Matter of AEJ 534 E. 88th LLC v New York State Div. of Hous. & Community Renewal
2019 NY Slip Op 31906(U)
July 1, 2019
Supreme Court, New York County
Docket Number: 157908/18
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

AEJ 534 EAST 88TH LLC,

Petitioner,

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

Index No.: 157908/18
DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL,

Respondent.

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HON. CAROL R. EDMEAD, JSC:

In this Article 78 proceeding, petitioner AEJ 534 East 88th LLC (AEJ) seeks a judgment to overturn an order of the respondent New York State Division of Housing & Community Renewal (DHCR) as arbitrary and capricious (motion sequence number 001). For the following reasons, AEJ's petition is denied and this proceeding is dismissed.

FACTS

AEJ is the owner of a residential apartment building (the building) located at 534 East 88th Street in the County, City and State of New York. *See* verified petition, ¶ 1. The DHCR is the administrative agency charged with registering and overseeing all rent regulated apartments located inside the five boroughs of New York City. *Id.*, ¶ 2. This proceeding concerns a dispute regarding the regulatory status of, and the correct legal monthly rent for, apartment 4C in the building, which is currently occupied by non-party Sharon Hayes (Hayes). *Id.*, ¶¶ 4-5.

Hayes initially took possession of apartment 4C on March 1, 2010 pursuant to the terms

of a one-year, non rent-stabilized lease that expired on February 28, 2011, and that specified a legal monthly rent of $2,300.00, and a preferential monthly rent of $1,600.00 for the first year. *See* verified petition, exhibit C. Hayes's initial lease also contained extension riders that permitted her to renew her tenancy through February 28, 2012 (a one-year term), February 28, 2014 (a two-year term) and February 28, 2016 (a two-year term), at monthly rents of $1,700.00, $1,890.00 and $2,004.00, respectively. *Id.* Hayes evidently took advantage of all of these renewals, and still occupies apartment 4C. *Id.*, verified petition, ¶ 5.

AEJ states that, on December 23, 2015, it filed a request with the DHCR for a determination of apartment 4C's regulatory status. *See* verified petition, ¶ 6, exhibit D. On July 14, 2017 a DHCR rent administrator issued an order that found apartment 4C to be a rent stabilized unit with a maximum legal rent of $1,800.00 per month (the RA's order). *Id.*, ¶ 7; exhibit E. AEJ and Hayes thereafter each filed petitions for administrative review (PARs) of the RA's order. *Id.*, ¶ 8. On June 27, 2018, the DHCR Commissioner's office issued an order granting, in part, and denying, in part, both of those PAR applications (the PAR order). *Id.*, ¶ 9; exhibit B. The PAR order included the following relevant findings and determinations:

> "Upon careful review of this matter, the Commissioner is of the opinion that the owner's PAR should be granted in part; that the tenant's PAR should be granted in part; that the Rent Administrator's order should be affirmed as to the determination of status, modified as to the determination as to the legal base rent in accordance with this Order and Opinion, and reversed as to the determination of overcharges with further direction.
>
> "The Commissioner finds that the evidence of record supports a finding that the subject apartment was temporarily exempt from the regulations for a period of four or more years immediately prior to the execution of the Teixeira lease, and that so much of the Rent Administrator's finding in this regard was correct notwithstanding the tenant's claims about the existence of triable issues based on evidentiary deficiencies with the owner's submissions.

"[RSC] Section 2520.11 (f) exempts from stabilization:

> "Housing accommodations owned, operated, or leased or rented pursuant to governmental funding, by a hospital, convent, monastery, asylum, public institution, or college or school dormitory or any institution operated exclusively for charitable or educational purposes on a nonprofit basis, and occupied by a tenant whose initial occupancy is contingent upon an affiliation with such institution; however, a housing accommodation occupied by a nonaffiliated tenant shall be subject to the RSL and this Code.

