

**Matter of Harlem 539-162 Assoc., LLC v New York  
State Div. of Hous. & Community Renewal**

2009 NY Slip Op 31692(U)

July 28, 2009

Supreme Court, New York County

Docket Number: 116683/08

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER, JSC Justice

PART 8

Index Number : 116683/2008  
HARLEM 539-162 ASSOCIATES LLC  
vs  
N.Y.S.D.H.C.R.  
Sequence Number : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ this motion to/for \_\_\_\_\_

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

PAPERS NUMBERED
_____
_____
_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion <sup>petition</sup>  
*dismissed per attached*  
*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: 7/28/09

*MARILYN SHAFER*  
J.S.C. 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: PART 8

-----X

In the Matter of the Application of  
HARLEM 539-162 ASSOCIATES, LLC,

Petitioner,

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

Index No. 116683/08

-against-

NEW YORK STATE DIVISION OF HOUSING AND  
COMMUNITY RENEWAL,

**UNFILED JUDGMENT**  
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141B).  
Respondent

-----X

Marilyn Shafer, J.:

Petitioner Harlem 539-162 Associates brings this proceeding to vacate a determination by respondent New York State Division of Housing and Community Renewal (DHCR) granting a tenant in the premises known as West 162 Street, New York, New York (premises) treble damages on a claim seeking a rent reduction. Petitioner is the owner of the premises.

Ylda Olivera (tenant) brought a rent overcharge proceeding before the DHCR, under the Rent Stabilization Code, based on petitioner's alleged failure to abide by earlier rent abatement orders. The Rent Administrator determined that there had been a rent overcharge, but did not impose treble damages as potentially available under section 2526.1 (a) (1) of the Rent Stabilization Code.

The tenant's original complaint was forwarded to petitioner by DHCR on October 23, 2007. Petitioner was given 30 days to respond. Petitioner requested an extension until December 20, 2007 to answer the petition.

Petitioner apparently did not answer, and DHCR sent a "Final Notice to Owner-Imposition of Treble Damages" to petitioner on March 21, 2008, informing petitioner that there had been an adjudication of a rent overcharge, and that petitioner would be granted the opportunity to prove that the tenant was not overcharged, or that the overcharge was not willful. DHCR informed petitioner that treble damages would be imposed, amounting to \$6,588.45.

Shortly thereafter, petitioner informed DHCR that it had reduced the tenant's rent, had given the tenant a rent credit of \$5,990.09, and that, after having receiving the treble damages notice, was preparing a check for \$2,459.00 which would take care of the overcharge, plus interest. Petitioner asserted that, under DHCR Policy Statement 89-2, this arrangement resolved all of the issues between petitioner and the tenant. From these circumstances, the Rent Administrator imposed interest on the overcharge, but not treble damages. Tenant then served a petition for administrative review of the determination upon the Rent Commissioner, seeking, among other things, to obtain an award of treble damages.

DHCR's Policy Statement 89-2 concerns the imposition of treble damages upon a landlord for failure to show by a preponderance of the evidence that a rent overcharge was not made in bad faith. The Policy Statement has an exception where "an owner adjusts the rent on his or her own within the time afforded to interpose an answer to the proceeding and submits proof to the DHCR that he or she has tendered, in good faith, to the tenant a full refund of all excess rent collected, plus interest."

Verified Answer, Ex. B.

DHCR contends that petitioner only offered to pay the rent overcharge after it received DHCR's notice that petitioner would be required to pay treble damages, and that petitioner did not act to do so within its time to answer, as required under Policy Statement 89-2.

DHCR also maintains that the fact that petitioner gave the tenant a rent credit during petitioner's time to answer (if the extensions are considered) is unavailing to any argument on petitioner's part that it acted with good faith. DHCR notes that all that the rent credit did was create a "negative balance" in the tenant's favor (Affirmation in Opposition, at 6), while petitioner continued to accept money orders from the tenant in excess of the legal rent.

Petitioner, in return, offers an opinion letter it received from DHCR, dated April 18, 2008, in which the agency stated that

both "[r]efund by check of a total overcharge, plus statutory interest" and "[r]efund by rent credit (plus interest) if the tenant has arrears and the rent credit does not exceed the arrears" are both acceptable "during the pendency of a rent overcharge complaint." Notice of Petition, Ex. E. The opinion letter goes on to say that a "[r]efund by rent credit (plus interest) if the credit is not so excessive that the tenant must stay in his or her apartment for years to use up the credit" is an unacceptable method of refunding rent to a tenant, but "most likely will not expose an owner to a treble damage penalty." *Id.* Petitioner posits that the opinion letter has at least the same force as Policy 89-2, and allows petitioner to approach the problem of the rent overcharge in the manner in which he did, establishing his good faith in the matter.

