

**Matter of 8082 Assoc., LP v New York State Div. of
Hous. & Community Renewal**

2010 NY Slip Op 32843(U)

October 5, 2010

Supreme Court, New York County

Docket Number: 114773/09

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN

Index Number : 114773/2009
 8082 ASSOCIATES L.P.
 VS.
 NEW YORK STATE D.H.C.R.
 SEQUENCE NUMBER : 001
 ARTICLE 78

— J.S.C. PART 11
 —
 INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

_____ papers, numbered 1 to _____ were read on 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~~ *Article 78 proceeding is determined in accordance with the annexed decision, order and judgment.*

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: October 5, 2010



 HON. JOAN A. MADDEN ^{C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION ^{J.S.C.}
 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: PART 11

-----X
In the Matter of the Application of
8082 ASSOCIATES, LP,

INDEX NO. 114773/09

Petitioner,

For a Judgment Pursuant to Article 78 of the CPLR

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent.

-----X
JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner owner 8082 Associates LP, seeks to annul the decision of respondent New York State Division of Housing and Community Renewal ("DHCR") determining the Maximum Collectible Rent for rent controlled apartment 3W at 210 West 82nd Street in Manhattan.

Judicial review of an agency determination is circumscribed by CPLR 7803. The court must not weigh the facts or the merits of petitioner's claims, nor may it substitute its judgment for that of the agency; the court is limited to deciding whether the agency's determination was arbitrary and capricious, or an abuse of discretion, by assessing whether a rational or reasonable basis exists for the agency's determination. See Matter of Pell v Board of Education, 34 NY2d 222 (1974). "It is well recognized that DHCR has a broad mandate to administer the rent regulatory system, and courts regularly defer to its interpretation and application of the laws it is responsible for administering, so long as its interpretation is not irrational." Hicks v. New York

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State Division of Housing and Community Renewal, 75 AD3d 127 (1st Dept 2010) (citations omitted).

Petitioner argues that DHCR's determination as to the maximum collectible rent violates the statute of limitations period in CPLR 213-a which applies to rent overcharge claims, and expressly "preclude[s] examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action." CPLR 213-a. Petitioner also argues that DHCR erred in not including in its calculations a \$65.00 monthly rent increase that the tenant consented to in 1986. Both arguments are without merit.

The issue as to the applicability of CPLR 213-a was recently addressed by the Appellate Division First Department in Hicks v. New York State Division of Housing and Community Renewal, 75 AD3d 127 (1st Dept 2010). The Appellate Division held that CPLR 213-a does not apply to rent controlled apartments or administrative proceedings, and applies only to judicial actions involving rent stabilized apartments. Specifically, the Appellate Division concluded that neither the four-year statute of limitations for rent overcharge claims nor the four-year restriction on considering a unit's rent history in CPLR 213-a, "limits the agency's [DHCR's] review of the rental history of a rent-controlled apartment in determining the MBR [maximum base rent]." The Appellate Division determined that "[w]hen examined in the context of the governing statute and regulations, DHCR's practice of reviewing the rent history of the premises is not irrational or unreasonable," reasoning that "[w]ith respect to fixing the maximum rent, City Rent and Rehabilitation Law (Admin. Code) §§ 26-405(a)(3) and (4) mandate that DHCR establish an initial base rent for rent controlled accommodations effective January 1, 1972, and thereafter make biennial adjustments to the MBR [maximum base rent] based upon periodic examination

of an owner's books and records to assess the actual operating expenditures for the building." Thus, in view of the holding in Hicks, the rent overcharge claim in this proceeding involving a rent controlled apartment, was not subject to the four-year statutory restriction on examining the rent history in CPLR 213-a, and DHCR properly relied on the tenant's rent history dating back to 1970 in determining the maximum collectible rent.

Turning to the second argument that DHCR failed to include the \$65 rent increase that the tenant consented to in 1996, the New York City Rent Control Law permits

[t]he landlord and tenant by mutual voluntary written agreement [to] agree to a substantial increase or decrease in dwelling space or a change in the services, furniture, furnishings or equipment provided in the housing accommodation. An adjustment under this subparagraph shall be equal to one-fortieth of the total cost incurred by the landlord in providing such modification or increase in dwelling space, services, furniture or furnishings or equipment, including the cost of installation. . . . *The owner shall give written notice to the city rent agency [DHCR] of any such adjustment pursuant to this subparagraph* [emphasis added].

