

**Matter of D'Alessandro v New York State Div. of  
Hous. & Community Renewal**

2010 NY Slip Op 34115(U)

August 4, 2010

Supreme Court, New York County

Docket Number: 115845-2009

Judge: Judith J. Gische

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X  
In the Matter of the Application of  
**Salvatore D'Alessandro and  
Andres Baltra,**  
Petitioners,

**DECISION/ ORDER**  
Index No.: 115845-2009  
Seq. No.: 001, 002

**PRESENT:**  
Hon. Judith J. Gische  
**J.S.C.**

*for a Judgment pursuant to Article 78 of  
the Civil Practice Laws and Rules*

***-against-***

The New York State Division of Housing and  
Community Renewal (DHCR),  
  
Respondents  
-----X

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>
<u>MOTION SEQ NO. 1</u>	
Verif Petition w/exhs .....	1
Verif Answer w/exhs .....	2
Original Records (Return) .....	3
Pet reply w/PK affirm .....	4
 <u>MOTION SEQ NO. 2</u>	
N/M by owner to intervene in & deny the petition w/AE affirm, exhs ..	5
Amended n/m by owner to intervene .....	6
Pets' opp w/PK affirm, exh .....	7
Owner's reply and further support w/AE affirm, FJR affid, exhs .....	8

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

**GISCHE J.:**

This petition is brought by Andres Baltra ("Baltra") and Salvatore D'Alessandro  
("D'Alessandro) pursuant to Article 78 of the CPLR. Petitioner seeks an order vacating

respondent's ("DHCR") order denying Baltra and D'Alessandro's petition for administrative review ("PAR"). Baltra is the tenant of record of apartment 2A located at 19 Barrow Street, New York, New York ("building"). The building is presently owned by a new owner ("Rudd" or "owner") who has brought a motion to intervene in this proceeding and to deny the petition.

The petitioners oppose the owner's motion. Although DHCR takes no position on whether the owner should be allowed to intervene, it also seeks the dismissal of this proceeding (CPLR §§ 3211; 7804 [f]).

Where a motion to dismiss is premised upon CPLR §7804 [f], only the petition and the exhibits attached thereto may be considered and all the allegations contained therein are deemed to be true (Green Harbour Homeowners' Ass'n, Inc. v. Town of Lake George Planning Board, 1 AD3d 744 [3<sup>rd</sup> Dept 2003]). Similarly, on a motion to dismiss brought pursuant to CPLR § 3211, the court is required to presume the truth of all allegations contained in the challenged pleadings and resolve all inferences which may reasonably flow therefrom in favor of the non-movant (Cron v. Hargro Fabrics, Inc., 91 NY2d 362 [1998]; Sanders v. Winship, 57 NY2d 391 [1982]). Thus, the court's inquiry is whether the petitioner has a cause of action, not whether it has stated one (Guggenheimer v. Ginzberg, 43 NY2d 268 [1977]; DePaoli v. Board of Educ., Somers Cent. School Dist., 92 AD2d 894 [2<sup>nd</sup> Dept 1983]).

The following facts are alleged:

#### **Underlying Facts**

Baltra is the tenant of apartment 2A, sometimes also referred to as apartment "2A/B" or "2AB." Regardless of how identified, it is unrefuted that the two apartments

are one and the same. Baltra has lived in the apartment since 1975, D'Alessandro is his domestic partner. Although they registered as domestic partners in New York in January 2003, they have lived together in this apartment since 1978 when D'Alessandro moved in.

Baltra was employed by the former owner of the building. Although the new owner contends the previous owner gave Baltra a preferential rent, Baltra contends he was tricked into accepting a lease in 1993 that set forth the preferential rent of \$750, but also identified the legal regulated rent as \$1,500 a month. Baltra has, over the years, paid rent increases based on the preferential rent and he now argues that the preferential rent is the legal rent for the apartment and the registered legal rent for the apartment was fabricated by the previous landlord. The new owner has eliminated the preferential rent and offered Baltra a lease based on the legal registered rent of \$2,185.89 plus applicable increases.

In August 2005, Baltra filed an overcharge claim with DHCR [Docket No. TH410015 R] ("2005 overcharge complaint"). In that complaint he alleged the rent of \$1,019.07 was an overcharge, although a preferential rent. Using the base date of August 1, 2001, however, DHCR denied the overcharge petition, determining there was no overcharge because the legal regulated rent was higher and the "rental events occurring more than four (4) years before the filing of the complaint are barred from being reviewed and are not subject to challenge . . ." This determination was made by DHCR in its decision dated November 16, 2005 and although Baltra filed a PAR, it was rejected by DHCR as defective and Baltra never re-filed the PAR. Thus, the 2005 overcharge complaint resolved that the preferential rent was not an overcharge and that

the legal regulated rent for the apartment was \$1,913.74 through November 2004.

In October 2006, before the building was sold to its current owner, the prior owner ("Teloca") offered Baltra a renewal lease for \$1,092.95 a month for two years or \$1,062.38 for one year. The lease indicates that this a "preferential rent," but the legal regulated rent for the apartment is \$2,124.76 or \$2,185.89 depending on whether it is a one or two year lease. Baltra accepted a two year lease.

In April 2008, before the lease expired, Baltra filed an overcharge complaint with DHCR [Docket No. WD 410176 R] ("2008 over charge complaint"). Shortly thereafter, in December 2008, D'Alessandro filed a separate complaint with DHCR [Docket No. WL 410013 RV] ("lease violation complaint") alleging that the Teloca and Rudd had each refused requests to add D'Alessandro's name to the lease although he and Baltra were registered domestic partners and both owners had accepted rent payments from D'Alessandro. In January 2009, the owner issued a renewal lease in Baltra's name, without the preferential rent. In February 2009 Baltra filed a supplemental complaint with DHCR, citing the owner's improper termination of the preferential rent. The overcharge and lease violation complaints consolidated by DHCR for consideration and decision.

After asking for and receiving additional documents from the parties about their claims and defenses, DHCR "terminated" the lease violation complaint on April 1, 2009 and then separately denied the 2008 overcharge complaint on April 24, 2009. Baltra and D'Alessandro filed a PAR on May 7, 2009 [Docket No. XE 410009 RT] challenging those decisions. On September 25, 2009, DHCR issued its Order and Opinion denying the PAR and affirming the rent administrator's decision. This petition ensued,

petitioners alleging that the denial of the PAR <sup>was</sup> arbitrary, capricious, without a rational basis and contrary to its own regulations. In particular Baltra argues that the 2008 rent overcharge claim only decided that the preferential rent is not in an illegal amount (i.e. not an overcharge) but DHCR did not decide or establish that the registered rent is the legal regulated rent for the apartment. Thus, Baltra argues this is still an open issue which DHCR should have decided. Baltra also claims that the preferential rent is the legal rent and that the legal regulated rent that was registered is without any basis in fact and should be "removed" from DHCR's records. Baltra contends further that the preferential rent cannot be unilaterally terminated by the owner and the owner must provide him with a renewal lease at the (lower) preferential rent.

In its Order denying the PAR, the commissioner gave several reasons why the rent administrator's decision was correct and affirmed. First, the base date for the 2008 overcharge claim was the April 25, 2004 (CPLR 213). However, since there had been a prior overcharge order [TH 410015 R] issued November 16, 2005, that established the legal rent at \$2,038.13 per month for the period December 1, 2004 - November 30, 2006, the issue was whether the proper guideline increases had been taken since that date. Once the DHCR was satisfied that the increases charged were correct and "[all] rent adjustments to the base date for the complainant have been lawful according to the *Rent Stabilization Law and Code*," DHCR determined that the legal regulated rent was \$2,038.13 as of November 30, 2006 and the preferential rent was \$1,019.07. DHCR also determined that the events prior to November 30, 2006 could not be reviewed or collaterally attacked because Baltra never properly filed an appeal of that determination.

In sustaining the rent administrator's decision denying the lease violation petition, the commissioner found that although Rent Stabilization Code ("RSC") § 2522.5 [g] requires that a landlord add a "spouse" to a lease if the apartment is his or her primary residence, there is no such statutory requirement for a domestic partner, even if the partnership is registered. The commissioner noted that the partner could, however, "at the appropriate time, establish his succession rights, if any, to the subject apartment under RSC section 2523.5 [b] [1] . . ." Furthermore, if the owner agreed to add D'Alessandro as a named tenant, the owner would be entitled to a regulatory rent increase because it was a change in tenancy akin to a vacancy.

### Discussion

#### *Motion to intervene*

At the outset, the court addresses whether the owner should be allowed to intervene in this proceeding on the grounds that it is a necessary party and upon that motion being granted, dismissal of this proceeding.

Under Article 78 the standard for intervention is liberal, requiring only that the proposed intervenor be "an interested person." CPLR § 1013, on the other hand, is more demanding, requiring that the proposed intervenor show that its claim or defense and the main action have a "common question of law or fact" (Bernstein v. Feiner, 43 A.D.3d 1161 [2<sup>nd</sup> Dept 2007]; County of Westchester v. Power Authority of State of N.Y., 188 A.D.2d 432 [1<sup>st</sup> Dept 1992]). The time requirements for challenging a PAR are set forth in RSC § 2530.1 and CPLR § 217 [1]; a petitioner has sixty (60) days to challenge the PAR order. This action was timely commenced, but the owner is not a named respondent. For the reasons that follow, the owner has established its right to

intervene in this action and that it is a necessary party, within the meaning of CPLR § 1001 (see, Nestor v. New York State Div. of Hous. & Community Renewal, 257 AD2d 395 [1<sup>st</sup> Dept 1999]; also, In re 37 West Realty Company v. New York City Loft Bd., 72 AD3d 406 [1<sup>st</sup> Dept 2010]).

Here, if the petition to annul DHCR's determination is granted, then the legal regulated rent the owner will be allowed to charge Baltra may differ from what the owner is now charging. Clearly, this will significantly affect the owner's rights (Solid Waste Services, Inc. v. NYC Dept Env Protection, 29 AD3d 318 [1<sup>st</sup> Dept 2006]; Nestor v. New York State Div. of Hous. & Community Renewal, *supra*; In re 37 West Realty Company v. New York City Loft Bd., *supra*). Therefore, this petition is defective because petitioner failed to name the owner as a respondent. Failure to join a necessary party is grounds alone for the dismissal of this proceeding (CPLR §§ 1003; 3211 [a][10]). Furthermore, given the very short statute of limitations to challenge DHCR's determination, the owner's absence in this proceeding is fatal for that reasons as well (Solid Waste Services, Inc. v. NYC Dept Env Protection, 29 AD3d 318 [1<sup>st</sup> Dept 2006]).

Petitioner offers several arguments why the owner is not a necessary party, and argues that it complied with RSC § 2530 which only requires service of the petition on DHCR within the 60 day time frame. Petitioner also claims that DHCR and the owner are united in interest and, therefore, the relation back doctrine (CPLR § 203 [c]) should be applied to rescue this action. Even were the court persuaded by any one or all of these arguments, this petition must be denied and this action dismissed for the reasons that follow.

*Dismissal*

Petitioner's argument, that this court should vacate the PAR or reverse the commissioner's determination, is based on the erroneous legal assumption that the rent administrator could and should have examined the legal regulated rent prior to December 1, 2006, the base date for the 2008 overcharge complaint, and evaluated whether it was correct.

Not only does the applicable statute explicitly provide that for purposes of determining a rent overcharge, the proper legal standard is deemed to be the rent charged on the base date (RSC § 2526.1 [a][3][I]), the base date in such cases is restricted to the preceding four (4) years before the filing of the overcharge complaint (RSC § 2520.6 [f]). This language is also codified in the CPLR and the Rent Stabilization Law (CPLR § 213-a; RSL § 26-516 [a][I]).

The nuance that Baltra asks the court to accept as another reason DHCR should have treated his overcharge claim differently is that in 2005 his challenge was to the preferential rent, not the legal regulated rent registered by Teloca with the DHCR. This distinction does not command a different result and is unavailing. In deciding whether there was a rent overcharge in 2005, DHCR examined the annual registrations from the base date in 2001 forward and determine that the preferential rent was less than the legal rent and the owner had taken the lawful increments it was entitled to take. Then, as now, DHCR was precluded from considering the rent history for apartment 2A prior to the four year period preceding the filing of the overcharge complaint (Rich v. East 10<sup>th</sup> St. Assoc. LLC, –AD3d–, 2010 Slip Op 06221 [1<sup>st</sup> Dept 2010]). Furthermore, DHCR appropriately took into consideration its November 2005 determination in

deciding Baltra's 2008 rent overcharge complaint (see, Matter of Citron v. Calogero, 59 AD3d 345 [1<sup>st</sup> Dept 2009]).

DHCR's determination, that the new owner can charge Baltra the legal regulated rent instead of the preferential rent the previous owner had agreed to accept, is in accordance with RSL § 26-511 [c] [14], as amended in 2003:

"Where the amount of rent charged to and paid by the tenant is less than the legal regulated rent for the housing accommodation, the amount of rent for such housing accommodation which may be charged upon renewal or upon vacancy thereof may, at the option of the owner, be based upon such previously established legal regulated rent, as adjusted by the most by the most recent applicable guidelines and any other increases . . ."

RSC § 2521. 2 [a] contains a similar provision:

"Where the amount of rent charged to and paid by the tenant is less than the legal regulated rent for the housing accommodation such rent shall be known as the "preferential rent." The amount of rent . . . which may be charged upon renewal or vacancy thereof may, at the option of the owner, be based upon either such preferential rent or an amount not more than the previously established legal regulated rent, as adjusted by the most recent applicable guidelines increases and other increases authorized by law."

RSC § 2521.2 [b] [1] defines the "previously established legal regulated rent" as the rent set forth in the vacancy or renewal lease pursuant to which the preferential rent is charged, or if not set forth in the lease, then the amount set forth in an annual rent registration served upon the tenant. DHCR's determination that these requirements were met has support in the record developed before it. There is nothing in the 1993 lease expressing an agreement by Teloca to accept a preferential rent from Baltra for the duration of his tenancy (Matter of Pastreich v New York State Div. of Hous. &

Community Renewal, 50 AD3d 384 [1<sup>st</sup> Dept 2008]; EQR 180 Riverside A, LLC v. Chu, 23 Misc.3d 126[A] [App Term 1<sup>st</sup> Dept 2009]). To the contrary, the first lease only recites what the legal rent is and that the tenant has a preferential rent: "Your monthly rent for the Apartment is \$1,500 Legal registered rent. Your preferential rent for this apartment is \$750 . . ." Later renewal leases contain similar language and clarify that the preferential lease is because "[the tenant] is an employee..." Another renewal lease states that the preferential rent is for this "lease and tenant only..." Thus, the new owner had the legal right to end the preferential rent when it notified Baltra of his lease renewal.

The commissioner succinctly set forth the reasons for affirming the rent administrator's decision that the owner is under no legal obligation to add D'Aessandro's name to the lease. RSC § 2522.5 [g] defines those individuals who can be added to the lease or any renewal thereof as an additional tenant. Among the persons who can be added to the lease are the tenant's "spouse, whether husband or wife." The statute does not include the term "domestic partnership" or require that persons in quasi marital relationships (i.e. "common law" spouses) be added. This is in contrast to RSC § 2523.5 [b] [1] which affords succession rights to domestic partners when the tenant of record has permanently vacated the premises. Furthermore, RSC § 2523.5 [b] [1] relies upon the far broader definitions of "family" provided in RSC §§ 2520.6 [o] [1] and [o] [2] of the code, which include persons who reside with the tenant and can prove emotional and financial commitment as well as interdependence with that person.

There is no legal support for petitioners' argument, that the owner "must" add

D'Alessandro as a named tenant because the petitioners have a registered domestic partnership (Zagrosik v. New York State Division of Housing and Community Renewal, 12 Misc.3d 1076 [Sup Ct, N.Y. Co. 2006]). RSC § 2522.5 [g], as written, cannot be interpreted as petitioners urge, and any change to the law is within the province of the legislature, not the judiciary (Hernandez v. Robles, 26 A.D.3d 98, 103 [1<sup>st</sup> Dept. 2005]; Raum v. Restaurant Assocs., 252 A.D.2d 369, 370 [1<sup>st</sup> Dept. 1998] *app dism* 92 N.Y.2d 946 [1998]).

Further claims by D'Alessandro, that Teloca and/or the current owner created a landlord/tenant relationship with him because either or both owners accepted rent payments from him is a new claim not previously raised before the DHCR. Although DHCR argues that "even if this argument is [now] considered, it is without merit . . ." an argument may not be raised for the first time before the courts in an article 78 proceeding and, therefore, this argument is not properly before this court (Peckham v. Calogero, 12 N.Y.3d 424 [2009]).

In reviewing an administrative agency's determination, the court must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious (Matter of Gilman v. New York State Div. of Hous. & Community Renewal, 99 N.Y.2d 144, 149 [2002]). An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts (Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 [1974]). If the determination is supported by a rational basis, then the determination must be sustained, even if the court would have made a different decision. Not only is DHCR's determination rationally based, it is also within the area of

its expertise (Peckham v. Calogero, supra). Therefore, DHCR's motion for the denial of the petition and the dismissal of this action is hereby granted.

**Conclusion**

In accordance with the foregoing,

*It is hereby*

**ORDERED** that the motion to intervene brought by Frederick J. Rudd, Abraham Djebeyan, et al., as Tenants in Common, is hereby granted; and it is further

**ORDERED, ADJUDGED AND DECLARED**, that this petition is denied and this proceeding is hereby dismissed.

Dated: New York, New York  
August 4, 2010

**ENTER:**

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

See original judgment filed on 8/24/10.  
7/9/10