"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 & Building Management Co. v State of New York Division of Housing and Community Renewal*, 46 AD3d 425, 428 (1st Dept 2007), *affd* 11 NY2d 859 (2008); see also *Matter of Cintron v Calogero*, 59 AD3d 345 (1st Dept 2009). "[O]nce it has been determined that an agency's conclusion has a 'sound basis in reason,' the judicial function is at an end ... ." *Paramount*

*Communications v Gibraltar Casualty Company*, 90 NY2d 507, 514 (1997), quoting *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974).

In reviewing the present matter, the court is also reminded that "the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld [internal quotation marks and citation omitted]." *Matter of New York State Association of Life Underwriters v New York State Banking Department*, 83 NY2d 353, 359-360 (1994); see also *Matter of Brooklyn Assembly Halls of Jehovah's Witnesses, Inc. v Department of Environmental Protection of the City of New York*, 11 NY3d 327, 334 (2008). Therefore, in this matter, this court must defer to any reasonable interpretation given to DHCR's regulations or rules by the agency itself.

Rent Stabilization Law § 2526.1 (a) (1) requires that a landlord prove by a preponderance of the evidence that a rent overcharge was not willful (*Matter of Argo Corporation v New York State Division of Housing and Community Renewal*, 191 AD2d 341 [1st Dept 1993]), nor "attributable to [the owner's] negligence [internal quotation marks and citation omitted]." *Matter of Sterling Apartments v Division of Housing and Community Renewal*, 269 AD2d 266, 267 (1st Dept 2000). "Absent such proof, the

landlord will be assessed a treble-damage penalty, payable to the tenant." *Matter of 508 Realty Associates, LLC v New York State Division of Housing and Community Renewal*, 61 AD3d 753, 754 (2d Dept 2009).

There is no question that petitioner did not proffer a rent refund to the tenant within the time prescribed in Policy Statement 89-2 (before the time to answer expired). However, as petitioner points out, courts have found that "[a] finding of willfulness, or, more precisely, a finding that the preponderance of the evidence does not show non-willfulness, and liability for treble damages, should not depend on the mechanical application of formulas designed to give the tenant every benefit of the doubt ... ." *Matter of Round Hill Management Company v Higgins*, 177 AD2d 256, 258 (1st Dept 1991). However, in *Round Hill*, the Court went on to say that the matter of wilfulness "should depend on a finding as to whether the owner had reason to know that the amount it was charging was in excess of the lawful rent." *Id.*

Petitioner relies on *Round Hill*, and several DHCR administrative decisions (see Reply Aff., Exs. E, F) to convince the court that Policy Statement 89-2 should not be applied rigidly, in that it reflects "parochial past policies" within the DHCR, and that "the Courts have supported a more generous standard regarding proof of non-wilfulness" in more recent instances, such as *Round Hill*, and *Matter of Sendowski v New York*

State Division of Housing and Community Renewal (227 AD2d 55 [1st Dept 1996])). Reply Aff., ¶¶ 3, 6.

The administrative orders provided by petitioner do indicate the agency's willingness to avoid a rigid application of Policy Statement 89-2 under certain circumstances. See Reply Aff., Ex. E (owner proved that its failure to provide rent refund within period imposed by Policy Statement 89-2 was not willful by showing that an attempt to refund the rent to tenant within three months of receipt of petition was rebuffed by tenant. Agency found three-month delay not unreasonable). However, these cases are distinguishable. In the matter herein, petitioner was informed of the rent overcharge when it received the tenant's petition, but failed to refund the overcharge until goaded by the agency's "Final Notice to Owner-Imposition of Treble Damages." Petitioner has not shown that it acted with dispatch to amend the situation, and this court finds that the application of Policy Statement 89-2 to the present matter was not unreasonable.

Petitioner argues that the opinion letter it received from DHCR on how to proceed should weigh as heavily in the agency's determination as Policy Statement 89-2. However, as previously discussed, the interpretation of DHCR's policies should be left to the agency, and DHCR's reliance on Policy Statement 89-2 over the generalities of the opinion letter is not irrational. This finding is all the more credible considering the concluding

language of the opinion letter, which states that "[p]lease be further advised that this opinion letter is not a substitute for a formal agency order issued upon prior notice to all parties and with all parties having been afforded an opportunity to be heard." Notice of Petition, Ex. E. Further, petitioner did not obtain the opinion letter until after his untimely attempt to refund the tenant's rent. He cannot claim that he relied on the letter in any way.

As a result of the foregoing, this court finds that DHCR's imposition of treble damages was not unreasonable, and should be allowed to stand.

Accordingly, it is

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

Dated: 7/28/09

ENTER:

~~MARILYN SHAFER~~  
J.S.C.  
J.S.C.

**UNFILED JUDGMENT**

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