

**Arias v Pascal**

2010 NY Slip Op 33732(U)

June 21, 2010

Supreme Court, New York County

Docket Number: 114111/10

Judge: Saliann Scarpulla

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

PRESENT: SALIANN SCARPULLA

PART 19

Index Number : 114111/2010

ARIAS, WILFREDO

vs

PASCAL, WOODY

Sequence Number : 001

ARTICLE 78

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

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

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

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

The following papers, numbered 1 to \_\_\_\_\_ were read on 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

*Article 78 proceeding is decided in accordance with the accompanying memorandum decision.*

FILED

JUN 24 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/20/11

*Saliann Scarpulla*  
SALIANN SCARPULLA  
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: CIVIL TERM: PART 19

----- X  
WILFREDO ARIAS d/b/a WILFREDO REALTY INC.,

Petitioner,

Index No. 114111/10  
Submission Date: 3/9/2011

-against-

**DECISION AND ORDER**

WOODY PASCAL, as Acting Deputy Commissioner of  
NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL, and NEW YORK STATE  
DIVISION OF HOUSING AND COMMUNITY RENEWAL

Respondent.

----- X  
For Petitioner:  
Breier, Deutschmeister, Urban Law Group, PLLC  
156 Fifth Avenue, Suite 600  
New York, New York 10010

For Respondent Woody Pascal:  
New York State DHCR Counsel's Office.  
25 Beaver Street, Room 707  
New York, New York 10271

Papers considered in review of this petition:

- Notice of Petition..... 1
- Opp of Petition..... 2
- Mem. Of Law..... 3
- Reply Affirm..... 4

**FILED**

**JUN 24 2011**

HON. SALIANN SCARPULLA, J.:

NEW YORK  
COUNTY CLERK'S OFFICE

In this Article 78 proceeding, petitioner Wilfredo Arias ("Arias") seeks to vacate and annul an order of the New York State Division of Housing and Community Renewal ("DHCR").

Non-party Bolivar Valerio ("Valerio") moved into Arias' building on September 1, 1989. At that time, or sometime thereafter, Valerio installed a washing machine in the apartment. In December 2000, DHCR amended the Rent Stabilization Code ("RSC") to permit landlords to collect a surcharge from a tenant who has a washing machine, dryer or dishwasher. Under RSC §2522.9, landlords may only collect surcharges

prospectively. Additionally, RSC §2522.9 provides that a permissible surcharge would be specified in an "Operational Bulletin." In a March 2005 Operational Bulletin, DHCR announced that a surcharge of \$13.62 would be a permissible amount to change tenants with washing machines, dryers and/or dishwashers.

Arias alleges that within three months of the March 2005 Operational Bulletin, he began to levy the surcharge on Valerio. Before the DHCR, Valerio argued that Arias first charged him a number of years later, in August 2007. On April 20, 2009, Valerio filed a rent overcharge complaint with DHCR. On July 7, 2010, the Rent Administrator issued an Order Finding Rent Overcharge and stated that the tenant was overcharged \$570.94.

On July 29, 2010, Arias filed a Petition for Administrative Review ("PAR") requesting the reversal of the Rent Administrator's order on the basis that the March 2005 Operational Bulletin was a necessary precondition of the surcharge and that he first collected the surcharge promptly after the Operational Bulletin in March 2005. On September 7, 2010, DHCR denied the PAR on the grounds that the March 2005 Operational Bulletin was not a precondition to collection of the surcharge. DHCR also found that Arias was not entitled to collect a surcharge from Valerio, because Arias had "impliedly consented" to Valerio's use of the washing machine without charge for many years, which constituted a waiver.

On October 25, 2010, Arias brought this Article 78 petition, claiming that the DHCR order denying his PAR should be vacated because he first collected the surcharge within a reasonable time after the March 2005 Operational Bulletin. Arias also

challenges DHCR's finding of a waiver as arbitrary and capricious, because there was no mention of a waiver in the statute or Operational Bulletin.

In opposition, DHCR argues that the PAR denial was rational, not arbitrary and capricious, and is consistent with the facts and intent of the RSC. The DHCR further argues that Arias' failure to collect the surcharge for years after learning that the RSC had been amended to permit collection of the surcharge constitutes a valid waiver. Finally, DHCR argues that the issuance of the Operational Bulletin is not a precondition of collecting the surcharge and that one could collect the surcharge anytime since December of 2000.

### **Discussion**

Judicial review of administrative determinations is limited to the grounds invoked by the agency. *Matter of Aronsky v. Board of Education*, 75 N.Y.2d 997 (1990). A court must only determine if the administrative decision is supported by a rational basis and cannot substitute its own judgment for the agency's determination. *See Matter of Clancy-Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635, 636 (1<sup>st</sup> Dept., 1983). Here, the issue is whether DHCR's determination that the washing machine surcharge was waived was supported by a rational basis or was arbitrary and capricious. CPLR 7803(3).

According to RSC §2522.9, a landlord may levy a surcharge on a tenant who installs a washing machine, dishwasher or dryer. If the appliance is installed without the landlord's consent, the landlord may levy a surcharge when the installation comes to the

landlord's attention. RSC §2522.9. However, the surcharge can only be applied prospectively.

While, the statute does not expressly mention a waiver or that the surcharge needs to be levied within a reasonable time, the DHCR has the broad mandate of administering the rent regulatory system and the courts must defer to DHCR's interpretation and application of its laws, such as the RSC, so long as the interpretation is rational. *Matter of Gaines v. New York State Division of Housing & Community Renewal*, 90 N.Y.2d 545, 548-549 (1997); *In re Victoria Hicks v. New York State Division of Housing & Community Renewal*, 75 A.D.3d 127, 130 (1st Dept., 2010).

Here, the DHCR's interpretation of RSC §2522.9 is rational. Prior to 2000, a landlord renting to a rent-stabilized tenant who installed a washer/dryer/dishwasher had two options: (1) acquiesce in the appliance without charging any surcharge; or (2) move to evict the tenant. When the RSC was amended in 2000, the landlord was provided a third option: when the landlord learned of the appliance and wished to consent to its use, the landlord could now prospectively charge for the appliance. The amendment of RSC §2522.9 in 2000 however did not vitiate the landlord's right to evict in the event the tenant installed an unauthorized appliance; nor did it vitiate the landlord's prior acquiescence in the appliance and waiver of a surcharge.

Moreover, DHCR's determination that a landlord must determine to collect a surcharge within a reasonable time after learning of the existence of an unauthorized appliance is a reasonable interpretation of RSC §2522.9, in light of the statute's history and purpose. *Compare Michetti v. Potts*, 2003 NY Slip Op 50870U, \*9 (Civ. Ct. Kings

County, March 12, 2003). As the DHCR's interpretation is not irrational, the courts must defer to it. *Matter of Gaines v. New York State Division of Housing & Community Renewal*, 90 N.Y.2d 545, 548-549 (1997); *In re Victoria Hicks v. New York State Division of Housing & Community Renewal*, 75 A.D.3d 127, 130 (1st Dept., 2010).

Here, Arias conceded in front of the DHCR that he knew of Valerio's washing machine well before the amendment of the RSC in 2000, and had acquiesced in Valerio's use of it without surcharge. When the RSC was amended in 2000, Arias did not then seek to assess a surcharge, and the amendment of the RSC in and of itself did not vitiate Arias' acquiescence in Valerio's use of the washing machine without surcharge.

Moreover, it was not arbitrary and capricious for DHCR to determine that its promulgation of Operational Bulletin 2005-1 in 2005 was not a condition precedent to Arias' assessment of a surcharge for Valerio's machine. RSC §2522.9 was amended in 2000 to permit collection of the surcharge. Nothing in the statute prevented Arias from seeking to collect the surcharge until 2005 when Operational Bulletin 2005-1 was circulated. That Operational Bulletin simply illustrated a permissible surcharge amount and was not an implementing statute.

In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that the petition of Wilfredo Arias d/b/a Wilfredo Realty Inc. to vacate the decision of the New York State Division of Housing and Community Renewal on September 7, 2010 is denied and this Article 78 petition is dismissed.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York

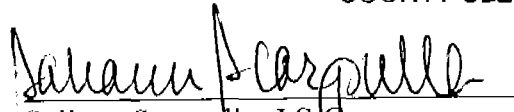
June 21, 2011

**FILED**

**JUN 24 2011**

ENTER:

NEW YORK  
COUNTY CLERK'S OFFICE

  
Saliann Scarpulla, J.S.C.