Cambridge Leasing Prop., LLC v Division of Hous. & Community Renewal
2014 NY Slip Op 33146(U)
July 23, 2014
Supreme Court, Queens County
Docket Number: 21454/2013
Judge: Thomas D. Raffaele

Short Form Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS D. RAFFAELE IA PART 13

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CAMBRIDGE LEASING PROPERTY, LLC,

Index No: 21454/2013

Petitioner,

Motion Date: February 10, 2014

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

Motion Sequence No. 1

-against-

DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendants.

The following papers numbered 1 to 11 read on this Article 78 proceeding for a judgment reversing the determination of respondent Division of Housing and Community Renewal, dated October 22, 2013, which denied the Petition for Administrative Review (PAR) and upheld the Rent Administrator's finding of a rent overcharge and the imposition of treble damages.

	Papers Numbered
Notice of Petition-Petition-Affidavit-Exhibits.....	1-4
Verified Answer-Affirmation-Exhibits.....	5-9
Reply Affirmation-Exhibits.....	10-11
Memorandum of Law.....	

Upon the foregoing papers the petition is determined as follows:

Petitioner Cambridge is the owner of an apartment building located at 48-50 37th Street, Long Island City, New York. Katherine McDaniel, a rent stabilized tenant in apartment 3C in said apartment building, filed a rent overcharge complaint with the

DHCR on August 31, 2010. She stated that on June 1, 1996, she moved into the apartment with her mother, who was the tenant of record. She stated that her mother passed away in 2008, and that she signed her first lease, as a succeeding tenant on November 1, 2009, with an initial rent of $1,120.97 a month, and that her current rent was $1,120.97 a month. She stated that prior to receiving this lease, she paid rent of $795.00 a month; that she was charged a vacancy increase rather than a renewal lease; and that when she received the lease in June 2010, the "building" wanted her to pay back rent of $368.24 a month, for the past 8 months for the period of November 1, 2009 to June 6, 2010. Ms. McDaniel attached various documents to her complaint, including a copy of a stipulation of settlement she had entered into with the owner in the Housing Court proceeding, whereby the owner recognized that she was the successor tenant to her mother; that she was the second successive tenant and that "as such the renewal shall be subject to all applicable increases and with a commencement dated of 11/1/2009."

On September 8, 2010, the DHCR mailed a copy of the tenant's complaint to Cambridge, along with a notice that warned the owner that if it was found to have collected an overcharge, treble damages would be imposed, unless the owner established that the overcharge was not willful, and advised the owner to submit documentation regarding the monthly rent collected when the owner was first required to register the apartment, or the month four years prior to the tenant's complaint, whichever was later.

On September 22, 2010 the owner submitted its answer, stating that it was "submitting the complete rental history showing no overcharge exists or has ever existed." The original tenant was Henry Lefkowitz, (respondent's grandfather) who occupied the apartment, pursuant to a lease commencing on November 1965, with his wife Pearl respondent's grandmother) and their daughter Marlene (respondent's mother). Upon Henry's death, Pearl became the tenant and upon Pearl's death Marlene became the tenant in 1985(*see* B1 *Owner's Petition for Administrative review ('PAR"), filed February 9, 2009).* Respondent, Katherine McDaniel is the second successive tenant in this apartment succeeding her mother Marlene, upon her mother's death as stated above.

Ms. McDaniel did receive the apartment through a second successive lease as noted and complied with the attached stipulation. The owner claimed that as Ms. McDaniel was the second successive tenant, it was entitled to a vacancy increase of 20%, plus a longevity increase of 26.4%, and sought the dismissal of the rent overcharge complaint.

Along with its answer, the owner submitted a copy of the Housing Court stipulation; a rental history form, with a handwritten notation "1965 Original Tenant Henry Lefkowitz to wife Pearl Lefkowitz, Prior Succession 1985 to daughter Marlene Lefkowitz"; copies of the orders directing MCI rent increases; a copy of Ms. McDaniel's June 11, 2010 lease; a copy of Marlene Lefkowitz's death certificate; and copies of

Marlene Lefkowitz's 2007, 2006 and 2005 renewal lease forms, and her October 10, 1985 lease. The rental history form lists "Lefkowitz" as the tenant with a lease term of November 1, 2006 though October 31, 2007, and a lease term of November 1, 2007 through October 31, 2009, and lists McDaniel as the tenant with a lease term of November 1, 2009 through October 31, 2011. This form sets forth the amount of the rent paid by each tenant, the RGB order number, the renewal lease percentage, the vacancy lease percentage, the maximum legal rent, and the computation. With respect to Marlene Lefkowitz no vacancy lease percentage is listed. With respect to respondent, Ms. McDaniel, a vacancy increase of 20% and a longevity increase of 26.4% are listed.

