

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

2013 NY Slip Op 31677(U)

July 24, 2013

Supreme Court, New York County

Docket Number: 100468/13

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 100468/2013

NAGLE, JOEL

vs

NYS DIVISION OF HOUSING

Sequence Number : 001

ARTICLE 78

PART _____

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

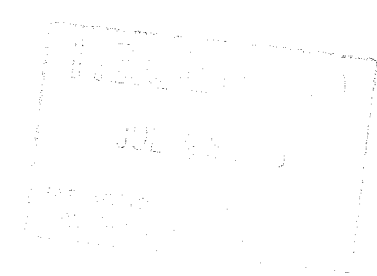
is decided in accordance with the annexed decision.

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

FILED

JUL 26 2013

COUNTY CLERK'S OFFICE
NEW YORK



Dated: 7/24/13

CR, 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----x
In the Matter of the Application of

JOEL NAGLE,

Petitioner,

Index No. 100468/13

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

FILED

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL,

JUL 26 2013

Respondent.

COUNTY CLERK'S OFFICE
NEW YORK

-----x
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Joel Nagle brings the instant proceeding pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”) seeking to challenge respondent New York State Division of Housing and Community Renewal’s (the “DHCR”) Order of Deregulation of his apartment. DHCR cross-moves for an Order pursuant to CPLR § 7806 remanding the case back to DHCR for further consideration and review. For the reasons set forth below, the petition is denied as premature and the cross-motion to remand is granted.

The relevant facts are as follows. In or around November 2005, the owner of apartment

#10 at 18 First Avenue, New York, New York (the “subject apartment”) submitted an application for a Major Capital Improvement (“MCI”) rent increase (the “application”). The rent increase sought was for a newly installed roof, masonry/waterproofing work and the installation of a new burner/boiler. In the application, the owner alleged that the items to be replaced had exceeded their useful lives, thereby meeting the “useful life” element required for an MCI rent increase pursuant to 9 NYCRR § 2522.4(2). Pursuant to 9 NYCRR § 2522.4(2)(d), all of the items in question generally have required useful lives that range between 10 and 20 years. Approximately 15 years prior to the owner’s current MCI application, previous MCI applications for the same items had been made and approved by respondent. Thus, upon review of the owner’s application, DHCR’s Rent Administrator directed the owner to “submit proof of a ‘Waiver of Useful Life’...” In addition, the Rent Administrator provided petitioner with a summary of the owner’s MCI application and gave him an opportunity to respond. In response, petitioner, along with other tenants, objected to the rent increase on the grounds that (1) the work was performed while building violations were outstanding; (2) the work was performed without the requisite work permits; (3) the work was not done in a workmanlike fashion resulting in leaks and damage to their apartments; (4) the cost for the work was overstated; and (5) the work performed was not necessary.

After giving the owner an opportunity to respond to the tenants’ claims, the Rent Administrator granted a rent increase based on the owner’s application. In response, various tenants filed Petitions for Administrative Review (“PARs”) in which they reiterated the objections they made during the Rent Administrator’s proceedings and specifically argued that the application should not be granted because the replaced items did not exceed their useful lives

and the owner's request for a waiver of useful life was not made. However, DHCR's Commissioner declined to address those arguments stating that "none of the tenant[s]...raised the issue of the useful life of the prior roof, masonry work and the burner and issues of waiver while the MCI application was pending before the Administrator...[,] the Commissioner is constrained to foreclose consideration of these issues raised for the first time in this appeal proceeding." Petitioner then commenced the instant Article 78 proceeding seeking to challenge DHCR's granting of the application.

The court first turns to respondent's cross-motion to remand the case back to the DHCR for further consideration and review. Pursuant to Rent Stabilization Code ("RSC") § 2527.8, "DHCR, on application of either party, or on its own initiative, and upon notice to all parties affected, 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." The Court of Appeals has confirmed DHCR's broad powers and authority to change or modify its prior determinations on remand. *See Matter of Porter v. New York State Div. of Hous. & Community Renewal*, 51 A.D.3d 417 (1st Dept 2008); *see also Matter of Yasser v. McGoldrick*, 306 N.Y. 924 (1954). Further, the First Department has held that "remission for further fact-finding and determination is appropriate where, as here, DHCR concedes an error in the issuance of its determination." *Matter of Porter*, 51 A.D.3d at 418; *see also Matter of Hakim v. Division of Hous. & Community Renewal*, 273 A.D.2d 3 (1st Dept 2000). Moreover, if further fact-finding is deemed appropriate, then the matter is not yet ripe for review and thus, remand is proper. *See Essex County v. Zagata*, 91 N.Y.2d 447 (1998).

In the instant action, remand of this case back to DHCR is appropriate as DHCR has

