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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Lobis Justice

PART 6

315 East 72nd Street Owners

-v-

NYS Division of Housing

INDEX NO. 109077/11

MOTION DATE 11/14/11

MOTION SEQ. NO. 001

The following papers, numbered 1 to 19, were read on this ~~motion to/for~~ Article 78 proceeding

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Notice of Petition | No(s). 1-10

Answering Affidavits — Exhibits | No(s). 11-18; Return

Replying Affidavits | No(s). 19

Upon the foregoing papers, it is ordered that this ~~motion is~~ petition is decided in accordance with the accompanying decision, order and judgment.

FILED

JAN 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 1/18/12

JBL, J.S.C.

JOAN B. LOBIS

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: ..... Petition ~~MOTION~~ IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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In the Matter of the Application of
315 EAST 72nd STREET OWNERS, INC.,

Petitioner,

Index No. 109077/11

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

Decision, Order and Judgment

- against -

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,
MORTON DROSNES,

Respondents.

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JOAN B. LOBIS, J.S.C.:

Petitioner 315 East 72nd Street Owners, Inc. (the "Owner") brings this petition under Article 78 of the C.P.L.R., seeking an order revoking the determination of respondent New York State Division of Housing and Community Renewal ("DHCR") dated June 6, 2011, denying the Owner's petition for administrative review ("PAR"). Respondent-tenant Morton Drosnes and DHCR each answer the petition and ask that the petition be denied on the basis that DHCR's determination was rational.

Mr. Drosnes is the rent-stabilized tenant of record of a unit (the "Unit") located at 315 East 72nd Street, a building owned by the Owner. The Unit is subject to the Rent Stabilization Code ("RSC") (9 N.Y.C.R.R. §§ 2520.1-2531.0) and the Rent Stabilization Law ("RSL") (Administrative Code of the City of New York §§ 26-501-26-520). On or about March 3, 2009, the Owner served Mr. Drosnes with an income certification form ("ICF"). Admin Code § 26.504.3(b); 9 N.Y.C.R.R. § 2531.2. On the ICF, Mr. Drosnes was required to list the names of all tenants and

> all other persons who occupy [the Unit] as a primary residence on other than a temporary basis as of the date [the ICF] was served on [him] by the [Owner], or who occupied [the Unit] as a primary residence on other than a temporary basis at any time during the period from January 1, 2007 through the date [the ICF] was served upon [him] by the [Owner] (include children and other relative).

Mr. Drosnes was required to certify whether the total annual income for the persons listed was more than $175,000 in each of the two preceding calendar years, or was $175,000 or less in either of the two preceding calendar years. Mr. Drosnes listed himself and Brendi Drosnes (his wife), and certified that their annual income was $175,000 or less in the two preceding years. Mr. Drosnes returned the ICF to the Owner.

On or about April 27, 2009, the Owner petitioned DHCR to deregulate the rent for the Unit due to high income ("Petition to Deregulate"), based on the Owner's belief that in addition to Mr. and Mrs. Drosnes, Carrie[1] Drosnes (Mr. Drosnes' adult daughter) also occupied the Unit. The Owner requested verification from DHCR. Accordingly, on October 15, 2009, DHCR mailed a notice ("Notice to Answer") to Mr. Drosnes, informing him that the Owner had filed the Petition to Deregulate and asking him to answer the petition within sixty (60) days. In his answer to the petition ("Answer to Petition"), Mr. Drosnes was required to list the tenants and, in language similar to the ICF,

> all other persons who occupied [the Unit] as a primary residence on other than a temporary basis as of the date the 2009 [ICF] was served upon [him] by the [Owner], or who occupied it as a primary residence on other than a temporary basis at any time during the period from January 1, 2008 through the date that the [ICF] was served upon him by the [Owner] . . . .

[1] Carrie Drosnes was mistakenly identified as "Carey Drosnes" in the Petition to Deregulate.

Mr. Drosnes was also required to submit information sufficient for DHCR to verify the income tax records of the persons listed above. Mr. Drosnes listed himself and his wife in the Answer to Petition, and provided copies of the first pages of their New York State income tax returns. He did not list or provide information as to his daughter. Accordingly, as the Owner had listed Mr. Drosnes' daughter as a tenant or occupant on the Petition to Deregulate, by notice dated December 7, 2009, DHCR informed Mr. Drosnes that his Answer to Petition was incomplete and requested that he provide either Carrie Drosnes's income tax information or, if she had vacated the Unit, the vacancy date. In response, Mr. Drosnes wrote a letter to DHCR dated December 15, 2009, stating that his daughter is not, and was never, a tenant. He stated that she was an "occupant on a temporary basis and permanently vacated the [Unit] on or about April 21, 2008." He explained that he did not list her in the Answer to Petition because she was never an occupant on anything "other than a temporary basis" and he understood that her income would not be included in calculating the household income. He further stated that if he was mistaken and income information about his daughter was actually required, he would submit his daughter's income tax returns.

On or about July 20, 2010, the Owner responded to Mr. Drosnes' submissions by asking DHCR to issue an order of deregulation based on the fact that Mr. Drosnes failed to comply with RSC §§ 2531.4(b)(3) and 2531.6[2] because he failed to provide information to DHCR about his daughter in the Answer to Petition within sixty (60) days of receiving the Notice to Answer.

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[2] RSC § 2531.4(b)(3) sets forth that a tenant must provide an Answer to Petition within sixty (60) days of service of DHCR's Notice to Answer, and that the Notice to Answer must set forth "that failure to respond by not providing any information requested by the DHCR shall result in an order being issued by the DHCR providing that such housing accommodation shall not be subject to the provisions of the RSL and [the RSC]." Section 2531.6 sets forth that "in the event the tenant [fails] to provide the information required pursuant to section 2531.4 of this Part, the DHCR shall, on or before the next December 1st, issue an order providing that such housing accommodation shall not be subject to the provisions of the RSL and [the RSC] upon the expiration of the current lease."

On or about December 15, 2010, DHCR issued its verification of income for the tenants/occupants of the Unit, stating that it had found that the total annual income was $175,000 or less in 2007 and 2008 for those persons occupying the Unit, Morton M. and Brendi G. Drosnes. In comments dated January 19, 2011, the Owner contended that DHCR had failed to verify the income for Mr. Drosnes' daughter and again argued that because Mr. Drosnes had failed to provide a complete Answer to Petition within sixty (60) days of service of the Notice to Answer, DHCR was required to issue an order of deregulation. On or about February 3, 2011, DHCR issued an order denying the Petition to Deregulate ("Denial Order"), finding that, after having considered all the evidence in the record and based upon an income tax returns search, the sum of the annual incomes of the tenants and those who occupied the Unit as their primary residence on other than a temporary basis did not exceed $175,000.

On or about March 4, 2011, the Owner filed a PAR, contending that the Denial Order contained substantive and procedural errors because DHCR failed to investigate the nature and duration of the occupancy of Mr. Drosnes' daughter and failed to verify her income. It also contended that DHCR had erred in failing to issue an order of deregulation after Mr. Drosnes failed to submit income verification. In opposition to the Owner's PAR, Mr. Drosnes argued that the Owner offered no evidence that Carrie Drosnes resided in the Unit on the date the ICF was served, March 3, 2009, and that the Owner had failed to challenge Mr. Drosnes' statement that his daughter had permanently vacated the Unit long before the ICF was served. Mr. Drosnes further argued that he had properly filled out the Answer to Petition by not listing his daughter Carrie because she only resided in the Unit on a temporary basis, and the explicit language of the Answer to Petition elicits

income information only for those who occupy the housing accommodation as their primary residence on other than a temporary basis. (Emphasis in original).

On or about June 6, 2011, Deputy Commissioner Woody Pascal of the DHCR issued a determination on the PAR (the "Determination"). The Deputy Commissioner noted that the effective date for determining tenants and permanent occupancy is the date an ICF is served on a tenant. In this case, Mr. Drosnes affirmatively stated that Carrie was only ever a temporary occupant and that she had permanently vacated on or about April 21, 2008, prior to the service of the ICF. The Deputy Commissioner pointed out that this fact was never challenged or rebutted by the Owner. Therefore, Carrie was not a qualified occupant for the purposes of the Petition for Deregulation. Deputy Commissioner Pascal noted that when a tenant asserts that a specified individual has vacated a unit, the owner has the burden of producing at least some evidence in support of its assertion that the person was occupying the unit at the relevant time period in order for there to be a joinder of issue with respect to this factual question and before DHCR will further investigate the issue. The Owner came forward with no evidence of any kind. Therefore, the Deputy Commissioner contended that DHCR did not err by declining to perform an income tax return search on Carrie Drosnes or by declining to include her income for the purposes of determining the Petition for Deregulation. Further, the Deputy Commissioner addressed the Owner's contention that Mr. Drosnes defaulted in answering the Petition to Regulate by failing to include his daughter's information in the Answer to Petition. Deputy Commissioner Pascal found that Mr. Drosnes had adequately responded to the Petition to Deregulate in light of his uncontested statements that Carrie Drosnes had permanently vacated the prior to the service of the ICF. Finally, the Deputy Commissioner noted that the income tax search yielded findings that Mr. and Mrs. Drosnes' income was below the statutory threshold for

deregulation, and that these findings were unchallenged by the Owner. Thus, the Deputy Commissioner found that the Owner had presented no issues of law or fact warranting reversal or modification of the Denial Order, and denied the PAR. This proceeding to challenge the denial of the PAR followed shortly thereafter.

In the instant petition, the Owner argues that DHCR had no authority to excuse Mr. Drosnes' purported default in providing income information. Additionally, the Owner asserts that the tenant bears the burden of proof to establish an allegation of temporary residency, citing In re Verbalis v. New York State Div. of Hous. & Cmty. Renewal, 1 A.D.3d 101, 107 (1st Dep't 2003). The Owner asserts that in Verbalis, the First Department held that a rent administrator's determination not to investigate an allegation of temporary occupancy and excuse a tenant's default in failing to provide income was without rational basis or was arbitrary and capricious. Thus, the Owner contends that here, as in Verbalis, DHCR's failure to investigate Mr. Drosnes' claim that Carrie Drosnes was a temporary occupancy and that she vacated the Unit before the ICF was served was arbitrary and capricious. The Owner argues that Mr. Drosnes' failure to document the temporary occupancy should have triggered a negative inference. Further, it argues that DHCR's determination to accept Mr. Drosnes' assertions without additional inquiry was arbitrary and capricious. For these reasons, the Owner asks this court to reverse the Determination or remand the matter for further proceedings on the issue of whether Carrie Drosnes was a temporary occupant and/or whether she vacated prior to March 3, 2009.

Respondents DHCR and Mr. Drosnes answer separately but assert similar arguments in support of upholding the Determination as rationally based on the administrative record.

Respondents maintain that Carrie Drosnes' income was not a factor under the RSC's definition of total annual income, and thus her income was properly neither required nor submitted for verification. As to the alleged default, respondents argue that Mr. Drosnes' initial Answer to Petition and his subsequent response to DHCR's request for more information satisfied DHCR's inquiry. As to the claim that DHCR failed to investigate Carrie Drosnes' occupancy status, respondents maintain that DHCR was not required to investigate this issue because Mr. Drosnes, an individual with personal knowledge, had submitted an affirmative statement on the issue; his statement was found to be credible; and there was no rebuttal or challenge to the statement by the Owner. As to the issue of burden of proof, DHCR sets forth that the burden of proof is on the party who initiates the proceedings, citing State Administrative Procedure Act § 306(1). In this case, DHCR maintains that the Owner did not meet the burden because it did not provide any proof regarding Carrie Drosnes' occupancy status. Accordingly, respondents maintain that the Determination has a rational basis in the administrative record and should be upheld.

In reply, the Owner reasserts its arguments that Mr. Drosnes failed to disclose that his daughter occupied the Unit in 2007 and 2008, and failed to submit any evidence to support his conclusory statement that his daughter had vacated or that she was only a temporary resident; that the tenant bears the burden of proof to establish occupant's statuses; and that DHCR should consider Mr. Drosnes' failure to include information about his daughter on his Answer to Petition a default, thus entitling the Owner to deregulation.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful

procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified * * * and whether the administrative action is without foundation in fact.'" Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id. "[A]n agency's interpretation of the operational practices attendant to the statute that it administers is entitled to deference." Rizzo v. New York State Div. of Hous. & Cmty. Renewal, 16 A.D.3d 72, 79 (1st Dep't 2009).

This is simply not a case where DHCR abused its discretion or made arbitrary and capricious determinations. First, the fact that Mr. Drosnes' Answer to Petition did not contain information about his daughter is consistent with the explicit instructions on the form. DHCR's determination to solicit further information from Mr. Drosnes after his Answer to Petition comported with DHCR's discretion to accept late filings. See Dworman v. New York State Div. of Hous. & Cmty. Renewal, 94 N.Y.2d 359, 373 (1999). Accordingly, DHCR's determination not to issue an order of deregulation based on default was rational. Second, the Owner does not dispute DHCR's assertion that petitions for deregulation are governed by State Administrative Procedures Act § 306(1), which puts the burden of proof on the person or entity bringing the proceeding. DHCR's requirement that an owner bringing a proceeding for rent deregulation must submit some proof in opposing a tenant's assertion of household tenancy and occupancy for the purposes of determining deregulation is, thus, rational. Third, the Owner submitted no proof that Carrie Drosnes lived in the Unit on a permanent basis on the date of service of the ICF or in the two years prior except its own

conclusory statement in the Petition for Deregulation that she was an occupant. Essentially, without proof otherwise, Mr. Drosnes' statements regarding the status of Carrie Drosnes' occupancy were unchallenged. Fourth, inasmuch as the Owner failed to submit proof rebutting Mr. Drosnes' statements regarding Carrie Drosnes' occupancy status, DHCR's determination not to further investigate the issue was rational. Thus, it was not arbitrary and capricious for DHCR to determine that Carrie Drosnes' income should not be included in the total annual income of the household members of the Unit.

Finally, the court notes that the only case that the Owner cites in its petition, In re Verbalis v. New York State Div. of Hous. & Cmty. Renewal, 1 A.D.3d 101 (1st Dep't 2003), has no bearing whatsoever on this case. In Verbalis, the First Department upheld DHCR's determination to treat petitioner's claim as a rent overcharge rather than a fair market rent appeal. Id. at107. Verbalis does not support the Owner's claim that DHCR's failure to require Mr. Drosnes to submit evidence of his daughter's occupancy status was arbitrary and capricious. Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed in its entirety.

Dated: Jan. 18, 2012

ENTER:

JOAN B. LOBIS, J.S.C.