87th St. Sherry Assoc., LLC v New York State Div. of Hous. & Community Renewal
2020 NY Slip Op 34061(U)
December 9, 2020
Supreme Court, New York County
Docket Number: 153995/2020
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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87TH STREET SHERRY ASSOCIATES, LLC

Plaintiff,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendant.

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INDEX NO. 153995/2020

MOTION DATE 12/22/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 18, 19 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 87th Street Sherry Associates LLC (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 87th Street Sherry Associates, LLC (landlord) seeks a judgment to nullify an "explanatory addendum" that was issued by the respondent New York State Division of Housing and Community Renewal (DHCR) to clarify the terms of a previously issued rent-deregulation order (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

FACTS

Landlord is the owner of a residential apartment building located at 125 East 87th Street in the County, City and State of New York (the building). *See* verified petition, ¶ 1. The DHCR is the administrative agency that oversees rent-stabilized buildings located in New York City. *Id.*, ¶ 2. This proceeding concerns apartment 8G in the building, which landlord had previously registered with the DHCR as a rent-stabilized unit. *Id.*; exhibit B.

On June 14, 2018, landlord filed a "petition for high income rent deregulation" with the DHCR concerning apartment 8G. *See* verified answer, Joseph affirmation, ¶ 5; exhibit C. Apartment 8G's tenants of record, non-parties Diane and Jane Davidowitz (tenants), submitted an answer that admitted that their total annual income was in excess of $200,000.00 in each of the two proceeding calendar years. *Id.*, ¶ 7; exhibit C. On February 27, 2019, a DHCR Rent Administer (RA) issued an "order of deregulation" for apartment 8G (the deregulation order). *Id.*, ¶ 8; exhibit B. The deregulation order found as follows:

> "The housing accommodation is subject to the Rent Stabilization Law of 1969 and/or the Emergency Tenant Protection Act of 1974, and that the legal regulated rent was $2,700.00 or more per month on the applicable date(s). In addition, the sum of the annual incomes of the tenant(s) named on the lease who occupied this housing accommodation . . . was in excess of $200,000.00 in each of the two preceding calendar years. Accordingly, and upon the grounds stated in the Rent Stabilization Code Section 2520.11(s) or Emergency Tenant Protection Regulations Section 2500.9(n), it is

> ORDERED, that the subject housing accommodation is deregulated, effective upon the expiration of the existing lease."

Id., exhibit B. The lease for apartment 8G expired on June 30, 2019. *See* verified petition, ¶ 6.

On June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA) became effective, and Part D thereof repealed the provisions of the Rent Stabilization Law (RSL) that had previously permitted "high rent" and "high income" deregulation of rent stabilized apartment units (NY Uncon Laws §§ 26-504.1, 26-504.2, 26-504.3). In a "cleanup bill" enacted several days after the HSTPA's effective date, the New York State Legislature amended Section (i.e., subparagraph) 8 of Part D to provide, in pertinent part, that:

> "This act shall take effect immediately; provided however, that (i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated . . .."

See L 2019, ch 39 Part Q, § 8.

On September 20, 2019, the DHCR sent both landlord and tenants an "explanatory addenda to order" that was intended to explain the impact of the HSTPA on previously issued deregulation orders (the explanatory addendum). *See* verified answer, ¶ 12; exhibit B. The relevant portion of the explanatory addendum stated as follows:

> "On February 27, 2019, the RA issued an order to above parties with respect to the owner's application for high rent/high income deregulation. It stated:
> "ORDERED that the subject housing accommodation is deregulated effective:
> "Upon the expiration of the existing lease, as the subject housing accommodation is subject to the Rent Stabilization Law of 1969 and/or the Emergency Tenant Protection Act of 1974.
> "The language, which makes the deregulation contingent upon the expiration of the lease in effect on the day the Rent Administrator's deregulation order was issued, was taken from the applicable ETPA and RSL provisions authorizing such orders. Effective June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA) and its subsequent amendments were enacted. HSTPA repealed the high rent/high income deregulation provisions under which the above order was issued and stated that the law is to 'take effect immediately.' Additionally, HSTPA provides that 'any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated.'
> "If the lease in effect on the day the Rent Administrator's deregulation order was issued expired before June 14, 2019 the housing accommodation is deregulated.
> "If the rent stabilized lease in effect on the day the Rent Administrator's deregulation order was issued expires on or after June 14, 2019, the housing

> accommodation remains regulated to the Rent Stabilization Law or ETPA and pursuant to HSTPA is not deregulated.
>
> "If a rent stabilized lease should have been in effect on the day the Rent Administrator's deregulation order was issued, the housing accommodation remains subject to the Rent Stabilization Law or ETPA and pursuant to HSTPA is not deregulated."

