[* 1]

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

PRESENT: SALIANN SCARPULLA PART _____

Justice

George Sun

-v-

Brian E. Lawlor

INDEX NO. 115206/2010

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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 Article 78 petition is decided in accordance with the 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).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 6/7/11

Saliann Scarpulla J.S.C.

SALIANN SCARPULLA

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

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In the Matter of the Application of
GEORGE SUN,

Petitioner,

For a Judgment Pursuant to Article 78 of the
Civil Practice Laws and Rules,

-against-

Index No. 115206/2010

BRIAN E. LAWLOR as COMMISSIONER of the
New York State Division of Housing and Community Renewal,

Respondent,

-and-

210 W 94 LLC,

Respondent-Landlord.

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Saliann Scarpulla, J.:

In this CPLR Article 78 proceeding, petitioner George Sun applies for an order vacating and reversing, as arbitrary and capricious, the determination by respondent Brian E. Lawlor as Commissioner of the New York State Division of Housing and Community Renewal (DHCR) denying petitioner's petition for administrative review (PAR), and affirming the DHCR rent administrator's denial of petitioner's rent overcharge complaint, and remitting the matter to DHCR for calculation of the rent overcharge award. DHCR cross-moves, pursuant to CPLR 7804 (f), for an order remitting this proceeding to DHCR for further consideration regarding, among other things, the propriety of the method used by DHCR to determine whether an overcharge existed, and issuance of a new determination.

Pursuant to written lease dated February 1, 1996, petitioner rented apartment 5B, a rent-stabilized apartment, in the building located at 210 West 94th Street in Manhattan, for a one-year term at an initial monthly rent of $986.21. In April 2001, respondent-landlord 210 W 94 LLC (landlord) purchased the building from the prior owner. Petitioner alleges that, throughout his tenancy, landlord's predecessor and landlord offered him renewal leases that increased the monthly rent for the apartment, and that, by 2009, the monthly rent had been increased to $1,632.11.

Petitioner alleges that, in 2009, he became aware that DHCR had issued a building-wide rent reduction order on June 17, 1994 under DHCR docket number HC-430169-B (the 1994 order), prior to the commencement of his tenancy in 1996. By the 1994 order, DHCR reduced the monthly rent for rent stabilized apartments in the building by $60, effective November 1, 1993, and prohibited landlord from increasing the monthly rent collected from rent-stabilized tenants, until landlord filed an application to restore, and DHCR issued an order restoring the rent. In the order, apartment 5B is incorrectly listed as rent controlled, rather than rent stabilized.

In August 2003, landlord filed an application to restore the rent for the seven rent-stabilized apartments listed in the 1994 order, based on the restoration of building services. By two orders issued on April 15, 2004, DHCR granted the application as to five apartments, and denied it as to the remaining two apartments.

In July 2004, landlord filed a second rent restoration application for the two apartments. By order issued August 26, 2004, DHCR found that "conditions cited in the order reducing rent [the 1994 order] have been corrected," and, on that ground, granted the second application.

Apartment 5B was not specifically included in any of the landlord's applications or

DHCR orders.

On February 3, 2005, petitioner filed a rent overcharge complaint under DHCR docket number TB-410036-R (the 2005 overcharge proceeding), alleging that landlord had charged improper rent increases based on certain major capital improvements (MCIs). By order issued June 3, 2005, the DHCR rent administrator calculated the legal regulated rent for apartment 5B, found that a rent overcharge had occurred from the February 3, 2001 base date through January 31, 2007, and directed landlord to roll back the rent to the legal regulated rent, and to make a full refund or credit to petitioner equal to the overcharge.

On July 20, 2007, petitioner filed a second overcharge complaint under DHCR docket number VG-410114-R (the 2007 overcharge proceeding), alleging that landlord had improperly charged more than the permitted amount for certain MCIs previously granted by DHCR. By order issued September 5, 2008, the DHCR rent administrator calculated the legal regulated rent for apartment 5B from June 2, 2005 through January 31, 2009, found that an overcharge had occurred, and directed landlord to refund to petitioner the sum of $3,094.14, including excess rent and treble damages. By order issued January 21, 2009, DHCR granted the landlord's PAR in part, and modified the underlying order, and affirmed the overcharge finding and removed the treble damages penalty, and directed landlord to refund the amount of $1,047.43 to petitioner.

Petitioner did not appeal the September 5, 2008 or the January 21, 2009 orders issued in the 2007 overcharge proceeding.

Subsequently, on October 20, 2009 and again on December 16, 2009, petitioner filed a rent overcharge complaint with DHCR under docket number XF-410113-R (the 2009 overcharge proceeding), alleging that landlord had willfully failed to comply with the 1994 order with

respect to apartment 5B, and that landlord had never applied for restoration of the rent for apartment 5B. Petitioner contends that, therefore, the rent for apartment 5B should have been frozen at the November 1, 2003 rate, and remained frozen through 2009.

