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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

In the Matter of the Application of
ALAN SCHIFFREN,

Petitioner,

For Judgment Pursuant To Article 78 Of The Civil Practice Law and Rules

-against-

BRIAN LAWLOR, as Acting Commissioner of the **NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,** and **98 RIVERSIDE DRIVE, LLC,**

Respondents.

INDEX NO. 102166/2010

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers were read on this motion by petitioner for an order pursuant to Article 78 Proceeding of the Civil Practice Law and Rules reversing, annulling, and setting aside a determination by the New York State Division of Housing and Community Renewal.

	PAPERS NUMBERED
Notice of Motion / Petition — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo) /Cross Motion to Dismiss	2, 3, 4
Reply Affidavits — Exhibits (Memo)	5

Cross-Motion: ☒ Yes ☐ No

In this Article 78 petition, the petitioner, whose income exceeded $175,000 for two consecutive years, challenges an order by defendant agency New York State Division of Housing and Community Renewal ("DHCR") that affirmed the luxury deregulation of his rent stabilized apartment. The petitioner's landlord, 98 Riverside Drive, LLC ("Riverside"), has interposed an answer opposing the petition, and DHCR has made a motion to dismiss for failure to state a cause of action and upon documentary evidence.

On or about September 6, 1989, petitioner and his daughter, Lisa Schiffren (collectively the "Schiffrens"), entered into a rent stabilized lease for an apartment at 98 Riverside Drive, a residence building now owned by Riverside. The Schiffrens entered into consecutive rent stabilized lease renewals running through September 30, 2009.

In 1995, J-51 tax benefits in the form of a tax abatement were granted with respect to the 98 Riverside Drive building. No tax exemption was granted. The last of the abatement credits were applied in the tax year 2005-06.

On June 26, 2008, Riverside filed a petition for high income rent deregulation (the "Deregulation Petition"), alleging that the Schiffrens' legal monthly rent exceeded $2000. On January 27, 2009, the Rent Administrator sent to petitioner a Notice to Tenant, which advised that a deregulation petition had been filed, together with an Answer to Petition form requesting information regarding the Schiffrens' household income. Petitioner completed the Answer, and stated therein that his income in each of the preceding two years exceeded $175,000. Based upon that admission, the Rent Administrator issued an Order of Deregulation Based on Tenant Admission, dated April 6, 2009 (the "Deregulation Order").

On or about May 11, 2009, petitioner filed a Petition for Administrative Review (the "PAR") regarding the Deregulation Order. The petition argued that the Deregulation Order was inappropriate because petitioner's apartment building had received J-51 benefits and because petitioner's income only exceeded the statutory deregulation threshold because of mandatory IRA disbursements. DHCR denied the petition and affirmed the Deregulation Order in an Order dated January 5, 2010 (the "PAR Order").

Petitioner now brings the instant proceeding to reverse and set aside the PAR Order. Petitioner's primary argument is that the DHCR did not consider that Petitioner's apartment

could not be deregulated because Riverside was still receiving J-51 benefits[1], as 1) the DHCR only considered the J-51 abatement, and not the J-51 exemption, which ran for 14 years expiring in 2009; and 2) Riverside was also still receiving J-51 abatement benefits, as the abatement benefits only expire after 20 years. Petitioner also argues that 3) there is no "Income Certification Form" ("ICF") in the record; 4) the DHCR did not provide copies of any submissions by Riverside in response to the PAR; 5) Lisa Schiffren was not joined as a necessary party to the Deregulation Petition; 6) Rent Stabilization Law 26-504.1 provides that luxury deregulation does not apply to housing that is rent stabilized due to J-51 benefits, and because the statute does not state an expiration, the subject apartment's rent stabilization status is permanent and will continue until the subject apartment becomes vacant; 7) Riverside never provided notice in the lease renewal that J-51 benefits had expired and that the apartment could become subject to deregulation; 8) the DHCR erred in concluding that Petitioner's income exceeded $175,000 in each of the two relevant years, as the income was high for those two years only because of mandatory IRA distributions; and 9) DHCR was arbitrary in rendering the PAR Order contrary to a public notice from DHCR (the "Public Notice") stating that "DHCR must await the final resolution of [*Roberts v Tishman Speyer Properties, L.P.*] by the New York Courts for direction on how it should handle all cases and matters before it concerning New York buildings that have benefited from J-51 tax abatements" (Petition Exhibit H).

