

**Matter of 529 W. 138 St. LLC v New York State Div.
of Hous. & Community Renewal**

2012 NY Slip Op 32358(U)

September 10, 2012

Supreme Court, New York County

Docket Number: 113851/2011

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: PETER H. MOULTON
Justice

PART 40B

Index Number : 113851/2011
529 WEST 138 STREET LLC
vs.
NYS DIVISION OF HOUSING
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

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

Answering Affidavits — Exhibits + Memo of Law _____ | No(s). 2+3

Replying Affidavits _____ | No(s). 4

Supplemental Briefs
Upon the foregoing papers, it is ordered that this motion is proceeding is decided

per attached

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

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).

Dated: 9/10/12

Peter H. Moulton, J.S.C.
PETER H. MOULTON

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 40 B

-----X
In the Matter of the Application of
529 WEST 138 STREET LLC,

Petitioner,

FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE
CIVIL PRACTICE LAW AND RULES

-against-

Index No.: 113851/11

NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL

Respondent,
-----X

PETER H. MOULTON, J.S.C.:

Petitioner, 529 West 138 Street LLC (the "Landlord" or "petitioner") moves, pursuant to CPLR Article 78, to annul, reverse and set aside the October 14, 2011 administrative Order and Opinion of Deputy Commissioner Woody Pascal (the "Order") of respondent the New York State Division of Housing and Community Renewal ("DHCR"). The Order upheld the rent administrator's determination, issued June 30, 2010, finding that Ketty Guerrero is entitled to succession rights to the rent controlled apartment of her deceased husband, Jose Guerrero. The rent administrator also found that the Maximum Collectible Rent for the rent controlled apartment effective May 1, 2007 is \$185.28 (exclusive of fuel cost adjustments).¹

¹The rent administrator's determination was made in connection with a 2008 overcharge complaint filed by Ketty Guerrero (Docket Number W1-410141-R) and a proceeding to determine the rent regulatory status of the apartment, initiated by the rent administrator (Docket Number XE-420021-AD). These matters were consolidated by the rent administrator under the latter docket number. The overcharge complaint was filed by Ketty Guerrero, based on her

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Petitioner maintains that the Order (and the rent administrator's decision) was arbitrary and capricious because the decision was based "solely" on a 1984 marriage certificate, without consideration of documents such as bank statements, telephone bills, tax returns, a driver's license, voter registrations, or credit card statements. Petitioner also maintains that the rent administrator failed to consider comparable housing accommodations or the equities in setting the Maximum Collectible Rent, such as petitioner's expenditure of \$25,000.00 in improvements for the apartment. Petitioner also points to the fact that the Maximum Base Rent for 2004 was \$429.49.

Respondent maintains the evidence was sufficient to establish succession rights and that the rent administrator properly determined the Maximum Collectible Rent, pursuant to § 2202.22 of the Rent and Eviction Regulations and based on the rent history chart attached to the Order. Respondent notes that petitioner waited until the Petition for Administrative Review to argue that the rent should be based on certain equities (i.e., the Landlord's alleged expenditure of \$25,000.00) and on other comparable housing accommodations. This argument, respondent maintains, is beyond the scope of review (*see* 9 NYCRR § 2926.1 [the scope of review on an administrative appeal "shall be limited to facts or evidence before a Rent Administrator as raised in the petition"]; *Gilman v DHCR*, 99 NY2d 144, 150 [2002] ["[n]ew facts can be admitted only in narrow circumstances" when petitioner establishes that it could not have been previously offered]; *60 Gramercy Park Co. v DHCR*, 188 AD2d 371 [1st Dept 1992] [disposition of an article 78 proceeding "is limited to the facts and record adduced before the agency when the

assertion that she made all payments due for an "individual apartment improvement" to her bathroom.

[* 4]

administrative determination was rendered”]). Here, the Landlord had only argued to the rent administrator that Ketty Guerrero had no standing to file an overcharge complaint because Jose Guerrero was the tenant of record. The Landlord made no argument in connection with setting the rent. Moreover, respondent argues that § 2202.22 (b) (6) of the Rent Eviction Regulations only requires DHCR to take into consideration comparable rents or factors bearing on the equities when there are no documents available to determine the rent.

Discussion

On a CPLR article 78 petition, the role of the court is to consider whether the “determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion ...” (CPLR 7803 [3]). On judicial review of an agency action under CPLR Article 78, the courts must uphold the agency’s exercise of discretion unless it has no rational basis or the action is arbitrary and capricious (*Matter of Pell v Board of Educ. Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 [1974]). “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (*id.* at 231). Where the agency’s interpretation is founded on a rational basis, its interpretation should be affirmed, regardless of whether the court’s conclusion might have been different (*see Matter of Mid-State Mgt. Corp. v New York City Conciliation & Appeals Bd.*, 112 AD2d 72 [1st Dept], *affd* 66 NY2d 1032 [1985]). DHCR has a broad mandate to administer the rent regulation system and courts regularly defer to DHCR’s interpretation so long as the interpretation is not irrational (*see Matter of Hicks v DHCR*, 75 AD3d 127, 130 [1st Dept 2010]).

Petitioner mis-characterizes the evidence relied upon by the rent administrator as being solely based on the marriage certificate. In fact, in addition to the 1984 marriage certificate, the

rent administrator pointed out that the Landlord's own apartment registration with DHCR for the year 2006 indicated that Ketty Guerrero was the tenant of the apartment. Moreover, the rent administrator cited to the death certificate, issued July 25, 2003, which indicated that Ketty Guerrero was the informant (Box 20a) and the wife of Jose Guerrero (Box 20b), with the address of the apartment (Box 20 c). The record also includes Ketty Guerrero's Answer To Notice And/Or Application, dated August 25, 2009, wherein she states that she is the "wife of deceased Jose Guerrero" who has "lived in this apartment 28 years." There is no requirement that a tenant submit the type of documents cited by petitioner in order to establish entitlement to succession rights. This is especially true where tenants may not possess certain documents due to their financial status (e.g., credit card statements), age (e.g., a driver's license) or for numerous other reasons. The sole requirement is that the agency's determination is not arbitrary and capricious. Here, it is not irrational for the agency to have determined that Ketty Guerrero has established her succession rights based on the petitioner's own filing with DHCR in 2006, the 1984 marriage and 2003 death certificates, and Ketty Guerrero's own statements.

It was also not arbitrary and capricious for the rent administrator to determine that the Maximum Collectible Rent effective May 1, 2007 is \$185.28 (exclusive of fuel cost adjustments). Respondent maintains that the issue cannot be reviewed because petitioner did not raise it until after the rent administrator made his finding. Although petitioner would not have known of the rent administrator's determination, prior to his decision, respondent failed to respond to requests from DHCR for information, dated June 25, 2009, November 6, 2009, March 17, 2009 and April 30, 2010. These notices warned "your failure to comply will result in a determination based solely on the information in the record." By notice dated June 4, 2009, petitioner was notified that the proceeding was "to determine the rent regulatory status of and

rent for the subject apartment.” Thus, it was incumbent upon respondent to raise the issue of comparable housing accommodations or the equities in its responses to DHCR’s requests for information.

Even if the issue is subject to this court’s review, DHCR’s determination as to the Maximum Collectible Rent was not arbitrary and capricious. Petitioner has not demonstrated that in a proceeding such as this one, where a rent history is readily available, that the rent administrator is required to consider comparable rents. Further, the fact that the Maximum Base Rent was \$429.39 in 2004 does not dictate that the Maximum Collectible Rent should be higher. The Maximum Base Rent is the ceiling, and is usually higher than the Maximum Collectible Rent, which generally cannot exceed more than 7.5 percent each calendar year (*see* 9 NYCRR § 2201.6; 9 NYCRR § 2202.7). Here, the Maximum Collectible Rent was last assessed in 2001 as \$152.96. Petitioner has not established that the rent administrator exceeded his discretion. Moreover, petitioner has not established that it was arbitrary and capricious for the rent administrator not to have considered the individual apartment improvements. A \$25,000 expenditure is not supported by the record.² It also appears that the minor improvements were paid for by the tenant, and that numerous applications for increases in the Maximum Base Rent were denied based on the Landlord’s failure to remove various violations over the years.

It is hereby

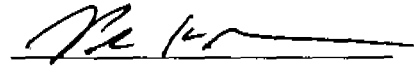
²The record contains a self described Rider to lease, dated March 1, 1990 (submitted by Ketty Guerrero) indicating that the cost of bathroom renovations totaled \$6,000.00, that tenant would pay 1/40th of the cost in the amount of \$150.00 per month. The agreement, dated February 17, 1993 indicates that tiles and kitchen fixtures and appliances would be installed for a cost of \$500.00, payable in two installments; \$300.00 having already been paid.

[* 7]
ADJUDGED that the petition is denied and the proceeding dismissed.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: September 10, 2012

ENTER:



J.S.C.

PETER H. MOULTON