"In the proceeding below, the owner presented deeds showing that ownership of the subject building was conveyed on June 11, 1970 to Doctor's Hospital; then conveyed on November 4, 1982 from Doctor's Hospital to East 88th Street Properties, Inc., a not-for-profit corporation and affiliate of the Mount Sinai- Beth Israel Medical Center; and then conveyed on September 24, 2004 from East 88th Street Properties, Inc. to a private corporation, 534 East 88th Street, Inc. Also presented was a letter from attorney Jill Clayton, Senior Associate General Counsel of Mount Sinai Hospital to owner's counsel dated October 29, 2015 stating, in pertinent part, that: 'Review of the available records by staff in the Hospital's Real Estate Services and Human Resources Department indicates that for the period September 1, 1999 through March 6, 2002, Apartment 4C was occupied by Andrea Szelenyi, an employee of the Hospital. ... that from July 26, 2002 through March 19, 2004, Apartment 4C was occupied by Mojgan Soroosh, also an employee of the hospital [who was hired in August of 2002].' An Attorney Affirmation was presented attesting to a telephone conversation during which Ms. Soroosh confirmed her personal occupancy of the subject apartment during the aforementioned period. The owner also presented additional documentation indicating that the subject apartment was occupied by hospital employees - namely, nurses Maria Cadiz and Kathryn Purwin - well prior to September of 1999; this documentation included an Affidavit signed by Kathryn Purwin who indicates that she worked for certain hospitals as a nurse and that based on such employment, she was provided with Apartment 4C and occupied same from 'at least as early as 1980 and ended sometime in 1990.' There is however no issue that the subject apartment was registered by a prior owner as rent-stabilized during the period 1984 to 1990 as to the named tenant: 'Kathryn Terry' or 'Terry-Purwin' with rents ranging from $314.65 per month as of 1984 to $398.15 as of 1990.

"While the owner's documentation may not be as comprehensive as might be required by the evidentiary standards of the Civil Court, the Commissioner finds nonetheless that the owner's many submitted papers were sufficient by regulatory standards to show that, at the least, the subject apartment met the criteria for a

temporary exemption from at least 1999 to 2004.

"The next issue concerns the applicability of the amended RSC Section 2526.1 (a) (3) (iii) to the facts of this case. This regulation was amended in January of 2014 and thus was in effect when the owner filed the initial AD request and when the Rent Administrator issued the order appealed herein. Although the owner maintains on appeal that the Code Section in effect on the date the Teixeira tenancy commenced requires that the DHCR find that the subject apartment was deregulated as the agreed-upon rent exceeded the high rent vacancy threshold of $2,000.00 per month, the Commissioner disagrees with this position.

"The prior RSC § 2526.1 (a) (3) (iii) provided:

> "Where a housing accommodation is vacant or temporarily exempt from regulation pursuant to Section 2520.11 of this Title on the base date, the legal regulated rent shall be the rent agreed to by the owner and the first rent stabilized tenant taking occupancy after such vacancy or temporary exemption, and reserved in a lease or rental agreement.

"In 2012, the New York Supreme Court, Appellate Division, First Department, held in *Gordon v 305 Riverside Corp.* that RSC Section 2526.1 (a) (3) (iii) requires that the first lease after an exemption period must be a stabilized lease at a stabilized rent in order for the owner to take advantage of this regulation that allows a 'first rent' where there is a vacancy or exemption on the base date. The Court remanded the matter for a determination of a legal regulated rent because, due to the deregulated claim by the owner, the RSC Section 2526.1 (a) (3) (iii) was not actually applicable.

"It should be noted that the amended RSC Section 2526.1 (a) (3) (iii) provides for a determination of a legal regulated rent using the last legal regulated rent and increasing it by any applicable guideline increases or other legal rent adjustments. In effect, this calculation 'bridges the gap' between the last regulated rent before the exemption period and the first stabilized rent to be charged after the exemption period.

"The claim raised by the owner, that the application of the amended Rent Code Section causes undue hardship or prejudice, is a 'red herring' in that the prior Section 2526.1 (a) (3) (iii) was never applicable in the first instance because it does not provide for an agreed upon rent in a deregulated lease. Therefore, this matter is akin to the Court's application of the new regulation in *Versailles Realty v DHCR*, 154 AD2d 540 (2nd Dept. 1989), aff'd 76 NY2d 325 (1990). The Court of Appeals in *Versailles* applied the rule in effect at the time of the determination, noting that there has been no pre-existing rule and no 'vested right' to the continuation of that rule. Consequently, the Commissioner finds that the Rent

Administrator's application of the amended Section 2526.1 (a) (3) (iii) in this proceeding was correct as a matter of law and notwithstanding any errors associated with reliance upon findings of two prior overcharge orders involving other tenants at the subject building.

"Even without the formula set forth in the new Code Section, some methodology is required to be used in accordance with *Gordon* to set the rent, rather than simply validating a deregulated rent and calling it regulated. Prior to the promulgation of the prior Section 2526.1 (a) (3) (iii), the DHCR had a policy which is now embodied in the amended regulation which enabled the DHCR to calculate the legal rent by 'bridging the gap.' To bridge the gap, the DHCR must look beyond the four-year cut off to the last regulated rent and then add all legal increases that an owner is entitled to. Therefore, the base date rent in this case shall be recalculated using the last regulated rent, in 1990, with subsequent legal increases as detailed below. This essentially takes into account the tenant-petitioner's request for a thorough consideration of the entire rent history of the apartment.

"To summarize, in this case, under either the prior or amended RSC Section 2526.1 (a) (3) (iii), the subject apartment is rent stabilized and tenant Adriana Teixeira should have been offered a rent stabilized lease when she assumed occupancy in June of 2005.

"Pursuant to the amended Section 2526.1 (a) (3) (iii), the 'legal regulated rent shall be the prior legal regulated rent for the housing accommodation, the appropriate increase under Section 2522.8 of this Title, and if vacated or temporarily exempt for more than one year, as further increased by successive two-year guideline increases that could otherwise have been offered during the period of such vacancy or temporary exemption and any other rental adjustments that would have been allowed under this code.' The Commissioner finds that the legal regulated rent of the subject apartment prior to the period of temporary exemption was $398.15 per month, the last registered rent for the year 1990.

"As noted, the Affidavit from Kathryn Purwin indicates that she was provided with the subject apartment as part of her employment with Doctor's Hospital and Beth Israel Hospital. However, whether tenant Purwin was or was not temporarily exempt is not determinative. The owner-petitioner alleges that it's predecessor erroneously registered rent stabilized rents for the Purwin tenancy in the 1980s, and, erroneous or not, the Commissioner finds that the registered rents for this period reflect the then-owner's good faith belief as to what the rent stabilized rents were, or would have been, during the period from 1984 through 1990. Therefore, under the specific facts of this case, and given the length of time involved, the Commissioner deems it appropriate to use the last of these registered rents - $398.15 per month - as a sufficiently reliable last legal rent upon

for use in the calculation of the base date rent herein.

"The last legal regulated rent of $398.15 per month is increased by 7%, which was the two-year guideline increase that otherwise would have been offered on October 1, 1990 for a two-year lease ending in September of 1992, yielding a rent of $426.02 per month. This rent of $426.02 per month is increased by 5%, which was the two-year guideline increase that otherwise would have been offered on October 1, 1992 for a two-year lease ending in September of 1994, yielding a rent of $447.32 per month. This rent of $447.32 per month is increased by 4%, which was the two-year guideline increase that otherwise would have been offered on October 1, 1994 for a two-year lease ending in September of 1996, yielding a rent of $465.21 per month. This rent of $465.21 per month is increased by 7%, which was the two-year guideline increase that otherwise would have been offered for two-year lease ending in September of 1998, yielding a rent of $497.78 per month. This rent of $497.78 per month is increased by 4%, which was the two-year guideline increase that otherwise would have been offered for two-year lease ending in September of 2000, yielding a rent of $517.69 per month. This rent of $517.69 per month is increased by 6%, which was the two-year guideline increase that otherwise would have been offered for two-year lease ending in September of 2002, yielding a rent of $548.75 per month. This rent of $548.75 per month is per month is increased by 4%, which was the two-year guideline increase that otherwise would have been offered for two-year lease ending in September of 2004, yielding a rent of $570.70 per month. This rent of $570.70 per month is increased by 6.5%, which was the two-year guideline increase that otherwise would have been offered for two-year lease ending in September of 2006, yielding a rent of $607.80 per month. The owner was then entitled to a 17% vacancy increase in relation to the Teixeira tenancy, which yields a rent of $711.12 per month.

