Matter of Peralta v New York State Div. of Hous. & Community Renewal
2016 NY Slip Op 33121(U)
November 10, 2016
Supreme Court, New York County
Docket Number: Index No. 101248/15
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the Matter of the Application of
JACQUELINE PERALTA,

Index No. 101248/15
Motion Seq.: 001 + 002

Petitioner,

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

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent.

Administrative Review Docket No.: CU410007RO
Rent Administrator's Docket No.: BS410022R

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SCHLESINGER, J.

In this Article 78 petition brought by the tenant of Apartment #1D at 618 Academy Street, the sole issue is should the overcharge due here be trebled. The Rent Administrator ("RA") first hearing this case found an overcharge in the tenant's favor of $19,829.76. Then the RA trebled that amount, as willful and calculated the total to be $59,581.58. This was on August 8, 2014. The landlord then brought a Petition for Administrative Review ("PAR") challenging the overcharge.

At the PAR, as pointed out by counsel for petitioner, the landlord made two arguments, only two arguments. The first was a Statute of Limitations argument banning review beyond four years from filing the overcharge complaint. This meant that DHCR could not consider a 1993 Rent Reduction Order ("RRO"). The second argument was that the landlord bringing the PAR, 618 Associates LLC had just purchased the building on

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August 27, 2014, after the RA's order of August 8, 2014 and therefore should not be held liable for penalties for willful overcharge. These arguments were responded to by Ms. Peralta, the tenant. The landlord won its PAR, at least on the issue of treble damages. In the actual used words used, the Deputy Commissioner of DHCR modified the Rent Administrator's award stating:

> The Commissioner having, reviewed the record herein, finds that the petition should be granted in part in that treble damages are dismissed and the Rent Administrator's Calculation Chart is revised as herein stated

The new calculation resulted in an award of $22,660.16. That sum consisted of the overcharge amount of $19, 829.76 plus interest of $2,738.10 plus excess security deposit of $92.30. However, in determining that "the particular facts in this case warrant a finding that the overcharge was not willful," (pg 3). DHCR used facts and arguments not made by the parties. It did point out that the four year look back argument was dealt with by the Court of Appeals holding in *Cintron v Calogerio*, 15 NY3d 347 (2010) "which held that the agency must pierce the four year statute of limitations to give effect to outstanding rent reduction orders in rent overcharges cases" (pg 2)

The Deputy Commissioner then searched its own records and discovered that the hot water issue in Apartment 1D seemed to have been resolved on November 24, 1993, pursuant to an agency inspection of that date. It then pointed out evidence that the prior owner had applied to restore the rent on December 4, 2013, before receiving the RA's treble damage notice. Then, according to the decision, the agency served the affected apartments with notices asking whether the hot water problem had been dealt with. Further, the 1D tenant, petitioner here, did not respond to a Final Notice Pending Default served on July 15, 2014. A year later, on April 22, 2015, a rent restoration order was

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issued.

Those facts were not part of the arguments. Nor was the rationale that followed.

With regard to the rationale, DHCR first criticizes the Rent Administrator for issuing the treble damages award against the former owner before its rent restoration application had been determined. Then the Deputy Commissioner dismisses the second rent reduction order, VL430022B because only the other order, G1530034HW was identified and served in the agency's Amended Final Notice to Owner.[1] DHCR decided this failure could not serve as a basis to impose treble damages.

As stated earlier, these arguments were not made by the current owner, who had brought the PAR.[2] Having never been made, there was no response by the tenant. Counsel for Ms. Peralta now makes two arguments in support of the Petition to annul the Order of May 11, 2015. First, it is urged that the rationales relied upon by DHCR were legally unsupportable. Second, and according to counsel

> More importantly and fundamentally, the Deputy Commissioner's action in *sua sponte* substituting entirely new bases for modifying the Rent Administrator's order-without giving Ms. Peralta an opportunity to be heard on them-and its reliance on matters that were outside the record of the underlying docket being reviewed was arbitrary and capricious (¶30, pg 15).

Petitioner also pointed out that the records relied upon by DHCR were no longer obtainable. Counsel had made efforts to get them, via FOIL, but it appears that they were destroyed in 1999.

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[1]Ms. Peralta, in filing her rent overcharge complaint on several grounds, included only the rent restoration order under Docket No.: G1530035HW. In other words, not on the other docket number that the Deputy Commissioner dismissed.

