

**Matter of 415 E. 71st St. LLC v State of N.Y.  
Div. of Hous. & Community Renewal**

2009 NY Slip Op 32781(U)

November 20, 2009

Supreme Court, New York County

Docket Number: 110325/09

Judge: Joan B. Lobis

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

PRESENT Joan B. Lohis

PART 6

Index Number : 110325/2009

415 EAST 71ST STREET LLC

VS.

DIV. OF HOUSING & COMMUNITY RENEWAL

SEQUENCE NUMBER : # 001

ARTICLE 78

Justice

INDEX NO. 110325-09

MOTION DATE 10/3/09

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

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

PAPERS NUMBERED

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

Answering Affidavits -- Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

1-4

5-9; Return Admin. Rec.: 10

Cross-Motion: Yes  No

Upon the foregoing papers, it is ordered that this motion **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).**

PETITION

**MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER, & JUDGMENT.**

Dated: 11/20/09 \_\_\_\_\_ JBL \_\_\_\_\_

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  
NEW YORK COUNTY: IAS PART 6**

-----X  
In the Matter of the Application of  
415 EAST 71ST STREET LLC, C/O NEAL HIDALGO,

Petitioner,

Index No. 110325/09

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

**Decision, Order and Judgment**

- against -

STATE OF NEW YORK DIVISION OF  
HOUSING AND COMMUNITY RENEWAL  
OFFICE OF RENT ADMINISTRATION

**UNFILED JUDGMENT**  
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appear in person at the Judgment Clerk's Desk (Room  
141B)  
Respondent.

-----X  
**JOAN B. LOBIS, J.S.C.:**

Petitioner 415 East 71st Street LLC, c/o Neal Hidalgo ("415 East"), brings this petition, pursuant to Article 78 of the C.P.L.R., seeking to overturn the opinion and order of respondent, the State of New York Division of Housing and Community Renewal ("DHCR" or the "Division"), denying 415 East's petition for administrative review ("PAR"). The denial of the PAR upholds the Division's determination of a rent overcharge and the imposition of treble damages.

This matter originated with DHCR's receipt of an overcharge complaint (the "Complaint") from Carlee Gustin, the tenant in Apartment C (the "Apartment"), dated April 12, 2008. The Complaint set forth that Ms. Gustin moved into the Apartment on August 23, 2007, and was given a written lease for a one or two year term, expiring on either August 31, 2008 or 2009. Her rent was \$1,275 per month. Ms Gustin asserted in the Complaint that no renovations were done to the Apartment, and that the Apartment had a broken oven, refrigerator, leaky sink and showers, cracked walls, chipped paint, and numerous other defects. According to Ms. Gustin, in 2002, the

rent was \$494.06 per month, and given the condition of the Apartment, it would not be possible for the rent to increase to \$1,275.

On or about May 1, 2008, DHCR transmitted notice of the Complaint to the landlord, 415 East. On November 21, 2008, DHCR mailed a request for additional information to 415 East. Among other items, DHCR requested proof of repairs to the Apartment; proof of registration with DHCR for the years in question; and, copies of complete leases and/or rent ledgers from the base date, April 23, 2004, to the present, to substantiate the rent charged. The Division gave 415 East twenty-one (21) days from the date of mailing to submit the information and evidence requested.

415 East did not submit any response to the Complaint. The Division's review of the rental history for the building owned by 415 East reflected that 415 East failed to file timely building or apartment registrations for the years 2003 through 2007, inclusive. The registration information on file with DHCR showed that for the lease period from March 1, 2002 through February 28, 2003, the Apartment was rented to Ita Lyons, who had lived there since 1984, and was charged \$494.06 per month in rent. There was no information until 2007, when the information reflected that a tenant named Jessica Wittwer had a lease from July 20, 2006 through July 31, 2007, at a monthly rent of \$1,100 per month. Under "apartment services" is listed a stove and refrigerator. The rent registrations were not filed until August 2008.

