

Matter of Ruskin Assoc., LLC v State of New York

2013 NY Slip Op 31601(U)

July 18, 2013

Supreme Court, New York County

Docket Number: 100287/11

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: EDMEAD
Justice

PART 35

Index Number : 100287/2011
RUSKIN ASSOCIATES, LLC
vs.
NYS DIVISION OF HOUSING
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

Motion sequences 001, 002 and 003 are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that, in motion sequence no. 001, seeing annulment of the final order of the New York City Department of Housing Preservation and Development, office of Rent and Housing Maintenance, Rent control division issued on April 29, 1983 under Protest Docket No: CPLA 33,312 9DRO Docket No. 2AD 39733) is denied; and it is further

ORDERED that, in motion sequence no. 002, petitioner's motion to consolidate is denied; and it is further

ORDERED that in motion sequence no. 002, the cross motion and motion of respondents The State of New York, Division of Housing and Community Renewal and Sylvain Gilary to dismiss the petition are granted; and it is further

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: _____, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE


ORDERED that motion sequence 003 is denied; and sit is further

ADJUDGED that the petition is denied and the proceeding is dismissed. And it is further

ORDERED that counsel for respondent NYS Division of Housing and Community Renewal shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all counsel.

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 7.18.2013 ENTER:  J.S.C.

HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

-----X
In the Matter of the Application of
RUSKIN ASSOCIATES, LLC,

Petitioner,

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

-against-

Index No. 100287/11

THE STATE OF NEW YORK, DIVISION OF
HOUSING AND COMMUNITY RENEWAL and
SYLVAIN GILARY

Respondents.

CAROL R. EDMEAD:

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 sequence nos. 001, 002, and 003 are consolidated for disposition. Motion sequence no. 001 consists of the petition, described below. In motion sequence no. 002, respondent Sylvain Gilary and respondent The State of New York, Division of Housing and Community Renewal (DHCR), respectively, move and cross-move to dismiss the petition. In motion sequence no. 003, petitioner moves to consolidate this proceeding with a prior proceeding, *Ruskin Assoc., LLC v State of N.Y. Div. of Hous. & Community Renewal*, 2009 WL 8599403 (June 10, 2009), *affd* 77 AD3d 401 (1st Dept 2010) (Ruskin 1).

In *Ruskin 1*, the petitioner sought an order directing DHCR to determine, or to dismiss, Gilary's overcharge complaint, filed with the New York City Conciliation and Appeals Board (CAB), a predecessor agency of DHCR, in 1979. This court denied the petition and dismissed the action on the ground that it was time-

barred. The Appellate Division affirmed. Accordingly, there remains nothing of Action 1 that can be consolidated with the instant action, and motion sequence no. 003 is being denied.

In the instant action, petitioner seeks an order annulling the April 29, 1983 order (Order) of the New York City Department of Housing Preservation and Urban Development (HPD), Office of Rent and Housing Maintenance, Rent Control Division (ORC), which determined that Gilary's apartment (Apartment) 1-A, in the building (Building) located at 34 East 39th Street in Manhattan was rent controlled, and affirmed the district rent director's order fixing the maximum collectible rent for the Apartment at \$326.54. HPD is also a predecessor agency of DHCR. Petitioner is the current owner of the Building. Gilary has been the tenant of the Apartment since 1976.

Petitioner contends that ORC lacked jurisdiction to issue the Order, because the CAB, as the agency charged with administering the Rent Stabilization Law (RSL), was the only agency that had jurisdiction to determine whether a rental unit was subject to the RSL, and that, instead of making that determination, CAB merely ascertained that the then-owner had not registered with the Rent Stabilization Association (RSA) and, accordingly, forwarded Gilary's overcharge complaint to ORC. The Rent Stabilization Law (RSL) in effect, at that time, provides that:

"[d]welling units covered by this law ... shall be deemed to be housing accommodations subject to control under the provisions of Title Y of the administrative code [the Local Emergency Housing Control Act] ... unless the owner of such unit is a member in good standing of any association registered with the housing and development

administration pursuant to YY51-6.0.

Local Laws of City of New York No. 16 § YY51-4.0. Petitioner argues that, while ORC administered the rent control law, CAB administered the RSL. However, petitioner cites neither any statutory provision, nor any decision by a court, placing the issue of whether a dwelling unit is subject to the RSL within the powers of CAB. For the reasons that follow, the petition is being dismissed.

When CAB forwarded Gilary's complaint to ORC, by letter dated November 1, 1979, stating that "[a] check of the records indicates that this premises [sic] is not enrolled with the [RSA]," and copied both Gilary and the then-owner (see petition, exhibit D), the then-owner could have commenced an Article 78 proceeding challenging the legality of that referral, absent a finding by the CAB that the Apartment was subject to rent stabilization. However, the then-landlord did nothing until after the district rent director issued his order on April 1, 1981. It then filed a protest with ORC, and, far from contesting ORC's jurisdiction, it actively litigated before that body the issue of whether the Apartment was subject to rent stabilization. See petition, exhibit F. After the Order was issued, the then-owner did not challenge it in a court proceeding, either on the merits or on the basis of ORC's alleged lack of jurisdiction.

It is established that a party can challenge the subject matter jurisdiction of a court or administrative body "at any stage of the action," including on appeal (*Matter of Fry v Village of*

Tarreytown, 89 NY2d 714, 718 (1997) (citation and internal quotation marks omitted); see also *Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 NY3d 12, 17 (2008); *Editorial Photocolor Archives v Granger Collection*, 61 NY2d 517, 523 (1984). Here no such challenge to ORC's jurisdiction was made.

