Matter of 87th St. Sherry Assoc. LLC v New York State Div. of Hous. & Community Renewal
2021 NY Slip Op 34236(U)
June 21, 2021
Supreme Court, New York County
Docket Number: Index No. 154002/2020
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER PART 6
Justice

In the Matter of the Application of
87th STREET SHERRY ASSOCIATES LLC,

Petitioner,

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

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent.

INDEX NO. 154002/2020
MOTION DATE
MOTION SEQ. NO. 1
MOTION CAL. NO.

DECISION AND ORDER

The following papers, numbered 1 to _____ were read on this motion for/to

PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answer — Affidavits — Exhibits _____
Replying Affidavits
Cross-Motion: Yes X No

Petitioner 87th Street Sherry Associates LLC ("Petitioner") brings this action, pursuant to Article 78 of the New York Civil Practice Laws and Rules ("Article 78"), for an Order setting aside and nullifying Respondent New York State Division of Housing and Community Renewal's ("DHCR" or "Respondent") Deputy Commissioner's Administrative Review Order dated March 5, 2020, under Docket Nos. HV410231RO, nullifying the Explanatory Addenda, and fully reinstating the Deregulation Order. DHCR opposes.

Rent Stabilization Law ("RSL")

The procedures for high income deregulation were set forth in RSL §26- 504.3 (now repealed), including mandatory timelines.

An owner of an apartment whose rent equaled or exceeded the deregulation threshold was permitted to send the tenant an income certification form on or before May 1st of each year and the tenant was required to respond within 30 days of such service.

If the income as certified was in excess of the deregulation income threshold in each of the two preceding calendar years the owner was permitted to file the

certification with DHCR on or before June 30th of such year and the Agency was required, within 30 days of the filing, to issue an order deregulating the unit as of June 1 in the year next succeeding the owner's filing of the certification.

If the tenant or tenants failed to return the certification within 30 days or the owner disputed their certification, the owner had the right to petition DHCR who, within 20 days, had to notify the tenant or tenants of the obligation to provide information for DHCR to verify whether the income exceeded the deregulation income threshold, and that the failure to respond within 60 days would result in an order of deregulation.

If the Department of Finance and Taxation determined the income exceeded the threshold, DHCR had to notify the parties by November 15th and the parties had 30 days to comment.

Within 45 days after the expiration of the comment period, DHCR was required to issue an order, where appropriate, deregulating the unit as of March 1 of the year after the filing of the owner's petition with DHCR.

Under RSL §26-504.3(c)(3), as it existed prior to June 14, 2019, provided the following in pertinent part: "In the event the tenant or tenants fail to provide the information required pursuant to paragraph one of this subdivision, the division shall issue, on or before December first of such year, an order providing that such housing accommodation shall not be subject to the provisions of this law upon the expiration of the current lease."

Housing Stability and Tenant Protection Act of 2019 ("HSTPA")

On June 14, 2019, HSTPA was enacted and repealed RSL § 26-504.3, the high income/high rent deregulation provision.

The effect of that repeal was limited in Part Q §10 of Ch. 36 of the Laws of 2019 (colloquially referred to as the "Clean Up Bill"), which amended Part D §8 of HSTPA to read as follows: "§ 8. This act shall take effect immediately; *provided however, that (i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated;* ***." (New portion in italics.)

Background/Factual Allegations

According to the Petition, in April 2018, Petitioner, by counsel timely served Tenant, Francesca Coloni (the "Tenant"), with an income certification form, which was sent via certified mail, return receipt requested, as required by the statute. Petitioner contends that the Tenant failed to complete the income certification form for the 2018 filing period.

On June 29, 2018, Petitioner filed its 2018 luxury deregulation petition with DHCR, with a copy of the Tenant's income certification form and indicating that the Tenant failed to respond. Petitioner contends that DHCR did not issue an Order by September 29, 2018, even though the statute and regulations mandated the date a decision was to be rendered.

DHCR contends that on April 5, 2019, the Rent Administer issued GR410654LD Order of Deregulation as the Tenant did not submit a response to the Notice and failed to provide the information required to verify the household income. The Order 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.

On September 6, 2019, DHCR issued the Explanatory Addenda. DHCR contends that the Addenda was sent to explain the effect of the Deregulation Order. The Addenda stated:

> 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. . . .

On October 9, 2019, the Owner filed a Petition for Administrative Review ("PAR") claiming the Addenda attempts to change the terms of a final Order of Deregulation based on Tenant's failure to respond after notice from DHCR for the 2018 filing period. The Owner stated that the Order deregulated the subject apartment effective upon the expiration of the lease that the Owner stated ended June 30, 2019.

On March 5, 2020 the PAR was denied. The PAR Order stated that the purpose of the Addenda was to explain the impact of HSTPA on deregulation orders.

Petitioner's Contentions

Petitioner argues that DHCR erroneously applied HSPTA retroactively. Petitioner asserts that "[s]ince HSTPA did not provide for retroactive application to previously issued deregulation orders based upon when the applicable lease would expire, the 'shall take effect immediately' provision has no retroactive effect and may not be applied to the Deregulation Order." Petitioner argues that "[b]ased upon the plain language of the statute, HSTPA does not apply to the Deregulation Order and the Explanatory Addenda should never have been issued." Petitioner asserts that "[t]here is no language in the HSTPA that even remotely supports DHCR's 'interpretation' as set forth in the Explanatory Addenda."

Petitioner argues that the Deputy Commissioner improperly and erroneously relied upon *Dugan v. London Terrace Gardens, L.P.*, 177 A.D.3d 1, 8 [1st Dept 2019] as its basis for making this determination. Petitioner avers that the holding in *Dugan* that the HSTPA was retroactive in its applicability, was recently invalidated by the Court of Appeals' ruling in *Regina Metropolitan Co., LLC v. New York State Division of Housing and Community Renewal*, 2020 WL 1557900, 2020 N.Y. Slip Op. 02127. Petitioner argues that "[e]ven if *Dugan* had not been nullified, it would not have supported DHCR's actions in this matter," especially since that ruling addressed Part F of the HSTPA, which specifically provided for its applicability to pending proceedings, while Part Q of the Act, which addresses luxury deregulation, became effective immediately and thus had no retroactive effect.

Moreover, Petitioner argues that DHCR improperly revived a time-barred claim. Petitioner contends that "[t]he Deregulation Order became final and binding 35-days after May 3, 2019, which is when the Tenant's time to challenge the luxury

deregulation of the apartment expired." Petitioner asserts that "[b]ecause the Explanatory Addenda, as applied to the Deregulation Order, impacts substantive rights possessed by the Owner and has a retroactive effect, the prohibition against retroactivity is triggered." Petitioner argues that "[b]y attempting to limit the Deregulation Order's applicability, DHCR is now attempting to avoid the effect of the Deregulation Order by improperly applying HSTPA retroactively." Petitioner argues that "DHCR's prohibited (and erroneous) retroactive application of the repeal of RSL § 26-504.3 is also evidenced by the fact that the Explanatory Addenda reopened a closed case and revived a claim that was previously time-barred and finally determined in Petitioner's favor." Petitioner argues that the Legislature clearly did not intend for this repeal to be applied retroactively.

Petitioner argues that the retroactive application of HSTPA is a denial of due process. Petitioner asserts that "the re-regulation of the subject apartment, which should have been deregulated as of 2018, explicitly impairs the Owner's due process rights and is an unconstitutional taking." Additionally, Petitioner asserts that DHCR lacked jurisdiction to issue the Explanatory Addenda. Petitioner argues that "[t]he Deregulation Order is clear and unequivocal, that the Apartment was deregulated because of High Income/High Rent on the date of the Deregulation Order." Petitioner contends that "[t]he Deregulation Order became effective as of May 3, 2019, and became final 35 day later, on or about June 7, 2019, before the HSTPA was enacted." Petitioner argues that on September 6, 2019, "DHCR issued the Explanatory Addenda, without any authority, claiming that the Explanatory Addenda was an 'Explanatory Addenda to Order,' even though the Deregulation Order was clear on its face and did not need to be to 'explained.'"

