

<b>Matter of Romanoff v New York State Div. of Hous. &amp; Community Renewal</b>
2011 NY Slip Op 31342(U)
May 19, 2011
Supreme Court, New York County
Docket Number: 109708/2010
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Saliann Scarpulla  
Justice

PART 19

Index Number : 109708/2010  
**ROMANOFF, DARRY**  
vs.  
**NEW YORK STATE D.H.C.R.**  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
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 determined in accordance with the accompanying decision/order. This constitutes the decision and order of the Court.

**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: 5/19/11

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

-----X  
IN THE MATTER OF THE APPLICATION OF  
DARRYL ROMANOFF, SHIRLEY HYMAN, AND  
MR. AND MRS. ARTHUR MARCUS,

Petitioners,

- against -

NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL,

Respondent.

- and -

BELNORD REALTY ASSOCIATES, L.P.,

Respondent-Intervenor.

-----X  
For Petitioners:  
Kucker & Bruh, LLP  
747 Third Avenue  
New York, NY 10017

For Respondent:  
Gary R. Connor  
25 Beaver Street, Room 707  
New York, NY 10004

For Respondent-Intervenor:  
Belkin Burden Wenig & Goldman, LLP  
270 Madison Avenue  
New York, NY 10016

Papers considered in review of this petition:

- Notice of Petition and Petition . . . . . 1
- Verified Answers . . . . . 2, 3
- Reply . . . . . 4

HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioners Darryl Romanoff, Shirley Hyman and Mr. & Mrs. Arthur Marcus (“tenants”) seek to annul the determination of respondent New

Index No.: 109708/2010

Submission Date: 2/2/2011

**DECISION AND ORDER**

**UNFILED JUDGMENT**

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York State Division of Housing and Community Renewal (“DHCR”) issued on May 25, 2010, which granted respondent-intervenor Belnord Realty Associates, L.P.’s (“Belnord”) petition for administrative review.

The tenants reside in rent controlled apartments located at 219-225 West 86<sup>th</sup> Street (“subject premises”), premises owned by Belnord. On June 13, 2005, Belnord filed an application seeking maximum base rent (“MBR”) increases for the subject premises for the 2006/2007 cycle. In order to be eligible for these rent increases, Belnord was required to establish that at least six months prior to the effective date of such increases all rent impairing violations and at least 80% of all non-rent impairing violations that were recorded against the property one year prior to such effective date were cleared, corrected or abated.

A DHCR rent administrator granted the application in an order dated May 25, 2006, which was affirmed on July 28, 2006. However, in August 2006, one of the tenants filed a petition for administrative review, and in an order dated July 1, 2007, DHCR granted the petition, finding that Belnord had failed to cure certain violations at the subject premises.

On May 31, 2007, Belnord re-filed an application seeking MBR increases for the subject premises for the 2006/2007 cycle. Belnord submitted additional evidence indicating that the violations were cured. The application was denied on October 30, 2008 and Belnord filed a petition for administrative review and a challenge to the denial,

alleging that it corrected any violations that had previously prevented it from obtaining approval of its application. On January 16, 2009, Belnord's challenge was denied.

On February 20, 2009, Belnord filed another petition for administrative review, alleging that it submitted probative evidence that the violations had been cleared.<sup>1</sup> On May 25, 2010, DHCR granted the petition and revoked the order of the rent administrator, finding that the owner was entitled to 2006/2007 MBR increases effective December 1, 2007 because Belnord submitting probative evidence establishing that it met the violation removal requirements.

The tenants now commence this proceeding, filing a petition seeking to annul DHCR's May 25, 2010 determination. Specifically, they argue that (1) they were denied their due process rights in that DHCR failed to provide them with certain evidence it used in reaching its determination; and (2) DHCR's finding was arbitrary and capricious in that Belnord did not establish that the violations were cured in a timely manner.

DHCR answers the petition, maintaining that its finding was rationally based on the evidence presented and should be affirmed. Belnord answers the petition, alleging that it submitted sufficient evidence that it timely corrected the violations so as to entitle it to the MBR rent increases.

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<sup>1</sup> It is undisputed that during the relevant period, there were no rent impairing violations and five non-rent impairing violations on record.

## Discussion

It is well settled that judicial review of an administrative determination pursuant to CPLR Article 78 is limited to a review of the record before the agency and the question of whether its determination was arbitrary or capricious and has a rational basis in the record. See CPLR §7803(3); *Gilman v. N.Y. State Div. of Hous. & Community Renewal*, 99 N.Y.2d 144 (2002); *Nestor v. New York State Div. of Hous. & Community Renewal*, 257 A.D.2d 395 (1<sup>st</sup> Dept. 1999). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken ‘without sound basis in reason and without regard to the facts.’” *Matter of Rohan v. New York City Housing Authority*, 2009 NY Slip Op 30177U, at \*6-\*7 (Sup. Ct. N.Y. Co. Jan. 23, 2009) (quoting *Matter of Pell v. Board of Education*, 23 N.Y.2d 222, 231 (1974)). An agency has great discretion in deciding which evidence to accept and how much weight should be accorded particular documents or testimonial statements, and its determination in that respect is subject only to the legal requirement that the administrative finding be rationally based. See *Kogan v. Popolizio*, 141 A.D.2d 339 (1<sup>st</sup> Dept. 1988).

Pursuant to NYC Administrative Code 26-405(h)(6) and 9 NYCRR 2202.3(h), in order for an owner to be eligible for bianual MBR increases for rent controlled apartments, the owner must establish that at least six months prior to the effective date of such increases all rent impairing violations and at least 80% of all non-rent impairing violations that were recorded against the property one year prior to such effective date

have been cleared, corrected or abated. Here, it was within the broad authority of DHCR to determine whether the proof offered was sufficient to demonstrate that Belnord had timely corrected all rent-impairing violations and 80% of all other violations. See generally *Belnord Realty Associates, L.P. v. N.Y. State Div. of Hous. & Community Renewal*, 39 A.D.3d 226 (1<sup>st</sup> Dept. 2007); *Brusco W. 78th St. Assocs. v. N.Y. State Div. of Hous. & Community Renewal*, 281 A.D.2d 165 (1<sup>st</sup> Dept. 2001). Based upon a review of the record, the Court finds that DHCR's determination that Belnord submitted sufficient proof of its timely correction of the violations was not arbitrary or capricious. Further, the tenants have not established that their due process rights were violated.

In accordance with the foregoing it is

ORDERED and ADJUDGED that petitioners Darryl Romanoff, Shirley Hyman and Mr. & Mrs. Arthur Marcus' petition is denied and the proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

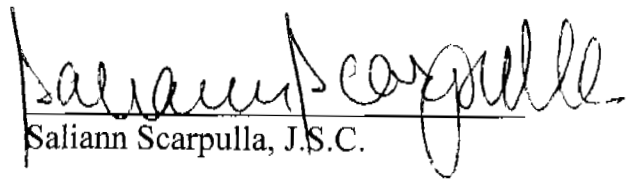
This constitutes the decision and order of the court.

Dated: New York, New York  
 May 19, 2011

ENTER:

**UNFILED JUDGMENT**

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 Saliann Scarpulla, J.S.C.