New York City Rent Control Law § 26-405(g)(4)(e); see also New York City Rent and Eviction Regulations § 2202.4(a)(2).

It is not disputed that in 1996, petitioner and the tenant of apartment 3W agreed in writing that petitioner would perform substantial electrical work in her apartment, and the tenant would pay 1/40 of the cost of the work as a permanent increase in her monthly rent, which resulted in a monthly rent increase of \$65, that went into effect on January 1, 1997. It is also undisputed that petitioner did not provide DHCR with written notice of that agreement and the \$65 rent increase before it began collecting the rent increase in January 1997. Petitioner did not notify DHCR of the tenant's agreement and the rent increase until June 2009, after the tenant filed a rent overcharge complaint in December 2008, and DHCR issued its May 20, 2009 order finding that

the apartment's maximum collectible rent was \$814.11, effective January 1, 2008.

Petitioner filed a Petition for Administrative Review ("PAR"), objecting that DHCR did not include the \$65 rent increase that began in 1997, and requesting that the DHCR recompute the tenant's rent history. In its decision denying the PAR, the DHCR Deputy Commissioner determined as follows:

Pursuant to Section 2202.4(a)(2) of the City Rent and Eviction Regulations, a landlord and a tenant may agree to a rent increase based upon improvements to the apartment, without the necessity of obtaining the approval of the [DHCR] Administrator, and such rent increase shall be equal to 1/40 of the cost of the agreed upon improvement(s). However, the Commissioner points out that before the landlord can collect such a rent increase, the aforementioned section of the City Rent and Eviction Regulations require that the landlord "give written notice to the Administrator of any such adjustment."

The record reflects that the subject landlord first filed the requisite notice with the rent agency pertaining to the tenant's consent of the IAI rent increase of \$65.00 per month on June 2, 2009, which was after the issuance of the Administrator's order herein under review. Accordingly, the Commissioner finds that the subject apartment's IAI increase of \$65.00 per month could not have been included in the calculation of the subject apartment's maximum collectible rent by the Administrator. Moreover, the Commissioner further finds that the IAI rent increase of \$65.00 per month was effective July 1, 2009, the first rent payment date after the landlord first filed the requisite notice with the rent agency evidencing the subject tenant's consent to this rent increase. Based upon the above, the Commissioner find that the landlord's allegation that the IAI rent increase of \$65.00 per month should be retroactive to 1996 is without merit.

The court is not persuaded that DHCR's determination lacks a rational basis. As DHCR explains in its opposition papers, the written notice requirement in the Rent Control Law was intended to ensure that all rent adjustments are entered into the rent records maintained by DHCR, where they become part of the official rent history for rent controlled apartments. Those are the records that DHCR reviews and relies on when it is called upon to make a determination as to the lawful rent for a rent controlled apartment. As the Appellate Division makes clear in

Hicks, “[b]y legislative design, the legal rent for a rent-controlled apartment is determined by reference to the history of the premises dating back to the time the initial base rent was established.” *Id.* Here, since the document on which petitioner relies to support the \$65 rent increase was never filed with DHCR, that document was not part of DHCR’s rent records and the rent history for the subject apartment, and DHCR had no notice of the \$65 consensual rent increase. Once, however, DHCR received notice of the increase in June 2009, it entered that rent adjustment into its records and noted that the maximum collectible rent could be increased by \$65.00 per month, prospectively, as of July 1, 2009.

Petitioner asserts that DHCR had notice of the rent increase based on other documents it filed with DHCR in 1996 and 1997, entitled Schedule of Monthly Rent Adjustment for Rent Controlled Apartments. In those documents, petitioner simply listed the “current” maximum base rent for apartment 3W in 1996 as \$329.35, and in 1997 as \$394.35. Although the difference in those amounts reflects a \$65 increase, those documents alone provide no information or explanation as to the reason and lawful justification for the increase, and are insufficient to satisfy the statutory notice requirement for a consensual rent increase.

Under the circumstances presented, the court concludes that DHCR’s denial of petitioner’s PAR was not arbitrary and capricious, nor an abuse of discretion.

Accordingly, it is

ORDERED AND ADJUDGED that the petition is denied and dismissed.

DATED: ~~September~~ ^{October 5, 2010} , 2010

ENTER:



J.S.O.

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).