"Accordingly, it is now determined that the legal regulated rent was $711.12 per month at the time Adriana Teixeira commenced occupancy, as explained above. Pursuant to RSC Section 2526.1 (a) (3) (iii), the gap between this rent and the base date rent will be bridged as follows. This rent of $711.12 per month is increased by 5.5%, which was the two-year guideline increase that otherwise would have been offered for two-year lease commencing on June 1, 2006 and ending in May of 2008, yielding a rent of $750.23 per month. This rent of $750.23 per month is increased by 5.75%, which was the two-year guideline increase that otherwise would have been offered for two-year lease beginning on June 1, 2008 and ending in May of 2010, yielding a rent of $793.40 per month. Pursuant to the RSC, because the subject tenant, Hayes, commenced her occupancy on March 1, 2010, prior to the base date herein (December 23, 2011), the legal rent must be increased by a 17% vacancy increase to which the owner would be entitled for a one-year lease beginning March 1, 2010 and ending February 28, 2011, which results in a legal rent of $928.28 per month. Because

this bridged lease term covers the base date, the Commissioner finds that the lawful base date rent in this case is $928.28 per month.

"Since the legal rent for the subject apartment at the time tenant Hayes took initial occupancy was less than the deregulated high rent vacancy threshold, the Rent Administrator's finding of rent stabilized status was correct and is hereby affirmed.

"At this point, while the issue of the lawful base rent has been determined herein, the Commissioner is of the opinion and recommendation that a determination as to overcharges should be made by the Civil Court. Several reasons support this conclusion. First, although concurrent jurisdiction exists between the DHCR and the Courts, the Order and Decision of Judge Maria Milin dated September 20, 2016 affirmatively stated, in pertinent part, that: *'[H]ere, to afford complete relief to both sides in a speedy and expeditious manner Civil Court will decide respondents' overcharge claim. Furthermore, the petitioner cannot commence an action and then request a stay of the proceeding to await a decision from another agency to determine if he even has a cause of action.'* Under these circumstances, it is clear the Rent Administrator should have addressed the status issue only and should not have converted the AD proceeding into an overcharge complaint. Secondly, the Rent Administrator's fact findings were plainly affected by evidentiary deficiencies in that neither party submitted tenant Hayes' vacancy or renewal leases in the proceeding below. Such evidence should have been included in the record. Thirdly, the owner has indicated, without denial by the tenant, that at least one substantial rent abatement has been afforded the tenant, which would be a factor to take into account in computing overcharges. Lastly, according to the owner, the tenant has not been paying rent since July of 2015 and, if true, this would be another factor to take into account.

"Lastly, the Commissioner is of the opinion that the Rent Administrator's imposition of treble damages was in error in this case, and that the court should take this into account in computing overcharge liability. Pursuant to RSC Section 2526.1, treble damages are inappropriate as the overcharges in this matter resulted solely from the owner's and its predecessor's reliance on the RSC and the practice of the DHCR prior to the promulgation of the 2014 Rent Code Amendments, as explained above. In this respect, the owner's PAR is being granted in part.

"THEREFORE, in accordance with all applicable provisions of the New York City Rent Stabilization Law and Code, it is

"ORDERED, that the owner's petition for administrative review be, and the same hereby is, granted in part; that the tenant's petition for administrative review be, and the same hereby is, granted in part; that portion of the Rent Administrator's order determining the rent stabilized status of the subject apartment be, and the

> same hereby is, affirmed; that portion of the Rent Administrator's order establishing the lawful base date rent is modified in accordance with this Order and Opinion; and, that portion of the Rent Administrator's order which determined overcharge liability be, and the same hereby is, reversed; and it is further
>
> "ORDERED, that the issue of overcharge liability in this matter shall be addressed and determined by the Civil Court in the pending matter referenced under L&T Index No. 050263/2016."

Id., exhibit B (emphases in original).

Dissatisfied, AEJ thereafter commenced this proceeding to vacate the PAR order on August 24, 2018. *See* verified petition. The DHCR filed an answer on February 5, 2019. *See* verified answer. Hayes chose not to appear in this Article 78 proceeding or to challenge the PAR order. AEJ's application to do so is now before the court (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *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 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination is arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *See Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), *citing Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. Thus, if there is a rational basis for the administrative determination, there can be no judicial interference.. *Id.*, 34 NY2d at

231-232. Here, AEJ raises five arguments that the PAR order was arbitrary and capricious. The court will review each of them in turn.

First, AEJ obliquely asserts that the $2,000.00 'preferential [rent]' was the legal rent of the apartment on June 1, 2005." *See* verified petition, ¶¶ 13-34. However, further reading shows that AEJ's real legal argument is that the PAR order was arbitrary and capricious because the Commissioner applied the "first rent" rule in the order inconsistently with the way the rule was applied in other DHCR decisions. *Id.* The Court of Appeals has certainly recognized that: "'[a] decision of an administrative agency which neither adheres to its own prior precedent nor indicates its reason for reaching a different result on essentially the same facts is arbitrary and capricious.'" *Matter of Lantry v State of NY*, 6 NY3d 49, 58 (2005) (citation omitted). Here, AEJ presents copies of DHCR PAR orders from: 1) *Matter of Keim* (Docket No. AQ410041RT); 2) *Matter of Forest Royale Assts.* (Docket No. WC110015RO); 3) *Matter of Perlman* (Docket No. TI410014RT); 4) *Matter of Olsen* (Docket No. ZPL410079R); and 5) *Matter of Healy* (Docket No. ER410062RT). *See* verified petition, ¶¶ 14-28; exhibit H. The first two of these decisions featured leases that specified monthly "preferential rents" at amounts below the RSC's $2,000.00 deregulation threshold, and riders that specified monthly "legal rents" above the deregulation threshold. *Id.* The remaining cases involved apartments that had been vacant on their respective "base dates," but whose "legal regulated rents" were determined to exceed the deregulation threshold as a result of "vacancy increases" and/or other legally permissible rent increases. *Id.* AEJ asserts that, in each of these decisions, the DHCR applied the older version of the "first rent rule" to fix the subject apartments' "legal regulated rents" at amounts above the

deregulation threshold. *Id.* AEJ then argues that the PAR order was arbitrary and capricious because, in it, the Commissioner used the new, 2014 amended version of the "first rent rule" to determine that apartment 4C's "legal regulated rent" did not exceed the deregulation threshold, despite the fact that the apartment had become deregulated while the old Code provision was still in effect. *Id.* The DHCR responds that it was within its authority to apply the new version of RSC § 2526.1 (a) (3) (iii). *See* respondent's mem of law, at 13-14. The court agrees.

When it considered a similar deregulation dispute in *Matter of St. Vincent's Hosp. & Med. Ctr. of N.Y. v New York State Div. of Hous. & Community Renewal* (66 NY2d 959 [1985]), the Court of Appeals upheld the rule that the administrative agency should apply the law as it stands when an application is submitted, rather than the law as it stood when an initial determination was made. 66 NY2d at 961; citing *Matter of St. Vincent's Hosp. & Med. Ctr. of N.Y. v New York State Div. of Hous. & Community Renewal*, 109 AD2d 711, 712 (1st Dept 1985) ("[w]here a statute has been amended during the pendency of a proceeding, the application of that amended statute to the pending proceeding is appropriate and poses no constitutional problem). More recently, in *Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.* (10 NY3d 474, 482 [2008]), the Court observed that "[a]lthough [the] DHCR's inordinate delay in resolving the owner's [PAR] may have prejudiced the tenant as the amendment to RSC § 2522.3 benefitted the owner, neither a property owner nor a tenant has a vested interest in beneficial regulations."

Here, the older version of the "first rent rule," set forth in RSC § 2526.1 (a) (3) (iii), provided that:

> "[w]here a housing accommodation is vacant or temporarily exempt from rent regulation on the base date, the legal regulated rent shall be the rent agreed to by the owner and the first stabilized tenant taking occupancy after such vacancy or temporary exemption, and reserved in a lease or rental agreement."

The 2014 amended version of RSC § 2526.1 (a) (3) (iii) provides that:

> "[w]here a housing accommodation is vacant or temporarily exempt from regulation . . . on the base date, the legal regulated rent shall be the prior legal regulated rent for the housing accommodation, the appropriate increase under section 2522.8 of this Title, and if vacated or temporarily exempt for more than one year, as further increased by successive two year guideline increases that could have otherwise been offered during the period of such vacancy or exemption and such other rental adjustments that would have been allowed under this code."I

It is easy to see how applying the older version of RSC § 2526.1 (a) (3) (iii) would have yielded the result that apartment 4C 's "first rent" would have been the $2,300.00 "legal rent" specified in Hayes's original 2010 lease. Here, however, AEJ filed its regulatory status request with the DHCR on December 23, 2015, and filed its PAR request on August 21, 2017; both of which dates were *after* the amended version of RSC § 2526.1 (a) (3) (iii) had gone into effect. *See* return, exhibits A-1, B-1. As a result, the above-cited Court of Appeals precedent makes it clear that the DHCR was correct to apply the more recent Code provision. Doing so results in determinations that apartment 4C's legal regulated rent did *not* exceed the deregulation

threshold, and that the apartment therefore *is* rent stabilized.

The DHCR PAR orders that AEJ annexed to its petition were all rendered before 2014, and the Commissioner applied the older version of RSC § 2526.1 (a) (3) (iii) to make determinations of each apartment's "legal regulated rent." *See* verified petition, exhibit H. However, because the administrative proceeding that gave rise to the instant PAR order was commenced after the new version of RSC § 2526.1 (a) (3) (iii) had gone into effect, it is based on different law, and cannot be deemed to be inconsistent with decisions that were rendered under the previous version of that law. Therefore, the court rejects AEJ's "inconsistency" argument.

The DHCR correctly pointed out that the only post-2014 PAR decision that AEJ presented, *Matter of Healy* (Docket No. ER410062RT), was vacated by an order of this court on September 27, 2018 (Index No. 155503/18, Perry, J.) and remanded to the agency for reconsideration. Therefore, the court finds that that decision provides no support for AEJ's argument, and discounts it.

The court finally notes that the facts of this proceeding make it improper to apply the older version of RSC § 2526.1 (a) (3) (iii) under any circumstances. The First Department has held that that provision only applies where a rental amount has been "agreed to by the owner and the first rent stabilized tenant" of an apartment, but *only if* that first tenant is given a rent stabilized lease. *Gordon v 305 Riverside Corp.*, 93 A.D.3d 590 (1st Dept 2012). Here, the evidence plainly shows that Hayes's first lease was *not* rent stabilized. *See* verified petition, exhibit C. Therefore, there are no grounds to invoke the older version of RSC § 2526.1 (a) (3)

(iii), and the court rejects AEJ's first argument in its entirety.

AEJ's second argument is that "the vacancy lease met the requirements of the RSC, [t]herefore it is reversible error to discount the 2005 lease and preferential rent agreement." *See* verified petition, ¶¶ 35-41. AEJ initially focuses (somewhat confusingly) on the closing text of the old version of RSC § 2526.1 (a) (3) (iii) that "the legal regulated rent shall be the rent agreed to by the owner and the first stabilized tenant taking occupancy after such vacancy or temporary exemption, and reserved in a lease *or rental agreement*" (emphasis added). AEJ then asserts that, because neither the RSC nor the DHCR's in-house rules proscribe an exact form that a vacancy lease must take, the fact that the PAR order "determined the lease was invalid is another example of [its] inherently arbitrary and capricious nature." *See* verified petition, ¶ 37. AEJ concludes that the solution is to vacate the PAR order and replace it with a decision "in line with the DHCR case precedent pursuant to 'first rent scenarios' prior to the 2014 amendment to RSC § 2526.1 (a) (3) (iii)." *Id.*, ¶ 41. Thus, AEJ's second argument is, in substance, merely a repetition of its first argument; i.e., that it was arbitrary and capricious of the DHCR to apply the new version of RSC § 2526.1 (a) (3) (iii) in the PAR order. The court has already rejected this argument for the reasons discussed above. The court also notes that several of the ancillary points that AEJ raised in its second argument either lack credibility or are "red herrings." For one thing, the fact that the RSC does not proscribe the exact form that a vacancy lease must take is irrelevant, since the PAR order does not discuss that issue. For another, despite AEJ's insinuation to the contrary, the PAR order does *not* contain a finding that Hayes's original (vacancy) lease was "invalid." The order simply found that the lease's rent needed to be

recalculated using a different formula. *See* return, exhibit B-3. Finally, the court is mindful that Hayes's first lease explicitly stated that it was *not* rent stabilized, which is inconsistent with AEJ's contention that Hayes was apartment 4C's first stabilized tenant after a vacancy. *See* verified petition, exhibit C. Therefore, the court rejects AEJ's second argument.

Next, AEJ argues that "the Deputy Commissioner ignored evidence that the apartment was temporarily exempt for twenty (20) years, from at least 1984 to 2004, and improperly relied on the former owner's rent registrations." *See* verified petition, ¶¶ 42-51. AEJ asserts that the evidence that apartment 4C was occupied by employees of Mt. Sinai/Beth Israel Hospital between 1984 and 2004 is conclusive proof that the apartment enjoyed "exempt" status from rent regulation during that entire time, and compels the conclusion that the building's former landlord was "mistaken" to file rent registrations for apartment 4C between 1984 and 1990 and in 1999. *Id.* The DHCR responds that this argument "is pure conjecture . . . not based on any evidence," and that "the Commissioner's reliance on the [1984 - 1990 and 1999 registrations was] reasonable." *See* respondent's mem of law, at 8-9. Appellate case law favors the DHCR's position. In *Matter of Lyndonville Props. Mgt. v Division of Hous. & Community Renewal* (291 AD2d 311 [1st Dept 2002]), the Appellate Division, First Department, held that:

> "Under the circumstances, it was not irrational for DHCR to fix the base rent in the amount stated in the first reviewable registration statements rather than the unexplained amount actually charged and collected. To do otherwise would be to render largely meaningless a registration system that requires landlords to substantiate the lawfulness of their rents."

291 AD2d at 312 (internal citations omitted). Here, the administrative record before the DHCR contained rent registration filings for apartment 4C for the years 1984-1990 and 1999. Clearly, the law required the DHCR Commissioner to review those filings as part of the PAR proceeding, and allowed him to accord them whatever evidentiary value he saw fit. AEJ's contention that those filings were "mistakes" is impermissible speculation. Nor is there anything conclusive about AEJ's contention that the presence of hospital employees in apartment 4C between 1984 and 2004 is proof that the apartment was exempt from rent stabilization. The First Department has also recognized that, under the RSL, a non-profit corporate entity such as Mt. Sinai/Beth Israel Hospital may be the tenant of rent stabilized premises which it allows designated employees to occupy without acceding to tenancy rights themselves. *Manocherian v Lenox Hill Hosp.*, 229 AD2d 197 (1st Dept 1997). The issue of whether or not that was the case with respect to apartment 4C is not before the court. However, the legal possibility that the hospital employees who formerly occupied apartment 4C may well have enjoyed rent stabilized status means that AEJ's insistence that the apartment must have been exempt from rent stabilization is unwarranted. Therefore, the court rejects AEJ's registration argument.

Next, AEJ argues that "the 'bridging the gap' formula that the DHCR utilized to set the legal rent was also arbitrary, capricious and unreasonable." *See* verified petition, ¶¶ 52-67. This argument refers to the second of the four methods set forth in RSC § 2522.6 (b) (3) (i)-(iv) by which the DHCR may fix an apartment's "base date rent" whenever the apartment's "legal regulated rent" is "in dispute, in doubt, or not known." The Code provision describes those four methods as follows:

> "(i) the lowest rent registered . . . for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment [the 'default method'; or
>
> "(ii) the complaining tenant's initial rent reduced by the percentage adjustment [for vacancy increases] [the 'bridging the gap' method]; or
>
> "(iii) the last registered rent paid by the prior tenant (if within the four year period of review) [the 'last registered rent' method]; or
>
> "(iv) if the documentation set forth in subparagraphs (i) through (iii) of this paragraph is not available or is inappropriate, an amount based on data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations [the 'sampling method']."

RSC § 2522.6 (b) (3) (i)-(iv). AEJ again repeats the argument that the DHCR should have fixed apartment 4C's rent via the method set forth in the old version of RSC § 2526.1 (a) (3) (iii), as it did in the pre-2015 PAR orders that AEJ annexed to its petition. *See* verified petition, ¶¶ 52-63; exhibit H. The court has already rejected this argument for the reasons stated earlier. AEJ also reasserts that the DHCR acted arbitrarily and capriciously by ignoring the evidence that apartment 4C was exempt from rent stabilization between 1984 and 2004. *Id.*, ¶¶ 64-65. The court has already rejected this argument, too, as unwarranted. Finally, AEJ characterizes the DHCR's choice of the "bridging the gap" method to set apartment 4C's base date rent as "bizarre." *Id.*, ¶ 60. The DHCR takes issue with this, and refers to AEJ's assertion as a "straw man" argument. *See* respondent's mem of law, at 6-7. Without getting into gratuitous characterizations, the court observes that appellate precedent again favors the DHCR. In *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (164 AD3d

420 [1st Dept 2018]), the First Department held that, while the "default method" is generally used to fix an apartment's base date rent when there is evidence of fraud, the DHCR is free to employ any of the other methods in cases that feature other circumstances. Because there were no allegations of fraud in the administrative record before the DHCR in this case, there was therefore nothing "bizarre" about the agency's choice of the "bridging the gap" method to set apartment 4C's base date rent. Therefore, the court rejects AEJ's argument.

Finally, AEJ argues that "the application of the 'bridging the gap' formula prior to the four-year base date violates the four-year rule." *See* verified petition, ¶¶ 68-71. This argument refers to the portions of RSL § 26-526 (a) and RSC § 2526.1 (a) (2) (ii) that preclude the examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint. However, it is inapposite. The First Department has repeatedly held that the four-year rule only applies to rent overcharge claims, and that it does *not* apply to requests to determine an apartment's regulatory status. *See Rodriguez v Kalata*, _ AD3d_, 2019 NY Slip Op. 04894 (1st Dept 2019); *Gersten v 56 7th Ave. LLC*, 88 AD3d 189, 199-200 (1st Dept 2011); citing *East W. Renovating Co. v New York State Div. of Hous. & Community Renewal*, 16 AD3d 166, 167 (1st Dept 2005). Despite the fact that the proceeding before the DHCR below was a request for a regulatory status determination, AEJ nevertheless argues that "the portion of the [PAR] order that sets the rent must be vacated" because "a determination of the rent based on a review beyond the base date is still impermissible because there was no fraud in this case." *See* verified petition, ¶ 66. AEJ's argument plainly turns on an improper interpretation of the holding of *Matter of Regina Metro. Co., LLC v New York State*

Div. of Hous. & Community Renewal. AEJ asserts that the DHCR cannot make a base date rent calculation using evidence from before the four-year period *unless* there was evidence of fraud. *Id.* However, the DHCR correctly notes that *Matter of Regina Metro. Co., LLC* contains no such holding. *See* respondent's mem of law, at 6-7. That case involved a rent overcharge claim, and its holding is *not* applicable to requests for determinations of an apartment's regulatory status. In *Gersten v 56 7th Ave. LLC*, the First Department held that such requests are *not* subject to the four-year rule (or to any statute of limitations), and allowed the tenant to proceed with the rent overcharge claim that arose in the wake of the regulatory status determination that the subject apartment was rent stabilized. 88 AD3d at 199-200; *see also Suarez v Four Thirty Realty LLC*, 169 AD3d 546 (1st Dept 2019); *Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95 (1st Dept 2017). This is not to say that a tenant who receives a favorable regulatory status determination will automatically prevail on an ensuing rent overcharge claim. RSC§ 2526.1 (a) (2) restricts both the amount that a tenant may recover for such a claim, and the time period during which such a claim is cognizable. *See e.g.*, *Rodriguez v Kalata*, _Ad3d_, 2019 N.Y. Slip Op. 04894 (1st Dept 2019). However, the PAR order specifically declined to address the matter of compensation, and remanded the issue of calculating of the amount of rent overcharge due (if any) to the Civil Court. Thus, the PAR order contained no improper, or even questionable, rent overcharge findings. As a result, the court rejects AEJ's final argument as inapposite. Accordingly, having rejected all of AEJ's arguments, the court finds that the PAR order was not an arbitrary or capricious determination, and that AEJ's Article 78 petition should consequently be denied.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner AEJ 534 East 88th LLC (motion sequence number 001) is denied and the petition is dismissed, with costs and disbursements to respondent. And it is further

ORDERED that counsel for petitioner shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for respondent.

Dated: New York, New York
July 1, 2019

ENTER:

Hon. Carol R. Edmead, JSC

HON. CAROL R. EDMEAD
J.S.C.