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[1]Administrative Code §§ 11-243 and 11-244, which were formerly codified as § J-51, provide incentives for landlords to invest in improvements to substandard dwellings. When a landlord makes a qualifying improvement, the building may receive J-51 benefits in the form of tax exemptions or tax abatements, or both. A J-51 tax exemption temporarily (for 14 years) reduces the assessed value of the building, for real property tax purposes, by the amount by which the assessed value increases as a result of the improvement. This has the result of negating the tax increase to the landlord as a result of improving the property. A J-51 tax abatement, by contrast, is directly subtracted from property taxes owed on the improved building. In each tax year, eight and one third percent (8 1/3 %) of the abatement amount is applied to the property tax payable on the building, resulting in the abatement being exhausted in 12 years. However, if applying the full eight and one third percent in a given year would result in a tax refund, then only an amount sufficient to set off the tax due for that year is applied. Abatements can therefore last longer than 12 years, but any abatement credit not applied within 20 years is forfeited.

Standard - Article 78 Proceeding

The standard of review in an Article 78 proceeding is whether the respondent agency's "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]; *see also Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Furthermore, the Court of Appeals has held "that the interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable" (*Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]; *see also Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of West Vil. Assocs. v New York State Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000] [a rational and reasonable determination of the DHCR within its area of expertise is entitled to deference by the courts]). As such, a court "may not overturn an agency's decision merely because it would have reached a contrary conclusion" (*Matter of Sullivan County Harness Racing Assn., Inc. v Glasser*, 30 NY2d 269, 278 [1972]; *see also Matter of Verbalis v New York State Div. of Hous. & Community Renewal*, 1 AD3d 101 [1st Dept 2003]).

Discussion

A review of the records submitted by petitioner reveals that its first argument, that respondent Riverside was receiving J-51 exemption benefits at the time of the Deregulation Petition, is meritless. The same records petitioner points to as evidence that the subject building received a 14 year exemption also clearly state the amount of the exemption as "$0" (Petitioner's Exhibit "E"). Petitioner's second argument, that Riverside was receiving J-51

abatement benefits at time of the Deregulation Petition, is incoherent. The abatement was applied pursuant to statute, and exhausted in 2005-06, years before the Deregulation Petition. There is no rational argument to support petitioner's position that Riverside was receiving J-51 benefits at the relevant time. The DHCR was obviously correct in its determination that Riverside was no longer receiving J-51 benefits, which obviates the need for this Court to apply the standard of review under CPLR 7803.

Regarding the petitioner's third argument (that no Income Certification Form is in the record) and fifth argument (that Lisa Schiffren was not joined as a necessary party to the Deregulation Petition), these arguments were not raised by petitioner in the PAR. Because it failed to raise these issues before the DHCR, petitioner cannot now allege that, by failing to consider the same issues, the PAR Order issued by the DHCR "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]).

Regarding petitioner's fourth argument (that a copy of Riverside's opposition to the PAR was never provided to petitioner), petitioner cites no statutory support for the supposed requirement that forms the basis of that argument. To the extent that such a requirement exists, it is created by regulation or policy promulgated by the DHCR, and so this Court must give deference to the DHCR's PAR Order with respect to those issues (*see Gaines*, 90 NY2d at 548-549).

The Court also notes that the PAR Order does not refer to the opposition petitioner presumes to have been made. Being that the DHCR did not base the PAR Order on Riverside's opposition, which may or may not exist, any failure by respondents to provide a copy thereof to petitioner is not a legitimate basis for an Article 78 petition.

Petitioner's sixth argument (that the rent stabilization status resulting from J-51 benefits is permanent until the subject apartment becomes vacant) and seventh argument (that

Riverside never provided notice in the lease renewal that J-51 benefits had expired) misinterpret the final clause of RSL § 26-504(c), the statutory provision granting rent stabilization status to buildings receiving J-51 benefits. That provision reads:

> [Rent stabilization] shall apply to: c. Dwelling units in a building or structure receiving [J-51 benefits]. Upon the expiration or termination for any reason of the [J-51 benefits] any such dwelling unit shall be subject to [rent stabilization] until the occurrence of the first vacancy of such unit after such benefits are no longer being received or if each lease and renewal thereof for such unit for the tenant in residence at the time of the expiration of the tax benefit period has included a notice in at least twelve point type informing such tenant that the unit shall become subject to deregulation upon the expiration of such tax benefit period and states the approximate date on which such tax benefit period is scheduled to expire, such dwelling unit shall be deregulated as of the end of the tax benefit period; provided, however, that if such dwelling unit would have been subject to [rent stabilization] in the absence of this subdivision, such dwelling unit shall, upon the expiration of such benefits, continue to be subject to [rent stabilization] to the same extent and in the same manner as if this subdivision had never applied thereto.

Petitioner interprets the latter clause, that following the semicolon, to be "applicable [only] to tenants who were stabilized prior to the receipt of J-51 benefits, *and who did receive the notice*" (Reply affirmation at 5 [emphasis in original]). This interpretation is obviously incorrect. If the legislature had intended to limit the final clause of the subdivision to tenants who had received notice, then limitation language would appear adjacent to the words "as if this subdivision had never applied thereto." The plain meaning of the statement "as if this subdivision had never applied thereto" is that all conditions of the subdivision, including the notice requirement, are inapplicable.

Further, the notice is required to state "that the unit shall become subject to deregulation upon the expiration of such tax benefit period" (RSL § 26-504[c]), which statement would be false if the unit was rent stabilized prior to the receipt of J-51 benefits. Therefore, the tenants of a unit that was rent stabilized prior to the receipt of J-51 benefits cannot receive notice pursuant to RSL § 26-504(c). Adopting petitioner's interpretation would thus render the latter clause of

the statute meaningless.

To support petitioner's interpretation of the statute, petitioner cites *Roberts v Tishman Speyer Properties, L.P.* (13 NY3d 270 [2009]). *Roberts*, however, holds that a rent stabilized unit that is located in a building receiving J-51 benefits, and would be subject to luxury deregulation but for such J-51 benefits, cannot be deregulated until such benefits expire. *Roberts* does not in any way support petitioner's interpretation of RSL § 26-504(c). The Court therefore finds that, pursuant to RSL § 26-504(c), petitioner's apartment unit was not granted permanent rent stabilized status until vacancy, and that the apartment unit is subject to luxury deregulation even though no § 26-504(c) notice appeared in the petitioner's lease renewal.

Petitioner's eighth argument (that the mandatory IRA disbursements should not have been considered in determining whether petitioner had an income greater than $175,000 in each of the two years prior to the Deregulation Petition) fails because the PAR Order does not meet the arbitrary or capricious standard on the issue of including mandatory IRA disbursements in determining whether petitioner's income exceeded $175,000 in each of the two relevant years. Contrary to petitioner's contention (*see* Verified Petition at 18), DHCR did not fail to consider petitioner's argument regarding the mandatory IRA disbursements. In addressing whether the mandatory disbursements should be considered in determining petitioner's income, the PAR Order cites to the relevant statute, which defines annual income as "the federal adjusted gross income as reported on the New York state income tax return" (RSL § 26-504.3[a]). DHCR correctly noted in the PAR Order that no exceptions were provided for mandatory IRA disbursements or for any other reason. In all the papers and the record pertaining to this petition, petitioner cites no support, instead contending that including the mandatory disbursements is "unfair" (PAR Affirmation at 4). The PAR Order, which relied upon the plain interpretation of the relevant statute, was therefore not arbitrary or capricious as to whether petitioner met the luxury deregulation income threshold.

Petitioner's ninth argument (the PAR Order was arbitrary because it was made contrary to DHCR policy as set forth in the Public Notice) similarly fails to meet the appropriate arbitrary and capricious standard pursuant to CPLR § 7803. As discussed hereinabove, the *Roberts* case dealt only with situations in which the apartment unit's owner was still receiving J-51 benefits. The Public Notice did not concern instances where J-51 benefits were exhausted, and postponing the PAR Order until after the resolution of the *Roberts* decision would have served no purpose. In any case, this is a matter of internal DHCR policy, for which DHCR is entitled to deference.

The petitioner's remaining arguments have been considered and found unavailing. DHCR's cross-motion is rendered moot.

For these reasons and upon the foregoing papers, it is therefore,

ORDERED that the Article 78 petition brought by Alan Schiffren is hereby denied; and it is further

ORDERED that the cross-motion to dismiss by New York State Division of Housing and Community Renewal is denied as moot.

This constitutes the Decision and Order of the Court.

Dated: May 10, 2011

Enter:

Paul Wooten, J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**