

**Faith Ministries Inc. v New York State Div. of Hous.  
& Community Renewal**

2010 NY Slip Op 33203(U)

November 8, 2010

Sup Ct, NY County

Docket Number: 106427/10

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER  
Justice

PART 15

Index Number : 106427/2010

FAITH MINISTRIES CORP.

VS.

NYS DIVISION OF HOUSING

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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

i this motion to/for \_\_\_\_\_

notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

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

PAPERS NUMBERED

~~1~~ 1  
2, 3  
4

Cross-Motion:  Yes  No

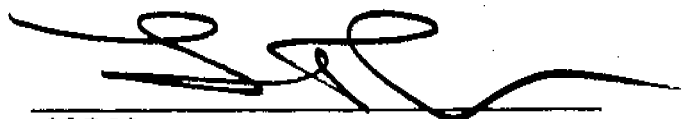
Upon the foregoing papers, It is ordered that this motion

**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).

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 11/10/10



**HON. EILEEN A. RAKOWER**

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: PART 15

-----X  
FAITH MINISTRIES INC.,

Index No.  
106427/10

Petitioners,

-against-

**DECISION  
and ORDER**

NEW YORK STATE DIVISION OF HOUSING AND  
COMMUNITY RENEWAL and STEPHEN BATISTA,

Mot. Seq.  
001

Respondents.

-----X  
HON. EILEEN A. RAKOWER:

Faith Ministries Inc. (hereinafter "Owner") is the owner of the premises located at 339 East 94<sup>th</sup> Street in New York County. Respondent Stephen Batista (hereinafter "Tenant") is the Tenant of Apartment 339D (the "Apartment"), where he has resided since January 1, 2005. Petitioner Faith Ministries Inc. brings this Article 78 proceeding for an order annulling respondent New York State Division of Housing and Community Renewal's ("DHCR") Order and Opinion dated March 17, 2010, which granted Tenant's Petition for Administrative Review ("PAR").

In 2007, Tenant filed an Administrative Determination ("AD") proceeding seeking a determination as to the status of the Apartment. In the AD proceeding, the Owner asserted that the Apartment was deregulated based upon high rent vacancy because of an established legal regulated rent of \$2,000.

By Order dated January 18, 2008, Tenant's application was denied and the AD proceeding was terminated by the Rent Administrator on the grounds that Tenant's application was properly the subject of an overcharge proceeding rather than an AD proceeding. Tenant subsequent filed a PAR challenging the Rent Administrator's January 18, 2008 Order. By Order and Opinion dated April 23, 2008, Tenant's PAR was denied on the grounds stated in the prior Order.

On May 17, 2008, Tenant filed a rent overcharge complaint, alleging that, in December 2005, the Owner demanded a substantial increase in rent for a renewal

lease. Tenant further alleged that the Owner subsequently refused to answer Tenant's inquiries as to the rent increase, which prompted him to file a Freedom of Information Law request. According to Tenant, the Owner submitted a copy of a lease purportedly signed on February 1, 1998 between the Owner and a prior tenant for the period of February 1, 1998 through January 31, 1999 to support its claim that the legal regulated rent exceeded \$2,000 and thus was no longer subject to the Rent Stabilization Law and Rent Stabilization Code. Tenant stated that the purported 1998 lease was on a Blumberg form which had not even been published until November 1998, nine months after the date on the lease.<sup>1</sup>

Answering the overcharge complaint, the Owner took the position that the Apartment was deregulated with a rent that exceeded \$2,000 per month in the year 1998. When asked by DHCR for a copy of the exit registration of the first tenant who occupied the Apartment after it was deregulated, the Owner submitted the affidavit of Isabel Felix from the Rent Stabilization Association of NYC, Inc. ("RSA") dated February 11, 2009. According to the affidavit, RSA provides a service to owners of residential buildings with rent stabilized units in which it completes apartment registration forms, mails them to the respective tenant, and transmits the forms to DHCR. The Felix affidavit further states that "RSA's computer records indicated that [the Apartment] was registered by RSA as exempt on the 1998 rent registration cycle with an exempt date of February 1, 1998," and "was filed on June 15, 2000 and subsequently amended on February 15, 2001 under registration identification number 120469." The Owner stated that it did not have a copy of the exit registration "because of a flood that occurred in the owner's basement where the files are kept."

Further, and with respect to the issue of treble damages, the Owner stated that, notwithstanding its position that no rent overcharge took place, it was tendering a rent refund credit to Tenant in the amount of \$5,282.55 (the agency's calculation of overcharge plus interest). The Owner asserted that said refund established its good faith and proved that, to the extent that there was an overcharge, such overcharge was not willful. This submission was dated June 23, 2009, and was delivered to DHCR on June 24, 2009.