Id.; exhibit B.

On October 10, 2019, landlord filed a "petition for administrative review" (PAR) with the DHCR that claimed that the explanatory addendum sought to improperly change the terms of the deregulation order. *Id.*; verified answer, ¶ 15; exhibit D. On March 5, 2020 the DHCR's Deputy Commissioner issued an order that denied landlord's PAR (the PAR order). *Id.*, ¶ 23; exhibit A. Because the PAR order is lengthy, this decision will not reproduce it in full, but will rather discuss the Deputy Commissioner's findings individually, as appropriate. It is sufficient to observe that the PAR order rejected all of landlord's legal challenges to the explanatory addendum. *Id.*; exhibit A.

Aggrieved, landlord thereafter commenced this Article 78 proceeding on June 5, 2020. *See* verified petition. The DHCR filed an answer on September 17, 2020. *See* verified answer. The matter is now fully submitted (motion sequence number 001).

DISCUSSION

In most cases, the court's role in an Article 78 proceeding is to determine, upon the facts before an administrative agency, whether a challenged agency 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, 230-231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1st Dept 1996). In this proceeding, however, only the final portion of landlord's petition challenges the March 5, 2020 PAR order as an arbitrary and capricious ruling.

The bulk of landlord's petition challenges the statutory analysis set forth in the DHCR's September 6, 2019 explanatory addendum, which, landlord claims, the DHCR improperly relied on to abrogate the February 27, 2019 deregulation order. Indeed, landlord's PAR application also purported to challenge the explanatory addendum rather than the deregulation order itself. *See* verified answer, exhibit D. This is anomalous, since the explanatory addendum is not a final agency determination, but is instead an "advisory opinion/operational bulletin," which 9 NYCRR § 2527.11 authorizes the DHCR to issue at its discretion. Since landlord's objections to the explanatory addendum flow from its' concerns about its' rights as the lessor of apartment 8G, it might have been more appropriate for landlord to have proceeded via an action for declaratory judgment. Declaratory judgment is traditionally the vehicle that the courts use to determine the respective rights of all affected parties under a lease. *See e.g. Chekowsky v Windemere Owners, LLC*, 114 AD3d 541 (1st Dept 2014); *Riccio v Windermere Owners LLC*, 58 Misc 3d 1223(A), 2018 NY Slip Op 50230(U), * 4 (Sup Ct NY County 2018), citing *Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 (1926). However, CPLR 7803 (3) also provides that courts may consider Article 78 petitions which question "whether a[n agency] determination was made in violation of lawful procedure, [or] *was affected by an error of law. . .* (emphasis added)." *See also Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d 142, 146 (2004) ("Our review of an administrative agency's action is limited to '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.'"); *Matter of 107-10 Shorefront Realty, LLC v Division of Hous. & Community Renewal*, 140 AD3d 1071 (1st Dept 2016).

Here, to the extent that landlord's petition argues that the explanatory addendum contained errors of law that adversely affected the deregulation order, the court finds that CPLR

7803 (3) encompasses review the explanatory addendum under the "error of law" standard. *See e.g., Terence Cardinal Cooke Health Ctr. v Commissioner of Health of the State of N.Y.*, 175 AD3d 435, 436 (1st Dept 2019) (""[W]here a quasi-legislative act by an administrative agency . . . is challenged on the ground that it 'was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion' . . ., a proceeding in the form prescribed by article 78 can be maintained.'" [internal citation omitted]). To the extent that landlord's petition seeks to overturn the March 5, 2020 PAR order, CPLR 7803 (3) mandates judicial review under the "arbitrary and capricious" standard. This decision will apply each standard where appropriate, first addressing the explanatory addendum, and then the PAR order.

A judicial inquiry into whether an agency determination was "affected by an error of law," pursuant to CPLR 7803 (3), "is 'limited to the grounds invoked by the agency' in its determination." *Matter of Barry v O'Neill*, 185 AD3d 503, 505 (1st Dept 2020), citing *Matter of Madeiros v New York City Educ. Dept.*, 30 NY3d 67, 74 (2017). Appellate courts have recognized "errors of law'' to exist in agency determinations that relied on inapplicable case law (*see e.g. Solnick v Whalen*, 49 NY2d 224 [1980]), or misapplied governing statutes. *See e.g. Matter of Rossi v New York City Dept. of Parks & Recreation*, 127 AD3d 463 (1st Dept 2015); *Matter of Nestle Waters N. Am., Inc. v City of New York*, 121 AD3d 124 (1st Dept 2014). On the latter point, the Appellate Division, First Department, recently reiterated the Court of Appeals' long-standing directive that:

> "[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld. Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be

> accorded much less weight. . . . [I]f the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight."
> *Matter of West 58th St. Coalition, Inc. v City of New York*, 188 AD3d 1, 8 (1st Dept 2020), quoting *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 (1980).

Here, the statutes that the DHCR identified in the explanatory addendum were "the applicable ETPA and RSL provisions authorizing [deregulation] orders . . . [and] the [HSTPA]." *See* verified answer, exhibit B. The two RSL provisions mentioned in the order (§§ 26-504.1 and 26-504.3) were both repealed by Part D of the HSTPA. The first governed "high income rent deregulation," and provided, in pertinent part, as follows:

> "Upon the issuance of an order by the [DHCR], 'housing accommodations' shall not include housing accommodations which: (1) are occupied by persons who have a total annual income, as defined in and subject to the limitations and process set forth in section 26-504.3 of this chapter, in excess of the deregulation income threshold, as defined in section 26-504.3 of this chapter, for each of the two preceding calendar years; and (2) have a legal regulated monthly rent that equals or exceeds the deregulation rent threshold, as defined in section 26-504.3 of this chapter."

RSL § 26-504.1. The second defined the "deregulation thresholds" referenced above, and provided, in pertinent part, as follows:

> "2. Deregulation income threshold means total annual income equal to one hundred seventy-five thousand dollars in each of the two preceding calendar years for proceedings commenced before July first, two thousand eleven. For proceedings commenced on or after July first, two thousand eleven, the deregulation income threshold means the total annual income equal to two hundred thousand dollars in each of the two preceding calendar years.
> 3. Deregulation rent threshold means two thousand dollars for proceedings commenced before July first, two thousand eleven. For proceedings commenced on or after July first, two thousand eleven, the deregulation rent threshold means two thousand five hundred dollars. For proceedings commenced on or after July first, two thousand fifteen, the deregulation rent threshold means two thousand seven hundred dollars, provided, however, that on January first, two thousand sixteen, and annually thereafter, such deregulation rent threshold shall be adjusted by the same percentage as the most recent one year renewal adjustment adopted by the relevant guidelines board."

RSL § 26-504.3. The corresponding Rent Stabilization Code (RSC) provision that governed "high income rent deregulation"[1] applications provided, in pertinent part, as follows:

> "This Code shall apply to all or any class or classes of housing accommodations made subject to regulation pursuant to the RSL . . ., except the following housing accommodations for so long as they maintain the status indicated below:
>
> * * *
>
> "(s) Upon the issuance of an order by the DHCR pursuant to the procedures set forth in Part 2531 of this Title, including orders resulting from default, housing accommodations which:
>
> "(1) have a legal regulated rent of $2,000 or more per month as of October 1, 1993, or as of any date on or after April 1, 1994, and which are occupied by persons who had a total annual income in excess of $250,000 per annum for each of the two preceding calendar years, where the first of such two preceding calendar years is 1992 through 1995 inclusive, and in excess of $175,000, where the first of such two preceding calendar years is 1996 through 2009 inclusive, with total annual income being defined in and subject to the limitations and process set forth in Part 2531 of this Title;
>
> "(2) have a legal regulated rent of $2,500 or more per month as of July 1, 2011 or after, and which are occupied by persons who had a total annual income in excess of $200,000 per annum for each of the two preceding calendar years, where the first of such two preceding calendar years is 2010 or later, with total annual income being defined in and subject to the limitations and process set forth in Part 2531 of this Title; . . ."

RSC § 2520.11. The relevant portion of RSC § 2531 that is referenced in RSC § 2520.11 (s) provides, in pertinent part, as follows:

> "In the event that the total annual income as certified is in excess of $250,000, $175,000, or $200,000 in each such year, whichever applies, as provided in section 2531.2 of this Part, the owner may file an owner's petition for deregulation (OPD), accompanied by the ICF, with the DHCR on or before June 30th of such year. The DHCR shall issue within 30 days after the filing of such OPD, an order providing that such housing accommodation shall not be subject to the provisions of the RSL *upon the expiration of the existing lease*."

RSC § 2531.3 (emphasis added). As previously mentioned, Part D, Section 8 of the HSTPA, which codified the repeal of "high income rent deregulation," provides that:

> "This act shall take effect immediately; provided however, that (i) any unit that was *lawfully deregulated prior to June 14, 2019* shall remain deregulated . . .."

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[1] The PAR order noted that the RA specifically relied on RSC § 2520.11 (s) in the February 27, 2019 deregulation order. *See* verified petition, exhibit A.

See L 2019, ch 39 Part Q, § 8 (emphasis added).

After carefully analyzing all the above statutes and regulations, the court concludes that the rationale which the DHCR followed in the explanatory addendum did not "run counter to the clear wording of a statutory provision." As of June 14, 2018, when landlord filed its deregulation petition, RSL §§ 26-504.1 and 26-504.3 authorized the "high income rent deregulation" of apartments where: 1) the tenant of record had reported a total income of $200,000.00 or more per year to the New York State taxing authorities for two consecutive years; and 2) the unit's legal regulated rent was $2,700.00 per month or more.[2] That deregulation petition alleged that tenants' total income exceeded the "deregulation income threshold" during the two tax years prior to June 14, 2018, and that apartment 8G's legal regulated rent exceeded the $2,700.00 "deregulation rent threshold" as of June 14, 2018. *See* verified answer, exhibit C. It is clear that landlord's deregulation petition facially comported with the requirements of RSL §§ 26-504.1 and 26-504.3. Therefore, it was no "error of law" for the DHCR to process landlord's deregulation petition pursuant to those statutes (or any petition that properly pled the statutory requirements for "high income rent deregulation").

Also as of June 29, 2018, RSC §§ 2520.11 and 2531.3 authorized the DHCR to grant petitions for "high income rent deregulation" when a tenant's total annual income was certified as in excess of the applicable deregulation threshold amount. Here, the RA's deregulation order specifically noted that "the annual incomes of the tenant(s) named on the lease who occupied this housing accommodation . . . was in excess of $200,000.00 in each of the two preceding calendar

[2] Landlord's reply papers acknowledge that these two criteria must be met in order for the DHCR to issue a deregulation order. *See* Gilbert reply affirmation, ¶¶ 32-58. However, as will be discussed, landlord's assertion that the deregulation became effective on the day that the DHCR issued the order was incorrect.

years." *See* verified petition, exhibit B. Therefore, it was no "error of law" for the RA to have entered a deregulation order against tenants, pursuant to RSC §§ 2520.11 and 2531.3 (nor would it have been an "error of law" for the DHCR to enter a deregulation order against any tenant of record whose certified annual income had exceeded the applicable deregulation threshold amount for two years).

Further, the courts of this state have long and consistently acknowledged that the plain language of RSC § 2531.3 authorizes the DHCR to enter orders terminating an apartment's rent stabilized status "*upon the expiration of the current lease,*" which is usually a different date that falls after the one on which the agency enters a deregulation order. *See e.g. Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d 142 (2004); *Rose Assoc. v Johnson*, 247 AD2d 222 (1st Dept 1998); *Matter of London Terrace Gardens v New York State Div. of Hous. & Community Renewal*, 6 Misc 3d 1020(A), 2005 NY Slip Op 50132(U) (Sup Ct, NY County, 2005); *see also Matter of Lacher v New York State Div. of Hous. & Community Renewal*, 25 AD3d 415, 417 (1st Dept 2006) ("the language of the rent stabilization system with respect to deregulation is prospective in nature"). Therefore, it was no "error of law" for the RA to have abided by the "lease expiration" instruction set forth in RSC § 2531.3 when he issued the February 27, 2019 deregulation order. *See* verified answer, exhibit B.

Finally, as was previously observed, the "clean up" Section 8 of Part D of the HSTPA provides that "any unit that was lawfully deregulated prior to June 14, 2019 (the HSTPA's effective date) shall remain deregulated," but that as to all other apartments, "this act shall take effect immediately," with the result that "high income rent deregulation" will no longer be available because the statutes that authorized it (i.e., RSL §§ 26-504.1 and 26-504.3) were repealed effective as of that date. *See* L 2019, ch 39 Part Q, § 8; *see also Widsam Realty Corp. v*

Joyner, 66 Misc 3d 132(A), 2019 NY Slip Op 52097(U) (App Term, 1st Dept 2019) ("'the so-called "clean up" bill clarified, at Section 8 thereof, that HSTPA did not re-regulate any units lawfully deregulated before HSTPA's June 14, 2019 effective date'" [internal citation omitted). The statute's plain language makes it clear that it was no "error of law" for the DHCR to have concluded that it could not authorize the deregulation of any rent stabilized apartments after the HSTPA's June 14, 2019 effective date.

The court also finds that it is reasonable for the DHCR to read the plain language of HSTPA, Part D, Section 8, in conjunction with RSC § 2531.3 (and the case law that interprets those provisions), and to conclude that it could not authorize the deregulation of rent stabilized apartments after June 14, 2019, even pursuant to previously issued deregulation orders, if such orders provided for the subject apartments to remain subject to stabilization until their pending lease terms expired, and the expiration dates fell after June 14, 2019. The court makes this finding fully cognizant of the Court of Appeals' directive that it, and not the DHCR, is the proper tribunal to resolve "question[s] . . . of pure statutory reading and analysis . . .." *Matter of West 58th St. Coalition, Inc. v City of New York*, 188 AD3d at 8, quoting *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d at 459. In this instance, however, the court finds that the DHCR's interpretation of the statutes (i.e., that the applicable RSL and RSC provisions did not authorize apartment 8G's deregulation, despite the agency's previous approval of landlord's deregulation petition) did not "run counter to the clear wording of a statutory provision." Instead, the court finds that it was reasonable for the DHCR to read the plain language of the RSL and RSC provisions in conjunction with the HSTPA, and the court adopts that reading. As a result, the court concludes that the DHCR's explanatory addendum did not contain an "error of law" that would adversely affect the February 27, 2019 deregulation order, in violation of CPLR 7803 (3).

Consequently, the court finds that the portion of landlord's Article 78 petition that challenges the explanatory addendum lacks merit and should be dismissed. Landlord's petition nevertheless asserts five arguments that the explanatory addendum should be annulled, each of which the court shall consider.[3]

First, landlord argues that "[the] DHCR erroneously applied the HSTPA retroactively." *See* verified petition, ¶¶ 36-58. Landlord specifically avers that "DHCR clearly erred by retroactively applying the HSTPA to the deregulation order which issued before the HSTPA, and failed to heed Part Q, §10 of Ch. 36, Laws of 2019." *Id.*, ¶ 41. However, this argument is based on a fallacy. The DHCR did *not* retroactively apply the deregulation repeal set forth in Part D of the HSTPA. Instead, the agency found that Part D of the HSTPA caused a supervening change in the law of "high income rent deregulation" on June 14, 2019 which precluded the instant deregulation order from taking effect when tenants' lease for apartment 8G expired two weeks later on June 30, 2019. Had the Legislature given Part D of the HSTPA an effective date that fell after the lease's June 30, 2019 expiration date, then apartment 8G might have been deregulated pursuant to the February 27, 2019 order. However, the repeal of "high income rent deregulation" took place on June 14, 2019, before tenants' lease for apartment 8G expired. Thus, when that lease did end on June 30, 2019, New York law no longer permitted deregulation, and the unit remained subject to the RSL.

It is also disingenuous for landlord to imply that the explanatory addendum enunciated a new DHCR policy to apply Part D of the HSTPA retroactively. It plainly did not. Instead, that document clearly stated that: 1) if a rent-stabilized lease in effect when the DHCR issued a

[3] At the end of this decision, the court will also address landlord's sixth argument, which asserts that the March 5, 2020 PAR order should be vacated on the ground that it was an "arbitrary and capricious" ruling.

deregulation order expired before the HSTPA's June 14, 2019 effective date, then the subject apartment would be deregulated; but that 2) if the lease instead expired on or after June 14, 2019, then the apartment would not become deregulated, but would instead remain rent-stabilized. *See* verified petition, exhibit C. This reading of HSTPA Part D in the explanatory addendum accords with the Court of Appeals' holding in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332, 372-373 [2020]), which found that Part D is "entirely forward-looking," and "take[s] effect immediately." 35 NY3d at 372-373. Landlord's petition and reply papers both devote a great deal of discussion to the portion of the *Regina Metropolitan* holding that dealt with the DHCR's improper retroactive application of Part F of the HSTPA. *See* verified petition, ¶¶ 45-52; Gilbert reply affirmation, ¶¶ 5-31. However, that discussion is plainly inapposite to Part D, which contains no language that might suggest retroactive application, as Part F does. Landlord's "retroactive application" argument seeks to bind the *Regina Metropolitan* holding to the erroneous assumption that rent deregulation orders are effective as of the day that the DHCR issues them. However, as was previously discussed, that is not always the case. RSC § 2531.3 formerly authorized the DHCR to issue "high income rent deregulation" orders which would take effect after the expiration of an existing rent-stabilized lease term, and New York's courts routinely acknowledged that regulatory authority. *See e.g.*, *Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d at 142; *Rose Assoc. v Johnson*, 247 AD2d at 222; *Matter of London Terrace Gardens v New York State Div. of Hous. & Community Renewal*, 6 Misc 3d 1020(A); *see also Matter of Lacher v New York State Div. of Hous. & Community Renewal*, 25 AD3d at 417. Landlord's copious legal arguments do not cite any precedent upholding a statutory interpretation which measured the effective date of an apartment deregulation from the date that a DHCR

deregulation order was issued, rather than the lease expiration date specified in such order. The reason for landlord's lack of citations is that no such precedent exists. The court concludes that landlord's characterization of the explanatory addendum is inaccurate, that its assumption about the effective date of rent deregulations pursuant to RSC § 2531.3 is incorrect, and that the case law which landlord cited is inapposite. Therefore, the court rejects landlord's "retroactive application" argument against the explanatory addendum as unsupported.

Next, landlord argues that the "DHCR improperly revived a time-barred claim." *See* verified petition, ¶¶ 59-78. This argument, too, proceeds from a fallacy. Landlord asserts that tenants' right to challenge the deregulation order expired 35 days after the DHCR issued it on February 27, 2019, at which time it acquired a "vested right" in apartment 8G's deregulation that could not be challenged. *Id*., ¶ 59. Landlord then cites the portion of the *Regina Metropolitan* holding which, in turn, cited the United States Supreme Court's decision in *Landgraf v USI Film Products* (511 US 244 [1994]), to support the proposition that "the explanatory addenda . . . clearly impairs an existing legal or property right that the owner possessed, namely the deregulation order," and should therefore be deemed a nullity. *See* verified petition, ¶ 60. However, it is apparent that the *Landgraf* holding does not support landlord's position. In *Landgraf*, the U.S. Supreme Court held that "[w]hen the intervening statute authorizes or affects *the propriety of prospective relief*, application of the new provision is not retroactive." 511 US at 273 (emphasis added). In *Regina Metropolitan,* the Court of Appeals interpreted *Landgraf* to hold that "a statute that affects only 'the propriety of prospective relief" . . . has no potentially problematic retroactive effect even when the liability arises from past conduct." 35 NY3d at 365-366. Applying the Court of Appeals' reasoning to the facts of this case indicates that the "past conduct" which the explanatory addendum affected was the February 27, 2019

deregulation order, while the "prospective relief" that the explanatory addendum also affected was the pending deregulation of apartment 8G after the June 30, 2019 lease expiration. Applying the holdings of *Regina Metropolitan* and *Landgraf* to the facts of this case shows that landlord is incorrect to claim that the deregulation order created "an existing legal or property right," because the RSL and RSC make it clear that the deregulation order merely created "a right to prospective relief." Those cases further mandate that "rights to prospective relief" do not entitle the parties who hold them to raise retroactive application challenges against intervening statutes that alter or abrogate said "rights to prospective relief."[4] Under this analysis, the deregulation order did not bestow a "vested right" on landlord to deregulate apartment 8G. Instead, it only accorded landlord a "right to prospective relief" in such deregulation, which right was extinguished when Part D of the HSTPA became effective on June 14, 2019, and before the apartment was due to exit rent stabilization on June 30, 2019.[5] The court concludes that *Regina Metropolitan* and *Landgraf* mandate that landlord's "retroactive application" challenge to Part D of the HSTPA is improper, and the court should not consider it. For that reason, the court also finds that landlord's "time-bar" argument, which incorrectly presumes that its "retroactive application" analysis is proper, fails with respect to the explanatory addendum.[6]

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[4] By way of example, the Supreme Court noted that, because "relief by injunction operates *in futuro*," a plaintiff is deemed to have no "vested right" created by the trial court decree that entered the injunction. *Landgraf v USI Film Products,* 511 US at 273-274, quoting *American Steel Foundries v. Tri-City Central Trades Council*, 257 US184, 201 (1921).

[5] This is the reasoning that the DHCR's Deputy Commissioner employed in the portion of the explanatory addendum which stated that "the application of HSTPA to pending matters is not based upon the independent judgement of the rent agency, but, rather, it is pursuant to the plain text in HSTPA." *See* verified petition, exhibit A.

[6] The court here notes that landlord's reply papers merely restate the "time-bar" argument without adding anything of further relevance. *See* Gilbert reply affirmation, ¶¶ 59-64.

Next, landlord argues that "retroactive application of the HSTPA is a denial of due process." *See* verified petition, ¶¶ 79-95. This argument cites the portion of the *Regina Metropolitan* holding that used *Landgraf* and other U.S. Supreme Court decisions as authority to invalidate the DHCR's retroactive application of Part F of the HSTPA on due process grounds. *Id*. However, that portion of the *Regina Metropolitan* holding was premised on the finding that the DHCR *had* applied Part F of the HSTPA retroactively. *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 374-388. Here, as the court has repeatedly made clear, the DHCR did *not* apply Part D of the HSTPA retroactively. As a result, the due process analysis that landlord seeks to import from *Landgraf* and its progeny to dispute said retroactive application is inapposite.[7] The court therefore discounts landlord's "due process" argument.[8]

Next, landlord argues that the "DHCR lacked jurisdiction to issue the explanatory addenda." *See* verified petition, ¶¶ 96-108. However, landlord cites no case law, statutes or regulations to support its claim that the DHCR acted in excess of its authority in issuing the explanatory memorandum.[9] *Id*. In the PAR order, the DHCR's Deputy Commissioner asserted that "the EA [i.e., explanatory addendum] was not a superseding order modifying or revoking the previously issued order and therefore no jurisdictional predicate was needed under the rent laws

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[7] The court here notes that, in landlord's memorandum, counsel misrepresented the court's own holding in *Matter of AEJ 534 East 88th v DHCR* (Index Number 157908/18, motion sequence number 001, July 1, 2019). That decision did *not* "revoke[] DHCR's retroactive application of amended RSC §2526.1 (a) (3) (iii)." *See* verified petition, ¶ 88. The decision *upheld* the DHCR's decision to employ the newly amended version of that regulation which became effective during the pendency of the administrative proceeding.

[8] The court notes that neither the explanatory addendum nor the PAR order discussed the issue of due process, although they both asserted the correct premise that the DHCR had not applied Part D of the HSTPA retroactively.

[9] Landlord's reply memorandum does not contain any such citations either; and, indeed, does not mention this argument at all. It thus appears that landlord may have abandoned it.

to issue it." *See* verified petition, exhibit A. The court noted earlier that RSC § 2527.11 authorizes the DHCR to issue "advisory opinions and operational bulletins," on its own initiative, which "may include the issuance and updating of schedules, forms, instructions, and the official interpretative opinions and explanatory statements of general policy of the commissioner, including operational bulletins, with respect to the RSL and this Code." The court finds that the September 20, 2019 explanatory addendum at issue in this case is an "explanatory statements of general policy" authorized by 9 NYCRR § 2527.11. Therefore, the court rejects landlord's "no jurisdiction" argument as it is belied by that RSC regulation.

Finally, landlord argues that "the timeline pertaining to the owner's 2018 petition for deregulation bars applying HSTPA in this instance." *See* verified petition, ¶¶ 109-114. Landlord specifically asserts that "the deregulation order should have been issued by September 14, 2019, since there was no dispute that the apartment qualified for high rent/high income deregulation, based upon the tenants' admissions in their income certification form responses." *Id.*, ¶ 111. This appears to have been a typographical error, and it is likely that landlord meant to assert that "the deregulation order should have been issued by *September 14, 2018*," which is the date that fell three months after landlord filed its deregulation application on June 14, 2018. Although the DHCR's memorandum does not address this argument, the court notes that the Deputy Administrator's PAR order rejected it on the grounds that: a) there were "no unreasonable delays in processing the owners [deregulation] application"; and b) even if there had been, RSC § 2531.9 provides that "[t]he expiration of the time periods prescribed in this Part for action by the DHCR shall not divest the DHCR of its authority to process petitions filed pursuant to this Part in accordance with the above procedures, and to issue final determinations pursuant to this Part." *See* verified petition, exhibit A. The court also notes that landlord appears to have abandoned its

"timeline" argument in its reply papers. Whether it did or not, however, the court rejects the "timeline" argument because landlord has failed to present evidence of any purported DHCR delays, or to identify case law that would entitle it to nullify the explanatory addendum as a result of such delays.[10] Having thus rejected all of landlord's arguments as to the legal propriety of the September 20, 2019 explanatory addendum, the court reiterates its finding that so much of landlord's petition as challenged the explanatory addendum under the "error of law" standard should be denied as meritless.

As was mentioned at the beginning of this decision, the last argument in landlord's petition is not directed at the explanatory addendum, but at the March 5, 2020 PAR order, which landlord claims "is erroneous, arbitrary, capricious and unsupported by HSTPA or other applicable law." *See* verified petition, ¶¶ 115-131. The DHCR responds that the PAR order should be sustained because it was rationally based on the administrative record. *See* respondent's mem of law at 12-13. An agency's 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 v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, a rational basis for the agency's determination can be drawn from the administrative record; 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, landlord specifically asserts that the PAR order was an arbitrary and capricious ruling because it: "(1) incorrectly relies on [*Dugan v London*

[10] The court also observes that the argument incorporates landlord's oft-repeated misrepresentation that apartment deregulations become effective on the date that DHCR issues apartment deregulation orders, rather than on the date that the apartment's current lease expires.

Terrace Gardens, L.P., 177 AD3d 1 (1st Dept 2019)] to support its retroactive application of HSTPA; (2) incorrectly applied HSTPA retroactively to alter a final order; and (3) incorrectly held no party has a vested right to any remedy under the RSL." *See* verified petition, ¶ 115. The court has already rejected landlord's second and third assertions for the reasons stated earlier in this decision. With respect to the PAR order's reliance on *Dugan v London Terrace Gardens, L.P.*, it is true that the Court of Appeals' *Regina Metropolitan* decision reversed the First Department's original 2019 ruling in *Dugan*, and that the First Department thereafter recalled and vacated that decision, and issued a new one in 2020 (*Dugan v London Terrace Gardens, L.P.*, 186 AD3d 12 [1st Dept 2020]). However, both *Dugan* decisions and the *Regina Metropolitan* holding are inapposite to the facts of this case, since they all centered on the DHCR's improper retroactive application of Part F of the HSTPA. Further, the PAR order relied on the first *Dugan* decision for the proposition that Part D of the HSTPA repealed "high income rent deregulation" prospectively. *See* verified petition, exhibit A. As the court discussed at length earlier, the *Regina Metropolitan* holding itself confirmed this application of HSTPA Part D. 35 NY3d at 373. Therefore, the fact that the DHCR's Deputy Commissioner cited an improper case to draw a proper conclusion makes landlord's objection meritless. Because landlord raises no other arguments as to how the PAR order might have been an "arbitrary and capricious" ruling, the court finds that so much of landlord's petition as challenged the PAR order directly under that standard should be denied.

Accordingly, having concluded that landlord's challenge to both the explanatory addendum and the PAR order lack merit, the court finds that landlord's article 78 petition should be denied, and that this proceeding should be dismissed.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR article 78, of petitioner 87th Street Sherry Associates LLC (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.

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12/9/2020
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