

Martinez v Visnauskas
2020 NY Slip Op 30738(U)
March 9, 2020
Supreme Court, New York County
Docket Number: 451563/2019
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART IAS MOTION 35EFM

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MARGARITA MARTINEZ,	INDEX NO.	<u>451563/2019</u>
	MOTION DATE	<u>09/10/2019</u>
Petitioner,	MOTION SEQ. NO.	<u>001</u>
- v -		
RUTHANNE VISNAUSKAS,		
Respondent.		

**DECISION + ORDER ON
 MOTION**

-----X

HON. CAROL R. EDMEAD:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 19, 20, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

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

ORDERED that the cross motion, pursuant to CPLR 1012, 1013 and 3211, of proposed intervenor 559 West 156 BCR, LLC (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 7806, of the respondent Ruthanne Visnaukas, as Commissioner of the New York State Division of Housing and Community Renewal (motion sequence number 001), is granted, and the administrative case bearing Docket Number ES 410086 RV is hereby remitted to the respondent agency for further proceedings.

CASE DISPOSED

In this Article 78 proceeding, petitioner Margarita Martinez (Martinez) seeks a judgment to overturn an order of the respondent New York State Division of Housing and Community Renewal (DHCR) as arbitrary and capricious. Non-party 559 West 156 BCR, LLC (559) cross-moves for leave to intervene in this proceeding and to dismiss the petition, and the DHCR cross-moves to remit this matter for further administrative proceedings (together, motion sequence number 001). This decision disposes of the petition and both cross motions.

FACTS

Martinez is the tenant of record of apartment 34, a non-rent-stabilized unit in a building (the building) located at 559 West 156th Street in the County, City and State of New York. *See* verified petition, ¶ 2. As mentioned, 559 is the building's current landlord/owner. *See* notice of cross motion (559), Fatmi affirmation, ¶ 9. The DHCR is the agency charged with overseeing rent-regulated apartments in buildings located within New York City. *See* verified petition, ¶ 3.

Martinez states that her late parents, Manuel and Amelia Martinez, originally occupied apartment 25 in the building, which was a slightly larger unit and was subject to the Emergency Tenant Protection Act of 1974 (a/k/a "rent control"). *See* verified petition, ¶¶ 13-15. On October 16, 2007, Martinez's parents and the building's former owner, non-party PSRK Realty, LLC (PSRK), executed an agreement in which the tenants received the sum of \$4,300.00 and a preferential lifetime monthly rent of \$541.00 in return for relocating from apartment 25 to apartment 34. *See* return, exhibit A-9 (B). The relevant portion of the October 16, 2007 agreement provides that:

"The said lease [for apartment 34], and every subsequent renewal thereof, shall provide for a preferential rent rate of [\$541.00] per month, for so long as the Tenant, or either of them, shall live [in] and occupy the New Premises. The preferential rent shall lapse and expire immediately upon the earlier of (i) the death of the last surviving Tenant named herein or (ii) the cessation of at least one Tenant named herein to occupy the New Premises as his or her primary residence. The preferential rent shall not be deemed to extend to any other occupant of the New Premises, other than the Tenant(s) executing this Agreement and specifically named as Tenant(s) herein, regardless of whether any such other occupant thereof shall lawfully succeed thereto."

Id. Martinez states that she began to reside with her parents in apartment 34 in December 2007, and that her mother passed away in 2014. *See* verified petition, ¶¶ 16-17. Martinez further states

that, on July 11, 2014, she and her father executed a joint renewal lease for apartment 34 that ran from July 1, 2014 through June 30, 2016, and stated that:

“The Lease referred to above has expires [sic]. If you wish to extend your Lease for an additional term the annual rent for the premises commencing on July 1, 2014 will be \$6,492.00 payable \$541.00 monthly, for an additional term.

“The said Lease and every subsequent renewal thereof, shall provide a preferential rent at a rental rate of Five Hundred and Forty One and 00/100 (\$541.00) per month, for as long as the tenants, or either of them, shall live and occupy the Premise [sic]. The preferential rent shall lapse and expire immediately upon the earlier of the (i) death of the last surviving Tenant name [sic] herein, (ii) the cessation of at least one Tenant named herein to occupy the New Premises as his or her primary residence. The preferential rent shall not be deemed to extend [sic] any other occupant of the Premises other than the Tenant(s) executing this agreement and specifically named as Tenant(s) herein, regardless of whether any such other occupant thereof shall lawfully succeed thereto.”

