

**Follin v New York State Div. of Hous. & Community
Renewal**

2011 NY Slip Op 30431(U)

February 24, 2011

Supreme Court, New York County

Docket Number: 110207/10

Judge: Carol E. Huff

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

PRESENT: CAROL E. HUFF
Justice

PART 32

HERDI KOLLIN
- v -
NY STATE DHER

INDEX NO. 110207/10
MOTION DATE _____
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

motion is decided in accordance
with accompanying memorandum 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: FEB 24 2011

CAROL E. HUFF

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 32

-----X

HEIDI FOLLIN and INDREK KOSTABI, : Index No. 110207/10

both individually and as representatives of any rent :
stabilized tenant in the City of New York who would :
have cause to seek equitable or hardship relief if afforded :
the opportunity before The New York State Division :
of Housing and Community Renewal, :

UNFILED JUDGMENT

Petitioner This judgment has not been entered by the County Clerk
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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

- against -

THE NEW YORK STATE DIVISION OF HOUSING :
AND COMMUNITY RENEWAL, :

Respondent. :

-----X

CAROL E. HUFF, J.:

Motions with sequence numbers 001 and 002 are consolidated for disposition.

In this "hybrid" Article 78 proceeding and action for declaratory judgment, petitioners seek to overturn the order of respondent New York State Division of Housing and Community Renewal (DHCR) denying petitioner's appeal of a ruling ordering high income rent deregulation of petitioners' apartment. DHCR cross moves to dismiss the petition.

The Article 78 proceeding will be addressed first. The undisputed facts are as follows.

Petitioners were tenants of rent-stabilized premises located at 166 Second Avenue, Apt. 41, New York, New York. On July 1, 2008, their landlord filed a petition for high income rent deregulation with DHCR. Pursuant to New York City Admin. Code § 26-504.3 (Rent Stabilization Law [RSL]), rent-stabilized apartments that have a legal regulated rent of at least

\$2,000 per month are eligible for deregulation if the non-corporate occupants' combined incomes exceeded \$175,000 for each of the two years preceding the petition for deregulation. RSL § 26-504.3.

On May 6, 2009, petitioners filed information to verify their income with the Department of Taxation and Finance (DTF). On March 16, 2010, DHCR issued an "Order of Deregulation Based on a Determination and Match by the Department of Taxation and Finance," finding that petitioners' income in both 2006 and 2007 exceeded \$175,000. On April 21, 2010, petitioners filed a Petition for Administrative Review (PAR). They conceded that their income exceeded the threshold amount for the two years at issue, but argued that, since then, "because of the recession, the tenants have suffered financial reverses" and had income of less than \$50,000 in 2009. The Order and Opinion denying the PAR, dated June 3, 2010, is the subject of this proceeding.

Petitioners contend that DHCR is obligated to take equitable factors into account in rent deregulation cases, pursuant to Rent Stabilization Code (9 NYCRR) § 2522.7:

Consideration of equities. In issuing any order adjusting or establishing any legal regulated rent . . . the DHCR shall take into consideration all factors bearing upon the equities involved, subject to the general limitation that such adjustment, establishment or determination can be put into effect with due regard for protecting tenants and the public interest against unreasonably high rent increases inconsistent with the purposes of the RSL, for preventing imposition upon the industry of any industry-wide schedule of rents or minimum rents, and for preserving the regulated rental housing stock.

This provision, however, is addressed at the "adjusting or establishing" of a legal regulated rent, not at the elimination of rent regulation because of high income. The cases cited by petitioner are inapposite because they involve such "adjusting or establishing." In 1G Second

Generation Partners LP v DHCR, 34 AD3d 379 (1st Dept 2006), the issue was whether DHCR had authority to forgive rent arrears when it determined in a fair market rent appeal that the regulated rent was correct. The First Department suggested that hardship might be a relevant inquiry in the context of “establishing” a regulated rent, not high income deregulation. Also in Cabrini Realty v New York State Div. of Hous. and Community Renewal, 6 AD3d 379, 380 (1st Dept 2004), the issue concerned the adjusting or establishing of a regulated rent.

In any event, with respect to high income deregulation, the statutory procedure for high-income rent deregulation provides a specific formula for determining the circumstances under which deregulation must occur. See Classic Realty LLC v New York State Div. of Hous. and Community Renewal, 2 NY3d 142 (2004): “[T]he luxury decontrol procedures [RSL § 26-504.3] contemplate a single verification, the result of which is binding on all parties unless it can be shown that DTF made an error.”

Petitioners have no ground to challenge the clear legislative directive in RSL § 26-504.3, that the income for the two years preceding the deregulation petition be the determining factor. Petitioners make no equitable claims for those two years. Their equitable claims are centered on 2009, two years after the relevant measuring period.

Accordingly, petitioners’ Article 78 petition is denied because DHCR’s determination was not irrational, arbitrary and capricious, or an abuse of discretion. See Concourse Rehabilitation and Nursing Ctr., Inc. v Novello, 80 AD3d 507 (1st Dept 2011).

As for petitioners’ attempt to bring a combined Article 78 proceeding and declaratory judgment action, “A declaratory judgment action is inappropriate to challenge an administrative act ‘when other remedies, including an Article 78 proceeding, are available.’” Jackson v

Biderman, citing Greystone Mgt. Corp. v Conciliation and Appeals Board of the City of New York, 94AD2d 614, 616 (1st Dept 1983), affd. 62 NY2d 763 (1984).

Accordingly, it is

ADJUDGED that the petition is denied, the cross motion is granted, and the proceeding is dismissed.

Dated:

FEB 24 2011


CAROL E. HUFF
J.S.C.

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