Matter of Kostic v New York State Div. of Hous. & Community Renewal
2018 NY Slip Op 31467(U)
July 3, 2018
Supreme Court, New York County
Docket Number: 152243/17
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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In the Matter of

ISABELLE KOSTIC, INDEX NO. 152243/17

Petitioner,

v MOT SEQ 001, 003

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL and AMDAR COMPANY, LLC

Respondents.
----------X DECISION, ORDER, and
----------X JUDGMENT

In the Matter of

AMDAR COMPANY, LLC, INDEX NO. 100290/17

Petitioner,

v MOT SEQ. 001

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL and ISABELLE KOSTIC,

Respondents.
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NANCY M. BANNON, J.:

I. INTRODUCTION AND BACKGROUND

In a decision dated January 7, 2016, the Rent Administrator (RA) of the New York State Division of Housing and Community Renewal (DHCR) concluded that an apartment rented by the tenant petitioner, Isabelle Kostic, from her landlord, Amdar Company,

LLC (Amdar), remained subject to rent stabilization and that Amdar charged excessive rent, but that Kostic was not entitled to a rent rollback or treble damages. Kostic and Amdar each filed petitions for administrative review (PARs), requesting the DHCR to reverse those portions of the RA's decision that were adverse to each of them. In a determination dated January 11, 2017, the DHCR denied both PARs.

Kostic petitions pursuant to CPLR article 78 under Index No. 152243/17 for judicial review of so much of the DHCR's determination as denied her PAR (SEQ 001). Under Index No. 100290/17, Amdar petitions for judicial review of so much of the DHCR's determination as denied its PAR (SEQ 001).

By order dated October 25, 2017, this court consolidated the two proceedings to the extent of joining them for disposition, but denied the DHCR's request to remit the matter to it for reconsideration, directed the DHCR to answer the petitions and submit the administrative record, and adjourned the return date of the petitions. The petitions are now before the court for determination.

The DHCR moves under Index No. 152243/17 pursuant to CPLR 2221(d) and (e) for leave to reargue and renew that branch of its prior cross motion which was to remit the matter to it (SEQ 003).

The DHCR's motion is denied, Amdar's petition is denied, and Kostic's petition is granted.

II. DISCUSSION

A. REARGUMENT AND RENEWAL

That branch of the motion which is for leave to reargue is denied, inasmuch as the court did not overlook or misapprehend any facts or relevant law that were presented to it in connection with the prior cross motion seeking remittal. See CPLR 2221(d)(2); William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 (1st Dept 1992). The purpose of a motion to reargue is not "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." Pro Brokerage, Inc. v Home Ins. Co., 99 AD2d 971, 971 (1st Dept. 1984), quoting Foley v Roche, 68 AD2d 558, 567 (1st Dept. 1979).

The DHCR is not entitled to the alternative relief of renewal, since it has failed to present "new facts not offered on the prior motion that would change the prior determination," or demonstrate that "there has been a change in the law that would change the prior determination." CPLR 2221(e)(2), (3); see Foley v Roche, supra. "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." Joseph v Simmons, 114 AD3d 644, 644 (2nd Dept. 2014), quoting Elder v Elder, 21 AD3d 1055, 1055 (2nd Dept. 2005).

Contrary to the DHCR's contention, the First Department's May 25, 2017, decision in Matter of Taylor v 72A Realty Assoc.,

L.P. (151 AD3d 95 [1st Dept. 2017]), does not constitute a "change in law" with respect to the issue of when remittal to an agency is warranted, and thus does not support the request for renewal here. Taylor addressed the issue of when the DHCR should apply the four-year lookback period in rent overcharge proceedings, and did not alter the well-settled legal rule that, in a CPLR article 78 proceeding, remittal to an agency in the absence of a determination on the merits is only warranted where the administrative record is incomplete, and not where the agency concedely misapplied substantive law. See Matter of Peckham v Calogero, 54 AD3d 27, 28 (1st Dept. 2008), affd 12 NY3d 424 (2009); Gersten v 56 7th Ave., LLC, 88 AD3d 189 (1st Dept. 2011).

B. MERITS OF THE PETITIONS

Where an administrative determination is made, and there is no requirement of a trial-type hearing, that determination must be confirmed unless it is arbitrary and capricious, affected by an error of law, or made in violation of lawful procedure. See CPLR 7803(3); Matter of Lemma v Nassau County Police Officer Indem. Bd., ___NY3d___, 2018 NY Slip Op 04392 (Jun. 14, 2018); Matter of Resto v State of N.Y., Dept. of Motor Vehs., 135 AD3d 772 (2nd Dept. 2016); Matter of McClave v Port Auth. of N.Y. & N.J., 134 AD3d 435 (1st Dept 2015). A determination is arbitrary and capricious where is not rationally based, or has no support

in the record (see Matter of Gorelik v New York City Dept. of Bldgs., 128 AD3d 624 [1st Dept. 2015]), or where the decision-making agency fails to consider all of the factors it is required by statute to consider and weigh. See Matter of Kaufman v Incorporated Vil. of Kings Point, 52 AD3d 604 (2nd Dept. 2008).

With respect to the merits of Kostic's petition, the DHCR effectively admits that it misapplied the proper standards for considering whether to go beyond the otherwise applicable four-year lookback period in rent overcharge proceedings. It has thus conceded that its determination was both arbitrary and capricious and affected by an error of law within the meaning of CPLR 7803(3).

In Taylor, the First Department ruled that, in light of the DHCR could not impose a "mechanical application" (id. at 106) of the four-year limitations period of CPLR 213-a in light of the Court of Appeals' determination in Roberts v Tishman Speyer Props, L.P. (13 NY3d 270 [2009]). The First Department held that, even the absence of a showing that the owner committed fraud in concealing whether an apartment was properly regulated, the DHCR must consider all permitted rent stabilization increases after the expiration of a prior tenant's lease but prior to the base date for the fixing of rent for the current tenant.

> "Only in this manner can it be determined whether the rent the Owner charged plaintiffs on the base date bears any relation to a permissible, rent-stabilized rent. In other words, a contrary ruling would

> essentially allow the Owner to collect rent that might be in excess of what it could have otherwise charged [the current tenants], based upon its own misapprehension of the law. Therefore, a determination of the legally permissible rent-stabilized rent that plaintiffs should have been charged on the base date requires a mathematical calculation of the applicable rent guidelines (and any other) legally permissible increases since . . . the expiration date of the first lease."

Taylor, supra, at 106.

Here, the administrative record reflects that the DCHR rationally determined that, even viewing the rent history in the light most favorable to Amdar, the subject unit remained subject to rent stabilization. Hence, Amdar's petition must be denied.

However, the DHCR's determination that Kostic was not entitled to a rent rollback or treble damages was admittedly affected by an error of law, as the DHCR did not consider whether prior rent increases were within permissible stabilization guidelines, or whether the rent charged to Kostic on the base date was the legally permissible stabilized rent. Hence, Kostic's petition must be granted, the determination denying her PAR annulled, and the matter remitted to the DHCR for a recalculation in accordance herewith.

The court notes that, inasmuch as the matter is being remitted to the decision-making agency for a new discretionary determination, the disposition of Kostic's petition constitutes an order, not a judgment. See Matter of Mid-Island Hospital v

Wyman, 15 NY2d 374 (1965); Matter of Clermont Tenants Assn. v New York State Div. of Housing & Comm. Renewal, 73 AD3d 658 (1st Dept. 2010); Matter of Valentin v New York City Police Pension Fund, 16 AD3d 145 (1st Dept. 2005).

IV. CONCLUSION

Accordingly, it is

ORDERED that the motion of the respondent New York State Division of Housing and Community Renewal for leave to reargue and renew its prior cross motion for remittal of the matters ot it (Index No. 152243/17, SEQ 003) is denied; and it is further,

ORDERED that the petition of Amdar Company, LLC (Index No. 100290/17, SEQ 001) is denied; and it is,

ADJUDGED that the proceeding under Index No. 100290/17 is dismissed; and it is further,

ORDERED that the petition of Isabelle Kostric (Index No. 152243/17, SEQ 001) is granted, so much of the determination of the New York State Division of Housing and Community Renewal dated January 11, 2017, under DHCR Docket Nos. EN410023RT and EN410025RO, as denied the Petition for Administrative Review of Isabelle Kostic is annulled, and the matter is remitted to the New York State Division of Housing and Community Renewal for reconsideration of her Petition for Administrative Review in accordance with the guidelines articulated in Matter of Taylor v

72A Realty Assoc., L.P. (151 AD3d 95 [1st Dept. 2017], and a new determination thereafter.

This constitutes the Decision, Order, and Judgment of the court.

Dated: July 3, 2018

ENTER:

J.S.C.

HON. NANCY M. BANNON