Matter of 10th Street Assoc., LLC v N.Y.S. Div. of Hous. & Community Renewal

2012 NY Slip Op 30615(U)

March 9, 2012

Sup Ct, NY County

Docket Number: 108314/11

Judge: Alice Schlesinger

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SCANNED ON 3/13/2012

[* 1]

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

PRESENT: ALICE SCHLESINGER PART IA PART 16

Index Number : 108314/2011

10TH STREET ASSOCIATION

VS

NYS DIVISION OF HOUSING

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 petition is denied and the proceeding is dismissed in accordance with the accompanying memorandum decision.

FILED
MAR 13 2012
COUNTY CLERK'S OFFICE
NEW YORK

Dated: MAR 09 2012

ALICE SCHLESINGER J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

----------X

In the Matter of the Application of
10th STREET ASSOCIATES LLC,

Petitioner,

Index No. 108314/11
Motion Seq. No. 001

For a Judgment Under Article 78 of the
Civil Practice Law and Rules,

-against-

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL and EDWARD COFFINA,

Respondents.

----------X

FILED
MAR 13 2012
COUNTY CLERK'S OFFICE
NEW YORK

SCHLESINGER, J.:

In this Article 78 proceeding the petitioner-owner challenges the May 24, 2011 decision by the New York State Division of Housing and Community Renewal (DHCR) to the extent it imposed the penalty of treble damages in favor of the respondent-tenant in connection with a finding of rent overcharges. The underlying facts include the unfortunately common scenario of extended litigation regarding the owner's filing of improper rent registration statements with DHCR. However, the facts also include the uncommon scenario of the tenant's alleged participation in the filing of those statements.

Background Facts

The respondent Edward Coffina commenced his rent-stabilized tenancy at the subject premises, Apartment 1R at 77 Christopher Street, NY, NY, in 1994 when the building was owned by Alberta Carrano. In 1997 the building was conveyed to Champion Properties, LLC. It appears that petitioner 10th Street Associates became a co-owner with Champion in December 2003 and became the full owner in or about 2009 through today.

According to rent registration statements, the tenant in occupancy before respondent Coffina was named Jack Howells. The then-owner Carrano filed rent registration statements reflecting a two-year lease for Howells from May 1, 1989 through April 30, 1991 with a stated legal regulated rent of $488.10, and another from 1991 through 1993 reflecting a rent of $522.27. The leases were not part of the administrative record, but the rent registrations make no mention of a preferential rent or anything else out of the ordinary.

The first lease for the tenant herein was registered on July 15, 1994 as having commenced March 1, 1994 at a legal regulated rent of $564.05. In June 1995, the owner registered a legal regulated rent for 1995 in the amount of $566.45, which included a major capital improvement rent increase. About six months later, on December 15, 1995, the then-owner filed an amended registration amending the first registration statement that had been filed about eighteen months earlier. That amended registration stated that the legal regulated rent on April 1, 1994 was $1,004.50 but that the collectible rent was $566.45 based on a preferential rent agreement. Neither of the two registration statements that had been filed earlier had made any mention of a preferential rent.

Nor did the tenant's actual lease make any mention of a preferential rent. Nevertheless, the lease was somewhat unique. Although the lease itself was a standard form rent-stabilized lease, the length of the lease was eight years. It provided for a monthly rent of $564.05 for the first two years and included a Rider that provided for future rent increases with every two-year renewal in accordance with the rent stabilization guidelines in effect at the time. In the Rider, the owner further agreed not to seek to recover the apartment based on owner occupancy. (See Administrative Return at A-1).

The Rider also permitted the tenant to post a sign at the premises indicating that he was a Licensed Real Estate Broker. It further provided that the tenant's name would be displayed in the vestibule as one of the persons with keys and authority to grant access to official inspectors. Lastly, as ultimately noted for the first time in the Amended Petition filed in this proceeding, paragraph 38 of the Rider indicated that during the period from March 1, 1994 to February 28, 1997 the terms of the Filing Agent's Agreement attached to the lease would be incorporated into the lease. As discussed more fully below, that Agreement authorized the tenant to act as the owner's agent to file certain official documents on the owner's behalf. Significantly, however, the term "preferential rent" did not appear anywhere in the lease or the Rider.

