

**Matter of Soufer Family LLC v New York State Div. of
Hous. & Community Renewal**

2011 NY Slip Op 30077(U)

January 12, 2011

Sup Ct, New York County

Docket Number: 105006-2010

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 : 105006/2010
SOUFER FAMILY LLC
VS.
NY STATE DIVISION OF HOUSING
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 201

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

UNFILED JUDGMENT

Cross-Motion: Yes No

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 1415).

Upon the foregoing papers, it is ordered that this motion

and petition are
MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION, ORDER +
JUDGMENT

JAN 12 2011

Dated: _____

HON. JUDITH J. GISCHE *JG* 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: IAS PART 10**

-----X
In the Matter of the Application of
SOUFER FAMILY LLC,

Petitioner,

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

-against-

**NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL,**

Respondent.
-----X

DECISION/ ORDER
Index No.: 105006-2010
Seq. No.: 001

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

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

Papers	Numbered
Petition w/exhs	1
Answer w/exhs	2
Return	3
Reply	4
Order (Gische 8/12/10)	5

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

GISCHE J.:

This petition is brought by the owner ("Soufer") of the residential building located at 59 East 79th Street, New York, New York ("the building"). Defendant ("DHCR") is the administrative agency responsible for the administration of the Rent Stabilization Law ("RSL"). Soufer seeks an order from this court vacating DHCR's order and opinion issued February 16, 2010, which denied Soufer's petition for administrative review

("PAR"). Thomas Willsen ("Willsen"), the tenant of record of apartment 5A was not named as a respondent in this summary proceeding nor was he served with the petition. However, since Willsen is a "necessary party" (CPLR § 1001; see, Nestor v. New York State Div. of Hous. & Community Renewal, 257 AD2d 395 [1st Dept 1999]; also, In re 37 West Realty Company v. New York City Loft Bd., 72 AD3d 406 [1st Dept 2010]), the court adjourned the petition to allow Soufer to serve the petition on the tenant so he could be heard (Order, Gische J., 8/12/10). Although DHCR has answered the petition, Willsen has not taken any position on the relief sought by Soufer. Therefore, the only party opposing the petition is DHCR. It claims the petition should be dismissed because the deputy commissioner acted within his powers and the denial of Soufer's PAR was in accordance with the record developed before DHCR.

Background and Arguments

Willsen, who has been the tenant of apartment 5A since 1990, filed an overcharge complaint with DHCR on February 15, 2008 (WB410093R) ("overcharge complaint") alleging that he had not had a lease in many years when suddenly in July 2007 he received a renewal lease from Soufer. The lease offered was for \$1,338.64 per month for one year or \$1,377.17 per month for two years. Willsen signed the lease and returned it to the owner. According to the lease, legal rent on September 30th preceding the commencement date of the renewal lease was \$1,284.07. In his overcharge complaint, Willsen stated that during the years he did not have a lease he continued to pay \$957 a month in rent which the petitioner collected and accepted. Once the lease became effective in August 2007, he began paying and the owner accepted \$1,050 a month in rent.

In deciding the overcharge complaint, DHCR used February 15, 2004 as the base date, a date four years prior to the filing of Willsen's complaint. DHCR determined that subsequent to February 2004 a rent overcharge had occurred (DHCR Order 4/23/09). According to DHCR, Willsen was a month to month tenant from February 15, 2004 through July 31, 2007 at a monthly rent of \$957. Applying guideline increases to the \$957 that he had been paying, the legal collectible rent for the period August 1, 2007 through July 31, 2009 was \$1,026.00. Thus, by giving Willsen a lease for \$1,377.17 a month and then accepting rent of \$1,050 a month, Soufer had overcharged Willsen.

DHCR determined the overcharge was wilful and awarded the tenant treble damages. The owner then filed a PAR which DHCR denied on February 16, 2010 ("PAR") and is the subject of this summary proceeding. Soufer contends the decision is arbitrary and capricious because DHCR deliberately refused to consider its prior order on a Fair Market Rent Appeal ("FMRA") which had set the initial legal rent for apartment 5A on August 1, 1990 at \$827.57. According to Soufer, adding the applicable guideline increase resulted in bringing the base rent to \$1,216.25 on February 2004, four years prior to Willsen's overcharge complaint. Thus, according to Soufer, there was no overcharge and Willsen had arrears.

In denying the owner's PAR, DHCR determined that: 1) the owner's rent ledgers did not establish that the legal regulated rent was \$1,216.25 on the base date, 2) the owner had charged and accepted rent of \$957 a month for over three years after the base date and not commenced court proceedings to enforce the payment of higher rent and; 3) the registrations filed with DHCR did not establish the base rent alleged

because they were self reported and reflected only the rent as of April 1st each year. DHCR also refused to consider its prior order ("FMRA order") in connection with the FMRA previously filed by Willsen (MA410078RT), stating that "the owner's arguments are based upon rental events which cannot be considered in this matter under the four-year rule."

In its FMRA order dated October 26, 2000, DHCR determined that, effective August 1, 1990, the initial legal regulated rent for apartment 5A was \$827.57 and that, after applying guideline increases, the last legal rent for the apartment for the period August 1, 1996 - July 31, 1998 was \$962.45. The owner had, however, been charging Willsen rent of \$1,000 a month for several years. DHCR ordered that Soufer "roll back" the rent to the lawful stabilized rent and refund or fully credit Willsen with the excess rent the owner had collected. The FMRA order also directed the owner to:

"reflect the findings and determinations made in this order on all future registration statements, including those for the current year if not already filed, citing this order as the basis for the change. Registrations already on file, however, should not be amended to reflect the findings and determinations made in this order. The owner is further directed to adjust subsequent rents to an amount no greater than determined by this order plus any lawful increases."

Soufer contends that DHCR's refusal to acknowledge its FMRA order is arbitrary and capricious because an owner is duty bound to abide by a rent reduction order in effect at the time of the overcharge complaint and therefore, not "rent history" within the meaning of the four-year rule set forth in CPLR § 213-a and RSL § 26-516 [a][ii]. For this argument, Soufer principally relies on the decision in Condo Units, LP v. DHCR (4

* 6]

AD3d 424 [2nd Dept 2004] *lv den* 5 NY3d 705 [2005]) in which the court decided that “where a duty imposed prior to a limitations period is a continuing one, the statute of limitations is not a defense to actions based on breaches of that duty occurring within the limitations period . . .” (Condo Units, LP v. DHCR, 4 AD3d at 425). Soufer maintains that DHCR’s FMRA order is not materially different than a rent reduction order because of its ongoing nature.

In its answer to the tenant’s complaint, Soufer acknowledged that it had only filed the annual rent registration for apartment 5A for the years 2000 and 2004 but not for the years 2001, 2002 or 2003. However, later, in response to DHCR’s notice that it would be imposing treble damages, the owner modified its claim to state that it had registered the rent “effective 4/1/1999.” Examining the 2000 rent registration provided by the petitioner shows that no registration was filed for apartment 5A in 2000, after the DHCR made its FMRA order. The 1999 rent that was registered for apartment 5A was \$1,081 a month.

Discussion

Since 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 [4th Dept 1977]).

In this proceeding, Soufer is challenging DHCR’s denial of its PAR as arbitrary

and capricious because DHCR refused to consider its FMRA order and limited its review of the rental history for apartment 5A to the four year period preceding the filing by Willsen. The petitioner is also challenging DHCR's determination the overcharge was willful.

The purpose of the four-year limitation or "look back" period is to "alleviate the burden on honest landlords to keep rent records indefinitely." (Thornton v. Baron, 5 NY3d 175, 181 [2005]). It is, however, well established law that DHCR should, in calculating any rent overcharge, honor rent reduction orders that, while issued prior to the four year limitations period, remained in effect during that period (Cintron v. Calogero, 15 NY3d 347 [2010]). Generally, a rent reduction is ordered until the landlord corrects conditions at the premises. Once that happens, the landlord can apply for a restoration in the rent (RSL § 26-514). Thus a rent reduction order places a continuing obligation on the landlord to reduce rent until the required services are restored (Cintron v. Calogero, *supra* [internal citations omitted]).

DHCR's October 2000 determination was not on an overcharge or services complaint, but on a FMRA. A FMRA is a procedural vehicle for a tenant to claim an overcharge in the initial stabilized rent for his or her apartment (RSC 2521.1; Gilman v. New York State Div. of Housing and Community Renewal, 99 N.Y.2d 144 [2002]). When DHCR resolves the FMRA, it sets the legal regulated rent for that apartment. Thus, a FMRA order and a rent reduction order address different situations in the landlord/tenant relations and they are not the same thing.

