At an IAS Term, Part 18 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of July, 2025.

P R E S E N T:

HON. GINA ABADI,
Justice.

Dec | Order

----------X

CREAS INC.,

Petitioner,

-against-

Index No.: 535355/2024
Motion Sequence: 1

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

----------X

The following e-filed papers read herein:	NYSCEF Doc Nos.:
Notice of Motion, Affirmations, and Exhibits Annexed	1-14,16,17
Affirmation in Opposition, and Exhibits Annexed	19-31
Affirmation in Reply	33-37

In this Article 78 proceeding, Creas Inc. ("petitioner") seeks a judgment directing the New York State Division of Housing and Community Renewal ("respondent/ DHCR") to annul, revoke, and/or reverse, or in the alternative, remand the underlying October 30, 2024 Order and Opinion Denying Administrative Review ("Par Order"). The Par Order affirmed an earlier order dated January 11, 2024 issued by the District Rent Administrator ("RA Order") finding that the building located at 117 North 4th Street, Brooklyn, New York 11249 ("subject premises") was not exempt from the rent stabilization law ("RSL").

Petitioner argues that both, the Par Order and RA Order, were issued arbitrarily and capriciously. Respondent opposes.

Background

Petitioner is the current landlord and owner of the subject premises. The building, built before 1974 and having eight residential units, was subject to rent stabilization in October 2021 when petitioner's predecessor-in-interest ("Prior Owners") began replacing 13 building wide systems. Prior to the renovations, the deed holders - - predecessors of the Prior Owners - - resided as tenants in apartments 1L and 2L. When the Prior Owners purchased the subject premises, three units were vacant and the other three units were subsequently vacated under surrender agreements.

On or about September 15, 2022, the Prior Owners filed an application for exemption with DHCR seeking to have the subject premises declared substantially rehabilitated pursuant to RSC §2520.11(e) and thus exempt from rent stabilization. To support this exemption application and address DHCR's request for further documentation, the Prior Owners submitted, among other things, tenant surrender agreements, a renovation contract, PW3 Cost Affidavits, records and application details from the Department of Buildings (DOB), a certificate of occupancy, a letter confirming completion, and photographs purportedly showing the property's condition before, during, and after the renovation. The Prior Owners also submitted the affidavit of architect Jeff Akerman, who stated he prepared and submitted renovation plans to DOB, conducted a pre-construction inspection of the property and based on his professional assessment, found the building-wide systems to be in poor condition. Akerman also indicated that all eight units of the

subject premises were vacant prior to the rehabilitation. The Prior Owners noted that none of the former tenants returned to occupy any of the apartments in the subject premises after the renovation was completed. Petitioner subsequently obtained title to the subject premises on September 13, 2023.

On January 11, 2024, the District Rent Administrator issued the RA Order denying the exemption application. The RA Order stated that "[a] review of all information and evidence in the file indicates that three out of eight units in the building were vacated via surrender agreements, and two units (1L and 2L) were occupied by the owner, immediately prior to the renovation. Furthermore, the owner has failed to submit sufficient evidence to support its claim that the building was in substandard or deteriorated condition prior to the renovation..." The RA Order also references DHCR Operational Bulletin 2023-3 ("OB 2023-3") as the guidelines for DHCR's determination of whether the subject premises was in a substandard or seriously deteriorated condition.

Petitioner timely filed a Petition for Administrative Review ("PAR") of the RA Order alleging that Operational Bulletin 95-2 ("OB 95-2"), and not OB 2023-3, should apply since the work at issue was completed in 2022 before OB 2023-3 took effect and as defined in OB 95-2, the subject premises was in substandard condition. On October 30, 2024, DHCR issued its PAR Order, affirming the January 11, 2024 RA Order, finding that while petitioner was correct that OB 2023-3 is not applicable to the instant proceeding, "the RA applied the relevant provisions of OB 95-2 in her analysis even though she cited OB 2023-3." The PAR Order further states:

> "[T]he owner secured the vacancy of three out of the eight apartments by buyout agreements ranging from $150,000.00 (4R) - $175,000.00 (2R and 4L). The Commissioner finds that these buyout agreements, providing for the large sums paid pursuant to such agreements, show that these three apartments had substantial, value, that they were therefore habitable, and that the building was not substandard given that three of the eight apartments therein (or 37.5% of the apartments) were habitable and of some considerable value. Nothing in these buyout agreements implies or establishes that substandard conditions had any bearing on the tenants' acceptance of such buyouts."

The PAR Order also references the two former owner-occupied apartments and determined that five of the eight apartments in the building, or 62.5% of the apartments, were habitable prior to the work at issue. Petitioner subsequently filed the instant Article 78 proceeding seeking a judgment directing DHCR to annul, revoke, and/or reverse or, in the alternative, remand the PAR Order.

Discussion

In Article 78 proceedings, a "court cannot interfere with the decision of an administrative tribunal in a case . . . unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious" (*Matter of Kammerer v Crouchley*, 205 AD2d 629, 629 [2d Dept 1994]; *see also Pell v Bd. of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 230 [1974]). "Where a rational basis exists in the record to support a determination of the Division of Housing and Community Renewal . . . that determination will be sustained" (*Matter of Jamaica Estates, LLC v New York State Div. of Hous. and Community Renewal*, 78 AD3d 1053, 1054 [2d Dept 2010]); *see also Matter of 68 Apt. Assoc., Inc. v New York State Div. of Hous. and Community Renewal*, 71 AD3d 1031, 1032 [2d Dept 2010]). A

particular action is arbitrary or capricious if it is "without sound basis in reason and is generally taken without regard to the facts" (*Pell*, 34 NY2d at 231). "Where such administrative determinations are made by the agency responsible for the administration of the law, the court is not to substitute its judgment for that of the agency. Even though the court might have decided differently were it in the agency's position, the court may not upset the agency's determination in the absence of a finding, not supported by this record, that the determination had no rational basis" (*Mid-State Mgt. Corp. v New York City Conciliation and Appeals Bd.*, 112 AD2d 72, 76 [1st Dept 1985], *affd* 66 NY2d 1032 [1985]; *see also Matter of Rocky Hill Terrace Assoc. v New York State Div. of Hous. and Community Renewal*, 202 AD2d 512, 512 [2d Dept 1994]).

An owner claiming exemption from rent stabilization on the grounds that it was substantially rehabilitated must demonstrate that the property had been in substandard or seriously deteriorated condition prior to the rehabilitation (*see* RSC § 2520 [e]). DHCR issued OB 95-2 on December 15, 1995 to describe the circumstances under which DHCR would determine whether a building is substantially rehabilitated, making it eligible for exemption from rent stabilization. A building where at least 80% of the residential units were vacant prior to renovations was presumed to be in substandard condition. Under OB 95-2, once a building has been determined to be in substandard condition, DHCR evaluates 17 building-wide and apartment systems to assess whether the rehabilitation complied with applicable regulations. On November 8, 2023, the RSL was amended, including RSC § 2520.11(e), no longer recognizing a presumption of a substandard conditions based on the "80% vacancy" criterion. OB 95-2 was retitled to OB 2023-3 and now required a building

owner seeking exemption, pursuant to RSC § 2520.11(e), to prove the building was in a substandard or seriously deteriorated condition. Notably, DHCR stated in the subject PAR Order:

> "The substantial rehabilitation provisions of the RSC are to encourage the rehabilitation of buildings that are essentially uninhabitable and are not to facilitate a formal removal of otherwise habitable buildings from rent regulation. For this reason, the presumption that a building is substandard when 80% of the apartments in such building are vacant, is not a formal formula, but, rather, is based on reasoning that, if 80% of such apartments are not habitable, the building itself is very likely to be substandard."

In support of their determination that the subject premises was not in a substandard condition qualifying for exemption, DHCR cited its record showing that the subject building was almost completely occupied in 2019. DHCR also pointed out that the vacaturs of both the prior deed holders and other tenants occurred just prior to the renovation, as confirmed by DOB records that show an initial permit filing in September 2020, and an approved DOB application dated May 13, 2021. DHCR also noted the subsequent filing for a work permit by Eli Hecht, Method General Contractor, which evidences that during construction, four of eight dwelling units were occupied. The buyout agreements confirm the vacaturs occurred in late 2020 and that one of the three tenants, with successor rights, had resided in the building for almost 40 years.

DHCR also argues that the documentary evidence submitted by petitioner to prove the substandard condition of the subject building is inadequate. DHCR indicates that the photos submitted to support the claim of a substandard condition were undated, did not indicate what part of the subject premises were the subject of the photographs, and did not show that the entire building was deteriorated. DHCR further proffers that the affidavit of

engineer Ackerman claims he conducted an inspection of the subject premises on June 30, 2020, before the Prior Owners had title to the subject building. DHCR stated that the affidavit lacked specificity regarding the age of any of the building wide systems and found Ackerman's claim, that every system at the subject premises was over 100 years old, was not credible as there were no corroborating photographs evidencing such, with only one photograph showing a modern electrical system, complete with a digital display. Courts have rejected rent regulation exemptions due to a lack of adequate evidence and overly general claims. For example, where a landlord provided considerable proof regarding the construction work that was done, the court denied a substantial rehabilitation exemption as the landlord "failed to establish that the Code's precondition that the building had been in substandard condition prior to the construction was met, because it failed to produce any records demonstrating the condition of the building prior to the construction and relied solely on testimony that was conclusory" (*867-871 Knickerbocker, LLC v Poli*, 65 Misc 3d 15, 18 [2d Dept 2019]).

In opposition, petitioner contends that nothing in OB 95-2 mandates that if the 80% vacancy presumption is not met, the inquiry into the substandard or seriously deteriorated condition of a building ends. Petitioner further avers that OB 95-2 itself specifically instructs and mandates that the 80% vacancy presumption is to be viewed "in addition to the items described in III Documentation." OB 95-2 also reads that DHCR will find that a building has been substantially rehabilitated within the meaning of RSC 2520.1(e) based upon the totality of the circumstances. It is, however, the totality of the circumstances which requires denial of petitioner's application.

Based upon the totality of the record, DHCR's denial of the substantial rehabilitation exemption cannot be found arbitrary or capricious. DHCR had a rational basis for both, concluding that petitioner failed to demonstrate the subject premises was 80% vacant prior to renovations warranting a presumption of a substandard condition and that the evidence submitted was insufficient to prove that the building was in a deteriorated condition. Even assuming, for the sake of argument, the vacancy presumption was sustained, there was still a rational basis for DHCR to find the presumption rebutted based on evidence of occupancy up to the point of construction. Petitioner's argument that it was denied due process by DHCR's failure to conduct an evidentiary hearing is also unavailing (*see Matter of Richter v New York State Div. of Hous. and Community Renewal*, 204 AD2d 648 [2d Dept 1994]; *see also Matter of DeSilva v New York State Div. of Hous. and Community Renewal Off. of Rent Admin.*, 34 AD3d 673, 674 [2d Dept 2006]).

Accordingly, it is

ORDERED that the petitioner's motion for a judgment pursuant to Article 78 is denied, and it is further

ORDERED that respondent's counsel is directed to electronically serve a copy of this decision/order with notice of entry on petitioner's counsel and to electronically file an affidavit of service with the Kings County Clerk.

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

ENTER

Hon. Gina Abadi
J.S.C.

KINGS COUNTY CLERK
FILED
2025 JUL -2 A 10:24