Matter of Teguegne v New York State DHCR
2013 NY Slip Op 32432(U)
October 9, 2013
Sup Ct, New York County
Docket Number: 100947/13
Judge: Cynthia S. Kern
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 100947/2013

TEGUEGNE, ADDIS-ALEM BEKELE

vs

NYS DIVISION OF HOUSING

Sequence Number : 001

ARTICLE 78

PART ______

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.

FILED
OCT 10 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 10/9/13

______, 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: Part 55

---x

In the Matter of the Application of

ADDIS-ALEM BEKELE TEGUEGNE,

Petitioner,

Index No. 100947/13

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,

Respondent.

---x

FILED
OCT 10 2013
NEW YORK
COUNTY CLERK'S OFFICE

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..................................	1
Notice of Cross Motion and Answering Affidavits......................	2
Replying Affidavits..	3
Exhibits..	4

Petitioner Addis-Alem Bekele Teguegne ("petitioner" or "tenant"), the tenant of a rent-stabilized apartment located at 1781 Riverside Drive, Apartment 5-I, New York, New York (the "subject apartment") brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") challenging a final order ("Final Order") issued April 30, 2013 by respondent New York State Division of Housing and Community Renewal ("DHCR") affirming the denial of a rent-reduction for tenant due to an alleged decrease in services. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. On or about October 14, 2010, tenant submitted an application for a rent reduction from the owner of the building, 1781 Riverside LLC (the "Owner"), based upon decreased services in the subject apartment. Specifically, tenant alleged warped and sagging floors, sagging and leaking ceilings, holes and cracks in the walls, leaking sinks and broken tiles. In response, the Owner informed tenant that it requested access to the subject apartment on numerous occasions to inspect and make any repairs and was denied access by tenant. Respondent then notified the parties of an inspection of the subject apartment on April 5, 2011 between 10:00 a.m. and 10:30 a.m. and required the tenant and Owner to be present and for the tenant to provide access to the Owner for the purposes of attending to repairs and/or restoration of services. The inspection was then rescheduled to April 11, 2011. However, the tenant allegedly refused access. Specifically, DHCR's Inspector's report states "At time of inspection, tenant, Mr. Teguegne, present, however, not ready to provide access for repairs to begin at time of inspection." Thus, by order dated May 12, 2011, DHCR denied tenant's application for a rent reduction based upon a decrease in services finding that tenant failed to cooperate with an inspection on April 11, 2011.

On June 15, 2011, tenant filed a Petition for Administrative Review ("PAR") challenging the DHCR's May 12, 2011 order. In the PAR, tenant alleged that he had a doctor's appointment scheduled for 1:00 p.m. on the date of the rescheduled inspection and that he had spoken to the DHCR inspector by telephone prior to the scheduled inspection to advise him of the doctor's appointment but that the inspector would not change the date of the inspection. The tenant further alleged that on the date of the inspection, he agreed to allow the repair work to begin and advised the DHCR inspector that the work would have to be interrupted due to his doctor's

appointment. However, tenant alleges that the inspector refused to inspect the subject apartment and would not allow the repair work to begin. The Owner responded and alleged that the tenant continues to deny access to the subject apartment. By order issued on May 25, 2012, DHCR denied tenant's PAR.

Tenant filed a request for reconsideration on June 28, 2012. DHCR denied the reconsideration request on the basis that the tenant did not dispute the fact that he was properly notified of the DHCR inspection and that a failure to provide access would result in a determination solely on the evidence contained in the record. Additionally, DHCR noted that the Owner was present with contractors and was prepared to make repairs and that no documentation was provided to substantiate tenant's position. Thereafter, tenant commenced an Article 78 proceeding against DHCR alleging that DHCR incorrectly affirmed a finding of non-cooperation in this matter and alleged that the Rent Administrator's finding was affected by an error of fact as the tenant-imposed limitation on the duration of the inspection on April 11, 2011 had good cause based upon tenant's medical appointment. By Stipulation entered into on October 23, 2012, the parties agreed to have the matter remitted back to DHCR for re-determination following additional review and consideration.

Pursuant to the Stipulation, DHCR opened a reconsideration proceeding. On December 14, 2012, DHCR's case processor requested that the Inspection Unit perform an inspection at the subject apartment on January 7, 2013. On January 3, 2013, DHCR received a letter from tenant stating that he would not be able to keep the appointment scheduled for January 7, 2013 and requested it be rescheduled for another date. Additionally, in a letter dated January 11, 2013, tenant informed DHCR's Inspection Unit that a "Stop Work" order for the building had been

issued by the New York City Department of Buildings ("DOB") in November 2011 and that such order remained in effect to date. Tenant claimed that although the structural work to be done included the repair and replacement of the floor joists through the four apartments in the "I"-line, the Owner violated the Stop Work order by working on Apt. 6-I's joists and renting it in September 2012 rather than allowing tenant to move into Apt. 6-I while the subject apartment was being repaired.

Meanwhile, the Owner informed DHCR by letter dated December 24, 2012 that the parties were actively litigating the decreased services issue in a Civil Court action initiated by the Tenant. The Owner further alleged that the Civil Court had already determined that it would be necessary for tenant to temporarily relocate from the subject apartment in order for the structural-related repairs to be properly completed and that tenant did not wish to relocate. The Owner then requested that DHCR close the matter since it was already being litigated in Civil Court. In reviewing the transcript from the Civil Court litigation, respondent noted that Judge Peter Wendt set forth the serious nature of the structural problems throughout the subject apartment, which necessitated the removal and replacement of the existing flooring and floor joists and further stressed that the tenant's continued occupancy in the subject apartment while the structural repairs were underway would place the tenant's "life and limb" at risk.

In a letter dated January 15, 2013, counsel for DHCR informed tenant that after reviewing the transcript from Civil Court, it was clear that the issue of the floor repairs throughout the subject apartment was under the jurisdiction of that court at tenant's election and that DHCR would not address that issue. However, the letter informed petitioner that DHCR retained jurisdiction of tenant's other decreased services claims and that an inspection to facilitate repair

of those other items would be scheduled. A notice of inspection for access was issued on February 6, 2013 to schedule an inspection on February 13, 2013 to repair the non-structural items in the subject apartment. In a letter dated February 7, 2013, Owner acknowledged that it was going to repair four items in the subject apartment: (1) the leak under the kitchen sink; (2) the leak under the bathroom sink; (3) the doorbell to the entrance door; and (4) the ceiling in the bathroom. In a letter dated February 11, 2013, tenant informed DHCR that he would be withdrawing his Housing Court action so that DHCR would retain complete authority and jurisdiction over all of his claims and that he wanted DHCR to inspect the floor condition in the subject apartment.

In a letter dated February 13, 2013, DHCR informed tenant that

> As to your professed intention to withdraw the [Housing Court] action, we remind you that the flooring issue is not being entertained by the DHCR as part of this remand proceeding. This was made clear by this office's letter to the parties dated January 15, 2013...the subject [Housing Court] proceeding has been pending since at least June 2012. At the time DHCR entered into the Stipulation of Remand during the Article 78 proceeding, in October 2012, the [Housing Court] action was in progress and entertaining the issue of the floor repairs in the subject apartment. In the interests of expediency and fairness, we would urge you to allow the Court to retain jurisdiction over the subject matter so that a stipulation arrived at by the parties or a decision can be rendered after trial...
>
> It is also clear that the Court has found that the corrective work for the flooring and joists can only be performed while the apartment is vacant. The Court has the ability to take punitive corrective actions to compel timely completion of the work and place you back in the apartment after the repairs which the DHCR does not have. Also, the failure to cooperate in the repairs as needed has the same consequence in both proceedings.

On February 13, 2013, DHCR's inspector conducted an inspection of the subject apartment. DHCR's Inspector's report shows that the Owner's representatives were present to attend to

minor repairs and the tenant, management representative, superintendent and handyman were present as well. The following day, Owner sent a letter claiming that the front doorbell had been replaced, the leak under the kitchen sink was fixed, there was no leak under the bathroom sink and the ceiling in the bathroom was plastered. It is undisputed that all non-structural repairs to the subject apartment have been made.

In a letter dated February 22, 2013, tenant notified DHCR that the Civil Court action was marked off by Judge Cheryl J. Gonzales in order for tenant "to pursue his claims at DHCR, and may be restored within one year" and that DHCR now had "jurisdiction" to address the structural problems with the floors in the subject apartment. Tenant also attached the work permits from the DOB and claimed that the contractor, Liberty Management, did not require tenants to vacate in order to do the repairs. The letter also attempted to refute the Owner's claim that there was any finding by the Civil Court that tenant had to vacate the subject apartment because the transcript from the hearing was not a final order.

On March 14, 2013, DHCR received a letter from the Owner reiterating tenant's claim that the Civil Court action had been marked off and stating its position that the tenant must relocate to another apartment in order for the Owner to do the necessary repairs to the floors. The Owner also included the transcripts from hearings in the underlying Civil Court action which revealed that a non-payment proceeding is pending between tenant and the Owner due to tenant allegedly being in arrears for over $20,000. Thereafter, on April 20, 2013, DHCR issued an Order and Opinion finding that the Civil Court action was a better forum for tenant to pursue the repairs of the flooring and that since the Owner cooperated with the non-structural repairs of the subject apartment, it affirmed the Rent Administrator's decision denying the reduction of services complaint. Specifically, the DHCR held, in pertinent part, that

> At this point, the Deputy Commissioner finds that the Division may not undertake the task of overseeing the structural related repairs that are involved in this case, especially since there is no evidence that a vacate order has been issued, and because the tenant has initiated a court case and has indicated before the presiding judge an unwillingness to remove himself from the subject apartment unless certain conditions are met.
>
> The Rent Stabilization Law and Code does not authorize the Division to direct the owner to make repairs while the tenant remains in the apartment and oversees such work. In this regard, the Court in the [Civil Court] case has already found that the remedial work can be performed only while the subject apartment is vacant, as to do otherwise would place the tenant in a position of peril...
>
> Accordingly, since the evidence in this matter shows that the owner has cooperated with the no-access inspections during the course of this remand proceeding and has completed repairs, to the extent possible under the circumstances, and since the tenant has the option of pursuing remedies through either the courts or the administrative framework of the [DOB], the Deputy Commissioner finds that the Rent Administrator's initial determination to deny relief was correct and should be upheld.

Tenant then filed the instant Article 78 proceeding challenging the DHCR's decision to affirm the Rent Administrator's denial of tenant's decreased rent request.

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 DHCR's Final Order affirming the Rent Administrator's denial of a rent reduction for tenant was made on a rational basis. DHCR based its determination on the inspection conducted on February 13, 2013, which indicated that the non-structural repairs had been fixed. Specifically, the leaks from the sinks had been fixed, the bathroom ceiling had been plastered, the doorbell was fixed and there were no defects in the entrance door. Additionally, DHCR rationally upheld the Rent Administrator's denial of a rent-reduction due to structural repairs on the ground that the structural issues could not be addressed by DHCR due to tenant's refusal to vacate the subject apartment while the renovations are conducted and that the structural issues are more properly dealt with in Civil Court. Although petitioner is correct in his assertion that the transcripts relied upon by respondent are not final orders, the findings made by the Civil Court judge suggest that it would be dangerous for petitioner to remain in the subject apartment while significant renovations are made to the floors of his apartment. Additionally, pursuant to Real Property Law ("RPL") § 235-b, the Civil Court is the preferred court for addressing the more significant deprivation of services to protect tenants from "any conditions which would be dangerous, hazardous or detrimental to their life, health or safety" and to afford a remedy for such deprivation. RPL § 235-b.

Although tenant submitted additional documentation in support of his claim that Civil Court Judge Gonzales indicated that he should not have to relocate to a smaller apartment while structural repairs are conducted, these are facts and information that were not before DHCR

when it issued its April 30, 2013 Order. The court cannot consider the submission and consideration of evidence outside of the Administrative Record. "The role of a court in reviewing a decision of an administrative agency...is limited with the standard of review being whether the administrative determination was in violation of a lawful procedure or was affected by an error of law or was arbitrary and capricious and without a rational basis in the administrative record." *Rowan v. NYC HPD*, 21 Misc.3d 1235 at *3 (Sup. Ct. N.Y. Ct., 2011); *see also Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974). "The court cannot conduct a de novo review of the facts and circumstances or substitute the court's judgment for that of the agency's determination" as judicial review of administrative determinations is confined to the facts and record adduced before the agency. *Rowan*, 21 Misc.3d *3; *see also Greystone Management Corp. v. Conciliation and Appeals Bd.*, 94 A.D.2d 614, 616 (1st Dept 1983), *affd.* 62 N.Y.2d 763 (1994). Even if this court were to consider tenant's submissions with respect to Justice Gonzales' comments, the submissions only demonstrate that Civil Court is better capable of assisting tenant with relocating to an apartment favorable to him so that the structural repairs may be conducted.

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: 10/9/13

Enter: ______CMK______
J.S.C.

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