SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

----------X

MICAELA SIERRA,

Plaintiff,

- v -

COMMISSIONER OF THE DIVISION OF HOUSING & COMMUNITY RENEWAL, NLD PROPERTIES, INC.

Defendant.

----------X

INDEX NO. 152525/2020

MOTION DATE 04/14/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 13, 14, 15, 16, 17, 18, 19, 20, 21, 24, 25, 26

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

Upon the foregoing documents, it is

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

ORDERED that counsel for respondent New York State Division of Housing and Community Renewal shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Micaela Sierra (Sierra) seeks to overturn an order of the respondent New York State Division of Housing and Community Renewal (DHCR) as arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

FACTS

Sierra is the tenant of record of unit 3C in a rent-stabilized apartment building (the building) located at 2310 Second Ave. in the County, City and State of New York. *See* verified petition, ¶ 2. Co-respondent NLD Properties, Inc. (NLD) is the building's landlord. *Id.*, ¶ 4. The DHCR is the administrative agency charged with overseeing all rent-stabilized housing located inside New York City. *Id.*, ¶ 3.

Sierra states that she moved into apartment 3C on June 1, 2010 pursuant to a one-year lease that ran through May 31, 2011, with a monthly rent of $1,450.00. *See* verified petition, ¶ 8. She avers that she executed two subsequent two-year renewal leases, with the second commencing on September 1, 2013 with a monthly rent of $1,775.00. *Id.*, ¶ 9. Sierra states that, at that point, she became suspicious that NLD had included an improper increase in her monthly rental amount for the cost of certain "individual apartment improvement" (IAI) work that NLD claimed to have performed in 2010 before her tenancy commenced. *Id.*, ¶ 7. As a result, Sierra commenced a pro se administrative rent overcharge proceeding against NLD with the DHCR on August 23, 2013. *Id.*, ¶ 10. While that proceeding was pending, NLD evidently concluded that apartment 3C had actually become deregulated before Sierra took possession of it in 2010, since its maximum legal monthly rent – including the IAI increase - exceeded the Rent Stabilization Code's (RSC) $2,000.00 per month deregulation threshold rent at that time. *Id.* Sierra claims

that NLD did not perform any IAI work in apartment 3C in 2010, however, and argues that the unit's purported deregulation was improper because NLD's maximum legal monthly rent calculation should not have included the IAI increase. *Id.*

A DHCR Rent Administrator (RA) received documentary submissions and other communications from Sierra and NLD during 2016 and 2017, and conducted a personal inspection of apartment 3C on December 14, 2018. *See* verified answer, Kelly affirmation, ¶¶ 4-10. On March 7, 2019, the RA issued an order that confirmed both the IAI work and apartment 3C's deregulation, and denied Sierra's rent overcharge petition (the RA's order). *Id.*, ¶¶ 11-13; exhibit D. Sierra thereafter filed a "petition for administrative review" (PAR) to challenge the RA's order on April 4, 2019. *Id.*, ¶ 14. On January 7, 2020, the DHCR's Deputy Commissioner issued an order that denied Sierra's PAR (the PAR order). *Id.*, ¶ 15; exhibit A. The relevant portion of the PAR order found as follows:

> "The Commissioner, having reviewed the record herein, finds that the petition should be denied.
>
> "Pursuant to RSC §2522.4 (a) (1), which was in effect in 2010, an owner was entitled to a rent increase where there was a substantial increase of the dwelling space or an increase in services or installation of new equipment or improvements' or new furnishings provided in the tenant's housing accommodation on written tenant consent to the rent increase. Where, as here, the apartment was vacant at the time of the IAIs, tenant consent was not required. The owner was entitled. to pass on 1/40th of the cost of the improvements to the tenant. See RSC §2522.4(a) (4).
>
> "DHCR Policy Statement 90-10, also in effect in 2010, provided that IAIs must be supported by adequate documentation which should include at least one of the following: (1) cancelled checks contemporaneous with the completion of work· (2) invoices marked paid in full contemporaneous with the completion of the work; (3) signed contract agreement; or (4) contractor's affidavit indicating that the installation was completed and paid in full.
>
> "In this matter, the owner provided a contractor affidavit as proof of the IAIs. The contractor's affidavit sufficiently described the scope of the work performed and that the work cost $38,000. The Commissioner finds that there was no requirement that IAIs be performed by a licensed contractor or that work permits be obtained in 2010.
>
> "DHCR performed an inspection of the apartment on December 14, 2018 and specifically ascertained that the following was installed and/or completed in 2010:
>
> 1. The kitchen, subflooring and tiles

