SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. DEBRA A. JAMES** **PART** **IAS MOTION 59EFM**

Justice

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INDEX NO. 158454/2018

OLTIMDJE OUATTARA,

MOTION DATE 09/02/2019

Petitioner,

MOTION SEQ. NO. 001

For a Judgment Pursuant to Article 78 of the Civil Practice Laws & Rules,

- v -

DECISION + ORDER ON MOTION

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, and AUDTHAN, LLC,

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

ORDER

Upon the foregoing documents it is

ORDERED and ADJUDGED that the petition is granted to the extent of annulling the PAR Order of July 20, 2018, which applied the sampling method for ascertaining the rent without adequate explanation, and the matter is remanded to DHCR for proceedings consistent with the terms of this decision; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

DECISION

Respondent Audthan, LLC (Audthan), is the net lessee of the Chelsea Highline Hotel (the Hotel), a building located at 184 11th

Avenue in Manhattan.[1] The Hotel, which includes single room occupancy (SRO) units, is subject to the New York Rent Stabilization Law. Under the Rent Stabilization Code,

> "an occupant [of a hotel] who has never had a lease . . . may at any time during his or her occupancy request a lease and the owner must, within 15 days after such request, grant a lease commencing on the date such request was made at a rent which does not exceed the legal regulated rent, for a term of at least six months."

(9 NYCRR § 2522.5 [a] [2]).

A request for a lease makes the occupant a permanent tenant (9 NYCRR § 2520.6 [j]; see Nutter v W & J Hotel Co., 171 Misc 2d 302, 304-305 [Civ Ct, NY County 1997]). As such, the occupant acquires the legal rights afforded under the rent stabilization laws, and the owner cannot evict him or her "except to the extent that the owner may be permitted to do so by law pursuant to a warrant of eviction" or other specified legal means (9 NYCRR § 2522.5 [a] [2]). Further, when the occupant registers, the owner must provide him or her with a Notice of Rights which describes "the rights and duties of hotel owners, occupants and tenants as provided for under the [Rent Stabilization Law] and this code" (9 NYCRR § 2522.5 [c] [2]). If an owner does not provide this notice,

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[1] Audthan has been involved with the Hotel since 2013, when it formed a partnership with the nonprofit Clinton Housing Development Company "for the express purpose of curing the harassment [of the prior owner]. . . and creating permanent affordable housing at the property" (NYSCEF Doc. No. 15 at *320 [Return, Part I] [Audthan's Dec 17, 2015 letter]).

it may be assessed a penalty as well as "a loss of a guidelines adjustment" (id.) - that is, the owner cannot increase the rent above the room's last registered rent unless it can show "that the rent collected was otherwise legal" (9 NYCRR § 2522.5 [c] [3]).

The Hotel did not adhere to these regulations. In fact, it had "a policy of not renting rooms to anyone who lives in New York City, or who has a New York City address" (Ouattara v Audthan LLC, 49 Misc 3d 1206[a], 2015 NY Slip Op 51496[U]), *2 [Civ Ct, NY County 2015]). In addition, it informed renters "that the maximum permissible stay is 14 days," and it did not provide renters with a Notice of Rights which informs occupants of their right to request a stabilized lease (id., *5; see NYSCEF Doc. No. 1 [Petition], ¶ 17).

On August 3, 2015, petitioner Oltimdje Ouattara (Ouattara) checked into room 201 at the Hotel and paid the daily rate of $39 for one of the two bunks in the room (Petition ¶¶ 8-9). As he was aware of Audthan's policy of not renting its rooms to New York residents, Ouattara did not provide his New York address when he registered (Ouattara, 2015 NY Slip Op 51496 [U], *2). On August 4, 2015, Ouattara formally requested a six-month lease for apartment 201 (Petition, ¶ 10).[2] The building manager denied his request,

[2] Judge Sabrina B. Kraus' order in Ouattara's Housing Court case states that Ouattara submitted the request on August 3, 2015 (Ouattara, 2015 NY Slip Op 51496 [U], *1).

telling Ouattara to leave the premises and return after 3:00 p.m. Ouattara left, under protest, when the manager contacted the police. When he returned after 3:00 p.m., the manager offered him a different room. Ouattara declined and commenced a Housing Court unlawful eviction proceeding before Judge Sabrina B. Kraus (id. ¶ 12).

In her October 9, 2015 order (the Kraus Order), Judge Kraus noted that apartment 201 in the Hotel is rent-stabilized. The Kraus Order cited Nutter (171 Misc 2d at 302), which, on similar facts, found that the occupant of an SRO unit became a permanent tenant when she requested a six-month lease, and that the owner acted unlawfully when it evicted her (Ouattara, 2015 NY Slip Op 51496 [U] at *4, citing Nutter, 171 Misc 2d at 304-306). Here, too, Judge Kraus determined, Ouattara had acquired the rights of a permanent tenant and Audthan had acted unlawfully when it evicted Ouattara. Moreover, she stated, "[r]espondents[']' act of . . . using the police to intimidate Petitioner into vacating the Subject Premises and surrendering his key, after he had asserted the right to be a permanent tenant, was a use of force and intimidation designed to evade their obligations under the rent stabilization law" (Ouattara, 2015 NY Slip Op 51496 [U], *4). Judge Kraus also noted that the respondents "were well aware of their obligations," as they recently had litigated "a nearly identical proceeding"

concerning another Hotel tenant (id.). Accordingly, the Kraus Order awarded Ouattara a judgment of possession (id.).

Under the Kraus Order, Audthan had to issue Ouattara a rent-stabilized lease. However, due to the predecessor owner's recording failures and Audthan's failure to provide residents with rent-stabilized leases, the rental history for apartment 201 does not include any information about the legalized regulated rent for the unit from 1984 onward (*see* NYSCEF Doc. No. 15 [Return, Part I] at **60-64 [Registration Apartment Information printout]). After DHCR rejected its request for an advisory opinion and stated that a determination based on evidence was necessary, Audthan filed a request for an Administrative Determination Case (Return, Part I at *83). DHCR's Notice of Commencement of Administrative Proceeding is dated December 24, 2015 (id. at **205-206).

Both parties submitted supporting documentation to DHCR. Audthan's letter stressed that Ouattara had rented one bed in a two-bed room of 118 square feet, and that he had paid $39 for one night. Audthan did not directly argue that the rent should be derived from this rate. However, this is the only rental information that Audthan provides, and its letter reiterates the price twice and the room's two-bed setup three times (see id. at **208-209).

Ouattara stated that he is a tenant with the right to the protections of the rent stabilization laws. Pursuant to Judge

Kraus' order Ouattara was a permanent tenant, and Ouattara stated that therefore the daily rate for transients of $39 per day did not apply to him. Furthermore, Ouattara noted that in a prior case, Guira v Audthan LLC (48 Misc 3d 1217 [A], 2015 NY Slip Op 51152 [U], *4 [Civ Ct, NY County 2015]), Judge Kraus found that Audthan lied, schemed, and intimidated residents who requested leases, all in order to avoid its obligations under the rent stabilization laws, and that she made virtually the same findings in his own case. Ouattara also pointed to Cabelis v Audthan LLC (Civ Ct, NY County, Nov. 17, 2015, Gonzales, J, Index No. 76374/2015), in which the judge found Audthan had illegally locked the petitioner out of his room at the Hotel despite his attempt to seek a six-month rent. Ouattara cited cases and annexed rent registration reports and tenant affidavits which purportedly showed that tenants in the Hotel have been overcharged and that Audthan's predecessor owner improperly listed numerous apartments in the Hotel as exempt from rent stabilization.

In addition, Ouattara stated that the legal regulated rent for the room should be $82.84 per month (id. at 227). He pointed to Kanti-Savita Realty Corp. v Santiago (18 Misc 3d 74, 76 [App Term, 2d Dept 2007), which stated that the legal regulated rent in an SRO building is the most recent legal regulated rent registered for the unit (citing 9 NYCRR § 2526.1), along with any legal increases. In the case at hand, in light of the lack of evidence

about the unit's rent-stabilized rates and the "evidence of fraudulent schemes," however, Ouattara stated that DHCR should use the default method and select the "lowest rent registered for a similar rent stabilized room in the same building" (Return, Part I at *232; *see* 9 NYCRR § 2522.6 [b][3][i]). Here, he stated, the lowest stabilized rent was room 401, for which tenant David Glasser (Glasser) paid $82.84 per month. Furthermore, Ouattara contended that because Audthan had not provided him with a Notice of Rights, it was not entitled to any rent guideline increases (id. citing 9 NYCRR § 2522.5 [c] [2]). He asserted other arguments, including that Audthan illegally placed two beds in the 118-square-foot room, as the minimum size for a two-person unit is 130 square feet (Return, Part I at *332 [Guira's August 2, 2016 letter to DHCR]).