The tenancy apparently continued uneventfully until petitioner became a co-owner with Champion in 2003. When the lease then in effect was expiring, petitioner offered the tenant a renewal lease that sought to increase the rent from $656.37 to $1224.73 on the ground that the alleged preferential rent was being terminated. The tenant necessarily signed the renewal lease and then commenced the rent overcharge proceeding before DHCR that is the subject of this proceeding, asserting that the rent increase charged pursuant to the renewal was unlawful because he had always paid the legal regulated rent for his apartment and had never had a preferential rent (A-1).

DHCR sent the tenant's complaint to the owner with a notice indicating that a penalty of treble damages would be assessed should DHCR find an overcharge and should the owner fail to establish that the overcharge was not willful (A-2). The owner's attorney responded, claiming that no overcharge existed because the owner had properly asserted its right to terminate the "preferential rent" that had been "previously established" in various rent registration statements and the most recent renewal lease (A-3).

By Final Notice dated July 15, 2004, DHCR advised the owner that the evidence — including the tenant's initial lease — did not support the owner's claim of a preferential rent. The owner was afforded one final opportunity to rebut the presumption of willful overcharges and avoid the penalty of treble damages (A-4). The owner responded by letter dated August 3, 2004, insisting that the rent registration statements and recent renewal leases were sufficient evidence of a preferential rent and that the law did not require that the initial lease include the preferential rent agreement (A-13). Additionally, DHCR asked the tenant to submit canceled checks or other proof of rental payments, which the tenant did (A-5, 11) while maintaining his position that the controlling document was the initial lease which was silent as to the preferential rent issue (A-6).

Apparently persuaded by the owner's arguments, DHCR's Rent Administrator issued an order dated November 4, 2005, denying the tenant's overcharge complaint (A-19). The agency found that the owner had demonstrated that a preferential rent had been "previously established" in the rent registration statements and the recent renewal lease, notwithstanding the terms of the initial lease. Therefore, pursuant to Rent Stabilization Code §2521.2, as amended in 2005, the owner had the right to terminate the preferential rent.

The tenant then filed a Petition for Administrative Review (PAR) (B-1), and the owner opposed (B-3). In the course of the PAR proceeding the tenant submitted an Opinion Letter dated March 4, 2002 that had been issued by DHCR Associate Counsel discussing policy changes on preferential rents based on recent case law (B-4). The letter indicated that while DHCR had long permitted an owner to terminate a preferential rent only upon the vacancy of the tenant, that right had recently been expanded to allow an

owner to terminate the preferential rent while the tenant remained in occupancy, but only if the preferential rent had been clearly stated in the tenant's lease.

Following numerous submissions from both parties, DHCR denied the tenant's PAR by order issued November 1, 2006, finding that the owner had established the higher legal regulated rent in the registration statements filed during the four-year period immediately preceding the tenant's complaint (B-9). The tenant filed an Article 78 proceeding, which was dismissed by the New York County Supreme Court on December 12, 2007 (Petition, Exh E). The tenant then appealed to the Appellate Division.

The Appellate Division reversed the lower court and granted the tenant's petition "to the extent of remanding to DHCR for calculation of the legal regulated rent for the subject apartment beginning in 2002, consistent with the terms of the parties' 1994 lease and the actual legal regulated rent paid by petitioner in 2000 and 2001, plus any applicable rent increase approved by the rent guidelines board and DHCR." *Matter of Coffina v New York State Div. of Hous. & Community Renewal,* 61 AD3d 404 (1st Dep't 2004). The court found that DHCR's determination that the owner had demonstrated a right to terminate an alleged "preferential rent" and charge a higher legal regulated rent was "irrational since it was refuted by the terms of the 1994 lease" and by the tenant's payment of the legal regulated rent in 2000 and 2001. In a partial concurrence and partial dissent, Justices Nardelli and Catterson suggested that a hearing was in order on the "question as to whether fraud was perpetrated, so as to warrant looking further back in the rental history than the four years authorized by the Rent Stabilization Code ... " *Id* at 405 (citations omitted). The Court of Appeals denied leave to appeal. 13 NY3d 702.

After accepting numerous submissions from both parties in the remand proceeding, DHCR issued a new order dated November 18, 2009 granting the tenant's PAR (C-7).

Consistent with the Appellate Division's order, the agency calculated the tenant's rent based on the 1994 lease and the actual rent paid in 2000 and 2001, plus lawful guideline increases. The total overcharge found was $33,224.32, inclusive of treble damages that amounted to $21,803.46. The owner requested reconsideration, contending that it had not been given a chance to rebut the presumption of willfulness, but the agency denied the request in light of the repeated notices, referenced above, that it had sent to the owner during the course of the proceeding.

The owner then commenced a second Article 78 proceeding. By "So Ordered" Stipulation dated January 13, 2011, the matter was remanded to the agency to give both parties an opportunity to more fully address the issue of treble damages (Petition, Exh J). After accepting still more submissions, DHCR issued a Final Order dated May 24, 2011, denying the owner's request to annul the treble damages penalty (DHCR Answer, Exh A). Holding that the petitioner stood in the shoes of its predecessor owners on the issue of willfulness, DHCR noted that the current owner had in any event continued the prior owner's practice of filing improper rent registration statements claiming the existence of a preferential rent when the initial lease provided no support for that position. DHCR further found that the owner had failed to present sufficient evidence to rebut the presumption of willfulness.

Additionally, DHCR specifically rejected the owner's claim that its entry in its bookkeeping records of a $12,022.29 rent credit in the tenant's favor on June 11, 2009 rebutted the presumption of willfulness. DHCR reasoned that the alleged credit had not only been given five years after the tenant had filed the overcharge complaint, rather than within the required twenty days of service of the overcharge complaint, but that it also failed

to include the full interest amount. Further, the owner's alleged good faith reliance on a change in the law was unavailing, as there was insufficient proof that a true preferential rent had been "previously established" as required by the amended law.

The owner then commenced the instant Article 78 proceeding. As had been the case over the prior eight years when the matter was being litigated, the owner neither attached nor specifically mentioned the Filing Agent's Agreement referred to in the tenant's initial lease. After DHCR answered, the owner amended the petition to allege that the DHCR order must be vacated because it was made without knowledge of "key facts"; i.e., the Filing Agent's Agreement which the owner sought to introduce for the first time in these proceedings. That Agreement, which had been expressly referenced in the tenant's initial lease as being attached thereto, authorized the tenant to serve as the owner's agent to make required filings with governmental agencies, including those dealing with rents. Both the tenant and DHCR have vigorously opposed the petition as to all the issues raised.

Discussion

As indicated above, the owner does not challenge the agency's finding of rent overcharges. Indeed, it could not reasonably do so in light of the Appellate Division's finding that the legal regulated rent was less than that charged by the owner. Instead, the owner limits its challenge herein to the agency's imposition of treble damages. The standard for judicial review is whether the agency's decision on that point was arbitrary or capricious or without a rational basis in the administrative record. *Greystone Mgt. Corp. v Conciliation and Appeals Bd.*, 94 AD2d 614 (1st Dep't 1983), *aff'd*, 62 NY2d 763 (1984).

Both the Rent Stabilization Law at §26-516(a) and the Rent Stabilization Code at §2526.1(a)(1) create a presumption of willfulness in connection with any finding of rent

overcharges. The burden is on the owner to rebut the presumption by establishing by a preponderance of the evidence that the overcharge is not willful. Absent such proof, treble damages are mandatory. *Graham Court Owners Corp. v DHCR,* 71 AD3d 515 (1st Dep't 2010).

Additionally, Rent Stabilization Code §2526.1(f)(2) authorizes carryover liability for rent overcharges by prior owners for complaints filed on or after April 1, 1984. *Gaines v DHCR,* 90 NY2d 545 (1997). This carryover liability applies equally to rent overcharges and the penalty of treble damages, as the Code expressly includes "overcharge penalties." *See, S.E. & K Corp. v DHCR,* 239 AD2d 123 (1st Dep't 1997).

In the case at bar, it was petitioner's predecessor who first registered the fictitious preferential rent and the higher alleged legal regulated rent. However, it was the petitioner who first attempted to charge the higher rent, claiming that it had the right to terminate the "preferential rent". While petitioner contends in its papers here that it had a good faith belief that the rent it was charging was lawful, never once in the extended administrative or judicial proceedings did the owner indicate that it had investigated the dual registration begun by the prior owner, which was clearly at odds with the tenant's lease. The petitioner-owner here proceeded at its own peril when it decided to adopt the prior owner's improper registration statements and overcharge the tenant until the Appellate Division put an end to that wrongful conduct.

Wholly disingenuous is the owner's claim after the fact that it was relying on a purported change in the law regarding preferential rents. As indicated above, to the extent the law was amended to allow for the termination of a preferential rent before the tenant's vacancy, that right was limited to cases in which a higher legal regulated rent had been

"previously established." RSL §26-511(c)(14); RSC §2521.2(b). Here, no higher legal rent and lower preferential rent were "established" in accordance with the law. The tenant's initial lease made no mention whatsoever of a preferential rent, and the prior owner never charged the higher rent. The owner's reliance on the registration statements, which were inconsistent with the lease, was misplaced and insufficient to establish a preferential rent.

Also without merit is the owner's attempt in its Amended Petition to shift the blame to the tenant by pointing for the first time to the Filing Agent's Agreement included as part of the tenant's initial lease. First and foremost, the law is well-established that Article 78 review is limited to the arguments and evidence raised in the administrative proceeding. *Fanelli v NYC Conciliation and Appeals Board,* 90 AD2d 756 (1st Dep't 1982), *aff'd* 58 NY2d 952 (1983). Nor does any basis exist to direct DHCR to reopen the proceedings for consideration of new evidence. RSC §2529.6 prohibits such a result where, as here, the owner has failed to establish that it could not have reasonably offered the evidence during the administrative proceeding. As indicated above, the Filing Agent Agreement was expressly referred to in the Rider to the tenant's initial lease, which had been attached to the overcharge complaint filed in 2004. To the extent the owner overlooked the Rider, it did so due to its own neglect. What is more, the Agreement merely allowed the tenant to file certain documents on the owner's behalf at its direction and request and did not divest the owner of its principal authority or responsibility.

Similarly without merit is the owner's contention that it should be absolved of the treble damages penalty because it provided the tenant with a rent credit. The bookkeeping entry did not include the full amount of interest or the additional interest that continued to accrue over time. More significantly, however, once the Appellate Division determined the

amount of the legal regulated rent, the owner had a duty to promptly refund the overcharges in full by repaying to the tenant the entire amount it had wrongfully collected. Contrary to the owner's claim, only the tenant can assert the right to accept less by deducting amounts from its rent. See RSC §2526.1(e). Here, the tenant made no such election but instead continued to assert his right to recover the rent overcharges as the controversy continued before DHCR and the courts.

In sum, the petitioner has failed to meet its burden of establishing that DHCR's decision was arbitrary or capricious or without a rational basis in the record.

Accordingly, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed. The Clerk may proceed to enter judgment accordingly. Counsel for DHCR may retrieve the Administrative Return from the Part Clerk in Room 222.

Dated: March 9, 2012 MAR 0 9 2012

MAR 0 9 2012

J.S.C.
ALICE SCHLESINGER

FILED
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