At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 2nd day of October, 2018.

PRESENT: HON. LOREN BAILY-SCHIFFMAN
JUSTICE

JASON REIF, Plaintiff, - against - 205 SAINT JAMES, LLC, Defendants.	Index No.: **510088/14** Motion Seq. # 2 DECISION AND ORDER
In the Matter of the Application of JASON REIF, Petitioner, For a Judgment Pursuant to Article 78 of the CPLR, - against - THE NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, DEPUTY COMMISSIONER WOODY PASCAL and 205 SAINT JAMES LLC, Respondents.	Index No.: **504068/18** Motion Seq. # 1 & 3 DECISION AND ORDER

As required by CPLR 2219(a), the following papers were considered in the review of these motions for summary judgment dismissing the complaint in Index No **510088/14** and for judgment pursuant to Article 78 and for a preliminary injunction in Index No **504068/18**

	PAPERS NUMBERED
Notice of Motion for Summary Judgment, Affirmation, Affidavit and Exhibits	1
Affirmation in Opposition and Exhibits	2
Reply Affirmation	3
Notice of Petition and Petition and Exhibits in Support of Article 78	4
205 Saint James' Affirmation in Opposition and Exhibits	5
Petitioner's Reply Affirmation and Exhibits	6

DHCR Answering Affirmation and Exhibit	**7**
DHCR Verified Answer	**8**
DHCR Memorandum of Law	**9**
Petitioner's Reply Affirmation in Response to DHCR	**10**
Order to Show Cause for Preliminary Injunction, Affirmation and Exhibits	**11**
Affirmation in Opposition and Exhibits	12

In Index No **510088/14,** the tenant, Jason Reif, seeks damages for rent overcharge and other relief against his landlord, 205 Saint James, LLC. The motion before this court in that action seeks summary judgment dismissing the first, second and third causes of action in the complaint or in the alternative staying the instant action pending exhaustion of plaintiff's administrative remedies and/or remanding the instant claim to the DHCR. The dispute between the parties is whether the apartment occupied by Jason Reif is rent stabilized or whether it has been de-stabilized as a result of substantial rehabilitation.

Index No **504068/18** is an Article 78 proceeding concerning a determination of the DHCR granting 205 Saint James, LLC's application for exemption from rent stabilization and denying tenant's petition for administrative review ("PAR"). Tenant filed an Article 78 proceeding seeking annulment of DHCR's January 8, 2018 Order which denied tenant's PAR arguing: a) that two prior Orders of the DHCR concerning other tenants in the subject building found that the owner was exempt from rent stabilization and the owner is, therefore, collaterally estopped from re-litigating that issue; b) that tenant should have been permitted discovery in the DHCR proceeding; and c) that DHCR should have held an evidentiary hearing prior to determining owner's exemption application. Tenant also argues that the administrative record does not support the required finding that the rehabilitation of the building completely replaced 75% of the building's systems and, therefore, the January 8, 2018 DHCR Order should be annulled.

Tenant also moves under Index No **504068/18** for a preliminary injunction staying the pending Housing Court proceeding brought by 205 Saint James LLC against Jason Reif. Landlord, 205 Saint James LLC, argues in opposition to tenant's motion that tenant cannot establish the required elements of an application for a preliminary injunction: that he has a likelihood of success on the merits, that a balancing of the equities favors tenant and that tenant is likely to be irreparably injured if the motion is not granted.

PROCEDURAL BACKGROUND

In 2000 a 7A Administrator was appointed for the subject building, 205 Saint James Place in Brooklyn, NY. In 2002 the 7A Administrator purchased the building. Thereafter, the new owner renovated or rehabilitated six (6) of the eight (8) apartments in the building. In 2009, tenant Jason Reif began occupancy of the building pursuant to a one-year market rate lease. Leases were renewed through 2013. In 2014, 205 Saint James LLC purchased the building. Five months after 205 Saint James LLC purchased the building, Jason Reif sued them for rent overcharge. In 2015, the owner filed an application with DHCR for exemption from Rent Stabilization on the basis of substantial rehabilitation. Jason Reif did not submit opposition to the owner's application to DHCR. In 2016, the owner's application was granted by DHCR. Jason Reif then filed a PAR with DHCR. In 2017 the PAR was denied. Mr. Reif then filed an Article 78 proceeding under Index No 508005/17 challenging the denial of his PAR. The Article 78 proceeding resulted in the remand of the administrative proceeding to DHCR to permit Jason Reif to submit opposition to the owner's application for exemption. On January 8, 2018, DHCR denied Mr. Rief's PAR after reconsideration. The instant Article 78 proceeding was timely filed thereafter.

SUMMARY JUDGMENT STANDARD

Pursuant to CPLR §3212, a party may move for summary judgment when it can show that there are no material issues of fact in controversy and that movant is entitled to judgment as a matter of law. ***Winegrad v. New York Univ Med Center, 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980)***. After a *prima facie* showing is made, the burden shifts to the non-moving party to submit evidentiary proof in admissible form sufficient to establish that there are material issues of fact in controversy requiring a trial. ***Stewart Title Insurance Company v Equitable Land Services, Inc, 207 AD2d 880, 881 (2d Dept 1994).*** The court must consider the evidence presented in a light most favorable to the non-moving party. ***Negri v Stop & Shop. 65 NY2d 625 (1985)***.

OWNER'S MOTION FOR SUMMARY JUDGMENT

Defendant, 205 Saint James LLC, argues in its motion for summary judgment that the May 2, 2016 DHCR Order granting its application for exemption from Rent Stabilization is entitled to *res judicata* and collateral estoppel effect because DHCR and the court have concurrent jurisdiction over issues of rent overcharge and the Rent Stabilization status of apartments. It must be noted that the owner's motion was made in 2016, before the 2018 DHCR Order after reconsideration which again granted owner's application for exemption on the basis of substantial rehabilitation.

Jason Reif opposes owner's motion on the basis that the administrative proceeding at DHCR was on-going and, therefore, is not a final determination entitled to *res judicata* or collateral estoppel effect. In addition, Reif argues that the motion is premature as discovery is not complete and that the DHCR Order was granted on default and is, therefore, not entitled to *res judicata* effect.

An Order granted on default is not entitled to *res judicata* or collateral estoppel effect. ***Kossover v Trattler, 82 AD2d 610 (2nd Dept 1981).*** Here, the tenant presented no response to owner's application for an exemption from Rent Stabilization. Accordingly, the DHCR Order, dated May 2, 2016, was granted on default and is not entitled to *res judicata* or collateral estoppel effect. The owner's motion for summary judgment is, therefore, DENIED in all respects. The court rejects tenant's other arguments as without merit or unnecessary to determine in light of the court's decision.

TENANT'S ARTICLE 78 PROCEEDING

Petitioner, Reif, contends in his Article 78 Petition that the DHCR'a January 8, 2018 Order and Opinion denying his PAR was affected by multiple errors of law, was arbitrary and capricious and/or was an abuse of discretion and should be vacated and the PAR granted or in the alternative the matter should be remanded to the DHCR for further proceedings on the basis that: 1) two prior Orders of the DHCR holding that apartments in the subject building were not subject to rent stabilization on the basis of luxury decontrol are entitled to *res judicata* and collateral estoppel effect; 2) the DHCR Order and Opinion is at odds with its policy statement concerning the

requirement that 75% of building systems must be completely replaced; 3) a hearing should have been held; and 4) DHCR should have permitted petitioner to conduct discovery.

STANDARD

A court reviewing the determination of an administrative body may not interfere with the agency's discretion unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious. ***Matter of Pell v. Board of Education, 34 NY2d 222 at 231 (1974)***. In addition, a reviewing court may not review the facts generally as to the weight of the evidence except to determine whether the administrative decision was supported by substantial evidence. ***Id at 230***.

Res Judicata or Collateral Estoppel

The DHCR's January 8, 2018 determination denying Petitioner/Tenant's PAR rejected Petitioner/Tenant's contention that two prior agency determinations holding that certain apartments in the subject building were exempt from rent regulations on the basis of high rent vacancy decontrol implicitly held that the entire building was not entitled to be decontrolled on the basis of substantial rehabilitation. In the administrative proceedings concerning apartments 3L and 4L, the owner had argued both that the apartments were not subject to rent regulation because of high rent vacancy decontrol and that the entire building was not subject to rent regulation because of substantial rehabilitation. The Rent Administrator in each proceeding held only that the subject apartment was decontrolled based on high rent and failed to mention the owner's argument that the entire building was decontrolled on the basis of substantial rehabilitation. Petitioner/Tenant argued before the DHCR and argues here that the DHCR implicity rejected the Owner's substantial rehabilitation argument and that that determination is entitled to preclusive effect because "it is well established that the court's failure to issue an express ruling is deemed a denial thereof. . . " ***Rochester Equipment & Maintenance v. Roxbury Mountain Service, Inc., 68 AD3d 1803, 1805 (4th Dept 2009).*** Petitioner/Tenant further argues that this court is required to find that the issue of decontrol based upon substantial rehabilitation was decided by the DHCR against the owner and that that holding is entitled to *res judicata.*

The DHCR argues before this court that caselaw holding that a court's failure to explicitly address a claim or defense asserted by a party is tantamount to a rejection of that claim or defense and that such decision has preclusive effect is not applicable to the holdings of a Rent Administrator because proceedings before a Rent Administrator have little in common with a judicial or even a quasi-judicial proceeding. While administrative determinations are entitled to *res judicata* effect where the proceeding employed procedures substantially similar to those used in a court of law, ***Ryan v New York Telephone Co., 62, NY2d 271 (1988)***, proceedings before a Rent Administrator do not fall into that category. As can be seen by the difference between the Rent Administrator's decisions concerning apartments 3L and 4L compared with the decision of the DHCR denying Petitioner/Tenant's PAR, the Rent Administrator cited no facts and stated only the conclusion that the apartment is no longer subject to rent regulation. The DHCR decision denying the PAR is replete with factual findings and reference to the materials submitted by the parties and citations to relevant regulations. Accordingly, this court declines to find that the decisions of the Rent Administrator concerning apartments 3L and 4L are entitled to preclusive effect or that they implicitly hold that the building was not substantially rehabilitated and, thus not exempt from rent regulations.

Is the Determination that 75% of the Building Systems Were Replaced Supported by Substantial Evidence or is it Arbitrary and Capricious?

Petitioner/Tenant argues that the owner failed to establish that 75% of the building systems were completely replaced as required by the applicable regulations and, therefore, the DHCR determination finding that 75% of the systems have been completely replaced is not supported by substantial evidence and is arbitrary and capricious. Petitioner/Tenant is attempting to hold the owner and, therefore, DHCR to a standard higher than that required. The seminal case of ***Eastern Pork Products v NYS DHCR, 187 AD2d 320 (1st Dept 1992)*** holds that to qualify as substantially rehabilitated, a building need not have been gutted nor need it be completely vacant. Additionally, the term substantial rehabilitation is not to be mechanically applied.

In response to the ***Eastern Pork*** decision, the DHCR promulgated Operational Bulletin 95-2

which requires that 75% of existing building-wide systems be replaced to qualify as substantially rehabilitated. Exceptions are permitted to this requirement where a system or part of a system is found to be structurally sound or where preservation of a component of the building is required by law or historical merit. In the subject matter, certain windows were not required to be replaced because of the building's landmark status and other windows had been replaced by the prior owner. The owner's architect submitted documentation that parts of other systems were structurally sound. The direction by the Appellate Division in ***Eastern Pork*** is that DHCR must be flexible in applying its criteria in order to further the goal of creating new or rehabilitated housing. Based upon the foregoing, the court holds that the DHCR applied proper criteria in determining that the subject building had met the requirements of substantial rehabilitation and that there was substantial evidence to support its findings. Accordingly, the DHCR decision is not arbitrary or capricious.

Should Petitioner/Tenant Have Been Permitted to Conduct Discovery?
Was DHCR Required To Hold a Hearing?

Petitioner/Tenant argues that it was entitled to conduct discovery in the DHCR proceeding and that DHCR denied it that entitlement. Petitioner/Tenant is incorrect. As argued by the DHCR, the agency is entitled to issue subpoenas, require the production of documents or require persons to appear and testify. However, there is no authority permitting a party to conduct discovery during a DHCR proceeding. Accordingly, the DHCR's failure to permit Petitioner/Tenant to conduct discovery is not arbitrary or capricious.

Whether a hearing is required in a PAR proceeding before the DHCR is a matter within the discretion of the agency. ***508 Realty Associates, LLC v SDHR, 61 AD3d 753 (2nd Dept 2009); Acevedo v. DHCR, 67 AD3d 785 (2nd Dept 2009).*** In the instant proceeding, voluminous documentary evidence was submitted to and reviewed by the agency. There was more than sufficient evidence in the administrative record to support the findings of the agency. Accordingly, Petitioner/Tenant was afforded a full and fair opportunity to present his case and due process requires no more. ***Id.***

TENANT'S MOTION FOR A PRELIMINARY INJUNCTION

In the proceeding under Index Number 504068.18, Petitioner/Tenant moves for a preliminary injunction staying the proceeding in Housing Court captioned: 205 Saint James LLC v Jason Reif under Index Number L&T 79681/17. Owner, 205 Sant James , LLC, opposes the motion on the basis that Petitioner/Tenant cannot meet the standard required to obtain a preliminary injunction.

Standard

In order to prevail on a motion for preliminary injunction, movant has the burden of establishing that it has a likelihood of success on the merits, irreparable injury will result to movant if the motion is not granted and that there is a balancing of equities in movant's favor. ***Aetna Ins. Co v Capasso, 75 NY2d 860 (1990); Cruz v McAneney, 29 AD3d 512 (2nd Dept 2006)***. The grant or denial of a motion for preliminary injunction lies in the discretion of the court. ***Doe v. Axelrod, 73 NY2d 748 (1988).***

Has Petitioner/Tenant Met His Burden?

The within decision denying Petitioner/Tenant's Article 78 proceeding clearly indicates that he has not established a likelihood of success on the merits. The court has found on all bases alleged by Petitioner/Tenant that the DHCR decision was neither arbitrary nor capricious and was supported by substantial evidence. Moreover, the court has found that the DHCR properly determined that the Owner's application was not precluded by *res judicata* or collateral estoppel. Accordingly, a balancing of the equities does not favor the movant. While injury will result to movant if the motion is not granted in that there is likely to be a judgment for unpaid rent in an amount in excess of $100,000 and movant will be subject to eviction, that alone does not meet movant's burden. Movant must meet each element required to prevail and this he has failed to do. Accordingly, as movant has failed to meet his burden of establishing all the elements required to prevail on his motion for a preliminary injunction, the motion is denied in all respects and the court will not impose a stay of the Housing Court proceeding under Index Number L&T 79681/17.

CONCLUSION

Based upon the foregoing, it is hereby

ORDERED that in Index Number **510088/14,** Defendant/Owner's motion for summary judgment is denied; and it is hereby

ORDERED that in Index Number **504068/18**, the Petition is denied in all respects; and it is hereby

ORDERED that in Index Number **504068/18**, Petitioner/Tenant's motion for a preliminary injunction is denied.

This is the decision and Order of the court.

ENTER

LOREN BAILY-SCHIFFMAN
JSC

HON. LOREN BAILY-SCHIFFMAN

KINGS COUNTY CLERK
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