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

PRESENT: CYNTHIA S. KERN J.S.C. Justice PART 52

Index Number : 402728/2010
STRUJAN, ELENA
VS.
N.Y.S.D.H.C.R.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 402728/10
MOTION DATE
MOTION SEQ. NO. 01
MOTION CAL. NO.

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 is decided in accordance with the annexed decision.

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).

Dated: 2/14/11

CYNTHIA S. KERN J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☒ SETTLE ORDER/ JUDG.

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 52

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In the Matter of the Application of
ELENA STRUJAN,

Petitioner,

Index No. 402728/2010

DECISION/JUDGMENT

-against-

DIVISION OF HOUSING AND
COMMUNITY RENEWAL,

Respondent.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	
Answering Affidavits to Cross-Motion.....	
Replying Affidavits.....	3
Exhibits.....	4

Petitioner commenced this Article 78 proceeding to challenge the determination of respondent New York State Division of Housing and Community Renewal ("DHCR") denying her Petition for Administrative Review ("PAR") to review the termination of the proceeding evaluating her Application For a Rent Reduction Based Upon Decreased Services(s). Respondent DHCR cross-moved for dismissal on the grounds that petitioner's claims are barred by res judicata and that her petition fails to state a cause of action. For the reasons set forth

below, the petition is hereby dismissed.

The relevant facts are as follows. Petitioner resided at a rent stabilized apartment at 1413 York Avenue. On April 29, 2009, petitioner filed an Application For a Rent Reduction Based Upon Decreased Service(s) with DHCR based on her complaint that the stove in her apartment had been replaced three times since 2006, causing high levels of carbon monoxide in her apartment, and that she had not had a working stove since July 2008. On June 18, 2009, the owner responded and submitted a decision by the New York City Civil Court, Housing Part, Glencord Building Corp. and Giustizia Agressivo, LLC v Strujan, Index No. L&T 90925/2008, which awarded the owner a judgment of $17,966.20 for rent due through February 2009. The Court's decision also addressed the issue with the stove. The Court found that a test on January 14, 2009 showed that the gas connection to the stove was restored and carbon monoxide levels were within acceptable limits. The decision noted that the owner had given petitioner a $1000 rent credit in consideration of the problems with the stove and awarded petitioner an additional 20% abatement for the stove for sixty days out of the total period from November 2006 through February 2009.

Petitioner responded on January 9, 2010. In her response, petitioner claimed that she had lived in a hotel from February 2009 to June 25, 2009 because of these issues and finally completely abandoned the apartment on June 24, 2009. Nevertheless, on January 29, 2010, DHCR mailed petitioner a notice of inspection to take place on February 17, 2010. Petitioner was not present in the apartment and the inspector was not able to gain access to conduct the inspection. The inspection report stated that petitioner had called the inspector and stated that she had been evicted from the apartment six months earlier.

On February 19, 2010, the DHCR Rent Administrator issued an order terminating the proceeding. Petitioner filed a PAR appealing the administrative order and arguing that she was forced to leave her apartment due to the effects of the living conditions on her health and was not able to provide the inspector with access because she had left the apartment seven months earlier. The owner submitted a response stating that petitioner was evicted from the apartment on June 23, 2009 and again included the housing court decision as well as a copy of the decision of the Appellate Term, First Department upholding the housing court's determination. On July 29, 2010, DHCR Deputy Commissioner Leslie Torres issued an Order and Opinion denying the PAR. The Order and Opinion stated that Rent Administrator properly terminated the proceeding based on the record showing that petitioner failed to allow access to the apartment to investigate her claims on February 17, 2010. The Order and Opinion also noted that the issues with the stove and alleged toxic gases in the apartment were addressed by the above-referenced New York Civil Court decision, which afforded petitioner with appropriate relief for these problems notwithstanding the results of her DHCR proceeding.

As an initial matter, the instant petition is moot because the effective date for any reduction in rent for a rent stabilized tenant filing a request for a rent reduction would be the first day of the month following DHCR's service of the complaint of the owner. Petitioner's request was served on the owner on June 8, 2009, meaning that the effective date for any reduction would be July 1, 2009. However, it is undisputed that petitioner was no longer living in the apartment in July 2009. According to the owner, she was evicted on June 23, 2009 and according to petitioner, she abandoned the apartment on June 24, 2009. Regardless of which account the court accepts, because petitioner was no longer living in the apartment on July 1,

2009, an application to reduce her rent effective that date would be moot.

Moreover, the instant Article 78 petition is barred by res judicata. Pursuant to the doctrine of res judicata, "a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter." *In re Hunter*, 4 N.Y.3d 260, 269 (2005). This bar applies not only to claims that were actually litigated "but also to claims that could have been raised in the prior litigation." *Id.* Specifically, "[o]nce a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy." *Fifty CPW Tenants Corp. v Epstein*, 16 A.D.3d 292 (1st Dept 2005) (citations omitted). The issues involving the problems with the stove and alleged toxic gases, which form the basis of the instant petition, were fully litigated in front of the Housing Court and upheld by the Appellate Term. As a result, petitioner may not litigate them again before the court now.

Furthermore, even if the petition was not barred by res judicata, the court finds that the hearing officer's decision to deny petitioner's PAR was made on a rational basis. "The law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); *see 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)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a

particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell,* 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, the hearing officer's decision to deny petitioner's PAR was neither arbitrary nor capricious. As stated above, Deputy Commissioner Torres made her determination on the grounds that petitioner had failed to provide access to a DHCR inspector to investigate her claims and that her allegations about unsafe conditions were already adjudicated by the housing court. These grounds constitute a rational basis for her determination.

It is therefore ADJUDGED that the petition is denied and the DHCR's cross-motion is granted. The proceeding is dismissed.

Dated: 2/14/11

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.