The DHCR, in a notice dated November 8, 2011, requested additional information from the tenant, which she responded to on November 14, 2011. On November 9, 2011, the DHCR, requested that the owner submit a copy of the rent ledger showing the rent paid for the period of November 1, 2009 to the present, as well as copy of the tenant's lease, and the owner responded on November 15, 2011. Copies of the additional documents submitted were sent to each party.

In a notice dated, November 25, 2011, the DHCR informed the owner that based upon the evidence in the record, the Rent Administrator proposed a finding of a rent overcharge, and the imposition of treble damages, as the evidence in the file indicated that the owner was charging and collecting more than the Rent Guidelines Board Order, and gave the owner a final opportunity to demonstrate that there was no overcharge, and/or that the overcharge was not willful. The owner was given 21 days from the date of mailing, to reply to said notice. However, the landlord contends that they never received this notice. The tenant submitted an additional response on November 25, 2011, demonstrating that she had paid the rent from November 2009 through the present. The owner did not respond to the Rent Administrator's notice of November 25, 2011, since they allegedly never received it.

The Rent Administrator, in an order issued on January 25, 2012, found a rent overcharge totaling $2,125.78, and imposed treble damages of $4,251.56. As the tenant owed the landlord the sum of $123.87, this amount was subtracted, and the landlord was directed to refund $6,253.47 to the tenant. The Rent Administrator determined that as of November 1, 2011, the legal regulated rent that the owner was entitled to collect was $1,148.36, which included a Rent Guideline increase. Attached to the order was a rent calculation chart, which includes the following footnotes:

> "1) THE BASE DATE FOR AN OVERCHARGE PROCEEDING IS THE DATE FOUR YEARS PRIOR TO THE FILING OF THE COMPLAINT. IN THE INSTANT PROCEEDING, THE CASE WAS FILED ON 08/ 31/ 2010. THE BASE DATE IS 08/31/ 2006 WITH A BASE RENT OF

$682.78."
"2) THE EFFECTIVE DATE OF MCI ORDER NO. WI1100490M IS 12/01/ 2008. HOWEVER, THE RENT INCREASE DIRECTED BY THIS ORDER IS NOT COLLECTIBLE UNTIL 04/01/2009. THE TOTAL PERMANENT INCREASE IS $12.96."

"3) IF THE LEGAL REGULATED RENT WAS NOT INCREASED BY A PERMANENT VACANCY ALLOWANCE WITHIN EIGHT YEARS PRIOR TO A VACANCY LEASE EXECUTED ON OR AFTER JUNE 15, 1997, THE LEGAL REGULATED RENT MAY BE FURTHER INCREASED BY AN AMOUNT EQUAL TO THE PRODUCT RESULTING FROM MULTIPLYING THE PREVIOUS LEGAL REGULATED RENT BY SIX-TENTHS OF ONE PERCENT (.06%) AND FURTHER MULTIPLYING SUCH RESULTING AMOUNT BY THE NUMBER OF YEARS SINCE THE IMPOSITION OF THE LAST PERMANENT VACANCY ALLOWANCE (0.6% X 24 YEARS)".

"4) AS PER COURT STIPULATION OF SETTLEMENT, DATED 08/04/2010, UNDER INDEX # 50899/10, IT WAS DETERMINED THAT THE TENANT, KATHERINE MCDANIEL, IS THE SECOND SUCCESSOR TENANT TO THE SUBJECT APARTMENT, AND THE OWNER IS ENTITLED TO COLLECT ALL APPLICABLE INCREASES WITH A COMMENCEMENT DATE OF 11/01/2009. AS A RESULT THE OWNER WAS ENTITLED TO COLLECT A VACANCY INCREASE".

"5) THE EFFECTIVE DATE OF MCI ORDER NO. XK110023OM IS 03/01/10. HOWEVER, THE RENT INCREASE DIRECTED BY THAT ORDER IS NOT COLLECTIBLE UNTIL 07/01/10. SECTION 2522.4(A)(8) OF THE RENT STABILIZATION CODE LIMITS THE COLLECTION OF THE INCREASE IN ANY 12 MONTH PERIOD TO 6% ($61.75) OF THE LEGAL REGULATED RENT ON 11/01/09."

