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

PRESENT: Goodman Justice

PART 17

KWIK RLTY LLC

- v -

NYS DHCR AND STEPHEN C. WISHNER

INDEX NO. 115320/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for Art 78

	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~~ petition is decided per attached

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: 11/6/09

EMILY JANE GOODMAN J.S.C.

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

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 17

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In the Matter of the Application of
KWIK REALTY LLC,

Petitioner,

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

-against-

Index No.: 115320/08

NEW YORK STATE DIVISION OF HOUSING &
COMMUNITY RENEWAL,

Respondent,

-and-

STEPHAN C. WISHART,

Respondent.

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EMILY JANE GOODMAN, J.S.C.:

Petitioner, Kwik Realty LLC (Kwik), a landlord, moves, pursuant to CPLR Article 78 to annul, reverse and set aside the September 19, 2008 administrative order (the Order) of Deputy Commissioner Leslie Torres (the DC) of respondent the New York State Division of Housing and Community Renewal (DHCR) determining (1) that an apartment occupied by respondent Wishart (the Apartment) was not high-rent deregulated; (2) that the legal regulated rent for the Apartment was $1,198.80 per month on June 26, 2003, and (3) that petitioner was liable to Wishart (the Tenant) for $16,482.81 for rent overcharges and penalties. DHCR opposes the

petition, and requests that the court render a judgment dismissing the petition in its entirety.[1]

Background

In the underlying proceeding at the DHCR, the DC confirmed a DHCR rent administrator's (RA) determination that Kwik had, pursuant to Rent Stabilization Code (RSC) § 2526.1,[2] overcharged the Tenant. It is undisputed that the Tenant moved into the Apartment in April 2001, pursuant to a one-year lease and was then charged the rent specified in the lease of $1,095 monthly. It is also undisputed that, commencing in the year 2003, the rent that Kwik charged to the Tenant was in excess of New York City Rent Guidelines Board increase allowance (Guidelines Increases) for rent-stabilized apartments.

After the RA found that Kwik had improperly overcharged the Tenant, and awarded overcharge and treble damages to him, Kwik and the Tenant each filed a petition for administrative appeal (PAR) with the DHCR. In its PAR, Kwik appealed the RA's overcharge finding and decision to award treble damages. The Tenant appealed only the RA's calculation of treble damages.

In the Order, the DC granted the Tenant's petition and denied Kwik's petition. The DC found that Kwik's argument that the Apartment was vacancy high-rent deregulated pursuant to RSC § 2520.11 lacked merit because it relied on pre-base date rental events. The base date to which the DC refers is "the date four years prior to the date of the filing of [the] complaint" (RSC § 2520.6 [f] [1]), in this case June 26, 2003. The Order states that the lease for the Apartment, on the June 26, 2003 base date, listed the rent as $1,198.90 per month, without

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[1]The court notes that while the Tenant is a respondent, he did not move for relief here.

[2]The RSC is codified as 9 NYCRR 2520.1, *et seq.*

indication that this amount was a preferential rent.[3] The Order further provides that the RA correctly determined that the Apartment was not exempt from rent stabilization because the base date rent, and the subsequent legal regulated rents calculated for the period thereafter, were less than the $2,000 per month rent required for vacancy high-rent deregulation pursuant to RSC § 2520.11 (r). The DC also opined that to make a determination of the rent based on calculated guidelines and lawful adjustments would require examination of the rent history prior to the base date in violation of RSC § 2526.1. Specifically, the DC stated that RSC § 2526.1 does not permit review of the rental history of a housing accommodation, or apartment,[4] prior to the base date where the issue to be determined is whether the housing accommodation was deregulated due to vacancy high-rent deregulation.[5] The DC also found that although the legal regulated rent in the instant case was subject to lawful yearly Guidelines Increases, the RA's decision to freeze the collectible rent at the $1,198.80 level was warranted because the RSC does not permit an owner to collect Guidelines Increases if registration is not current and Kwik had failed to register the Apartment. The DC advised Kwik that the rent freeze would be lifted upon the filing of all missing registrations.

Regarding treble damages, the DC also found that Kwik did not establish by a preponderance of the evidence that the overcharge was not willful, as is required to overcome

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[3]Pursuant to the RSC, a preferential rent is a rent which an owner agrees to charge that is lower than the legal regulated rent that the owner could lawfully collect for the rent-stabilized apartment (*see* 9 NYCRR 2521.2).

[4]The court will use the term "housing accommodation" and the word "apartment" interchangeably.

