

**Matter of Bowlus v New York State Div. of Hous. & Community Renewal**

2020 NY Slip Op 31396(U)

May 14, 2020

Supreme Court, Kings County

Docket Number: 515369/18

Judge: Wavny Toussaint

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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 14th day of May, 2020.

P R E S E N T:

HON. WAVNY TOUSSAINT,  
Justice.

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In the Matter of the Application of  
SUSAN BOWLUS,

Index No. 515369/18

Petitioner,

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

-against-

NEW YORK STATE DIVISION OF HOUSING AND  
COMMUNITY RENEWAL and DUMBO LOFTS RENTAL  
LLC.,

Respondents.

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Administrative Review Docket No. FT210038RT  
Rent Administrative' s Docket No. EM210060R

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The following e-filed papers read herein:

NYSEF Nos.:

Notice of Motion: \_\_\_\_\_ 65

Affirmation/Affidavit in Support: \_\_\_\_\_ 55

Affirmations/Affidavit in Opposition: \_\_\_\_\_ 70, 79

Reply Affirmations/Affidavits: \_\_\_\_\_ 83

Upon the foregoing papers, petitioner Susan Bowlus moves, by order to show cause, for an order: 1) pursuant to CPLR 2221 (e), granting leave to renew petitioner's Article 78 petition; and 2) vacating this court's decision, order and judgment dated June

21, 2019 and issuing an order remitting this proceeding to respondent New York State Division of Housing and Community Renewal (DHCR), with directions to apply the Housing Stability and Tenant Protection Act of 2019 to petitioner's claims.

### ***Background***

Petitioner commenced this proceeding seeking judicial review under CPLR article 78 of an order by DHCR, which upheld a determination of rent overcharge by the Rent Administrator (RA) in the amount of \$1,156.35. The decision did not, however: 1) freeze the legal rent for certain years where owner/respondent Dumbo Lofts Rental LLC (Dumbo) did not file annual registrations for the subject apartment; 2) impose treble damages on the overcharge; 3) apply DHCR's "default formula" in determining the legal regulated rent; or 4) award petitioner attorneys' fees and costs.

On January 4, 2016, petitioner filed a rent overcharge complaint with DHCR alleging that the owner charged and collected rent higher than allowable under the Rent Stabilization Law (RSL) and Rent Stabilization Code (RSC). In her complaint, petitioner alleged that she was the first rent stabilized tenant in the subject apartment, that the apartment was rent stabilized solely by virtue of J-51 tax benefits, that the initial legal regulated rent of \$2,300 was the amount charged, that the owner illegally designated said amount as a preferential rent and improperly claimed a higher amount as the legal regulated rent, that the owner did not give notice pursuant to RSL § 26-504 (c), thus preserving her stabilized tenancy until vacancy, that the owner did not file timely and

proper rent registrations and that the owner engaged in a fraudulent scheme to remove the apartment from rent regulation.

On July 25, 2017, the RA issued an order finding an overcharge in the amount of \$1,156.35, representing the amount overcharged from the base date,<sup>1</sup> interest and excess security deposit (\$25,278.89) less the amount refunded to petitioner by the owner (\$24,122.54). The RA found that since petitioner was the first regulated tenant to take occupancy, the first rent charged to and paid by petitioner (\$2,300.00) became the initial legal regulated rent upon which all future increases should be based and could not otherwise be deemed a lower “preferential rent.” The RA established the base date rent (the legal regulated rent four years prior to the filing of the complaint) by increasing the \$2,300.00 initial rent by the applicable guidelines increases, resulting in a base date rent of \$3,240.40. The RA also found that petitioner's claims of a rent freeze due to the owner's failure to properly register the apartment for certain years before the base date could not be considered, as they constituted rental events outside of the limitations period for which there was no “look back” exception under the RSL or RSC. The RA also declined to award treble damages, as he determined that the owner had demonstrated that the overcharge was not willful.

On May 31, 2018, the Deputy Commissioner issued an order denying petitioner's Petition for Administrative Review (PAR). The PAR order stated:

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<sup>1</sup> The base date is defined, under the law then in effect, as the most recent of (1) the date four years before the overcharge complaint, or (2) the date when the apartment became rent regulated (RSC § 2520.6 [f])

“The existence of a claimed preferential rent and a claimed higher legal regulated rent on the base date of January 4, 2012 implicates a specified exception to the four-year rent history review set forth in RSC section 2526.1 (a) (2). RSC section 2526.1 (a) (2) (viii) provides that 'for purposes of establishing the existence or terms and conditions of a preferential rent under section 2S21.2 (c) of this Title, review of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section shall not be precluded...'

"In accordance with RSC section 2526.1 (a) (2) (viii), the Rent Administrator reviewed the rental history prior to January 4, 2012, going back to the tenant's vacancy lease commencing on January 15, 2000. The Rent Administrator determined that since the tenant was the first rent stabilized tenant of the apartment, and there was no previously established legal regulated rent, the legal regulated rent for the tenant's vacancy lease was the rent charged, \$2,300.00 per month, and not the purported legal regulated rent of \$4,025.00 per month, provided for in a rider to the lease.”

The Deputy Commissioner found that the RA properly made an "independent review" of the rents charged prior to the base date and properly determined the legal regulated rent by the applicable rent guidelines for renewal leases executed between the parties from the year 2000 through the base date. The Deputy Commissioner rejected petitioner's argument that the rent should have been frozen during time periods prior to the base date when the apartment had not been properly registered with DHCR, stating:

"In her PAR, the tenant claims that the Rent Administrator's determination of the legal regulated rent on the base date is incorrect because the Rent Administrator granted the owner increases during periods before the base date where the apartment had not been properly registered with the agency. This claim is incorrect. The agency is only authorized by the RSC to review rental events prior to the base date based upon the specific scenarios set forth in RSC sections 2526.1 (a) (2) (iii) through (ix). A claim that the pre base-date rent history must be reviewed based upon an owner's failure to

properly register an apartment is not one of these scenarios. Accordingly, the Rent Administrator was correct in determining that the agency could not investigate the tenant's claim of missing or improper rent registrations before January 4, 2012.”

The Deputy Commissioner further affirmed the RA's determination not to award treble damages against the owner on the grounds that the overcharge was not willful, stating:

"The agency's practice of not assessing treble damages on an owner who makes a timely refund to a tenant in response to the tenant's complaint does not violate RSL section 26-514 a [sic] and the related RSC section 2526.1 (a) (1). Both provisions clearly authorize the agency to determine the issue of willfulness based on the particular facts of each proceeding. Furthermore, the state legislature has amended the rent laws several times since the issuance of Policy Statement 89- 2 in 1989, and the state legislature has chosen not to amend the treble damage penalty to prevent the agency from considering an owner refund as a ground for finding non-willfulness. Finally, it is reasonable that the agency treat an owner who makes a refund before ordered to do so differently from an owner who makes no effort to return the rent overcharge until an order is issued.

“Based upon the particular facts in this case, the Commissioner finds that the Rent Administrator properly applied RSL section 26-516 a [sic] and RSC section 2526.1 (a) (1) in finding that the owner had shown that the overcharge was not willful.”

The Deputy Commissioner also found no basis for utilizing the default method for determining the base rent for the subject apartment, as there was no evidence of a fraudulent scheme to deregulate the apartment. The Deputy Commissioner stated that the owner's mistaken belief regarding its ability to charge a higher legal regulated rent is not evidence of the owner's attempt to fraudulently deregulate the apartment that would

render the base date rent unreliable. Finally, the Deputy Commissioner found that the RA properly exercised the discretion afforded him by the RSC in not assessing attorneys' fees.

By decision, order and judgment dated June 21, 2019, petitioner's Article 78 petition was denied, and the proceeding dismissed. This court determined the DHCR order was not arbitrary or capricious.

*New Legislation:*

On June 14, 2019, the Housing Stability Tenant Protection Act (HSTPA) (L 2019, Ch. 36) went into effect, making extensive changes to the Rent Stabilization Law. Part F of the HSTPA pertains to the examination of rent history, determination of legal regulated rent, calculation of overcharge awards and the assessment of treble damages.

