

<b>Matter of 260 Partners, L.P. v New York State Div. of Hous. &amp; Community Renewal</b>
2009 NY Slip Op 31311(U)
June 15, 2009
Supreme Court, New York County
Docket Number: 101944/08
Judge: Shirley Werner Kornreich
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SCANNED ON 6/17/2009  
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **JUSTICE SHIRLEY WERNER KORNREICH**

PART 54

Index Number : 101944/2008  
**260 PARTNERS, L.P.**  
VS.  
**NYS DIV HOUSING & COMMUNITY RENEWAL**  
SEQUENCE NUMBER : # 001  
ARTICLE 78

INDEX NO. 101944-08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. #001  
MOTION CAL. NO. \_\_\_\_\_

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

PAPERS NUMBERED

1, 2  
3

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

Answering Affidavits — Exhibits \_\_\_\_\_

Repeating Affidavits \_\_\_\_\_

record 4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is denied in  
accordance with the surrogates orders  
judgment & decision.

**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 141B).

Dated: 6/15/09

[Signature]  
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: PART 54

-----X  
In the Matter of the Application of  
260 PARTNERS, L.P.

Petitioner,

Index No.: 101944/08

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

DECISION  
and ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL,

Respondent.

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141B).

-----X  
KORNREICH, SHIRLEY WERNER, J.:

Petitioner, 260 Partners, L.P. (Landlord), brings this Article 78 proceeding seeking to set aside an order issued by respondent, New York State Division of Housing and Community Renewal (DHCR), determining that an apartment was rent stabilized, not deregulated.

Respondents oppose.

*I. Background*

On May 8, 2007, Ashraf Chowdhury (Tenant), filed a complaint with DHCR of rent overcharge, contending that his rent increase was "very high for a one year renewal lease." Petition, Exh. C. At the time, Tenant occupied apartment 64 at Petitioner's building, 260 Convent Avenue, New York, N.Y. 10031. In response to Tenant's complaint, Landlord submitted documentation that the rental increases had been lawfully calculated, that Tenant had signed a two-year vacancy lease, and that the apartment as of June 1, 2003, could have been deregulated in accordance with 9 NYCRR § 2520.11(r)(4).

Landlord argued Tenant had renewed a preferential, rather than the legal, rent. Tenant asserted that the apartment was obtained at a monthly rent of \$1,600 pursuant to a lease

commencing on June 1, 2003. He argued that the legal rent was \$1,600 and that he was not given a preferential rent. On September 21, 2007, a DHCR rent administrator agreed with Landlord and issued an order denying the Tenant's application for relief.

Subsequently, Tenant filed a Petition for Administrative Review (PAR) challenging the findings of the rent administrator. Leslie Torres, a Deputy Commissioner with DHCR, determined Landlord never actually charged a legal rent over \$2,000. Therefore, DHCR revoked the order of the rent administrator and granted Tenant's PAR.

In order to determine whether the apartment was deregulated, DHCR may look back four years from the date of the filing of the complaint. 9 NYCRR § 2500.2(q). In this case, both parties agree that the base date is May 8, 2003. The base date is determinative of the legal regulated rent. 9 NYCRR § 2500.2(e).

DHCR granted Tenant's PAR, finding:

There is no evidence in the record to support the owner's claim that the subject apartment was deregulated when the tenant took occupancy. There was nothing within the four corners of the tenant's initial lease to notify the tenant that the legal rent was over \$2,000.00 per month or that the apartment was deregulated based on high-rent vacancy. The 2004 apartment registration, which is the earliest reviewable registration in this case, did not indicate that the apartment was deregulated, but rather listed the complainant as the tenant, listed the legal rent as \$1,600.00 and indicated the apartment status as rent stabilized. The 2005 registration listed the apartment as exempt due to high rent vacancy, but listed a different tenant and a different rent.

Based on the statements by the parties in this case, it is undisputed that the subject apartment was vacant on the base date of May 8, 2003. The prior tenant's lease was no longer in effect. The complainant was the first tenant to take occupancy after the base date. Pursuant to Section 2526.1(a)(3)(iii) of the Rent Stabilization Code, where a housing accommodation is vacant on the base date, the legal regulated rent shall be the rent agreed to by the owner and the first rent stabilized tenant taking occupancy after such vacancy, and reserved in a lease or rental agreement. The tenant's initial rent of \$1,600.00 is therefore the legal regulated rent for the tenant's initial lease term. Since this amount is less than \$2,000.00, the apartment is not deregulated.

Petition, Exh. A. Petitioner then filed this Article 78 Petition challenging the order granting Tenant's PAR as arbitrary, capricious and in violation of the law.

## *II. Discussion and Rulings*

In the current Article 78 proceeding, the question presented is limited to "whether a 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 or discipline imposed." CPLR § 7803(3). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Pell v. Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974). To determine if an action is arbitrary or capricious, "the proper test is whether there is a rational basis for the administrative orders." *Id.* quoting *Colton v. Berman*, 21 N.Y.2d 322, 329 (1967). Furthermore, when considering an application for relief under CPLR Article 78, "it is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency." *Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991); see *Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000).

In the present case, the court must determine whether the decision of DHCR to grant the PAR was rational and supported by the record. It is undisputed that the subject apartment was vacant on the base date, May 8, 2003, and that Tenant was the first rent regulated tenant after the vacancy. In accordance with 9 NYCRR § 2526.1(a)(3)(iii), DHCR looked to the subsequent lease agreement entered into by the owner and the first rent stabilized tenant taking occupancy after the vacancy. Thus, DHCR had a rational basis to conclude that the new legal regulated rent was \$1,600.00 in accordance with Tenant's lease.

Petitioner contends that the legal regulated rent exceeded \$2,000.00, thereby deregulating the apartment in accordance with § 2520.11(r)(4). However, a legal regulated rent is "the rent

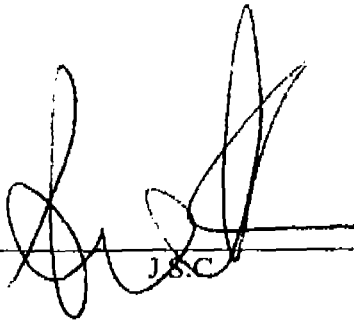
charged on the base date . . . plus any subsequent lawful increases and adjustments." 9 NYCRR § 2500.2(e). While Petitioner may have been entitled to a lawful increase upon entering into a two-year vacancy lease, an actual or legal rent exceeding \$2,000.00 was never charged.

Additionally, the agency reviewed the allegation that there was an error in the apartment registration in 2004 and determined that the apartment was properly registered as rent stabilized in the amount of \$1,600.00. Ample records, including the 2004 apartment registration, provide a rational basis to support DHCR's conclusion that the apartment remained rent stabilized. "[A] court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion." *Pell*, 34 N.Y.2d at 232. The decision of DHCR constitutes sound judgment and no evidence suggests DHCR acted arbitrarily in concluding the apartment remained rent stabilized. Accordingly, it is

ORDERED and ADJUDGED that Petitioner 260 Partners, L.P.'s application seeking an order reversing, annulling and setting aside a determination issued by respondent, New York State Division of Housing and Community Renewal is denied.

Date: June 15, 2009  
New York, New York

ENTER:



J.S.C.

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