[5]This conclusion is apparently based on §RSC 2526.1 (2) (ii) which provides "the rental history of the housing accommodation prior to the four-year period preceding the filing of the complaint...shall not be examined...**Except in the case of decontrol pursuant to section 2520.11 (r) or (s) of this Title, nothing herein shall limit a determination as to whether a housing accommodation is subject to the RSL and the Code**."

the RSC § 2526.1 (a) (1) presumption of willful overcharge. Although Kwik argued that did not act willfully because it believed that the Apartment was deregulated, and had filed an amended rent registration setting forth that the Apartment was permanently exempt, the DC found Kwik's purported belief, and amended filing only after the tenant's complaint was filed, unpersuasive to demonstrate lack of willfulness. The DC's finding appears predicated on a 2000 rent registration filing listing the Apartment as rent stabilized with a tenant named "Flores" paying a rent of $698.79 and another rent registration filing for 2001 which lists the Tenant as paying a stabilized rent of $1,095.

The Petition and Opposition

In its petition, Kwik avers that the Apartment was not subject to the Rent Stabilization Law of 1969 (Administrative Code of City of NY § 26-501, *et seq.*) (RSL) or the RSC. Kwik further avers that at the time it purchased the subject building in 2000, the Apartment was temporarily exempt, as it was occupied by the prior owner's building superintendent, Mr. Flores, for more than four years. Kwik states that when Kwik bought the building in 2000, Mr. Flores was terminated from his position, but then entered into a lease for the Apartment which permitted him to pay $900 per month in rent, but also indicated that the first rent was lawfully set at $2,000 per month, and that the Apartment was "exempt" and deregulated (the Flores Lease). Kwik notes that the Tenant indicated in his June 26, 2007 complaint to the DHCR that he had commenced occupancy of the Apartment on April 1, 2001, but did not file the overcharge complaint challenging the rent until 2007. Kwik contends that because the $2,000 rent set in the Flores Lease remained unchallenged for over four years, pursuant to the Rent Regulation Reform Act of 1997 (RRRA 97), the $2,000 rent set therein became the legal regulated rent, and is not now subject to challenge as it was not challenged within the four-year time period permitted

under RRRA 97. Kwik maintains that because the Flores Lease rent was set at $2,000, the Apartment was vacancy high-rent deregulated, regardless of what was actually paid in rent.

Kwik contends that RSL § 26-504.2 and RSC § 2520.11 (r) (4) provide that an apartment is deregulated once the legal regulated rent is $2,000 or more per month, regardless of what rent an owner charges a tenant thereafter, and that once an Apartment is deregulated, an owner may set a negotiated rent without either DHCR restrictions or the apartment again becoming subject to rent stabilization, as there is no jurisdictional basis upon which to re-regulate such an apartment. Kwik argues that the DC erred in holding that the Apartment remained subject to rent stabilization because Kwik did not preserve a preferential rent on the base date because the very concept of a preferential rent, a part of rent-stabilization regulation, does not apply when an apartment is exempt from RSL.

Ironically, after maintaining that because the $2,000 rent set in the Flores Lease remained unchallenged for over four years, the rent can no longer be challenged, Kwik maintains that the DC erred by refusing to review the events prior to the base date, including the Flores Lease, because the DHCR is permitted to go beyond the four-year rule set forth in RSC § 2526.1 to determine whether an apartment is subject to rent regulation.[6]

Kwik also takes exception to the DC's assertion that Kwik's 2007 amendment of the Apartment rent registration for the years 2000-2001 is probative as to the issue of whether the Apartment is rent regulated. Kwik states that it had previously advised the DHCR that it had

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[6]To illustrate its point, Kwik discusses a hypothetical situation involving an apartment that has been deregulated for 10 years, at a rent of $5,000 per month, where, in an economic downturn, the owner reduces the rent to $1,950 per month. Kwik maintains that in such a situation, if the tenant filed an overcharge complaint five years after the owner's voluntary rent reduction to $1,950, a refusal to review rent history prior to the four-year base date would result in the unregulated housing accommodation becoming subject to rent stabilization.

improperly registered the Apartment and claims that the registration filings, registering the Apartment at $698.79 in 2000 and $1,095 in 2001 were in error, with the error discovered upon the Tenant's filing of the overcharge complaint and remedied by amendment. Kwik also argues that status is not created by inaccurate annual registrations, and cites to RSL § 26-517 which, it contends, permits a landlord to amend registrations without adverse consequences.

As to the DC's finding of willfulness for the purposes of treble damages, Kwik argues that it proved by a preponderance of the evidence that it the overcharges were not willful because it established that it rationally believed the premises to be deregulated based on the $2,000 rent in effect, and unchallenged, since the year 2000. Kwik claims that the DHCR requested additional information and evidence about whether the Apartment's rent had been increased by Major Capital Improvement Orders granted, respectively, in August 2003 and August 2005. Kwik asserts that it responded to the DHCR that the rent had not been increased because the Apartment was deregulated. Kwik argues that its internal printouts, which were part of the record before the DC, also demonstrate that Kwik viewed the Apartment as exempt. Kwik argues that the scales tipped in its favor, and that the DHCR should have reviewed the Flores Lease to determine whether Kwik's belief that the Apartment was deregulated was rational, and accepted Kwik's rationale for viewing the premises as deregulated.