In opposition, DHCR argues that HSTPA repealed the Rent Stabilization Law §§ 26-504.1, 26-504.2 and 26-504.3 which provided for vacancy and high income deregulation. DHCR asserts that "Section 8 of HSTPA provided that housing accommodations that were lawfully deregulated prior to June 14, 2019 shall remain deregulated." DHCR contends that "RSL §26-504.3(c)3 provided that if the Tenant should fail to provide the information required, DHCR shall 'issue an order that such housing accommodation shall not be subject to the provisions of this act upon the expiration of the existing lease.'" DHCR argues that "[u]nder the clear and explicit language of the statute, which was in effect at the time the deregulation petition was filed and the deregulation order was issued, the subject apartment did not become deregulated as conceded by the Owner until the expiration of the lease in effect at the time of the issuance of the deregulation order as the lease in effect in this case did not expire until June 30, 2019 after the enactment of HSTPA." DHCR asserts that "even if it did not send the Owner and Tenant the Addenda, the housing accommodation would not be deregulated because as RSL §26-504.3(c)3 and the

May 3, 2019 Order as conceded by the Owner provided 'the subject housing accommodation is deregulated effective upon the expiration of the existing lease.'" DHCR argues that the "lease did not expire until June 30, 2019, the housing accommodation was not deregulated prior to June 14, 2019 and pursuant to HSTPA the housing accommodation shall remain regulated."

Furthermore, DHCR asserts that the explanatory addenda did not revive a time barred claim or was applied retroactively. DHCR argues that "HSPTA Part D, as amended, set forth a very definitive effective date for the abolishment of high rent vacancy and high income deregulation." DHCR contends that "[t]he repeal of high rent vacancy and high income deregulation was to take effect immediately, but with an express carve out date and explanation, that any unit that was lawfully deregulated prior to June 14, 2019, would remain deregulated." DHCR argues that "Part D is prospective in nature as anything lawfully deregulated remains deregulated, and HSTPA neither impairs a right that the Owner had in the past as it did not yet have the 'right' of deregulation; it does not increase his 'liability' for past conduct as with overcharges; nor did it impose new duties on a completed transaction."

DHCR argues that that the Order was not arbitrary and capricious. DHCR asserts that the Order was rationally based on Rent Stabilization Law and Code and the administrative record. DHCR asserts that "the Explanatory Addenda informed the Owner and Tenants of the applicability of HSTPA to the Order of Deregulation but did not change the terms of the May 3, 2019 Order of Deregulation which in accordance with RSL §26-504.3(c)3 conditioned deregulation on the expiration of the current lease."

Legal Standards

"Article 78 proceedings exist for the relief of parties personally aggrieved by governmental action." *Dunne v. Harnett*, 399 NYS 2d 562, 563 [Sup Ct, NY County 1977]. Judicial review is limited to questions expressly identified by CPLR 7803. *Featherstone v. Franco*, 95 NY2d 550, 554 [2000]. One such question is "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." *See* CPLR 7803[3]. "[I]t is settled that in a proceeding seeking judicial review of administrative action, the court may not substitute its judgment for that of the agency responsible for making the determination, but must ascertain only whether there is a rational basis for the decision or whether it is arbitrary and capricious." *Flacke v. Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363

[1987]. "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts." *Testwell, Inc. v. New York City Dept. of Bldgs.*, 80 AD3d 266, 276 [1st Dept 2010].

"[J]udicial review of an administrative agency determination is limited to the grounds invoked by the agency." *Rizzo v. N.Y.S. Div. of Hous. & Cmty. Renewal*, 16 A.D.3d 72, 75-76 [1st Dep't 2005], *aff'd*, 6 N.Y.3d 104 [2005]. "In reviewing orders of the DHCR, courts are limited to the factual record before the agency when its determination was rendered." *Id*

"Where 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." *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]). "If its interpretation is not irrational or unreasonable, it will be upheld." *Id.* "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." *Id.* "[I]f the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight." *Id.*

Discussion

Petitioner has failed to demonstrate that the Deregulation Order was arbitrary and capricious. *Flacke*, 69 NY2d at 363. The Deregulation Order was rationally based on the Rent Stabilization Law and Code and the administrative record. The Explanatory Addenda informed the Owner and the Tenant of the applicability of HSTPA to the Order of Deregulation but did not change the terms of the May 3, 2019 Order of Deregulation which in accordance with RSL §26-504.3(c) conditioned deregulation on the expiration of the current lease. The Tenant's lease did not expire until June 30, 2019, the housing accommodation was not deregulated prior to June 14, 2019 and pursuant to HSTPA the housing accommodation remained regulated. Thus, the Explanatory Addenda did not revive a time barred claim or applied deregulation retroactively. Petitioner fails to meet its burden of demonstrating that the Order should be disturbed by the Court.

Wherefore it is hereby

ORDERED that the Petition is denied and the proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: June 21, 2021

EILEEN A. RAKOWER, J.S.C.

Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION