

**Matter of Ross v New York State Div. of Hous. &  
Community Renewal**

2012 NY Slip Op 32561(U)

October 5, 2012

Supreme Court, New York County

Docket Number: 102506/2012

Judge: Alexander W. Hunter Jr

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

PRESENT: ALEXANDER W. HUNTER JR  
*Justice*

PART 33

Index Number : 102506/2012  
ROSS, DAVID  
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). <u>1-22</u>
Answering Affidavits — Exhibits _____	No(s). <u>23-24, 25, 26, 27-196</u>
Replying Affidavits _____	No(s). <u>197-199</u>

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

*See memorandum decision and judgment annexed hereto.*

### 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: 10/5/12

*AWH*, J.S.C.  
ALEXANDER W. HUNTER JR

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

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33**

-----X

In the Matter of the Application of  
David Ross and Helen Werngren-Ross

Index No.: 102506/12

Petitioners,

Decision and Judgment

-against-

New York State Division of Housing and  
Community Renewal, Arthur Brandt & Hayim Grant,

Respondents.

-----X

**HON. ALEXANDER W. HUNTER, JR.**

The application by petitioners for an order annulling respondent New York State Division of Housing and Community Renewal's ("DHCR") February 28, 2012 determination is denied and the proceeding is dismissed, with costs and disbursements to respondents.

Petitioners are the occupants of apartment 2A ("subject apartment") located at 170 East 75<sup>th</sup> Street, New York, NY ("subject building"). Respondent Arthur Brandt was the former owner of the subject building. Respondent Hayim Grant is the current owner of the subject building. Respondent New York State Division of Housing and Community Renewal ("DHCR") is the agency which regulates rent stabilized housing in New York State.

Rent Stabilization Code § 2520.11(d) provides that a building is exempt from the Rent Stabilization Law and Code if on the applicable base date, the building had fewer than six residential units. The applicable base date for the subject building is May 31, 1968.

Respondent Brandt purchased the subject building in either 1961 or 1962. Shortly after purchasing the subject building, respondent Brandt altered the interior configuration of the subject building and reduced the number of apartments from six to five units. Thereafter in 1963, an amended Certificate of Occupancy was issued by the New York City Department of Buildings indicating a total of five apartments.

On April 1, 2005, petitioners filed an overcharge complaint after respondent Brandt refused to renew their lease. In their complaint, petitioners disputed respondent Brandt's assertion that the subject apartment was exempt from rent stabilization. On May 12, 2006, the DHCR Rent Administrator ("RA") issued an order determining that petitioners' apartment was not rent stabilized. Based upon the Certificate of Occupancy, the RA determined that the subject building had a total of only five residential units.

Thereafter, petitioners filed a Petition for Administrative Review ("PAR") challenging the RA's determination. Petitioners alleged that the RA had failed to fully consider the

documentary evidence. At petitioners' request, DHCR reopened the proceeding for further review and to conduct an inspection of the subject building. On February 16, 2007, the RA issued an order affirming DHCR's previous order finding that the subject building was exempt from the Rent Stabilization Law because the building contained fewer than six residential units.

For further fact finding, DHCR directed the parties to appear for a hearing before DHCR's Administrative Law Judge ("ALJ") Alan G. Polak to determine if the subject apartment is subject to the Rent Stabilization Law and Code. The notice of the hearing further directed the parties to submit evidence regarding whether six apartments in the subject building were rented or occupied on or after June 30, 1974. The hearing was held over the course of sixteen days beginning on September 9, 2008. Both parties were represented by counsel. At the close of the hearing, the ALJ determined that apartment 1A was either vacant, used separately for commercial purposes, or used in conjunction with the garden level duplex. The ALJ also found that apartment 1A may have been used as a residence from August 1987 to November 1988, without the owner's consent. Consequently, the ALJ recommended that the DHCR's Commissioner find that there were only five residential units in the subject building.

On February 19, 2012, DHCR's Commissioner issued a PAR order adopting the ALJ's findings and recommendation. DHCR's PAR order determined that the subject apartment was not subject to rent stabilization and petitioners' PAR was denied.

Petitioners assert that DHCR's order was arbitrary and capricious, lacked a rational basis in law and fact, and was not supported by substantial evidence. Petitioners further assert that the hearing violated petitioners' due process rights since material evidence was improperly excluded, improper hearsay evidence was admitted and petitioners' request to have altered evidence examined by an expert was improperly denied. Petitioners also argue that instead of adopting the ALJ's findings, respondent DHCR only incorporated certain findings in order to reach its erroneous determination that the subject apartment is not rent stabilized.

Specifically, petitioners aver that six credible and disinterested witnesses testified that apartment 1A was occupied residentially at various times during 1975 to 1993. Petitioners maintain that Brandt's witnesses failed to rebut the evidence which established that apartment 1A was used residentially. It was also established that Jane Demetro responded to a newspaper advertisement placed by Brandt for a "live-work" space and resided in apartment 1A from August 1987 through November 1988 and utilized the unit as a "live-work" space. However, petitioners assert that the ALJ inexplicably found that Ms. Demetro's use of apartment 1A was without Brandt's knowledge or consent.

Petitioners contend that the ALJ acted irrationally when admitting into evidence certain exhibits presented by Brandt and in choosing not to make negative inferences regarding Brandt's failure to testify on his own behalf and his alleged failure to produce certain rent ledgers and leases.

Respondent DHCR contends that the PAR order which determined that the subject apartment was not rent stabilized had a rational basis and was supported by substantial evidence

in the record. DHCR also asserts that petitioners have failed to demonstrate any unfairness or lack of due process regarding the hearing or DHCR's PAR order.

Respondent DHCR asserts that it was well within the ALJ's discretion to make his own credibility determinations concerning witness testimony. The admissibility and weighing of documentary evidence submitted was also within the ALJ's discretion.

As to petitioners' due process claims, respondent DHCR argue that petitioners had a fair opportunity to present and prove their claims over the course of sixteen days. Moreover, contrary to petitioners' contentions, the PAR order sufficiently sets forth the findings of fact and conclusions of law pursuant to the State Administrative Procedure Act ("SAPA") § 307.

At the outset, respondent Grant asserts that the instant proceeding is merely a ploy for petitioners to force a monetary settlement from him and his wife, the current owners of the subject building. Respondent Grant also avers that petitioners have no right to the subject apartment because the subject apartment is not used as their primary residence as required under the Rent Stabilization Law and Code. Instead, petitioners reside with their children at their home in Westport, Connecticut and the subject premises is at best a pied-a-terre which they have no legal right to possess.

Respondent Grant further argues that DHCR's Order and Opinion is based on factual evaluations in the area of the agency's expertise and it is supported by the extensive record. As such, DHCR's determination is to be afforded great deference and weight by this court. Respondent Grant avers that the record establishes that DHCR weighed the testimony and the credibility of each witness before issuing its rational determination based on the evidence presented at the discretionary hearing.

In February 2012, respondent Brandt sold the subject building to respondent Grant and his wife. Respondent Brandt adopts all of the arguments set forth in respondent DHCR and respondent Grant's opposition papers. In addition, respondent Brandt argues that even if the instant petition was granted, petitioners would have no legal right to the subject apartment under the Rent Stabilization Law and Code since the subject apartment is not used as their primary residence.

In reply, petitioners aver that respondents DHCR and Grant have failed to offer any persuasive arguments to support DHCR's finding and respondent Brandt wholly failed to address the merits of petitioner's application. Petitioners argue that apartment 1A was occupied residentially from 1968-2003 by numerous tenants, including Jane Demetro. Petitioners further assert that the ALJ's reliance on interested witnesses, the ALJ's disregard of respondent Brandt's history of misrepresentations, and the destruction, alteration, and alleged loss of key evidence rendered DHCR's order arbitrary and capricious.

It is important to note that the hearing conducted before DHCR's ALJ was discretionary and not mandated by law. Therefore, review of this matter is in the nature of mandamus to

review. As such, the applicable standard of review is whether DHCR's determination was arbitrary and capricious or an abuse of discretion. C.P.L.R. 7803(3).

It is well settled that a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts." See, Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 (1974). "Even though the court might have decided differently were it in the agency's position, the court may not upset the agency's determination in the absence of a finding, not supported by this record, that the determination had no rational basis." Matter of Mid-State Mgt. Corp. v. New York City Conciliation and Appeals Bd., 112 A.D.2d 72, 76 (1st Dept. 1985). Also, credibility determinations made by the hearing officer are largely unreviewable. See, Matter of Berenhaus v. Ward, 70 N.Y.2d 436 (1987). Morevoer, administrative proceedings need not adhere to the formal rules of evidence. SAPA § 306(1); see also, Matter of Sowa v. Looney, 23 N.Y.2d 329 (1698); Class v. New York City Hous. Auth., 250 A.D.2d 543 (1st Dept. 1998). Therefore, this court's role is limited to whether or not respondent DHCR's final determination was made without a rational basis.


It is evident from a review of the extensive record that respondent DHCR's final order was not arbitrary and capricious and had a rational basis. Over the course of sixteen days, the testimony of eleven witnesses was heard and numerous documents were admitted into evidence by petitioners and respondent Brandt. At the conclusion of the hearing, ALJ issued a fifty-two page hearing report detailing all of his findings of fact and the weight he afforded to each witness' testimony and documentary exhibits. Petitioners have failed to establish any basis for this court to vacate or modify DHCR's final order.

Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondents; and it is further

ADJUDGED that respondent DHCR, having an address at \_\_\_\_\_, respondent Brandt, having an address at \_\_\_\_\_, and respondent Grant, having an address at \_\_\_\_\_, do recover from petitioners, having an address at \_\_\_\_\_, costs and disbursements in the amount of \$ \_\_\_\_\_, as taxed by the Clerk, and that respondents have execution therefor.

Dated: October 5, 2012

ENTER:  
  
\_\_\_\_\_  
J.S.C.  
**ALEXANDER W. HUNTER JR**