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

**PRESENT :** DONNA M. MILLS **PART** 58

*Justice*

*In the Matter of the Application of TANJI CANTY,*

INDEX NO. 400488/12

Petitioner,

MOTION DATE

-v-

MOTION SEQ. NO. 001

144 FIFTH AVENUE LLC, et al.,

Respondents.

MOTION CAL NO.

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

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/Order to Show Cause-Affidavits– Exhibits.... | 1 |
| Answering Affidavits Exhibits | 2, 3, 4 |
| Replying Affidavits | 5 |

CROSS-MOTION: _____ YES ✓ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

FILED

**Dated:** 6/18/12

DONNA M. MILLS, J.S.C.

J.S.C.

Check one: ✓ FINAL DISPOSITION ____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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In the Matter of the Application of
TANJI CANTY,

Petitioner,

Index No.: 400488/2012

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

-against-

146 FIFTH AVENUE LLC, NEW YORK
STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL and
ATTORNEY GENERAL,

Respondents.

----------X

**DONNA MILLS, J.:**

In this Article 78 proceeding, petitioner Tanji Canty, acting pro se, seeks a judgment reversing and annulling the January 11, 2012 determination of respondent the New York State Division of Housing and Community Renewal (DHCR) which denied petitioner's rent overcharge complaint. Motion sequence number 001 contains petitioner's request for relief on this matter. Motion sequence number 002, which is hereby consolidated with 001, is petitioner's order to show cause seeking a stay of her eviction, pending the outcome of motion sequence number 001.

**BACKGROUND AND FACTUAL ALLEGATIONS**

Petitioner is a tenant in a rent-controlled apartment located at 146 Fifth Avenue, New York, New York and owned by defendant 146 Fifth Avenue, LLC (Owner). On July 24, 2008,

petitioner filed a "tenant's complaint" with DHCR's Office of Rent Administration, alleging that she was being charged too much for rent. Specifically, petitioner maintained that the Maximum Base Rent (MBR) had been improperly calculated, leaving her with a current monthly rate of $476.26 per month. She also wrote in her complaint that her rent had been unjustly increased in 1994, and continued to be unjustly increased thereafter. Her complaint noted that she had also filed other overcharge complaints with the DHCR. Petitioner claimed that she never received certain notices of her rent increases, therefore, the "landlord waived his rights to collect an increase." DHCR's Exhibit A-1, at 4. Petitioner did not allege that the apartment needed repairs.

According to the "Rent Fact Sheet," provided in the record by DHCR and located on the DHCR's website, the MBR is calculated for rent controlled apartments taking into consideration "real estate taxes, water and sewer charges, operating and maintenance expenses ... The [MBR] is updated every two years by a factor that incorporates changes in these operating costs." DHCR's Answer, Exhibit C. However, the MBR is not what is collected by the landlord from the tenant. The MBR determines the Maximum Collected Rent (MCR), which is generally less than the MBR. *Id.*

As set forth by DHCR, the process to obtain an MBR increase involves multiple steps. First, in his application for an MBR increase, the owner must certify that, among other things, all rent-impairing violations are corrected. DHCR will then issue an order increasing the MBR, and then adjusting the MCR.

Tenants can challenge the MBR increase by filing an overcharge complaint form, as petitioner did. Rent Administrators then investigate the challenge. Tenants are also allowed, in addition, to file separate complaints to DHCR alleging that the landlord failed to make certain repairs. DHCR is empowered to find a rent decrease based on a decrease in essential services. This decrease is in place until the condition is abated. *See generally* Administrative Code of the City of New York § 26-405 (known as the Rent Control Law [RCL]).

In December 2008, the Rent Administrator issued an order calculating that the MCR on petitioner's apartment should be $319.23 per month, effective January 1, 2008. The order noted that there had already been approval for MBR increases in 2004 and 2005, subject to a different order.

In 2009, the Owner filed a petition for administrative review. Also in 2009, the Owner's petition was denied.

In 2009, the Owner commenced an Article 78 proceeding challenging the DHCR Commissioner's determination. DHCR and the Owner then stipulated to have the proceeding remanded to the Commissioner of DHCR for further review.

Petitioner was mailed a copy of the Article 78 petition and advised that she could submit a reply. She did not respond.

On January 11, 2012, DHCR's Commissioner issued an order approving the Owner's calculations, stating that the MCR should be increased to $476.26 per month. The Commissioner found that the statutory formula allowed for a MBR of $1,219.31 per month as

of January 1, 2008. The Commissioner also indicated that, pursuant to the statutory formula, the Owner should be entitled to collect an increased rent every year through 2011.

The Commissioner arrived at his decision by reviewing the rent records since 1972 and taking into account the MBR increases since 1994. The Commissioner found that, among other things, the Owner was entitled to equitable relief and that the apartment was located in an "area in Manhattan where rents for apartments comparable to the subject apartment are substantially higher than the rent which the subject landlord was collecting from the subject tenant ... ." DHCR's Exhibit C-23, at 3.

In March 2012, petitioner commenced this Article 78 proceeding, challenging the DHCR Commissioner's January 11, 2012 finding. In her petition, she argues that the DHCR's findings, which approved an MBR, were made in error. She also claims that she has suffered a "tremendous decrease in services" and that the rents have shown a "steady increase" throughout the years. Amended Verified Petition, at 1.

In the record, there is an application for rent reduction, dated February 22, 2012, that petitioner filed with DHCR, alleging that she should be entitled to a rent reduction based on a decrease in services. Petitioner listed certain conditions such as moldy kitchen cabinets, which she believed would entitle her to a rent reduction.

On May 30, 2012, DHCR issued a determination denying another one of petitioner's application for rent reduction, which was

dated March 5, 2012. In its decision, DHCR wrote that it had inspected the apartment and reviewed the record. DHCR also informed petitioner that she is entitled to appeal its May 30, 2012 decision.

Petitioner has not paid rent since 2005. A warrant of eviction was issued on or around April 19, 2012. The related non-payment proceeding took place in Housing Court on May 22, 2012, whereby the Honorable Michelle D. Schreiber denied petitioner's request for a stay of the eviction.

Petitioner brought an order to show cause, with this court, seeking a stay of the eviction pending the outcome of her Article 78 proceeding. On May 23, 2012, petitioner was granted a temporary stay of the eviction by this court.

**DISCUSSION**

In the context of an Article 78 proceeding, courts have held that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious." *Matter of Soho Alliance v New York State Liquor Authority*, 32 AD3d 363, 363 (1st Dept 2006), citing to *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *see* CPLR 7803 (3). "The arbitrary and capricious standard asks whether the determination in question had a rational basis [internal quotation marks and citations omitted]." *Matter of Mankarios v New York City Taxi &*

*Limousine Commission*, 49 AD3d 316, 317 (1st Dept 2008).

The January 11, 2012 determination from DHCR fully addressed whether or not the MBR increase was proper. DHCR set forth its reasoning for approving the increase, which included, among other things, looking at the statutory formula and the prior MBR increases, equitable relief for the landlord and the comparison of the rent of the apartment to other comparable ones. As such, the court finds that the DHCR has set forth a rational determination and it will not be disturbed at this time.

Moreover, "[a]n agency's interpretation of its own regulations is entitled to deference if that interpretation is not irrational or unreasonable [internal quotation marks and citations omitted]." *Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. and Community Renewal, Off. of Rent Admin.*, 10 NY3d 474, 481 (2008). As set forth by *Matter of Drennan v New York State Div. of Hous. & Community Renewal* (30 AD3d 281, 282-283 [1st Dept 2006]), "[t]he procedures used by DHCR in reviewing MBR increase applications are longstanding and have been approved by this Court." Accordingly, DHCR's MBR determination will not be set aside.

Petitioner now claims that the MBR should not be increased since she has experienced a decrease in services. However, in her original complaint, which was the basis of the January 11, 2012 determination, petitioner only alleged that MBR amounts were incorrectly calculated. Since the allegation by petitioner of a decrease in services was not included in the original record

before the DHCR, it cannot be considered at this time. It is well settled that "[j]udicial review of administrative determinations is confined to the facts and record adduced before the agency [internal quotation marks and citation omitted]." *Matter of Rizzo v New York State Division of Housing & Community Renewal*, 6 NY3d 104, 110 (2005).

Petitioner additionally tried to challenge the prior years' MBR increases on both her 2008 complaint and her current petition. However, petitioner missed her statute of limitations challenging the prior years' increases, and she may not challenge them at this time. For instance, she challenges an MBR increase from 1994, which was issued to her in 1994. The notice to petitioner explained that she had 33 days to challenge this increase from the notice of such increase. *See* DHCR's Exhibit B-2. She can no longer challenge the past years' MBR increases.

The record indicates that petitioner has also filed at least two separate complaints, dated after the January 11, 2012 determination, challenging her rent increase. She claims that she has experienced a decrease in services in both of her complaints. Apparently at least one of the complaints has been investigated by the DHCR and petitioner was denied relief. Petitioner was informed on the denial that she was entitled to seek an appeal of that determination. It is well settled that "'one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law.'" *Matter of Ford v Snashall*, 275

AD2d 493, 494 (3d Dept 2000), quoting *Watergate II Apartments v Buffalo Sewer Authority*, 46 NY2d 52, 57 (1978). As such, since petitioner has not exhausted her administrative remedies with respect to her complaints made after the January 11, 2012 determination, she is unable to seek the court's review of these complaints at this time.

Petitioner has brought a related order to show cause seeking a stay of her eviction pending the outcome of the Article 78 challenge to the DHCR's January 11, 2012 determination. As a result of this decision, the January 11, 2012 determination has been upheld and the petitioner was denied relief. Accordingly, since the petition has been denied and the proceeding dismissed, petitioner is also denied a further stay of her eviction.

The Attorney General is Not a Proper Party:

Petitioner served the New York State Attorney General (Attorney General) with her Article 78 petition and her order to show cause for a stay on the eviction. The Attorney General is not an agency involved in any of the proceedings and seeks dismissal of the action. The court finds that the Attorney General is not a proper party and the petition is dismissed as against it.

CONCLUSION

Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that the order to show cause seeking a stay of the

eviction pending the outcome of the Article 78 petition is denied and the stay is lifted.

Dated: 6/18/12

ENTER:

J.S.C.

**DONNA M. MILLS, J.S.C.**