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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: BARBARA JAFFE J.S.C. Justice

PART 12

Kolinsky v. Fein

Towns, Darryl, C.

INDEX NO. 103897/12

MOTION DATE _____

MOTION SEQ. NO. 001

The following papers, numbered 1 to _____, were read on this motion to/for Art 78

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

PETITION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION, ORDER AND JUDGMENT.

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: 8/27/13

BARBARA JAFFE J.S.C.

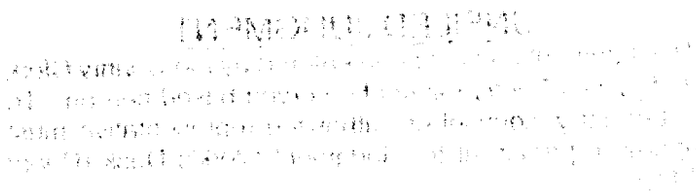
1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

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

[* 2]



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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In the Matter of the Application of NYC 107, LLC,

Petitioner,

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

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent, and

FAIN KOLINSKY a/k/a FAIN CLARK,

Respondent-Intervenor.

Index No. 103885/12

DECISION & JUDGMENT

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In the Matter of the Application of FAIN KOLINSKY a/k/a FAIN CLARK,

Petitioner,

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

-against-

DARRYL C. TOWNS, AS COMMISSIONER OF THE NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent, and

NYC 107, LLC,

Respondent-Landlord.

Index No. 103897/12

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BARBARA JAFFE, JSC:

For NYC 107, LLC:	**For DHCR:**	**For Kolinsky:**
Robert H. Berman, Esq.	Martin B. Schneider, Esq.	Mika Dashman, Esq.
Kucker & Bruh, LLP	Patrice Huss, Esq.	Fishman & Mallon, LLP
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New York, NY 10017	New York, NY 10004	New York, NY 10007
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By order dated May 22, 2013, these actions were consolidated by another justice of this court. Fain Kolinsky, a/k/a Fain Clark, is the tenant of apartment 5E in the building located at 230 West 107th Street in Manhattan. She is the respondent-intervenor in action no. 1 and the

that, because petitioner received J-51 tax benefits, the apartment remained rent-stabilized. By order dated February 5, 2009, the deputy commissioner denied Kolinsky's PAR and affirmed the order of the RA.

On March 5, 2009, the Appellate Division, First Department, decided *Roberts v Tishman Speyer Props., L.P.*, 62 AD3d 71, 81 (1st Dept), *affd* 13 NY3d 270 (2009), holding that "all apartments in buildings receiving J-51 tax benefits are subject to the [Rent Stabilization Law (RSL) during the entire period in which the owner receives such benefits." (*See* Administrative Code of City of New York § 11-243 [previously § J51-2.5]).

Thereafter, by order dated March 16, 2009, the deputy commissioner re-opened the administrative proceeding for consideration of the possible impact of the *Roberts* decision, and found that the apartment remained rent-stabilized and that the legal regulated rent for the apartment preceding Kolinsky's occupancy was $2,053.64, but that the collectible rent for her initial lease term was $1,925.00, as landlord "effectively waived any higher rent to which it may have been entitled." (Order, at 7).

Rent Stabilization Law § 26-511(c)(14), which became effective on June 6, 2003, roughly codifies *Matter of Missionary Sisters of Sacred Heart Ill. v New York State Div. of Hous. and Community Renewal*, 283 AD2d 284 (1st Dept 2001), in which the court held, in relevant part, that:

> [W]here the amount of rent charged to and paid by the tenant is less than the legal regulated rent for the housing accommodation, the amount of rent for such housing accommodation which may be charged upon renewal or upon vacancy thereof may, at the option of the owner, be based upon such previously established legal regulated rent, as adjusted by the most recent applicable guidelines increases and any other increases authorized by law.

Not only does the statute provide no support for a retroactive rent increase here, but there was no "previously established legal regulated rent." Consequently, there is no basis for a retroactive increase. (*See 370 Manhattan Ave. Co. v Seitz*, 20 Misc 3d 9,10 [App Term, 1st Dept 2008] [legal regulated rent may be "previously established" only if tenant had notice of it]; *see also Matter of Coffina v New York State Div. of Hous. and Community Renewal*, 61 AD3d 404,

404-405 [1st Dept 2009] [RSL § 26-511 (c) (14) applicable only where there is a "prior-noticed 'preferential' rent']). A "preferential rent" is a rent that is lower than the legal regulated rent, where the latter is "established and documented in a manner prescribed by the DHCR." (RSC § 2521.2). Here, it is undisputed that, in October 2005, Kolinsky had notice neither of any legal regulated rent, nor of the fact, established only after the *Roberts* decision, that the rent reserved in her lease was, in effect, a "preferential rent."

Landlord argues that, but for its mistaken belief that the apartment was exempt from rent-stabilization, it would have attached a preferential rent rider to Kolinsky's initial lease. Such a rider generally preserves a landlord's right to charge the legal regulated rent upon the passage of such time as is set forth in the rider. Landlord also maintains that, pursuant to RSC § 2522.8, respondent may consider the equities when it sets a legal regulated rate. Landlord failed, however, to advance this argument before the DHCR, and in any event, fails to demonstrate why it would be equitable to saddle Kolinsky with retroactive rent increases based on its failure to include a preferential rent rider because of its view of the law, now determined to have been mistaken.

That courts post-*Roberts* have refused to impose penalties for actions taken in good faith, does not change the result here, as the penalties to which landlord refers include treble damages for willful violation of the RSC. (*See eg Rosenzweig v 305 Riverside Corp.*, 35 Misc 3d 1241[A] [Sup Ct, NY County June 7, 2012]). Here, DHCR imposed no such penalty.

II. ACTION NO. 2

The Rent Stabilization Code (RSC) provides that a landlord may increase the legal regulated rent for an apartment subject to rent-stabilization by one-fortieth of the total cost, excluding finance charges, of "install[ing] new equipment or improvements, or new furniture or furnishings, provided in or to the tenant's housing accommodation . . . ." (RSC § 2522.4[a] [1] and [4]). A landlord may impose such a rent increase without DHCR's prior approval. (*Matter of Rockaway One Co, LLC v Wiggins*, 35 AD3d 36 [2d Dept 2006]).

DHCR Policy Statement 90-10 lists the following four forms of evidence that a landlord may present to justify an IAI rent increase: "1) Cancelled check(s) contemporaneous with the completion of the work; 2) Invoice receipt marked paid in full contemporaneous with the completion of the work; 3) Signed contract agreement; 4) Contractor's affidavit indicating that the installation was completed and paid in full." (Petition, Exh. C). Policy Statement 90-10 provides a reasonable measure of acceptable proof of the cost of, and payment for, work justifying an IAI increase. (*See eg Matter of 1234 Broadway LLC v New York State Div. of Hous. & Community Renewal*, 102 AD3d 628 [1st Dept 2013]).

The evidence submitted by landlord to the RA to justify its IAI rent increase consists of a February 4, 2004 invoice for $50,633 from Richard Mishkin Contracting (Mishkin) and seven cancelled checks issued by the previous landlord totaling $55,633 and drawn to the order of Mishkin. Of this sum, landlord claimed to have spent $48,504.40 for qualifying work.

On July 16, 2012, respondent sent an inspector to report on the work. The Commissioner's order reflects the following findings: The checks submitted to the RA establish that the former landlord paid Mishkin $55,633; the inspector's July 16, 2012 report supports the RA's calculation of the maximum IAI rent increase which could have been credited to landlord under the prior tenant's lease; and Mishkin's invoice, as described below, supports the RA's calculation of an IAI rent increase in the amount of $1,212.61.

Kolinsky argues that because Mishkin's invoice is not marked paid, it does not constitute evidence of work performed in the apartment, relying on Policy Statement 90-10. She also asserts, citing *Lirakis v 180 Seventh Ave. Assoc., LLC,* 15 Misc 3d 128(A), 2007 NY Slip Op 50551 (U) (App Term, 1st Dept 2007), and *Sheridan Props., LLC v Liefshitz*, 17 Misc 3d 1137(A), 2007 NY Slip Op 52316 (U) (Civ Ct, Bronx County 2007), that, because the checks bear no notation that they are in payment for work performed in the apartment, they are not probative, and that, therefore, the Commissioner's order must be reversed to the extent that the Commissioner held that the checks to Mishkin, all of which were negotiated, satisfy the first

criterion listed in Policy Statement 90-10.

In both *Lirakis* and *Sheridan Properties*, the trial court was the finder of fact, whereas here, DHCR "weighed the evidence and resolved issues of credibility." (*Matter of Mauro v Division of Hous. and Community Renewal*, 309 AD2d 678, 679 [1st Dept 2003]). Thus, the issue is whether DHCR's partial reliance on the checks written to Mishkin is irrational. (*See Matter of Fernandez v New York Stated Div. of Hous. & Community Renewal*, 3 AD3d 366, 368 [1st Dept 2004] ["Where [DHCR's] determination is rational, the court's function is exhausted, regardless of whether the court would have found differently."]).

Citing *Matter of 251 W. 98th St. Owners v New York State Div. of Hous. & Community Renewal*, 276 AD2d 265 (1st Dept 2000), DHCR argues that it may rely on reports by its inspectors. There, as in *Matter of 335 E. 49th Assoc., LP v New York State Dept. of Hous. and Community Renewal, Off. of Rent Admin.*, 40 AD3d 516 (1st Dept 2007), *affd* 9 NY3d 982, the inspection reports on which DHCR relied concerned then-current conditions. Here, by contrast, the inspector reported on work claimed to have been performed some four years earlier, and he repeatedly states in the report that the purported improvements he observed "appear to have possibly been installed" in 2004. (Report, Exh. C-33 at 2-3). In *Matter of St. Nicholas 184 Holding, LLC v New York State Div. of Hous. & Community Renewal*, 20 Misc 3d 1138(A), 2008 NY Slip Op 51785(U) (Sup Ct, NY County 2008), the court held that a DHCR inspector's March 2007 report stating that certain improvements that had purportedly been made in July 2004 "appear[ ] to have been possibly installed in 2004" was "inconclusive." (*Id.* at *3, *7). The inspector's report on which DHCR here relies is just as inconclusive.

However, in the order it is noted that on the copy of Mishkin's invoice that landlord submitted appear initials written next to certain items, not including work that does not qualify for an IAI increase, and that the sum of the amounts next to which initials appear equals 40 times the amount by which landlord had increased petitioner's rent based on an IAI. In these circumstances, although the invoice is not marked "paid in full," it was not irrational for DHCR

to have concluded, based on the annotated invoice and the checks written to, and negotiated by Mishkin, that work performed in the apartment justified an IAI rent increase of $1,212.61, and Kolinsky presented no evidence that any portion of the $48,504.40 that landlord claimed as a basis for the IAI increase was paid for anything other than work in the apartment. And, Policy Statement 90-10 does not require that checks submitted to support an IAI increase bear on their face an indication that the apartment in which the work justifying such an increase was, or is being, performed.

Accordingly, it is hereby

ADJUDGED, in action no. 1, that the motion of respondent New York State Division of Housing and Community Renewal to dismiss the petition is granted, the petition is denied, and the proceeding is dismissed; and it is further

ADJUDGED, that in action no. 2, the petition is denied and the proceeding is dismissed.

ENTER:

Barbara Jaffe, JSC

Dated: August 27, 2013
New York, New York

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).