Audthan replied on September 12, 2016, after the August 23 deadline for its submission had passed. It argued that DHCR could not use the $82.84 rent as the lowest stabilized rent because Glasser and the Hotel's prior owner had entered into a stipulation in 1997, pursuant to which Glasser paid no rent for the remainder of his tenancy - and, accordingly, his $82.84 rent had never been adjusted (id. at *345 [Audthan's Answer to DHCR Request for Additional Evidence dated July 18, 2016]; see also id. at *389-390 [Glasser stipulation]). It rejected Maria Ortiz's rent of $125 per month for each of the two rooms she rented, arguing that the amounts should be aggregated and considered as $250 for a two-room

unit - and that, as a two-room unit, it was not a comparable unit pertinent to the sampling. Thus, Audthan argued that the default rent for the apartment should be the lowest comparable registered rent, or $207.84 per month, which Arion Aston paid for apartment 312 (id. at *346; see 9 NYCRR § 2522.6 [b] [3] [setting forth default methods]).

DHCR issued its order on March 27, 2017 (id. at **394-395 [the RA Order]). The Rent Administrator (RA) did not consider Audthan's reply papers. He found that the room had not been occupied by a rent-stabilized tenant in the past, but rejected Ouattara's suggested method of utilizing the lowest possible rent for the Hotel. Instead, he concluded, without explanation, "that the best method for establishing the legal regulated rent will be by using the average rent of comparable stabilized units in the subject building, at the time the tenant took occupancy" (id. at 394). A rent roll for the period, the RA stated, showed an average stabilized rent of $340.52 for the Hotel, and he directed that Ouattara receive a lease at this rate (id. at 395).

Ouattara filed a petition for administrative review (PAR) (NYSCEF Doc. No. 16 [Return, Part II] at *7 *et seq*). He argued that DHCR was required to "us[e] the default method yielding the lowest rental amount" - which, he reiterated, was $82.84 per month for room 401 (*id.* at 13). He also stated that the sampling method was inappropriate because the Hotel's history of charging

fraudulent rent rates made this method unreliable (id. at *34). Even using the sampling method, Ouattara argued, DHCR erred in its computation. Instead, Ouattara set forth the rental amounts for the 11 units in the Hotel, including Glasser's registered rent of $82.84 per month, the daily rate of $45 for room 315, and the rents for the tenants who temporarily relocated due to renovation work but would return at the same rent. If, alternatively, DHCR used the sampling method, the average rent should be $295.05. In his amended PAR, Ouattara additionally argued that both Audthan and DHCR were bound by Judge Kraus' finding that Audthan deliberately avoided its obligations under the Rent Stabilization Code and its accompanying regulations. Ouattara contended that, because of Audthan's fraud, DHCR was required to use the first alternative, applying the Hotel's lowest registered rent, to apartment 201 (citing 9 NYCRR § 2522.6 [b] [3] [i]). He claimed that Audthan violated 9 NYCRR § 2525.3. He argued that Audthan lacked standing to request and to participate in the PAR, citing Audthan, LLC v Ogunrinde (Return, Part I at *265-266 [Civ Ct, NY County, March 21, 2012, Chan, J., index No. L&T 084624/2011]), in which the court found Audthan had not demonstrated that it had standing.[3]

[3] In response, Audthan mistakenly points to a later eviction proceeding against Mr. Ogunrinde in which Judge Paul A. Goetz, then in Civil Court, reached a similar conclusion. The fact that the parties pointed to different cases is immaterial to this court's analysis.

In response, Audthan reiterated the arguments it had made before the RA. Additionally, it argued that the RA's determination was rational. It contended that Ouattara's reliance on the ruling in his Housing Court proceeding was misplaced both because the court's statement that Audthan knowingly deprived Ouattara of his legal rights was dicta and because courts have no power to establish rents (Return, Part II, at **86-87). Audthan also argued that the RA had the discretion to use the sampling method (citing 9 NYCRR § 2522.6 [b] [2] [iv]).

Further, Audthan challenged Ouattara's inclusion of the rent of tenants who had permanently or temporarily relocated, and it argued that Glasser's registered rent should be excluded because he was not paying the legal regulated rent (Return, Part II, at **88-89). Audthan argued that it remedied its prior failure to provide Ouattara with a Notice of Rights, and there was no penalty due to tardiness. To show that it had standing, Audthan submitted copies of the lease between owner Nick & Duke and net lessee West 23rd Street Hospitality, coupled with the assignments between various parties which culminated with the lease to Audthan (id. at **90-92). It stated that it had all the rights of a net lessee.