2. Kitchen countertop and kitchen cabinets
3. Kitchen wall tiles
4. Kitchen plumbing
5. Stove and oven
6. Bathroom subflooring and tiles
7. Bathroom plumbing
8. Bathroom wall tiles
9. Drywall/sheetrock on ceiling in every room
10. Doors frame and molding
11. Electrical wiring, panels, switches and outlets
12. Breaker box

"DHCR inspector verification that the work was performed lends credibility to petitioner's claimed IAIs and that the owner paid the contractor $38,000 in cash which appears to be a reasonable amount for such work. It was reasonable for the [RA] to rely on the observations of an agency inspector in determining the validity of the IAIs. The observations of the agency inspector, who is non-biased and is specifically trained in performing apartment inspections and recognizing the age of work performed sufficiently rebuts the petitioner's assertions against the improvements, including those of petitioner's expert.

"There is no support in this record for the petitioner's contention that the renovations were not performed. The Commissioner finds that the owner's evidence comports with DHCR Policy Statement 90-10. Furthermore, while the Commissioner recognizes that added scrutiny be performed for cash payments, the affidavits submitted and the inspector's observations warrant granting the said IAIs even though they were paid for in cash.

"Additionally, the Commissioner finds that the contractor's affidavits and the inspector's findings demonstrate that the entire apartment was substantially renovated. The work was not limited to merely painting and plastering or otherwise repair work. Moreover, the agency has held that labor costs and demolition costs may be claimed as IAIs when they are part of an overall renovation project. The Commissioner finds that any current violations issued in the apartment or any claim that there are defects in the apartment currently does not rebut the evidence that the work was performed in 2010.

"The Commissioner notes that even under the extended review period provided by the Housing Stability and Tenant Protection Act of 2019 ("HSTPA") (Chapter 36 and 39 of the Laws of 2019) effective June 14, 2019, and which applies to pending matters, yields a finding that the subject apartment is deregulated. The [RA], in order to establish the longevity increase, reviewed apartment registrations confirming that the prior tenant entered occupancy in 2000 and vacated in 2010 and that the rent increases taken during the 11-years of the prior tenancy were lawful. The Commissioner also notes that HSTPA provides that apartments, such as the subject apartment, which were legally deregulated prior to June 14, 2019 shall remain deregulated.

"While the petitioner has cited prior PAR decisions which found that registrations alone are insufficient to support a longevity increase, the Commissioner notes that under HSTPA such registrations can be relied upon. Here, it was reasonable for the [RA] to rely on the registration history to determine the longevity increase as an owner would not be expected to have rent records dating back to 2000. Moreover, a review of the

registrations indicate that they were reliable in that they were filed contemporaneously and accurately stated the tenant, lease terms and the rents during the 11-year period of the prior tenancy. The Commissioner also notes that, given the prior rent of $1,297.89, the affirmed IAI rent increase alone (without even a vacancy or longevity increase) would have been sufficient to deregulate the subject apartment.

"The Commissioner finds that that the lack of a lease rider in the tenant's vacancy lease was not fraudulent particularly since the evidence establishes the requisite rent necessary to deregulate the premises. The agency has never determined that an apartment should be regulated solely based on the absence of a such a rider."

Id., exhibit A.

