

**Matter of Power v NYS Div. of Hous. & Community
Renewal**

2013 NY Slip Op 31269(U)

June 13, 2013

Sup Ct, New York County

Docket Number: 0100152/2013

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 100152/2013
POWER, JAMES A.
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). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

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

is decided in accordance with the annexed decision.

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

RECEIVED
JUN 18 2013
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

FILED

JUN 18 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/13/13

CR, 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 55

-----x
In the Matter of the Application of

JAMES A. POWER and RICHARD D. HASTINGS,

Petitioners,

Index No. 100152/13

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL and EAST 77th REALTY, LLC,

FILED

JUN 18 2013

Respondents.

COUNTY CLERK'S OFFICE
NEW YORK

-----x
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioners James A. Power ("Mr. Power") and Richard D. Hastings ("petitioner" or "Mr. Hastings") bring the instant proceeding pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to reverse, annul, revoke and/or vacate respondent New York State Division of Housing and Community Renewal's (the "DHCR") (1) November 21, 2012 Order and Opinion denying petitioner's Petition for Administrative Review; (2) March 1, 2006 Order and Opinion Remanding Proceeding on Appeal; and (3) November 17, 2011 Order of

Deregulation. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Mr. Power was and still is a rent-stabilized tenant of 500 East 77th Street, Apartments 2017 and 2018, New York, New York (the "Apartment"). This proceeding was commenced on May 4, 2004 when respondent East 77th Realty, LLC ("Owner") filed a petition for high rent/high income rent deregulation for the Apartment (the "Deregulation Petition") alleging that the legal rent for the Apartment was \$2,000 or more per month and requested a verification of the household income in order to establish that the total annual income of the household was in excess of \$175,000.

On June 23, 2004, the DHCR served a copy of the Deregulation Petition upon Mr. Power. In response, Mr. Power listed Mr. Hastings on the answer form as an occupant who was residing in the Apartment as his primary residence. Mr. Power subsequently submitted another answer form, but did not list Mr. Hastings as any type of occupant. In subsequent submissions, Mr. Power asserted that Mr. Hastings had not resided in the Apartment at specified times during the applicable two-year period and submitted various documents in support of this assertion. On April 28, 2005, the DHCR sent to Mr. Power's attorney a copy of the Owner's submission dated April 20, 2005 in which the Owner claimed that Mr. Hastings was a primary resident of the Apartment. The DHCR's notice asked Mr. Power to provide photocopies of the page of Mr. Hastings' 2002 and 2003 New York State Income Tax returns (with social security number and income figures deleted) or submit documentary evidence that substantiates the claim that Mr. Hastings was not a primary resident of the Apartment on March 16, 2004, the date the Income Certification Form ("ICF") was served on the tenant. Mr. Power's attorney responded to the notice and attached a photocopy of Mr. Hastings' Florida drivers license; a copy of a sublease for

a premises in Florida entered into between sublessor Janet L. Hastings and sublessee Richard D. Hastings for a term commencing January 1, 2002 and expiring December 31, 2004; and a photocopy of a mailing envelope addressed to Mr. Hastings at the Florida address postmarked April 2, 2005.

By Notice dated July 13, 2005, the DHCR sent to Mr. Power's attorney a letter submitted by Owner's attorney, dated June 29, 2005, urging the DHCR to include the income of Mr. Hastings in the verification by the Department of Taxation and Finance ("DTF") of the total household income. Attached to the letter was a copy of an application form signed by Mr. Power, dated October 31, 1992, in which Mr. Power stated that "Dan Hastings" would occupy the Apartment with Mr. Power as well as affidavits from three building employees each stating that for several years Mr. Hastings has resided in the Apartment with Mr. Power and enters and leaves the building nearly everyday. On or about July 21, 2005, Mr. Power's attorney submitted a letter and an affidavit sworn to July 20, 2005 by his neighbor, Ms. Katia Grossman, who stated that she and Mr. Power and Mr. Hastings have been neighbors in the subject building for more than 15 years and that in 2002, Mr. Hastings made a decision to relocate to Florida and that "Mr. Hastings returned to live with Mr. Power in 2003 and that he presently resides at 500 East 77th Street."

Both the Owner and Mr. Power were notified that the DHCR had forwarded income tax verification information to the DTF, that Mr. Power's information was matched to his tax returns for both 2002 and 2003 and that DTF found that the relevant household income, based on Mr. Power's income alone, did not exceed \$175,000 in 2002. By Order issued July 28, 2005, the Rent Administrator denied Owner's Deregulation Petition based on the DTF's finding that the

total household income did not exceed \$175,000 in 2002. The Rent Administrator's order also found that Mr. Hastings was "not an occupant of the apartment for Luxury Decontrol purposes".

The Owner filed a Petition for Administrative Review ("PAR") to challenge the Rent Administrator's order. In its PAR, the Owner asserted that the evidence of record established that Mr. Hastings occupied the Apartment as his primary residence at the relevant time period and thus that Mr. Hastings' income should have been included in the total household income and that Mr. Hastings' name should have been sent to the DTF as part of the income verification inquiry. The Owner further argued that a hearing should have been conducted with respect to the issue of Mr. Hastings' occupancy and that the Rent Administrator's order failed to adequately specify the legal and factual basis upon which it was issued, thereby violating the State Administrative Procedure Act (the "SAPA"). On or about October 17, 2005, Mr. Power's attorney submitted an answer recounting Mr. Power's earlier submission of copies of Mr. Hastings' Florida drivers license and sublease for a premises there and stated that "Mr. Hastings relocated to Florida in 2002 due to problems with his personal relationship with Mr. Power and that Mr. Hastings did not return to the subject housing accommodation until sometime in 2003" but did not address where Mr. Hastings resided in March 2004.

By Order and Opinion issued on March 1, 2006, DHCR's Deputy Commissioner revoked the Rent Administrator's order and remanded the proceeding to the Rent Administrator with the direction that Mr. Hasting's name be reported to the DTF for verification of his income and that Mr. Hastings' income be included in the calculation of the relevant total household income for determination of whether the Apartment qualifies for high rent/high income rent deregulation. The March 1, 2006 Order found that the relevant date for determining occupancy for the

purposes of luxury decontrol is the date that the ICF is served on the tenant of record, which in this case was March 16, 2004 and that the evidence clearly establishes that Mr. Hastings was residing at the Apartment as his primary residence when the ICF was served. The Order further found that the place where Mr. Hastings was living in 2002 is not relevant to the issue of whether the Apartment qualifies for luxury deregulation, that submissions by Mr. Power showing that Mr. Hastings had a Florida drivers license and leased a residence there where he received at least some mail was not dispositive and did not establish that Mr. Hastings resided in Florida as his primary residence. Moreover, the Order noted that the documents did not address the issue of where Mr. Hastings was residing in March 2004, that Mr. Power acknowledged to the Rent Administrator and again in the PAR proceeding that Mr. Hastings was residing in the Apartment in March 2004, that the July 20, 2005 affidavit of Ms. Grossman also stated that "Mr. Hastings returned to live with Mr. Power in 2003 and that he presently resides at 500 East 77th Street" and that the three building employees affirmed in their affidavits that they each had seen Mr. Hastings entering and exiting the building on a nearly daily basis.

By Notice dated March 8, 2006, the Rent Administrator informed the parties that the matter had been reopened for the purpose of additional processing of Owner's Deregulation Petition. Mr. Power and Mr. Hastings then brought an Order to Show Cause and Petition to prevent DHCR from processing Owner's Deregulation Petition and to halt DCHR's alleged intrusion into the "private and secret income tax information of...[Mr.] Hastings for the year 2002..." A temporary restraining order was granted by this court on May 1, 2006. DHCR filed a cross-motion to dismiss the Order to Show Cause and Petition. The Supreme Court granted the DHCR's cross-motion to dismiss and denied the petition stating that the relief requested would serve only to prevent DHCR from investigating Owner's request for high rent/high income rent

deregulation and that DHCR's request for copies of redacted tax statements from petitioners is within DHCR's jurisdictional authority and is directly related to the processing of an application for high rent/high income rent deregulation of a rent stabilized apartment. The Supreme Court further held that as the DHCR's March 1, 2006 Order remanding the proceeding to the Rent Administrator for further consideration and investigation of Owner's Deregulation Petition was not a final determination, the cross-motion to dismiss must be granted.

Petitioners appealed the court's order to the Appellate Division, First Department, which affirmed the Supreme Court's denial of the petition and stated, in pertinent part,

[I]n determining household income for purposes of luxury deregulation, DHCR may rationally take into consideration the income of occupants who reside in the apartment on the date the income certification form is served, even if the occupant did not occupy the apartment during the two years preceding service thereof.

Petitioners were then denied leave to appeal to the Court of Appeals. On April 6, 2011, the DHCR notified the parties of the reopened 2004 deregulation proceeding. Mr. Power submitted a new version of the answer to Owner's Deregulation Petition dated April 15, 2011, in which Mr. Hastings was listed in "Item 2" as an occupant of the Apartment at the time the ICF was served. Mr. Power described Mr. Hastings as "Status b" meaning a person who occupied the Apartment as other than a primary residence as of the date the ICF was served. Accompanying Mr. Power's answer was an affidavit sworn to by Mr. Hastings on April 15, 2011 in which Mr. Hastings stated "I was staying with James A. Power on a temporary basis in 2003 through 2004, including the date the ICF was served."

DHCR again forwarded income tax verification information to the DTF and that information was matched for petitioners for both 2002 and 2003. DTF then determined that the relevant total household income exceeded \$175,000 in both 2002 and 2003, the two tax years

relevant in this proceeding. Both parties were afforded an opportunity to provide further information concerning DTF's findings. In an Order issued on November 17, 2011, the Rent Administrator, upon reconsideration of the matter as remanded by DHCR's March 1, 2006 Order, ordered that the Apartment be deregulated upon the expiration of the existing lease based on DTF's finding that the relevant total household income exceeded \$175,000 in each of the two preceding calendar years.

On or about December 23, 2011, petitioners filed a PAR to challenge the Rent Administrator's order. In the PAR, Mr. Power asserted that Mr. Hastings' income should not have been included in the total income calculation because the Apartment was not Mr. Hastings' primary residence in March 2004 when the ICF was served. Mr. Power asserted that Mr. Hastings was only occupying the Apartment in March 2004 as a temporary occupant and that Mr. Hastings did not live in the Apartment at any time during 2002. Further, the PAR alleged that Mr. Hastings was ill and that even if his income was included in the total household income calculation, it was inflated because he was permanently disabled and unable to work and that therefore, the combined household income did not exceed \$175,000. In June 2012, Mr. Power submitted a supplement to the PAR which included a second affidavit from Ms. Grossman in which she contradicted Mr. Hastings' April 15, 2011 affidavit wherein Mr. Hastings conceded that he was in occupancy of the Apartment throughout all of 2004, including the date upon which the ICF was served. In Ms. Grossman's June 2012 affidavit, she claimed to have remembered that more than eight years prior, Mr. Hastings had told her that he intended to return to this Florida residence in the first week of March 2004 and that he had accepted a car ride to Florida with an unidentified friend of Ms. Grossman. This also contradicted Mr. Power's April 15, 2011 answer form in which Mr. Power asserted that Mr. Hastings returned to his Florida residence in

early March 2004 and did not return to the Apartment until December 2004. Mr. Power further requested that a hearing be conducted concerning the issue of Mr. Hastings' primary residence during the relevant time period.

The Owner then commenced an Article 78 proceeding in the nature of mandamus to compel an expedited determination of the PAR proceeding. The mandamus petition was denied by Order and Judgment dated October 4, 2011 as the Honorable Joan Lobis found that "it is in DHCR's discretion to issue an order of deregulation prior to December 1, 2011" and therefore, petitioner was not entitled to a writ of mandamus. Thereafter, on or about November 21, 2012, the DHCR's Deputy Commissioner affirmed the Rent Administrator's November 17, 2011 order deregulating the Apartment and found that the Rent Administrator had properly included Mr. Hastings' name in the income verification inquiry conducted with DTF and properly relied upon DTF's finding that the total household income exceeded the statutory threshold amount for deregulation. Petitioner then commenced the instant proceeding pursuant to Article 78 of the CPLR seeking to reverse, annul, revoke and/or vacate DHCR's (1) November 21, 2012 Order and Opinion denying petitioner's Petition for Administrative Review; (2) March 1, 2006 Order and Opinion Remanding Proceeding on Appeal; and (3) November 17, 2011 Order of Deregulation.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); see *Pell*

v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d, 222, 231 (1974) (“[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.”) “The arbitrary or capricious test chiefly ‘relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.’ Arbitrary action is without sound basis in reason and is generally taken without regard to facts.” *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, this court finds that the DHCR’s Final Order, affirming the Rent Administrator’s order of deregulation for the Apartment and denying petitioner’s PAR, had a rational basis. Pursuant to the Rent Stabilization Law (“RSL”), the owner of a rent-stabilized apartment may commence a “deregulation proceeding” before DHCR seeking to “deregulate” the apartment and remove it from the protection of said law where (a) the combined annual income of all individuals who are occupying the apartment as their primary residence was greater than \$175,000 per year during each of the two preceding calendar years; and (b) the monthly legal rent of the apartment is at least \$2,000 per month. An apartment owner who wishes to commence such a proceeding must serve the tenant with an ICF by May 1st of the year in which the proceeding is to be commenced. *See* RSL § 26-504.3(b). The tenant must complete the ICF by indicating whether the combined income of all individuals who were occupying the apartment as their primary residence exceeded the income threshold during the two preceding calendar years and return the ICF to the owner within 30 days. If the tenant fails to return the ICF within 30 days or if the ICF is returned but states that the combined annual income of all primary residents of the apartment did not exceed the income threshold in either or both of the two preceding

calendar years, the owner may file a deregulation petition with DHCR requesting verification of the combined annual income of the apartment's primary residents based upon information contained in the records of the DTF. Pursuant to RSL § 2531.5, if DTF verifies that the household income meets the required \$175,000 income threshold, the subject premises shall be deregulated. The total annual income for the purposes of luxury decontrol includes "the sum of the annual incomes of all persons whose names are recited as the tenant or co-tenant on a lease who occupy the housing accommodating and all other persons that occupy the housing accommodation as their primary residence on other than a temporary basis..." Rent Stabilization Code ("RSC") § 2531.1.

In the instant action, DHCR rationally found that Mr. Hastings was a primary resident of the Apartment on March 16, 2004, the date the ICF was served, and that his income should therefore be included in the calculation of total annual household income based on the following evidence: (1) Mr. Power's original answer form in which he listed Mr. Hastings as an occupant who was residing in the Apartment as his primary residence on other than a temporary basis as of the date the ICF was served; (2) an affidavit from Ms. Grossman, dated July 20, 2005, stating that although Mr. Hastings had previously moved out of the Apartment and down to Florida, "Mr. Hastings returned to live with Mr. Power in 2003 and that he presently resides at 500 East 77th Street"; (3) affidavits from three on-site building employees, dated April and May 2005, stating that based on their observations they had seen Mr. Hastings entering and exiting the building on a nearly daily basis during the relevant time periods and that they were certain Mr. Hastings resided in the subject building; (4) statements by Mr. Power in the original deregulation proceeding and the PAR proceeding which acknowledged that Mr. Hastings had been residing in

the Apartment in March 2004; (5) Mr. Power's acknowledgment in his answer to Owner's PAR that Mr. Hastings had moved back into the Apartment prior to the time the ICF was served and that Mr. Hastings had relocated to Florida in 2002 and did not return to the Apartment until sometime in 2003; and (6) Mr. Hastings' April 15, 2011 affidavit in which he stated that he was living in the Apartment during all of 2004. Further, DHCR's Final Order adhered to the March 1, 2006 Order which held that Mr. Hastings' Florida drivers license and apartment lease were not dispositive and did not establish that Mr. Hastings resided in Florida as his primary residence on the court-approved record date of March 16, 2004.

Although petitioners assert that the Decision was arbitrary and capricious because Mr. Power submitted evidence to the DHCR during the PAR proceeding that Mr. Hastings temporarily relocated to Florida a week before the ICF was served, this argument is without merit. As an initial matter, such argument contradicts affidavits signed by Mr. Hastings and Ms. Grossman which stated that Mr. Hastings occupied the Apartment for all of 2004. Further, the argument is precluded pursuant to RSC § 2529.6, which governs the scope of review in an administrative appeal before DHCR. RSC § 2529.6 limits the scope of review in an administrative appeal to the arguments and evidence submitted to the Rent Administrator and further provides that new arguments or evidence may not be raised in an administrative appeal absent a showing of good cause why such newly introduced material could not have been provided during the Rent Administrator's proceeding. However, respondent DHCR rationally found that petitioners failed to show good cause as their excuse was that they could not recall the specifics of Mr. Hastings' occupancy of the Apartment. Further, DHCR's Final Order reasonably declined to reconsider the issue of Mr. Hastings' primary residency as this issue was resolved in

the first PAR proceeding and affirmed by this court and the Appellate Division. DHCR's March 1, 2006 order remanded Owner's Deregulation Petition to the Rent Administrator for the express purpose of verifying the income of Mr. Hastings with DTF and to include Mr. Hastings' income in the calculation of the total annual household income. Furthermore, petitioners' assertion that it is immaterial whether Mr. Hastings resided in the Apartment on the date the ICF was served because he did not reside in the Apartment during the two prior years is without merit. The Appellate Division has made clear that occupancy for rent deregulation purposes is not to be measured during the two previous years but rather is measured at the time the ICF is served. *See 103 East 86th St. Realty Corp. v. New York State Division of Housing and Community Renewal*, 12 A.D.3d 289 (1st Dept 2004). As stated in the Final Order, "[p]ursuant to DHCR Operational Bulletin 95-3 it is longstanding DHCR standard policy that the relevant date for determining occupancy for the purposes of luxury decontrol is the date that the...ICF is served on the tenant...Therefore, where Mr. Hastings was living in 2002 is not relevant to the issue of whether the subject apartment qualifies for luxury decontrol."

Moreover, petitioners' assertion that even if Mr. Hastings was residing in the Apartment as his primary residence during the relevant time period, he should be entitled to a special accommodation as a disabled person is without merit. Under the high income deregulation statutes, DHCR lacks discretion to create an exception to the rent stabilization law if the Apartment meets the \$175,000 combined income threshold. Further, even if DHCR had such discretion, petitioners have failed to submit any evidence of Mr. Hastings' alleged disability to this court or to the Rent Administrator.

Additionally, to the extent petitioners seek to challenge the DHCR's March 1, 2006 Order

remanding the proceeding after the Owner's appeal, such request is denied on the grounds of *res judicata*. The principles of *res judicata* and collateral estoppel bar parties to a previous litigation from litigating matters which were decided in the prior proceeding. *See Schwartz v. Public Administrator of the County of Bronx*, 24 N.Y.2d 65 (1969). It is well-settled that once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy. *See O'Brien v. City of Syracuse*, 54 N.Y.2d 353 (1981). Petitioners Mr. Power and Mr. Hastings brought an Article 78 proceeding challenging the March 1, 2006 Order issued by the DHCR. The Supreme Court denied the petition and by order entered April 21, 2009, the Appellate Division, First Department, affirmed the dismissal of that Article 78 proceeding and the Court of Appeals denied leave to appeal. The gravamen of that Article 78 proceeding was DHCR's determination to include the income of Mr. Hastings in the calculation of the total annual household income of the Apartment. The March 1, 2006 order determined the following: (1) the date upon which an owner serves the ICF upon the tenant of record is the record date for indentifying those persons whose incomes shall be verified by DTF; (2) those persons in occupancy on the date the owner serves the ICF are the persons whose incomes are to be included in the total income and verified by DTF; (3) it is not arbitrary and capricious for DHCR to report Mr. Hastings' name to DTF for inclusion of his income in the calculation of total annual household income for the Apartment; and (4) Mr. Hastings was in occupancy of the Apartment as of March 16, 2004 and thus, his income must be included in the total annual household income when determining a petition for high rent/high income rent deregulation of the Apartment. Thus, petitioners are now precluded from asserting that the service date of the ICF, March 16, 2004, is

not controlling; that Mr. Hastings' income should not be included in the total annual household income; that Mr. Hastings was not a primary resident of the Apartment when the ICF was served; and that Mr. Hastings' name should not have been referred to DTF for verification of his income.

Finally, to the extent petitioners seek to challenge the November 2011 Order of Deregulation, the petition must be denied as such Order was not a "Final Order" for administrative review purposes. "It is hornbook law 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..." *Watergate II Apts v Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978). Here, the November 17, 2011 order of deregulation was issued by the Rent Administrator based upon a finding that the combined incomes of Mr. Power and Mr. Hastings exceeded the statutory \$175,000 threshold in both 2002 and 2003. Subsequently, Mr. Power filed a PAR appealing the Order of Deregulation. Such PAR was denied in a Final Order dated November 21, 2012, which this court has already addressed.

Accordingly, petitioner's request for relief under Article 78 of the CPLR is denied. The petition is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 6/13/13

Enter: _____


J.S.C.

FILED

JUN 18 2013

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