See return, exhibit A-9 (D). Martinez notes that the renewal lease named her as a tenant of record, and that she signed it in that capacity. *Id.*

Martinez states that her father passed away in 2016, and that the landlord refused to offer her a renewal lease despite the 2014 renewal. *See* verified petition, ¶ 19. As a result, Martinez filed a “tenant non renewal lease” case with the DHCR on July 25, 2016. *See* return, exhibit A-1. On August 17, 2018, a DHCR rent administrator (RA) issued a decision on Martinez’s case (the RA’s decision) that found as follows:

“After consideration of the evidence in file, it is determined that the subject apartment is not subject to the Rent Stabilization Code. It is also determined that

the complainant's parents, Manuel Martinez and Amelia Martinez, voluntarily vacated their previous Rent Control Apartment on September 30, 2007 and have not retained their previous rent control status when they took occupancy in the subject apartment #34. Therefore, this proceeding is terminated."

Id., exhibit A-11. Martinez thereafter filed a petition for administrative review (PAR) with the office of DHCR Commissioner Ruthanne Visnaukas on September 20, 2018. *Id.*, exhibit B-1. The Commissioner's office issued a decision on Martinez's PAR application on July 12, 2019 (the PAR order) that found as follows:

"PAR Determination

"After careful consideration, the Commissioner is of the opinion that the PAR should be denied and that the RA's order should be affirmed.

* * *

"Because of the contract wherein the tenant's parents fully knew of giving up their rent-controlled status in exchange for another apartment and a fair consideration of \$4,300.00 and \$541.00 monthly rent for the life of the parents, the RA correctly found a valid agreement benefitting both parties. There was no indication of one-sided urging and overreaching by the owner.

"*Capone* and similar cases are inapposite to this situation. The landlord asked the tenants in *Capone* to vacate the apartment '[b]ecause of his family's situation, and to relieve a hardship,' but the tenants refused. The landlord then applied to the [RA] for a certificate of eviction which . . . [the RA] granted on the condition that the petitioner/landlord offer to tenant his third-floor apartment in exchange for tenant's second-floor apartment on the basis of a two-year lease.' The *Capone* Court also held that '[h]ad the exchange of the apartments been wholly voluntary, the exchange would undoubtedly have operated in favor of the landlord.' The Commissioner notes that *Capone* and its line of cases determined that the landlord put the tenants in the dark as to their regulated status. The tenants in *Capone* etc. refused any agreement with the owner and had to go to court involving eviction or holdover proceeding [sic].

"In the instant case, there is no evidence that the former owner harassed in any way the tenant's parents to surrender the apartment. Her parents were aware of their rent-controlled status but freely entered into a contract for this exchange of apartments for a valuable consideration of \$4,300.00 and no rent increase. Unlike

Capone etc., the original tenants wholly voluntarily transferred to apartment 34 and waived their rent-control status in exchange \$4300.00 and the same low monthly preferential rent of \$541.00 without any increase. The agreement states:

“ . . . the Tenant has agreed to give up and surrender the Premises hereinbefore described unto the Landlord . . .

“ . . . the Tenant has had full opportunity to investigate the records of the Premises . . .

“ . . . the Tenant’s occupancy and tenancy of the subject Premises is subject to the laws of rent control . . .

“ . . . full opportunity has been granted to the Tenant for any additional and further investigation which the Tenant would care to undertake;’

“NOW, WITNESS that, in pursuance of said agreement, and in consideration of [\$4,300.00] heretofore paid by the Landlord to the Tenant . . . in consideration of mutual promises and obligations . . .

’

“The record suggests that this was an arms-length transaction between the former owner and petitioner’s parents, wherein for valuable consideration they voluntarily moved out of a rent-control apartment into a non-regulated unit at a preferential rent for life. The parents were aware of the status of the apartment they were leaving and entering. As to petitioner, the preferential rent arrangement does not extend to her and she cannot succeed to the deregulated unit.

“Thus, the RA’s order was correct when issued, and the petitioner has not raised any basis to modify or revoke the RA’s determination, based on the record and the law.”