Even were the court persuaded that a FMRA order and an overcharge order are substantially the same, allowing DHCR to have considered its October 2000 FMRA,

petitioner would not have been entitled to a different result. It is unrefuted that Willsen was a month to month tenant for several years until he was offered a lease effective August 2007. His most recent lease was the lease offered by Soufer in July 2007 which prompted Willsen's overcharge complaint. Throughout the time that Willsen did not have a lease, he was charged and he paid \$957 a month in rent - - even after DHCR determined in 2000 that the legal rent for Willsen's apartment was higher (\$962.45). The \$962.45 rent was never registered with DHCR.

Although Soufer claims to have "proof" of the higher rent, this is in the form of its own rent ledgers and records. Thus, as DHCR correctly argues, these are self-serving documents and not reflective of the actual rent being paid. While Soufer's rent roll shows that it kept increasing the rent for apartment 5A each year by applying the guideline increases, those higher rents were never charged, collected, or paid by Willsen. No rent was registered for apartment 5A in 2000 nor did Willsen receive a lease until 2007. The offering of a lease in 2007 does not prove the amount set forth in the lease is the legal rent. Furthermore, under the Rent Stabilization Code and the Emergency Tenant Protection Regulations, where an owner fails to comply with the initial or annual rent registration requirements, there is a retroactive "rent freeze" until such time as the missing registration is filed (RSL § 26-517 [e]).

Further arguments by the owner, that Willsen had arrears because the lease was for rent greater than was actually charged and accepted by Soufer, are unhelpful to the owner. Assuming \$1,050 was intended to be a "preferential" rent, the legal collectible rent was lower (\$1,026.38) and, therefore, not preferential at all, but an overcharge.

In an Article 78 petition, a reviewing court is limited to determining whether the

agency determination is arbitrary and capricious or an abuse of discretion (Matter of Ansonia Residents Assn v. New York State Div of Housing and Community Renewal, 75 NY2d 206, 213 [1989]; Matter of Barklee Realty Co. v. New York State Div of Housing and Community Renewal, 159 AD2d 416 [1st Dept In the Matter of Pell v. Board of Educ. of Union Free School Dist., 34 NY2d 222, 230-231 [1974]). Thus, the judicial reversal or annulment of the administrative order, etc., is only warranted if it is not supported by substantial evidence and was arbitrary, capricious and an abuse of discretion. A determination is arbitrary and capricious if it is untenable as a matter of law. However, if the determination is rationally based, judicial review is narrow, and the court must uphold the determination (In the Matter of Pell v. Board of Educ. of Union Free School Dist., 34 NY2d at 231).

The reason DHCR is permitted to look beyond the four-year limitation period is to motivate owners of regulated housing to provide required services and maintain the housing stock (see, Cintron v. Caolgero, *supra*). That salutary goal is not served by any of the arguments raised by the petitioner. It was the owner's responsibility to register the initial legal rent after the FMRA was resolved. Soufer did not do so. Thus, petitioner cannot get the benefit of that higher rent. DHCR's determination that the owner's arguments are based on rental events which could not be considered under the four-year rule is rationally based upon substantial evidence in the record and will not be disturbed.

To the extent that petitioner is also challenging the imposition of treble damages, the petition is denied. DHCR notified petitioner that it proposed to find the overcharge was wilful and Soufer was given the opportunity to present evidence that it was not.

DHCR found the evidence Soufer provided was insufficient to rebut the presumption of wilfulness. In this petition, Soufer has failed to meet its burden of showing that it established before the DHCR that its overcharge of rent was not willful and that DHCR's decision to impose such damages was not substantiated by the record (Graham Court Owners Corp. v. Division of Housing and Community Renewal, 71 A.D.3d 515 [1st Dept 2010]). Thus, DHCR's determination to impose treble damages is rationally based upon the information in the administrative record and is not arbitrary or capricious.

Conclusion


In accordance with the foregoing,

It is hereby,

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

Dated: New York, New York
 January 12, 2011

E N T E R:



Hon. Judith J. Gische, JSC