

**291 Pleasant Ave LLC v New York State Div. of
Hous. & Community Renewal**

2018 NY Slip Op 31470(U)

July 2, 2018

Supreme Court, New York County

Docket Number: 156408/2017

Judge: Barbara Jaffe

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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291 PLEASANT AVE LLC,

Petitioner,

INDEX NO. 156408/2017

MOTION DATE _____

- v -

MOTION SEQ. NO. 1

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL and JENNIFER
HADLOCK,

**DECISION, ORDER
AND JUDGMENT**

Respondents.

-----X

The following e-filed documents, listed by NYSCEF document number 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this application for an order pursuant to CPLR article 78

HON. BARBARA JAFFE:

By notice of petition and verified petition, petitioner moves pursuant to CPLR article 78 for an order reversing the May 18, 2017, order issued by respondent New York State Division of Housing and Community Renewal (DHCR) on an administrative appeal filed by respondent Hadlock. Respondents oppose.

I. BACKGROUND

The subject unit is within a residential building located at 291 Pleasant Avenue, New York, New York. In June 2007, a prior owner of the building owner leased the unit to a new tenant. Annexed to that lease is a rider reflecting a preferential rent of \$1,075 and a legal

regulated rent of \$1,868.50. (NYSCEF 1, 5). It is undisputed that between 2008 and 2009, that tenant vacated the unit. (NYSCEF 3).

The building went into foreclosure and, on November 20, 2009, a court-appointed receiver rented the unit to Hadlock for \$925 per month. (NYSCEF 21, 30). The lease contained no indication that the rent was preferential, nor did it set forth the legal regulated rent. (NYSCEF 20).

The receiver renewed Hadlock's lease in 2010 at a monthly rent of \$995 (NYSCEF 21), and again in 2012 at a monthly rate of \$1,015. (NYSCEF 3). In 2012, petitioner purchased the building at public auction. (NYSCEF 3). It gave Hadlock a proposed renewal lease, to commence in December 2013, at a monthly rent of \$1,300, with a preferential rent rider indicating that the legal regulated rent exceeded \$2,500 per month. (NYSCEF 3).

In November 2013, Hadlock filed a rent overcharge complaint with DHCR, attaching copies of her current and prior leases, and a copy of the prior tenant's lease. (NYSCEF 3).

In July 2016, a DHCR rent administrator issued an order denying Hadlock's complaint. In it, he stated, in relevant part, that the unit was rent regulated, and that the legal regulated rent exceeded the rent charged. (NYSCEF 3, 19).

In August 2016, Hadlock appealed the order by filing a petition for administrative review (PAR) solely as to the issue of overcharge. She annexed copies of her prior leases, the proposed lease and rider, and a record of the pertinent rent registrations. (NYSCEF 3). In relevant part, she stated that "the agency should partially reverse its decision . . . and find that Ms. Hadlock has been overcharged as set forth above." (NYSCEF 20). Petitioner opposed Hadlock's PAR, and did not file its own PAR. (NYSCEF 3).

On May 18, 2017, "having reviewed the entire evidentiary record," DHCR granted Hadlock's appeal to the extent of finding rent overcharges in the amount of \$1,245.39, and denied it to the extent that she had asked for treble damages. In relevant part, DHCR held that:

... the Rent Administrator erred in establishing a legal regulated rent of \$1,868.50 per month ... because no such rent is preserved in the tenant's vacancy lease. The fact that the apartment registration stated a legal regulated rent of \$1,597.01 per month is irrelevant as no rent higher than \$925 was preserved in the tenant's vacancy lease. Even under the version of RSC § 2521.2 in effect in 2009, any higher legal regulated rent had to at least be stated in the tenant's vacancy lease in order to be preserved. The fact that the vacancy lease was signed by a property receiver does not excuse its noncompliance with the preferential rent requirement. The fact that the property receiver mistakenly offered the tenant a deregulated lease also does not excuse compliance with the preferential rent regulation.

The order also provides that petitioner is not liable for overcharges from December 1, 2010 to November 30, 2012, as the premises was then possessed by the property receiver. (NYSCEF 3). In July 2017, petitioner commenced this proceeding. (NYSCEF 1).

II. CONTENTIONS

Petitioner argues that DHCR's order must be reversed, as it was arbitrary and capricious in that it misapplied the law and disregarded relevant rent history. Specifically, it contends, DHCR failed to consider the prior tenant's lease, and could not have done so, as the lease constitutes newly discovered evidence warranting a remand. And given the prior tenant's lease, it argues, the only rational determination is that the apartment is deregulated, as vacancy allowances caused the rent to exceed the deregulation threshold in November 2009. It asserts that the rent administrator's order is only partially accurate, as he correctly determined that the higher legal regulated rent as of the date of Hadlock's vacancy lease was \$1,868.50, but incorrectly determined that the unit is rent regulated. Even if regulated, moreover, petitioner maintains, the receiver failed to preserve a higher legal regulated rent, and DHCR's order is thus improper and inequitable, as it imposes on it a penalty for the receiver's inaction.

