SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

IN THE MATTER OF THE ADMINISTRATIVE APPEAL OF

SECOND 82ND SM LLC,

Petitioner,

- against -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

INDEX NO. 110928/11

MOTION DATE 1/27/12

MOTION SEQ. NO. 001

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

The following papers, numbered 1 to 4 were read on this Article 78 petition

Notice of Petition— Verified Petition — Exhibits A-D	No(s). 1-2
Verified Answer — Exhibits A-B	No(s). 3
Reply	No(s). 4

Upon the foregoing papers, it is ordered that this Article 78 petition is decided in accordance with the annexed memorandum decision and Judgment.

[redacted]

HON. MICHAEL D. STALLMAN

Dated: 3/26/12
New York, New York

_____, J.S.C.

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

1. Check one: ..... X CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. Check if appropriate:..... PETITION IS: ☐ GRANTED X DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

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IN THE MATTER OF THE ADMINISTRATIVE APPEAL of

SECOND 82nd SM LLC,

Petitioner,

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

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

Index No. 110928/11

DECISION AND JUDGMENT

---------- X

UNFILED JUDGMENT
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HON. MICHAEL D. STALLMAN, J.S.C.:

Petitioner Second 82nd SM LLC (Landlord) brings this Article 78 proceeding for an order reversing a July 28, 2011 Opinion and Order (Order) of respondent New York State Division of Housing and Community Renewal (DHCR). The Order, insofar as is relevant here, denied Landlord's petition for administrative review (PAR) of the August 13, 2010 order of the District Rent Administrator, which awarded triple damages on rent overcharges imposed on the tenants (Tenants) who resided, for approximately 16 years, in apartment 19B (Apartment) of the building located at 240 East

82nd Street (the Building). Landlord owns the Building. Tenants are not parties to this proceeding.

The Court notes that Landlord's notice of petition refers not to the Order, but to the August 13, 2010 order of the RA. So too, a number of the arguments in the petition are addressed to the RA's order. That nonfinal order may not be brought up for review in an Article 78 proceeding. CPLR 7801 (1); Matter of *Committee to Save the Beacon Theater v City of New York*, 146 AD2d 397 (1st Dept 1989). However, inasmuch as Landlord properly filed a PAR with DHCR, the Court will assume that Landlord's notice of petition and, where applicable, Landlord's arguments, are, in fact, addressed to the Order.

The petition alleges that the Order is arbitrary and capricious, and an abuse of discretion, and that it violated Landlord's right to due process of law. The petition also purports to allege that the Order "on the entire record, was not supported by substantial evidence." Petition at 5, tracking CPLR 7803 (4). A party may raise the question of substantial evidence only in relation to "a determination made as the result of a hearing held, and at which evidence was taken, pursuant to direction of law." CPLR 7803 (4). Here, no evidentiary hearing was held. Accordingly, there can be no question of substantial

evidence.

The administrative proceeding under review was commenced when the Tenants filed a complaint of rent overcharges with DHCR. After Landlord and Tenants had submitted documents and written arguments, the Rent Administrator (RA) found that Tenants' agreement that they would not use the Apartment as their primary residence did not exempt the Apartment from rent stabilization; Tenants were overcharged; and Landlord's stated belief that the Apartment was exempt from the RSL "was not sufficiently persuasive so as to establish by the preponderance of the evidence that the overcharge found in this case was not wilful." Petition, Exh. A, at 1. Accordingly, the RA imposed treble damages dating back to two years prior to the filing of Tenants' overcharge complaint, with interest on overcharges in the two earlier years. Landlord thereupon filed a PAR, arguing that the overcharge was not willful; that, in any event, Landlord had issued a refund check to Tenants prior to the RA's order; and that Landlord's leasing director had showed that her rent calculations differed from those of the RA. The Order rejected Landlord's arguments; corrected a typographical error in the RA's order, so as to reflect the true amount due to Tenants, as stated on the calculation chart attached to the RA's order; and denied

Landlord's PAR.

Where DHCR makes a finding of rent overcharge, the overcharge is presumed to have been willful, and a penalty equal to three times the overcharge is to be imposed, unless the landlord shows, by a preponderance of the evidence, that the overcharge was not willful. Administrative Code of City of New York § 26-516 (a); *Matter of Graham Ct. Owners Corp. v Division of Hous. and Community Renewal*, 71 AD3d 515 (1st Dept 2010).

Landlord does not, here, dispute that the Apartment was subject to the Rent Stabilization Law (RSL), and that Landlord charged rents in excess of the lawful stabilized rent. Landlord contends, instead, as it did in support of its PAR, that the overcharges found by the RA were not willful, because Tenants did not use the Apartment as their primary residence, and neither Landlord, nor Tenants, believed that the Apartment was rent-stabilized. Landlord relies, in part, upon an affidavit that Michele Weinberg, the director of residential leasing for the Building, submitted in response to DHCR's final notice, stating that treble damages would be imposed. Ms. Weinberg averred that she had been "under the impression that it was legal to exempt a stabilized apartment if it was being rented for professional purposes." The affidavit is attached as a portion of Exhibit C

to the petition. In addition, Landlord notes that Tenants' leases provided that Tenants and Landlord understood that the Apartment was exempt from the RSL, because Tenants, whose primary residence was in St. James, New York, would not be using the Apartment as their primary residence.

Nevertheless, it is well established that parties to a lease may not, by agreement, exempt a rent-stabilized apartment from application of the RSL, and that an agreement to waive the primary residence requirement provisions of the RSL is void. *Draper v Georgia Props.*, 94 NY2d 809 (1999); *see also Matter of Grimm v State of N.Y. Div. of Hous. and Community Renewal Off. of Rent Admin.*, 68 AD3d 29 (1st Dept 2009), *affd* 15 NY3d 358 (2010); *Drucker v Mauro*, 30 AD3d 37 (1st Dept 2006). Accordingly, it was not unreasonable for the RA to find, and for the Deputy Commissioner to agree, that Landlord had failed to show, by a preponderance of the evidence, that it had not willfully collected overcharges. It appears to be true, as Landlord argues, that this is not a case where a landlord tricked an unwitting tenant. The tenants here are savvy business people. Nonetheless, Landlords's illicit arrangement with Tenants constituted a clear circumvention of the RSL, and it is neither arbitrary nor unjust that Landlord's attempt to exempt the

Apartment from rent stabilization should carry the risk of triple damages on the excess rent that Landlord collected.

In Policy Statement 89-2, DHCR provided a safe harbor to landlords who have exacted overcharges, stating that:

> the burden of proof in establishing lack of willfulness shall be deemed to have been met ... [w]here an owner adjusts the rent on his or her own within the time afforded to interpose an answer to the [administrative] proceeding and submits proof to the DHCR that he or she has tendered, in good faith, to the tenant a full refund of all excess rent collected, plus interest.

See Matter of Two Lincoln Sq. Assoc. v New York State Div. of Hous. and Urban Renewal, 191 AD2d 281 (1st Dept 1993). Here, Landlord failed to tender a refund of its admitted overcharges prior to answering the tenants' complaint, but instead, retained such overcharges for almost a year, and even then, Landlord retained a portion of the overcharges and failed to tender any interest on the overcharges. Accordingly, Landlord cannot avail itself of the protection offered by the safe harbor. *See Matter of East 163rd St. v New York State Div. of Hous. and Community Renewal*, 4 Misc 3d 169 (Sup Ct, Bx County 2004) (failure to comply with terms of Policy Statement 89-2 bars reliance thereon).

In addition to arguing that the overcharges were not willful, Landlord contends that the Rent Administrator's

calculation of overcharges should not have taken into account a freeze on the legal regulated rent from April 1, 2007, through November 1, 2009, that resulted from landlord's failure to file registration statements for the Apartment throughout that time. At best, Landlord raised this issue only obliquely in its PAR, when, in the affidavit referred to above, Ms. Weinberg expressed puzzlement at the difference between her calculation of overcharges and the RA's calculation thereof. Nonetheless, the Court will take the matter to have been raised.

RSL § 26-517 (e) provides that a landlord's failure to properly file annual rent registration statements bars the landlord "from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement ... ." *See Jazilek v Abart Holdings, LLC*, 72 AD3d 529 (1st Dept 2010). Landlord states that it filed late registrations on September 13, 2010, and that, accordingly, the freezes should have been retroactively lifted. However, a late-filed registration statement has no retroactive effect on the legal regulated rent. Such a filing only allows the freeze imposed for failure to register to have no further, prospective, effect on the legal regulated rent. RSL § 26-517 (e). RSL § 26-517 (e) provides that:

> provided that increases in the legal regulated rent were lawful except for the failure to file a timely registration, the owner, upon the service and filing of a late registration, shall not be found to have collected an overcharge at any time prior to the filing of the late registration.

Here, however, Landlord's rent increases in 2005 and 2007 were unlawful for reasons independent of landlord's failure to file timely rent registration statements. Consequently, Landlord's late-filed statement is not a bar to the imposition of triple damages calculated on the basis of the properly imposed freeze. *Matter of BN Realty Assoc. v State of N.Y. Div. of Hous. & Community Renewal*, 254 AD2d 7 (1st Dept 1998).

Finally, Landlord's argument that it was denied due process is addressed solely to the RA's order; Landlord properly raised the argument in its PAR; and Landlord does not mention it in its reply memorandum. Suffice to say, Landlord has not met its burden of demonstrating that it had not been given such process as had been due. No further discussion of that argument is needed here.

- Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed without costs.

Dated: March 26 2012
New York, NY

ENTER:

J.S.C.

HON. MICHAEL D. STALLMAN

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