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<sup>1</sup>The 1998 lease was submitted in the AD proceeding, which was dismissed on the grounds that Tenant's claim was more properly asserted in an overcharge proceeding, and that a copy of the lease was not submitted in the overcharge proceeding.

By Order dated June 25, 2009, the DHCR Office of Rent Administration ("Rent Administrator") found that a rent overcharge occurred. The Rent Administrator stated that

The owner... was afforded an opportunity to respond and submit a copy of the lease in effect on the base date (5/22/2004) for this proceeding. In response, the owner claimed that the subject apartment was previously deregulated based upon a rent in excess of \$2,000.00 after being fully renovated.

The owner was requested to submit a copy of the exit registration served upon the first tenant to commence occupancy after the claimed deregulation. To date, the owner has failed to submit the requested documentation.

Accordingly, in the absence of the lease in effect as of the base date, and/or the rent ledger in effect on the base date, the Rent Administrator used DHCR Default Method, Criterion #2, whereby the base date is calculated by using the complaining tenant's initial rent minus the initial guidelines adjustment. This formula established the base date rent to be \$982.81 per month. Further, and also in accordance with this methodology, the base rate was frozen at \$982.81 per month effective January 1, 2005 (the commencement date of the tenancy). The Rent Administrator then took the difference between the base rent and the rent Tenant was actually charged for the period of January 1, 2005 through December 31, 2006, and found that Tenant was overcharged \$4,976.16. The Rent Administrator also assessed treble damages in the sum of \$3,466.26. In all, when combined with interest and the excess security amounts of \$1,100.74 and \$247.59, respectively, the Owner was assessed a total sum of \$9,750.75, to be either refunded or credited to Tenant.

By its submission dated July 6, 2009, the Owner sought reconsideration of the June 25, 2009 Order on two grounds. First, the Owner argued that ORA improperly assessed treble damages as against it, in light of the fact that the Owner submitted evidence on June 24, 2009 (one day prior to the date of the Order) that it had voluntarily refunded the alleged overcharge with interest, and lowered Tenant's rent to \$982.91. Secondly, The Owner argued that DHCR failed to "accept or to recognize an 'Exit Registration' that was filed by the Owner indicating that the subject apartment had been deregulated based upon a high rent

vacancy.” The Owner took the position that the Felix affidavit established “a conclusive presumption that the registration was filed with DHCR more than four (4) years ago and that the subject apartment is exempt from rent stabilization.”

On July 31, 2009, the Rent Administrator reopened the June 25, 2009 Order in light of the fact that “[t]he owner’s submission was misdirected and not taken into consideration when the Rent Administrator’s Order was issued.”

On November 19, 2009, after the overcharge proceeding was reopened and the Owner and Tenant made additional submissions, the Rent Administrator determined that “the Order previously issued... should be revoked.” The Rent Administrator found that “a review of the record reveals that the subject apartment was previously exempt from rent regulations due to the high rent vacancy deregulation which occurred prior to the base date of this proceeding.”

Tenant filed a PAR challenging the Rent Administrator’s November 19, 2009 order. In his PAR, Tenant reiterated his claim that the Owner had provided him with a fraudulent prior lease as evidence that the apartment had been deregulated due a high rent vacancy. The Owner submitted papers in opposition which urged that DHCR uphold the November 19, 2009 Order on the grounds that Tenant failed to allege any errors of fact or law warranting reversal.

In an Order and Opinion dated March 17, 2010, DHCR granted Tenant’s PAR. DHCR found that “there [was] insufficient evidence to support the Rent Administrator’s finding that the subject apartment is exempt from regulation. There is no copy of the exit registration claimed to have been filed in 2000 and DHCR has no record of such a registration.” DHCR further noted that

The owner claims that its records were lost in a fire and flood but no evidence was submitted to substantiate where or when such a catastrophe occurred. Curiously, the owner was able to submit leases from 1998, 1999 and 2000 but not the 1998 registration that was supposedly filed in 2000 and amended in 2001. The last registration DHCR does have for the subject apartment is for 1998, filed on June 14, 2000, indicating a legal rent of \$964.34 and a tenant ‘Emmaus Inns’ who is also registered as the tenant of ten other apartments in this complex.

Accordingly, in light of the fact that DHCR found that the evidence did not support the Owner's claim that an exit registration was filed in 2000, DHCR utilized the default method used by the Rent Administrator in the June 25, 2009 Order, and found overcharges (including treble damages, interest and excess security) in the sum of \$9,750.75, which could be offset against the amount of arrears that Tenant owed as of the time of the Order and Opinion.

The Owner commenced this Article 78 proceeding on May 17, 2010 by filing a Verified Petition. The Owner contends that DHCR's Order and Opinion granting Tenant's PAR was arbitrary and capricious in that it (1) improperly assessed treble damages despite the Owner's refunding the alleged overcharge and interest; (2) improperly considered the purported 1998 lease, which was submitted in the AD proceeding but not in the overcharge proceeding; and (3) failed to acknowledge the filing of the 1998 exit registration in 2000.

DHCR submits a Verified Answer and a memorandum of law in support of its Answer. In addition, DHCR submits the administrative record of proceedings pertaining to Tenant's overcharge complaint. DHCR argues that its determination had a rational basis and therefore must be upheld by the Court. With respect to the purported 1998 exit registration, DHCR argues that it was rational to conclude that there was insufficient evidence to support the Owner's claim that an exit registration for the year 1998 was duly filed in 2000. As for the imposition of treble damages, DHCR argues that it was rational to conclude that the Owner failed to establish non-willfulness by a preponderance of the evidence, notwithstanding the refund credit of the alleged overcharge and interest.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary

and capricious” if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

Based on the record before it, the Court finds that DHCR’s Order and Opinion granting Tenant’s PAR had a rational basis and therefore cannot be disturbed by the Court. With respect to the purported exit registration, it was rational for DHCR to conclude that the Owner failed to proffer sufficient evidence that such a registration was filed for the subject Apartment. DHCR noted that it had no record of any such filing (though it did have an 1998 registration pertaining to the apartment that was filed on June 14, 2008, one day prior to the alleged filing of the exit registration, which stated that the legal rent amount was \$964.34). DHCR further noted that, while the Owner claimed that it lost the exit registration documents as a result of flooding, no evidence was offered to substantiate that such an accident occurred. In light of the foregoing, it was reasonable for DHCR to conclude that no such exit registration was filed.<sup>2</sup>

Moreover, the Court finds that DHCR had a rational basis for finding that the Owner had failed to show by a preponderance of the evidence that its overcharge was not willful (*see* NYC Admin. Code §26-516(a); 9 NYCRR §2526.1(a)(1)). The Owner relies on ORA’s Policy Statement 89-2, which states that

The owner must prove by a preponderance of the evidence that the overcharge was not a willful act. This simply means that where an owner submits no evidence or where the evidence is equally balanced, the overcharge is deemed to be willful. The owner can submit such evidence after receiving notice of a tenant’s filing of an overcharge complaint prior to the final order being issued.

The Owner claims that, since it refunded the alleged overcharge with interest by crediting it to Tenant’s arrears prior to the issuance of the Order and Opinion

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<sup>2</sup>Nor was it arbitrary or irrational for DHCR to reject the Felix affidavit, which was sworn to over eight-and-a-half years after the alleged initial filing of an exit registration (during the pendency of the overcharge proceeding) and merely stated that RSA’s records indicated that an exit registration was filed, without providing any detail as to its filing procedures at the time.

granting Tenant's PAR, it established that its conduct was non-willful and did not warrant treble damages.

However, Policy Statement 89-2 specifically addresses the issue of an owner's refunding any overcharge plus interest during the pendency of an overcharge proceeding. Policy Statement 89-2 provides that the burden of showing non-willfulness will be met where, *inter alia*,

an owner adjusts the rent on his or her own within the time afforded to interpose an answer to the proceeding and submits proof to the DHCR that he or she has tendered, in good faith, to the tenant a full refund of all excess rent collected, plus interest.

Here, it is undisputed that the Owner was given until December 4, 2008 to interpose an answer to the overcharge complaint, and did so on said date. However, it was not until an additional submission by the Owner on May 29, 2009 that the Owner advised DHCR of its intention to credit Tenant the amount of the overcharge plus interest. Accordingly, whereas the Owner has not established its non-willfulness under Policy Statement 89-2, and did not provide any other evidence to demonstrate non-willfulness by a preponderance of the evidence, treble damages were properly assessed by DHCR.

Lastly, the Owner's argument that DHCR improperly considered the allegedly fraudulent lease that was submitted in the AD proceeding but not the overcharge complaint is without merit. DHCR's determination was based upon the fact that the Owner failed to provide credible evidence to establish that the Apartment was deregulated due to a high rent vacancy.

Wherefore, it is hereby

ADJUDGED that the Petition is denied and the proceeding is dismissed; and it is further

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: November 8, 2010

  
EILEEN A. RAKOWER, 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 7)