 AD2d 614).

The managing agent's affidavit stated that the repairs were done on a single day. The Deputy Commissioner rejected this assertion. While petitioner argues that the statement was merely a linguistic error, the court cannot substitute its judgment for DHCR's by interpreting the managing agent's meaning (see *Matter of Belnord Holding Corp. v. Joy*, 73 AD2d 459, 450; *Matter of West Village Associates v. New York State Division of Housing and Community Renewal*, 277 AD2d 111, 113). The question of whether the managing agent correctly stated when the repairs took place is one of credibility. This is an issue for the agency, not the reviewing court, to determine (see *Matter of Berenhaus v. Ward*, 70 NY2d 436, 444). The court will not interfere with the finding that the assertion that the work was due on a single day was not credible.

Moreover, the alleged repairs would have been made at a time the apartment was occupied. Nothing in the record demonstrates that the tenant gave permission for the repairs. Therefore, the renovation could not serve as a basis for de-regulation (Rent Stabilization Code §2522.4(a)(1)).

On the basis of the record before it, DHCR's determination that petitioner is liable for treble damages because of its wilful overcharge is not arbitrary and capricious.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding dismissed.

This constitutes the decision and judgment of the court.

Dated: December 3, 2008

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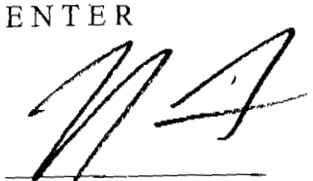

J.S.C.

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