

**Matter of Mays v New York State Div. of Hous. &
Community Renewal**

2023 NY Slip Op 30457(U)

February 10, 2023

Supreme Court, New York County

Docket Number: Index No. 156549/2022

Judge: John J. Kelley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART 56M

Justice

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In the Matter of
KRISTA MAYS,

Petitioner,

- v -

NEW YORK STATE DIVISION OF HOUSING &
COMMUNITY RENEWAL and EMO REALTY PARTNERS,
LLC,

Respondents.

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INDEX NO. 156549/2022

MOTION DATE 11/16/2022

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43

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

In this CPLR article 78 proceeding, the petitioner seeks judicial review of a June 8, 2022 New York State Division of Housing and Community Renewal (DHCR) determination which, upon reconsideration, denied, in part, her petition for administrative review (PAR) of the Rent Administrator’s (RA) November 10, 2020 determination denying her rent overcharge complaint. The respondent landlord, Emo Realty Partners, LLC (Emo), cross-moves to dismiss the petition or, in the alternative, to remit the matter back to the DHCR to reopen the administrative record, conduct additional investigations, and complete the record. The DHCR separately cross-moves for remittal. The petitioner opposes the cross motions. The DHCR’s cross motion and that branch of EMO’s cross motion seeking remittal are granted, Emo’s cross motion is otherwise denied, and the matter is remitted to the DHCR for further proceedings and further reconsideration of the June 8, 2022 determination in accordance herewith.

When an official acts in his or her governmental capacity, he or she is not estopped from reconsidering an administrative determination (see *Matter of Gonzalez v New York City Hous. Auth.*, 148 AD3d 505 [1st Dept 2017]). When an administrative agency has decided a matter “based upon a proper factual showing and the application of its own regulations and precedent,” the parties “are entitled to have the determination treated as final” (*Matter of Peckham v Calogero*, 54 AD3d 27, 28 [1st Dept 2008], *affd* 12 NY3d 424 [2009]; see *Gersten v 56 7th Ave. LLC*, 88 AD3d 189 [1st Dept 2011]). Conversely, where, as here, the record may be incomplete, remittal “to the respondent for the submission of a complete record, further fact finding, and a new determination is necessary in order for the Division to function efficiently and render substantial justice to the parties concerned” (*Matter of 47 Clinton St. Co. v New York State Div. of Hous. & Community Renewal*, 161 AD2d 402, 403 [1st Dept 1990] [citation and internal quotation marks omitted]; see *Matter of Hefti v New York State Div. of Hous. & Community Renewal*, 203 AD3d 605, 605 [1st Dept 2022]).

The DHCR properly contended that the record was not completely developed, explaining that where, as here, “a J-51 building [is] involved, additional factors need to be reviewed as there may be circumstances in which rent freezes are and are not appropriate in the J-51/*Roberts* context” (citing to the Court of Appeals’ decision in *Roberts v Tishman Speyer Props., L.P.* [13 NY3d 27 (2009)]). Here, the DCHR established that its order determining the PAR did not address any such additional factors, but only addressed a rent freeze that already was in effect for reasons unrelated to the veracity or existence of the owner’s registration of the building with the DHCR. The DHCR explained that it now must review the registration issue directly, and that remittal is the only procedural method for permitting it to address that issue (see *Matter of Regina v Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d 332, 356 [2020] [an owner’s failure to register a building with the DHCR, after relying on incorrect DHCR guidance that luxury units could be deregulated, could not, under the circumstances, be the basis of a further enhancement of overcharge penalties]; *Corcoran v*

Narrows Bayview Co., LLC, 183 AD3d 511, 512 [1st Dept 2020] [the term “rental history,” as employed in the statute of limitations applicable to rent overcharge claims, is not limited to DHCR records, and may include the records of the landlord and the tenant; moreover, where defendant followed DHCR’s guidance when deregulating a unit, a finding of willful or wrongful deregulation usually is not warranted]).

The court notes, however, that the DHCR’s interpretation of the Appellate Division’s decision in *Hefti* is incorrect. The Court there determined that a tenant who pursued her rent overcharge claims before the DHCR could not also litigate the claim in the Supreme Court by way of a plenary action to recover the overcharge. It did not conclude that a CPLR article 78 proceeding to review the DHCR’s final determination was improper or inappropriate; indeed, it held exactly the opposite, to wit, that CPLR article 78 review was the only judicial remedy for a claimant who pursued such a claim before the DHCR.

The court notes that, inasmuch as the matter is being remitted to the decision-making agency for a new discretionary determination, this paper constitutes an order, not a judgment, within the meaning of CPLR 5701(b)(1) for the purposes of appellate review (see *Matter of Mid-Island Hospital v Wyman*, 15 NY2d 374 [1965]; *Matter of Clermont Tenants Assoc. v New York State Div. of Hous. & Community Renewal*, 73 AD3d 658 [1st Dept 2010]; *Matter of Valentin v New York City Police Pension Fund*, 16 AD3d 145 [1st Dept 2005]).

In light of the foregoing, it is

ORDERED that the cross motion of the respondent New York State Division of Housing and Community Renewal, and that branch of the separate cross motion of the respondent Emo Realty Partners, LLC, seeking remittal of the matter to the New York State Division of Housing and Community Renewal for further consideration of the issue of the registration of the subject building, are granted, and the separate cross motion of the respondent Emo Realty Partners, LLC, is otherwise denied; and it is further,

ORDERED that the matter is remitted to the respondent New York State Division of Housing and Community Renewal, and that agency is directed to reopen the administrative proceeding, admit and consider evidence concerning the registration of the subject building, and, upon reconsideration, render a new determination of the petitioner's Petition for Administrative Review thereafter, without prejudice to the commencement of a new CPLR article 78 proceeding following the new determination of the New York State Division of Housing and Community Renewal, and the petition is otherwise denied.

This constitutes the Decision and Order of the court.

2/10/2023
DATE



JOHN J. FELLEY, J.S.C.

MOTION:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	REFERENCE
CROSS MOTION 1:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	REFERENCE
CROSS MOTION 2:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	REFERENCE