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

PRESENT: _____ PART 10

Justice

Index Number : 114874/2009

WEST SIDE EQUITIES, LLC

VS.

NEW YORK STATE D.H.C.R.

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: March 31, 2010

_____ J.S.C.

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: Part 10

In the Matter of the Application of

WEST SIDE EQUITIES, LLC,

Petitioner,

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

-against-

THE NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL

Respondent.

-and-

MARLENE EIDELHEIT and OSAMA A. KHATLAN,

Respondents-Intervenors

Decision/Order
Index No.: 114874/09
Mot. Seq.: 001

Present:
Hon. Judith J. Gische
J.S.C.

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	**NUMBERED**
Notice of Petition, verified petition, exhibits	1
Verified Answer, SAJ affirm, exhs	2
Administrative Record	3
BF affirm	4
Verified Answer, SAJ affirm, exhs	5
RHB reply affirm, exhs	6

Upon the foregoing papers the decision and order of the court is as follows:

Petitioner is the owner of the premises located at 309 West 72nd Street, New York, New York. Respondent New York State Division of Housing and Community

Renewal ("DHCR") is the administrative agency having jurisdiction over rent control and rent stabilization laws and regulations in the State of New York. Petitioner brings this Article 78 petition for an order reversing, annulling and setting aside the order and opinion of the DHCR issued on August 31, 2009, which affirmed an order of the Rent Administrator, which had denied petitioner's application for permission to refuse to renew a rent stabilized lease, and directed the DHCR to issue such an order.

The DHCR has answered the petition and opposes the relief sought therein. Respondent-intervenors Marlene Eidelheit and Osama A. Khatlan (the "tenants") are the tenants of the subject premises, and have submitted opposition to the petition as well.

On February 13, 2009, petitioner filed an Owner's Application for Order Granting Approval to Refuse Renewal of Lease and/or to Proceed for Eviction (the "Application"). Petitioner alleged that it intended to withdraw the subject apartment from the rental market so that it could, instead, be used by the resident superintendent and his family. Petitioner claimed that the need arose because the superintendent's wife was expecting a child, and a family of three could not continue living in the studio apartment they were then residing in at the premises. Petitioner represented that the subject apartment was the only suitable unit for the superintendent and his growing family because it was the only one bedroom apartment at the premises.

However, petitioner acknowledged that the tenants were offered and executed a renewal lease, but that was before it became aware of the need for the apartment for the superintendent and his family. On March 17, 2009, the tenants responded that the Application should be denied because: [1] the application was untimely; [2] the

application was not based on business necessity; and [3] there was no indication that withdrawal from the rental market will be permanent. The tenants further claimed that petitioner filed the application less than one month after renewing the tenant's lease for two years and submitted a copy of the renewal lease.

On May 11, 2009, petitioner responded to the tenant's submission arguing that, *inter alia*, it did not know that the superintendent's wife was pregnant until after the renewal was sent out and executed by the tenants, and the Rent Stabilization Code ("RSC") does not have a requirement that the Application must be filed within a "window period." On May 29, 2009, the tenants responded that there is a "window period" within which an owner must notify a tenant of its intent not to renew a lease, citing to RSC § 2523.5 (a).

On July 10, 2009, the Rent Administrator ("RA") issued XG41100002OE Order Denying Application or Terminating Proceeding. The RA found that RSC § 2524.2 (c) (3) mandates that an owner seeking permission from DHCR to refuse a tenant a renewal lease must have served such tenant with a "notice of non-renewal" withing 90-150 days prior to the expiration of the tenant's lease. The RA further found that since petitioner entered into a renewal lease with the tenants, such renewal would have negated any served notice of non-renewal.

Petitioner filed a timely Petition for Administrative Review ("PAR"), which was denied by Order dated August 31, 2009. The Order found that there were no issues of law or fact warranting reversal or modification of the RA order.

Petitioner commenced this Article 78 proceeding challenging the Order, arguing that DHCR improperly interpreted RSC § 2524.2 (c) (3) and § 2524.5 (a) (1) to require

that a termination notice must be filed before an application not to renew is filed. Further, petitioner argues that DHCR did not conduct a hearing in violation of its due process rights, and that if a hearing had been held, petitioner would establish good faith for seeking to remove the subject apartment from the rental market.

Discussion

The standard of judicial review in an Article 78 proceeding is whether there was a rational basis for the decision rendered by the administrative body. Thus, in reviewing DHCR's Order, the only questions that may be considered by the court are whether it was made in violation of lawful procedure, was effected by an error of law, or was arbitrary and capricious or an abuse of discretion. CPLR § 7803. Where the determination is rationally based upon the administrative record, it should not be disturbed (Matter of Salvati v. Eimicke, 77 NY2d 784 [1988]; Elgart v. New York State Div. of Housing and Community Renewal, 2 AD3d 218 [1st Dept 2003]). While pure issues of law should be determined by the court, issues concerning the interpretation of a statute or regulation by the agency responsible for its administration should be upheld, if they are not irrational or unreasonable (Madison-Oneida Board of Comparative Educational Services v. Mills, 4 NY3d 51 [2004]; Allstate Ins. Co. v. Libow, 106 AD2d 110 [2d Dept 1984] aff'd 65 NY2d 807 [1985]).

