SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LAURENCE L. LOVE** **PART** **63M**

Justice

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MILTON JONES,

Plaintiff,

- v -

RUTHANNE VISNAUSKAS, DHCR, WEST SIDE MARQUIS, LLC

Defendants.

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INDEX NO. 153066/2022

MOTION DATE 07/13/2022

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, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30

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

Upon the foregoing documents, it is

The following reads on a Petition to reverse and annul the Division of Housing and Community Renewal's Administrative Review Order and Opinion Denying Petitioner's Petition for Administrative Review, assigned Docket No. JW410008RT, dated February 7, 2022, which affirmed the Rent Administrator's Order that Petitioner is bound to pay the ACR rent, rather than the preferential rent, on the grounds that such determination is arbitrary and capricious and constitutes an abuse of discretion.

A cross – motion states "the undersigned will move this court pursuant to CPLR 103(b), 105(b), 404(a), 7801(1), 7804(a), 7804(d) and 7804(f) … for an order remitting the instant CPLR Article 78 proceeding to respondent New York State Division of Housing and Community Renewal for further proceeding and for issuance of a new determination upon the grounds:

> To review the Order and Opinion Denying Petition for Administrative Review (Docket Number JW-410008-RT) in light of the decision of the appellate division in *Extell Belnord LLC v. Uppman*, 113 A.D.3d 1, 976 N.Y.S.2d 22 (1st Dept. 2013)."

The Verified Petition states, "[h]e lived with his mother […]. Ms. Jones passed away […]. Mr. Jones filed a complaint with Respondent DHCR, seeking an Order directing his landlord, Respondent West Side Marquis, LLC, to issue a rent – stabilized lease in Mr. Jones' name. On March 3, 2020, DHCR issued an Order Directing Lease Renewal, […] the Rent Administrator directed Respondent West Side Marquis, LLC to issue Mr. Jones a first succession lease to the subject unit at a monthly rent of $947.75, rather than the legal regulated rent of $2,679.24, pursuant to an ACR agreement. Respondent West Side Marquis, LLC, filed a Request for Reconsideration. [W]hich modified … to the extent that the HSTPA did not apply and Mr. Jones was not entitled to the lower preferential rent. On or about November 2, 2021 Petitioner filed a [Petition for Administrative Review] of the September 29, 2021 Order Pursuant to Reconsideration" (see NYSCEF Doc. No. 1 pars 9 – 11, 13, 14).

Respondent – West Side Marquis, LLC opposes DHCR's cross motion. The affidavit of Randi Koch Nir, Director of Residential Lease for West Side Marquis LLC affirms,

> "I am personally familiar with [West Side Marquis, LLC]'s ownership and operation of the rent stabilized property located at 70 West 95th Street, New York. On or about March 10, 2005, the former Mitchell-Lama limited profit housing corporation that owned the Building dissolved. Thereafter, the Building became subject to rent stabilization pursuant to the rent Stabilization Law. [Mitchell-Lama] filed an application with the [Division of Housing and Community Renewal], for an upward rent adjustment. The tenants of the Building objected to the initial legal rents. After months of negotiations, [Mitchell-Lama] and the approved tenants executed the WSM Agreement. The WSM Agreement provided that in settlement of [Mitchell-Lama]'s U/P Application, [Division of Housing and Community Renewal] would issue an order establishing a LRR of $500 per room per month for all apartments in the building. Approved Tenants, however, would pay a far lower rent until their vacatur from their apartments, known as the 'Actual Collectible Rent.' Also relevant … the WSM Agreement provides that certain family members of the Approved Tenants ("ACR Successors") could pay the ACR upon the death or vacatur of the Approved Tenant signatory if, and only if, all they satisfied certain

> criteria. To eliminate future disputes as to the identity of ACR Successors, each Approved Tenant signatory was asked to name any person who satisfied the ACR Successor requirements. Those names were memorialized in a schedule annexed to the Settlement Agreement and are the only persons who should qualify for the ACR. Notably, Petitioner was not identified by Thelma on this list." Pursuant to Section 3 of the WSM Agreement, Thelma did not qualify for an ACR Successor, because she did not occupy the Premises 'for at least ten (10) consecutive years prior to December 1, 2006.' In addition, Thelma did not list Petitioner (or anyone for that matter) as an ACR Successor on the schedule of qualified ACR Successors annexed to the WSM Agreement. As such, Petitioner (and no one else for that matter) is not entitled to pay the ACR under the final and binding 2006 DHCR Order. [T]he 2022 PAR Order properly determined that Petitioner was entitled to succeed to Thelma as the rent-stabilized Tenant of the Premises, and was obligated to pay the legal regulated rent for the Premises. WSM has recognized Petitioner's rent stabilized rights by offering a rent stabilized renewal lease offer. However, to date, Petitioner has not signed and returned the lease, and this dispute is the subject of a holdover proceeding that remains off-calendar pending a determination in this proceeding" (see NYSCEF Doc. No. 14 Pars. 2, 10, 12 – 13, 15, 16, 29 – 31, 41 – 42).

Respondent West Side Marquis, LLC, provides the "Order and Opinion Denying Petition for Administrative Review (see NYSCEF Doc. No. 16), the WSM Agreement (see NYSCEF Doc. No. 17), various other leases, orders, and documents (see NYSCEF Doc. Nos. 19 – 25), and also the lease offer (see NYSCEF Doc. No. 26), and the holdover off-calendar stipulation (see NSYCEF Doc. No. 27).

"Once an administrative agency has decided a matter, based upon a proper factual showing and the application of its own regulations and precedent, the parties to that matter are entitled to have the determination treated as final" (see *Matter of Peckham v. Calogero*, 54 AD3d 27, 28 [1st Dept 2008]). "[R]emittal is not appropriate, especially where agency is merely seeking second chance to reach different determination on merits" (see *Matter of Police Benev. Ass'n of New York State Troopers Inc. v. Vacco*, 253 AD2d 920 [3d Dept 1998]).

A memorandum of law in opposition to Division of Housing and Community Renewal's cross – motion states, "remand may be appropriate where the 'agency has made the type of substantial error that constitutes an 'irregularity in vital matters' (see *Gersten v. 56 7th Ave. LLC*, 88 AD3d 204 [1st Dept. 2011]), where the 'record is deficient' (see *Matter of Deutsch v. Catherwood*, 31 NY2d 487 [1973]), or where an agency 'or applies an improper standard of proof' (see *Matter of Police Benev. Ass'n of New York State Troopers Inc. v. Vacco*, 253 AD2d 920 [3d Dept 1998]). DHCR's cross – motion does not articulate any basis for remanding the matter for further proceedings. In fact, DHCR does not state that the Order constitutes an 'irregularly' (see *Gersten v. 56 7th Ave. LLC, 88* AD3d 204 [1st Dept. 2011], it does not argue that it applied an 'improper standard of proof' (see *Matter of Police Benev. Ass'n of New York State Troopers Inc. v. Vacco*, 253 AD2d 921) and it has not even 'conceded an error in the issuance' of the 2022 PAR Order (see *Matter of Porter v. New York State Div. of Hous. & Community Renewal*, 51 AD3d 418 [1st Dept. 2008])" (see NYSCEF Doc. No. 28 Ps. 16 – 17).

"[O]nce an administrative agency has decided a matter, based upon a proper factual showing and the application of its own regulations and precedent, the parties to that matter are entitled to have the determination treated as final. Although, as noted above, a remand may be appropriate where the agency has made the type of substantial error that constitutes an irregularity in vital matters, a final administrative determination cannot be reopened to give a party an opportunity to make a new argument based on the existing administrative record. That is simply not one of the recognized exceptions to the principle of administrative finality" (see *Gersten v. 56 7th Ave. LLC,* 88 AD3d 189 [1st Dept. 2011]).

DHCR Reply's with, "DHCR seeks a remit of this matter to expand the record pursuant to *Extell Belnord LLC v. Uppman,* 113 A.D.3d 1 [1st Dept. 2013]). In *[Extell]*, the First

Department found that a settlement agreement incorporated in a final DHCR order was void as against public policy because it incorporated terms which undermines Rent Stabilization Law. Therefore, it is necessary for this proceeding to be remitted to DHCR in order to consider the entire WSM agreement to determine whether it undermines the [Rent Stabilization Law]" (see NSYCEF Doc. No. 29 Pars. 3, 6, 9).

This Petition was brought to review a Division of Housing and Community Renewal's Administrative Order. Said Order bound Petitioner to pay the ACR rent, rather than the preferential rent. Petitioner contends judicial review is necessary on the grounds that such determination is arbitrary and capricious and constitutes an abuse of discretion.

Petitioner seems to argue for CPLR 7803(3), "[t]he only questions that may be raised in a proceeding under this article are … whether a determination was made … arbitrary and capricious or an abuse of discretion."

Through all the documents submitted an administrative review occurred along with reconsideration. The facts submitted do not show how the decisions above were "arbitrary and capricious" nor "an abuse of discretion."

Respondent [Division of Housing and Community Renewal] argues "[t]he legislature in adopting CPLR 7806 granted the Supreme Court the power to remit to DHCR, which would then review the matter" (see NYSCEF Doc. No. 9 Par. 20). CPLR 7806 reads in pertinent part, "[t]he judgment may grant the petitioner the relief to which he is entitled, or may dismiss the proceeding either on the merits or with leave to renew. If the proceeding was brought to review a determination, the judgment may annul or confirm the determination in whole or in part, or modify it."

Division of Housing and Community Renewal argues that *Extell Belnord LLC v. Uppman* is controlling based on their notice of motion (see NYSCEF Doc. No. 8). Division of Housing and Community Renewal appears to invoke CPLR 7803(3), "[t]he only questions that may be raised in a proceeding under this article are whether … a determination … was affected by an error of law."

West Side Marquis LLC cites *Gersten* and "the principle of administrative finality."

Division of Housing and Community Renewal gives some facts about *Extell Belnord LLC v. Uppman*. "The settlement agreement required all tenants to maintain their apartments as their primary residence. Uppman signed the settlement agreement. After Uppman moved into a nursing home, landlord sought to eject grandson from the apartment on the basis that Uppman was not occupying the apartment as her primary residence" (see NYSCEF Doc. No. 9 P. 7).

The case at bar has a deceased primary tenant with a family member who is not being evicted, but who has been ordered to pay a higher rent. The administrative agency did not make an error of law and the parties are entitled to "the principle of administrative finality" in *Gersten*.

ADJUDGED that the application is DENIED and the petition is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED that the cross – motion application of Division of Housing and Community Renewal to have this matter remitted is DENIED

ADJUDGED that respondents, having an address at NYS Division of Housing & Community Renewal and Ruthanne Visnauskas as Commisioner of Division of Housing and Community Renewal, 641 Lexington Avenue, New York, NY 10022, and West Side Marquis, LLC, 40 West 57th Street, 23rd Floor, New York, NY 10019, do recover from petitioner, having

an address at 70 West 95th Street, Apt. 5A, New York, NY 10024 , costs and disbursements to be determined at an assessment is directed; and it is further

ORDERED that a copy of this order with notice of entry be served by the movant upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who is directed, upon the filing of a note of issue and a certificate of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed; and it is further

ORDERED that such service upon the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)].

10/12/2022
DATE

LAURENCE L. LOVE, 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