Etame v New York State Div. of Hous. & Community Renewal
2018 NY Slip Op 32162(U)
June 12, 2018
Supreme Court, Queens County
Docket Number: 8251/2017
Judge: Thomas D. Raffaele
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Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE THOMAS RAFFAELE IA PART 13

GEORGE ETAME,

Petitioner,

-against-

NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL, and HILLSIDE PLACE LLC,

Respondent(s).

x

Index Number 8251/2017

Motion Date: December 11, 2017

Motion Seq. Nos. 1, 2 & 3

The following papers read on this Article 78 proceeding by self represented petitioner, George Etame, for a judgment vacating the order issued by respondent New York State Division of Housing and Community Renewal, (DHCR), dated June 21, 2017. Respondent, Hillside Place LLC, separately moves for an order dismissing the proceeding on the grounds of failure to state a cause of action, collateral estoppel and a defense grounded in documentary evidence, pursuant to CPLR 3211 (a)(1)(5) and (7). Petitioner separately moves for an order staying all proceedings in New York City Housing Court, concerning the June 21, 2017 DHCR order.

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Upon the foregoing papers the petition and motions are consolidated for the purposes of a single decision and are determined as follows:

Self represented petitioner, George Etame, an attorney, is a tenant in a rent-stabilized apartment known as apartment 12A, located at 87-50 167th Street, Jamaica, New York. Respondent, Hillside Place LLC, is the owner of said apartment building. Mary P. Nguma was the tenant of said apartment, pursuant to a four-year lease agreement for the period of June 1, 2009 through May 31, 2013. Her lease provided that the lease was not subject to rent regulation as the legal-regulated rent exceeded $2,000.00 at the commencement of the tenancy. Said lease provided that the rent was $3,073.00 per month, with a on-time discount of $1,584.00 a month, so that the discounted rent was $1,489.00 a month.

At the time said lease was entered into, the building owner was receiving J-51 tax benefits. As a result of the Court of Appeals ruling in *Roberts v Fishman Speyer* (13 NY3d 270 [2009]), and Appellate Division's ruling in 2011 in *Gersten v 56 7th Ave. LLC* (88 AD3d 189 [1st Dept 2011], the subject apartment remained rent stabilized.

Ms. Nguma requested, and the owner consented to add Mr. Etame to said lease. Ms. Nguma and Mr. Etame entered into a rent-stabilized renewal lease with Hillside Place LLC for the period of June 1, 2011 through May 31, 2013. Said renewal lease set forth the monthly rent amount and a lower amount that was charged (a preferential rent), and includes a rider setting forth an "on-time payment" monthly rent discount, and a provision permitting the landlord to unilaterally discontinue the on-time payment discount at the end of the lease term and demand payment in full of the legal-regulated rent for any subsequent term, without the benefit of any reduced rents or discounts.

Ms. Nguma, Mr. Etame and the owner thereafter entered into a rent-stabilized renewal lease for the period of June 1, 2013 through May 31, 2015. On May 28, 2014, petitioner filed a rent-overcharge compliant with the DHCR. On August 20, 2015, the Rent Administrator issued an order finding the owner overcharged the tenant $7453.00, that the amount of interest on the overcharge was $1,522.99, that the owner had refunded $9,189.18 to the tenant and therefore there was no amount due to the tenant. The Rent Administrator also found that the legal-regulated rent for the period of June 1, 2014 through May 31, 2105 was $1,630.79 per month.

In 2013, Hillside Place LLC commenced a nonpayment proceeding to recover rent arrears against Mary Nguma and George B. Etame, in the Civil Court, Queens County (Index No. 69710/2013). The Civil Court, in its order of July 30, 2014, recited that Mr. Etame was the only respondent to appear in said proceeding; set forth the procedural history;

and granted the motion to renew. Upon renewal the court therein determined that according to the terms of Mr. Etame's lease, the on-time discounted rent is a preferential rent which is less than the legal-regulated rent, and not a rent concession, and that the landlord could not increase the rent to the legal-regulated rent in the middle of the lease term, due to the tenant's action of paying the rent untimely. The court therein determined that as Mr. Etame had a preferential rent of $1,795.50 per month for the lease term of August 2013 through May 2014, upon the failure to pay the rent on time, he was only responsible for said monthly preferential amount, plus any late fees, if provided for in the original lease, until the end of the lease term. The prior judgment was amended to reflect the correct amount of rent due since February 2014, including payments made after the February 7, 2014 order. The execution of the warrant of eviction was stayed so that Mr. Etame could pay all rent arrears due through May 2014. Mr. Etame did not appeal the Civil Court's judgment.

Mr. Etame had filed a rent overcharge complaint with the DHCR, alleging that the rent of $1,795.00 charged and collected by the owner on May 28, 2014 constituted an overcharge. The Rent Administrator, in an order issued on August 20, 2015, determined that the base date for the proceeding was May 28, 2010; that the legal regulated rent for the period of June 1, 2014 was $1,630.79 a month; that the "discounted rent" was not a preferential rent; that the amount of $1,489.00 paid by the tenant on the base date was the legal-regulated rent; and that the overcharge was not willful. The Rent Administrator also determined that the subject apartment was under the jurisdiction of the Rent Stabilization Law, as the subject building was receiving J-51 tax benefits. The landlord was directed to roll back the legal-regulated rent, and recompute the rent; to refund or credit to the tenant any rent paid in excess of the legal-regulated rent and any excess security, as shown on the rent-calculation chart.

On September 23, 2015, the owner filed a petition for administrative review (PAR), in which it asserted, among other things, that the Rent Administrator's finding that the "discounted rent" was not a preferential rent was erroneous, as the Civil Court had previously determined that the lower discounted rent was in fact a preferential rent. The owner also asserted that pursuant to the court's order, the preferential rent could be terminated at the end of the lease term. The owner argued that as the Civil Court, Housing Part, has concurrent jurisdiction with the DHCR, the Deputy Commissioner was required to acknowledge and follow the court's findings in its July 30, 2014 order.

On April 12, 2016, the DHCR issued a separate PAR order, which found that the Rent Administrator had incorrectly reduced the legal rent for the subject apartment by $17.88 per month pursuant to an MCI modification order. The Deputy Commissioner, also in an order and opinion dated April 12, 2016, granted the owner's PAR only to the extent that the Rent Administrator's order was modified to eliminate that portion of the order which referred to

the MCI modification order. The Deputy Commissioner held that the "Civil Court did not reach the issue of whether the on-time provision is a legal provision that preserves a lower 'preferential rent", and affirmed the Rent Administrator's finding that the "on-time" provision was an illegal late fee. The Deputy Commissioner, thus, ignored the Civil Court's finding that the on-time provision discounted rent was a preferential rent, and set forth the legal regulated rents and collectable rents, finding that the owner had collected an overcharge of $6,462.52, that interest on said overcharge is $1,702.19, that the total award including overcharges and interest is $8,164.71 and that the owner was to base the future rent on the lawful rent of $1,650.60 a month. The Rent Administrator's order was affirmed in all other respects.

The owner thereafter commenced an Article 78 proceeding in this court entitled *Matter of the Application of Hillside Place LLC v New York State Division of Housing and Community Renewal*, (Index No. 6287/2016). The owner asserted in its petition that the Deputy Commissioner had ignored the Civil Court's prior order in the summary proceeding, which established that the rent charged to the tenant was a preferential rent. The DHCR and Hillside Place LLC entered into a stipulation on August 10, 2016, whereby they agreed to have the matter remitted to the agency, and this court, pursuant to an order dated August 23, 2016, denied the petition, dismissed the proceeding and remitted the matter to the DHCR for further consideration.

Upon remittal, the Deputy Commissioner issued an order and opinion dated June 21, 2017, granting the owner's PAR, based upon the owner and tenants' prior submissions. The Deputy Commissioner stated as follows:

"A review of the record reveals that, on July 30, 2014, in a case involving the same owner, the same tenants and the same apartment, the Civil Court of the City of New York, County of Queens: Part D held that "...it is clear that respondent's discount rent is a preferential rent" (Decision and Order Index # 69710/13). Accordingly, because the Civil Court has concurrent jurisdiction with the Agency over rent regulation issues, the Commissioner finds that this issue has been determined by the Civil Court. Because the Civil Court has determined that the discounted rent at issue in this proceeding is a preferential rent, this issue has been determined for the purposes of this proceeding and may not be further investigated or examined."

The Deputy Commissioner further stated that the only remaining issue was whether the purported preferential rent charged by the owner was actually greater than the legal - regulated rent. He stated that:

"In order to resolve this issue, the base date legal and preferential rents must be determined.

It is noted that the base date lease could not have been based upon a legal rent as it was for a four-year term (guideline increases are for only one or two-year lease terms). The Commissioner finds that the facts of this case are similar to those in 72A Realty Associates v. Lucas, 101 AD3d 401 (1st Dept 2012) which found that the base date rent may not be relied on when there was an improper deregulation of the apartment while the apartment was receiving J-51 tax benefits. See also Taylor v 72A Realty Associates, 2017 NY App Div Lexis 4113, 2017 Slip Op 04218 (1st Dept 2017). Section 2526.1 (a)(2)(ix) states 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, the 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'. RSC Section 2526.1 (a)(3)(iii) sets forth a formula for setting the rent when the housing accommodation at issue is vacant or temporarily exempt on the base date, stating that the legal rent shall be the prior legal regulated rent for the accommodation increased by two year guideline increases that would have been allowed during the time of vacancy or temporary exemption plus such other rental adjustments that would have been allowed under the Code. Because Lucas is analogous to this case in that the subject apartment was incorrectly deregulated based upon a prior faulty Agency interpretation while receiving J-51 tax benefits prior to the issuance of the Roberts v. Fishman Speyer Props., 13 NY3d 279 (2009) case, rendering the base date rent in this case unreliable, pursuant to RSC Section 2526.1, the base date rent herein is set based on the last legal regulated rent on record prior to the pre-Roberts and erroneous deregulation, and increased by allowable and appropriate guideline increases".

He further stated that "In determining the legal rent and the preferential rent in this case, pursuant to RSC Section 2526.1(a)(3)(iii), the last registered rent stabilized rent of $1,695.39 and the last registered preferential rent of $1,423.09 per month, which rents were based on a two year lease entered into by prior tenants beginning October 1, 2005 and ending September 30, 2007, will be increased by allowable MCI rent increases, by appropriate vacancy increases, and by appropriate guideline rent increases. It is noted that the above-referenced registration shows that Leslie and Jean Gibson signed a two year lease spanning the term from October 1, 2005 through September 30, 2007. The next registration shows that Leslie Gibson, Jean Gibson and Curleen Gibson signed a two year lease for a term from June 7, 2006 through June 30, 2008, and that the apartment was registered as exempt due to the owner's claim of a high rent vacancy. Given that the second of these two leases commenced during, and interrupted, the term of the first of these leases, and given the owner's claim that the apartment was deregulated on June 20, 2006, the Commissioner finds that there will be no increases allowed for the second of these two leases. Accordingly, the legal and preferential rents of $1,695.39 a month and $1,403.19 per month respectively are the legal rents (plus the MCI rent increases set forth below) as of June 30, 2008."

The Deputy Commissioner stated that an MCI proceeding (UB110087OM) had a long and protracted history; that it was last determined that the owner was entitled to an increase of $15.90 per room per month, effective May 1, 2006; and that although denials of the owner's and tenants PARs were the subject of an Article 78 proceeding, said challenge was currently pending. The Deputy Commissioner found that the owner was entitled to a $15.90 per room per month increase in the rents of the affected apartment, including the apartment at issued herein. Therefore, "the amount of $47.70 is added to the rents of the subject apartment ($15.90 per room increase x 3 which is the number of rooms in the subject apartment = $47.70) for a legal rent of $1,743.09 per month and a preferential rent of $1,450.89 per month. Should this MCI amount be changed pursuant to the pending litigation and/or to any further proceedings resulting from said litigation, the owner is responsible for modification of the rent accordingly".

The Deputy Commissioner stated that: "MCI order (VJ110035OM) issued on January 14, 2008, authorized a permanent rent increase of $1.53 per room per month, effective February 1, 2008, for the apartment at issue herein. Therefore, the amount of $4.59 is added to the rents of the subject apartment ($1.53 per room increase x 3 which is the number of rooms in the subject apartment = $4.59) for a legal rent of $1,747.68 per month and a preferential rent of $1,455.48 at the end of the June 7, 2006 to June 30, 2008 lease term. The next lease was a four year (erroneously non-stabilized) vacancy lease for the complaining tenant spanning the term from June 1, 2009 through May 31, 2013. Adding the 20% vacancy increase to the previous rent yields a legal rent of $2,097.22 per month and a preferential rent of $1,746.58 per month. After issuance of the Roberts case, cited above, the owner and tenants entered into a two year rent stabilization renewal lease for the term of June 1, 2011 to May 31, 2013. The owner was entitled to a 4.5% guideline increase for this lease which yields a legal rent of $2,191.59 per month and a preferential rent of $1,825.17 per month for this lease term. The owner and tenants then entered into a one year rent stabilized renewal lease for the term from June 1, 2013 through May 31, 2014, and the allowable guideline for this renewal lease was 2%. Accordingly, for this term, the legal rent was $2,235.42 per month and the preferential rent was $1,861.67 per month. The last lease at issue in this proceeding is a one year rent stabilized renewal lease spanning June 1, 2014 through May 31, 2015, and the allowable guideline increase for this renewal lease was 4%. Accordingly, for this term, the legal rent was $2,324.84 per month and the preferential rent was $1,936.14 per month."

The Deputy Commissioner determined that there was no overcharge in this case as the the calculation chart attached to the Rent Administrator's order demonstrated that the tenant never paid more than the legal regulated rents, as calculated above. The Deputy Commissioner therefore reversed the Rent Administrator's order and denied the tenant's overcharge complaint. The owner was directed to reflect any findings arrived at in all

relevant MCI proceedings in future rents. He also directed that if there were any arrears due pursuant to the findings of said order, such arrears are to be repaid in 24 equal installments over 24 months.

Petitioner commenced the within Article 78 proceeding on August 14, 2017, and seeks a judgment reversing the DHCR's determination of June 21, 2017 on the grounds that it is arbitrary and capricious and an abuse of discretion in that it reversed the prior April 12, 2016 order, without any new facts or circumstances, or evidence of illegality, irregularity or fraud. It is asserted that the parties should not have been given the opportunity to re-litigate the matter in order to reach a different outcome. It is also asserted that the DHCR failure to give the tenant the option to challenge or object to the reversal of the prior April 12, 2006 order was arbitrary and capricious.

Petitioner also alleges that the June 21, 2017 order contains an error of law, in that the DHCR misstated the provisions of Rent Stabilization Law §2526.1(a)(3)(iii), and ignored the fact that the tenant and owner had agreed to a rent of $1,489.00 in the lease agreement, and that the amount shown in the registration is greater than the amount agreed upon by the parties to the lease. Respondent further alleges that the DHCR utilized an improper base date; that the determination is contrary to a letter sent to landlords on January 6, 2016 regarding J-51 tax adjustments; and that the determination is contrary to 9 NYCRR 2522.6 (a)(3)(i) and (b)(3). It is alleged that the DHCR should have reviewed the entire rental history for the subject apartment as the tenant alleged fraud in its initial petition; and that the subject determination is contrary to public policy.

Respondent DHCR, in opposition, asserts as affirmative defenses that its determination is neither arbitrary nor capricious, nor erroneous, nor contrary to law; that the petition fails to state a cause of action; and that petitioner is barred from challenging the order on the grounds of res judicata and collateral estoppel.

Respondent Hillside Place LLC separately moves to dismiss the proceeding on the grounds that the petition fails to state a cause of action. It asserts that the DHCR has the authority to modify or revoke an order that was the result of illegality, irregularity in vital matters or fraud, and that the court had the authority to remit the matter to the agency. It is also asserted that the DHCR was required to give the Civil Court order proper precedential deference and that its failure to do so was an irregularity in a vital matter warranting modification of the prior order of April 12, 2016. It is further asserted that petitioner was not a necessary party to the Article 78 that resulted in the remittance to the agency and that petitioner was given notice of said Article 78 proceeding and did not elect to intervene in that proceeding.

Respondent Hillside Place LLC further asserts that petitioner is barred by the doctrine of collateral estoppel from re-litigating the legal and preferential rent, inclusive of the issue of whether the discounted rent constituted a preferential rent. It is asserted that Mr. Etame was a party to the Civil Court non-payment proceeding and had a full and fair opportunity to be heard; that he presented arguments concerning the legality of his rent; that the Civil Court in its order determined that the discounted rent was a preferential rent; that the Civil Court order was issued prior to the commencement of the underlying DHCR proceeding; and that said order is binding on the petitioner and the DHCR.

Finally, respondent Hillside Place LLC asserts that a defense based upon documentary evidence exists with respect to petitioner's allegations pertaining to fraud. It is asserted that the DHCR's determination of June 21, 2017 does not contain the word "fraud" and does not intimate that the agency examined the rental history prior to the base date pursuant to a finding of a fraudulent scheme to deregulate.

Petitioner in opposition to Hillside Place LLC's motion to dismiss asserts that there is no contradiction between the Civil Court order and the DHCR's determination of April 12, 2016, which would require a rehearing of said determination; that the Civil Court determined that the discounted rent is a preferential rent that cannot be changed during the lease term; that the issue of what was the legal regulated rent on the base date and any overcharges was not before the Civil Court; and that the decision to remit the matter to the DHCR was arbitrary and capricious and an abuse of discretion.

Petitioner further asserts that landlord's claim of collateral estoppel is misguided, as his petition does not contain any reference to preferential or discounted rent or question the Civil Court order; that the April 12, 2016 determination set the legal regulated rent as the rent demanded and paid at the start of the tenancy while the determination at issue set it as the last legal rent on record for the prior tenant; and that there is no legal basis for the method used by the DHCR to calculate the legal regulated rent at the base date, as set forth in the June 21, 2017 determination. In addition, petitioner questions why he was not given notice of the stipulation between the landlord and DHCR to remand the matter to the agency for further consideration.

Hillside Place LLC in its reply asserts that petitioner's opposition contains a series of misstatements that lack any reference to the DHCR orders and any applicable statutory authority. It is asserted that the DHCR's determination of April 12, 2016 was in direct contravention of the Civil Court's order, and constituted an irregularity in a vital matter requiring that the matter be remanded to the agency; that the DHCR in its determination of June 21, 2017 specifically acknowledged that the agency had failed to properly adhere to the Civil Court's order; and that petitioner was not a necessary party to the owner's prior Article

78 proceeding and that he was not prejudiced by the stipulation between the parties therein remanding the matter to the agency.

Respondent Hillside Place LLC states in its reply that petitioner's opposition contradicts statements made in his petition, in that petitioner now admits that he received notice of the commencement of the prior Article 78 proceeding. It is asserted that the DHCR in its June 21, 2017 determination properly computed the legal regulated rent based upon judicial and statutory authority pertaining to the facts and circumstances of this case, and that petitioner's objections to the same do not represent a legally cognizable basis to challenge the agency's determination, nor do they substantiate his claim that said determination is arbitrary and capricious.

In an Article 78 proceeding to review a determination made by an administrative agency such as the DHCR, "the court's inquiry is limited to whether the determination is arbitrary and capricious, or without a rational basis in the record and a reasonable basis in law" (*Matter of ATM One, LLC v New York State Div. of Hous. & Community Renewal*, 37 AD3d 714, 714; *see* CPLR 7803[3]; *Matter of Migliaccio v New York State Div. of Hous. & Community Renewal,* AD3d , 2018 NY Slip Op 03132, 2018 WL 2031305, 2018 NY App Div LEXIS 3101 [2d Dept 2018] ; *Matter of 9215 Realty, LLC v State of N.Y. Div. of Hous. & Community Renewal*, 136 AD3d 925 [2d Dept 2016]; *Matter of Velasquez v New York State Div. of Hous. & Community Renewal*, 130 AD3d 1045, 1046 [2d Dept 2015]; *Matter of Gomez v New York State Div. of Hous. & Community Renewal,* 79 AD3d 878, 878-879[2d Dept 2010]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 652 [2013] [internal quotation marks omitted]; *see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Migliaccio v New York State Div. of Hous. & Community Renewal*, *supra; Matter of 9215 Realty, LLC v State of N.Y. Div. of Hous. & Community Renewal*, 136 AD3d at 925).

Here, the DHCR properly viewed its determination of the owner's PAR to be an irregularity in a vital remand, as it failed to give proper deference to the Civil Court's order which determined that the tenant was paying a preferential rent (*see* 9 NYCRR § 2527.8; *Matter of 60 E. 12th St. Tenants' Assn. v NY State Div. of Hous. & Community Renewal*, 134 AD3d 586, 588 [1st Dept 2015]; *Matter of Atkinson v Division of Hous. & Community Renewal*, 280 AD2d 326 [1st Dept 2001]). When such an "irregularity in vital matters" is presented, and the agency is not merely attempting to reach a different determination, a remand is appropriate despite the otherwise final nature of the questioned order (*see Matter of Peckham v Calogero*, 54 AD3d 27, 28 [1st Dept 2008], *affd* 12 NY3d 424 [2009]). An irregularity in a vital matter is not limited to procedural defects and may be substantive in

nature (*Matter of Silverstein v Higgins*, 184 AD2d 644 [2d Dept 1992]).

Petitioner may not collaterally attack this court's order dismissing the owner's petition and remanding the matter to the agency. Although Mr. Etame alleges in his verified petition that he was not a party to the owner's prior Article 78 and only found out that the matter had been remanded to the agency after the fact, in opposition to the owner's motion to dismiss, he admits that he received notice of the commencement of the owner's Article 78 proceeding. Mr. Etame was not a necessary party to the owner's Article 78 proceeding, and he never sought leave to intervene in said proceeding.

Upon remand, the DHCR review of the owner's PAR was limited to the facts and evidence previously submitted to the agency. The Deputy Commissioner reviewed the evidence in the record, and accorded the Civil Court's order proper deference. He did not consider any new facts or new evidence, nor was he required to do so.

Under the doctrine of res judicata, a disposition on the merits bars litigation between the same parties, or those in privity with them, of a cause of action arising out of the same transaction or series of transactions as a cause of action that either was raised or could have been raised in the prior proceeding (*see Matter of Josey v Goord*, 9 NY3d 386, 389 [2007]; *Matter of Hunter*, 4 NY3d 260, 269 [2005]; *O'Brien v Syracuse*, 54 NY2d 353, 357 [1981]; *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485[1979]; *Blue Sky, LLC v Jerry's Self Stor., LLC*, 145 AD3d 945, 946 [2016]). "[U]nder New York's transactional analysis approach to res judicata, once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Matter of Hunter*, 4 NY3d at 269 [internal quotation marks omitted]; *see O'Brien v City of Syracuse*, 54 NY2d at 357; *Webb v Greater NY Auto. Dealers Assn., Inc.*, 144 AD3d 1134, 1134-1135 [2016]).

The doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action . . . an issue clearly raised in a prior action . . . and decided against that party" provided that the party has been afforded a full and fair opportunity to contest the issue, and applies to administrative proceedings (*Ryan v New York Tel. Co.*, 62 NY2d 494, 500-501[1984]; *see Rizzo v Matturro*, 8 AD3d 646, 646 [2d Dept 2004]).

Mr. Etame was a party to the Civil Court proceeding and was given a full and fair opportunity to litigate the issue of the discounted rent and the preferential rent. The Civil Court determined that the discounted rent is a preferential rent, and as Mr. Etame did not appeal that determination, it is final and binding on Mr. Etame. Thus, having asserted in the Civil Court proceeding that the discounted rent (on-time rent) was a preferential rent, he cannot now claim in this proceeding that the same discounted rent is something other than

a preferential rent. In addition, as the Civil Court determined that the amount of the preferential rent was $1,795.50 for the lease term of August 2013 through May 2014, the doctrines of collateral estoppel and res judicata apply to the amount of rent petitioner was required to pay for the time periods set forth in said order.

The DHCR and the Civil Court have concurrent jurisdiction over rent regulated housing in the City of New York. The Deputy Commissioner, in his June 21, 2017 determination, properly applied the doctrine of collateral estoppel and res judicata to the Civil Court order with respect to the issue of the preferential rent, and his determination in this regard was neither arbitrary nor capricious, nor an abuse of discretion.

Contrary to petitioner's claim, the rent calculations set forth in the DHCR's determination of April 12, 2016 are not consistent with the provisions of the Civil Court's order. The Civil Court's order was issued prior to the Rent Administrator's order and determined that the discounted on-time rent was a preferential rent. The Rent Administrator and the Deputy Commissioner in the April 12, 2016 determination improperly interpreted the Civil Court's order and failed to acknowledge that said Court had determined the issue of a preferential rent, and that said determination was binding on the agency. Upon remand from this court the Deputy Commissioner clearly could not perpetuate this error.

It is undisputed that the Civil Court made no determination as to the legal regulated rent for the subject apartment. Therefore, it was well within the Deputy Commissioner's authority to determine the base date legal regulated rent and the preferential rent, in order to determine whether the petitioner had paid any amount in excess of the preferential rent. The court finds that the Deputy Commissioner properly determined that the base date lease could not have been based upon a legal rent, as it was a four year lease, and the rent guidelines only permit increases for one or two year leases.

The subject apartment was improperly deregulated while it was receiving J-51 tax benefits due to a prior faulty Agency interpretation, and was then returned to rent stabilization. As the circumstances presented here were similar to those found in *72A Realty Associates v Lucas* (101 AD3d 401 [1st Dept 2012], and *Taylor v 72A Realty Associates*, (151 AD3d 95 [1st Dept 2017]), the Deputy Commissioner calculated the legal regulated rent in accordance with said holdings and the provisions of 9 NYCRR 2526.1 (a)(3)(iii). Petitioner has not established that this case is distinguishable from *Lucas* and *Taylor*, and thus has not established that the Deputy Commissioner's determination lacks a legal basis, or that it is arbitrary and capricious.

Petitioner's allegations are insufficient to establish substantial indicia of fraud, warranting an examination of the entire rental history of the subject apartment (*see Matter*

of Watson v NY State Div. of Hous. & Community Renewal (N.Y.S.D.H.C.R.), 109 AD3d 833, 833-834 [2d Dept 2013]). Finally, petitioner's allegation that the DHCR's determination of June 21, 2017 is contrary to public policy, is without merit.

In view of the foregoing, it is hereby ADJUDGED that petitioner's request for an judgment vacating respondent DHCR's determination of June 21, 2017 is denied, and the petition is dismissed.

It is hereby ORDERED that Respondent Hillside Place LLC's motion to dismiss the petition is denied as moot.

It is hereby ORDERED that Petitioner's motion for injunctive relief is denied as moot.

This constitutes the JUDGMENT and ORDER of the court.

Dated: June 12, 2018

Thomas D. Raffaele, J.S.C.

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242 AM/PM
JUN 27 2018
COUNTY CLERK
COUNTY OF QUEENS

Audrey I Pheffer
CLERK

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