By order issued on July 2, 2010, the DHCR rent administrator calculated the lawful rent from June 1, 2008 through January 31, 2011, and denied the overcharge claim on the ground that all rent adjustments subsequent to the base date were lawful. In the order, the rent administrator did not expressly consider the effect, if any, of the 1994 order on the lawful regulated rent for apartment 5B.

On August 1, 2010, petitioner filed a PAR challenging the decision, contending that DHCR incorrectly applied the statutory four-year limitations period to preclude the consideration of prior DHCR rent reduction orders, that DHCR was not prohibited from examining records in existence prior to the base date, and that DHCR had a duty to enforce the 1994 order.

By opinion and order issued September 22, 2010 in the 2009 overcharge proceeding, DHCR denied petitioner's PAR and affirmed the rent administrator's order, finding that:

> Consideration of the orders mentioned by the tenant in his PAR is not barred by the four[-]year rule but by the fact that an order was issued on September 5, 2008 in Docket No. VG410114R (affirmed on appeal except for treble damages . . .) which determined the legal regulated rent for the subject apartment through 5/31/08 and was not appealed by the tenant. That order is a final determination of the legal regulated rents through May 2008 and any challenges to rents prior to that date may not be considered

(DHCR Sept. 22, 2010 Order, at 1).

Petitioner then commenced this proceeding, and now seeks to vacate the September 22, 2010 order as arbitrary, capricious, and an abuse of discretion on the grounds that DHCR

improperly ignored landlord's fraud in willfully failing and refusing to comply with the 1994 order and in intentionally failing to notify petitioner of the 1994 order, that DHCR improperly ignored the effect of the 1994 order, and that DHCR improperly found that the September 5, 2008 order was final and binding.

In opposition to the petition, DHCR cross-moves for an order remitting this proceeding back to DHCR for further consideration and issuance of a new determination, in light of the decision in *Matter of Cintron v Calogero* (15 NY3d 347 [2010]), recently issued by the Court of Appeals.

In opposition to the cross motion, landlord contends that the DHCR's order was rational, that DHCR was not required to consider the 1994 order in calculating the lawful regulated rent because the 1994 order had been superseded by the September 5, 2008 order, that the holding in *Matter of Cintron v Calogero* (*id.*) is not applicable here, and that no grounds for remitting this proceeding to DHCR exist.

Petitioner takes no position on DHCR's request that the proceeding be remitted, but urges that his petition be granted.

DHCR's cross motion to remit is denied. While "DHCR, on application of either party, or on its own initiative, . . . may issue a superseding order modifying or revoking any order issued by it under this or any previous Code where the DHCR finds that such order was the result of illegality, irregularity in vital matters or fraud" (Rent Stabilization Code [RSC] § 2527.8; *Matter of Porter v DHCR*, 51 AD3d 417, 418 [1st Dept], *lv denied* 11 NY3d 703 [2008]), here, DHCR has failed to demonstrate a basis upon which to remit this proceeding.

A motion by an administrative agency for further consideration of its own order will be

denied, absent a showing of sufficient cause.

> Once an administrative agency has decided a matter, based upon a proper factual showing and the application of its own regulations and precedent, the parties to that matter are entitled to have the determination treated as final. Although a remand may be appropriate where the agency has made the type of substantial error that constitutes an irregularity in vital matters, no remand is appropriate where the agency is merely seeking a second chance to reach a different determination on the merits

(*Matter of Peckham v Calogero*, 54 AD3d 27, 28 [1st Dept 2008], *affd* 12 NY3d 424 [2009] [internal quotation marks and citations omitted]; *see Matter of Pantelidis v New York City Bd. of Stds. & Appeals*, 43 AD3d 314, 315 [1st Dept 2007], *affd* 10 NY3d 846 [2008]).

DHCR seeks to review its September 22, 2010 order in light of the recent holding in *Matter of Cintron v Calogero* (15 NY3d 347). In that case, the Court of Appeals held that DHCR "rent reduction orders impose a continuing obligation on a landlord and, if still in effect during the four-year period [preceding the filing of the rent overcharge complaint], are in fact part of the rental history which DHCR must consider" (*id.* at 356).

In the September 22, 2010 order appealed here by petitioner, DHCR noted petitioner's argument that the rent administrator incorrectly applied the four-year rule to preclude consideration of prior DHCR orders, and determined that, in fact, consideration of the 1994 order cited by petitioner "is not barred by the four[-]year rule," but is, instead, barred by the DHCR's rent administrator's rent calculation order issued on September 5, 2008 in the 2007 overcharge proceeding commenced by petitioner (DHCR Sept. 22, 2010 Order, at 1). Thus, the recent holding in *Matter of Cintron v Calogero* (15 NY3d 347) has no application to the underlying order, and, therefore, provides no ground upon which to remit the proceeding to the agency.