Among the changes implemented by Part F, § 4 of the HSTPA was the amendment of RSL § 26-516, which defines the legal regulated rent for purposes of determining an overcharge as the rent indicated in the most recent reliable annual registration statement filed and served upon the tenant six or more years prior to the most recent registration statement, (or, if more recently filed, the initial registration statement), plus in each case any subsequent lawful increases and adjustments. Further, the changes increase the period of a tenant's recovery for overcharge penalties from four years preceding the complaint to six years preceding the complaint; extend the period of recovery for treble damages on overcharges from two years preceding the complaint to

six years preceding the complaint; preclude DHCR or the courts from considering a voluntary refund of overcharges as evidence that the overcharges were not willful; and mandate that an owner found to have overcharged be assessed the reasonable costs and attorney's fees of the proceeding, rather than leaving such an award discretionary.

Further, PART F, § 5 of the HSTPA enacts a new subsection (h) of RSL § 26-516, which provides for review of all available rental history reasonably necessary in investigating complaints of overcharge and in determining legal regulated rents, and that “[n]othing contained in this subdivision shall limit the examination of rent history relevant to a determination as to:

(i) whether the legality of a rental amount charged or registered is reliable in light of all available evidence including but not limited to whether an unexplained increase in the registered or lease rents, or a fraudulent scheme to destabilize the housing accommodation, rendered such rent or registration unreliable . . .”

Petitioner argues that the aforementioned provisions of the HSTPA are applicable to her underlying claims and will result in a greater award in her favor. For instance, petitioner contends that under the new law she is now entitled to recover overcharge penalties for an additional two year period prior to the original base date (January 4, 2010 to January 4, 2012) and further entitled to recover treble damages since the “safe harbor” provision for owners voluntarily refunding overcharges has been eliminated. Petitioner also asserts that since DHCR found an overcharge, it is now required under the new law to award petitioner attorneys’ fees and costs; such an award is no longer discretionary.

Petitioner contends that this matter therefore must be remitted to DHCR for a new determination.

### *Discussion*

Pursuant to CPLR 2221 (e), a motion to renew must be based upon “new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination.” While there is no dispute that the HSTPA constitutes a change in the law, the newly enacted statute would not change this court’s prior decision as it not applicable to petitioner’s claims.

Part F, § 7 of the HSTPA provides that “[t]his act shall take effect immediately [June 14, 2019] and shall apply to any claims pending or filed on and after such date.” In its opposition papers, Dumbo argues that the HSTPA is not applicable to this matter as petitioner’s overcharge claims, having been disposed upon the issuance of the PAR order, were no longer “pending” on June 14, 2019. Dumbo contends that this Article 78 proceeding cannot be considered a “pending” claim under the HSTPA as it does not involve an examination of the merits of petitioner’s overcharge claims but simply whether DHCR’s determination was rationally based in the record and was neither arbitrary nor capricious.

On April 2, 2020, while the instant motion was pending, the Court of Appeals issued a decision in *Matter of Regina Metropolitan Co., LLC v Div. of Hous. and*

*Community Renewal* (2020 NY Slip Op 02127 [2020]), disallowing the retroactive application of the rent overcharge provisions contained in Part F of the HSTPA. In examining the “claims pending” language of the HSTPA, the Court of Appeals concluded that “the Legislature evinced a sufficiently clear intent to apply Part F to timely pending claims . . . where the overcharge calculation issue was unresolved at the time the HSTPA was enacted” (*Matter of Regina Metropolitan Co., LLC*, 2020 NY Slip Op 02127, at \*15). Accordingly this court is constrained by the majority ruling of the Court of Appeals, to hold that where, as here, the overcharge claims were determined by DHCR prior to the effective date of the HSTPA, the new legislation is inapplicable, and any challenges to or appeals of DHCR’s determination are to be resolved under the law in effect at the time of the overcharge (*id.*). Any order remitting this matter to DHCR and directing a de novo examination of petitioner’s claims under the HSPTA would effectively constitute an impermissible retroactive application of the new law.

Accordingly, it is hereby

**ORDERED** that petitioner’s motion to renew her Article 78 petition and to vacate this Court’s June 21, 2019 order is denied in its entirety.

The foregoing constitutes the decision and order of the court

ENTER,  
  
J. S. C.