"6) THE MCI ARREARS (TEMPORARY INCREASE) IS COMPUTED BY TAKING THE NUMBER OF MONTHS FROM THE EFFECTIVE DATE OF THE MCI ORDER TO THE COLLECTIBLE DATE OF THE MCI ORDER AND MULTIPLYING IT BY THE MONTHLY INCREASE PER ROOM. THE TOTAL ARREARS DUE IS $166.56. THE OWNER IS ENTITLED TO COLLECT $20.11 EIGHT MONTHS (07/01/10-02/28/11) AND THE BALANCE OF $5.68 FOR ONE MONTH (03/01/11-03/31/11). THE ARREARS DOES NOT BECOME PART OF THE BASE

RENT WHEN COMPUTING FUTURE INCREASES".

The owner, by its counsel, filed a PAR on February 9, 2012, in which it asserted that the Rent Administrator erred in concluding that the last vacancy increase was taken in 1985. It was asserted that no vacancy increase had been taken prior to Ms. McDaniel's occupancy, and therefore the longevity increase had been calculated from 1965. The owner submitted copies of the 1985 lease and rider issued to the tenant's mother Marlene Lefkowitz; the 1977 lease issued to the tenant's grandfather Henry Lefkowitz; Henry Lefkowitz's 1965 application for tenancy; and the owner's rent ledger cards with handwritten notations pertaining to the occupancy by the complaining tenant's grandfather Henry Lefkowitz; the transfer of the lease and security to Pearl Lefkowitz following Henry's death in 1980; the transfer of the lease and security to Marlene Lefkowitz following Pearl Lefkowitz's death in 1985; and various notations pertaining to the amount of rent paid by said tenants.

The owner asserted that as Marlene Lefkowitz was only charged a renewal increase of 6.5% and not a vacancy increase, the Rent Administrator should have determined that the applicable vacancy increase should have been set at a date earlier than 1985. The owner requested that the matter be remanded to the Rent Administrator for the purposes of determining the correct longevity increase, or utilizing the documents submitted by the owner in its PAR. The owner asserted that its calculation based on Henry Lefkowitz's occupancy in 1965, and the fact that a prior vacancy increase was never taken, would result in a vastly different longevity increase, and would eliminate the overcharge.

The owner's counsel further stated in its PAR that treble damages should not be imposed, as "upon information and belief" the owner was not sent a notice of the intention to impose treble damages. Finally, it was asserted that the overcharge was not willful, as the owner clearly relied upon the 1965 occupancy date as being the appropriate start date for calculating the longevity increase.

The DHCR notified the tenant of the PAR on February 28, 2012 and she filed an answer on March 2, 2012, stating that the owner was not entitled to a vacancy increase and a longevity increase, claiming to be the first successor to the subject apartment. Ms. McDaniel also opposed the owner's request to vacate the award of treble damages.

The owner's counsel, in response, stated that the tenant had not responded to the issues raised in the PAR; had not filed her own PAR; and that her claims regarding the application of the vacancy and longevity increases by successor tenants were not supported by any agency rule or regulation.

The Deputy Commission of the DHCR, in a decision and order dated October 22,

2013, determined that the Rent Administrator properly determined the amount of the rent to be paid by the tenant to the owner, and properly assessed treble damages. The Deputy Commissioner stated, in pertinent part, as follows:

> " It is noted that only errors of law (either substantive or procedural), errors of fact, or errors of calculation can provide a basis for modifying or revoking a Rent Administrator's order. Because the owner's submission of Henry Lefkowitz's 1965 unsigned application to Kraham Leasing Corp., as well as the owner's tenancy records that allegedly demonstrate consistent notations from 1965 through Marlene Lefkowitz's tenancy, were not before the Rent Administrator, they cannot be presented in the PAR. Generally, evidence submitted for the first time on appeal cannot be considered unless the party submitting the evidence provides this agency with a reasonable explanation why that evidence was not submitted, previously, to the Rent Administrator. Because said evidence was not submitted before the Rent Administrator and the owner failed to adequately explain why it was not submitted before the Rent Administrator, it is beyond the scope of review herein and may not be considered for the first time at this stage of the proceeding."
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> "Also since the owner failed to advise the Rent Administrator that the owner had not collected a vacancy increase in the 1985 lease, the Rent Administrator was not obligated to determine on his own whether a vacancy increase was collected in 1985. Given that the 1985 lease was executed before the development of the concept of preferential rents, the owner was not permitted to receive credit later for any lawful rent increases not taken. Furthermore, the agency would have no basis for determining whether the lesser rent collected was due to the owner not taking the rent guideline or not taking the vacancy allowance."
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> "Additionally, the case file contains a copy of the notification of the imposition of treble damages that was sent to the owner by the Rent Administrator, as well as the notation that said notification was mailed to the owner on November 25, 2011. Consequently, because the owner was given the opportunity to respond to the imposition of treble damages, but failed to do so before the Rent Administrator, the owner's defense that the overcharge was not willful cannot be considered at this time."

Petitioner Cambridge commenced the within Article 78 proceeding on November 21, 2013 and seeks a judgment vacating the DHCR's determination of October 22, 2013 on the grounds that it is arbitrary and capricious, in violation of the law and is not in

accordance with the facts and evidence presented. Petitioner asserts that the DHCR's finding that it took a vacancy allowance in 1985 is contrary to the record and the facts; that it clearly informed the DHCR in the rental history chart included in its answer that it was calculating the longevity increase based upon a 44-year period, without obtaining a prior vacancy increase; and that going back 44 years from the commencement of Ms. McDaniel's tenancy in 2009, meant that no vacancy increase had been taken since 1965. Petitioner further states that it notified the Rent Administrator in a hand written notation at the top of the rental history chart that original tenants Henry and Pearl Lefkowitz, the complaining tenant's grandparents, took occupancy in 1965 and that their daughter Marlene, the complaining tenant's mother, succeeded to the tenancy in 1985. Petitioner, thus, asserts that the Rent Administrator was clearly aware that it had not taken a vacancy increase since 1965, and that this would necessarily include no vacancy increase for the 1985 lease.

Petitioner also argues that contrary to respondent's determination, the Rent Administrator could have easily determined that Cambridge did not take a vacancy increase in 1985. It is asserted that the 1985 lease demonstrates that Cambridge increased Marlene Lefkowitz's security by $22.43, which equals 6.5% above the prior monthly rent of $345.13. This is the same percentage that was permissible under Rent Guidelines Board Order (RGBO) #17, which was in effect at the time. Cambridge maintains that had it taken a 7.5% vacancy increase in the 1985, the amount of the security and monthly rent would have been an additional $25.91. Petitioner argues that the DHCR is well aware of the applicable RGBOs, including #17, and that by performing a simple calculation, the DHCR knew that the petitioner had only taken a 6.5% renewal increase for the 1985 lease, and not an additional 7.5% vacancy increase. Petitioner also asserts that the DHCR could have reviewed its own rent registration records in order to determine whether a vacancy allowance was taken in 1985. The underlying record before the Rent Administrator is devoid of any evidence whatsoever that a previous vacancy increase was charged in 1985.

Moreover, petitioner states that the Rent Administrator knew that it was claiming a longevity increase for 44 years, and not 24 years as found by the Rent Administrator, and that if additional documentation were required, the Rent Administrator should have given petitioner notice prior to making his determination. Petitioner asserts that had the Rent Administrator informed it that the vacancy increase would be calculated from 1985 rather than 1965, petitioner could have easily submitted additional evidence demonstrating that no vacancy increase had been taken in 1985.

Finally, petitioner asserts that the imposition of treble damages was improper, as the DHCR did not submit proof of mailing of the Final Notice to the owner on November 25, 2011. Petitioner further asserts that even if proper notice were provided, the facts

presented establish that there was no overcharge; that the DHCR's finding of an overcharge was based solely on an error in calculating the longevity increase; and that even if petitioner miscalculated the longevity increase, it was not willful and treble damages should not have been imposed.

Respondent DHCR, in opposition, asserts that its determination was neither arbitrary nor capricious, and has a rational basis in the law and the record.

It is well settled that judicial review of an administrative determination is limited to a review of the record before the agency and whether the agency's determination was arbitrary or capricious, was an abuse of discretion, or lacks a rational basis in the law or the record (*see* CPLR 7803 [3]; *Gilman v N.Y. State Div. of Hous. & Community Renewal*, 99 NY2d 144 [2002]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County,* 34 NY2d 222 [1974]; *Matter of Colton*, 21 NY2d 322 [1967]). 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 Pell,* 34 NY2d at 231). "[A]n 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 AD2d 339 [1st Dept 1988]).

It is uncontested that there was absolutely no evidence before the Rent Administrator that the landlord had collected a vacancy increase for the 1985 lease. It was not part of the rent Administrator's obligation to use fantasy to invent out of thin air a vacancy increase for the 1985 lease which had no basis in reality. The evidence before the Rent Administrator clearly showed that the 1985 increase was 6.5%, exactly the amount prescribed by the Rent Guidelines Board Order #17 for that year, with no additional vacancy increase. If he had any question or uncertainty about that issue and if he were acting responsibly, all he needed to do was to ask the parties if a vacancy increase was in fact collected for the 1985 lease. He never did so.

Likewise, it is willful and capricious for the PAR to cover up the Rent Administrator's mistake and to sustain a treble damages assessment for which there is no justification in the record.

This court finds that the determination by the DHCR was arbitrary and capricious because it made a determination against the landlord without considering the evidence before the agency and further without making further inquiry into the issues before the agency. Also, the DHCR's determination was arbitrary and capricious because when the landlord stated at the PAR that all the issues had previously been before the Rent

Administrator, the DHCR used feeble excuses to cover up the improper assumptions that were originally made. Specifically the Rent Administrator had before him evidence that only the prescribed RGBO # 17 6.5% increase was taken in 1985 and no additional vacancy increase. The PAR untruthfully denies this. The DHCR's unwillingness to admit and correct their mistake and their capricious attitude to deliberately impose treble damages without any basis in law or fact demonstrates that its determination was arbitrary and capricious.

The Rent Regulation Reform Act of 1997 (L 1997, ch 116) entitles the owner of a regulated housing accommodation, upon the vacancy of the unit, to a 20% rent increase, plus, whenever there has not been a vacancy increase with respect to the unit for eight years or more, an additional increase, known as a "longevity" increase, equal to .6% of what was the legal regulated rent for each year since the previous vacancy increase (see L 1997, ch 116, § 19, codified at 9 NYCRR § 2522.8 [a] [2] [ii]). An owner's entitlement to a longevity increase thus depends upon a factual determination that there has been no vacancy increase with respect to the housing accommodation in question during the previous eight years (*see Ardor Realty LLC v DHCR*, 25 AD3d 128 [2d Dept 2005]; Administrative Code of the City of New York, 26-511(c)(5-a); 9 NYCRR 2522.8).

The Rent Stabilization Code defines a vacancy lease as the first lease entered into between an owner and tenant (9 NYCRR 2520.6 [g]), and defines a renewal lease as the extension of a tenant's lawful occupancy (9 NYCRR 2520.6 [h]). Generally, when the original tenant vacates, an owner can take a vacancy increase on the new tenant's lease (i.e., vacancy lease). However, a vacancy increase may be taken when there is no vacatur by the original tenant. Under the rules of succession, a qualified family member, as defined by 9 NYCRR 2520.6 (o), has the right to a rent-stabilized renewal lease when the tenant dies or permanently vacates (9 NYCRR 2523.5 [b]). Under the Rent Regulation Reform Act of 1997, upon vacatur of the succeeding family member, an owner may charge a vacancy increase to the next family member entitled to succeed to the lease (9 NYCRR 2522.8 [b]). In determining and calculating vacancy and longevity increases, the DHCR may examine the rental history beyond the period of four years prior to the date of the tenant's overcharge complaint (*see Ardor Realty LLC v DHCR*, 25 AD3d 128, 128). Here it is uncontroverted that the Rent Administrator had the entire rent roll history before him before making his determination of a rent overcharge on January 25, 2012.

The Rent Administrator was required to make a determination based upon the evidence submitted by the complaining tenant and the owner. This court, therefore, finds that the DHCR's determination that the Rent Administrator, on his own, was not required to determine if a vacancy increase had been taken, and that the 1985 lease was insufficient on its face to establish the lack of vacancy increase, does not have a rational basis in the law, is not supported by the evidence in the record, and is arbitrary and capricious.

Pursuant to section 26-516 (a) of the Rent Stabilization Law (Administrative Code of City of NY § 26-501 et seq.), "once the occurrence of a rent overcharge has been established, it becomes incumbent upon the landlord to establish by a preponderance of the evidence that the overcharge was not willful" (*Matter of Obiora v New York State Div. of Hous. & Community Renewal*, 77 AD3d 755, 756 [2d Dept 2010].

In view of the foregoing, it is hereby ADJUDGED that the petition is granted to the extent that the DHCR determination is vacated and the matter is remitted to the agency for further determination.

This constitutes the judgment of this court.

Dated: July 23, 2014

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Thomas D. Raffaele, J.S.C.