Aggrieved, Sierra commenced this Article 78 proceeding on March 6, 2020 by filing a verified petition and notice of petition. *See* verified petition. Shortly thereafter, the Covid-19 national pandemic caused the court to suspend most of its operations indefinitely. The DHCR eventually filed an answer on August 18, 2020. *See* verified answer. Discovery ensued, and this matter is now fully submitted (together, motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before an administrative agency, whether the agency's 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, 231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1st Dept 1996). A determination will only be found 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*, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell*, 34 NY2d at 231-232. Here, the DHCR asserts that there was a

rational basis for all of the Deputy Commissioner's factual and legal findings in the PAR order. Upon review, the court agrees.

The Deputy Commissioner first correctly noted that, in 2010: 1) RSC § 2522.4 (a) (1) permitted landlords to permanently add 1/40th of the cost of qualifying IAI work to a rent stabilized apartment's legal regulated rent; and 2) DHCR Policy Statement 90–10 also permitted landlords to establish the cost of such qualifying IAI work by presenting proof of payment in one of four acceptable forms, the last of which was "a contractor's affidavit indicating that the installation was completed and paid in full." *See* verified answer, exhibit A. The Deputy Commissioner found that the affidavit that NLD presented from contractor Theo Zaharopoulos (Zaharopoulos), which stated that he had performed specified items of work in apartment 3C for a cash payment of $38,000.00, satisfied the foregoing requirements and entitled NLD to permanently add an $950.00 IAI increase (1/40th of $38,000.00) onto the unit's monthly rent. *Id.* The court finds that Zaharopoulos's affidavit provided a rational basis for the Deputy Commissioner's findings regarding the IAI increase.

The Deputy Commissioner next took note of the December 14, 2018 DHCR inspection report which found that twelve items of qualifying IAI work had been installed and/or completed in 2010. *See* verified answer, exhibit A. The Deputy Commissioner found that it was permissible to rely on that report to conclude that NLD had qualifying IAI work performed in apartment 3C in 2010, and also permissible to accord the report more weight than the evidence that Sierra submitted to support her allegations that: 1) no work was performed in 2010; 2) any work that was performed was not qualifying IAI work; and/or 3) the fact that there were Building Code violations recorded against apartment 3C in 2018 for items that had purportedly been renovated as part of the 2010 IAI work justified an inference that no such IAI work had been

performed. *Id*. The court finds that the inspection report provides a rational basis for the Deputy Commissioner's findings, and that the RA was entitled to rely on it. *See e.g.*, *Matter of 333 E. 49th Assoc., LP v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 9 NY3d 982 (2007); *Matter of 370 Manhattan Ave. Co., L.L.C. v New York State Div. of Hous. & Community Renewal*, 11 AD3d 370 (1st Dept 2004). The court also notes that it is the DHCR's role to weigh the evidence that parties have submitted, and that even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record. *See e.g.*, *Matter of Marisol Realty Corp. v New York State Div. of Hous. & Community Renewal*, 154 AD3d 463, 464 (1st Dept 2017), citing *Matter of Jane St. Co. v State Div. of Hous. &Community Renewal*, 165 AD2d 758 (1st Dept 1990); *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 (1st Dept 2007), citing *Matter of Tolliver v Kelly*, 41 AD3d 156, 158 (1st Dept 2007).

Finally, the Deputy Commissioner made three legal findings in the PAR order, all of which the court determines were justified. First, the Deputy Commissioner found that the RA had properly applied the four-year "lookback" provision contained in the old version of Rent Stabilization Law (RSL) § 26-516 to limit the agency's consideration of Sierra's rent overcharge claim. *See* verified answer, exhibit A. The Deputy Commissioner also opined that the RA would have reached the same result regarding apartment 3C's legal regulated rent under the amended, post-HSTPA version of RSL § 26-516. *Id*. The Deputy Commissioner's original finding was correct and his opinion is of no moment. This year, in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332 [2020]), the Court of Appeals held that Part F of the HSTPA, which applies to rent overcharge claims, should not be

applied retroactively. As a result, the pre-HSTPA version of RSL § 26-516 (containing the "lookback" provision) governed Sierra's claim.[1]

The Deputy Commissioner also found that the RA was entitled to rely on apartment 3C's rent registration history when determining the unit's lawful regulated rent because the registration statements "were filed contemporaneously and accurately stated the tenant, lease terms and the rents during the 11-year period of the prior tenancy." *See* verified answer, exhibit A. The Deputy Commissioner correctly noted that the HSTPA specifically provides that the DHCR must rely on an apartment's existing registration history, in the first instance, when the agency calculates the apartment's lawful regulated rent. *Id*. The court adds that the pre-HSTPA version of RSL § 26-516 contained a similar provision.

Finally, the Deputy Commissioner found that the admitted lack of a vacancy deregulation rider on Sierra's 2010 lease did not impair apartment 3C's deregulation because "[t]he agency has never determined that an apartment should be regulated solely based on the absence of a such a rider." *See* verified answer, exhibit A. The court notes that there does not appear to be any case law which mandated such a determination either.[2]

---

[1] The Deputy Commissioner correctly noted that Part D of the HSTPA, which repealed "high rent deregulation" (L 2019, ch. 39 Part Q, § 8), provided that "any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated." *See* verified answer, exhibit A. In *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, the Court of Appeals determined that Part D of the HSTPA only had prospective effect after June 14, 2019. 35 NY3d at 373. Because apartment 3C's deregulation was confirmed by the March 7, 2019 RA's order, Part D of the HSTPA has no effect.

[2] Some decisions have found that the deliberate omission of a deregulation rider from a new tenant's lease can provide some evidence of a landlord's fraudulent conduct. *See e.g.*, *Butterworth v 281 St. Nicholas Partners, LLC*, 160 AD3d 434 (1st Dept 2018); *Sandlow v. 305 Riverside Corp.*, 2020 NY Slip Op 20214 (Sup Ct, NY County 2020). Here, however, Sierra's PAR application did not allege fraud.

Having concluded that there was a rational basis to support each of the Deputy Commissioner's findings in the PAR order, the court finds that that order should be upheld. Sierra nevertheless raises a number of arguments that it was, instead, arbitrary and capricious.

In her petition, Sierra contends that: 1) NLD's $38,000.00 cash payment to Zaharopoulos "merits heightened scrutiny under . . . DHCR [regulations]"; 2) the electrical and plumbing work in apartment 3C was "defective and/or illegal"; and 3) the Deputy Commissioner "violated due process" by relying on the RA's December 14, 2018 inspection report in the PAR order without having provided her with a copy of it beforehand. *See* petitioner's mem of law at 4-11. These arguments are unavailing.

The PAR order recites that "while the Commissioner recognizes that added scrutiny be performed for cash payments, the affidavits submitted and the inspector's observations warrant granting the said IAIs even though they were paid for in cash." *See* verified answer, exhibit A. It is plain that the Deputy Commissioner did accord NLD's $38,000.00 cash payment to Zaharopoulos "heightened scrutiny," but that he found that other documentary evidence demonstrated that NLD's decision to pay by cash was not so suspicious as to warrant denying the IAI approval. The court finds that the Deputy Commissioner's consideration of all of the foregoing evidence demonstrates that there was a rational basis in the administrative record for his "heightened scrutiny" determination. Sierra's assertion that he should have made a different finding is unpersuasive. As was previously noted, even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record. *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d at 429. Therefore, the court rejects this argument.

The court also rejects Sierra's contentions regarding the electrical and plumbing work in apartment 3C for similar reasons. The PAR order plainly found that the subject work had been performed in 2010, and noted that "any current violations issued in the apartment or any claim that there are defects in the apartment currently does not rebut the evidence that the work was performed in 2010." *See* verified answer, exhibit A. As just discussed, the court may not disregard the DHCR's evidentiary findings. *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d at 429. The court further notes that none of the case law which Sierra cited stands for the proposition that IAI applications must be denied, as a matter of law, where a landlord fails to obtain permits for electrical or plumbing work. Indeed, Sierra cites no authority to establish that such permits were necessary in this case.

