

**Matter of Smith v State of N.Y. Div. of Hous. &
Community Renewal**

2010 NY Slip Op 31648(U)

June 28, 2010

Supreme Court, New York County

Docket Number: 109183/2009

Judge: Joan M. Kenney

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

PRESENT: JOAN M. KENNEY
J.S.C.
Justice

PART 8

*In the Matter of the Application of
SEAN SMITH, petitioner
for a Judgment Pursuant to Article 78
of the CPLR - against -
State of New York Division of Housing and Community
Renewal (DHCR) and 56th Ave LLC*

INDEX NO. 109183/09
MOTION DATE July '09 (Shaper case)
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to 39 were read on this motion to/for Article 78 proceeding

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

PAPERS NUMBERED

1-12
13-28
29-39

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this

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).*

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

Dated: June 29, 2010

JMK
JOAN M. KENNEY 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
COUNTY OF NEW YORK: IAS PART 8

-----X
In the Matter of the Application of
SEAN SMITH,

Petitioner,

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

Index No.
109183/2009

-against-

STATE OF NEW YORK DIVISION OF
HOUSING AND COMMUNITY RENEWAL
(DHCR) AND 56 7th AVENUE, LLP,

**ORDER &
JUDGMENT**

Respondents.

-----X
KENNEY, J.:

Papers considered in review of this Order To Show Cause seeking a
stay:

Papers	Numbered
Order to Show Cause, Affirmation	1-2
Verified petition with Exhibits	3-12
Respondent's verified answer, affirmation in opposition and memorandum of law	13-23
Notice of Cross-Motion, affirmation in support, and exhibits	24-28
Reply to Answer, affirmation, affidavit, and exhibits	29-31
Reply affirmation in support of cross-motion	32
Petitioner's reply affirmation and exhibits	33-36
Petitioner's supplemental affirmation and exhibits	37-39

Petitioner's Counsel:
Sanders Litigation Associates, P.C.
69 Roslyn Road
Roslyn Heights, New York 11021
(516) 625-4400

Respondent's Counsel:
Gary R. Connor, Esq.
DHCR
25 Beaver Street, Rm. 707
New York, New York 10004
(212) 480-7421
Belkin, Burden
270 Madison Ave.
New York, NY 10016
(212) 867-0709

In this Article 78 proceeding brought by petitioner Sean Smith
(Smith), against respondents State of New York Division of Housing
and Community Renewal (DHCR) and 56 7th Avenue, LLP (Landlord),
petitioner seeks annulment of the Rent Administrator's (RA)
determination denying his overcharge complaint. Petitioner further

seeks an annulment of the Commissioner's order that denied (1) his petition for administrative review (PAR), (2) a stay in the holdover proceeding marked Index # 96122/08, pending a determination of this Article 78 proceeding, (3) an order and judgment that clarifies petitioner's status as a rent-stabilized tenant, (4) a renewal lease that includes a preferential rate along with lawful increases, and (5) costs, disbursements, and an award of the attorneys' fees he has incurred in this proceeding.

FACTUAL BACKGROUND

Petitioner entered into a lease agreement (Lease) with Landlord's predecessor in interest, AVJ Management Corporation (AVJ Corp) to rent apartment 11K (a/k/a Apt. K11) located at 56 7th Avenue, New York, New York (the Premises). The Lease commenced on March 1, 2001 and expired on February 28, 2003. Petitioner alleges that his initial rent during that Lease period was \$1,200 per month. After several lawful increases, Petitioner's rent during the Lease term beginning March 1, 2007 and ending on February 28, 2008 was \$1379. Landlord purchased the subject Premises on January 11, 2008. Petitioner received a Lease renewal for a term beginning March 1, 2008 and ending February 28, 2009. Said renewal incorporated a rent increase in excess of \$500, changing Petitioner's monthly rent from \$1,379 to \$1,900. On February 4, 2008, Petitioner filed an overcharge complaint with DHCR, disputing the amount of monthly rent designated in the March 1, 2008 lease

(Verified Petition, Exhibit B).

On June 27, 2008, the RA issued an order dismissing the overcharge complaint following its determination that the legal regulated rent at the Premises exceeded \$2,000 on the date petitioner took occupancy, and thus the Premises were exempt from the rent-stabilization laws.

Petitioner subsequently filed a PAR alleging that (1) the Landlord engaged in fraudulent behavior concerning the "high rent vacancy deregulation"; (2) neither he nor any other tenant had been served with a registration statement that listed the rent at over \$2,000 per month; and (3) the rental fee cited by the Landlord was improper as evidenced by language within a summary holdover petition whereby AVJ Corp. conceded that the Premises were subject to the Rent Stabilization Law (Exhibit D to Verified Petition). In August of 2008, DHCR denied petitioner's PAR because of a procedural defect and petitioner was afforded 35 days to re-file his petition properly (Exhibit E to Verified Petition). Petitioner re-filed his petition on August 14, 2008.

On May 18, 2009, the Commissioner issued an order denying Smith's petition for administrative review, while also modifying the RA's order. The Commissioner's opinion denied the petition, pursuant to Section 26-516 of the Rent Stabilization Law, which provides, "where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent

registration statement [and] is not challenged within four years of its filing, [then] neither such rent nor service of any registration shall be subject to challenge at anytime thereafter" (Exhibit E to Verified Petition). The order also stated that, as a result of said provision, the legal regulated rent reported in the Premises' 2001 rent registration and its status as exempt from rent stabilization [were] no longer subject to challenge (*id.*). Finally, the Commissioner also found that the RA's final determination was correct. However, the RA's reliance upon Section 2520.11 (r) (8) of the Rent Stabilization Code in making the determination was improper.¹

On June 11, 2009, petitioner submitted an application to re-open the PAR, pursuant to 9 NYCRR § 2207.8 (a), which allows the DHCR to modify, supercede, or revoke an order upon a finding that the determination was the result of illegality, irregularity in vital matters, or fraud. Smith also commenced this proceeding seeking to overturn DHCR's determination. Shortly thereafter, on

¹Section 2520.11 (r) (8) (i) provides: "where an owner installs new equipment or makes improvements to the individual housing accommodation qualifying for a rent increase pursuant to section 2522.4(a) (1) of this Title, while such housing accommodation is vacant, and where the legal regulated rent is raised on the basis of such rent increase, or as a result of any rent increase permitted upon vacancy or succession as provided in section 2522.8 of this Title, or by a combination of rent increases, as applicable, to a level of \$2,000 per month or more, whether or not the next tenant in occupancy actually is charged or pays \$2,000 per month or more for rental of the housing accommodation, the housing accommodation will qualify for exemption under this subdivision."

July 8, 2009, DHCR denied petitioner's request to re-open the PAR.

In its answer, Landlord argues that, prior to 1999, the Premises were subject to NYC Administrative Code § 26-401 (the Rent Control Law). At that time, the Premises were owned by AVJ Corp. and occupied by Laura Winston. Winston vacated the Premises prior to November 1999, and upon her vacatur, the Premises became "decontrolled," pursuant to Title 26 of the NYC Administrative Code. In November 1999, AVJ Corp. rented the Premises to Alexander Joseph in the amount of \$1,805 per month. The lease term began in November 1, 1999 and expired on October 31, 2000 (Exhibit B to Affirmation of Phillip L. Billet, dated September 25, 2009) (Billet Aff.).

On November 1, 1999, the Premises became subject to the Rent Stabilization Law pursuant to the Emergency Tenant Protection Act of 1974 (ETPA).² In 2000, AVJ Corp. filed a 2000 "rent registration statement" with DHCR, wherein it stated that, on April 1, 2000, the monthly rent at the Premises was \$1,805 (Exhibit C to Billet Aff.). Landlord asserts that the 2000 registration statements were never challenged during the statutory period.

Upon the expiration of the November 1, 1999 lease, the parties executed a one-year renewal lease that commenced on November 1, 2000, and expired on October 31, 2001, at a monthly rate of \$1,877.31. Joseph vacated the Premises at some point prior to the

² 9 NYCRR § 2500.

expiration of the November 1, 2000 lease. Thereafter, Smith and AVJ Corp. executed a two-year Lease commencing on March 1, 2001. Landlord contends that, upon the execution of the March 1, 2001 lease, AVJ Corp. was entitled to a 20% percent increase in rent pursuant to the Rent Stabilization Law.³ As a result, the Premises was exempt from the Rent Stabilization Law under 26-504.2 (a) of the Administrative Code of the City of New York, which is commonly referred to as the "luxury decontrol provision."⁴

³ Section 26-511 (c) (5-a) of the Administrative Code of the City of New York provides in part: "notwithstanding any provision of this chapter, the legal regulated rent for any vacancy lease entered into after the effective date of this paragraph shall be as hereinafter provided in this paragraph. The previous legal regulated rent for such housing accommodation shall be increased by the following: (i) if the vacancy lease is for a term of two years, twenty percent of the previous legal regulated rent; or (ii) if the vacancy lease is for a term of one year the increase shall be twenty percent of the previous legal regulated rent less an amount equal to the difference between (a) the two year renewal lease guideline promulgated by the guidelines board of the city of New York applied to the previous legal regulated rent and (b) the one year renewal lease guideline promulgated by the guidelines board of the city of New York applied to the previous legal regulated rent."

⁴ § 26-504.2 (a) of the Administrative Code of the City of New York provides in part: "Housing accommodations" shall not include any housing accommodation which becomes vacant on or after April first, nineteen hundred ninety-seven and where at the time the tenant vacated such housing accommodation the legal regulated rent was two thousand dollars or more per month, or any housing accommodation which is or becomes vacant on or after the effective date of the rent regulation reform act of 1997 with a legal regulated rent of two thousand dollars or more per month. This exclusion shall apply regardless of whether the next tenant in occupancy or any subsequent tenant in occupancy actually is charged or pays less than two thousand dollars a month."

ARGUMENTS

The Landlord argues that although the legal rent of the Premises was greater than \$2,000 per month, AVJ Corp. charged Petitioner \$1,200 per month when it determined that petitioner could not pay more than that amount toward his monthly rent. However, Landlord argues that said concession did not change the Premises' exempt status under the Rent Stabilization Law. The terms of petitioner's Lease contained an attached rider declaring that the legal rent during the Lease term was \$2,252.77 per month and that AVJ Corp. "HAD THE RIGHT TO TREAT APARTMENT AS DECONTROLLED" (Exhibit E to Billet Aff.). Additionally, on August 6, 2001, AVJ Corp. filed a rent registration statement with DHCR that stated the Premises were exempt from rent regulation based upon the luxury decontrol provision, or as it sometimes referred to, the "high rent vacancy." The legal rent of the Premises, as of April 1, 2001, was \$2,252.77 per month (Exhibit A to Billet Aff.). Seven years after moving into the Premises, petitioner filed a rent overcharge complaint, a date which Landlord argues runs afoul of the statutory limitations for such a claim.

Smith contends that the DHCR's adherence to a four year statute of limitations for overcharge claims that allege fraud is arbitrary and capricious. Petitioner argues further, that even assuming the four year statute of limitations applied to all claims of rent overcharges including fraud, the Commissioner's finding has

no bearing on the regulated status of the Premises.

Landlord argues that petitioner is not entitled to vacatur of the Commissioner's determination because it was made in conformity with all applicable laws, rules, and regulations, and was neither arbitrary, capricious, nor an abuse of discretion. Moreover, an unsubstantiated claim of fraud does not in and of itself warrant an exception to the four year statute of limitations that governs rent overcharge claims. Such a restriction would limit any examination of the rental history of housing accommodations prior to the four year period immediately preceding the filing of the overcharge complaint. Landlord also contends that Smith's fraud claim is untimely because he failed to raise that claim during the proceeding before the RA, and petitioner's filing of the complaint more than six years after the alleged fraud deregulated the Premises as a matter of law. Finally, Landlord states that any designation of the Premises as rent-stabilized, in proceedings with its predecessor in interest, is of no consequence because such matters are governed by statute and cannot be created by waiver or estoppel.

DISCUSSION

The petition is granted in part. DHCR acted arbitrarily and capriciously by failing to consider Smith's fraud claims in relation to the Premises' decontrol and luxury exempt status, and the appropriate formulation of the Premises' rental rate.

As set forth in the Omnibus Housing Act passed by the legislature in 1983, DHCR is vested with the responsibility of administering the New York City Rent Stabilization and Rent Control Laws (see *Roberts v Tishman Speyer Props.*, 62 AD3d 71, 78 [1st Dept], *affd* 13 NY3d 270 [2009]).

In 1993, the Legislature enacted the Rent Regulation Reform Act (RRRA) to amend, inter alia, the Rent Stabilization Law (RSL) (*id.* at 77). The new sections of the RSL provided for the deregulation of residential apartment units that became vacant when the monthly legal regulated rent reached \$2,000 or more (Administrative Code § 26-504.2), or had a legal regulated monthly rent of \$2,000 or more, and whose tenants and/or occupants' total income exceeded \$250,000 for each of the two preceding calendar years (Administrative Code § 26-504.1).

