

341 W. 19th St. Partners 2 LLC v New York State Div. of Hous. & Community Renewal
2022 NY Slip Op 31374(U)
April 27, 2022
Supreme Court, New York County
Docket Number: Index No. 159663/2021
Judge: Frank P. Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. FRANK NERVO PART 04

Justice

-----X

341 WEST 19TH STREET PARTNERS 2 LLC

Plaintiff,

- v -

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL,

Defendant.

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INDEX NO. 159663/2021

MOTION DATE 10/25/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 8, 9, 10, 11, 12, 13, 14, 15

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

Petitioner seeks, inter alia, to annul respondent agency’s determination that the subject apartment was improperly removed from rent stabilization regulation and assessed an overcharge and treble damages against petitioner-owner. Respondent opposes contending its determination properly applied the Rent Stabilization Code and case-law and is otherwise supported by the evidence.

The standard of review of an agency determination via an Article 78 proceeding is well established. The Court must determine whether there is a rational basis for the agency determination or whether the determination is arbitrary and capricious (*Matter of Gilman v. New York State Div. of Housing and*

Community Renewal, 99 NY2d 144 [2002]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Peckham v. Calogero*, 12 NY3d 424 [2009]; see also *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]). When an agency determination is supported by a rational basis, this Court must sustain the determination, notwithstanding that the Court would reach a different result than that of the agency (*Peckham v. Calogero*, 12 NY2d at 431).

“Regardless of its age, an apartment’s rent history is always subject to review to determine whether a unit is rent-stabilized” (*Matter of Kostic v. DHCR*, 188 AD3d 569 [1st Dept 2020] citing *Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 NY3d 332 [2020]). Stated another way, the prohibition against a lookback beyond four years from the date of an overcharge action to establish the base rent, absent a finding of fraud, does not apply when the lookback at the rent history is to determine the rent regulation status of the apartment and not the base rent (*id.*). The owner bears the burden of establishing, in proceedings before DHCR, that the subject apartment was properly deregulated (*Matter of Kostic v. New York State Div. of Hous. & Community Renewal*, 188 AD3d 569).

Here, in the action before respondent DHCR, petitioner failed to provide documentary proof establishing that the unit was properly removed from rent stabilization; petitioner failed to produce the prior lease upon which it based its contention that the apartment was deregulated due to high rent. Respondent was empowered not to accept the prior building-owner's annual rent registration statements, as same are unilaterally filed unverified declarations and respondent found them without probative value. Furthermore, the former owner of the building failed to comply with 9 NYCRR § 2526.1(a)(3)(iii), in that upon the superintendent vacating the apartment, the apartment reverted to rent-stabilized status and the initial rent following the superintendent's vacatur was required to be stabilized (*see Gordon v. 305 Riverside Corp.*, 93 AD3d 590, 593 [1st Dept 2012]). It is undisputed that the initial rent following the superintendent vacating the apartment was not stabilized, as required. Consequently, respondent's determination that petitioner failed to meet its burden establishing the apartment was properly deregulated, and thus respondent's finding the apartment was improperly deregulated, is based upon a fair interpretation of the evidence, and is not arbitrary or capricious.

Turning to respondent's calculation of the appropriate base rent, petitioner argues, as a matter of equity, that because it did not own the property

at the time the apartment was improperly deregulated, the legal regulated rent should not be calculated by the default formula nor should it be frozen for the duration of the tenant's occupancy. A purchaser of real estate takes title subject to the predecessor's liabilities and rights related thereto – including an apartment's regulation status (*see e.g. Matter of 61 Jane Street Assoc. v. New York City Conciliation & Appeals Bd.*, 108 AD2d 636 [1st Dept 1985], *aff'd* 65 NY2d 898 [1985]). Where, as here, the base rent cannot be determined by any other method proscribed by 9 NYCRR § 2522.6(b)(2), the default formula to calculate the base rent applies (*see Simpson v. 16-26 E. 105, LLC*, 176 AD3d 418 [1st Dept 2019]; *Matter of Herman v. New York State Div. of Hous. & Community Renewal*, 239 AD2d 305 [1st Dept 1997] 9 NYCRR §§ 2522.6[b][2] and [b][3]). Under such circumstances, the default formula is not a penalty or punishing conduct (*id.*).

Likewise, Rent Stabilization Code § 2528.4 (9 NYCRR § 2528.4) provides that where an owner has improperly filed rent registrations, the rent is frozen at the base date rent, and the owner “is retroactively relieved of that penalty upon the filing of a proper registration only when the increases were lawful except for the failure to file a timely registration” (*Nolte v. Bridgestone Associates LLC*, 167 AD3d 498 [1st Dept 2018]). This is not the case at bar as the rent increases were not found to be lawful. Accordingly, respondent properly applied the

default formula to determine the base rent four years prior to the action, and froze the tenant's rent at the base date rent.¹


Finally, petitioner alleges respondent improperly assessed treble damages for the overcharge. 9 NYCRR §2526.1 provides that where an owner is unable to demonstrate the overcharge was not willful, treble damages for such overcharge shall lie against the owner. Notwithstanding, “[a]n owner should not be penalized with treble damages for failing to provide rent records for a period of time before it succeeded to ownership where... the owner had every reason to suppose, at the time of taking ownership, that the rent then being charged was not in excess of the lawful rent” (*Round Hill Management Co. v. Higgins*, 177 AD2d 256 [1st Dept 1991]). “A finding that the preponderance of the evidence does not show non-willfulness, and liability for treble damages... should depend on a finding as to whether the owner had reason to know that the amount it was charging was in excess of the lawful rent” (*id.* at 258).

¹ To the extent that petitioner contends respondent improperly calculated the base rent, such contention is entirely without merit, as DHCR employed the default method required by the Rent Stabilization Code – sampling comparable apartments.

Here, respondent, in weighing the evidence and credibility, found petitioner failed to establish the overcharge was not willful. Respondent found the lack of any rental history records, upon which petitioner based its contention that the subject apartment was deregulated, precluded a finding that relying on such missing rental history records in issuing deregulated leases was reasonable.² Respondent’s findings on credibility are afforded deference in this action (*Nekle v. Department of Motor Vehicles*, 79 AD3d 433 [1st Dept 2010]). Consequently, respondent’s assessment of treble damages is supported by its evidentiary and credibility findings, and it is not arbitrary or capricious.

Accordingly, it is

ORDERED that the petition is denied in its entirety and the matter dismissed.

<u>4/27/2022</u> DATE					 HON. FRANK P. NERVO, J.S.C.
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/>	REFERENCE

² To the extent that petitioner contends the temporary exemption from regulation during the superintendent’s occupation of the apartment converted to a permanent exemption for subsequent tenants and that reliance upon same was reasonable, such contention is flatly contradicted by case law issued prior to the improper deregulation which found a temporary exemption cannot be converted to a permanent exemption for a subsequent tenant (*see e.g. 656 Realty LLC v. Cabrera*, 910 NYS2d 408 [App Term 1st Dept 2010])