Matter of 722-724 Tenth Ave. Holdings, LLC v New York State Div. of Hous. & Community Renewal
2022 NY Slip Op 33889(U)
November 3, 2022
Supreme Court, New York County
Docket Number: Index No.151054/21
Judge: Alexander Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 18
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In the Matter of the Application of

722-724 TENTH AVENUE HOLDINGS, LLC,

Petitioner, Index No.: 151054/21
DECISION/ORDER

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

-against-

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL, and
PAUL GIORDANO and SIMON MATHIS,

Respondents.
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ALEXANDER M. TISCH, J.:

In this Article 78 proceeding, petitioner 722-724 Tenth Avenue Holdings, LLC (landlord) seeks a judgment to overturn part of an order issued by the respondent New York State Division of Housing and Community Renewal (DHCR) pursuant to a "petition for administrative review" (PAR; motion sequence number 001). For the following reasons, landlord's petition is denied, and this proceeding is dismissed.

FACTS

Landlord is the owner of a residential, rent-stabilized apartment building located at 724 Tenth Avenue in the County, City and State of New York (the building). *See* NYSCEF document 1 (verified petition), ¶ 1. DHCR is an administrative agency charged with overseeing all rent-stabilized housing accommodations located in New York City. *Id.*, ¶ 2. This proceeding arose out of a DHCR rent overcharge complaint filed by the nonparty tenants of apartment 4A in the building, Paul Giordano (Giordano) and Simon Mathis (Mathis; together, tenants).

Tenants filed that DHCR complaint on January 25, 2017. *See* verified petition, exhibit D (PAR order). On January 2, 2018, a DHCR rent administrator (RA) issued an order disposing of it (the first RA order). *Id.* Tenants then filed a request for reconsideration of the first RA order on January 29, 2018. *Id.* On May 28, 2019, the RA issued a second decision that revoked the first RA order (the second RA order). *Id.*, exhibit C (second RA order). Both landlord and tenants thereafter filed separate PARs to challenge the second RA order. *Id.*, verified petition, ¶¶ 8-9; exhibit E. On November 30, 2020, the DHCR Deputy Commissioner's office issued an order and opinion that granted both PARs in part and denied them both in part (the PAR order). *Id.*, ¶ 10; exhibit D. The portion of the PAR order that is germane to this proceeding[1] found as follows:

> "Owner's PAR (HS410011RO)
>
> "On PAR, the owner alleges that the RA's order erroneously determined that the subject apartment's monthly legal regulated rent is $2,222.26. The owner further alleges that, '[a] portion of the apartment history was inadvertently omitted and miscalculated.' Based upon the owner's calculation (as demonstrated by a chart prepared by the owner), the monthly legal regulated rent should have been $2,752.17.
>
> "The owner's chart shows that starting from September 1, 2001 and through to July 31, 2020, the subject apartment's monthly collectible rent remained frozen at $439.82. Moreover, the chart shows that the monthly legal regulated rent for the last registered tenant (Michael Goodman) was $689.00 for the lease period commencing on September 1, 2001 and expiring on August 31, 2003; that the monthly legal regulated rent for the lease period commencing on May 1, 2004 and expiring on June 30, 2005 (for the tenants 'Clark Mills & Gallagher') had been increased to $1,873.76, based upon a 17% vacancy allowance and an individual apartment improvement increase (IAI) of $1,067.63; that the monthly legal regulated rent for the lease period commencing on July 5, 2005 and expiring on July 31, 2007 (for the tenant Glen Unger) had been increased to $2,248.51, based upon a 20% vacancy allowance; that the monthly legal regulated rent from August 1, 2007 through to March 31, 2016 (also for the tenant Glen Unger) remained at $2,248.51; that the monthly legal regulated rent for the lease period commencing on August 1, 2016 and expiring on July 31, 2018 (for the tenants Simon Mathis and Paul Giordano) had been increased to $2,698.21, based upon a 20% vacancy allowance, and that the monthly legal regulated rent for the lease period commencing on

[1] The Court notes that tenants commenced a separate Article 78 proceeding to challenge the balance of the November 30, 2020 PAR order under Index Number 150852/21.

August 1, 2018 and expiring on July 31, 2020 had been increased to $2,752.17, based upon a 2% rent guideline increase.

"In support of the PAR, the owner submits a copy of a rent ledger. It allegedly shows that the rents charged to, and collected from, the subject tenants and their predecessors, starting from 2002 through 2018. The rent ledger shows that the monthly rent collected (from Glen Unger) on the base date was $2,595.00. The owner also submits a copy of the subject tenants' lease commencing on August 1, 2016 and expiring on July 31, 2018, at a monthly rent of $2,945.00.

"After a careful consideration of the evidence of record, the Commissioner finds that the owner's PAR should be granted in part.

"As noted in the owner's rent calculation chart, the subject apartment's monthly rent on the January 25, 2013 base date was $2,248.51. Contrary to that base date rent, the rent ledger indicated that the subject apartment's monthly rent on the January 25, 2013 base date was $2,595.00. The Commissioner finds that the owner's rent calculation chart carries more evidentiary weight than the rent ledger. The basis of this finding is because the base date rent in the calculation chart is an admission that the base date rent was actually lower than the rent indicated in the rent ledger. Alternatively, as the owner's submissions showed two inconsistent base date rents, causing confusion as to which base date rent is correct, the Commissioner finds that the base date rent must be the amount that places the owner in the more unfavorable position, i.e., the rent in the owner's calculation chart is lower than the rent in the ledger.

"As to the monthly base date rent indicated in the RA's rent calculation chart of $1,566.07, the Commissioner finds that that rental amount is not supported by the record. The Commissioner accordingly finds that the subject apartment's monthly base date rent is $2,248.51.

"As the monthly base date rent noted in the RA's rent calculation chart has been increased to $2,248.51, the Commissioner finds that a recalculation of the subject apartment's legal regulated rent is warranted. Subsequent to the lease in effect on the base date, the monthly legal regulated rent for the one-year renewal lease commencing on November 1, 2014 and expiring on October 31, 2015 is $2,270.99. This rental amount is calculated by increasing the base date rent of $2,248.51 by the applicable rent guidelines increase of 1%. The monthly legal regulated rent for the two-year vacancy lease commencing on August 1, 2016 and expiring on July 31, 2018 is $2,725.19. This rental amount is calculated by increasing the previous legal regulated rent of $2,270.99 by a vacancy allowance of 20%. The monthly legal regulated rent from August 1, 2018 through to May 20, 2019 remains frozen at $2,270.99. The freezing of that monthly legal regulated rent at $2,270.99 is due to the tenants not having been offered a rent-stabilized lease. During that time period, the tenants resided in the subject apartment pursuant to a month-to-month tenancy.

"The Commissioner notes that the monthly legal regulated rent shall remain at $2,270.99 until the tenants are offered and that they sign a valid lease pursuant to the relevant Rent Regulatory Laws and Regulations. The Commissioner further notes that any subsequent rent adjustments will be based upon the monthly legal regulated rent of

> $2,270.99. Moreover, based upon the above determination of the tenants' PAR, the Commissioner points out that this modification of the legal regulated rent has no effect on the overcharge amount calculated in the order herein under review.
>
> "THEREFORE, in accordance with the relevant Rent Regulatory Laws and Regulations, it is
>
> "ORDERED, that the tenants' petition under Docket No. HS410009RT be, and the same hereby is granted in part; and that the owner's petition under Docket No. HS41001IRO be, and the same hereby is granted in part; and that the Rent Administrator's order under Docket No. ON410001RK be, and the same hereby is, modified in accordance with this order and opinion, and as so modified, is affirmed."

Id., exhibit D.

Landlord commenced this Article 78 proceeding to challenge the PAR order on February 4, 2021. *See* NYSCEF document 12 (aff of service). After stipulating to an extension of time, the DHCR filed an answer on April 8, 2021. *See* NYSCEF document 14 (verified answer). This matter is now fully submitted (motion sequence number 001).[2]

DISCUSSION

Pursuant to CPLR 7803 (3):

> "The only questions that may be raised in a proceeding under this article are:
> * * *
> "3. 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; . . ."

CPLR 7803 (3) (emphasis added); *see e.g.*, *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). 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*

[2] The Court notes that it previously granted landlord's separate motion for leave to change counsel (motion sequence number 002) in a decision dated August 5, 2021. *See* NYSCEF document 50.

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" in the administrative for a challenged agency determination, there can be no judicial interference with it. *Matter of Pell*, 34 NY2d at 231-232. Further, it is well settled that "[t]he interpretations of [a] respondent agency of [the] statutes which it administers are entitled to deference if not unreasonable or irrational." *Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251, 252 (1st Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988). Here, landlord argues that the PAR order was arbitrary and capricious in two ways.

First, landlord argues that the DHCR Deputy Commissioner's "acceptance of a rent calculation chart in an attorney's letter as a rent record as opposed to a rent ledger is contrary to DHCR policy and procedure." *See* landlord's mem of law at 4-7. It is true that a DHCR determination will be deemed arbitrary and capricious if it "'neither adheres to [the agency's] own prior precedent nor indicates its reason for reaching a different result on essentially the same facts.'" *See Matter of 20 Fifth Ave., LLC v New York State Div. of Hous. & Community Renewal*, 109 AD3d 159, 163 (1st Dept 2013), quoting *Matter of Lantry v State of New York*, 6 NY3d 49, 58 (2005). The Appellate Division, First Department, instructs that "[w]hen a party mounts an attack upon a decision by DHCR as inconsistent with prior determinations, [the court's] task is to examine DHCR's precedent in similar situations." *Matter of 20 Fifth Ave., LLC v New York State Div. of Hous. & Community Renewal*, 109 AD3d at 164. Here, however, landlord does not identify any DHCR precedent. Instead, landlord cites the Second Department's 35-year-old decision in *Matter of Kraus Mgt. v State of N.Y., Div. of Hous. & Community Renewal, Off. of Rent Admin.* (137 AD2d 689 [2d Dept 1988]) for the proposition that agency precedent states that "an owner's rent calculations [are] not a record and [cannot] be

utilized as a rent record in the DHCR proceeding." *See* landlord's mem of law at 4. However, *Kraus Mgt.* plainly says no such thing. The Second Department's decision merely upheld the trial court's ruling that the plaintiff/landlord's rent calculation sheet did not meet the criteria for the "business record exception" to the hearsay rule, as set forth in CPLR 4518 (a). 137 AD2d at 691. The Second Department did not cite or discuss DHCR administrative precedent at all. *Kraus Mgt.* was a simple evidentiary ruling, and it may no longer be good law since the Court of Appeals has subsequently held that a court reviewing a DHCR determination should consider it "based on the persuasive force of the evidence submitted by the parties," and not simply make a "resolution . . . governed by any inflexible rule" of evidence. *Jemrock Realty Co., LLC v Krugman*, 13 NY3d 924, 926 (2010). As far as agency proceedings, the First Department consistently acknowledges that "it [is] for DHCR to weigh the evidence that the parties [have] submitted" to it. *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). Here, the DHCR Deputy Commissioner opted to rely on the "base date rent" contained in landlord's rent calculation chart rather than the amount set forth in landlord's rent ledger when he considered the discrepancy between the two figures. *See* verified petition, exhibit D. His stated rationales were as follows:

> "The basis of this finding is because the base date rent in the calculation chart is an admission that the base date rent was actually lower than the rent indicated in the rent ledger. Alternatively, as the owner's submissions showed two inconsistent base date rents, causing confusion as to which base date rent is correct, the Commissioner finds that the base date rent must be the amount that places the owner in the more unfavorable position, i.e., the rent in the owner's calculation chart is lower than the rent in the ledger."

Id., exhibit D. Although landlord argues that these rationales are "contrary to DHCR policy and procedure," it has failed to document what the DHCR's policies and procedures actually are, or

to explain how the Deputy Commissioner's ruling deviated from them. Therefore, the Court rejects as unsupported landlord's argument that the above ruling was arbitrary and capricious.

Next, landlord argues that "the exclusion of the vacancy allowance is unreasonable and arbitrary and capricious." *See* landlord's mem of law at 7-8. Landlord bases this argument on the allegations that (a) "there is no such thing as a standardized "rent stabilized" lease form for new tenancies," and (b) it "reasonably believed that the apartment was exempt from rent stabilization when the Tenants moved in." *Id.* The DHCR responds to landlord's first allegation with the observation that both Rent Stabilization Law (RSL) § 26-511 (d) and Rent Stabilization Code (RSC) § 2522.5 (a) (1) (c) (i)-(iii) require landlords to offer the incoming tenants of previously vacant apartments leases that include a rider which "set forth their rights under the rent stabilization law." *See* respondent's mem of law at 16-20. Those statutes speak for themselves and clearly negate any "reasonable belief" that landlord may have harbored regarding its obligation to provide Giordano and Mathis with a "vacancy lease" containing a rent stabilization rider. Because the administrative record that the DHCR Deputy Commissioner reviewed plainly showed that landlord did *not* provide the tenants with such a lease or rider, the Court finds that the Deputy Commissioner's decision to disallow the disputed "vacancy increase" was rationally based. The Court consequently rejects landlord's argument that it was an arbitrary and capricious ruling.

In its reply papers, landlord raises the additional argument that "the DHCR ignored the Court of Appeals ruling in *Regina Metro. Co. LLC v N.Y. State Division of Housing & Commanity Renewal*, and erroneously applied the HSTPA period of review." *See* Myers reply affirmation, ¶¶ 5-10. However, since landlord did not raise this argument before DHCR and makes it now for the first time in this Article 78 proceeding, it would be improper for the Court

to consider it. *See e.g.*, *Matter of 2084-2086 BPE Assoc. v State of N.Y. Div. of Hous. & Community Renewal*, 15 AD3d 288, 289 (1st Dept 2005), citing *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756 (1st Dept 1982), *affd* 58 NY2d 952 (1983); *Matter of Jane St. Co.*, 165 AD2d at 759.

Instead, as indicate above, the Court finds that the PAR order had a rational basis in the administrative record. Landlord failed to show that the DHCR Deputy Commissioner's reliance on the rent calculation chart represented a deviation from agency precedent, and the record below also showed that landlord failed to provide tenants with a rent stabilized "vacancy lease," which justified the decision to deny a vacancy increase. Accordingly, the Court finds that landlord's Article 78 petition should be denied and this proceeding should be dismissed.

CONCLUSION

Accordingly, for the foregoing reasons it is hereby ORDERED and ADJUDGED that the petition for relief, pursuant to CPLR Article 78, by petitioner 722-724 Tenth Avenue Holdings, LLC (motion sequence number 001) is denied and the proceeding is dismissed.

This constitutes the decision, order and judgment of the Court.

11/3/2022
DATE

HON. ALEXANDER TISCH, 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