The petition is denied. It is well established that judicial review pursuant to CPLR Article 78 is limited to determining whether the administrative agency determination is supported in law, and is rationally based in the administrative record; if so, the determination should not be disturbed (*see Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]; *see* CPLR 7803 [3]). "Courts are not permitted to substitute their judgment for that of the administrative agency where said decision is rationally based on the record" (*Matter of Royal Realty Co. v DHCR*, 161 AD2d 404, 405 [1st Dept 1990]). "The issue is not the truth or accuracy of the proof upon which the [agency] based its determination. It was, rather, the reasonableness of the [agency's] conclusions" (*Matter of Mid-State Mgt. Corp. v New York City Conciliation & Appeals Bd.*, 112 AD2d 72, 76 [1st Dept], *affd* 66 NY2d 1032 [1985]). Here, DHCR's determination is neither arbitrary nor capricious, and is supported by a rational basis in the record.

DHCR correctly held that the September 5, 2008 order issued in petitioner's 2007 overcharge proceeding, in which DHCR calculated the rent for apartment 5B, is binding on petitioner. A party who wishes to challenge an order issued by a DHCR rent administrator must do so by filing a PAR within 35 days after the date that DHCR issues the order (*Matter of LeHavre Tenants Assn., Inc. v DHCR*, 176 AD2d 877, 878 [2d Dept 1991]; RSC § 2529.2). An administrative agency order that is not challenged in a timely manner becomes final and binding upon the parties and the agency (*Bernstein v Birch Wathen School*, 71 AD2d 129, 132 [1st Dept 1979], *affd* 51 NY2d 982 [1980] ["It is settled law that the principles of *res judicata* and collateral estoppel are applicable to the determinations of quasi-judicial administrative agencies and that such determinations, when final, become conclusive and binding on the courts"]).

Petitioner admittedly did not, in the 2007 overcharge proceeding, timely challenge the September 5, 2008 order, nor did he challenge the January 21, 2009 order granting landlord's PAR in part and amending the prior order and removing the penalty of treble damages.

Petitioner's contention that the DHCR internal limitations period for appeal of the rent administrator's order was tolled until petitioner learned of the 1994 order is without merit. DHCR "has broad power to construe and interpret its own rules and regulations" (*Matter of LeHavre Tenants Assn., Inc. v DHCR*, 176 AD2d at 878, citing *Matter of Bernstein v Toia*, 43 NY2d 437, 448 [1977]). "DHCR has interpreted the relevant regulations to provide that there is no discretion to excuse the failure of a party who is seeking administrative review of an order issued by a district rent administrator to timely file a petition for administrative review (PAR) of the order sought to be reviewed" (*id.*, citing RSC § 2529.2). Courts have held that DHCR's construction of RSC § 2529.2 is not irrational, and that, therefore, it will be upheld (*see e.g. id.*).

Further, petitioner's allegations of fraud do not justify the annulling of the September 22, 2010 order. The record is devoid of any evidence suggesting that landlord intentionally hid the 1994 order from petitioner. The court notes that, in the 1994 order, DHCR does not reference apartment 5B, the apartment later rented by petitioner. Therefore, landlord could not have known that the order might govern the lawful regulated rental amount for that apartment.

Petitioner does not deny landlord's allegations that landlord refunded to him the overcharge amounts, in full compliance with the DHCR orders issued in the 2005 and 2007 overcharge proceedings. Clearly, then, petitioner received the full benefit of those orders, and will not now be heard to complain.

Thus, while it appears that, in the 2005 and 2007 overcharge proceedings, DHCR did not

consider the effect of the 1994 order on the lawful regulated rent for petitioner's apartment, that failure cannot be collaterally attacked in the instant proceeding. A party who fails to timely challenge an agency determination may not later attack the determination collaterally (*Matter of Lewis Tree Serv., Inc. v Fire Dept. of City of N.Y.*, 66 NY2d 667, 669 [1985]; *Matter of Joseph v Roldan*, 289 AD2d 243, 244 [2d Dept 2001]; *City of New York v East N.Y. Wrecking Corp.*, 161 AD2d 489, 489 [1st Dept 1990]).

Accordingly, it is

ADJUDGED that the petition is denied, and the proceeding is dismissed; and it is further

ORDERED that the cross motion is denied.

This constitutes the decision, order and judgment of the court.

Dated: June 7, 2011

ENTER:

J.S.C.

SALIANN SCARPULLA

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).