Petitioner also contends that if there are overcharges, it is exempt from liability for them, as it purchased the property at public auction. (NYSCEF 1). As documentary support, it offers copies of the challenged determination, the rent administrator's determination, the rent history, and the deed. (NYSCEF 3-7).

In opposition, DHCR argues that its order is neither arbitrary nor capricious, as it is based on an examination of the entire record and a reasonable, established interpretation of applicable laws. Per that interpretation, it contends, rent increases for the unit must be based on the charge of \$925 set forth in the vacancy lease, as that lease did not indicate that \$925 was preferential rent, nor did it set forth a higher legal regulated rent. Thus, petitioner's right to a higher legal regulated rent was not preserved therein. Petitioner's assertion that it should not be held responsible for the receiver's actions, DHCR argues, is unavailing; as a new owner purchases at its own risk, and stands in the prior owner's shoes with respect to rights, obligations and encumbrances on the purchased property. DHCR observes that the prior tenant's lease, which petitioner presents as new evidence, is not new, as it was attached to Hadlock's PAR, and is explicitly referenced in the challenged order. Thus, it argues, there is no new evidence warranting remand.

Moreover, DHCR contends, the issue of rent regulation is not properly raised in this proceeding, as petitioner did not file a PAR, and Hadlock's PAR is limited to the issue of overcharges. The challenged determination is, therefore, also limited to overcharges, and as petitioner may not raise issues for the first time in an article 78 proceeding, its arguments as to rent regulation may not be reached. To hold otherwise, it argues, would be to permit judicial review notwithstanding a failure to exhaust administrative remedies.

In any event, DHCR argues that the challenged determination is rational as it considered the entire record, and petitioner's contention that it should be shielded from all liability for overcharges is academic, as it was afforded the protection to which it is entitled, shielding it from liability for overcharges incurred before the sale. (NYSCEF 34). In opposition, Hadlock advances the same arguments. (NYSCEF 16).

III. ANALYSIS

As a matter of law, judicial review in a proceeding pursuant to CPLR article 78 is limited to whether the agency's determination is arbitrary and capricious, "without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc. v Div. of Hous. & Community Renewal*, 225 AD2d 349, 349 [1st Dept 1996]). An agency's determination is entitled to great deference, and the court "may not substitute its judgment for that of the agency when the agency's determination is supported by the record" (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of NY Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008], *appeal dismissed* 10 NY3d 928), nor may it permit judicial review pursuant to article 78 where the petitioner has not first exhausted administrative remedies (*Pascale v New York State Div. of Hous. & Community Renewal*, 157 AD3d 625, 625-26 [1st Dept 2018]; *Matter of Ross v DHCR*, 125 AD3d 434, 434 [1st Dept 2015]).

DHCR administers the New York City Rent Stabilization Law (RSL) and Rent Stabilization Code (RSC). A landlord may charge a tenant a preferential rent, or an amount less than the legal regulated rent, and may thereafter charge the higher rent upon renewal if based on the previously established legal regulated rent. (RSL § 26-511[c][14]; RSC § 2521.2[a]). As

relevant here, RSC § 2521.2(b) provides the “legal regulated rent shall be set forth in the vacancy lease or renewal lease pursuant to which the preferential rent is charged.”

As petitioner did not file a PAR challenging the rent administrator’s determination that the unit is regulated, it failed to exhaust its administrative remedies. (See Matter of Ross, 125 AD3d at 435 [petitioner’s failure to timely file PAR after issuance of the overcharge order constituted failure to exhaust administrative remedies justifying dismissal of article 78 proceeding]; Matter of Welch v New York State Div. of Hous. & Community Renewal, 287 AD2d 725, 726 [2d Dept 2001] [as petitioner did not file PAR, proceeding dismissed for failure to exhaust administrative remedies]).

In any event, DHCR’s order is neither arbitrary nor capricious, as it is based on a careful review of the record and subsequent determination that the legal regulated rent on the base date was \$925, the amount charged in Hadlock’s vacancy lease, as petitioner’s predecessor failed to preserve a higher legal regulated rent in that lease, and petitioner now stands in his shoes.

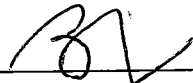
In light of the foregoing, the parties’ other contentions need not be reached.

IV. CONCLUSION

Accordingly, it is hereby

ADJUDGED, that the petition is denied and the proceeding is dismissed.

7/2/2018
DATE



BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE