Portofino Realty Corp. v Apartment Owners Advisory Council
2017 NY Slip Op 32773(U)
May 31, 2017
Supreme Court, Kings County
Docket Number: 501554/2014
Judge: Richard Velasquez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 31st day of May, 2017.

PRESENT:

HON. RICHARD VELASQUEZ,
Justice.
-----------------------------------X

PORTOFINO REALTY CORP., PROMETHEUS REALTY CORP., SYLVAN TERRACE REALTY LLC, WINDSOR REALTY LLC, UNICORN 151 CORP., TUSCAN REALTY CORP., 90 STATE STREET ASSOCIATES, INC., 274 HENRY ASSOCIATES, INC., 141 WADSWORTH, LLC, RENT STABILIZATION ASSOICATION OF N.Y.C., INC., COMMUNITY HOUSING IMPROVEMENT PROGRAM, INC., AND THE SMALL PROPERTY OWNERS OF NEW YORK, INC.,

Plaintiffs,

and

APARTMENT OWNERS ADVISORY COUNCIL, ADVISORY COUNCIL OF MANAGING AGENTS, THE BUILDING AND REALTY INSTITUTE OF WESTCHESTER & THE MID-HUDSON REGION, STEPPING STONES ASSOCIATES, L.P., AND DEROSA BUILDERS INC.,

Intervenor-Plaintiffs,

- against -

Index No. 501554/14

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

Defendants,

and

MAKE THE ROAD NEW YORK, NEW YORK STATE TENANTS AND NEIGHBORS, AND THE ASSOCIATION FOR NEIGHBORHOOD HOUSING AND DEVELOPMENT,

Intervenor-Defendants.

-----------------------------------X

The following e-filed papers read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	181-199 202 206-248 267-268
Opposing Affidavits (Affirmations)	258-259 264-265 251-254 261-263
Reply Affidavits (Affirmations)	270-272 274-275
Memoranda of Law	200 249 257 269 276 203-205 255 260 273

Upon the foregoing papers, in this action for declaratory and injunctive relief, defendants New York State Division of Housing and Community Renewal (DHCR) and Darryl C. Towns (Commissioner Towns), as the Commissioner of DHCR, (collectively, defendants) move, under motion sequence number six, pursuant to CPLR 3212, for summary judgment dismissing the complaint in its entirety as against them, with prejudice, based upon the grounds that there is no triable issue of fact and that they are entitled to judgment as a matter of law. Plaintiffs Portofino Realty Corp., Prometheus Realty Corp., Sylvan Terrace Realty LLC, Windsor Realty LLC, Unicorn 151 Corp., Tuscan Realty Corp., 90 State Street Associates, Inc., 274 Henry Associates, Inc., 141 Wadsworth, LLC, Rent Stabilization Association of N.Y.C., Inc., Community Housing Improvement Program, Inc., and The Small Property Owners of New York, Inc. (collectively, plaintiffs) move, under motion sequence

number seven, for an order, pursuant to CPLR 3212, granting them summary judgment in their favor.

FACTS AND PROCEDURAL BACKGROUND

Nine of the plaintiffs, i.e, Portofino Realty Corp., Prometheus Realty Corp., Sylvan Terrace Realty LLC, Windsor Realty LLC, Unicorn 151 Corp., Tuscan Realty Corp., 90 State Street Associates, Inc., 274 Henry Associates, Inc., 141 Wadsworth, LLC, are landlords that own or manage rent-stabilized or formerly rent-stabilized buildings in New York City. The other three plaintiffs, i.e., Rent Stabilization Association of N.Y.C., Inc., Community Housing Improvement Program, Inc., and Small Property Owners of New York, Inc., are real estate industry membership organizations whose members are landlord-owners and managers of rent-regulated properties throughout New York City, and Nassau, Westchester, and Rockland counties. DHCR is the executive branch agency that is responsible for the supervision, maintenance, and development of low- and moderate-income housing in New York State. Among its responsibilities, DHCR supervises rent-stabilized apartments, promulgates regulations concerning rent stabilization, and enforces the rent stabilization laws,[1] namely, the Rent Stabilization Law of 1969 (Administrative Code of City of NY § 26-

[1]The rent stabilization laws include the Rent Stabilization Law of 1969 (Administrative Code of City of NY § 26-501 et seq.), which generally governs New York City, and the Emergency Tenant Protection Act of 1974 (McKinney's Uncons Laws of NY § 8621 et seq.), which extends the Rent Stabilization Law's protections to municipalities in Nassau, Rockland, and Westchester counties. The Emergency Tenant Protection Act and its implementing regulations, the Emergency Tenant Protection Regulations (McKinney's Uncons Laws of NY § 2500.1 et seq.) are substantially identical to the Rent Stabilization Law and its implementing regulations, the Rent Stabilization Code (9 NYCRR § 2520 et seq.). For ease of reference, the

501 et seq.) and the Emergency Tenant Protection Act of 1974 (McKinney's Uncons Laws of NY § 8621 et seq.) (collectively, the rent stabilization laws).

The New York State Legislature has charged DHCR with enacting regulations to implement the rent stabilization laws and its policies (*see* Rent Stabilization Law of 1969 [Administrative Code of City of NY] [RSL] § 26-511 [b]). The rent stabilization laws direct that the objectives of the regulations adopted by DHCR are to, among other things, "provide[] safeguards against unreasonably high rent increases," "protect[] tenants and the public interest," "require[] owners not to exceed the level of lawful rents as provided by this law," and "insure that the level of fair rent increase established under this law will not be subverted and made ineffective" (RSL § 26-511 [c] [1], [2], [5]). The regulations promulgated by DHCR pursuant to this legislative grant of authority constitute the Rent Stabilization Code (9 NYCRR § 2520 et seq.) (RSC), which "may be amended from time to time" (RSL § 26-516 [b]).

The legislature has granted DHCR broad authority to enforce the RSL. DHCR is empowered, among other things, "to administer oaths, issue subpoenas, conduct investigations, make inspections and designate officers to hear and report" (RSL § 26-516 [f]). DHCR may take action on its own initiative to penalize owners who collect rent overcharges from their tenants (*see* RSL § 26-516 [a]). DHCR may commence proceedings

---

court shall cite only to the Rent Stabilization Law and the Rent Stabilization Code, while its reasoning and conclusions apply equally to the Emergency Tenant Protection Act and the Emergency Tenant Protection Regulations.

in the Supreme Court to enjoin violations of the RSL, the RSC, or orders issued pursuant thereto (*see* RSL § 26-516 [e]). "In addition to issuing the specific orders provided for by other provisions of [the RSL], [DHCR] . . . [is] empowered to enforce [the RSL] and the [RSC] by issuing, upon notice and a reasonable opportunity for the affected party to be heard, such other orders as it may deem appropriate" (RSL § 26-156 [b]).

In 2011, the New York State Legislature passed the Rent Act of 2011, L 2011, ch 97, part B, effective June 24, 2011, which amended the rent stabilization laws to make them more protective of tenants' rights. The Rent Act of 2011 limited the number of times a vacancy rent increase can be taken for an apartment in a single year to only once per year, reduced the percentage of individual apartment improvement (IAI) costs that an owner can use for purposes of raising the legal rent for the affected apartment from 1/40th to 1/60th in buildings with more than 35 units, increased the rent threshold for luxury deregulation from $2,000 to $2,500, and increased the income threshold for luxury deregulation from $175,000 to $200,000. The Rent Act of 2011 also reaffirmed DHCR's statutory authority to "promulgate rules and regulations to implement and enforce all provisions of this act and any law renewed or continued by this act" (L 2011, ch 97, part B, § 44). In 2012, the Tenant Protection Unit (TPU) was created as an investigative and enforcement unit within DHCR. By order dated May 14, 2012, then DHCR Commissioner and Chief Executive Officer Towns, pursuant to Public Housing Law § 11 and § 12 and Public Officers Law § 9,

designated Richard R. White as Deputy Commissioner for TPU to investigate and prosecute violations of the rent stabilization laws.

DHCR promulgated amendments, effective January 8, 2014, to the RSC (the 2014 Amendments). The 2014 Amendments addressed the changes made by the Rent Act of 2011. In addition, the 2014 Amendments further revised the RSC to enhance tenant protections against fraud and abuse which result in unlawful and excessive rents.

The 2014 Amendments codified TPU (*see* RSC § 2520 [o]). They also set forth exceptions to the four-year statute of limitations for reviewing rent records (the Four-Year Rule) (*see* RSC § 2526.1 [a] [2], § 2531.2 [c], § 2526 [a] [2] [ix]). In addition, they amended the RSC with respect to, among other things, the default rule, rent reductions for failing to provide services, rent increases for major capital improvements (MCIs), lease riders, and the filing and amendment of rent registration statements.

TPU carries out its duty to investigate and prosecute rent overcharge violations by seeking voluntary compliance and by bringing enforcement actions. TPU investigates violations using DHCR's statutory authority to "administer oaths, issue subpoenas, conduct investigations, [and] make inspections" (RSL § 26-516 [f]). TPU selects rent-stabilized apartments to be audited by it by examining information provided in the annual rent registrations filed with DHCR by property owners. Upon making this examination, TPU chooses which rent-stabilized apartments to audit where there has been a significant increase

in rent from one year to the next, which has occurred after a vacancy, and which the owner based, in whole or in part, on an asserted IAI.

TPU initiates its audit by sending an Audit Letter to the owner, which requests that the owner submit documentation to substantiate the rent increase and gives the owner 30 days to comply. If TPU determines that the IAI rent increase was not fully justified, it sends the owner a Notice of Audit Determination Letter, which lists the items that do not warrant inclusion and outlines the steps that the landlord must take to comply with its audit findings. If the owner does not comply, TPU is authorized to bring a rent overcharge complaint before DHCR's Office of Rent Administration (ORA), which issues binding administrative orders subject to judicial review, or directly in the Supreme Court. If the property owner does not respond to the initial TPU Audit Letter within 30 days, TPU sends the owner an IAI Investigation-Final Warning Letter, which reiterates the steps that the owner must take to comply with its audit request, and the owner is given 30 days to respond. If the owner still does not respond, TPU sends the owner a Notice of Audit Determination (Default) Letter, which states that the owner must immediately refund the amount overcharged based on its audit findings and re-register the rent in the correct amount, and that if the owner fails to comply, it will initiate an overcharge complaint with ORA, which may result in a finding of default and an award of treble damages.

On February 24, 2014, plaintiffs filed this action against defendants. Plaintiffs challenge DHCR's adoption of the 2014 Amendments as being unconstitutional. Plaintiffs

seek to eliminate TPU and strike down the 2014 Amendments in their entireties. Specifically, plaintiffs seek a declaratory judgment that the 2014 Amendments are invalid, and a permanent injunction barring DHCR from enforcing the 2014 Amendments and prohibiting TPU from conducting further investigations or issuing further determinations. Plaintiffs' claims are premised on the due process clause of the New York State Constitution and the separation of powers doctrine.

In their complaint, which contains 15 causes of action, plaintiffs allege that the 2014 Amendments, which, among other things, codified the creation of TPU and codified exceptions to the Four-Year Rule, are unconstitutional and invalid because they: (1) are inconsistent with the statutes upon which they are based, (2) constitute legislative policy-making and, therefore, violate the constitutional principle of separation of powers, (3) violate property owners' due process rights, and (4) were not adopted in compliance with the State Administrative Procedure Act (SAPA). Specifically, plaintiffs, in the causes of action set forth in their complaint, allege that TPU violates their due process rights under the New York State Constitution and that the creation of TPU violates the separation of powers doctrine. They further allege that the amended rental history review regulations, the amended default rule regulation, the amended regulations governing rent reductions for failing to provide services, the amended regulations governing rent increases for MCIs, the amended regulation governing first rents, the amended regulation requiring landlords to apply to DHCR to amend rent registration statements for prior years, the amended regulation barring

rent increases to landlords who fail to properly file an annual registration statement, the amended regulation governing lease riders, and the amended regulation making it unlawful to file false documents with DHCR violate the separation of powers doctrine. They additionally allege that the amended regulations violated SAPA, and seek a permanent injunction.

By a Stipulation Consenting to Intervenor Parties, so-ordered on May 5, 2014, Apartment Owners Advisory Council, Advisory Council of Managing Agents, The Building and Realty Institute of Westchester & The Mid-Hudson Region, Stepping Stones Associates, L.P., and DeRosa Builders, Inc. were permitted to intervene in this action as intervenor-plaintiffs, and Make the Road New York, New York State Tenants and Neighbors, and The Association for Neighborhood Housing and Development were permitted to intervene in this action as intervenor-defendants.

By a decision and order dated October 27, 2014, the court denied a motion by plaintiffs for a preliminary injunction enjoining defendants from enforcing the 2014 Amendments, and enjoining TPU from auditing the owners of rent-stabilized properties and issuing determination letters, but permitted plaintiffs to have expedited limited discovery. That decision and order also denied a cross motion by defendants to dismiss plaintiffs' complaint.

On September 16, 2016, defendants filed their instant motion for summary judgment, and plaintiffs filed their instant motion for summary judgment.

DISCUSSION

Issue of Whether TPU Violates Landlords' Due Process Rights

Plaintiffs argue that the creation of TPU, which was codified in the 2014 Amendments, violates their due process rights. Article I, section 6, of the New York State Constitution provides that: "[n]o person shall be deprived of life, liberty or property without due process of law." "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner" (*Mathews v Eldridge*, 424 US 319, 333 [1976] [internal quotation marks omitted]).

In order to determine whether administrative procedures provide plaintiffs with a constitutionally adequate opportunity to be heard, the court must consider the following three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail" (*id.* at 335).

Plaintiffs argue that they have a property interest in the rents that they charge their tenants and a protectable statutory right to charge the maximum legal rent permitted by the rent stabilization laws. They contend that TPU poses a threat to this property interest and risks erroneously depriving them of this interest through the procedures used by it. Specifically, they assert that they are deprived of the safe harbor provision set forth in

Amended Policy Statement 89-2, which, prior to the creation of TPU, afforded an owner of a rent-regulated property the ability to avoid a presumption of willfulness and a treble damages penalty in an overcharge proceeding brought against him or her if he or she refunded the alleged overcharge amount to the tenant after an overcharge complaint was filed by the tenant.

Plaintiffs further assert that the government would not be burdened by additional procedural safeguards to protect their interests since ORA previously existed and functioned without TPU. They state that TPU should be eliminated since it does not possess any powers that ORA does not possess, and because TPU is only being used to avoid ORA's existing adjudicatory process. They point out that TPU investigators very infrequently speak to potential witnesses, such as contractors, about the IAI rent increases, and, instead, rely upon correspondence with the owner. They also point to the fact that TPU does not hold hearings or permit any internal administrative appeal. They maintain that TPU's audit practices, therefore, do not comport with due process requirements.

Initially, the court notes that plaintiffs could not have been deprived of their property rights by a TPU audit or investigation since TPU does not issue legally binding administrative orders or make any findings that could deprive landlords of their legal rights. Rather, TPU performs a preliminary audit function that is followed by subsequent review procedures. A landlord who does not voluntarily comply with the findings of TPU will be referred to ORA for an independent adjudication. This includes the opportunity to submit

additional evidence in support of a claimed IAI. In this regard, TPU's audit findings are not binding on ORA, and since ORA determines rent overcharge proceedings independently of TPU, TPU's audits cannot implicate the due process clause.

Plaintiffs do not dispute that in rent overcharge proceedings, ORA provides landlords with the required due process protection. Instead, plaintiffs argue that TPU does not follow the same procedures as ORA before determining whether an audit warrants referring a matter to ORA for a formal rent overcharge proceeding. However, since TPU's audit findings are not binding on ORA, which makes the actual determination, there can be no due process requirement that TPU must follow the same procedures as performed by ORA before determining whether its audit warrants referring a matter to ORA for a rent overcharge proceeding. The ORA administrator is free to agree or disagree with TPU's recommendation and, even if ORA agrees with TPU's recommendation and orders the landlord to compensate a tenant for a rent overcharge, the landlord may petition for administrative review of that determination. Additionally, the landlord has the right to challenge the final judgment of ORA, whether derived from a TPU recommendation or otherwise, by filing a CPLR article 78 petition in the Supreme Court. The existence of this review procedure provides plaintiffs with due process (*see e.g. State of New York v Dennin*, 17 AD3d 744, 746 [3d Dept 2005], *lv dismissed* 5 NY3d 824 [2005] ["The existence of CPLR article 78 review . . . clearly provides due process"]).

Plaintiffs argue, however, that despite defendants' claim that the audit findings are not binding, TPU's audit findings actually deprive them of an important due process right because if they, as owners of rent-regulated properties, fail to comply with TPU's determination, they will lose the safe harbor, set forth in Amended Policy Statement 89-2, from the presumption of willfulness and treble damages. The safe harbor in Amended Policy Statement 89-2 is a regulatory policy statement, promulgated by DHCR, which, under certain circumstances, effectively curtails the statutory presumption of willfulness and treble damages. This safe harbor provides that a landlord's "burden of proof in establishing lack of willfulness shall be deemed to have been met, and, therefore, the treble damages penalty is not applicable" where: "an owner adjusts the rent on his or her own within the time afforded to furnish DHCR with an initial response when initially served with the overcharge complaint *initiated by the tenant*, and submits proof to the DHCR that he or she has tendered, in good faith to the tenant, a full refund by check or cash of all excess rent collected, plus interest as provided by CPLR Section 5004" (emphasis added). It further provides that "[r]efunds tendered after the initial period in which to respond will be reviewed in conjunction with other evidence to determine the issue of willfulness."

As set forth above, the regulatory safe harbor in Amended Policy Statement 89-2, by its terms, applies only to complaints "initiated by the tenant," and, therefore, it does not apply to complaints referred to DHCR by TPU. Furthermore, Amended Policy Statement 89-2, which was issued on April 26, 2013, now expressly states that "the burden of proof in

establishing a lack of willfulness and no related treble damages . . . will not be met if the overcharge case was initiated by DHCR and had been preceded by an investigation by DHCR or another government agency, during which the owner, having been given notice, failed to take corrective action and issue a refund." Thus, DHCR's Amended Policy Statement 89-2, provides, in effect, that the safe harbor that allows landlords to avoid a finding of willfulness by cooperating with ORA is unavailable in cases brought by TPU.

Plaintiffs contend that they are deprived of the safe harbor due to TPU's audit findings, and, therefore, TPU's audit findings are determinative on the issue of whether an overcharge was willful and warrant the imposition of treble damages, and that this demonstrates that they are being denied due process. Plaintiffs argue that this leaves owners of rent-regulated properties with a "Hobson's Choice" between complying with TPU's determinations even if they believe that they are incorrect, or losing the safe harbor rights in Amended Policy Statement 89-2. They claim that as a result, owners of rent-regulated properties are effectively compelled to cooperate with TPU and comply with the remedial measures ordered by TPU before TPU files an overcharge complaint against them. They point to the deposition of Gregory C. Fewer (Fewer), TPU's bureau chief, wherein he testified that the purpose of adding the amended language in Amended Policy Statement 89-2 was to "give teeth to the TPU audit" (Fewer's Dep. Transcript at 364-365).

Significantly, Amended Policy Statement 89-2 expressly states that it was "issued to clarify DHCR's position on the application of treble damages upon the finding of a rent

overcharge pursuant to the [RSL]." RSL § 26-516 (a), as amended by the Omnibus Housing Act of 1983, provides that an owner is presumptively liable to a tenant for treble damages on a rent overcharge, unless the owner can establish by a preponderance of the evidence that the overcharge was not willful. RSL § 26-516 (a) provides as follows:

> "Subject to the conditions and limitations of this subdivision, any owner of housing accommodations who, upon complaint of a tenant, or of the state division of housing and community renewal is found by the state division of housing and community renewal, after a reasonable opportunity to be heard, to have collected an overcharge above the rent authorized for a housing accommodation subject to this chapter shall be liable to the tenant for a penalty equal to three times the amount of such overcharge. If the owner establishes by a preponderance of the evidence that the overcharge was not willful the state division of housing and community renewal shall establish the penalty as the amount of the overcharge plus interest" (*see also Matter of Graham Ct. Owners Corp. v Division of Hous. & Community Renewal*, 71 AD3d 515, 516 [1st Dept 2010] ["Treble damages were properly imposed because the owner failed to establish that its overcharges were not willful"]).

Amended Policy Statement 89-2 constitutes a regulatory policy exception to this statutory presumption since it provides that in certain circumstances, it will "deem" an overcharge to be "not willful," even if the overcharge was, in fact, willful and the landlord was otherwise subject to treble damages by statute. As explained by defendants, the justification for this regulatory exception to the statutory presumption is to encourage landlords to correct a rent overcharge on their own volition soon after a complaint is brought to DHCR's attention. A landlord who knows that the complaint is valid and that his or her overcharge was willful may avoid statutory treble damages that would otherwise apply by

swiftly remedying the violation. Conversely, a landlord who believes the current rent is appropriate may proceed to file an answer and contest the alleged violation. By contesting the violation, the landlord loses the safe harbor, but, even if his or her challenge is unsuccessful, he or she can still avoid treble damages by proving that the violation was not willful.

While the safe harbor is unavailable in cases brought by TPU, this is wholly consistent with the purpose of the safe harbor. As defendants explain, in cases preceded by an audit by TPU, the owner was notified of a rent overcharge complaint through an earlier investigation, and already was given the opportunity to correct the violation during the entire course of that audit proceeding up until the time that TPU initiates an overcharge complaint before ORA for adjudication, but declined to correct it. Amended Policy Statement 89-2 expressly limits the safe harbor to owners that are required to respond to tenant-initiated complaints filed directly with ORA, and had no prior opportunity to substantiate the challenged rent. By the terms of Amended Policy Statement 89-2, a landlord that fails to cooperate with TPU cannot take advantage of the safe harbor by subsequently cooperating with ORA. John Lance (Lance), who is DHCR's Bureau Chief of the Overcharge and Luxury Decontrol Bureau within ORA, explains that the rationale for this exception to the safe harbor is that these owners have been offered, but failed to take advantage of, several opportunities to submit evidence supporting the rent charged by them to TPU. Lance notes that ORA, in practice, has not enforced the exception to the safe harbor that is set forth in

Amended Policy Statement 89-2, and that owners who did not refund the excess rent as calculated by TPU still have been able to take advantage of the safe harbor and avoid treble damages by cooperating with ORA once a rent overcharge proceeding has been filed. In any event, ORA determines whether to assess treble damages based on the facts of each case, including the facts and documents that owners may submit to ORA, and the safe harbor set forth in the Amended Policy Statement 89-2 does not override ORA's statutory authority and duty to render overcharge determinations based on the facts of each case.

Plaintiffs cannot be deprived of due process based upon the fact that the regulatory safe harbor exception to statutory law does not apply where the overcharge complaint is initiated by TPU since in those cases, the landlords' conduct remains governed by the underlying statutory scheme of the RSL. Owners of rent-stabilized properties do not have a property right based on this administrative exception to an otherwise applicable statutory remedy. Moreover, if a landlord elects to challenge an overcharge complaint made to ORA referred by TPU and is unsuccessful, the landlord can still "demonstrate[e] that the overcharge . . . was not willful" and avoid treble damages. Amended Policy Statement 89-2 specifically provides that pursuant to the RSL, the owner can rebut the presumption of willfulness by showing non-willfulness of the overcharge by a preponderance of the evidence. As set forth by Amended Policy Statement 89-2, "[w]hen an owner receives notice that an overcharge has been determined and treble damages are about to be imposed, he or she will be notified to submit evidence within twenty-one (21) days to prove that the

Thus, even if an owner fails to comply with the TPU process, he or she is still afforded the opportunity to challenge both the overcharge itself and the willfulness of the violation before ORA, and ORA can still consider the landlord's evidence that an overcharge was not willful.

As explained by Lance, TPU does not make willfulness determinations or recommend treble damages in connection with the rent overcharge cases it refers to ORA, but, rather ORA conducts a de novo review of each rent overcharge case referred by TPU. In each case where ORA finds that an overcharge occurred, ORA independently determines whether treble damages should be assessed. Notably, statistics for "ORA Determinations of Overcharge Cases Initiated by TPU as of 8/04/16" show that ORA has denied a number of overcharge findings referred to it by TPU after the owner submitted additional evidence, and, in other cases referred by TPU, ORA has affirmed the overcharge, but did not award treble damages.

Thus, the creation of TPU does not deprive plaintiffs of due process since the landlord is given a fair and meaningful opportunity to present evidence on the issue of the willfulness of the overcharge prior to DHCR's final determination (*see Matter of East 163rd St. v New York State Div. of Hous. & Community Renewal*, 4 Misc 3d 169, 173 [Sup Ct, Bronx County 2004]). Consequently, plaintiffs' claims based upon a violation of due process are rejected and must be dismissed (*see* CPLR 3212 [b]).

Issue of Whether the Creation of TPU and the 2014 Amendments Violated the Separation of Powers Doctrine

Plaintiffs argue that the 2014 Amendments violate the separation of powers doctrine. They point to the principle that "[a]dministrative agencies can only promulgate rules to further the implementation of the law as it exists," but "they have no authority to create a rule out of harmony with the statute" (*Kahal Bnei Emunim & Talmud Torah Bnei Simon Israel v Town of Fallsburg*, 78 NY2d 194, 204 [1991], *rearg denied* 78 NY2d 1008 [1991] [internal quotation marks omitted]; *see also State Div. of Human Rights v Genesee Hosp.*, 50 NY2d 113, 118 [1980]). "If an agency regulation is 'out of harmony' with an applicable statute, the statute must prevail" (*Weiss v City of New York*, 95 NY2d 1, 5 [2000]; *see also Finger Lakes Racing Assn. v New York State Racing & Wagering Bd.*, 45 NY2d 471, 480 [1978]).

Plaintiffs argue that the 2014 Amendments are out of harmony with the rent stabilization statutes. Specifically, plaintiffs contend that the 2014 Amendments are inconsistent with the rent stabilization laws with respect to the Four-Year Rule. In this regard, the court notes that the Four-Year Rule is both a four-year statute of limitations applicable to rent overcharge claims and an evidentiary rule which generally prohibits consideration of an apartment's rental history more than four years prior to the commencement of an overcharge proceeding.

With respect to the statute of limitations component of the Four-Year Rule, RSL § 26-516 (a) provides that "[w]here the amount of rent set forth in the annual rent registration

statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter" (*see also* CPLR 213-a [providing that "[a]n action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced"]). This component of the Four-Year Rule was not changed by the 2014 Amendments. RSC § 2526.1 (a) (2) provides that "[a] complaint pursuant to this section must be filed with the DHCR within four years of the first overcharge alleged, and no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed."

With respect to the evidentiary component of the Four-Year Rule, RSL § 26-516 (g) provides that "[a]ny owner who has duly registered a housing accommodation pursuant to section 26-517 of this chapter shall not be required to maintain or produce any records relating to rentals of such accommodation for more than four years prior to the most recent registration or annual statement for such accommodation" (*see also* CPLR 213-a [providing that "this section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action"]). RSC § 2526.1 (a) (2) (ii) provides that "subject to subparagraphs (iii), (iv), (v),

(vi), (vii), (viii) and (ix) of this paragraph, the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section, and section 2522.3 of this Title, shall not be examined; and examination of a rent registration for any year commencing prior to the base date, as defined in section 2520.6 (f) of this Title,[2] whether filed before or after such base date shall be precluded." The 2014 Amendments set forth exceptions to consideration of an apartment's rental history more than four years prior to the filing of an overcharge proceeding. These exceptions are contained in RSC § 2526.1 (a) (2) (iii), (iv), (v), (vi), (vii), (viii) and (ix) and in RSC § 2521.2 (c).

Plaintiffs challenge the 2014 Amendments with respect to the Four-Year Rule, which allow DHCR to review more than four years of rent records when the landlord claims that he or she was charging a preferential rent.[3] This amendment to the Four-Year Rule is codified at RSC § 2526.1 (a) (2) (viii), and provides that "for the purposes of establishing the existence or terms and conditions of a preferential rent under section 2521.2 (c) of this Title, review of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section shall not be precluded." In addition, with respect to preferential rents, the 2014 Amendments, in RSC § 2521.2 (c), provides that "[w]here the amount of the legal regulated rent is set forth either in a vacancy

---

[2]The base date is generally the date four years prior to the date of the filing of the overcharge complaint (RSC § 2520.6 [f] [1]).

[3]Where a landlord charges a rent-stabilized tenant less than what is legally permissible due to market conditions or other reasons, this is a "preferential rent" (RSC § 2521.2 [a]).

lease or renewal lease where a preferential rent is charged, the owner shall be required to maintain, and submit where required to by DHCR, the rental history of the housing accommodation immediately preceding such preferential rent to the present which may be prior to the four-year period preceding the filing of a complaint." Plaintiffs also challenge RSC § 2526.1 (a) (2) (ix), which provides that "for the purpose of establishing the legal regulated rent pursuant to section 2526.1(a) (3) (iii) of this Title where the apartment was vacant or temporarily exempt on the base date, review of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section shall not be precluded."

Plaintiffs contend that the 2014 Amendments concerning the Four-Year Rule improperly permit DHCR to look beyond four years any time where there is a preferential rent indicated in an apartment's rental history, even if it were longer than four years ago and from a prior tenancy, for purposes of establishing the validity of the base date rent. They also contend that the 2014 Amendments which permit the DHCR to do the same where the apartment was vacant or temporarily exempt on the base date is improper. They argue that nothing in the rent stabilization laws or the Rent Act of 2011 permits these exceptions, and that these exceptions are, therefore, in conflict with the rent stabilization laws.

However, with respect to the rent stabilization laws, "the legislature has provided DHCR a broad mandate to promulgate regulations in furtherance of the . . . rent stabilization laws" (*Rent Stabilization Assn. of N.Y. City v Higgins*, 83 NY2d 156, 168 [1993], *cert denied*

512 US 1213 [1994]). The DHCR must follow the procedural requirements set by the Legislature, but otherwise has expansive authority to carry out its mandate to adopt a RSC that "provides safeguards against unreasonably high rent increases and, in general, protects tenants and the public interest" (RSL § 26-511 [c] [1]). Indeed, the Court of Appeals has repeatedly recognized that DHCR's promulgation of rent regulations will "'inevitably require some changes in the legal relationship between landlords and tenants'" (*see Higgins*, 83 NY2d at 168, quoting *Matter of Versailles Realty Co. v New York State Div. of Hous. & Community Renewal*, 76 NY2d 325, 328 [1990], *rearg denied* 76 NY2d 890 [1990]).

Plaintiffs further argue that the Rent Act of 2011 did not expressly authorize these exceptions to the Four-Year Rule since it did not mention them. However, the Rent Act of 2011 expressly authorized DHCR to issue regulations pursuant to any law renewed or continued by this Act, including the rent stabilization laws. Thus, the mere fact that the Rent Act of 2011 did not expressly refer to the Four-Year Rule did not subvert DHCR's authority, pursuant to RSL § 26-516 (b), to issue and amend rent regulations.

Moreover, these 2014 Amendments to the Four-Year Rule are consistent with well established case law which has created exceptions to the Four-Year Rule. These 2014 Amendments codify this case law and do not violate the intent of the legislature. While rent overcharge claims are generally subject to a four-year statute of limitations, pursuant to RSL § 26-516 (a), CPLR 213-a, and RSC § 2526.1(a) (2), courts have held that events dating back

beyond the four-year statute of limitations may properly be considered in various circumstances.

With respect to preferential rents, courts have held that "[c]onsideration of the rental history [of a rent-stabilized apartment] prior to the four-year statutory period is . . . permissible to determine the existence of a preferential rent and whether it was a 'term and condition' of the original lease . . . that continues until the tenancy ends" (*2115 Washington Realty, LLC v Hall*, 55 Misc 3d 1213[A], 2017 NY Slip Op 50573[U], *4 [Civ Ct, Bronx County 2017]; *see also Matter of 218 E. 85th St., LLC v Division of Hous. & Community Renewal*, 23 Misc 3d 557, 559-560 [Sup Ct, NY County 2009]).

In *Matter of Sugihara v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (13 Misc 3d 1239[A], 2006 NY Slip Op 52186[U], *7 [Sup Ct, NY County 2006]), the Supreme Court, New York County, found that DHCR's consideration of a 1991 lease and lease rider would not violate the Four-Year Rule. It noted that RSC § 2522.5 (g) (1) requires that each renewal lease "shall be on the same terms and conditions as the expired lease" (*id.*). It reasoned that "[a]s a "term and condition' of the original lease, the 1991 lease rider, by virtue of [RSC §] 2522.5 (g) (1), is incorporated into each and every one of [the tenant's] subsequent renewal leases, including the renewal lease in issue and the immediately preceding one" (*id.*). It then held that "since the 1991 rider with the preferential rent was incorporated into all previous renewal leases, DHCR's consideration of the 1991 rider would not violate the four-year rule" (*id.*).

In *560-568 Audubon Realty Inc. v Rodriguez* (54 Misc 3d 1226[A], 2017 NY Slip Op 50323[U], *3 [Civ Ct, NY County 2017]), the Civil Court, New York County, in granting a tenant's motion to vacate a stipulation of settlement and the judgment and warrant contained therein, found it appropriate to consider rent increases more than four years prior to the interposition of the rent overcharge defense where the use of unregistered preferential rents, along with other factors, supported an 'arguably meritorious' rent overcharge cause of action (*see also Matter of Coffina v New York State Div. of Hous. & Community Renewal*, 61 AD3d 404, 404 [1st Dept 2009], *lv denied* 13 NY3d 702 [2009] [finding that the language of an original lease from 1994 supported the argument of the tenant therein that "the parties intended the legal rent for the subject apartment to be the rent stated in that lease, plus any statutory guideline increases, for the duration of the tenancy"]).

Thus, DHCR, in RSC § 2526.1(a)(2)(viii) of the 2014 Amendments, has codified this exception to the Four-Year Rule for the purposes of establishing the existence or terms and conditions of a preferential rent. It has also codified, in RSC § 2521.2 (c), that where such a claim is raised, the landlord may be "required to maintain, and submit where required to by DHCR, the rental history of the housing accommodation immediately preceding such preferential rent to the present which may be prior to the four-year period preceding the filing of a complaint." Therefore, these 2014 Amendments are in accordance with existing case law precedent.

Furthermore, with respect to the exceptions to the Four-Year Rule, it is noted that the four-year limit does not apply to determine whether the apartment is rent-regulated (*see Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 200 [1st Dept 2011] [holding that DHCR's consideration of events beyond the four-year period is permissible if done to determine whether an apartment is rent-regulated]). This exception is codified in the 2014 Amendments at RSC § 2526.1 (a) (2) (iii).

Plaintiffs further argue that the 2014 Amendments allow DHCR to consider more than four years of rental history based on a mere allegation of fraud, rather than a "colorable claim of fraud," as required by the Court of Appeals in *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (15 NY3d 358, 367 [2010]). However, contrary to plaintiffs' argument, the 2014 Amendments do not allow DHCR to consider more than four years of rent records based on a mere allegation of fraud. While that term was used in a summary published by DHCR as part of the SAPA process, it was not included in the regulation and does not control DHCR's actions. The regulation, 9 NYCRR 2526.1 (a) (2) (iv), provides that "in a proceeding pursuant to this section the rental history of the housing accommodation pre-dating the base date may be examined for the limited purpose of determining whether *a fraudulent scheme* to destabilize the housing accommodation or a rental practice proscribed under section 2525.3 (b), (c) or (d) of this Title rendered unreliable the rent on the base date" (emphasis added). Furthermore, Sheldon Melnitsky (Melnitsky), who is the deputy counsel for DHCR, testified, at his deposition, that pursuant to this

regulation, DHCR will consider more than four years of rental history when there is a "colorable claim of fraud" (Melnitsky's Dep. Transcript at 241-242).

9 NYCRR 2526.1 (a) (2) (iv) codifies existing case law. "There is a common-law exception to the four-year look-back period, which is triggered if the landlord set the rent as part of a fraudulent scheme" (*Morton v 338 W. 46th St. Realty, LLC*, 45 Misc 3d 544, 550 [Civ Ct, NY County 2014]). It has been expressly held that "the four-year limit does not apply. . . to determine 'whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date'" (*2115 Washington Realty, LLC*, 2017 NY Slip Op 50573[U], *4, quoting *Matter of Grimm*, 15 NY3d at 367; *see also Conason v Megan Holding, LLC*, 25 NY3d 1, 17 [2015], *rearg denied* 25 NY3d 1193 [2015]; *Thornton v Baron*, 5 NY3d 175, 181 [2005]; *cf. Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999, 1000-1001 [2014] [finding that DHCR's determination denying a tenant's administrative appeal based on a sizable increase in the legal regulated rent was not arbitrary and capricious as the "tenant failed to set forth sufficient indicia of fraud to warrant consideration of the rental history beyond the four-year statutory period"]).

Where there is a 'colorable' claim of fraud, the rental history outside the four-year period may be examined (*see Conason*, 25 NY3d at 17; *Matter of Grimm*, 15 NY3d at 364; *Thornton*, 5 NY3d at 180). A colorable claim of fraud "require[s] . . . evidence of a landlord's fraudulent deregulation scheme to remove an apartment from the protections of

rent stabilization" (*Matter of Grimm*, 15 NY3d at 367). Thus, the 2014 Amendment codifying the fraud exception is not out of harmony with the RSL, as construed by case law.

Plaintiffs further argue that because owners of rent-regulated properties cannot predict when a future tenant may challenge his or her rent, they must now maintain documents forever in order to ensure that every single preferential rent in the rental history of the apartment can be supported so that DHCR is satisfied that the rent charged on the "base date" (i.e., four years prior to the date the overcharge complaint may be filed) is legitimate. This argument, however, is unavailing. The purpose of the Four-Year Rule "was to alleviate the burden on honest landlords to retain rent records indefinitely . . . not to immunize dishonest ones from compliance with the law" (*Thornton*, 5 NY3d at 181; *see also Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002]).

Plaintiffs additionally contend that the regulation concerning tenants' lease riders promulgated in the 2014 Amendments, i.e., RSC § 2522.5 (c) (1), (the lease rider amendment) is out of harmony with RSL § 26-511 (d) (1), which provides that "[e]ach owner subject to the rent stabilization law shall furnish to each tenant signing a new or renewal lease, a rider describing the rights and duties of owners and tenants as provided for under the rent stabilization law of nineteen hundred sixty-nine." Plaintiffs note that under RSC § 2622.5 (c) (1), owners of rent-regulated properties must now provide a detailed description, in a format prescribed by DHCR, of how the rent was adjusted from the prior legal rent, as well as an itemized breakdown of IAI costs and supporting documentation of the IAI.

RSC § 2522.4 (a) (13), however, was issued pursuant to the legislature's mandate, in RSL § 26-511 (d) (2), that "[t]he [lease] rider shall be in a form promulgated by the commissioner" of DHCR, and shall be utilized to provide information to tenants as to the pertinent rules and regulations governing tenants and landlords' rights under the RSL. As explained by defendants, the purpose of this regulation was to give tenants greater access to information showing why their rent was increased.

Plaintiffs also state that the lease rider amendment allows tenants to withhold rent if they are not satisfied with the documentation that the landlords provide to justify an IAI rent increase. However, the lease rider amendment does not authorize tenants to withhold rent unilaterally, but contemplates a proceeding in which the landlord is afforded an opportunity to demonstrate that the rent is legal (*see* RSC § 2522.5 [c] [3]). Thus, there is nothing in this regulation which is contrary to the rent stabilization laws or usurps legislative authority.

Plaintiffs also contend that RSC § 2522.4 (a) (13), which is part of the 2014 Amendments, is out of harmony with the rent stabilization laws. RSC § 2522.4 (a) (13) provides that "[t]he DHCR shall not grant an owner's application for a rental adjustment pursuant to this subdivision, in whole or in part, if it is determined by the DHCR, based upon information received from any tenant or tenant representative or upon a review conducted on DHCR's own initiative that, as of the date of such application for such adjustment that the owner is not maintaining all required services, or that there are current immediately

hazardous violations of any municipal, county, State or Federal law which relate to the maintenance of such services."

Plaintiffs contend that the rent stabilization laws make clear that any newly enacted code provision must permit the owners of rent-regulated properties to increase the rents that they charge their tenants in the event that the owners undertake and complete an MCI or IAI to the rent-regulated property or unit. Specifically, plaintiffs point to RSL § 26-511 (c) (6), which provides that any code adopted by DHCR must allow owners to seek increases in the rent charged to tenants for "completed building-wide major capital improvements" that are "deemed depreciable under the Internal Revenue Code." They also point to RSL § 26-511 (c) (13), which similarly provides that any code adopted by DHCR must "provide[] that an owner is entitled to a rent increase where there has been a substantial modification or increase of dwelling space or an increase in the services, or installation of new equipment or improvements or new furniture or furnishings provided in or to a tenant's housing accommodation." Plaintiffs assert that in RSC § 2522.4 (a) (13), DHCR has now improperly empowered itself with the right to dismiss MCI applications when there is a lapse in service or a hazardous condition on the property.

This regulation, however, reasonably implements the statutory directive that DHCR "require[] owners to maintain all services," and the statutory prohibition on owners who fail to maintain services "from applying for or collecting" rent increases (RSL § 26-511 [c] [8]; § 26-514). Moreover, courts have consistently held that DHCR may properly deny an

owner's request for a rent increase based on an MCI to the building when there are immediately hazardous violations in the building (*see Matter of Weinreb Mgt. v New York State Div. of Hous. & Community Renewal*, 24 AD3d 269, 270 [1st Dept 2005], *lv denied* 7 NY3d 709 [2006]; *Matter of 370 Manhattan Ave. Co., L.L.C. v New York State Div. of Hous. & Community Renewal*, 11 AD3d 370, 371-372 [1st Dept 2004]; *Matter of 251 W. 98th St. Owners v New York State Div. of Hous. & Community Renewal*, 276 AD2d 265, 265-266 [1st Dept 2000]).

Plaintiffs argue that since the owners are required to file MCI applications within two years of completing and paying for the MCI and, under this regulation, this two-year period is not tolled from running in the event DHCR dismisses an MCI application, an owner that timely files his or her MCI application, but then has it dismissed due to a hazardous condition, could have his or her MCI application time-barred from recovering the monies spent by him or her in improving services for the tenants. This argument, however, is without merit since RSC § 2522.4 (a) (13), as now amended, allows the MCI application to "be granted upon condition that such services will be restored within a reasonable time, or dismissed with leave to refile within 60 days which time period shall stay the two year filing requirement." This affords the landlord an opportunity to correct the violation while preserving his or her right to seek a rent increase based on the MCI. As such, RSC § 2522.4 (a) (13) is consistent with the rent stabilization laws and does not violate the separation of powers doctrine.

Plaintiffs assert that the 2014 Amendments eliminate the requirement that tenants must provide notice to the owner of any disruption of services prior to seeking a rent reduction order from DHCR (RSC § 2523.4 [c]). They also assert that the 2014 Amendments bar an owner from collecting an MCI or vacancy increase when there is a rent reduction order issued (RSC § 2523.4 [a] [1]). They contend that these 2014 Amendments violate the rent stabilization laws which allow owners to increase the rent of an apartment when it is improved through an MCI or IAI (RSL § 26-511 [c] [13]) or when it becomes vacant (RSL § 26-511 [c] [5-a]), and also violate Real Property Law § 235-b (3) (b), since, without having prior notice, the landlord cannot make a "good faith attempt . . . to cure the breach" of the warranty of habitability.

However, RSC § 2523.4.(c) provides that "[e]xcept for complaints pertaining to heat and hot water or other conditions requiring emergency repairs, before filing an application for a reduction of the legal regulated rent pursuant to subdivision (a) of this section, a tenant should notify the owner or the owner's agent in writing of all the service problems listed in such application," and that "[a] copy of the written notice to the owner or agent with proof of mailing or delivery should be attached to the application." Moreover, RSC § 2523.4 is consistent with RSL § 26-514, which provides that an owner subject to a rent reduction order is "barred from applying for or collecting any . . . rent increases" while such a rent reduction order remains in effect. Thus, this regulation is not out of harmony with any statute and does not violate the separation of powers doctrine.

Plaintiffs further argue that the codification of the default formula in the 2014 Amendments, in RSC § 2522.6 (b) (2) and (3), violates the separation of powers doctrine. However, the default formula is not new, but has been used since the 1980s to determine the legal rent in specified circumstances where there are no reliable rental history records. In these circumstances, DHCR cannot calculate the current legal rent using the rent on the base date. The Court of Appeals has approved the use of the default formula to illusory tenancies in *Thornton* (5 NY3d at 181), and, thereafter, expanded its use in *Matter of Grimm* (15 NY3d at 366-367) and *Conason* (25 NY3d at 6) (*see also Matter of Bondam Realty Assoc., L.P. v New York State Div. of Hous. & Community Renewal*, 71 AD3d 477, 478 [1st Dept 2010] [upholding DHCR's resort to the default formula to establish the base rent in view of the owners' failure to produce any rent records or any proof to substantiate the alleged reason for the absence of records]; *Matter of DeSilva v New York State Div. of Hous. & Community Renewal Off. of Rent Admin.*, 34 AD3d 673, 674 [2d Dept 2006] [holding that DHCR had a rational basis for applying default formula where the landlord failed to submit rent records necessary to establish the legal stabilized rent for the subject apartment]; *Matter of Clear Holding Co. v State Div. of Hous. & Community Renewal*, 268 AD2d 430, 430 [2d Dept 2000] [same]). Thus, the codification of the default formula in the 2014 Amendments did not violate the separation of powers doctrine.

Plaintiffs also challenge the 2014 Amendments with respect to the promulgation of RSC § 2528.3 (c), which requires owners to file an application with DHCR in order to amend

an apartment registration statement for a prior year, and RSC § 2528.4 (a), which bars certain rent increases when the owner has failed to properly register the apartment. Plaintiffs argue that these regulations are out of harmony with the rent stabilization statutes.

Plaintiffs' argument must be rejected. With respect to RSC § 2528.3 (c), there is no statutory provision which entitles owners to amend prior registration statements as of right, and RSC § 2528.3 (c) is consistent with the underlying purpose of the rent stabilization statutes since it prevents landlords from covering up intentional overcharges by filing accurate initial registration statements and then later filing unreviewed amended registration statements to rewrite the rental history without detection. With respect to RSC § 2528.4 (a), this regulation directly implements RSC § 26-517 (e), which provides that "[t]he failure to file a proper and timely . . . registration statement shall, until such time as such registration is filed, bar an owner from applying for or collecting any rent in excess of the legal regulated rent in effect on the date of the last preceding registration statement." Thus, there is no inconsistency between these regulations and the rent stabilization laws, and no violation of the separation of powers doctrine based upon the promulgation of these regulations.

Plaintiffs further contend that DHCR exceeded the bounds of its authority, as an administrative agency, by promulgating the 2014 Amendments, which included the codification of the creation of TPU. They argue that the promulgation of the 2014 Amendments constituted an invalid exercise of legislative power by DHCR so as to violate the separation of powers doctrine. "The separation of powers doctrine of the State

Constitution establishes the boundaries between actions of the legislature and an administrative agency" (*Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 110 AD3d 1, 7 [1st Dept 2013], *affd* 23 NY3d 681 [2014]). While "the [l]egislature cannot pass on its law-making functions to other bodies," it "may delegate to an agency the power to administer the law as enacted by the legislature" (*Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 121 AD3d 21, 32 [1st Dept 2014], *affd* 25 NY3d 600 [2015] [internal quotation marks omitted]). However, "[b]ecause the constitution vests legislative power in the legislature, administrative agencies may only effect policy mandated by statute and cannot exercise sweeping power to create whatever rule they deem necessary" (*New York Statewide Coalition of Hispanic Chambers of Commerce*, 110 AD3d at 7). "In other words, '[a]s an arm of the executive branch of government, an administrative agency may not, in the exercise of rule-making authority, engage in broad-based public policy determinations'" (*id.* at 7-8, quoting *Higgins*, 83 NY2d at 169).

"The constitutional principle of separation of powers . . . requires that the [l]egislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies" (*Bourquin v Cuomo*, 85 NY2d 781, 784 [1995]). "A legislature may enact a general statutory provision and delegate power to an agency to fill in the details, as long as reasonable safeguards and guidelines are provided to the agency" (*Greater N.Y. Taxi Assn. v New York City Taxi & Limousine Commn.*, 25 NY3d 600, 608 [2015]). "[A]n agency can

adopt regulations that go beyond the text of [its enabling] legislation, provided they are not inconsistent with the statutory language or its underlying purposes" (*id.* [internal quotation marks omitted]; *see also Agencies for Children's Therapy Servs., Inc. v New York State Dept. of Health*, 136 AD3d 122, 130 [2d Dept 2015], *appeal dismissed* 26 NY3d 1132 [2016], *lv denied* 27 NY3d 907 [2016]).

The Court of Appeals, in *Boreali v Axelrod* (71 NY2d 1, 12-14 [1987]), set forth four factors to consider in determining if the "difficult-to-demarcate line" between administrative rule-making and legislative policymaking has been transgressed and if the regulations promulgated by the administrative agency were an invalid exercise of legislative power so as to violate the separation of powers doctrine (*see New York Statewide Coalition of Hispanic Chambers of Commerce*, 110 AD3d at 8; *Garcia v New York City Dept. of Health & Mental Hygiene*, 144 AD3d 59, 68 [1st Dept 2016], *lv granted* 28 NY3d 913 [2017]). The *Boreali* factors, as recently described by the Court of Appeals, are "whether (1) the agency did more than balanc[e] costs and benefits according to preexisting guidelines, but instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems; (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance; (3) the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and (4) the agency used special expertise or competence in the field to develop the challenged

regulation[s]" (*Matter of NYC C.L.A.S.H., Inc. v New York State Off. of Parks, Recreation & Historic Preserv.*, 27 NY3d 174, 179-180 [2016] [internal quotation marks and citations omitted]; *see also Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d 681, 692-693 [2014]; *Boreali*, 71 NY2d at 12-14; *Garcia*, 144 AD3d at 68).

These considerations "are not to be applied rigidly" (*NYC C.L.A.S.H., Inc.*, 27 NY3d at 180; *see also Matter of New York Statewide Coalition of Hispanic Chambers of Commerce*, 23 NY3d at 696). "In fact, they 'are not mandatory, need not be weighed evenly, and are essentially guidelines for conducting an analysis of an agency's exercise of power'" (*NYC C.L.A.S.H., Inc.*, 27 NY3d at 180, quoting *Greater N.Y. Taxi Assn.*, 25 NY3d at 612).

The first *Boreali* factor of whether the agency "did more than balanc[e] costs and benefits according to preexisting guidelines, but instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems" cuts against agency action only when the agency acts in the absence of "'any legislative guidelines at all'" as to how to balance the relevant interests (*Matter of New York Statewide Coalition of Hispanic Chambers of Commerce*, 23 NY3d at 698, quoting *Boreali*, 71 NY2d at 12). This is not the case here. The legislature provided guidelines for balancing the interests of tenants and landlords in the rent stabilization laws, and DHCR may enact regulations in accordance with those guidelines. Acting within that framework, DHCR has the "discretion to strike a policy balance" (*Matter of Hatanaka v Lynch*, 304 AD2d 325, 326 [1st Dept

2003]). The fact that DHCR did so in promulgating the 2014 Amendments does not violate the separation of powers doctrine.

As to the second *Boreali* factor of whether "the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance," agencies engage in permissible, interstitial rulemaking when they act "in furtherance of legislatively-defined policy" (*Matter of Acevedo v New York State Dept. of Motor Vehs.*, 132 AD3d 112, 120 [3d Dept 2015], *affd* __ NY3d __, 2017 NY Slip Op. 03690 [May 9, 2017]). Similar to the first *Boreali* factor, an agency violates this second factor only by acting in the absence such guidance. Here, DHCR did not act in the absence of such guidance. Indeed, in *Higgins* (83 NY2d at 170), the Court of Appeals held that the rent stabilization laws provide sufficient policy direction to satisfy this second *Boreali* factor. The Court of Appeals, in *Higgins* (83 NY2d at 168), specifically recognized that DHCR has a broad mandate to promulgate regulations in furtherance of the rent stabilization laws. In promulgating the 2014 Amendments, DHCR did not act on a clean slate, but within the legislatively defined policy set by the rent stabilization laws. The 2014 Amendments constitute DHCR's efforts to effectuate the rent stabilization policies established by statute.

As to the third *Boreali* factor, i.e., that "the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve," plaintiffs assert that in 2010, the State Senate Majority

Leader at the time, at the request of the Governor, introduced New York Senate Bill S8050 (S8050), but the legislature did not pass it. They claim that the 2014 Amendments codify the very exceptions to the Four-Year Rule that the legislature had refused to adopt when it rejected S8050. They further claim that as to the lease rider amendment in the 2014 Amendments, the legislature had repeatedly attempted, but failed, to amend the RSL, in proposed bills S2830, A247, and S3173, to entitle DHCR to prohibit an MCI increase when there is a Class B (hazardous conditions) or Class C (immediately hazardous conditions) violation on the subject building, and to add a detailed itemization of rent increases and rent history, as well as supporting documentation, as a required part of the lease rider.

However, a regulation is not invalid "merely because the [l]egislature had, at some point, considered the same subject matter" (*Festa v Leshen*, 145 AD2d 49, 63 [1st Dept 1989]). Indeed, "[l]egislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences" (*Bourquin*, 85 NY2d at 787-88 [internal quotation marks omitted]; *see also Matter of NYC C.L.A.S.H., Inc.*, 27 NY3d at 184). The legislature might have declined to act because it believed that DHCR already possessed the authority to take action itself (*see Matter of NYC C.L.A.S.H., Inc.*, 27 NY3d at 184).

Plaintiffs contend that here, there was not simply legislative inaction because the legislature repeatedly proposed, considered, but did not pass, bills that addressed many of the 2014 Amendments. However, even in cases where the legislature repeatedly declined to act on proposed bills, the Court of Appeals has still refused to infer hostile intent from the fact

that unsuccessful bills had been introduced on the topic, holding that the failed bills alone do not "warrant the conclusion that the agency has exceeded its mandate" (*Higgins*, 83 NY2d at 170). In *Higgins* (83 NY2d at 170), the Court of Appeals specifically refused to credit the argument that legislative inaction was proof of hostile intent when 27 bills on the subject had been introduced in the legislature and were not passed prior to DHCR's adoption of the regulations in question. The Court of Appeals, in *Higgins* (83 NY2d at 170), also observed that the legislature did nothing to counteract the effect of the regulations after the regulations were adopted. Similarly, here, the legislature, in the Rent Act of 2015 (*see* L 2015, ch 20, part A, § 1), which was enacted subsequent to the 2014 Amendments, has taken no action to repeal or modify the 2014 Amendments. The absence of any legislative statutory action is indicative of the legislature's acquiescence in the 2014 Amendments, as promulgated by DHCR, and reaffirms DHCR's broad authority to regulate in this area.

With respect to the fourth *Boreali* factor, i.e., whether "the agency used special expertise or competence in the field to develop the challenged regulation[s]," plaintiffs argue that DHCR did not invoke its purported expertise to enact the 2014 Amendments. This argument is rejected since the evidence demonstrates that DHCR relied on its own expertise in promulgating the 2014 Amendments. Significantly, the Consolidated Regulatory Impact Statement (defendants' exhibit N at ¶ 3) states that DHCR relied upon "twelve years of experience in administration" of the regulations since the last major amendment, as well as "dialogue during this period with owners, tenants, and their respective advocates," including

"one hundred forums and meetings on an annual basis." DHCR also relied upon its specialized insight into the current operation of the rent regulations in adopting the 2015 Amendments. Melnitsky, at his deposition, testified that the 2014 Amendments were prompted by DHCR's experience and extensive comments by landlord and tenant advocates, including comments received during a round of technical amendments in 2012 and the SAPA process in 2013-2014 (Melnitsky's Dep. Transcript at 36-37).

Thus, all of the *Boreali* factors support DHCR's claim that it acted within the confines of its delegated powers and did not usurp the authority of the legislature in promulgating the 2014 Amendments. Therefore, the *Boreali* factors weigh against plaintiffs' challenge to the 2014 Amendments based on the separation of powers doctrine.

Plaintiffs also have alleged that DHCR has violated the separation of powers doctrine by its internal organizational decision to establish TPU. However, DHCR already had explicit statutory authorization to create the internal administrative structures necessary to carry out its legislative mandate. The legislature, pursuant to Public Housing Law § 11 and § 12 and Public Officers Law § 9, authorized DHCR's Commissioner to appoint officers and deputies and to delegate DHCR's statutory powers to them. Consistent with this authorization, Commissioner Towns established TPU as a sub-unit of DHCR and delegated to it DHCR's longstanding authority to investigate and prosecute violations of the rent stabilization laws (RSC § 2520.5 [o]).

Moreover, the executive branch has authority to establish new organizational structures to enforce existing law (*see Bourquin*, 85 NY2d at 787; *Clark v Cuomo*, 66 NY2d 185, 189 [1985]). The executive branch, in exercising its power to enforce legislation, "is accorded great flexibility in determining the methods of enforcement" (*Clark*, 66 NY2d at 189 [internal quotation marks omitted]). Here, the legislature has already articulated its policy and the underlying objectives, and DHCR created TPU to better implement this legislative policy (*see id.* at 190). DHCR acted within its province and consistent with separation of powers principles when it established TPU as a new sub-unit to further DHCR's statutory mandate to enforce compliance with the rent stabilization laws and regulations (*see Bourquin*, 85 NY2d at 787; *Clark*, 66 NY2d at 189).

SAPA

Plaintiffs, in their fourteenth cause of action, allege that DHCR's promulgation of the 2014 Amendments violated SAPA. Article 2 of SAPA governs administrative rule-making in New York. SAPA § 202 (8) provides that each rule proposed by an agency "must be promulgated 'in substantial compliance' with [SAPA] §§ 202 (setting forth general procedures for rulemaking), 202-a (requiring consideration of the regulatory impact of the proposed rule), and 202-b (requiring consideration of regulatory flexibility for small businesses)" (*Matter of Medical Socy. of State of N.Y. v Serio*, 100 NY2d 854, 869 [2003]; *see also Matter of Gioia v Lynch*, 306 AD2d 280, 280 [2d Dept 2003], *lv denied* 100 NY2d 514 [2003]; *Matter of Hospital Assn. of N.Y. State v Axelrod*, 164 AD2d 518, 525 [3d Dept

1990]). Defendants, by their submissions in support of their motion, have shown that DHCR substantially complied with SAPA (*see* SAPA § 202 [8]).

Plaintiffs do not offer any arguments in opposition to defendants' argument that summary judgment dismissing their SAPA claim must be granted. Rather, they argue that they need not respond to this argument because the court, nearly three years ago, in its October 27, 2014 decision and order, which addressed plaintiffs' motion for a preliminary injunction and defendants' cross motion to dismiss plaintiffs' complaint, pursuant to CPLR 3211 (a) (1), in granting expedited discovery as to the issues of the validity of the 2014 Amendments and TPU under the separation of powers doctrine and based upon due process, stated, in passing, that ancillary issues, such as plaintiffs' assertion that defendants violated SAPA, would be reserved for separate determination.

Plaintiffs' argument must be rejected. Defendants have moved for summary judgment dismissing plaintiffs' entire complaint, putting all claims therein at issue. Plaintiffs have failed to raise any argument whatsoever in response to defendants' prima facie showing that the SAPA cause of action should be dismissed, and, thus, no triable issue of fact is raised as to this issue. Therefore, summary judgment dismissing plaintiffs' SAPA claim is warranted (*see* CPLR 3212 [b]).

CONCLUSION

Accordingly, defendants' motion for summary judgment dismissing plaintiffs' complaint in its entirety as against them is granted, and plaintiffs' motion for summary judgment in their favor is denied.

This constitutes the decision, order, and judgment of the court

E N T E R,

J. S. C.

So Ordered
Hon. Richard Velasquez

MAY 31 2017

2017 JUN 12 AM 9: 14
FILED