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SCANNED ON 5/15/2012

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Jaffe Justice **PART** 5

Index Number : 110437/2011
BOYD, KELLEY S.
vs.
HOUSING AND COMMUNITY RENEWAL
SEQUENCE NUMBER : 002
ARTICLE 78 CAL. #14

INDEX NO. _____
MOTION DATE 1/17/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4 **, were read on this motion to/for** vacate administrative determination

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	**No(s).** 1
Answering Affidavits — Exhibits	**No(s).** 2, 3, 4
Replying Affidavits	**No(s).** 5

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

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).

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

Dated: 5/11/12
MAY 11 2012

BARBARA JAFFE, J.S.C.

1. **CHECK ONE:** ..... ☑ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**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
COUNTY OF NEW YORK : PART 5

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In the Matter of the Application of:
KELLEY S. BOYD,

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

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Counsels Office, Room 707, 25 Beaver Street,
New York, New York 10004

-and-

232/242 Realty Co. LLC aka Uptown Realty
Robert Candee, Owner
240 Cabrini Boulevard # 1D
New York, New York 10033,

Respondents.

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Index No. 110437/11

Argued: 1/17/11
Motion Seq. Nos.: 002
Motion Cal. No. 14

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

For petitioner:
Kelley S. Boyd, self-represented
240 Cabrini Boulevard, Apt. 4F
New York, NY 10033
917-291-0004

For respondent DHCR
Gary R. Connor, Esq.
General Counsel
25 Beaver Street, 7th Floor
New York, NY 10004
212-480-7439

For respondent 232/242 Realty:
David I. Paul, Esq.
Rappaport, Hertz, et al., P.C.
118-35 Queens Blvd., 9th Floor
Forest Hills, NY 11375
718-261-7700

By notice of petition dated September 13, 2011, petitioner brings this Article 78 proceeding seeking an order vacating and reversing respondent New York State Division of Housing and Community Renewal's (DHCR) order and opinion denying her petition for

administrative review. Respondents oppose.

By order to show cause dated December 21, 2011, DHCR moves pursuant to CPLR 2304 for an order quashing the judicial subpoena duces tecum petitioner served on it. Petitioner opposes.

By order to show cause dated January 3, 2012, respondent 232/242 Realty Co. LLC, a/k/a Uptown Realty, moves pursuant to CPLR 2304 for an order quashing the judicial subpoena duces tecum petitioner served on it. Petitioner opposes.

I. ARTICLE 78

Judicial review of an administrative agency's decision is limited to whether the decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." (CPLR 7803[3]). In reviewing an administrative agency's determination as to whether it is arbitrary and capricious, the test is whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assocs., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). Moreover, the determination of an administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

As rent overcharge claims are subject to a four-year statute of limitations (*Matter of Grimm v State of New York Div. of Hous. & Community Renewal*, 15 NY3d 358, 364 [2010]), examination of an apartment's rental history beyond the four-year period is precluded (CPLR 213-a; New York City Administrative Code § 26-516[a][2]). Where an overcharge complaint alleges fraud, however, the DHCR must examine the rental history beyond the four-year period to determine "whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date." (*Matter of Grimm*, 15 NY3d at 366). Neither an increase in rent nor a mere allegation of fraud alone is sufficient to state claim of fraud. (*Id.*).

Here, in concluding that there were insufficient indicia of fraud to warrant examination of the rental history for petitioner's apartment beyond the four-year limitations period, the Deputy Commissioner for DHCR's Department of Rent Administration rationally distinguished the building owner's behavior from that of the landlords in *Grimm* and *Thornton v Baron*, 5 NY3d 175 (2005). Whereas they engaged in fraudulent deregulation by, *inter alia*, requiring tenants to sign leases containing a provision that their apartments would not be their primary residences, increasing rent without providing rent stabilized lease riders, and threatening to raise rents if tenants failed to perform repairs at their own expense, the building owner here always registered the apartment as rent stabilized, even when the registered rent exceeded the $2,000 limit for rent stabilized apartments, and provided rent stabilized lease riders. (Affirmation of Jack Kuttner, Esq., in Opposition, dated Nov. 17, 2011, Exh. A). Moreover, the Commissioner noted that, in contrast to the circumstances set forth in *Grimm* and *Thornton*, the rent increase at issue occurred after the building owner renovated the apartment for the first time in 32 years and that "it would not be difficult for anyone with any experience in this industry to believe that it could have taken

$39,000" to do so. (Affirmation of Jack Kuttner, Esq., in Opposition, dated Nov. 17, 2011, Exh. A). He also found that the variance in the registered rent reflected in the rent stabilized lease rider for the previous tenants resulted from a clerical error, not fraud, as it was apparent that the owner had completed the rider using an old version of the form. (*Id.*).

Petitioner's assertions regarding the cost of the repairs provide no basis for disturbing the decision, as the Commissioner evaluated the building owner's proof in light of his experience and expertise in the field, and I may not substitute my judgment for his. Nor does the Commissioner's error as to petitioner's initial rent provide a basis, as it was immaterial to his final determination. Therefore, as the Commissioner made his decision on the basis of the record and the Rent Stabilization Law, it is neither arbitrary nor capricious.

II. MOTIONS TO QUASH

"An application to quash a subpoena should be granted only where the futility of the process to uncover anything legitimate is inevitable or obvious or where the information sought is utterly irrelevant." (*Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 332 [1988]). As judicial review of an administrative agency's determination is limited to the record before the agency (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]), the information petitioner seeks is irrelevant to the instant proceeding.

III. CONCLUSION

Accordingly, it is hereby

ORDERED and ADJUDGED, that the petition is denied in its entirety and the proceeding is dismissed; and it is further

ORDERED and ADJUDGED, that respondent New York State Division of Housing and

Community Renewal's motion for an order quashing the judicial subpoena duces tecum served on it is granted; and it is further

ORDERED and ADJUDGED, that respondent 232/242 Realty Co. LLC aka Uptown Realty's motion for an order quashing the judicial subpoena duces tecum served on it is granted; and it is further

ORDERED, that the stay of the proceeding 232/242 Realty Co. LLC v Kelley Boyd, L&T Index Number 91598/10 (New York City Civil Court, Housing Part) is vacated.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: May 11, 2012
New York, New York

MAY 11 2012

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).