

**Matter of 9 East 10 LLC v New York State Div. of
Hous. & Community Renewal**

2009 NY Slip Op 30150(U)

January 26, 2009

Supreme Court, New York County

Docket Number: 109744/2008

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 109749/2008

9 EAST 10 LLC.

vs.

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

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 12/11/09

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

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 419).

Upon the foregoing papers, it is ordered that this motion


This application and cross motion are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the Petition of 9 East 10 LLC for an order and judgment under Article 78 of the CPLR (1) vacating the Order of the New York State Division of Housing and Community Renewal issued on May 22, 2008, under Docket No. WA 410031RO, as arbitrary, capricious and contrary to law; (2) vacating the Order of DHCR issued on June 4, 2008, under Docket No. WB410043RO, as arbitrary, capricious and contrary to law; and (3) remitting the matters to DHCR for further investigation and hearing, **is denied in its entirety**; and it is further

ORDERED and ADJUDGED that the cross motion of respondent DHCR for an order and judgment dismissing the Owner's Article 78 Petition pursuant to CPLR § 3211(a) (1) and (5) and (7) in that the Petition fails to state a cause of action and is barred by collateral estoppel, is **granted in that the petitioner fails to state a cause of action, and the instant Petition is hereby dismissed in its entirety**; and it is further

ORDERED that counsel for respondent shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner.

Dated: 1/26/09



HON. CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

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

x

In the Matter of the Application of
9 EAST 10 LLC.

Petitioner,

Index No. 109744/2008

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

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

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
1112).

Re: Docket Nos.
WB410043RO (VE410159LD)
WA410031RO (UF410940LD)

x

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner 9 East 10 LLC ("petitioner" and/or "Owner"), moves for an order and judgment under Article 78 of the CPLR (1) vacating the Order of the New York State Division of Housing and Community Renewal ("DHCR") issued on May 22, 2008, under Docket No. WA 410031RO (the "May Determination"), as arbitrary, capricious and contrary to law; (2) vacating the Order of DHCR issued on June 4, 2008, under Docket No. WB410043RO (the "June Determination"), as arbitrary, capricious and contrary to law; and (3) remitting the matters to DHCR for further investigation and hearing.

DHCR Cross-moves for an order and judgment dismissing the Owner's Article 78
Petition pursuant to CPLR § 3211(a) (1) and (5) and (7) in that the Petition fails to state a cause

of action and is barred by collateral estoppel.

Background

This proceeding involves a housing accommodation located at 9 East 10th Street, Apartment 2R, New York, New York (the "Apartment"), and is regulated under the Rent Stabilization Law {"RSL"} and Rent Stabilization Code {"RSC"}.

DHCR is the State agency charged by statute with administering the RSL, including determining applications by Owners for high rent/high income deregulation of apartments.

Naum Medovoy and Susan Neuman ("Tenants") are the tenants of the subject apartment and occupy same with their son Michael Medovoy. The Tenants and their son have not been named as party respondents in this CPLR Article 78 proceeding.

The instant case commenced by the Owner challenges two final orders of DHCR's Deputy Commissioner for Rent Administration. Each of the final orders denied separate petitions filed by the Owner for deregulation of the Apartment pursuant to the high rent/high income deregulation provisions of the RSL and RSC.

On or about June 29, 2006 the Owner filed a "Petition by Owner for High Income Rent Deregulation, II ("Deregulation Petition") for the year 2006 filing period, asserting that the monthly rent for the Apartment exceeded \$2,000.00 on April 1, 2006, and requesting verification of the Tenants' household income to see whether the Tenants' total income exceeded the threshold level that would permit the Apartment to be deregulated pursuant to the high rent/high income deregulation provisions of the RSL and RSC. The Owner's Deregulation Petition was filed with DHCR after the Tenants returned the statutory notice or, Income Certification Form ("ICF") to the Owner. The Tenants claimed in the ICF that their total household income was

\$175,000 or less, in either one or both of the two preceding calendar years 1998 and 1999.

DHCR then sent the Tenants an answer form entitled, "Answer to Petition and Notice to Tenant to Provide Information for Verification of Household Income (for 2006 Petitions) II along with instructions describing how to fill out the form. The Tenants timely submitted an answer to the Deregulation Petition indicating that the total incomes of all occupants of the Apartment was \$175,000 or less in 2004 one of the two preceding calendar years (2004 and 2005). Both the Owner and the Tenants were subsequently notified that DHCR had forwarded income tax verification information to DTF, that the information was matched for the Tenants and their son for both 2004 and 2005, and that DTF found that the relevant household income did not exceed \$175,000 in either of the two relevant tax years. Both parties were afforded an opportunity to provide further information concerning DTF's reported findings.

By order issued December 11, 2007 (DHCR Docket No. UF410940LD) the Rent Administrator denied the Owner's Deregulation Petition. The order indicated that the total income of all persons occupying the Apartment was not in excess of \$175,000 in both of the preceding two years. As DTF reported that the income threshold was not exceeded the Tenants were as a matter of law not eligible to be deregulated. The Owner filed a Petition for Administrative Review ("PAR") to challenge the Rent Administrator's order denying deregulation. In the May Order, the Commissioner affirmed the Rent Administrator's denial of the 2006 deregulation petition.

On or about May 10, 2007 the Owner filed a Deregulation Petition for the year 2007 filing period, asserting that the monthly rent for the Apartment exceeded \$2,000.00 on April 1, 2007, and requesting verification of the Tenants' household income to see whether the Tenants'

total income exceeded the threshold level that would permit the Apartment to be deregulated pursuant to the high rent/high income deregulation provisions of the RSL and RSC. By order issued January 23, 2008 (DHCR Docket No. VE410159LD) the Rent Administrator denied the 2007 Deregulation Petition based on the DTF's finding in the prior year's (2006) deregulation proceeding that the total household income did not, exceed \$175,000 in 2005 which was one of the two years relevant to the Owner's 2007 deregulation petition. The Owner filed a PAR to challenge the Rent Administrator's order denying deregulation. In the June Order, the Commissioner affirmed the Rent Administrator's denial of the 2007 Deregulation Petition. This Article 78 proceeding, challenging both the May 22, 2008 and June 4, 2008 final orders, ensued.

Petitioner's Contentions

Although the Owner established that the Tenants' income exceeded the statutory threshold for deregulation for the relevant years, DHCR simply relied on findings reported to DHCR by the DTF. Where, as here, a party submits sufficient evidence challenging findings reported by DTF, it is error for DHCR to accept the DTF findings without further investigation. As such, the May Order and the June Order should be vacated and the matters remanded to DHCR for further proceedings.

The Owner submitted evidence that three properties owned by the Tenants, whose market value was approximately \$2 million in 2004 and 2005, generated income to the Tenants in 2004 and 2005 in excess of \$250,000, plus the rental income from the commercial unit at 547 Hudson Street owned by the Tenants. This income was well in excess of the statutory threshold of \$175,000 per year required for deregulation. Here the evidence, including public records,

showed that the Tenants' household income substantially exceeded \$175,000.00 per year in 2004 and 2005. As such, DHCR should not have simply relied upon the contrary report from DTF.

On March 21, 2007, Tenants responded to Owner's January 21, 2007 submission. Notably, Tenants did not dispute the Owner's proof of their income from their real estate holdings or that they received additional income from their other businesses. In the March 21, 2007 submission, the Tenants also did not dispute the Owner's claim that their income exceeded \$175,000 in 2004 and 2005.

As to the two Orders at issue herein, the Owner submitted substantial evidence that the Tenants' household income exceeded the statutory threshold for high income deregulation for 2004 and 2005. Neither DTF nor DHCR conducted any type of investigation as to the Tenants' income, and relied solely on the income the Tenants allegedly reported on their tax returns.

DHCR's refusal to consider the evidence presented by the Owner and the Owner's comments to the DTF report flies in the face of the statutory scheme to permit deregulation of high rent apartments occupied by wealthy tenants. Here, the record shows that these wealthy Tenants apparently filed inaccurate or incomplete tax returns on which they fraudulently misrepresented their income in an effort to deceive DTF, DHCR and the Owner and to continue to unjustly enjoy the benefits of rent regulation.

Where DHCR's determination may be based on fraud committed by the Tenants, the matter should be remanded to DHCR for further consideration and issuance of a new order.

DHCR's Commissioner erroneously stated that the Administrator was required by statute to rely on DTF's findings and could not verify the Tenants' household income.

DHCR, in passively accepting DTF's report and ignoring the evidence provided by the

Owner, acted in an arbitrary and capricious manner.

Respondent's Contentions

DHCR, correctly in accordance with an express statutory requirement, denied the deregulation petitions upon finding that an income verification report received from the NYS Department of Taxation and Finance ("DTF") showed that the total income of all of the persons residing in the apartment did not exceed the statutory threshold of \$175,000 in each of the two relevant tax years regarding each of the respective deregulation petitions. This fact alone was sufficient to require that the deregulation application be denied.

Denial of a deregulation application is required where DTF reports that the total income for all occupants of an apartment is not greater than \$175,000 in either of the two years for which income verification is required. The Owner may not prevail where DTF reports that the Tenants' total income was less than \$175,000 in either of the two years preceding the filing of the respective deregulation petitions.

Further the arguments advanced in the Owner's CPLR Article 78 petition are precluded by the doctrine of collateral estoppel, as they have been heard and dismissed by this court for failure to state a cause of action in a prior Article 78 proceeding involving this same Owner, the same Tenants, and the same apartment.

The Owner has previously sought before this court, and been denied, the same relief it seeks in this instant proceeding. The Owner's instant CPLR Article 78 Petition seeks an order, a) vacating both the May 22, 2008 and June 4, 2008 final orders that denied the Deregulation Petition, and b) remitting both proceedings to DHCR and directing DHCR to "investigate the Tenants' income and/or conduct an evidentiary hearing and enable DHCR to consider the

evidence presented by Owner."

In *9 East 10, LLC v. New York State Division of Housing and Community Renewal*, Index No. 118424/01, Sup. Ct., N.Y. Co. January 22, 2003 (Cahn, J.S.C.) ("Justice Cahn decision"), Justice Cahn granted DHCR's cross motion to dismiss a CPLR Article 78 challenge by this same Owner of DHCR's denial of the Owner's year 2000 Deregulation Petition involving the same Tenants and the same Apartment involved in the instant proceeding where the Owner sought the same relief as sought in this instant proceeding. In that year 2000 proceeding the Owner asked this court to require DHCR to investigate the Tenants' assets and income beyond the income report from DTF.

By an order and judgment signed January 22, 2003 the Owner's Article 78 Petition was dismissed for failure to state a cause of action. The court denied the same relief that Owner seeks in the instant proceeding.

Even if all of facts alleged in the petition are taken to be true (which DHCR does not concede), the petition must be dismissed because it does not state any cause of action.

29. In this case it is undisputed that DTF reported to DHCR that the total incomes of the Tenants, including their son, did not exceed the statutory threshold of \$175,000 in either 2004 or 2005. Therefore, there is no legal basis upon which the Owner may prevail. The household income could not have exceeded the required statutory threshold in 2005, based on the reported findings of DTF.

The Rent Administrator properly relied on DTF's finding in the 2006 deregulation proceeding concerning the amount of the 2005 total household income when the Rent Administrator denied both the 2006 and 2007 deregulation petitions. The Rent Administrator was

required by statute to rely on the findings reported by DTF in determining whether the Apartment qualified for high income/high rent deregulation. In a case such as this, where DTF has made a full match of occupants and tax returns, and has found the total household income to be below the required statutory threshold, DHCR has no jurisdiction to investigate DTF's income report. The Rent Administrator scrupulously followed the requirements of the RSL and RSC and no due process violations occurred.

In this case the DHCR complied with the express language of the statute that requires DHCR to obtain income verification

The DHCR is not mandated by the statute to take additional steps to verify the tenant's income, beyond simply reviewing the income verification report from DTF. Here, it is undisputed that the 2004 and 2005 tax information was obtained from the DTF just like the law intended, during the processing of the Owner's applications.

There is no merit to the Owner's request to conduct discovery for the purpose of fishing for information from which it might construct an argument that its own calculations be substituted for the DTF report. As noted above, the statute requires that the income determination be made solely by DTF and based solely on the adjusted gross income reported to DTF on income tax returns. There is no provision in the statute to challenge that report or to construct an alternative report.

