

Matter of Brookford L.L.C. v New York State Div. of Hous. & Community Renewal
2009 NY Slip Op 30535(U)
March 10, 2009
Supreme Court, New York County
Docket Number: 108882/08
Judge: Walter B. Tolub
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

WALTER B. TOLUB

PRESENT:

PART

Index Number : 108882/2008

BROOKFORD LLC

vs

NEW YORK STATE D.H.C.R.

Sequence Number : 001

ARTICLE

INDEX NO.

MOTION DATE

1.23.09

MOTION SEQ. NO.

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is denied as unavailing with the memorandum granted entered.

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 entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

Dated:

2/10/09

WALTER B. TOLUB

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: IAS PART 15

-----X
In the Matter of the Application of
BROOKFORD L.L.C.,

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

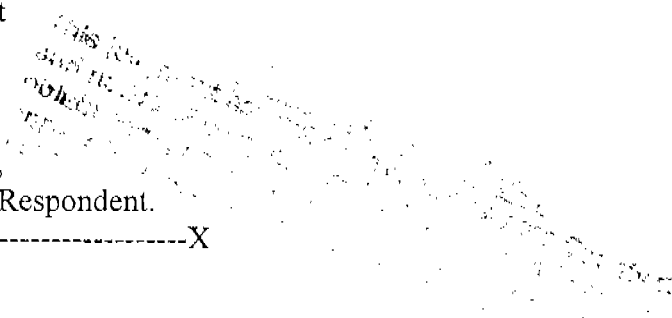
Index No.: 108882/08
DECISION/ORDER

-against-

THE NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,
Respondent

-and-

MARGARET SCHUETTE FRIEDMAN,
Intervenor-Respondent.



-----X
HON. WALTER B. TOLUB, JSC:

This is an Article 78 proceeding by which the petitioner landlord seeks a judgment overturning a decision by the respondent agency as arbitrary and capricious.

The petition is denied.

FACTS

The Parties

The petitioner Brookford L.L.C. (Brookford), a New York State limited liability corporation, is the owner of a residential apartment building located at 315 Central Park West in the County, City and State of New York (the building). *See* Verified Petition, ¶ 1. The intervenor-respondent Margaret Schuette Friedman (Schuette Friedman) has been the tenant of apartment 9S in the building since 1984, when she moved in with her now deceased husband, Si Friedman (Friedman). *See* Schuette Friedman Answer, ¶ 31. Mr. Friedman initially took

possession of apartment 9S in 1955, and had lived there until March 21, 2005, when he was put into a nursing home. *Id.*, ¶ 30. Friedman died on November 3, 2006. *Id.*, ¶ 32.

The respondent New York State Division of Housing and Community Renewal (DHCR) is the state agency charged with overseeing all rent-regulated properties. *See Verified Petition*, ¶ 2. At the inception of Friedman's tenancy, apartment 9S was a rent-controlled unit. *See Schuette Friedman Answer*, ¶ 31. In June of 2006, however, Brookford filed a "petition for high income rent deregulation" with the DHCR in order to cancel apartment 9C's rent-controlled status. *See Verified Petition*, ¶ 14. The exact status of apartment 9C is at issue in this proceeding.

Prior Proceedings

Brookford filed its high income rent deregulation petition on June 28, 2006. *See Return*, Exhibit A-1. A DHCR rent administrator denied that petition on December 5, 2007, in an order that found, in relevant part, as follows:

After consideration of all the evidence in the record, and based upon a search of the income tax returns on file with the New York State Department of Taxation and Finance (DTF), the Rent Administrator finds that the sum of the incomes of all persons who occupied this housing accommodation as a primary residence on other than a temporary basis (excluding bona fide employees and bona fide subtenants) was not in excess of \$175,000.00 in 2004 and 2005.

Id.; Exhibit A-29. Brookford thereafter filed a petition for administrative review (PAR) of the rent administrator's order on January 9, 2008. *Id.*; Exhibit B-1. A DHCR deputy commissioner denied that PAR on April 30, 2008, in an order that found, in relevant part, as follows:

In the [PAR], the owner asserts ... that the income of Si Friedman should have been included in the income verification inquiry conducted with DTF since the tenants did not adequately establish that he had permanently vacated the subject apartment when he was moved to a nursing home and that the DHCR's failure to include his income ... was arbitrary and capricious; that the Administrator's order violated the owner's right to due process since it did not

identify the names of the persons whose income was actually verified with DTF; that if the income of Si Friedman was not verified as part of the income verification inquiry the Administrator's order violated the owner's constitutional right to equal protection ...; that the DHCR did not serve the tenant with a request to provide income verification within the specified twenty-day time period ...; and that the Administrator's order failed to adequately specify the legal and factual basis upon which it was based, thereby violating the State Administrative Procedure Act (SAPA) and depriving the owner of its right to due process.

The Commissioner is of the opinion that this [PAR] should be denied

An apartment qualifies for luxury decontrol only if the relevant total household income exceeds \$175,000.00 in both of the prior two relevant tax years.

A review of the record below reveals that DTF reported that it made a match for both of the named tenants, including Si Friedman, for both 2004 and 2005, and found that the total household income was below the required \$175,000.00 statutory threshold amount in each of those two relevant tax years. The Commissioner notes that the owner was given notice of DTF's reported findings in the proceeding below and was provided with an opportunity to respond and comment. Therefore, the owner's assertion that DHCR failed to include Si Friedman's income as part of the income verification inquiry is contradicted by the evidence of record and is without merit.

Furthermore, Section 2200.2 (f) (20) of the New York City Rent and Eviction Regulations provides for deregulation only when it is determined that the required threshold income is exceeded in each of the two preceding calendar years. Section 2211.5 of the Rent and Eviction Regulations provides that where DTF determines that the income threshold has not been met, the DHCR shall issue an order denying the owner's deregulation petition. The administrator is required to rely on the findings reported by DTF in determining whether the subject apartment qualifies for high income rent deregulation. Therefore, the owner properly relied on DTF's finding ...

The Commissioner further notes that the time periods specified in the Rent and Eviction Regulations ... are directory only and not mandatory. Therefore, the owner's assertions concerning the specified time deadline for requesting a tenant to provide income verification information are without merit.

Finally, with respect to the owner's assertion that the Administrator's order did not adequately specify its basis, the Commissioner finds that the order ... clearly spells out on its face the reasons for the Administrator's determination to deny the owner's petition for deregulation in accordance with both SAPA and the regulations pertaining to high income rent deregulation. The Commissioner also notes that the owner has the right to file Freedom of Information Law (FOIL) request to review any relevant parts of the record below.

Accordingly, the Commissioner finds that the owner's [PAR] presents no issues of law or fact which warrant reversal or modification of the Administrator's

order and that the Administrator properly relied on the findings reported by DTF in denying the owner's petition for deregulation.

Id.; Exhibit B-4. Brookford thereafter commenced this Article 78 proceeding on June 25, 2008 (motion sequence number 001). Not having been named in Brookford's petition, Schuette Friedman requested leave to intervene in this proceeding, and received it via a stipulation executed between the parties on July 22, 2008. *See* Schuette Friedman Answer, Exhibit B. Schuette Friedman subsequently filed an answer on September 29, 2008, and the DHCR filed its answer on December 3, 2008.

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Pell v Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of F.G.A. Assoc. v New York State Div. of Hous. and Community Renewal*, 232 AD2d 302 (1st Dept 1996). "The interpretations of respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational." *Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251, 252 (1st Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988). After a review of this record, the court finds that the DHCR Commissioner's April 30, 2008 decision to deny Brookford's PAR was not arbitrary and capricious, and that Brookford's Article 78 petition should, therefore, be dismissed.

Brookford first argues that the DHCR "failed to consider the total income of all persons occupying the apartment as their primary residence on the controlling date for the relevant time

tenants' "realized actual income," for which it offers as proof the statement in Schuette Friedman's confidential affidavit that the income information therein "exactly matches" that which the tenants submitted on their tax returns. *See Reply Affirmation*, ¶¶ 8-9, 39-41. The court notes that Brookford does not produce the unredacted tax return itself, however. The court also finds that Brookford's arguments are not persuasive.

Pursuant to the Rent Control Law:

For purposes of this section [i.e., "High income rent decontrol"], annual income shall mean the federal adjusted gross income as reported on the New York State income tax return. Total annual income means the sum of the annual incomes of all persons who occupy the housing accommodation as their primary residence other than on a temporary basis ...

New York City Administrative Code § 26-403.1 (a). The Appellate Division, First Department, has unequivocally interpreted this statute to require that only "the Federal adjusted gross income of an occupant of an apartment, as reported on the New York State income tax return. [may be used] in determining whether the housing accommodation qualifies for deregulation." *Matter of Nestor v New York State Div. of Hous. and Community Renewal*, 257 AD2d 395, 396 (1st Dept), *lv denied* 93 NY2d 982 (1999). Further, the Rent Control Law reserves the income verification process to the DTF. New York City Administrative Code § 26-403.1 (c). The Court of Appeals has held that, once the DTF issues a verification, "the result ... is binding on all parties unless it can be shown that DTF made an error." *Matter of Classic Realty LLC v New York State Div. of Hous. and Community Renewal*, 2 NY3d 142, 146 (2004). Here, Brookford has presented no evidence that the DTF made any such error. The administrative record below reflects that the DHCR accepted and relied upon the DTF's verification that Friedman's and Schuette Friedman's combined incomes for the years 2004 and 2005 were below the deregulation threshold. *See*

Brookford's argument is any "controverting evidence with respect to whether and when [Friedman] had vacated the apartment," without which, Brookford's argument must fail. *Matter of 103 E. 86th St. Realty Corp. v New York State Div. of Hous. and Community Renewal*, 12 AD3d 289, 290 (1st Dept 2004). In any event, the court rejects Brookford's contention that the DHCR was obligated to consider Friedman's income during the income verification process, but failed to do so, as unsupported and meritless. Accordingly, the court finds that that argument affords no grounds for finding that the DHCR acted arbitrarily and capriciously.

Finally, Brookford argues that the "DHCR's failure to disclose ... that the sum of the total annual income for [Schuette Friedman] and [Friedman] exceeded \$175,000.00 in both the two relevant years prejudiced petitioner by excluding highly relevant facts from petitioner's review." *See Verified Petition*, ¶¶ 61-78. However, as previously discussed, the Rent Control Law expressly forbids the DHCR from disclosing the subject information - i.e., the tenants' 2004 and 2005 tax returns - to Brookford. McKinney's Unconsolidated Laws, § 8582-a (c) (4). Indeed, the fact that Brookford nonetheless obtained these documents through a FOIL request may have constituted a highly improper act. In any event, as previously discussed, the DHCR did not act arbitrarily and capriciously in relying on the DTF's notice of income verification, as the law mandated it to do. Further, any disparity between the amounts of income that Schuette Friedman recited in her confidential affidavit and the income actually reported on her's and Friedman's tax returns is of no moment. As the Appellate Division, First Department, observed in *Matter of Nestor v New York State Div. of Hous. and Community Renewal* (257 AD2d at 396),

While the criterion of household income does not take into account all income that might be imputed to the tenant, it has the advantage of affording a simple and consistent methodology. It is for the Legislature to decide whether public policy

is better served by ease of administration or precision of measurement, and the courts will not intrude upon the legislative prerogative.

Therefore, the court concludes that Brookford's final argument is meritless and constitutes no proof that the DHCR acted arbitrarily and capriciously. Accordingly, the court also finds that Brookford's Article 78 petition should be dismissed.

DECISION


ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition of Brookford L.L.C. for relief, pursuant to CPLR Article 78, is denied and the proceeding is dismissed.

This constitutes the decision and judgment of the Court.

Dated: New York, New York
March 19, 2009

ENTER:



Hon. Walter B. Tolub, JSC

NOTICE OF ENTRY OF JUDGMENT
This judgment has been entered by the County Clerk and notice of entry has been mailed heron. To obtain copies of this judgment, a representative must appear in person at the County Clerk's Desk (Room 2117).