Since this case involves the interpretation and application of the RSC, and the DHCR is the State agency responsible for the promulgation of regulations applicable to rent regulations, DHCR's interpretation of the Rent Stabilization Law and its implementing regulations in the RSC is entitled to great deference by this court (I/M/O Dworman v. New York State Division of Housing and Urban Renewal, 94 NY2d 359,

371 [1999]). Furthermore, because of its "specialized knowledge and understanding" of its own underlying operational practices, the DHCR is in the prime position to evaluate the facts developed before it and to draw any and all necessary conclusion therefrom that may be necessary, including making decisions about credibility (201 East 81st Street Associates v. New York State Div. of Housing and Community Renewal, 288 AD2d 89 [1st Dept 2001]).

Each of petitioner's arguments is unavailing. The first, that the DHCR misinterpreted the RSC, is contrary to the clear and unambiguous language of the applicable regulations. Petitioner sought to remove the subject apartment from the rental market pursuant to RSC § 2524.5 (a) (1) (i), because it requires the apartment for its own use in connection with its business. RSC § 2524.2 provides that:

> Except where the ground for removal or eviction of a tenant is nonpayment of rent, no tenant shall be removed or evicted from a housing accommodation by court process, and no action or proceeding shall be commenced for such purpose upon any of the grounds permitted in section 2524.3 or 2524.4 of Part, unless and until the owner shall have given written notice to such tenant as hereinafter provided.
>
> ...
>
> c) Every such notice shall be served upon the tenant:
>
> ...
>
> (3) in the case of a notice pursuant to sections 2524.4(a) and **2524.5(a)** of this Part, at least 90 and not more than 150 days prior to the expiration of the lease term, or in the case of a hotel permanent tenant without a lease, at least 90 and not more than 150 days prior to the commencement of a court proceeding; (emphasis added)

Consequently the plain reading of the RSC requires that a notice of termination pursuant to RSC § 2524.5 (a) (1) (i), withdrawal from rental market for business use, a

termination notice must be served "at least 90 and not more than 150 days prior to the expiration of the lease term." This "window period" in which to serve a notice of termination has been upheld by the Court of Appeals and is commonly referred to as "Golub Notice" (see Golub v. Frank, 65 NY2d 900 [1985]). Petitioner's argument that a Golub Notice was not required, is squarely rejected by this court.

Moreover, petitioner's Application was untimely. RSC § 2524.5 (a) provides that an owner shall submit an application on the prescribed form to DHCR for authorization to commence an action to recover possession in a court of competent jurisdiction "after the expiration of the existing lease term." This statute clearly requires the filing of the application to the DHCR "after" the lease term expires, not before.

It is of no moment that petitioner was unaware of its need for the subject apartment when it entered into the renewal lease with the tenants. A notice of termination is an absolute prerequisite before commencement of a proceeding to withdraw a rent stabilized apartment from the rent market (see i.e. Nicolaides v. New York State Div. of Housing and Community Renewal, 231 AD2d 723 [2d Dept 1996]; 30 Pilot Street Corp. v. Williams, 140 Misc2d 688 [Bronx Civ. Ct. 1988]). Moreover the termination notice must be served during the window period, at least 90 days and not more than 260 days prior to the expiration of the lease term (RSC § 2524.5 [a] [1]; see also Park House Partners, Ltd. v. Del Razabal, 140 AD2d 84 [1st Dept 1988]). Insofar as petitioner concedes he never served a termination notice, the DHCR's determination has a rational basis on this record and was not arbitrary or capricious.

Petitioner's second argument, that he was denied due process because the DHCR failed to conduct a hearing to determine petitioner's good faith intentions, is

improperly raised before the court. New evidence or arguments not raised before the DHCR may not be considered for the first time by this court (Muller v. New York State Div. of Housing and Community Renewal, 263 AD2d 296 [1st Dept 2000]; Jemlock Realty Co. v. New York State Div. of Housing and Community Renewal, 245 AD2d 92 [1st Dept 1997]; Rozmae Realty v. New York State Div. of Housing and Community Renewal, 160 AD2d 343 [1st Dept 1990]).

The landlord has not met its burden of putting forth facts that support its claim that the denial of its PAR by DHCR was arbitrary, in violation of lawful procedure, an abuse of its discretionary power, or made in excess of its jurisdiction (CPLR § 7803; Matter of Pell v. Board of Education, 34 NY2d 222 [1974]). The DHCR's denial of the PAR, and its decision to affirm the Rent Administrator's decision, are supported by the record, and its interpretation of the statutes and regulations applicable to the dispute. Greystone Mgmt Corp. v. CAB, 94 AD2d 614 [1st Dept 1983]). Therefore, the petition is dismissed and the clerk shall enter judgment in favor of the respondents.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 31, 2010

SO ORDERED:

HON. JUDITH J. GISCHE, J.S.C.