Id., exhibit B-7. Aggrieved, Martinez thereafter commenced this Article 78 proceeding on August 27, 2019. *See* verified petition. Landlord filed its cross motion to intervene/dismiss on November 19, 2019, and the DHCR filed its cross motion to remit on December 26, 2019. *See* notice of cross motion (landlord); notice of cross motion (DHCR). The matter is now fully briefed 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. 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 Matter of 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. It is also well settled that "[t]he interpretations of [a] respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational." *Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251, 252 (1st Dept 1994), *citing Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988). Here, Martinez's petition argues that the PAR order was arbitrary and capricious for three reasons: 1) "the decision that the transfer of apartments was 'wholly voluntary' because there was an agreement between the parties and the petitioner's parents weren't harassed was affected by an error of law"; 2) "the Commissioner's decision [was a] violation [of] public policy and permits the owner to circumvent the protections of rent regulation"; and/or 3) "the owner offered the petitioner a lease which was an extension of the original lease and entitled the petitioner to live in the apartment under the same terms and conditions as her parents." *See* petitioner's mem of law at 6-13.

The “error of law” that Martinez refers to in her first point of argument concerns the DHCR Commissioner’s alleged misreading and/or misapplication of the Court of Appeals’ holding in *Matter of Capone v Weaver* (6 NY2d 307 [1959]) and the cases that followed it. *See* petitioner’s mem of law at 6-11. She specifically asserts that those decisions require that an inquiry be made into the facts surrounding a tenant’s surrender of a rent-regulated unit for a non-regulated unit, and argues that merely reviewing the contractual terms of the surrender agreement is insufficient. *Id.* Martinez concludes that the DHCR made an insufficient inquiry in her case, since neither the RA’s order or the PAR order did more than recite the terms of her parents’ 2007 surrender agreement. *Id.* In response to this point, the DHCR’s cross motion asserts that “remittance of this proceeding . . . for further proceedings and a new determination is necessary.” *See* notice of cross motion (DHCR), Shia affirmation, ¶¶ 16-18. Counsel notes that “remittal for further fact finding and determination is permissible where the DHCR concedes an error in the issuance of its determination . . . ; where DHCR concedes that determination was made without benefit of complete necessary documentation . . . ; and where DHCR concedes that its review of issues raised by the tenants was inadequate.” *Id.*, ¶¶ 19-21 (internal citations omitted). Counsel for 559 submitted reply papers to the DHCR’s cross motion, but Martinez did not.¹ *See* Fatmi reply affirmation, ¶¶ 26-33. 559 asserted that “the DHCR does not make a proper showing” for remittance because it “has already evaluated all of the facts for petitioner’s claim.” *Id.* The court notes that neither party’s papers discussed the legal standard that governs motions to remit.

CPLR 7806, which governs judgments in Article 78 proceedings, does not specifically mention the word “remit.” However, Appellate Division decisions interpreting this statute have

¹ Instead, counsel for Martinez replied only to 559's cross motion to intervene. *See* Vega affirmation in opposition, ¶¶ 26-50.

consistently held that “[w]e unquestionably have the right under CPLR 7806 to remit a matter to an administrative agency when further agency action is necessary to cure deficiencies in the record, such as when an agency fails to make appropriate findings . . . or applies an improper standard of proof.” *Matter of Hawkins v Berlin*, 118 AD3d 496, 505 (1st Dept 2014), quoting *Matter of Police Benevolent Assn. of N.Y. State Troopers v Vacco*, 253 AD2d 920, 921 (3d Dept. 1998). In *Matter of Capone v Weaver*, the Court of Appeals reversed a Second Department decision that had itself reversed a decision by Supreme Court, Queens County to remit a “certificate of eviction” to the State Rent Administrator for further proceedings. 6 NY2d at 308. The Court of Appeals held that the State Rent Administrator² had the “inherent prerogative of administrative authority” to inquire into the circumstances of a tenant’s surrender of a rent-controlled apartment for an unregulated one, and to impose such conditions on the apartment transfer as the Administrator saw fit. 6 NY2d at 310. Here, the DHCR’s cross motion conceded that:

“In this case, the [October 16, 2007] Agreement does not specifically state that the [petitioner’s] parents were forfeiting their rights under rent control, let alone the right to succession by a family member. In essence, the Agreement is no more informative than a lease.

“Therefore, remittance of the instant . . . proceeding for further administrative fact finding is necessary to more fully address the argument as to whether the parents were fully informed that, by relocating, they permanently renounced their own as well as petitioner’s rights under the rent control laws.”