The RRRA of 1997 "clarified and reinforced the four-year statute of limitations applicable to rent overcharge claims . . . by limiting examination of the rental history of housing accommodations prior to the four year period [immediately] preceding the filing of [the] overcharge complaint" (*Thorton v Baron*, 5 NY3d 175, 180-1 [2005]; CPLR 213-a). "Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any

time thereafter (*id.*; Administrative Code of the City of NY § 26-516 [a]). "The four year Statute of Limitations applicable to both administrative and judicial rent overcharge claims, by its terms, commences to run with the 'first overcharge alleged'" (*Mozes v Shanaman*, 21 AD3d 854, 854-5 [1st Dept 2005], *lv denied* 6 NY3d 715 [2006]).

In this proceeding, Smith filed his overcharge complaint with DHCR on February 4, 2008, and therefore, the controlling period commences February 4, 2004 (the base date) (Administrative Code of City of NY § 26-516 [a]). DHCR concedes that there is not any valid rent registration statement on file as of the base date. There is also a discrepancy as to the proper designation of the Premises. It appears that the Premises are designated as both apartment 11K and K11 in the two registration statements that are on file with the DHCR. Nor are there any registration statements filed with DHCR for the years between 1984-2007, with the sole exception of the July 2000 registration for Apt 11K, which indicates that the premises was rented to Alexander Joseph for \$1,805 per month. The second registration statement was filed in 2001 for apartment K11 with a stated rent of \$2,252.77 per month. Apartment K11 was designated by the Landlord as decontrolled because the monthly rent exceeded \$2,000, as provided by the "luxury decontrol provision" of the Rent Stabilization Law.

The high rent or luxury decontrol provisions of the Rent

Regulation Reform Act, as amended in 1997, excludes housing accommodations from the scope of the Rent Stabilized Law "when either: the legal regulated rent [was] \$2,000 or more and the combined household income exceed[ed] \$175,000 for two consecutive years (Administrative Code § 26-504.1), or [in the event] the tenant vacate[d] the apartment and the legal rent, plus vacancy increase allowances and increases permitted for landlord improvements, is \$2,000 or more" (Administrative Code of City of New York §§ 26-504.2; 26-511[c] [5-a]).

The rent registration for apartment K11, which lists the Premises' exempt status under the high rent vacancy, is not dispositive of whether the rent of \$2,252.77 is the legal amount under the Rent Stabilization Code (*Matter of Grimm v State of N. Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 68 AD3d 29, 33-34 [1st Dept 2009], *appeal dismissed* 13 NY3d 917 [2010]). The apparent inconsistencies between the filed registration statements and the original lease provisions present a question as to whether fraud was perpetrated, so as to warrant looking further back in the rental history than the four years authorized by the Rent Stabilization Code (*see Thorton v Baron*, 5 NY3d 175, *supra*). Furthermore, there is testimony in the record stating that petitioner's original Lease was altered. Stuart Korn, the managing agent for AVJ Corp., attested that the Lease that he and petitioner executed listed the Premises as a rent-stabilized apartment with a

monthly rent of \$1,200, as opposed to the document that the Landlord, and submitted to DHCR, listed the Premises as exempt from rent-stabilization, with a monthly rent of \$2,252.77 (Exhibit C to Affirmation of Jeffrey G. Kelly, dated August 5, 2009) (Kelly Aff.). Korn asserts that the initial stabilized rent alleged by the Landlord, and its subsequent claim of high rent vacancy deregulation, within the Lease, was altered after the fact, without his knowledge (*id.*).

The Court of Appeals has made clear that an owner "should not be allowed to hide behind the four-year statute of limitations," because "an unscrupulous landlord could register a wholly fictitious, exorbitant rent and, and as long as the fraud is not discovered for four years, render that rent unchallengeable. That surely was not the intention of the Legislature when it enacted the RRRRA" (*Matter of Grimm v State of N. Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 68 AD3d 29 at 34 [internal citation and quotations omitted]).

"[W]hile the applicable four-year statute reflects a legislative policy to 'alleviate the burden on honest landlords to retain rent records indefinitely,' and thus precludes [the court] from using any rental history prior to the base date, where there is fraud or an unlawful rent, the lease is rendered void. [Under indices of fraud,] the legal rent should be established by using the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the base date" (*id.* at 32) [internal

quotations omitted]).

Said calculation is commonly referred to as the default, or "Thorton Formula."

The tenants immediately preceding petitioner's tenancy were never provided with annual registration statements, and were not told how their initial monthly rent was calculated. Therefore, if the rent in 2000 for apartment 11K was established at an illegal rate, that lease, as well as petitioner's lease at the same rate, is a nullity, and the default formula would be the appropriate mechanism for determining the base rent (*id.*).

"Sanctioning the owner's behavior on a statute of limitations ground 'can result in a future tenant having to pay more than the legal stabilized rent for a unit, a prospect which militates in favor of voiding agreements such as this in order to prevent abuse and promote enforcement of lawful regulated rents'" (*id.*).

Moreover, knowing that Landlord lowered the rent on behalf of petitioner should "have caused DHCR to determine whether the owner complied with rent regulation rather than to summarily dismiss petitioner's rent overcharge complaint" (*id.*). Therefore, it is this Court's determination that the RA erroneously failed to address whether the registration statement in effect on the base date, was the result of an unlawful rent calculation, or unreliable because of the owner possibly committed fraud by charging an illegal rent to petitioner, and/or the previous tenants of the

Premises. DHCR's denial of petitioner's PAR petition was based upon a calculated rent, that rested solely on the presumption that the rent registration was legitimate. Furthermore, it appears that petitioner may never have been served with a copy of the rent registration as required under Administrative Code 26-504.2 detailing the Premises' decontrolled status.

Finally, Landlord's argument that petitioner's PAR petition was not timely filed is without merit. Petitioner initially filed a petition for administrative review on July 31, 2008, within 35 days of the issuance of the RA's order (see Exhibit E to Verified Petition). On August 8, 2008, the tenant's petition was rejected because of a procedural defect and petitioner was afforded 35 days to re-file (Exhibit E to verified Petition). Petitioner re-filed properly on August 14, 2008. The Commissioner found that petitioner's petition was timely filed and it proceeded on the merits (Exhibit E to Verified Petition).

Petitioner also requests an award of attorneys' fees, presumably pursuant to Rent Stabilization Law § 26-516 (a) (4) or Rent Stabilization Code (9 NYCRR) § 2526.1 (d). Rent Stabilization Law § 26-516 (a) (4) provides that "[a]n owner found to have overcharged may be assessed the reasonable costs and attorneys' fees of the proceeding." Similarly, Rent Stabilization Code (9 NYCRR) § 2526.1 (d) states that an owner that is found to have "overcharged by DHCR may be assessed and ordered to pay the tenant

as an additional penalty the reasonable costs and attorneys' fees of the proceeding" Petitioner merely requests, but has not provided support for his application seeking an award of attorneys' fee, and such a determination is more appropriately made in the event such a determination is made.

With regard to DHCR's cross-motion to remit, for the reasons set forth above, in light of *Thorton*, and the relevant facts in this case, the RA and DHCR should have considered the issue of whether the rent registration in effect on the base date was reliable. Where an administrative determination is made without consideration of the central issue, remand for de novo review is appropriate (see *Matter of Blackmer v New York State Div. of Hous. & Community Renewal*, 141 AD2d 334 [1st Dept 1988]). [R]emission for further fact-finding and determination is appropriate where, as here, DHCR concedes [a possible] error in the issuance of its determination, and where the determination resulted from an "'irregularity in vital matters'" (*Matter of Porter v New York State Div of Hous. & Community Renewal*, 51 AD3d 417, 418, lv denied 11 NY3d 703 [2008]).

By statute, DHCR has the authority to modify or revoke any order that was the result of an illegality regarding vital matters or fraud (*id.*; 9 NYCRR § 2527.8). Furthermore, the Court of Appeals has confirmed DHCR's authority to alter a prior determination on remission (*id.*). For the reasons set forth above,

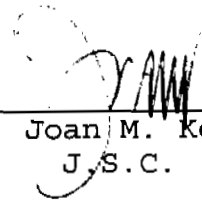
and because DHCR has acknowledged that Petitioner's allegations of fraudulent conduct were not addressed in its determination, nor given any consideration, remand for a determination of those issues is appropriate.

Accordingly, it is

ADJUDGED that the petition is granted in part, in that the May 18, 2009 determination of the DHCR is hereby vacated and annulled the matter is remanded to DHCR for reconsideration in accordance with this decision. This constitutes the decision and judgment of this Court.

Dated: June 28, 2010

ENTER:



Hon. Joan M. Kenney
J.S.C.

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 2074).