In opposition, the DHCR, through counsel, argues that RSC § 2526.1 (2) (ii) prohibits examination of rental history of the Apartment prior to the four-year period preceding the filing of the complaint, and that to determine the legal regulated rent pursuant to that section, the DHCR may only review the rental history from the June 26, 2003 base date forward. The DHCR contends that examination of any rent registration filed prior to the base date is prohibited,

regardless of whether the rent registration was filed before or after the base date.[7] DHCR's counsel cites no cases in support of its position.

Counsel argues that, as of the base date of June 26, 2003, the owner must establish that the legal regulated rent is over $2,000 per month, and that Kwik failed to do so because on the June 26, 2003 base date, the monthly rent was $1,198.80. While the lease in which that rent rate is stated contains the hand-written notation "exempt," DHCR states that the lease fails to indicate the basis of the exempt status, or to establish that the legal regulated rent was $2,000 per month or more. DHCR's counsel notes that the leases Kwik submitted for the three-year period from April 1, 2004 through March 31, 2007 similarly contain monthly rents below $2,000 per month, and while marked "exempt," do not state the basis for an exemption, or a notation that the legal rent was $2,000.00 per month or over. Counsel further notes that Kwik's own rent ledgers for the period from June 29, 2003 through April 8, 2004 fail to substantiate Kwik's claim that the tenant was charged a preferential rent reduced from $2,000, but show only a preferential rent of $1,198.80 reduced from $1,223.28.

Discussion

On an Article 78, petition the role of the court is to consider whether the "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]). On judicial review of an agency action under CPLR Article 78, the courts must uphold the agency's exercise of discretion unless it has

[7]The court notes that it appears that prior to the DHCR proceeding, Kwik, the former owner, or both, only filed rent registrations for the Apartment for three years, 1985, 2000 and 2001. In 1985, the rent is not listed, but the registration printout submitted indicates that the Apartment was subject to rent stabilization prior to Mr. Flores's occupancy.

no rational basis or the action is arbitrary and capricious (*Matter of Pell v Board of Educ. Union Free School District No 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231[1974]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*id.*, at 231 [1974]). Where the agency's interpretation is founded on a rational basis, its interpretation should be affirmed, regardless of whether the court's conclusion might have been different (*see Matter of Mid-State Mgt. Corp. v New York City Conciliation & Appeals Bd.*, 112 AD2d 72 [1st Dept], *affd* 66 NY2d 1032 [1985]). In that respect, however, it is well settled that judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ., Community School Dist. No. 22 of City of N.Y.*, 75 NY2d 997 [1990]).

As recently noted by the First Department:

> "The high-rent or luxury decontrol provisions of the RRRA, as amended in 1997, now exclude housing accommodations from the scope of the RSL when either: the legal regulated rent is $2,000 or more and the combined household income exceeds $175,000 for two consecutive years (RSL § 26-504.1) or the tenant vacates the apartment and the legal rent, plus vacancy increase allowances and increases permitted for landlord improvements, is $2,000 or more (RSL §§ 26-504.2, 26-511 [c] [5-a])"

(*Roberts v Tishman Speyer Props., L.P.*, 62 AD3d 71, 78 [1st Dept 2009]; RSC § 2520.11 [r] [4]). Thus, where the legal regulated rent for an apartment upon vacancy reaches the $2,000 per-month threshold, the apartment is no longer subject to the RSL. In addition, under certain circumstances, an apartment may also qualify for exemption from the RSL, pursuant to RSC § 2520.11 (r) (9), if the apartment has an established legal regulated rent of $2,000, but an owner agrees to a lower, preferential rent.

If an apartment is exempted from the RSL, then the provisions of that law and the RSC do not apply to the apartment. In that instance, it follows that there can be no overcharge under

the RSL or RSC. Moreover, the concept of a preferential rent does not apply to a deregulated apartment. The rent is then a free market unregulated, negotiated rent.

Under the RRRA 1997, tenants are precluded from challenging rent registration statements with the DHCR filed four years prior to the most recent registration statement on overcharge complaints. The RRRA 1997 also precludes examination of the rental history of an apartment prior to the four-year period preceding the filing of a complaint pursuant to the overcharge provision subdivision (*see Zafra v Pilkes*, 245 AD2d 218 [1st Dept 1997]). Thus, a tenant can only collect rent overcharges for the four years prior to filing the complaint, or, alternatively stated, from the base date forward. Furthermore, the Appellate Division Second Department has held that even if a landlord never filed a registration, a tenant may only look back four years for records to support a rent overcharge complaint (*Myers v Frankel*, 179 Misc 2d 225 [Civ Ct, Kings County 1999], *affd* 292 AD2d 575 [2d Dept 2002]; *Anderson v Lynch*, 292 AD2d 603 [2d Dept 2002]).

