Matter of Bazan v New York State Div. of Hous. & Community Renewal
2019 NY Slip Op 32976(U)
October 9, 2019
Supreme Court, New York County
Docket Number: 154307/19
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35
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In the Matter of the Application of

GUADALUPE BAZAN,

Petitioner,

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

Index No.: 154307/19
DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL,

Respondent,

-and-

EDGECOMBE REALTY, LLC,

Proposed Intervenor Respondent.
---X
HON. CAROL R. EDMEAD, J.S.C.:

In this Article 78 proceeding, petitioner Guadalupe Bazan (Bazan) seeks a judgment to overturn an order of the respondent New York State Division of Housing and Community Renewal (DHCR) as arbitrary and capricious, and landlord Edgecombe Realty, LLC (Edgecombe) moves for leave to intervene (together, motion sequence number 001). For the following reasons, the petition and motion are both denied and the proceeding is dismissed.

FACTS

Bazan is the tenant of apartment 15, a rent-stabilized unit in a building (the building) located at 141 Edgecombe Avenue in the County, City and State of New York. *See* verified petition, ¶ 1. The DHCR is the state agency charged with oversight of all rent stabilized housing accommodations in New York City. *Id.*, ¶ 2. Proposed Intervenor Edgecombe is the building's

owner. *See* notice of cross motion, Littman affirmation, ¶ 9.

On December 21, 2015, Bazan filed a rent overcharge complaint against Edgecombe with the DHCR. *See* return, exhibit A-1. On May 15, 2018, a DHCR rent administrator (RA) issued an order denying Bazan's overcharge complaint (the first RA's order). *Id.*, exhibit A-16. On October 8, 2015, Bazan also filed a second, separate DHCR complaint against Edgecombe for failure to furnish a lease. *See* return, exhibit B-1. On February 28, 2018, another RA issued an order that terminated that proceeding (the second RA's order). *Id.*, exhibit B-5.

Bazan filed a petition for administrative review (PAR) of the first RA's order on June 21, 2018; and, on August 3, 2018, the DHCR commissioner's office issued an order that rejected Bazan's PAR on procedural grounds (the first PAR order). *See* return, exhibits C-1, C-2. Bazan then refiled her PAR application on August 13, 2018. *Id.*, exhibit D-1. On February 27, 2019, the DHCR commissioner's office issued an order that denied the second PAR application as well (the second PAR order). *Id.*, exhibit D-6. The relevant portion of the second PAR order stated:

> "The Commissioner, having reviewed the record herein, finds that the petition should be denied.
>
> "As a first matter, the Commissioner finds that the petitioner timely re-filed the PAR within 35 days of the rejection notice served by the agency. Therefore, the PAR is timely.
>
> "RSC [rent stabilization code] § 2526.1 (a) (2) (i) provides generally that rent overcharge complaints must be filed within four years of the first overcharge alleged and that the rent history of the housing accommodation prior to the four-year period preceding the filing of a complaint shall not be examined. Pursuant to RSC § 2526.1 (a) (2) (iv), the rental history pre-dating the four-year base date may be examined to determine whether there was a fraudulent scheme to deregulate the apartment as set forth by the New York Court of Appeals in *Grimm v DHCR*, 15 NY3d 358 (2010). In *Grimm*, the Court found that a combination of factors including a rent increase from $578.86 to $2,000.00 per month; the failure to offer a lease with a rent-stabilized lease rider; the failure to register the apartment rents;

and the registration of the rents after the filing of the overcharge complaint warranted the agency to pierce the four-year statute of limitations and investigate the reliability of the base date rent and whether there was a fraudulent scheme to deregulate the apartment.

"Considering the factors that lead to a finding of fraud under *Grimm*, the Commissioner finds that there is insufficient evidence of a fraudulent scheme to deregulate the subject apartment. *See Boyd v DHCR*, 23 NY3d 999 (2014) (failure to set forth sufficient indicia of fraud to warrant consideration of the rental history beyond the four-year statutory period); *Grimm* (mere allegation of fraud, without more, will not be sufficient to require the agency to investigate rents beyond the four-year base date).

"The *Grimm* court specifically noted that a mere increase in rent alone is not indicative of fraud. As such, the pre-base date rent increases alleged by [Bazan] cannot be *per se* fraudulent. Further, [Edgecombe] presented sufficient evidence that the rent increase in 2005 was the result of IAIs [i.e., individual apartment improvements]. [Edgecombe] submitted a signed and itemized job estimate detailing a gut renovation of the subject apartment at a cost of $27,750.00 which was marked 'paid in full' as of December 1, 2005. [Edgecombe] also submitted an affidavit of the property manager who signed the job estimate stating that he paid the contractor six separate cash payments for the work totaling $29,000.00. The evidence is sufficient to support the pre-base date IAIs which were performed ten years prior to the filing of the overcharge complaint. *See Boyd v DHCR*, *supra.*

"[Bazan]'s contention that the IAIs had to be performed by a licensed contractor or supported by DOB [i.e., Department of Buildings] filings are without merit. No such requirements exist for an owner to obtain an IAI rent increase. Further, the allegation that similar IAIs were performed in 2002 does not invalidate the rent increase. If such work was performed, the Commissioner notes that it was done under prior ownership; said work occurred thirteen years prior to the filing of the complaint herein; and there is no evidence presented that the condition of the apartment in 2005 did not warrant further work by the current owner.

"Aside from an issue concerning the agency's jurisdiction over the apartment, the Commissioner notes that the mere allegation that pre-base date IAIs were somehow fraudulent does not make them subject to review after the four-year period. This is particularly true in this case where [Bazan] has been in continuous occupancy since 2006 and had ample opportunity to challenge the IAIs as well as the resulting 2006 rent increase within four years of her initial occupancy and failed to do so.

"Finally, the apartment registrations do not support a fraudulent scheme to

> deregulate the apartment. [Edgecombe] has produced a pre-base date lease of Barbara Lopez whose rent matches that which is registered with the agency. [Edgecombe] also produced a lease of a former tenant, Olin Sanders, which was signed after the 2005 registration and therefore need not have been registered in that year. The Sanders lease coupled with the IAI evidence supports [Bazan]'s initial rent amount and the filing of the apartment as exempt beginning in 2006. There is no evidence that [Edgecombe] filed false registration statements or attempted to file amended registrations after the complaint was filed.
>
> "Therefore, in accordance with the relevant Rent Regulatory Laws and Regulations, it is
>
> "Ordered, that this petition be, and the same hereby is, denied, and that the [RA's first] order ne, and hereby is, affirmed."

Id., exhibit D-6. Aggrieved, Bazan then commenced this Article 78 proceeding on April 25, 2019. *See* verified petition. The DHCR filed its answer on July 10, 2019, and Edgecombe filed its motion to intervene on July 23, 2019. *See* verified answer; notice of cross motion. All matters are now fully submitted and before the court (together, motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See 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 E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination is only arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *See Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), *citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of*

Scarsdale & Mamaroneck, Westchester County, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

Here, after a review of the administrative record, the court finds that there was a rational basis for the second PAR order. In it, the DHCR deputy commissioner noted that, as it was constituted on February 27, 2019,[1] RSC § 2526.1 (a) (2) (i) forbade the agency to examine an apartment's rent history from more than four years before the filing date of an overcharge claim. The deputy commissioner then noted that appellate case law has recognized an exception to this rule where there were "substantial indicia" of "a fraudulent scheme to deregulate an apartment." The deputy commissioner then concluded that the evidence in the administrative record did not conclude such "substantial indicia of fraud," so an extended lookback at apartment 15 was not warranted. This court finds that the Deputy commissioner's analysis of the subject regulations and case law was accurate, since both are clear and unambiguous. Also the court finds that the deputy commissioner's assessment that the evidence in the administrative record did not indicate the existence of a fraudulent scheme was correct. In *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (15 NY3d 358, [2010]), the Court of Appeals specifically stated that "[g]enerally, an increase in the rent alone will not be sufficient to establish a 'colorable claim of fraud,' and a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further." 15 NY3d at 367. In this case, the DHCR deputy

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[1] February 27, 2019 was the date that the DHCR commissioner's office issued the second PAR order. In June, the Housing Stability and Protection Act of 2019 was signed into law, and the four-year no-lookback rule was repealed.

commissioner found that Bazan had presented nothing more than evidence of increases to apartment 15's rent, while Edgecombe had adequately explained that the increases were due to IAIs, for which it presented proofs of performance and payment. *See* return, exhibit D-6. Because Bazan's evidence is insufficient to satisfy the *Grimm* criteria for fraud, the deputy commissioner's legal analysis and conclusion were correct. Nevertheless, Bazan's Article 78 petition raises two arguments as to why the deputy commissioner's decision should be overturned.

First, Bazan argues that "there is sufficient fraud to permit a lookback of more than four years." *See* verified petition, ¶ 14. However, the evidence of this alleged fraud that Bazan refers to is the same IAI work that the DHCR deputy commissioner considered in the second PAR order. *Id.*, ¶¶ 16-20. Bazan also now raises the same legal arguments concerning fraud in connection with this work that the DHCR deputy commissioner rejected in that decision. *Id.* The DHCR deputy commissioner specifically rejected her contentions that: 1) DOB permits were required for the subject work; 2) said work could only be performed by licensed contractors; and 3) some of the job items did not fall within the RSC's definition of eligible IAI work. *See* return, exhibit D-6. Counsel for Bazan presents no new evidence or legal arguments in the current petition, nor does he advance any new rationale as to how the DHCR deputy commissioner's analysis might have been in error. Counsel certainly does not identify any statutes or regulations to support Bazan's assertions. Therefore, the court rejects Bazan's first argument as unsupported.

Second, Bazan argues that "case law in the First Department makes it clear that the four-year lookback does not apply to determinations of status." *See* verified petition, ¶ 15. This is an

accurate statement of the law, since the First Department has held that "'DHCR's consideration of events beyond the four-year period is permissible if done not for the purpose of calculating an overcharge but rather to determine whether an apartment is regulated.'" *Matter of H.O. Realty Corp. v DHCR*, 46 AD3d 103, 109 (1st Dept 2007), quoting *East W. Renovating Co. v DHCR*, 16 AD3d 166, 167 (1st Dept 2005). However, that law is inapposite to this proceeding, which involves a DHCR rent overcharge claim, and *not* a request that the agency determine apartment 15's regulatory status. Therefore, the court rejects Bazan's second argument as well, and concludes that she has failed to demonstrate that the second PAR order was an "arbitrary and capricious" decision.

Accordingly, Bazan's petition is denied, and this proceeding is dismissed. As a result, Edgecombe's cross motion to intervene is also denied as moot.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Guadalupe Bazan (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

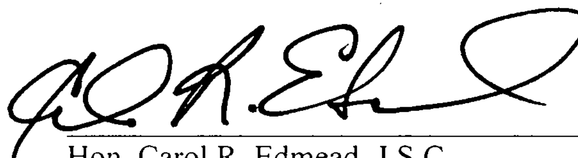
ORDERED that the Clerk of the Court shall enter Judgment accordingly; and it is further

ORDERED that the cross motion, pursuant to CPLR 1012 and/or 1013, of the proposed intervenor respondent Edgecombe Realty, LLC (motion sequence number 001) is denied; and it is further

ORDERED that counsel for Respondent shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for Petitioner and Proposed Intervenor Respondent.

Dated: New York, New York
October 9, 2019

ENTER:



Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.