Analysis

Collateral Estoppel

Collateral estoppel “requires ‘that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue’ ” (*Adam v Cutner & Rathkopf*, 238 A.D.2d 234, 242, 656 N.Y.S.2d 753 [1997], quoting *Allied Chem. v Niagara Mohawk Power Corp.*, 72 N.Y.2d 271, 276, 532 N.Y.S.2d 230, 528 N.E.2d 153 [1988], cert. denied 488 U.S. 1005, 109 S.Ct. 785, 102 L.Ed.2d 777 [1989]; see also *Aryeh v Altman*, 36 A.D.3d 492, 829 N.Y.S.2d 47 [2007].

In the Justice Cahn decision, the tenants are the same, the unit at issue is the same, the parties are all the same; the relief sought by the Owner is virtually identical except for the years under review. In the Justice Cahn decision,

[t]he owner contends that it established that the aggregate income of the household, for the years in question, was over \$175,000 per year based on the property they own, and that DHCR, by solely relying on the DTF records and ignoring the owners’ submissions...., was arbitrary and capricious in the decision denying the PAR. Further, the owner argues that DHCR misintepreted the Rent Regulation Reform Act of 1997 to mean that DHCR has no obligation beyond (i) verifying the tenants’ claimed income with DTF; and (ii) not deregulating any apartments for which either no match was found with DTF or for which the tenants have listed with DTF an aggregate income less than the threshold.”

In the instant case, the Owner essentially wants this court to order DHCR to conduct a full income tax audit of the Tenants, and to require DHCR to accept "evidence" developed by the Owner which the Owner claims shows that the Tenants' income is higher than reported on their income tax returns.

The issue before this court has not been exactly, squarely addressed and specifically

decided in Justice Cahn's decision. Erring on the side of caution, this court finds that the petitioner is not collaterally estopped from raising the issue in this application.

However, the petitioner's application is denied.

Article 78 Review

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]).

As to the Owner's 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.

On judicial review of an agency action under CPLR Article 78, the courts must uphold the agency's exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." *Pell v Board of Ed. Union Free School District*, 34 NY2d 222, 230-31, 356 NYS2d 833, 839 (1974) "The arbitrary and capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." 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").

It is important to note at the outset that section 26-504.3 (a) of the Administrative Code entitled "High income rent decontrol," defines annual income as the federal adjusted gross

income as reported on the New York state income tax return, rather than the realized actual income. It is recognized that this formula may exempt those households whose actual income meets the high income threshold but whose Federal adjusted gross income does not; however, it was the Legislature's decision to adopt adjusted gross income as the measure in defining "high income." *See Leepson v Holland*, 171 Misc.2d 84, 85-86, 653 NYS2d 841, *aff'd*, 245 AD2d 176, 665 NYS2d 895. Thus, that is the framework in which this analysis must operate.

In the instant case, the Court of Appeals decision in *Classic Realty LLC v New York State Division of Housing and Community Renewal*, 2 NY3d 142, 777 NYS2d 1 (2004) is instructive.

In *Classic*, the Court explained:

The Rent Stabilization Law sets forth the procedure for luxury deregulation (*see* Rent Stabilization Law [Administrative Code of City of NY] § 26-504.3). Rent-stabilized apartments that have a legal regulated rent of at least \$2,000 per month are eligible for deregulation if the occupants' combined statutory threshold income exceeds \$175,000 for each of the two years preceding an owner's petition (*see* Rent Stabilization Law [Administrative Code of City of NY] § 26-504.1). The owner of an eligible apartment may furnish the tenant with an income certification form and the tenant must certify whether the combined household income was above \$175,000 for each of the two previous years (*see* Administrative Code § 26-504.3 [b]).

If the tenant certifies that the income was below the threshold amount and the owner contests such certification, the owner may ask DHCR to verify the household income (*see* Administrative Code § 26-504.3 [c] [1]). DHCR must then request the necessary information from the tenant to allow DTF to verify the household income (*see* Administrative Code § 26-504.3 [c] [1]). DTF is only authorized to determine whether or not the income is within the statutory threshold (*see* Administrative Code § 26-504.3 [c] [1]; Tax Law § 171-b [3] [a], [b]). In the event DTF determines the income surpasses \$175,000 for each of the two previous years, DHCR must notify the parties and allow them 30 days to comment on the results (*see* Administrative Code § 26-504.3 [c] [2]). Thereafter, "[w]ithin forty-five days after the expiration of the comment period, the division shall, where appropriate, issue an order providing that such housing accommodation shall not be subject to the provisions of this law upon the expiration of the existing lease" (Administrative Code § 26-504.3 [c] [2]).

