

**Matter of Ogunrimde v NYS Div. of Hous. &  
Community Renewal**

2010 NY Slip Op 33350(U)

December 1, 2010

Supreme Court, New York County

Docket Number: 117886/09

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

Justice

Index Number : 117886/2009  
**OGUNRIMDE, ADETOKUMBO**  
 VS.  
**NEW YORK STATE D.H.C.R.**  
 SEQUENCE NUMBER : 001  
 ARTICLE 78

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

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

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

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

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

PAPERS NUMBERED

Exhibits ...

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

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

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).

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: DEC 01 2010

HON. JUDITH J. GISCHE *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: Part 10

In the Matter of the Application of  
Adetokumbo Ogunrimde,

Petitioner,

Decision/Order

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

Index#117886/09  
Mot. Seq. # 001

-against-

NYS Division of Housing and Community Renewal,

Respondent.

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obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

Recitation, as required by CPLR §2219(a), of the papers considered in the review  
of this (these) motion(s):

<b>PAPERS</b>	<b>NUMBERED</b>
Notice of Petition, Petition, exhibits.....	1
Amended Notice of Petition, Petition, Exhibits 1-51(although numbered, many exhibits missing).....	2
Notice of Cross-Motion, JGK affirm., exhibits.....	3
Verified Answer, exhibits.....	4
Reply to Notice of Cross-Motion to dismiss, exhibits.....	5

Hon. Gische, J.:

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

Petitioner, *pro se*, brings this Article 78 proceeding to challenge the October 22, 2009 determination by the New York State Department of Housing and Community Renewal ("DHCR") denying his overcharge complaint. The DHCR has answered the petition and also cross-moved to dismiss the multiple amended petitions it claims were served on it. Petitioner is the tenant of apartment 315 ("apartment") located at 184 11<sup>th</sup> Avenue, New York, New York ("building"). Chelsea Inn LLC owns the building. The

DHCR is the agency charged with hearing and deciding rent complaints for accommodations subject to rent regulation.

### **The Underlying DHCR Decisions**

On May 4, 2007 petitioner filed a rent overcharge complaint. By order dated 2/27/09 the Rent Administrator ("RA") denied the overcharge complaint. In its decision, the RA found that four years before the overcharge complaint was filed, the subject room was "vacant". Petitioner thereafter took occupancy of the room on January 22, 2006, paying \$55 per day. The amount was subsequently reduced to \$45 per day on January 31, 2006. The RA, assumed that the accommodation was a hotel, and based on the applicable regulations, determined that the petitioner became a permanent rent stabilized tenant of the accommodation on February 1, 2006, at which time the legal rent was established by the agreement of the parties at \$315 per week. Since the tenant had never paid in excess of \$315 per week, the RA determined that no overcharge existed.

Subsequent to the RA decision, a report was issued by an Administrative Law Judge, who had conducted testimonial hearings in connection with the landlord's separate application for a certificate of no harassment. The ALJ heard testimony from various witnesses, including petitioner, and made findings with respect thereto.

Petitioner and Respondent each filed a Petition for Administrative Review (PAR) in connection with the RA determination.

In a decision dated October 22, 2009, the DHCR found that there was a discrepancy in the RA's decision and the findings of fact by the ALJ regarding when petitioner became a permanent tenant at the building. It resolved the discrepancy in favor of the ALJ findings, holding that petitioner did not become a permanent resident of

the apartment until September 27, 2006. The DHCR also rejected petitioner's claim that in deciding the overcharge complaint, the RA should have used the DHCR default methodology to determine the legally regulated rent. Under that method, petitioner argued, the rent would have been \$84 per month and not \$315 per week. The DHCR, however, found that the landlord had not defaulted in providing documentation and, therefor, there was no basis to calculate rent based upon the default formula contained in the Rent Stabilization Code ("RSC").

**Arguments of the Parties**

Petitioner claims that the October 22, 2009 decision is arbitrary and capricious and that the rent overcharge should have been determined according to the default methodology. Petitioner makes sweeping claims about the landlord having lied and committed fraud with respect to other tenant/occupants of the building. Petitioner claims that the DHCR proceedings violated his constitutional rights, including due process, and the IV, V, and VI amendments. He also claims that he is being harassed by the DHCR and seeks \$10 million dollars in damages.<sup>1</sup>

Turning to the more particularized claims, petitioner contends that:

[1] the DHCR failed to provide petitioner with the landlord's documents to review or comment upon before making its decisions;

[2] the DHCR incorrectly found that on the base date the apartment was not

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<sup>1</sup>Petitioner's papers are prolix and blunderbuss. The identification of documents is confusing and many of the papers are not collated. Thus, it is difficult to understand what papers correspond to which petition. Many exhibit "tabs" contain no corresponding exhibit behind them. Petitioner's exhibits contain repeated handwritten commentary that obviously was not on the original documents. Against this cobbled record, the Court did the best it could to parse out petitioner's contentions.

occupied; according to the rent ledger submitted by the landlord, it had been occupied for at least 3 days at \$30 per day.

[3] the rent should have been determined according to the DHCR default formula;

[4] the landlord's registration statements were fraudulent and the DHCR should have investigated same; and

[5] the DHCR should not have considered and/or given collateral estoppel effect to the ALJ findings regarding when petitioner became a permanent resident because petitioner was not a party to those proceedings, only a witness who testified; and

[6] the Civil Court of the City of New York set his rent at \$208 per month.

The DHCR argues that it reviewed the rental history for the four year period prior to the filing of the overcharge complaint. It determined that the apartment was occupied only by transients from the base date until petitioner rented the room. Based upon that finding, it set the rent in the amount of the first rent agreed to by the parties following petitioner obtaining permanent resident status.

DHCR claims that petitioner's contention, that he did not receive the landlord's rent ledgers, is belied by the record which shows that they were provided to him on July 7, 2008 and that this argument is improperly raised at this time. DHCR also argues that the rent registration statements filed by the owner were not found to be fraudulent; nor is there any prohibition against filing a late registration and/or subsequently amending a registration.

### **Discussion**

An Article 78 proceeding is a special proceeding. It may be summarily determined upon the pleadings, papers, and admissions to the extent that no triable

Issues of fact are raised. CPLR § 409 [b]; CPLR §§ 7801, 7804 (h). Thus, much like a motion for summary judgment, the court should decide the issues raised on the papers presented and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial. CPLR § 7804 [h]; York v. McGuire 1984, 99 A.D.2d 1023 *aff'd* 63 N.Y.2d 760 (1984); Battaglia v. Schumer, 60 A.D.2d 759 (4<sup>th</sup> Dept 1977).

The applicable standard of review for a proceeding brought under Article 78 is whether the challenged administrative decision was: [1] made in violation of lawful procedure; [2] affected by an error of law; or [3] arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion. CPLR § 7803 (3). An agency abuses its exercise of discretion if its administrative orders lack a rational basis. “[T]he proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law.” Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester Co., 34 NY2d 222, 231 (1974); see also: Matter of Colton v. Berman, 21 NY2d 322, 329 (1967).

For the reasons that follow the court denies the petition.

It is black letter law that in determining an overcharge complaint, the DHCR may not examine any rental history occurring more than four year prior to the filing of a complaint. RSL §26-516; Zafra v. Pilkes, 245 AD2d 218 (1<sup>st</sup> dept, 1997); see also: Payne v. DHCR, 287 AD2d 415 (1<sup>st</sup> dept. 2001). The RA found that the apartment was “vacant” on the base date. That finding was not disturbed by the DHCR on the PAR. Petitioner claims that the rent ledgers submitted by the landlord, however, show that the apartment was tenanted on the base date.

The rent ledgers show that the apartment was tenanted only by transient occupants during the applicable look back period. There is no evidence that any occupant during the look back period was a permanent resident as that term is defined in the Rent Stabilization Code. RSC §2520.6(j). The DHCR claims that it treats transient occupation of a hotel room/apartment as the functional equivalent of a "vacant" on the base date, because such transient occupation temporarily exempts the apartment from regulation. See: Hatanaka v. Lynch, 304 AD2d 325 (1<sup>st</sup> dept. 2003). The DHCR's interpretation of its own statutes and regulations in this instance, which involves specialized knowledge and understanding of underlying operational practices, is neither arbitrary nor capricious and is upheld by the Court. Roberts v. Tishman Speyer Properties, LP, 13 NY3d 270 (2009). Under such circumstances, the legal rent is established by the amount of rent that is actually paid by a permanent tenant at the commencement of his/her occupancy. Payne v. DHCR, supra, Hatanka v. Lynch, supra.

The dispute about whether petitioner was actually provided with the landlord's rent ledger at the administrative level is a red herring, because the legal result would have been the same regardless.

Petitioner has not shown any reason why the DHCR should have been compelled to use the "default" formula for calculating the rent. The record on this petition shows that the landlord did not default before the DHCR and, therefore, it was neither arbitrary nor capricious for the DHCR to calculate base rent by another acceptable method. The default method of calculating rent is used when there is no reliable documentary rental history for the apartment. Cabrini Realty, LLC v. DHCR, 6 AD3d 280 (1<sup>st</sup> dept. 2004). At bar, the DHCR had the rent ledgers and other documentation supplied by the landlord, for

the applicable period, thereby allowing it to reach a conclusion that the apartment was inhabited only by transient residents.

Petitioner's claims that the registrations were fraudulent is not supported by any factual information in this record. Nothing the in the Rent Stabilization Law or RSC prohibits an owner from filing a late registration. Indeed, they implicit permit late filings since an overcharge may not be solely predicated upon a late filing of a registration statement. RSC §2528.4.

The DHCR, on the PAR, chose to resolve factual discrepancies in favor of the ALJ findings, rather than the information petitioner submitted to the RA. Contrary to petitioner's contention, there is no indication that the DHCR made this finding based upon the application of the doctrine of collateral estoppel. On the contrary, it made a specific credibility finding, weighing the conflicting testimony and concluding which was more reliable. The finding was based upon sworn testimony petitioner gave before the ALJ, albeit in a separate proceeding. In any event the date that petitioner became a permanent resident is irrelevant to any issue, because no overcharge was found, and no calculation needs to be made from the inception of his permanent residency or otherwise. The Court has reviewed petitioner's papers and finds no decision by a Judge of the Civil Court setting the rent at \$208 per month.

Petitioner's generalized claims of fraud and violations of Constitutional rights are not established in this record. His claims concerning other tenants are not reviewable in this proceeding and are otherwise unspecified. There is no cause of action for harassment in New York State and certainly no claim may be filed against an administrative agency for relief based on agency harassment. see Edelstein v. Farber, 27

AD3d 202 (1st Dept 2006).

**Cross-motion to dismiss additional petitions**

Respondent claims that it was served with multiple amended petitions. It argues that while one amendment is available as of right, the others should not be considered by the Court. Because of the manner in which petitioner filed his papers with the Court (see footnote #1) the court cannot distinguish the first amended petition from any subsequently served petition. Since the court finds that as whole, the collective petition lacks merit, the cross-motion is denied as moot.

**Conclusion**

in accordance herewith, it is hereby:

ORDERED and ADJUDGED that respondent's cross-motion is denied as moot, and it is further

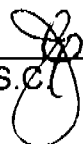
ORDERED and ADJUDGED that the petition, in all its forms, is denied in its entirety, and it is further

ORDERED and ADJUDGED that any requested relief not otherwise expressly addressed herein is denied, and it is further

ORDERED and ADJUDGED that this constitutes the decision, order and judgment of this Court.

Dated: New York, New York  
December 1, 2010

SO ORDERED:

J.G. 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 141B).