It is also established that, in certain circumstances, a party may challenge the jurisdiction of a court, or an administrative body, in a subsequent, collateral action. See e.g. *Abiele Contr. v New York City School Constr. Auth.*, 91 NY2d 1, 8-9 (1997), citing *Matter of Foy v Schechter*, 1 NY2d 604, 612 (1956). However, to the extent that petitioner seeks to overturn the Order, so as to litigate before DHCR the issue of whether the Apartment is, or ever was, subject to rent stabilization, and thus properly rent-controlled for failure of the then-owner to register with the RSA (see petitioner's reply mem. of law at 4, n 2), petitioner is barred by the res judicata effect of *Ruskin 1*, which held that any attempt to require DHCR to revisit the Order is time-barred. Moreover, petitioner would be collaterally estopped from relitigating the issue of whether the Building contained six or more apartments, because petitioner's predecessor-in-interest litigated that exact issue before ORC and lost. *Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 (1999); *Matter of Moore v Evans*, 95 AD3d 579 (1st Dept 2012). Petitioner does not contend that the then-owner did not have "a full and fair opportunity to contest" a finding that the Apartment was subject to rent stabilization, and therefore properly placed under rent control,

the very issue that petitioner seeks to relitigate before DHCR. *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 (1979).

The petition may also be barred by *res judicata*, inasmuch as petitioner's predecessor-in-interest could have challenged ORC's jurisdiction to decide that issue, either in the proceeding before ORC, or in a subsequent judicial proceeding challenging ORC's jurisdiction to issue the Order. See *Walentas v Johnes*, 126 AD2d 417, 420-421 (1st Dept 1987), quoting *Statter v Statter*, 2 NY3d 668, 672 (1957). The general rule is that, where a court's determination that it has subject matter jurisdiction over an action is a legal conclusion, rather than a litigated factual finding, a claim that the court lacked jurisdiction may be raised in a collateral action. *Friedman v State of New York*, 24 NY2d 528, 536 (1969). In *Nuernberger v State of New York* (41 NY2d 111, 116 [1976]), however, the Court noted that, in some circumstances, "a court's erroneous determination that it has 'subject mater jurisdiction' is subject to the doctrine of *res judicata*, and, hence, is not vulnerable to collateral attack." This court need not decide this issue (or the issue of whether the petition is, at bottom, a challenge to the correctness of CAB's referral to ORC, rather than a challenge to ORC's jurisdiction, in which case it would be barred by the four-month statute of limitations set forth in CPLR 217), because, as discussed below, the petition fails on the merits.

The CAB, which was established by the RSA, was created "to receive and act upon complaints from tenants and upon appeals from

owners claiming hardship under the levels for fair rent increases under this law." RSL § YY51-6.0 (b) (3). It also had jurisdiction to rule on issues pertaining to membership in the RSA (*Matter of Luba Realty v Joy*, 88 AD2d 864 [1st Dept 1982]) and, prior to the enactment of the Omnibus Housing Act, L 1983, ch 403, over primary residence disputes concerning apartments subject to rent stabilization. *Elwick Ltd. v Howard*, 111 AD2d 73 (1st Dept), *affd* 65 NY2d 1006 (1985). However, "the primary power to interpret and construe the [Rent Stabilization Code] and the law rests initially with the HDA [the Housing and Development Administration later, HPD] and, ultimately, with the courts," and "in any conflict of interpretation between HDA and CAB, the rulings of HDA take precedence and are controlling." *Berfond v Hoffman*, 65 Misc 2d 506, 509-510 (App Term, 1st Dept 1970), *affd* 36 AD2d 1022 (1st Dept 1971). CAB was not given jurisdiction to determine which dwelling units were subject to the RSL, a determination within the competence of HDA, subject to judicial review. See *Matter of Krueger v New York City Conciliation & Appeals Bd.*, 77 AD2d 517 (1st Dept 1980). In an earlier stage of *Krueger*, the judge who had presided over a summary non-payment proceeding ordered HDA, not CAB, to inspect the premises, and, upon HDA's determination that the building contained six apartments, dismissed the proceeding because the owner was not a member of the RSA. In recognition of its limited jurisdiction, CAB routinely forwarded tenant complaints to HDA, as it did here, after ascertaining that the owner was not a member of the RSA. See *Krueger* at 517; *Gottlieb v Mirabal*, 123

AD2d 574 (1st Dept 1986) (ORC determined that a building was part of a horizontal multiple dwelling, and, hence, subject to rent stabilization). Here, CAB properly found that the prior owner was not a member of the RSA and forwarded to HDA the issue of whether the Apartment was subject to rent stabilization. HDA properly found that it was, and that, therefore, because the owner was not a member of the RSA, the Apartment was governed by rent control.

Accordingly, it is hereby

ORDERED that, in motion sequence no. 001, seeing annulment of the final order of the New York City Department of Housing Preservation and Development, office of Rent and Housing Maintenance, Rent control division issued on April 29, 1983 under Protest Docket No: CPLA 33,312 9DRO Docket No. 2AD 39733) is denied; and it is further

ORDERED that, in motion sequence no. 002, petitioner's motion to consolidate is denied; and it is further

ORDERED that in motion sequence no. 002, the cross motion and motion of respondents The State of New York, Division of Housing and Community Renewal and Sylvain Gilary to dismiss the petition are granted; and it is further


ORDERED that motion sequence 003 is denied; and sit is further
ADJUDGED that the petition is denied and the proceeding is
dismissed.

Dated: July 18, 2013

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).

ENTER:



J.S.C.