

Matter of Mbow v State of New York
2019 NY Slip Op 33435(U)
November 21, 2019
Supreme Court, New York County
Docket Number: 151423/2019
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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In the Matter of the Application of

ABDOULAYE MBOW

Index No.
151423/2019

For an Order Pursuant to Article 78 of the Civil Practice
Law and Rules,

- against -

**DECISION
and ORDER**

STATE OF NEW YORK
DIVISION OF HOUSING AND
COMMUNITY RENEWAL, Woody
Pascal, Deputy Commissioner,

Motion Seq. 001

Respondent.

Administrative Review Docket No. GM 410029 RT
Rent Administrator's Docket No. DT 410030 R

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Abdoulaye Mbow ("Petitioner") brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules ("Article 78"), seeking the Court to reverse, set aside or otherwise modify the Order and Decision Denying Petition for Administrative Review dated December 12, 2018 (the "Decision"). Respondent State of New York Division of Housing and Community Renewal ("DHCR"), Woody Pascal, Deputy Commissioner opposes.

Background/Factual Allegations

Petitioner is the rent stabilized tenant at Apartment 507, 1951 Park Avenue, New York, New York (the "subject apartment"). DHCR is the state agency responsible for the management of rent stabilized apartments in New York.

On or about August 17, 2015, Petitioner contends that he filed a tenant rent overcharge complaint for the period of November 15, 2013 to November 14, 2014, against the owner of the subject apartment, Harlem River Point North LLC (the "Owner"). Petitioner "based that complaint upon the Owner's failure to charge rent

based upon the initial lease executed between the Petitioner and Owner at a rate of \$1,127.00.” (Verified Petition at 2). Petitioner contends that the Owner filed an Answer stating that Petitioner was not overcharged, and it was permitted to charge a set percentage of the fair market rental value for the subject apartment. On November 17, 2017, the Rent Administrator issued an Order finding that Petitioner was not overcharged.

On or about January 8, 2018, Petitioner contends that he submitted a Petition for Administrative Review (“PAR”) with DHCR asserting “that since the Petitioner won a housing lottery for a lease of \$1,127.00 and signed a lease with said monthly rent; that the legal regulated rent should be set at the agreed amount in the initial lease, and that the Owner fraudulently changed the monthly rent by hand after the initial lease was signed and falsified the Petitioner’s initials.” (Verified Petition at 3). On December 12, 2018, DHCR issued a Decision finding that there was no overcharge and Petitioner’s claim of fraud was without merit.

Petitioner brings this Verified Petition as an Article 78 proceeding on February 8, 2019. DHCR filed its Answer on July 1, 2019.

Parties’ Contentions

Petitioner argues that the Decision was arbitrary and capricious because “substantial, credible documentation” clearly shows that Petitioner’s rent was fraudulently increased from \$1,127.00 to \$1,720.08. On or about November 4, 2013, Petitioner asserts that part of the lease signing Petitioner executed a “Rental Deposit Agreement” which stated in relevant part “[i]t is hereby acknowledged that you are giving the deposit (*equal to 1 month’s rent*) in advance in the amount of \$1,127.00 payable to Harlem River Point North LLC for a 3 bedroom apartment.” (Verified Petition at 9). Petitioner argues that in or about September 2014, Petitioner received a renewal lease agreement and refused to sign because the rent increased to \$1,720.80. Petitioner asserts that the Owner submitted to DHCR “a lease that crossed out the monthly rent that the Petitioner signed in the amount of \$1,127.00 and changed the amount to \$1,720.80 and the Petition allege that the Owner fraudulently placed his and his wife’s initials on that page.” (Verified Petition at 11).

Moreover, Petitioner asserts that the New York City Housing Preservation and Development (“HPD”) and DHCR’s approval of the rent does not supersede the signed agreement between Petitioner and the Owner that Petitioner would pay \$1,127.00 for rent. Petitioner argues that,

“[i]f the rent set in the initial lease is below the rent stabilized rent for an apartment, it is considered preferential rent. Preferential rent is revocable if the legal regulated rent is also disclosed on the lease and even then this may be subject to a preferential rent rider. In this case the legal regulated rent is not disclosed on the Petitioner’s initial lease agreement and there is no preferential rent rider attached to the lease.”

(Verified Petition at 12).

In opposition, DHCR argues that the Decision was rationally based on the record. DHCR asserts that the Owner claimed throughout the proceeding that the lease incorrectly stated the rent for the subject apartment was \$1,127.00, but the Owner corrected the rent to \$1,720.80. DHCR argues that Petitioner and his wife initialed the corrected lease and “unequivocally denied that the corrected lease was forged as alleged by [Petitioner] in the underlying proceedings.” (Answer in Opp. at 12). DHCR contends that criminal conduct, such as fraud or forgery, would risk funding for the entire project and is a strong incentive to charge the correct rent. DHCR asserts that Petitioner’s claims are not credible because Petitioner was informed by HPD as early as April 2014 that the rent for that year was \$1,720.80, when HPD sent Petitioner a notice of the “Rent Breakdown”. DHCR argues that Petitioner has failed to prove fraud.

Furthermore, DHCR asserts that Petitioner has also failed to show that he was “personally” overcharged. DHCR contends that Petitioner never paid more than \$1,127.00. DHCR asserts that Petitioner “paid \$355 at the outset and in later years he would pay \$560 based upon his income because he receives Section 8 Assistance.” (Answer in Opp. at 13-14). DHCR argues that Petitioner stated that the difference in rent did not affect Petitioner. DHCR asserts that \$1,720.80 in rent per month for the subject apartment is a legal regulated rent because HPD approved the payments after review. DHCR further asserts that Petitioner lacks standing to represent HPD and Petitioner cannot show that overpayment by HPD establishes an overcharge to Petitioner.

Legal Standards

“Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action.” *Dunne v Harnett*, 399 NYS 2d 562, 563 [Sup Ct, NY County

1977]. Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v Franco*, 95 NY2d 550, 554 [2000]. One such question is “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed.” See CPLR 7803 [3]. “[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious.” *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363 [1987]. “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts.” *Testwell, Inc. v New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010].

Discussion

Petitioner has failed to demonstrate that the Decision was arbitrary and capricious. *Flacke*, 69 NY2d at 363. DHCR’s Decision Denying Petition for Administrative Review was rationally based on the record and DHCR determined that Petitioner “failed to set forth sufficient evidence of fraud.” Moreover, DHCR concluded that there was no overcharge of rent. DHCR stated that the rent set at \$1,720.80 was the legal regulated rent and Petitioner’s monthly share did not exceed \$1,127.00 pursuant to Section 6(b)(2) of the Regulatory Agreement. Petitioner fails to meet his burden of demonstrating that DHCR’s Decision Denying Petition for Administrative Review should be disturbed by the Court.


Wherefore, it is hereby,

ORDERED that the Petition is denied; and its further

ORDERED that the Petition is dismissed in its entirety and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: NOVEMBER 21, 2019


Eileen A. Rakower, J.S.C.