

**Matter of Chosen Realty Corp. v New York State Div.
of Hous. & Community Renewal**

2009 NY Slip Op 31438(U)

June 29, 2009

Supreme Court, New York County

Docket Number: 103277/08

Judge: Joan A. Madden

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: **HON. JOAN A. MADDEN** _____

PART II

J.S.C. Justice _____

Index Number : 103277/2008
CHOSEN REALTY CORP.
VS.
NYS DIV. HOUSING & COMMUNITY RENEWAL
SEQUENCE NUMBER : # 001
ARTICLE 78

INDEX NO. 103277-08
MOTION DATE _____
MOTION SEQ. NO. # 001
MOTION CAL. NO. _____

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~~ *Article 78 proceeding* is determined ~~in~~ *in accordance with the annexed* decision, order and judgment.

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 141B).

Dated: June 29, 2009


HON. JOAN A. MADDEN J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 11

In the Matter of the Application of
CHOSEN REALTY CORP.,

Petitioner,

INDEX NO. 103277/08

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.

UNFILED
This judgment has not been entered and notice of entry cannot be taken until the respondent appears in person at the judgment (CPLR 141B).

Joan A. Madden, J.:

In this CPLR Article 78 proceeding, petitioner Chosen Realty Corp. (the "landlord") seeks judicial review of an order by the respondent New York State Division of Housing and Community Renewal ("DHCR"), dated January 3, 2008 (the "01/03/08 DHCR Order"). The 01/03/08 DHCR Order granted a petition for administrative review ("PAR") and determined that the amount of rent that the landlord intended to charge one of its tenants was improper. The landlord seeks a determination that the challenged proposed rent for the rent-stabilized apartment in question, located at 545 West 125 Street, Apt. 54, New York, New York 10027 (the "apartment"), was proper, or, in the alternative, to remand this matter to DHCR for further review and reconsideration of the issues raised. For the reasons that follow, the landlord's petition is denied.

BACKGROUND

On or about July 10, 2006, Placido Sanchez, the apartment's tenant (the "tenant"), filed a complaint of rent overcharge (the "overcharge complaint") with DHCR, objecting to the proposed rent of \$1,193.66, which the landlord intended to charge him upon renewal of his lease, starting October 1, 2006. The tenant asserted that the rent of \$497.43, which he was paying at the time, was the proper amount, and alleged that he had never been given annual apartment registration statements.

On December 12, 2006, a DHCR rent administrator denied the tenant's overcharge complaint based on a determination that, beginning October 1, 2006, the landlord could charge the legal regulated rent of \$1,193.66.

The tenant filed a PAR, which, on March 20, 2007, was denied (the "03/20/07 DHCR Order"). The tenant then brought an Article 78 proceeding in Supreme Court, New York County, *Sanchez v DHCR*, Index No. 402960/07, and DHCR cross-moved to remand the matter to DHCR. By an order dated July 30, 2007, the Hon. Carole Edmead granted DHCR's cross-motion and remanded the matter to DHCR "for further proceedings and a new determination."

Upon remand, DHCR issued a notice that a hearing was scheduled for December 13, 2007, "to determine whether the tenant was served with a copy of the 2003 apartment registration statement." After the hearing, the DHCR hearing officer issued a

report crediting the tenant's testimony that he had not been served with a copy of the 2003 apartment rent registration statement, and recommended that the tenant's overcharge complaint be reconsidered.

Based on the hearing officer's report, a DHCR deputy commissioner found that the tenant was not served with the 2003 apartment rent registration statement and modified the previous 03/20/07 DHCR Order. In the resulting 01/03/08 DHCR Order, the deputy commissioner held that: (1) the legal regulated rent, under the tenant's then-current renewal lease, commencing on 10/01/06 and ending 09/30/08, was \$533.49 per month; and (2) the tenant had not overpaid, so he was not entitled to an refund. DHCR also directed the landlord to file amended apartment rent registration statements from 2003 onward to reflect the legal regulated rent.

The landlord filed a request for reconsideration of the 01/03/08 DHCR Order, which DHCR denied in view of the landlord's commencement of the instant Article 78 proceeding.

DISCUSSION

"It is a long-standing, well-established standard that the judicial review of an administrative determination is limited to whether such determination was arbitrary or capricious or without a rational basis in the administrative record" (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of*

Hous. & Community Renewal, 46 AD3d 425, 428 [1st Dept 2007] *affd* 11 NY3d 859 [2008]; see also *Matter of DiPalma v Suardy*, 207 AD2d 397, 398 [2d Dept 1994] [under CPLR Article 78, "the scope of judicial review is limited to questions of law and to a determination as to whether the record reveals a rational basis for the agency's action"]).

Upon receipt of a rent overcharge complaint, DHCR sets a base date, which is four years prior to the date of the filing of the complaint, and reviews the rental history for the apartment in question within that period. Here, since the overcharge complaint was filed on July 10, 2006, DHCR set the base date at July 10, 2002.

DHCR's Alleged Failure to Consider the 2002 Annual Registration

The tenant's apartment is governed by the Rent Stabilization Law ("RSL") of 1969 (Administrative Code of City of NY § 26-501, *et seq.*) and the Rent Stabilization Code ("RSC") (9 NYCRR 2520.1, *et seq.*). RSL regulates the maximum amount of rent a landlord may charge, known as the legal regulated rent (see e.g. *Aijaz v Hillside Place, LLC*, 37 AD3d 501, 501 [2d Dept 2007]). A landlord, however, may charge a lower rent, known as preferential rent (*id.*). Pursuant to an RSL amendment in 2003, upon renewal of a lease, a landlord who previously charged a lower preferential rent may start charging a higher legal regulated rent, provided the higher rent is considered "previously

established" (see RSL § 26-511 [c] [14]; *Aijaz*, 37 AD3d at 501).

Pursuant to 9 NYCRR 2521.2, one way a legal regulated rent is considered "previously established" is if it was stated in a "renewal lease pursuant to which the preferential rent is charged" (9 NYCRR 2521.2 [b] [1]). "[B]oth the preferential rent and the legal rent must be specifically set forth in the prior leases back to the base date" (*Les Filles Quartre LLC v McNeur*, 9 Misc 3d 179, 185 [Civ Ct, NY County 2005]; see also *DHCR Fact Sheet # 40*).

The parties here are in agreement that neither the original lease, for the period from October 1, 1991 to September 1, 1993, nor the subsequent renewal leases, including the renewal lease in effect on the base date, for the period from October 1, 2000 to September 30, 2002,¹ stated both the legal and the preferential rent. Those leases stated only one rent amount, without specifying whether it was the legal or the preferential rent. Therefore, the legal rent was not "previously established" in the tenant's leases.

Alternatively, the legal rent can be considered "previously established" if it was stated "in an annual rent registration served upon the tenant in accordance with the applicable

¹ In the DHCR proceedings, the landlord denied the authenticity of its signature on that lease, claimed that it was given to the tenant for information purposes only, and that its copy of the lease was lost in an office move.

provisions of law" (9 NYCRR 2521.2 [b] [2]). The 03/20/07 DHCR Order found that the first annual rent registration statement, filed with DHCR after the base date of July 10, 2002, was the one reflecting the tenant's rent as of April 1, 2003 (the 2003 Registration Statement). The 2003 Registration Statement stated both the legal regulated rent of \$1,045.04 and the preferential rent of \$467.07, which the tenant was paying pursuant to a renewal lease for the period from October 1, 2002 to September 30, 2004. The 03/20/07 DHCR Order stated that "a copy of [the 2003 Registration Statement] was, presumably, delivered to the tenant" and, therefore, held that the legal regulated rent was "previously established" and the landlord was allowed to charge the tenant an adjusted legal regulated rent of \$1,193.66 starting October 1, 2006.

On remand from the Supreme Court, DHCR held a hearing "to determine whether the tenant was served with a copy of the 2003 apartment rent registration statement." At the hearing, the tenant testified that he had been living in the apartment since 1992 and that he had never received any annual apartment registration statements from the landlord for any year.

The landlord now argues that DHCR failed to consider the 2002 annual registration statement, which, it claims, was filed with DHCR after the base date and stated both the legal and preferential rent. The landlord failed to raise this argument

prior to the issuance of the 01/03/08 DHCR Order, and it is, therefore, beyond the scope of judicial review (see e.g. *Matter of Franco v State of N.Y. Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 251 AD2d 140, 140 [1st Dept 1998]). Accordingly, DHCR never had an opportunity to address the issue of relevancy of the 2002 annual registration (*id.*; see also *Matter of Rozmae Realty v State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 160 AD2d 343, 343 [1st Dept 1990]).

Even if DHCR had considered the 2002 registration, the determinative question would be whether the tenant was served with it, so that the legal rent reflected in the 2002 registration is considered "previously established" (9 NYCRR 2521.2 [b] [2]). Although DHCR focused on the service of the 2003 Registration Statement, the hearing also addressed the service of all other annual registrations on the tenant.

The tenant testified that he never received any annual registration forms for any year. The landlord's agent testified that since 2002, he personally had served annual registration statements on the tenants or slipped the registrations under their doors, and that he personally served the registrations on the tenant for the previous four years. While the DHCR hearing officer determined that the tenant was not served with the 2003 Registration Statement, it is implicit in that determination that the hearing officer credited the tenant's explicit testimony that

he was never served with any registration statements, including 2002. Therefore, even if DHCR had specifically addressed the 2002 annual registration, its determination would necessarily have indicated that the legal regulated rent was not "previously established," as a result of the landlord's failure to serve the 2002 registration on the tenant (see 9 NYCRR 2521.2 [b] [2]).

The landlord further argues that the tenant failed to preserve the issue of his receipt of the apartment annual registrations and that the hearing on this issue was improper. However, the tenant stated in his original overcharge complaint that the landlord had never given him an apartment registration statement. Additionally, both the determination of the rent administrator and the 03/20/07 DHCR Order addressed the issue of service of the annual rent registrations upon the tenant. Furthermore, the landlord had the burden of proof to show that the legal regulated rent was "previously established," which, in this case, involved proof of service of the annual registration statement on the tenant (9 NYCRR 2521.2 [b] [2]). Accordingly, the issue of service of the annual registration on the tenant was not beyond the scope of the administrative review (*cf. Matter of Franco*, 251 AD2d at 140).

Alleged Improper Interpreter

The landlord contends that DHCR's failure to provide a certified Spanish interpreter at the hearing and the unofficial

interpreter's failure to properly translate statements of the tenant "constitutes a material and fatal irregularity in a vital matter." DHCR argues that the landlord did not preserve this objection, as the issue was not raised prior to the issuance of the 03/20/07 DHCR Order and is beyond the scope of judicial review.

A review of the transcript of the DCHR hearing shows that the landlord's agent made statements on the record expressing his concerns about the accuracy of the translation. Thus, since the issue of inadequate translation was raised in the DHCR proceedings, it is subject to judicial review (*cf. Rozmae Realty*, 160 AD2d at 343).

The landlord argues that the alleged inadequate interpretation precluded the hearing officer from "properly adducing testimony and precluded the [landlord] from conducting a proper and complete cross-examination of the Tenant." A review of the transcript, however, does not reveal that this was the case. For example, the landlord's agent cross-examined the tenant exhaustively and received answers to all of his questions.

The landlord also argues that the allegedly inadequate translation "precluded the Hearing Officer from having the complete and correct testimony necessary to make a determination regarding the credibility of the Tenant." The transcript, however, shows that the tenant was asked basic questions about

whether he had received annual registration statements and whether he knew certain individuals associated with the landlord. The tenant was also shown a sample annual registration statement and he testified that he had never received one.

The landlord points to no evidence showing or suggesting that the interpreter distorted or inaccurately translated the tenant's answers. Additionally, the State Administrative Procedure Act obligates state administrative agencies to provide qualified interpreters only to witnesses or parties who are deaf (see State Administrative Procedure Act § 301; see e.g. *Sandoval v Martinez*, 29 AD3d 774, 775 [2d Dept 2006]).

Based on the foregoing, the court finds no irregularity in the manner in which the interpreter at the hearing carried out her responsibilities. The testimony produced at the hearing provides a rational basis for the hearing officer's determination, which the court will not disturb. "[I]t is well settled that issues of credibility are for the administrative agency to decide ..." (*Matter of Manhattan Scene, Inc. v State Liq. Auth.*, 58 AD2d 1010, 1011 [4th Dept 1977]; see also *Matter of Bullock v State of N.Y. Dept. of Social Servs.*, 248 AD2d 380, 382 [2d Dept 1998]).

Thus, since the record before the court establishes a rational basis for DHCR's determination, the landlord's petition is denied.

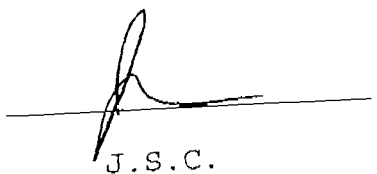
Accordingly, it hereby

ORDERED AND ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision, order and judgment of this court.

DATED: June 29, 2009

ENTER:


J.S.C.

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 1140).