Finally, the court also rejects Sierra's "due process" argument. She did not object to the Deputy Commissioner's consideration of the RA's December 14, 2018 inspection report on due process grounds during the PAR proceedings.[3] *See* verified answer, exhibit A. As a result, she cannot raise that argument before this court now in this Article 78 proceeding. *See e.g. Matter of Prioleau v New York State Div. of Hous. & Community Renewal*, 141 AD3d 439 (1st Dept 2016). Thus, the court rejects all three "arbitrary and capricious" arguments in Sierra's petition.

Sierra's reply papers raise six additional arguments that the PAR order was arbitrary and capricious; specifically, that: 1) the DHCR's failure to serve her with a copy of NLD's final submission in the PAR proceeding violated due process; 2) that the inspection report was "clearly erroneous"; 3) that the inspection report "contained major provisos" which the Deputy

[3] The DHCR further notes that Sierra's due process argument is belied by the facts, since the subject inspection report was plainly included among the submissions that the Deputy Commissioner compiled during the PAR proceedings, and it is evident that Sierra's counsel had access to that report. *See* respondent's mem of law at 13-14; exhibit A (administrative return).

Commissioner ignored, and was otherwise deficient; 4) the DHCR's failure to serve copies of both the inspection report and NLD's final PAR submission violated due process; 5) she did not waive her objection to the DHCR's failure to serve those items; and 6) the Deputy Commissioner's findings regarding the fitness of the electrical work in apartment 3C and the import of NLD's decision to pay Zaharopoulos in cash were not supported by evidence. *See* petitioner's reply mem of law at 2-14. However, the court also finds that these arguments are unavailing.

The court rejects Sierra's first "due process" argument for the same reason discussed previously; i.e., that she failed to raise it before the DHCR during the PAR proceeding. *Matter of Prioleau v New York State Div. of Hous. & Community Renewal*, 141 AD3d at 439.

The court rejects her "clearly erroneous" argument as the court has already determined that the Deputy Commissioner articulated a rational basis for his decision to rely on the inspection report, and the court may not substitute its judgment for the Deputy Commissioner's on matters of factual analysis. *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d at 429.

The court rejects Sierra's "major provisos" argument because the PAR order makes it clear that the Deputy Commissioner thoroughly reviewed the inspection report, and thereafter articulated a rational basis for his decision to rely on it. *See* verified answer, exhibit A. Whether Sierra would have interpreted the contents of that report differently is of no moment because such analysis of the facts is committed to the DHCR. *Matter of Marisol Realty Corp. v New York State Div. of Hous. & Community Renewal*, 154 AD3d at 463.

The court rejects Sierra's second "due process" argument for the reasons discussed *supra*.

The court rejects Sierra's "no waiver" argument for the same reason as it rejects her "due process" argument; i.e., that she never raised any objection to the Deputy Commissioner's consideration of the inspection report during the PAR proceedings.

The court rejects Sierra's arguments that the Deputy Commissioner's findings regarding electrical work and the significance of NLD's cash payment were "unsupported by evidence" as the court has already determined that the PAR order articulates a rational basis for the Deputy Commissioner's findings on both of those matters. *See* verified answer, exhibit A. It is irrelevant that Sierra would have preferred different findings. *Matter of Marisol Realty Corp. v New York State Div. of Hous. & Community Renewal*, 154 AD3d at 463.

Accordingly, having rejected all of Sierra's contentions that it was arbitrary and capricious, the court reiterates that the PAR order had a rational basis in the administrative record, and finds that Sierra's Article 78 petition challenging the PAR order should be denied as meritless, and that this proceeding should be dismissed.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

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

ORDERED that counsel for respondent New York State Division of Housing and Community Renewal shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days.

20201210162343CEDMEAD459BA69FEE4942F691F99FEEF185F1ED

12/10/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE