

**Matter of El-Taieb v New York State Div. of Hous.
and Community Renewal**

2019 NY Slip Op 31503(U)

April 25, 2019

Supreme Court, Kings County

Docket Number: 508073/2018

Judge: Dawn M. Jimenez-Salta

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on April 25, 2019.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA,

Justice.

-----X
**In the Matter of the Application of
IMMAD EL-TAIEB,**

Petitioner,

Index No.: 508073/2018

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

- against -

**NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL (D.H.C.R.),
SIDNEY MARESCA and STANLEY T. KAISER,**

Respondents.

DECISION AND ORDER

MOTION Seq # 1

RE: Administrative Review

Docket Number: FN-210048-RT

Docket Number: FO-210026-RO

-----X
STANLEY T. KAISER and SYDNEY MARESCA,

Petitioners,

-against-

**NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL, and IMMAD EL-TAIEB,**

Respondents.

2019 MAY 17 AM 9:30
KINGS COUNTY CLERK
FILED

**Administrative Review Docket Nos. FN210049RT and
FO210026RO**

Rent Administrator's Docket No. CV410120R

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Recitation, as required by *CPLR 2219(a)*, of the papers considered in the review of:

1) Petitioner Immad El-Taieb's ("Petitioner" or "El-Taieb" or "Landlord") Notice of Petition, dated April 17, 2018, Pursuant to *CPLR Article 78* to Annul, Reverse and/or Vacate Respondent New York State Division of Housing and Community Renewal's ("Respondent" or "DHCR") Denial of Petitioner Landlord's Application for Administrative Review ("PAR") of an Order, dated February 21, 2018, Addressing the Rent Administrator's January 27, 2018 Determination, Granting an Overcharge Claim as Well as Damages for Apartment #2 at 137 Nevins Street, Brooklyn, New York and for Such Further and Other Deemed Just and Proper Relief by the Court;

- 2) Respondent DHCR's Verified Answer and Answering Affidavit, dated July 19, 2018 along with DHCR Office of Rent Administration Order and Opinion, dated February 21, 2018, Denying PAR's;
- 3) Respondent DHCR's Memorandum of Law, dated July 19, 2018;
- 4) Petitioner Landlord El-Taieb's Reply Affirmation, dated September 21, 2018;
- 5) Cross Petitioners Stanley T. Kaiser ("Kaiser") and Sydney Maresca's ("Maresca") (collectively "Petitioners" or "Tenants") Petition, dated April 23, 2018, Pursuant to *CPLR 7803(3)* to Reverse, Annul, and/or Modify Respondent DHCR's Decision and Order, dated February 21, 2018; in the Alternative, Remanding the Matter to DHCR for Further Consideration and Revision; Granting Petitioners Fees and Other Expenses Pursuant to *CPLR 8601(a)*; and for Such Further and Other Deemed Just and Proper Relief by the Court;
- 6) Cross Petitioners Tenants Kaiser and Maresca's Memorandum of Law In Support, dated April 23, 2018;
- 7) Respondent DHCR's Verified Answer, dated July 19, 2018;
- 8) Respondent DHCR's Memorandum of Law, dated July 19, 2018;
- 9) Respondent DHCR's Certified True and Accurate Copy of the Original Record Pursuant to *CPLR Section 8608* and *CPLR Section 7804*;
- 10) Respondent Landlord El-Taieb's Affirmation in Opposition, dated September 21, 2018;
- 11) Cross Petitioners Tenants Kaiser and Maresca's Reply Affirmation, dated September 22, 2018, all of which submitted October 24, 2018.

| Papers | Numbered |
|---|---|
| Notice of Petition..... | Petitioner Landlord 1 [Exh. A-J] |
| Notice of Cross Petition | Cross Petitioners Tenants Kaiser & Maresca 5 [Exh. A-Q] |
| Order to Show Cause and Affidavits..... | |
| Answering Affidavits..... | Respondent DHCR Verified Answer 2 [Exhibit A & Affidavit] Respondent DHCR Verified Answer 7 [Affidavit; Exhs. A-B] Respondent Landlord 10 |
| Replying Affidavit..... | Petitioner Landlord Reply 4 Cross Petitioners Tenants Kaiser & Maresca Reply 11 [Exhibit A] |
| Supplemental Affidavits..... | |
| Exhibits..... | |
| Other [Memoranda of Law] | Respondent DHCR Memorandum of Law 3 Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6 Respondent DHCR Memorandum of Law 8 Respondent DHCR Certified Original Record 9 |

Upon the foregoing cited papers, the Decision/Order on these Petitions by Petitioner Landlord Immad El-Taieb and Cross Petitioners Tenants Stanley T. Kaiser and Sydney Maresca to Reverse, Annul and/or Modify Respondent New York State Division of Housing and Community Renewal's ("DHCR") Decision, dated February 21, 2018, pursuant to *CPLR Article 78* is as follows: Both Petitions are denied, and the Petitions are dismissed [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record

9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

BACKGROUND, PROCEDURAL HISTORY AND ARGUMENTS

Petitioner Landlord Immad El-Taieb (“Landlord”) is the owner (“Owner”) of the building at 137 Nevins Street, Brooklyn, New York 11217 (“the building”). The subject building contains only two (2) residential units. Apartment 2 (the “subject apartment”) is one of those two (2) residential units [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

Respondent New York State Division of Housing and Community Renewal (“DHCR”) issued an administrative determination on November 2, 1999 that six (6) adjoining buildings, including the building at 137 Nevins Street, were a horizontal multiple dwelling subject to rent stabilization. The addresses of the six (6) buildings are: 135 ½, 137, 139 and 141 Nevins Street as well as 251 and 253 Bergen Street. When Landlord Owner El-Taieb appealed the 1999 determination with an *Article 78* proceeding, Kings County Supreme Court issued its decision, dated May 30, 2000, upholding the DHCR’s determination and dismissing the proceeding. Despite the Court’s decision, Landlord Owner failed to file any registration forms for the subject apartment for any year through 2006. He did finally file a registration form for the year 2007, listing the subject apartment as permanently exempt, high rent vacancy [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

Cross Petitioners Tenants Stanley T. Kaiser (“Kaiser”) and Sydney Maresca (“Maresca”) (collectively “Tenants”) entered into occupancy of the subject apartment pursuant to an initial non-stabilized lease for the term from July 15, 2011 through to July 31, 2012 at a rent of \$1,800.00 (One Thousand Eight Hundred Dollars) per month. Pursuant to the initial lease, Tenants paid a security deposit of \$1,800.00 (One Thousand Eight Hundred Dollars). Thereafter, Tenants renewed their one-year non-stabilized leases: August 1, 2012 to July 31, 2013 at \$1,850.00 (One Thousand Eight Hundred Fifty Dollars) per month; August 1, 2013 to July 31, 2014 at \$2,050.00 (Two Thousand Fifty Dollars) per month; and August 1, 2014 to July 31, 2015 at \$2,250.00 (Two Thousand Two Hundred Fifty Dollars) per month. Tenants provided additional security deposits equivalent to one month’s rent upon execution of the new leases. Tenants were never provided with a fully signed copy of the lease for the term August 1, 2014 to July 31, 2015¹. Tenants duly paid all rent as required by their leases [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3;

¹ Consequently, Tenants were unable to provide any copy of the August 1, 2014 to July 31, 2015 lease to DHCR [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

Tenants filed a rent overcharge complaint, Docket No. DU210095R with the DHCR on September 29, 2015, alleging that the provisions of high rent/vacancy deregulation do not apply to the subject apartment. Because of no adequate DHCR registration history, they claimed that Landlord Owner did not establish any legal regulated rent above the high rent vacancy deregulation threshold. They alleged that the subject apartment's prior Tenant, Tara Althoff was never registered with the DHCR. Since Ms. Althoff never paid a rent amount higher than \$2,000.00 (Two Thousand Dollars) per month, they claimed that Landlord Owner had an obligation to register her tenancy as rent stabilized² [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

Tenants claimed never receiving any information from the Landlord Owner in their initial lease about: 1) the regulatory status of the apartment; 2) calculation of the rent amount; and 3) the apartment's prior rental history. Since the legal rent was not in excess of \$2,000.00 (Two Thousand Dollars) per month in 2007, Tenants alleged that the apartment was subject to rent stabilization despite Landlord Owner's 2007 DHCR high rent vacancy exemption registration. Since the prior tenant, Ms. Althoff's tenancy began in 2004 and ended in 2010, Tenants argued that the apartment was not vacant in 2007. Consequently, they maintain that the DHCR default formula was applicable in order to calculate the rent on the base date since Landlord Owner allegedly engaged in a fraudulent scheme to deregulate the apartment. They requested payment of their costs and attorneys' fees [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

In his Answer, dated November 30, 2015, Landlord Owner El-Taieb responded that: 1) to the best of his knowledge, the apartment was occupied by a rent controlled tenant for over forty (40) years; 2) the tenant was evicted in the 1990's by the previous owner, Mohamed Al-Tayeb due to illegal activities inside the apartment; 3) the apartment was vacant for four (4) years; and 4) it was "extensively renovated". Afterwards the apartment "became owner occupied for some period of time". Landlord Owner El-Taieb maintained that he had no other information other than the data in the DHCR's records. He stated that Mohamed Al-Tayeb and Abdul Eltaib (Immad El-Taieb's father) are not the owners of 137 Nevins Street except that he authorized Abdul Eltaib to collect rent during the completion of his studies [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6;

² Tenants tendered e-mails, showing that Ms. Althoff moved into the subject apartment in 2004. When she moved out in 2009, her rent was \$1,500.00 (One Thousand Five Hundred Dollars) per month [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

According to information provided on a September 28, 2016 DHCR request, Tenants Kaiser and Maresca's attorney stated that Tenants had paid all rent through August 31, 2016 at the rate of \$2,250.00 (Two Thousand Two Hundred Fifty Dollars) per month. He later informed DHCR by letter, dated October 11, 2016, that Tenants had vacated the apartment effective September 30, 2016 [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

Landlord Owner El-Taieb claimed in a second submission to DHCR on October 26, 2016, that: 1) a rent controlled tenant occupied the apartment until 1993; 2) the apartment was either vacant or occupied by the Superintendent until 2004; 3) there were Individual Apartment Improvements (IAI's) "prior to 2004"; 4) the apartment was rented to a tenant, Tara Althoff for \$1,875.00 (One Thousand Eight Hundred Seventy Five Dollars) per month; and 5) Ms. Althoff vacated the unit in 2010. Although Landlord Owner argued that he was allowed to charge Ms. Althoff a "first rent", he provided no explanation for his failure to register the apartment and list her as a rent stabilized tenant. He provided limited records, substantiating that a rent controlled tenant, "Ortiz" occupied the apartment in 1972. No records were provided to show the date of the rent controlled tenant's vacating the apartment. He did not submit any records, substantiating his claims that the apartment was either vacant or occupied by the Superintendent from 1993 to 2004. No records of IAI's were given. He did not submit any records of Ms. Althoff's tenancy. However, Landlord Owner did submit copies of two (2) deeds confirming the ownership of the building remained within his family for decades. Since the records from the 2012 deeds show no paid transfer taxes, the transfer was apparently without consideration [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

In their January 17, 2017 reply to DHCR, Tenants' attorney argued that Landlord Owner committed fraud. He referred to the 1999 DHCR order, finding the building to be one of six (6) buildings purchased by A.L. Taieb Realty Co., Ltd. in 1987 pursuant to a single deed and mortgage. A.L. Taieb Realty, Co., Ltd. subsequently transferred ownership to "Mohamed El-Tayib" pursuant to a deed, dated September 16, 1993. The deed reflects a transfer tax of \$220.00 (Two Hundred Twenty Dollars) which was paid. Ownership of the subject building, 137 Nevins Street was next transferred to the current owner, Immad El-Taieb, pursuant to a deed dated November 12, 2012. No transfer taxes were paid, indicating no consideration for the transaction. Because of the building's ownership by the El-Taieb family for decades, Tenants' attorney underscored Landlord Owner El-Taieb's lack of explanation in not producing the requisite rental apartment history records and documentation, such as a statutory decontrol report, in order to verify his claim of the apartment as rent controlled until 1993. Tenants' attorney pointed out that the apartment was not registered as stabilized, "temporarily exempt" during the alleged owner's occupancy. It also was not registered as rent stabilized from 2004 to 2009 or 2010 during the prior tenant, Ms. Althoff's tenancy. Consequently, their attorney argues that the Tenants' occupancy was in actuality rent stabilized [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR

Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

In his Order, dated January 27, 2017 (“the RA Order”), Rent Administrator (“RA”) Jerry M. Scher (“Scher”) determined a rent overcharge based upon the initial proceeding date of September 29, 2011, four years prior to the complaint’s filing date. According to the Calculation Chart, 1) the base legal regulated rent and legal collectible rent was \$1,800.00 (One Thousand Eight Hundred Dollars); 2) the rent was frozen at the lawful stabilized rent of \$1,800.00 (One Thousand Eight Hundred Dollars) per month in effect on April 1, 2012 due to Landlord Owner’s failure to file annual apartment and/or building registrations for the years 2012-2016; 3) Tenants remained in occupancy as month to month tenants from the period of August 1, 2015 to August 31, 2016 without a written lease or increase in rent; and 4) the rent was calculated only up to August 31, 2016, the end date of the last rent payment indicated in the rent ledger submitted by Landlord Owner [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

Since Landlord Owner did not establish that the overcharge was not willful, RA Scher assessed treble damages on the overcharge, beginning two (2) years prior to the filing of the complaint. He directed Landlord Owner: 1) to register the subject apartment for the years 2012 to 2016; 2) to return a signed copy of the renewal lease for the period August 1, 2014 to July 31, 2015 to Tenants; 3) to roll back the rent to the legal regulated rent; 4), to recompute the current rent; 5) to make a full refund or credit to Tenants of any rent paid in excess of the legal regulated rent and any security in excess of such rent; and 6) to refund any excess rent paid by the current occupant if the complainant was no longer in occupancy [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

The RA Order specifically found: 1) an overcharge amount of \$14,850.00 (Fourteen Thousand Eight Hundred Fifty Dollars); 2) a treble damages amount of \$27,500.00 (Twenty Seven Thousand Five Hundred Dollars); 3) an interest amount of \$373.91 (Three Hundred Seventy Three Dollars and Ninety-One Cents); 4), and an excess security amount of \$268.96 (Two Hundred Sixty-Eight Dollars and Ninety-Six Cents): 5), for a total award of \$42,992.87 (Forty Two Thousand Nine Hundred Ninety-Two Dollars and Eighty-Seven Cents) [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

In their Petition for Administrative Review (“PAR”) to Modify the RA Order (Docket Number FN210049RT), dated February 13, 2017, Tenants Kaiser and Maresca argued that: 1) the DHCR’s default formula was the proper one to be used in order to establish the legal regulated rent because of Landlord Owner’s alleged

fraud and illegal scheme to deregulate the apartment; 2) their September 2016 paid rent should have been included in the RA calculation; 3) there should have been an allowance for a refund of the full amount of their security deposit; and 4) they were entitled to attorneys' fees and costs in the amount of \$2,035.42 (Two Thousand Thirty Five Dollars and Forty-Two Cents) through January 2017 [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

In his Petition for Administrative Review ("PAR") (Docket Number FO210026RO), dated March 2, 2017, Landlord Owner El-Taieb asserted that treble damages were not proper because Tenants' overcharge complaint was actually a fair market rent appeal ("FMRA") where treble damages are not available. He argued that his conduct was not willful since his "reasonable belief" about not registering the unit was based upon his ignorance about the DHCR's 1999 decision concerning the buildings' status as a horizontal multiple dwelling. Because Ms. Althoff was the first tenant after the vacancy of the rent controlled unit, he claimed a "first rent" entitlement. Since Ms. Althoff never received any notice of the initial legal regulated rent by the former owner, he postulated that there was never any establishment of the initial legal regulated rent [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

Tenants' attorney and Landlord Owner's attorney submitted their opposing responses to each other's PAR's on April 20, 2017 and October 19, 2017 as well as on November 8, 2017; November 13, 2017; and December 19, 2017 [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

In his DHCR decision, dated February 21, 2018, DHCR Deputy Commissioner ("Deputy Commissioner") Woody Pascal ("Pascal") denied all parties' PAR's, succinctly addressing both sides' issues. Although there was an agency 1990 fuel order, indicating the subject apartment was once subject to the *New York City Rent Control Law*, Deputy Commissioner Pascal found that the Rent Administrator properly did not treat Tenants' complaint as an FMRA where treble damages are not available. Because the claimed vacancy in the apartment was more than four (4) years prior to the former tenant's 2004 tenancy, it was no longer subject to the *City Rent Law*. As a result, the appeal was dismissed since it was filed more than four (4) years following the vacancy pursuant to *RSC Section 2522 (c)*. He found the rent overcharges to be from rental events, occurring after the establishment of the rent base date. He noted that Landlord Owner's claim of lack of knowledge about the 1999 Commissioner's order had no bearing on the treble damages assessment on the rent overcharges after the base date. Treble damages were properly imposed by the RA pursuant to *RSC Section 2526.1(a)(1)* due to Landlord Owner's failure to register the subject apartment, "freezing" the charged rents in excess of the applicable rent guidelines [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B;

Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

Because of the lack of established proof by the Tenants, DHCR Deputy Commissioner Pascal ruled that the base date rent of \$1,800.00 (Eighteen Hundred Dollars) per month was not the product of a fraudulent scheme to deregulate the apartment. As a result, DHCR properly did not employ its default formula to set a new base date rent pursuant to *RSC Section 2526.1(a)(2)(ii)* and *RSC Section 2526.1(a)(2)(iv)*. Observing that Tenants' complaint was filed on September 29, 2015, he determined that pursuant to *RSC Sections 2520.6(e)* and *(f)*, the base rent for the complaint was the rent charged on September 29, 2011, the base date during Tenants' occupancy. The rent at that time was \$1,800.00 (Eighteen Hundred Dollars) per month. Because the 2007 rent registration for the subject apartment was the first filed rent registration, following a sixteen (16) year dispute about the rent regulatory status of the subject apartment and adjacent buildings, he found no evidence of a scheme to fraudulently deregulate the apartment. Any errors on the registration resulted from the owner's ignorance in not entering the apartment into the agency's rent registration system. He was not persuaded by Ms. Althoff's statement in her e-mail, dated August 1, 2018 to Tenants about her rent during her tenancy because it was neither sworn nor accompanied by copies of rent records created contemporaneously with the alleged rental events such as leases or rent checks [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

Highlighting that the last rent payment in the rent ledger provided to the RA was for the period, ending August 31, 2016, DHCR Deputy Commissioner Pascal ruled against Tenants' September 2016 rent payment claim. Consequently, the RA correctly determined the refund of that portion of the security deposit which exceeded one month's legal regulated rent. While *RSC Section 2526.1(d)* does allow the Rent Administrator discretion to assess an additional penalty for the reasonable costs and attorneys' fees upon an overcharge finding, he denied an award for the legal work associated with the processing of the Tenants' PAR's. He found no need for a private attorney's assistance since the rent overcharge award was exclusively the result of: 1) the owner's failure to register the apartment; 2) the collection of rents in excess of the applicable guidelines; and 3) the imposition of treble damages. Moreover, the RA correctly applied: 1) the basic stabilization rules for the penalty for non-registration, 2) the rent guidelines and 3) the statutory presumption of treble damages. He ruled against Tenants' claim for additional attorneys' fees for the PAR's since the *Code* only authorizes the Rent Administrator to assess attorneys' fees but does not allow the Commissioner to do so. Because of his denial of Tenants' PAR, Deputy Commissioner Pascal found no additional rent overcharge upon which attorney fees could attach [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

In his Notice of Petition, dated April 17, 2018, Landlord Owner El-Taieb argues that Respondent DHCR's decision was arbitrary and capricious pursuant to *CPLR Section 7803*. He underscores that there was no willful overcharge pursuant to *RSC Section 2526.1(a)(1)*. Because the previous owners registered the apartment as exempt for eight (8) years prior to the overcharge complaint filing, he contends that there is no requirement for him to keep rent records in excess of four (4) years from the overcharge complaint filing pursuant to *RSL 26-516*. See *Round Hill Management Co., v. Higgins*, 177 AD2d 256 (1st Dept., 1991) [Petitioner Landlord 1, Exhs. A-J; Respondent

DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

In its Verified Answer, Affidavit and Memorandum of Law dated July 19, 2018, DHCR counters Landlord Owner's claims [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

In his Reply Affirmation, dated September 21, 2018, Landlord Owner again questions the DHCR order [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

In their Cross Petition along with Memorandum of Law, dated April 23, 2018, Tenants Kaiser and Maresca argue that DHCR's decision was arbitrary, capricious and contrary to law pursuant to *CPLR Section 7803*. They postulate that the DHCR default formula was the proper one to use in order to calculate the legal rent and overcharges because of Landlord Owner's alleged fraud and illegal scheme to deregulate the apartment. Since the DHCR decision is flawed, they request attorneys' fees, overcharges on their September 2016 paid rent and a full security deposit refund [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

In its Verified Answer, Affidavit and Memorandum of Law, dated July 19, 2018, DHCR responds to Tenants' arguments [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

In his Affirmation in Opposition, dated September 21, 2018, Landlord Owner challenges Tenants' claims [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

In their Reply Affirmation, dated September 22, 2018, Tenants refute Landlord Owner's positions [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR

Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

COURT RULINGS

This Court denies both Petitioner Landlord Immad El-Taieb's and Cross Petitioners Tenants Stanley T. Kramer's and Sydney Maresca's Petitions to Reverse, Annul and/or Modify Respondent New York State Division of Housing and Community Renewal's ("DHCR") Decision, dated February 21, 2018, pursuant to *CPLR Article 78*, and they are dismissed [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

This Court is well aware that judicial review of an administrative determination pursuant to *CPLR Article 78* is limited to a review of the agency record. The proper standard for judicial review of an administrative record is whether it was arbitrary, capricious or without a rational basis in the record. A court may not disturb an administrative decision unless the agency's action was arbitrary, in violation of lawful procedure, an abuse of its discretionary power or made in excess of its jurisdiction. When an agency's determination is supported by the record, it must be affirmed, and a court may not upset its determination in the absence of finding that it has no rational basis. Consequently, a court's function is exhausted upon finding a rational basis for the DHCR determination. Moreover, a court may not substitute its judgment for that of the agency when its decision is rationally based in the record absent a demonstration of capriciousness or irrationality. Even when there are facts that might lead to differing conclusions, the determination of an agency responsible for administering the statute should be upheld unless irrational. Since factual issues are to be determined by the administrative agency, it is the agency's responsibility to evaluate information so provided to it as well as interpret and apply the law accordingly. Courts have regularly deferred to the agencies in their evaluation of evidence before them due to their expertise with the review of the appropriate statutes as well as implementation of regulations. See *Matter of Windsor Place Corp., v. New York State Division of Housing and Community Renewal*, 161 AD2d 279, 554 NYS2d 913 (1st Dept., 1990); *Mazel Real Estate v. Mirabel*, 138 AD2d 600, 526 NYS2d 183 (2nd Dept., 1988); *Matter of Bambeck v. New York State Division of Housing and Community Renewal*, 129 AD2d 51, 517 NYS2d 130 (1st Dept., 1987), motion for leave to appeal denied, 70 NY2d 615, 524 NYS2d 676 (1st Dept., 1988); *Greystone Management Corp., v. CAB*, 94 AD2d 614, 462 NYS2d 13 (1st Dept., 1983), aff'd NY2d 763, 477 NYS2d 315 (1984); *Royal Realty Co., v. DHCR*, 161 AD2d 40, 555 NYS2d 334 (1st Dept., 1990); *Pell v. Board of Education*, 34 NY2d 222, 356 NYS2d 833 (1974); *DiMaggio v. DHCR*, 248 AD2d 533, 670 NYS2d 501 (2nd Dept., 1998); *Barklee Realty Co., v. DHCR*, 159 AD2d 416, 553 NYS2d 112 (1st Dept., 1990), appeal dismissed 76 NY2d 844, 560 NYS2d 128 (1990), leave to appeal denied, 76 NY2d 709, 563 NYS2d 61 (1990); *Mid-State Management Corp., v. CAB*, 112 AD2d 72, 491 NYS2d 634 (1st Dept., 1985), aff'd 66 NY2d 1032, 499 NYS2d 398 (1985); *Plaza Management Co., v. City Rent Agency*, 48 AD2d 129, 368 NYS2d 178 (1st Dept., 1975), aff'd 37 NY2d 837, 378 NYS2d 33 (1975); *Howard-Carol Tenants' Assn v. CAB*, 64 AD2d 546, 406 NYS2d 845 (1st Dept., 1978), aff'd 48 NY2d 768, 423 NYS2d 911 (1979), reargument denied, 48 NY2d 1027, 425 NYS2d 1029 (1980); *C. Schmidt and Sons, Inc., v. NYS Liquor Authority*, 73 AD2d 399, 426 NYS2d 482 (1st Dept., 1980), aff'd 52 NY2d 751, 436 2d 482 (1980);

Krakower v. DHCR, 137 AD2d 688, 524 NYS2d 778 (2nd Dept., 1988), leave to appeal denied 74 NY2d 613, 547 NYS2d 847 (1989); *Oriental Boulevard Co., v. CAB*, 92 AD2d 470, 459 NYS2d 50 (1st Dept., 1983), aff'd 60 NY2d 633, 467 NYS2d 355 (1983); *Brusco West 78th Street Associates v. DHCR*, 721 NYS2d 232 (1st Dept., 2001); *Belnord Holding Corp., v. Joy*, 73 AD2d 549, 423 NYS2d 232 (1st Dept., 1979), aff'd 52 NY2d 945, 437 NYS2d 968 (1981); *Ansonia Residents Assn., v. DHCR*, 75 NY2d 206, 551 NYS2d 871 (1989); *Kurcsics v. Merchants Mutual Inc. Co.*, 49 NY2d 451, 426 NYS2d 454 (1980); *Howard v. Wyman*, 28 NY2d 434, 322 NYS2d 683 (1971), reargument denied 29 NY2d 749, 326 NYS2d 1027 (1971); *Parcel Realty v. DHCR*, 215 AD2d 132, 626 NYS2d 758 (1st Dept., 1995), leave to appeal denied 86 NY2d 706, 632 NYS2d 500 (1995); *Salvati v. Eimicke*, 72 NY2d 784, 537 NYS2d 16 (1988), reargument denied 73 NY2d 995, 540 NYS2d 1006 (1989); *McMurray v. DHCR*, 135 AD2d 235, 524 NYS2d 693 (1st Dept., 1988), aff'd 72 NY2d 1022, 534 NYS2d 924 (1988), reargument denied 73 NY2d 918, 539 NYS2d 302 (1989) [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

Because there is a rational basis in the record for Respondent DHCR's determination, this Court upholds its decision of February 21, 2018. See *DiMaggio v. DHCR*, *supra*; *Barklee Realty Co., v. DHCR*, *supra*; *Mid-State Management Corp., v. CAB*, *supra*; *Plaza Management Co., v. City Rent Agency*, *supra*; *Howard-Carol Tenants' Assn v. CAB*, *supra*; *C. Schmidt and Sons, Inc., v. NYS Liquor Authority*, *supra*; *Krakower v. DHCR*, *supra*; *Krakower v. DHCR*, *supra*; *Oriental Boulevard Co., v. CAB*, *supra*; *Brusco West 78th Street Associates v. DHCR*, *supra*; *Belnord Holding Corp., v. Joy*, *supra*; *Ansonia Residents Assn., v. DHCR*, *supra*; *Kurcsics v. Merchants Mutual Inc. Co.*, *supra*; *Howard v. Wyman*, *supra*; *Parcel Realty v. DHCR*, *supra*; *Salvati v. Eimicke*, *supra*; *McMurray v. DHCR* *supra* [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

DHCR's calculation of the legal regulated rent was in full accord with the applicable law because Landlord Owner failed to preserve his challenge to the DHCR established legal rent in his PAR. The filing of a PAR coupled with DHCR's determination is the jurisdictional prerequisite in order to obtain judicial review of a DHCR resolution. When a party fails to raise an issue during the PAR proceedings, the omission properly bars any judicial review of that issue. The failure to raise a particular issue on a PAR is a failure to exhaust administrative remedies by the regulatory system and achieve finality regarding the administrative process. Such a failure to exhaust administrative remedies precludes later judicial review of the issue upon jurisdictional grounds. See *Fanelli v. Conciliation and Appeals Board*, 58 NY2d 952, 406 NYS2d 534 (1983), affirming 90 AD2d 756, 455 NYS2d 814 (1st Dept., 1982); *Oriental Boulevard v. Conciliation and Appeals Board*, 60 NY2d 633, 467 NYS2d 355 (1983), affirming 92 AD2d 470, 459 NYS2d 50 (1st Dept., 1982); *Plaza Realty v. NYCAB*, 110 AD2d 704, 487 NYS2d 607 (2nd Dept., 1985); *Celestial Food v. NY State Liquor Authority*, 99 AD2d 25, 471 NYS2d 645 (2nd Dept., 1984); *RSC Sections 2529.7 and 2529.8; RSC Sections 2529.2 and 2529.3; RSL Section 26-516(h)(1); RSC Section 2530.1; Weber v. New York State Div. Of Housing and Community Renewal*, 190 AD2d 810, 594 NYS2d 640 (2nd Dept., 1993); *Jonathan Woodner Co., v. Higgins*, 179 AD2d 444, 578 NYS2d 561 (1st Dept., 1992), leave to appeal denied 80 NY2d 756, 602 NE2d 232, 588 NYS2d 824 (1992); *S&M Dev., v. State Division of Housing and Community Renewal*, 182 AD2d 995 (3rd Dept., 1991); *Rusty*

Realty Assoc., Ltd., v. New York State Division of Housing and Community Renewal, 161 AD2d 207, 554 NYS2d 594 (1st Dept., 1990), leave to appeal denied, 76 NY2d 711, 564 NE2d 672, 563 NYS2d 63 (1990); *Meyers v. Bethlehem Shipbuilding Corp.*, 303 US 41 (1938); *Acevado v. New York State Division of Housing and Community Renewal*, 67 AD3d 785 (2nd Dept., 2009) [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

The DHCR Decision was neither arbitrary nor capricious pertaining to Landlord Owner's claim that the legal rent was in excess of \$2,000.00 (Two Thousand Dollars) a month because there was no support in the administrative record. As the Appellate Division ruled in *Hawco v. DHCR*, 281 AD2d 294, 722 NYS2d 150 (1st Dept., 2001), DHCR may not predicate a rent overcharge finding upon rent registration statements or other rental information for a period more than four (4) years prior to the complaint filing date. Although the 2014 amendments to the *Rent Stabilization Code* delineated specific exceptions to this four (4) year rule, barring examination of prior rental history (*RSC Section 2526.1(a)(3)(iii)*), DHCR did not apply any of those exceptions in its PAR Order. Consequently, DHCR determined that the legal regulated rent for the subject apartment was founded upon the only rent listed in the base date lease which is generally the date four (4) years prior to the overcharge complaint filing. See *RSC Section 2520.6(f)(1)*. As the Appellate Division determined in *985 Fifth Avenue v. DHCR*, 171 AD2d 572, 567 NYS2d 657 (1st Dept., 1991), leave to appeal denied, 78 NY2d 861, 57 NYS2d 219 (1991), the owner of a rent stabilized apartment bears the burden of demonstrating the legality of the rent in an administrative overcharge proceeding. Because of Landlord Owner's failure to sustain his burden for the claimed amount of legal rent, the DHCR Order is fully supported [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

DHCR's imposition of treble damages was warranted and fully supported by the administrative record because Landlord Owner failed to rebut the statutory presumption of willfulness. *RSL Sections 26-516(a)* and *RSC Section 2526.1* mandate the imposition of treble damages by DHCR upon a rent overcharge finding unless the owner proves by a preponderance of evidence that the overcharge was not willful. The burden of proof of showing non-willfulness rests upon the owner. See *RSL Section 26-512*; *RSL Section 26-516(a)*; *RSC Sections 2522.1*; *RSL Section 26-511(a)*; *RSL Section 26-516*; *RSL Section 26-516(a)*; *RSC Section 2526.1*; *Lula Belle Branch v. DHCR*, 217 AD2d 581, 628 NYS2d 975 (2nd Dept., 1995); *Two Lincoln Square Associates v. DHCR*, 191 AD2d 281, 594 NYS2d 75 (1st Dept., 1993); *30 Seaman Ave. Co., v. Higgins*, 173 AD2d 371, 570 NYS2d 7 (1st Dept., 1991); *Coronet Properties Co., v. DHCR*, 134 AD2d 967, 520 NYS2d 692 (1st Dept., 1987). Landlord Owner did not dispute Tenants' allegations about the subject building's ownership by his family members prior to his taking title to the building. Since the 1999 DHCR order, finding the subject apartment was rent stabilized, was affirmed in the 2000 court decision, Landlord Owner was responsible for documentation, substantiating his claim to a higher legal rent. However, Landlord Owner did not meet his burden to demonstrate that the legal rent ever exceeded the deregulation level. Moreover, the entire overcharge occurred during the four (4) year period when Landlord Owner held the title as well as managed the subject building. [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser &

Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

DHCR's determination of no "fraudulent scheme to deregulate the apartment" was neither arbitrary nor capricious. The administrative record shows Tenants' failure to submit any evidence or documentation in rebuttal to Landlord Owner's "good faith belief" statement regarding the status of the subject apartment. As Deputy Commissioner Pascal found, there was sufficient support in the record that Landlord Owner's belief that the subject apartment had been deregulated, while mistaken, was not part of a fraudulent scheme to deregulate the apartment. Consequently, he determined that the base rent charged Tenants was not the product of a fraudulent scheme to deregulate. He pointed to the Court of Appeals decision in *In the Matter of Grimm v. DHCR*, 15 NY3d 358, 938 NE2d 924, 912 NYS2d 491 (2010) where the Court determined that absent a finding of an owner's fraudulent scheme to deregulate an apartment, a rent overcharge occurring prior to the base date did not render the base date rent unreliable. Accordingly, DHCR's decision not to use its default procedures in establishing the rent was rational. See *In the Matter of Grimm v. DHCR, supra*; *Gomez v. DHCR*, 79 AD3d 878, 912 NYS2d 444 (2nd Dept., 2010), leave to appeal denied, 17 NY3d 713 (2011); *VR Equities v. NYC Conciliation and Appeals Board*, 118 AD2d 459, 499 NYS2d 743 (1st Dept., 1986); *Matter of Park v. DHCR*, 150 AD3d 105, 50 NYS3d 377 (1st Dept., 2017); *Jane Street Co., v. DHCR*, 165 AD2d 758 (1st Dept., 1990), leave to appeal denied, 77 NY2d 801 (1991); *Stork Restaurant, Inc., v. Boland*, 282 NY 256 (1940); *Wemply Management v. DHCR*, 205 AD2d 319 (1st Dept., 1994), leave to appeal denied, 85 NY2d 808 (1995); *Hawthorne Gardens LLC v. DHCR*, 4 AD3d 135 (1st Dept., 2004); *Cora v Joy*, 81 AD2d 666 (2nd Dept., 1981) [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

DHCR's overcharge award calculation without Tenants' alleged September 2016 rent payment was proper. The last proof of a rent payment was a cancelled check for the July 2016 rent payment. Since Tenants did not submit any proof such as cancelled checks or rent receipt, indicating their alleged September 2016 payment, DHCR properly did not include that amount in its rent overcharge award. It did not include the full security deposit in its overcharge award calculation because the RA correctly directed the refund of that portion of the security deposit which was in excess of one month's legal regulated rent. Although *RSL* and *RSC* limit to one month the amount of the security deposit an owner may require, *RSL* does not regulate the actual security deposit. Therefore, since DHCR can only require the return of excess security deposit, it does not have the jurisdiction to adjudicate whether an owner properly withholds a security deposit. See *GOL Section 7-109* [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

DHCR's determination not to award attorney's fees to Tenants was rational. Pursuant to *RSL Section 26-514(a)(4)* and *RSC Section 2526.1(d)*, DHCR is allowed discretion when awarding attorney's fees in a rent overcharge proceeding based upon the facts and circumstances of the specific proceeding. See *Montbatten Equities v. DHCR*, 226 AD2d 128, 640 NYS2d 82 (1st Dept., 1996); *Waverly Associates v. DHCR and Berman*

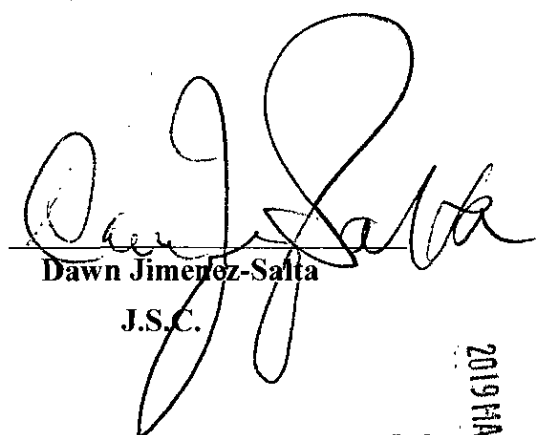
v. *DHCR*, 12 AD3d 272, 785 NYS2d 67 (1st Dept., 2004). However, the administrative record in this proceeding supports DHCR’s finding because the determination of a rental overcharge does not create a presumption of entitlement to attorney fees. See *Waverly Associates v. DHCR and Merman v. DHCR*, *supra*. Moreover, DHCR’s determination of no attorney fees against DHCR for the PAR’s is not arbitrary or unreasonable since Tenants do not set forth a basis for such an award against a state agency. Since the Tenants are not the prevailing party, and no final judgement has been issued, their request was premature. See *CPLR Section 8601*. In addition, *CPLR 8602* addresses counsel fees and expenses in certain actions against the State. It specifically provides attorney fees only to individuals whose net worth (excluding primary residences) is not in excess of \$50,000.00 (Fifty Thousand Dollars). Because Tenants were awarded a monetary sum of nearly \$43,000.00 (Forty Three Thousand Dollars) along with entitlement to statutory interest, Tenants may not be entitled to attorney fees. Thus, there is a rational basis for DHCR’s determination. See *Howard v. Wyman*, *supra*; *Howard-Carol Tenants Association v. New York Conciliation and Appeals Board*, *supra* [Petitioner Landlord 1, Exhs. A-J; Respondent DHCR Verified Answer 2, Exh. A & Affidavit; Respondent DHCR Memorandum of Law 3; Petitioner Landlord Reply 4; Cross Petitioners Tenants Kaiser & Maresca 5, Exhs. A-Q; Cross Petitioners Tenants Kaiser & Maresca Memorandum of Law 6; Respondent DHCR Verified Answer 7, Affidavit, Exhs. A-B; Respondent DHCR Memorandum of Law 8; Respondent DHCR Certified Original Record 9; Respondent Landlord 10; Cross Petitioners Tenants Kaiser & Maresca Reply 11].

Based on the foregoing, it is hereby ORDERED as follows:

The Petitions by Petitioner Landlord Immad El-Taieb and Cross Petitioners Tenants Stanley T. Kaiser and Sydney Maresca to Reverse, Annul and/or Modify Respondent New York State Division of Housing and Community Renewal’s (“DHCR”) Decision, dated February 21, 2018 are DENIED pursuant to *CPLR Article 78*, and the Petitions are DISMISSED.

This constitutes the Decision and Order of the court.

Date: April 25, 2019
 In re Immad El-Taieb
 In re Kaiser and Maresca
 (Index Number 508073/2018)



Dawn Jimenez-Salta

J.S.C.

Hon. Dawn Jimenez-Salta

2019 MAY 17 AM 9:30
 KINGS COUNTY CLERK
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