² The State Rent Administrator was the predecessor to the DHCR as regards oversight of rent-controlled apartment units.

See notice of cross motion (DHCR), Shia affirmation, ¶¶ 17-18. The court also notes that, in the PAR order, the DHCR found that *Capone* was inapposite, and that the Commissioner specifically decided to uphold the RA's order "because of the existence of the contract [i.e., the 2007 surrender agreement]." See return, exhibit B-7. The balance of the PAR order simply recites the contractual terms of the 2007 agreement and concludes that there was "no evidence" of any impropriety. *Id.* The DHCR's cross motion now states that the agency did not make an inquiry to determine whether such evidence existed, and requests the opportunity to do so. See notice of cross motion (DHCR), Shia affirmation, ¶¶ 19-22. The court agrees that *Capone* is persuasive, and finds that it directs the agency to make the factual inquiry that it had omitted previously.

In *Matter of Porter v New York State Div. of Hous. & Community Renewal* (51 AD3d 417 [1st Dept 2008]), the Appellate Division, First Department, noted that:

"Rent Stabilization Code (9 NYCRR) § 2527.8 provides that 'DHCR, on application of either party, or on its own initiative, and upon notice to all parties affected, may issue a superseding order modifying or revoking any order issued by it under this or any previous Code where the DHCR finds that such order was the result of illegality, irregularity in vital matters or fraud.' The Court of Appeals has confirmed DHCR's broad powers and authority to alter its prior determinations on remission . . . , and this Court has held that remission for further fact-finding and determination is appropriate where, as here, DHCR concedes an error in the issuance of its determination . . . , and where the determination resulted from an 'irregularity in vital matters.'"

51 AD3d at 418 (internal citations omitted). More recently, in *Matter of 60 E. 12th St. Tenants' Assn. v New York State Div. of Hous. & Community Renewal* (134 AD3d 586 [1st Dept 2015]), the First Department stated that:

“As this Court recognized . . . , when such an ‘irregularity in vital matters’ is presented, and the agency is not merely attempting to reach a different determination, a remand is appropriate despite the otherwise final nature of the questioned order. This is in keeping with the deferential standard utilized in assessing the careful and considered approach to this problem taken by the administrative agency (DHCR) charged with the responsibility over the subject matter at issue. Contrary to Tenants’ argument, such ‘irregularity in vital matters’ is not limited to procedural defects but may be substantive in nature.”

134 AD3d at 588 (internal citations omitted). The court believes that the *Capone* holding makes it clear that it conducting factual inquiries into the circumstances of a tenant’s surrender of a rent controlled unit for an unregulated one is a “vital matter” that the DHCR must perform.³ The court also believes that the DHCR’s failure to conduct such a factual inquiry with respect to Martinez’s parents’ 2007 surrender, and to rely instead solely on the terms of the 2007 surrender agreement, is accurately characterized as an “irregularity” in agency procedure. As a result, the court finds that the above-quoted First Department precedent permits it to remit this matter to the DHCR to correct that irregularity. Accordingly, the court denies Martinez’s Article 78 petition, dismisses this proceeding and grants the DHCR’s cross motion for remission. Having dismissed

³ In this regard, the court finds that the fact that apartment 25 was a rent-controlled unit, rather than rent-stabilized like the one in *Matter of 60 E. 12th St. Tenants' Assn.*, is of no moment because the DHCR has jurisdiction to oversee both rent-controlled and rent-stabilized accommodations.

the petition, the court concomitantly denies landlord’s cross motion to intervene as moot. The court notes that this works no real prejudice to landlord, who is free to request leave to intervene in the DHCR proceeding when the RA begins the fact finding process.

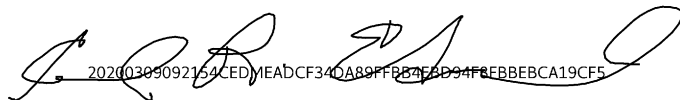
DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

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

ORDERED that the cross motion, pursuant to CPLR 1012, 1013 and 3211, of proposed intervenor 559 West 156 BCR, LLC (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 7806, of the respondent Ruthanne Visnauskas, as Commissioner of the New York State Division of Housing and Community Renewal (motion sequence number 001), is granted, and the administrative case bearing Docket Number ES 410086 RV is hereby remitted to the respondent agency for further proceedings.


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<u>3/9/2020</u> DATE					<u>CAROL R. EDMEAD, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE
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