SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART 59**

Justice

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722-724 10TH AVE LLC,

Petitioner,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL and JEFFREY KRANZEL,

Respondents.

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INDEX NO. 151173/2020

MOTION DATE 10/29/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 11, 14, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

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

ORDER

Upon the foregoing documents, it is

ORDERED and ADJUDGED that the cross motions of respondents to dismiss the proceeding, as premature, is granted, and the petition is dismissed, without prejudice, and without costs and disbursements to respondents.

DECISION

This court disagrees with petitioner that upon the Commissioner's setting of the monthly rent rate, pendent lite (i.e., until the effective date of the Rent Administrator's order on remand), at $757.12 per month, petitioner suffered "actual, concrete, injury" akin to the injury arising from the suspensions without pay of the petitioner probationary employees

in Dozier v New York City, 130 AD2d 135, 135-136 (2d Dept 1987). In Dozier, the Appellate Division, Second Department, determined that to the extent that their Article 78 proceeding, challenging their discharge as a result of a positive pre-employment drug test, involved a constitutional challenge[1] to such test, such petitioners were not required to exhaust their administrative remedies. The panel noted that the Commissioner is not empowered to decide constitutional questions under New York City Charter § 813.

Here to the contrary, the Rent Administrator is empowered to determine the legal monthly rental rate.

In addition, as argued by the respondents, the agency determination is not final, which CPLR 7801(1) requires. Such injury in the form of the interim rent "inflicted" upon petitioner by the agency is not final, as such "infliction" can be "'prevented or significantly ameliorated by further administrative action or by steps available to the complaining party'", Matter of Essex County v Zagata, 91 NY2d 447, 453-454 (1998). Moreover, the further administrative procedure on remand "'might render the disputed issue moot or academic'", and

[1] The Dozier probationary employees/petitioners challenged the City's requirement of a pre-employment drug tests and the adequacy of notice thereof, as violative of the fourth amendment prohibition against unreasonable searches and seizures, and the fourteenth amendment due process notice provisions.

therefore neither can the interim monthly rental rate be considered "'definitive'" nor the injury of such interim determination be considered "'actual'" or "concrete", Matter of Essex County, ibid.

Contrary to petitioner's claim that the question of whether the subject apartment was deregulated in 2004 has been finally determined, the Order and Opinion Granting Petitioner Review and Remanding the Proceeding to the Rent Administrator, dated December 3, 2019 (NYSCEF Document Number 7, Petition for Administrative Review [PAR] Order), states, in pertinent part,

> On remand, the Rent Administrator is to determine which, if any, are legitimate IAIs performed in 2003, and how, if at all, they affect the legal regulated rent as of the commencement of the June 1, 2004 lease. The Rent Administrator is to also determine any applicable rent increases due to the owner from June 1, 2004 through to the present.
>
> The Commissioner finds that as there has been no legal regulated rent established for the subject apartment since 2003, this proceeding should be remanded to the Rent Administrator to determine the subject apartment's legal regulated rent from June 1, 2004 to the present, and to determine whether the imposition of penalties based upon the collection of any rent overcharges are warranted; and, if so warranted, the calculation of the amount to be refunded to the subject tenant." (Underlining added.)

In revoking the Order of the Rent Administrator of January 2, 2018 (NYSCEF Document Number 25) and remanding the proceeding to such Administrator for a determination, the PAR Order requires such Rent Administrator to conduct a de novo hearing. Therefore, as

the PAR Order is a non-final determination, the herein petition is premature. See 140 West 57th Street Corp v DHCR, 130 AD2d 237, 245 (1st Dept 1987):

> Since DHCR remitted the matter to the District Rent Administration for a determination whether the apartment is entitled to rent-stabilized status in light of the finding of decontrol, its order did not conclude the pending administrative proceedings or finally determine the rights of the parties. Absent a final administrative determination, an article 78 proceeding does not lie.

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3/28/2023
DATE

DEBRA A. JAMES, 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