

**Matter of Cherif v New York State Div. of Hous. &  
Community Renewal**

2009 NY Slip Op 31613(U)

July 16, 2009

Supreme Court, New York County

Docket Number: 402949/2008

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN  
*Justice*

PART 12

Index Number : 402949/2008  
CHERIF, SOULEYMANE DR.  
vs.  
DIV. OF HOUSING & COMMUNITY RENEWAL  
SEQUENCE NUMBER : # 001  
ARTICLE 78

INDEX NO. 402949-08  
MOTION DATE 4/29/09  
MOTION SEQ. NO. #001  
MOTION CAL. NO. 3

were read on this motion to/for Article 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1/A  
2/B  
4

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**PETITION IS DECIDED IN ACCORDANCE WITH  
THE ANNEXED DECISION, ORDER AND JUDGMENT.**

**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: 7/16/09

[Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
In the Matter of the Application of  
DR. SOULEYMANE CHERIF, a.k.a.,  
DR. BIYAYAIBE N. BAMBA,  
Petitioner,

Index No. 402949/2008  
Submission Date 4/29/2009  
Mot. Seq. No. 001  
Cal. No. 3

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

**DECISION, ORDER AND  
JUDGMENT**

- against-

NEW YORK STATE DIVISION OF  
HOUSING AND COMMUNITY RENEWAL,  
Respondent.  
-----X

**For the Petitioner:**

Dr. Souleymane Cherif, *pro se*  
64 E. 129<sup>th</sup> St., Apt. 4  
New York NY 10035

**For the Respondent:**

Gary R. Connor, Esq.  
New York State Division of Housing and Community Renewal  
By: Susan E. Kearne, Esq.  
25 Beaver Street, 7<sup>th</sup> Floor  
New York, NY 10004

Papers considered in review of this filed motion to reverse determination:

Papers  
Petition & Attachments  
Verified Answer  
Memorandum of Law of the Respondent  
Reply Affidavit  
Return of the DHCR

**UNFILED JUDGMENT**  
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  
1440)  
5

**PAUL G. FEINMAN, J.:**

Petitioner seeks pursuant to CPLR 7803 (3) to partially reverse the October 6, 2008 determination of respondent New York State Division of Housing and Community Renewal (DHCR), which held that certain of his claims concerning the status of his apartment had been previously considered, or were baseless, or should have been made the subject of earlier litigation. For the reasons which follow, the petition is denied in its entirety.

Petitioner, who is self-represented, commenced this action by filing a notice of petition and verified petition on December 5, 2008, and serving it thereafter. (PI Pet).<sup>1</sup> Petitioner brings this petition in order to obtain resolution of issues he believes he raised but which were improperly and arbitrarily unaddressed in the October 6, 2008 determination by DHCR regarding previous rent overcharge applications (Pet Ex A, DHCR Order and Opinion Granting PAR in Part, Oct. 6, 2008). Petitioner alleges that DHCR “dodged a lot of issues” that he had brought up in prior proceedings, in particular, the allegedly illegal conversion of the apartment. (Not of Pet). He seeks to partially reverse the DHCR’s decision of October 6, 2008, which refused to address his claim of illegal conversion and held that certain other issues raised by him were “baseless”. (see DHCR Order and Opinion Granting PAR in Part, Oct. 6, 2008, esp. p. 2). He also seeks treble damages derived from the April 18, 2007 order by DHCR directing the landlord to offer petitioner a lease with rent adjusted down to the legal regulated rent. (Ver Pet, p. 3).

Petitioner has a somewhat extended history with DHCR as concerns his apartment. According to the record, petitioner originally filed an overcharge complaint in June 2004, which included a claim that his apartment had been illegally converted from a single room occupancy unit to a rent stabilized apartment. In a determination issued on February 17, 2005, and affirmed by Order and Opinion on April 28, 2005, the DHCR determined that it did not have jurisdiction to address the claim of illegal conversion, and found no rent overcharge. Separately, petitioner sought another challenge to the rent charged him by his landlord. In an Order and Opinion issued on April 18, 2007, the DHCR recalculated the legal regulated rent and reduced

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<sup>1</sup>Any issue of insufficiency of service of the petition on respondent was withdrawn on the record by respondent at oral argument on April 29, 2009 (Ct. Reporter: Evelyn Mysch).

petitioner's rent for a two-year period commencing on August 1, 2005. It also awarded a one-month rent credit.

Petitioner commenced the underlying proceeding with DHCR on November 5, 2007, claiming a rent overcharge, again raising the issue of the illegal conversion and that the owner had not registered the subject apartment, and seeking treble damages against the landlord based on the previous finding of a rent overcharge. The June 26, 2008, Rent Administrator's determination denied his request in its entirety. It found no rent overcharge, that the issue of the illegal conversion had previously been addressed by the Rent Administrator's order dated February 17, 2005, which held that the agency lacked jurisdiction to address the issue, a finding which was upheld in the subsequent Petition for Administrative Review of April 2005, and that the apartment had in fact been registered for the years in question. It did not address the issue of treble damages. Petitioner then appealed this order.

His Petition for Administrative Review was granted in part by the Order and Opinion issued October 6, 2008. (See DHCR Order and Opinion Granting PAR in Part, Oct. 6, 2008). The DHCR Commissioner upheld the Rent Administrator's findings to the extent that it agreed that the issue of illegal conversion was not within the jurisdiction of the agency, and that petitioner should have sought review of the April 2005 determination within 60 days of its issuance, as provided by the Rent Stabilization Code § 2530.1. It upheld the finding that the apartment was properly registered. It declared in a footnote that there was no basis for awarding treble damages as the record did not support a finding that the owner acted "willful[ly]." (DHCR Order and Opinion Granting PAR in Part, Oct. 6, 2008, p. 3 n. 1). The DHCR Commissioner also determined that petitioner was entitled to interest on the rent credit, and awarded him \$38.41. It found that petitioner's other claims were "baseless and, standing alone

without evidentiary support, do not give rise to reversible error.” (DHCR Order and Opinion Granting PAR, Oct. 6, 2008, p. 2). Petitioner timely commenced the instant special proceeding by filing his notice of petition and petition on December 16, 2008.

It is a well-settled rule that judicial review of administrative determinations pursuant to CPLR Article 78 is limited to the grounds invoked by the agency. (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency’s determination, but shall decide if the determination can be supported on any reasonable basis. (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]). As such, the standard of review for Article 78 proceedings where the petition claims that an agency determination is arbitrary or capricious, made in violation of lawful procedure, or affected by an error of law, is “determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.” (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). An arbitrary action is without sound basis in reason and is generally taken without regard to the facts. (*Matter of Pell*, at 232). The burden is “squarely on the petitioner” to demonstrate entitlement to Article 78 relief. (see *Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, 321 [1st Dept. 2006]; *Miggins v City of N.Y.*, 286 AD2d 258 [1st Dept. 2001]).

An Article 78 proceeding against a public body may be commenced only when a matter has been finally determined (CPLR 7801[1]). CPLR 217(1) provides that an Article 78 proceeding must be commenced within four months of the date of the final determination. (*Carter v State of New York*, 95 NY2d 267, 270 [2000]). An agency determination is deemed final “when the petitioner is aggrieved by the determination.” (*Biondo v New York State Bd. of*

*Parole*, 60 NY2d 832, 834 [1983]; *Matter of Town of Olive v City of New York*, 2009 NY Slip Op 5061; \_\_\_NY2d\_\_\_ [3 Dept. 2009], citing *Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 (2007), quoting *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]).

Here, although petitioner purportedly seeks review of the October 6, 2008, agency determination, in fact he partially seeks to reopen the previous determination of April 2005 which held that the agency does not have jurisdiction over claims of illegal conversion. That 2005 determination was binding once the DHCR issued its Order and Opinion on April 28, 2005. As such, petitioner should have sought judicial review pursuant to CPLR Article 78 on or before August 25, 2005, and it is therefore far too late to do so now. (CPLR 7803).<sup>2</sup> Furthermore, the doctrine of collateral estoppel, or issue preclusion, prohibits petitioner from relitigating this issue which was decided against him in a prior agency determination (see *Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]; *Gramatan Home Investors Corp. v Lopez*, 46 NY2d 481, 485 [1979]).

As to petitioner's other allegations, his 12-page handwritten reply affidavit sets forth claims concerning the apartment, the landlord, and the agency, which are speculative and without basis. Although he claims bias against him, he successfully won a recalculation and reduction of his rent, an abatement, and interest. (Pet. Exhibit A-C). There is no basis to address his other claims.

Turning to his claim that he should be awarded treble damages based on the rent overcharge, it is the law that if the DHCR "finds that a landlord, after a reasonable opportunity to

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<sup>2</sup> As noted by the October 6, 2008, Order and Opinion, pursuant to section 2530.1 of the Rent Stabilization Code, petitioner should have sought judicial review within 60 days of this issue (DHCR Order and Opinion Granting in Part PAR, Oct. 6, 2008, p. 2).

be heard, has collected an overcharge above the rent authorized for a housing accommodation, the landlord will be liable to the tenant for a penalty equal to three times the amount of the overcharge.” (*Matter of 508 Realty Assoc., LLC v New York State Div. of Housing and Comm. Renew.* 61 AD3d 753, 754 [2d Dept. 2009]; see also Administrative Code of City of N.Y. § 26-516[a]). It is the landlord’s burden to prove that the overcharge was not deliberate or willful; failure to do so will result in the assessment of a treble-damage penalty, payable to the tenant. (*Matter of 508 Realty Associates*, at 754; see also *Matter of H.O. Realty Corp. v State of New York Div. of Hous. & Community Renewal*, 46 AD3d 103, 107 [1<sup>st</sup> Dept. 2007]; *Matter of Ellis v Division of Hous. & Community Renewal of State of N.Y.*, 45 AD3d 594, 595 [2d Dept. 2007]; *Matter of DeSilva v New York State Div. of Hous. & Community Renewal Off. of Rent Admin.*, 34 AD3d 673, 674 [2d Dept. 2006]).

Here, as noted above, the DHCR’s Order and Opinion of October 6, 2008 concludes in a footnote that the “underlying record does not support a finding of ‘willfulness’ on the part of the owner.” The record reflects that the legal regulated rent was initially set on July 28, 2006, at \$1,021.25 for the period of August 1, 2005 - July 31, 2007, and amended on April 27, 2007, to \$1,011.75, after which the tenant was credited the overcharge difference as reflected in his reduced June 2007 rent payment. (DHCR Order and Opinion Granting in Part PAR, Oct. 6, 2008, p. 2). As stated by the agency, the miscalculation arose because the owner applied the wrong percentage increase of 7.5 percent to the base rent, rather than 6.5 percent. (DHCR Order and Opinion Granting in Part PAR, Oct. 6, 2008, p. 2). There is no irrationality or arbitrariness on the part of the agency to find that this error was computational in nature, rather than willful, and to deny petitioner’s claim for treble damages.

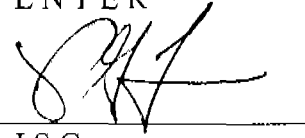
The court's role is limited in Article 78 proceedings to determining whether there is any reasonable basis to support the DHCR's determination and action. Here, the record does not support a finding that the DHCR's actions were either arbitrary or capricious, or in error of law. Further, as issue preclusion, as well as the statute of limitations, have estopped petitioner's grievances, the petition must be denied. Accordingly it is,

ADJUDGED and ORDERED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that respondent's counsel is further directed to contact the Part 12 Clerk, Michael Kasper, to make arrangements to pick up the Record.

The foregoing shall constitute the decision, order and judgment of this court.

ENTER



J.S.C.

Dated: 7/16/09  
New York, New York

**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).