[2]It should be noted here that the current owner did not participate in this Article 78. Although I believe it was served with the papers.

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The answer by DHCR argues that the Article 78 is without merit. It urges, via an affirmation of its counsel, that DHCR is allowed to rely on its own records and therefore did not abuse its discretion. That discretion was exercised in its balancing of the equities and by the totality of the circumstances, which led to its decision to dismiss the treble damages (¶32). Counsel also argues that the determination being challenged, exempting treble damages, should not shock the judicial conscience, particularly because it appears that the condition in the apartment was long ago cured, although acknowledging that a corresponding restoration order was never issued (pg 11 of Respondent's Memo).

The Rent Stabilization Code §2523.4(a)(1) makes it clear that a rent reduction order bars the owner from collecting any future increases until a rent restoration order is issued. Here as noted earlier, the prior owner just applied for this in December of 2013 and it was not granted until April 2015. At oral argument, the above was discussed, but mostly in the context of DHCR's consideration of new facts based on arguments never made by the owner in its PAR.

DHCR asked the court to remand this controversy, acknowledging how problematic the above was. It wanted a kind of "do over", but one where the additional new facts could be addressed by all. If that was done, certainly the owner would and should be notified and given a chance to participate. However, petitioner argues that this would be unfair and improper. The exclusive remedy should be, counsel urges, remand but with instructions to annul the Deputy Commissioner's order and reinstate the RA's which included the treble damages. Since both sides agreed to a remand, I asked for short letter briefs on what to tell DHCR when I did direct such a transfer.

After reading these letters and several cases arguably relevant, I find that the

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remand here should be limited to the facts and arguments argued by the parties in the PAR proceeding. One of the "arguably relevant" cases is one decided on the record by this court on April 20, 2016, *Carrion v NYS Division of Housing*, No. 101619/15. In that proceeding, I did remand and did not limit the future arguments that could be made. There, the Rent Administrator denied treble damages based on a clear mistaken fact, that the current owner had taken ownership via a judicial sale. That was not, in fact true. So when the controversy appeared again, pursuant to a PAR brought by the tenant, the Deputy Commissioner upheld the denial of treble damages but upon new facts and a new theory. It was that the current owner refunded the overcharge immediately. The tenant argued first this was not true and second, like the situation here, that is was never argued below as the RA relied on a fact which was clearly a mistake.

I do not believe the circumstances of the remand in *Carrion* are applicable here. Further my rationale for my instructions there do not pertain to the situation here. For one, all the facts relied upon by the Deputy Commissioner in *Carrion* were in the record and known to all the parties. Here, the PAR was decided, not on a mistake but rather on a decision by the Deputy Commissioner to independently conduct his own investigation and unearth old records from years before so as to put in question whether the circumstances of the rent reduction order of 1993 still applied. There was no justification for this, particularly when it is the owner's burden to prove that it did not act willfully in continuing to charge an improper and elevated rent while the RRO was still alive and well. Further, case law makes it clear that subsequent owners are bound by unlawful actions of their predecessors, (*Gaines v DHCR*, 90NY2d 545 [1997]). Here the current owner was the one

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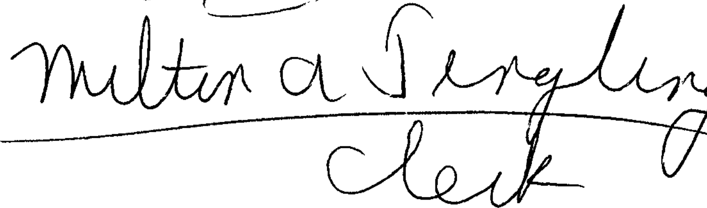
that not only brought the PAR but was the one involved in the overcharge proceeding before the RA as well.

I do find the determination here by the Deputy Commissioner to be an abuse of discretion. I also find that he over reached and in so doing, the Deputy Commissioner blurred the distinction between being an independent, neutral arbitrator and an advocate. Deciding a case on documents never referred to earlier, is to go outside the record in an improper and unacceptable manner. It is a determination that should be annulled and it is.

The decision by DHCR to act in this way is far different from the mistake which the RA made in *Carrion* which was then dealt with in the PAR. The matter is thus remanded so that the Deputy Commissioner can reconsider the controversy but solely on the original arguments made at the PAR. The owner bringing that PAR must of course be notified.

Date: November 10, 2016

Alice Schlesinger, J.S.C.



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