On December 22, 2008, DHCR mailed a document entitled "Final Notice to Owner-Imposition of Treble Damages on Overcharge" (the "Final Overcharge Notice"). The Final

Overcharge Notice set forth that based on the evidence in the record, the Rent Administrator proposed to find that there had been an overcharge, and that the owner would be directed to pay to the tenant a penalty equal to three times the amount of the overcharge (treble damages), retroactive to no more than two years' prior to the filing of the Complaint, unless the owner established by a preponderance of the evidence that the overcharge was not willful. The Final Overcharge Notice explicitly set forth that 415 East would have "a final opportunity to submit complete copies of the leases (including riders) and/or rent ledgers from the base date to present and proof that the subject apartment was registered for the year 2008." Any reply to the Final Overcharge Notice was to be made within 21 days.

On February 25, 2009, DHCR issued an "Order Finding Rent Overcharge," finding that 415 East was responsible for treble damages on the overcharge, beginning two years before the filing of the Complaint, because 415 East failed to establish that the overcharge was not willful. DHCR directed 415 East to roll back the rent to the legal regulated rent, to recompute the current rent, and to fully refund or credit the tenant with any rent paid in excess of the legal regulated rent and any security in excess of such rent. The Division established the tenant's rent at \$553.25 per month, finding an overcharge of \$5,983.51, and imposed treble damages starting two years before the Complaint. 415 East was found to be liable for a total amount of \$17,590.53. The Division advised 415 East that it had thirty-five (35) days to file a Petition for Administrative Review ("PAR"); a PAR was filed on or about April 3, 2009.

In the PAR, 415 East argued that the Apartment was registered correctly, and there should be no overcharge, let alone a willful overcharge. The owner included the registration rent roll

for the years 2003 through 2007. The owner asserted that the registered rent was \$1,100 in 2007, and that the tenant could have been charged \$1,320, but was charged only \$1,275. Finally, the owner further argued that Ms. Gustin moved out, but did not mail the key to 415 East until October 6, 2008, and the owner lost four months' rental income.

In an Order and Opinion dated May 21, 2009 (the "Order"), the Deputy Commissioner of DHCR denied 415 East's PAR. The Deputy Commissioner noted that the PAR failed to challenge anything in the Rent Administrator's determination. Rather, the PAR set forth "an irrelevant assertion regarding registrations; the basis of a separate legal claim against the tenant for late return of keys; and an assertion that comes too late as to the legality of the rent she paid." The Order states that because 415 East failed to provide proof of the base rent, the initial rent was computed using the default procedure, which resulted in a legal regulated rent of \$553.25. Treble damages were assessed because 415 East failed to establish that the overcharge was not willful. This petition, to challenge the denial of the PAR, was brought on September 29, 2009.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id.

Petitioner asserts that it was improper for DHCR to utilize the default method because the rent registrations were filed. Petitioner further asserts that there was no willfulness on the part of 415 East to overcharge the tenant. In response, DHCR asserts that the registrations are merely self-serving statements that are insufficient to establish the legal rent and that 415 East's failure to maintain a complete rental history warranted using the default procedure.

Since 415 East failed to submit a rental history, DHCR proceeded with its default formula to calculate the rent for the Apartment. This procedure has been upheld repeatedly by the First Department. Mengoni v. Div. of Hous. & Cmty. Renewal, 186 A.D.2d 385 (1st Dep't 1992); see also, Bauer v. N.Y. State Div. of Hous. & Cmty. Renewal, 225 A.D.2d 410 (1st Dep't) (owner's failure to register the regulated apartment initially; failure to serve a copy of the registration on the tenant; and, failure to provide a rent history for the apartment dating back to the base date, "allowed the agency to use its settled procedures to establish the rent."). appeal denied, 88 N.Y.2d 806 (1996). Additionally, because 415 East failed to prove, by a preponderance of the evidence, that the overcharge was not willful, DHCR was justified in awarding treble damages. Ellis v. Div. of Hous. and Cmty. Renewal, 45 A.D.3d 594 (2d Dep't 2007); Bauer, supra; see also Administrative Code of the City of New York §§ 26-512 and 26-516(a) (the Rent Stabilization Law).

For all of these reasons, the decision of the Deputy Commissioner denying the PAR and upholding the overcharge is not arbitrary and capricious. The petition is denied and this proceeding is dismissed. This constitutes the decision, order and judgment of the court.

Dated: November 20, 2009

**UNFILED JUDGMENT**

JOAN B. LOBIS, J.S.C.

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