Nevertheless, there are instances where "DHCR's consideration of events beyond the four-year period is permissible...if done not for *the purpose of calculating an overcharge but rather to determine whether an apartment is regulated*" (*East W. Renovating Co. v New York State Div. of Hous. & Community Renewal*, 16 AD3d 166, 167 [1st Dept 2005] [emphasis supplied]; *see Tribeca M. Corp. v Haller*, 2003 NY Slip Op 51271[U], *3 [Civ Ct, NY County 2003], *affd* 11 Misc 3d 133[A], 2006 NY Slip Op 50444[U] [App Term, 1st Dept 2006] [landlord's reliance on the four-year overcharge statute was misplaced where the proposed claim was based on high rent vacancy deregulation]).[8] Here, Kwik does not assert a rent overcharge

[8]Moreover, where there is fraud or an unlawful event, the lease is rendered void and that "a default formula should be used to determine the base rent in an overcharge case where . . . no valid rent registration statement was on file as of the base date" (*Matter of Grimm v New York*

complaint, but interposes the defense that the apartment was previously deregulated. This necessarily involves a determination as to whether the apartment is subject to rent regulation, and therefore the four-year limitations period does not apply. Further, the Appellate Term, First Department, has found a landlord's reliance on the four-year limitations period is misplaced where the proposed claim is based on high rent vacancy deregulation (*see Tribeca M. Corp.*, 2006 NY Slip Op 51271[U]).

Moreover, the interpretation of RSC § 2526.1 for which the DHCR advocates, that is, that the provision precludes review of rental history preceding the base date where an *owner* claims deregulation, could subject to the RSL apartments deregulated by statute years ago. It is clear, however, that rent regulation cannot be created, modified or terminated by agreement, and exists only by application of law (*Oxford Towers Co., LLC v Wagner*, 58 AD3d 422 [1st Dept 2009]; *Drucker v Mauro*, 30 AD3d 37, 38-40 [1st Dept 2006]; *Gregory v Colonial DPC Corp., III*, 234 AD2d 419 [2d Dept 1996]). Rent regulation cannot be created where it does not exist (*Ruiz v Chwatt Assoc.*, 247 AD2d 308 [1st Dept 1998] [the fact that the landlord mistakenly registered the apartment as stabilized and over the years often asked for rent increases that conformed to stabilization guidelines could not be used by the tenant to claim rent stabilization protections, because it is a matter of statutory right and cannot be created by waiver or estoppel]). The DHCR does not explain how the RSC § 2526.1 overcharge provision was intended to provide for such a result, nor even whether the statute itself applies if the apartment was properly deregulated. Its counsel cites no cases in support of this position. In light of the

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State Div. of Hous. & Community Renewal Office of Rent Admin., __AD2d__, __, 2009 WL 3030206 [1st Dept 2009] [DHCR acted arbitrarily and capriciously in failing to consider whether rent charged to tenant was unlawful]).

above, this Court finds that DHCR's refusal to look at records prior to the base date is arbitrary and capricious and in error of law.

Accordingly, the agency decision is vacated and the matter is remanded for consideration of all the evidence, without limitation to the base date of June 26, 2003, and for the issuance of a new determination. While DHCR's counsel may be correct that Kwik could not simply peg a rent of $2,000 in the Flores Lease as the legal regulated rent, and that the Flores Lease was not convincing as evidence to demonstrate that the legal regulated rent ever reached $2,000 (including because Flores failed to put his initials certain hand-written markings on the Flores Lease, while initialing others), coupled with the landlord's failure to make timely and proper registration filings, the DHCR did not decide the matter on those grounds. Thus, although the Court might have denied the Petition had the agency considered all the relevant evidence, but still concluded that Kwik failed to demonstrate that the apartment was deregulated, and therefore, that a willful overcharge resulted, the agency erroneously determined that it was precluded from examining any evidence prior to the base date.

Accordingly, it is

ORDERED and ADJUDGED that the decision of the Deputy Commissioner is arbitrary and capricious and in error of law to the extent that it failed to consider any evidence prior to the base date of June 26, 2003; and it is further

ORDERED and ADJUDGED that the petition is granted to the extent that the decision of the Deputy Commissioner is vacated and annulled, and the matter is remanded to respondent the New York State Division of Housing and Community Renewal for issuance of a new determination which also considers the threshold issue of whether the Apartment is deregulated

pursuant to high-rent vacancy deregulation, or is still subject to Rent Stabilization; and it is further

ORDERED and ADJUDGED that such consideration shall include review of pre-base date evidence.

This constitutes the Decision, Order and Judgment of the Court.

Dated: November 6, 2009

ENTER:

J.S.C.
EMILY JANE GOODMAN

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).