As respondent correctly points out, the Rent Regulation Reform Act of 1993 (L. 1993, ch. 253) and the RSL §26-501 *et seq*, prohibit disclosure of any income other than the Federal adjusted gross income of an occupant of an apartment, as reported on the New York State income tax return, in determining whether the housing accommodation qualifies for deregulation.

The case of, *Giffuni Bros. V New York State Division of Housing and Community Renewal*, 293 AD2d 402, 742 NYS2d 205 (1st Dept 2002) delineates the limited scope of a DHCR/DTF review:

DHCR, following statutory procedure, then sen[ds] that information to the New York State Department of Taxation and Finance (DTF) for income verification. Pursuant to the Reform Act as well as the New York State Tax Law, DTF may provide DHCR only a “Yes” or “No” answer to the question whether tenant income exceeds the \$175,000 threshold in two consecutive years (*see*, Administrative Code § 26-504.3; Tax Law § 171-b), and after searching its records and finding responsive records..., DTF advise[s] DHCR ...[as to whether] the income of the subject tenants had not exceeded the \$175,000 threshold

.

[t]he Reform Act as well as the New York State Tax Law limit the income information to which the DHCR is entitled. It would not be consistent with these statutory provisions to permit DHCR to request an actual tax return from a tenant.

As the issue of fraud is not before this court, petitioner’s reliance on *Matter of Ram I LLC v DHCR* (Supreme Court New York County, Index No. 113621/07 (Braun, J), is misplaced, as is petitioner’s reliance on *Matter of Zimak Co. V DHCR*, NYLJ, May 26, 2004, p. 17, cols. 1, 2 and p. 18, cols. 1,2 (Sup. Ct. N.Y.Co.). This is not a case where a determination was made in the absence of tax returns, or where the tax returns cannot be matched, *Matter of 81st Realty Corp.*, Docket No. UD410001RO, Division of Housing and Community Renewal, September 29, 2006.

Conclusion

Although the Owner's evidence is compelling, it is beyond the authority of this court in an Article 78 proceeding to extend the relief sought by the Owner herein.

DTF reported to DHCR that it had matched each occupant of the Apartment to a tax return for each of the relevant tax years and that the total household income did not exceed the statutory threshold of \$175,000 in each of the two relevant tax years. DTF reported that the total household income was such that the Apartment did not qualify for deregulation. DHCR is not authorized to look behind DTF's report.

Based on the foregoing, it is hereby

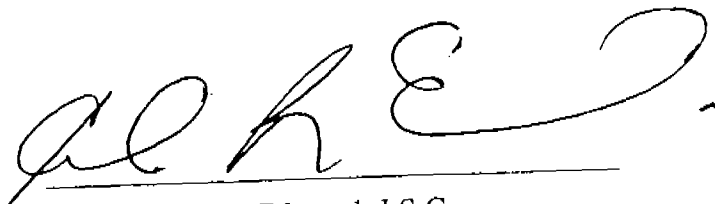
ORDERED and ADJUDGED that the Petition of 9 East 10 LLC for an order and judgment under Article 78 of the CPLR (1) vacating the Order of the New York State Division of Housing and Community Renewal issued on May 22, 2008, under Docket No. WA 410031RO, as arbitrary, capricious and contrary to law; (2) vacating the Order of DHCR issued on June 4, 2008, under Docket No. WB410043RO, as arbitrary, capricious and contrary to law; and (3) remitting the matters to DHCR for further investigation and hearing, **is denied in its entirety**; and it is further

ORDERED and ADJUDGED that the cross motion of respondent DHCR for an order and judgment dismissing the Owner's Article 78 Petition pursuant to CPLR § 3211(a) (1) and (5) and (7) in that the Petition fails to state a cause of action and is barred by collateral estoppel, is **granted in that the petitioner fails to state a cause of action, and the instant Petition is hereby dismissed in its entirety**; and it is further

ORDERED that counsel for respondent shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: January 26, 2009



Carol Robinson Edmead, J.S.C.

HON. CAROL EDM EAD

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 147B).