DHCR issued its order on the PAR on July 20, 2018 (*id.* at **336-343 [Order and Opinion Granting in Part Petition for Administrative Review (the PAR Order)]). The PAR Order took notice of Judge Kraus' findings, including that Audthan had intimidated

Ouattara in an effort to evade its legal obligations (*id.* at **336-337). It also reiterated the current positions of the parties (*id.* at **339-340).

Although the issue of standing was raised for the first time on appeal, DHCR considered it because it related to jurisdiction. It concluded that Audthan's supplemental submissions adequately resolved any questions regarding Audthan's standing. It summarized the documentary evidence and found that "on the whole [it] reasonably establishes that Audthan LLC was and continues to be a net lessee of the fee owner (Nick & Duke LLC) . . . ." (id. at 341).

Next, the PAR Order evaluated the RA's decision. It noted that the second lowest rent was $207.84 per month, and that Audthan had suggested using this as the lowest registered rent. However, the PAR Order concluded that the RA did not consider this argument from Audthan's reply papers - and, in fact, such consideration would have violated Ouattara's due process rights because he did not receive those papers (id. at *341). Rather than remand the matter so that the RA could consider this alternative, the PAR Order evaluated the rationality of the RA's decision. The Order found that the RA rationally excluded Glasser's $82.84 monthly rent from consideration because the agreement was between Glasser and the predecessor owner; DHCR accepted this stipulation but did not render a ruling as to the rent. Moreover, under the parties'

stipulation, the tenant actually paid $0 in rent, and the $82.84 rent did not increase over the years. Together, these reasons rendered the figure unreliable (id. at *342). Based on this and on the lack of rental history for apartment 201, DHCR found that the RA rationally used the sampling method. However, it found that the RA erred in including the $1,365.00 monthly rental rate for apartment 315 in its sample as it "is plainly excessive and is not deemed to be reliable" (*id.* at *343), and that the rent for units 410 and 411 should have been aggregated and considered in the computation. Using the rents of $207.84 for apartment 312, $208.00 for apartment 319, $270.00 for apartment 404, and $250.00 for the combined apartment 410/411, the Order concluded that the apartment's legal rent was $233.96 per month (id. at *343).

Following the issuance of the Order, Ouattara filed this Article 78 proceeding. First, Ouattara contends that DHCR improperly found Audthan had established standing. Although under Women's Interart Ctr., Inc. v New York City Economic Dev. Corp., 97 AD3d 17, 21 [1st Dept 2012] [Women's Interart], lv dismissed 20 NY3d 1034 [2013]), Ouattara states, a lessee is deemed a net lessee for standing purposes only if the tenant is responsible for all expenses, bears the costs incurred with any subleasing, indemnifies the landlord for damages occurring due to its use, and has the sole authority to sue (Petition, ¶ 42). Here, Ouattara states, the lease only empowers Audthan to collect rent (id. ¶

43). Second, Ouattara reiterates his argument that the proper rent for his apartment is $82.84. He asserts that because Audthan and the predecessor owner had engaged in fraud, DHCR was required to utilize the lowest registered rent in the building (id. ¶ 19 [citing Thornton v Baron, 5 NY3d 175 [2005]). DHCR did not set forth a rationale when it disregarded the lowest registered rent and instead selected the sampling method. This renders the Order arbitrary and an abuse of discretion, Ouattara claims (Petition ¶¶ 29-32, 45). He states that when an agency does not set forth the basis of its decision, adequate review by the court is impossible and the decision must be annulled (id. ¶¶ 33-39, 49).

DHCR's answer states that the Order was rational in all respects (NYSCEF Doc. No. 8). DHCR agrees with Ouattara that it was necessary to use the default formula because "the Hotel owner's systematic circumvention of the rent laws has rendered the base rent unreliable," (id. ¶ 19). Here, DHCR states, it rationally excluded the rent for apartment 401 from consideration because it was established by the agreement between the predecessor owner and the tenant rather than a DHCR ruling, because it was not a real rent as the tenant paid nothing, and because the registered rent has never been adjusted (id. ¶ 21). DHCR rejects Ouattara's contention that DHCR indicated the rent for apartment 401 was reliable, stating that Ouattara "blatantly misrepresents" the Order (id. ¶ 22). Moreover, DHCR states that default options (ii)

and (iii) were inapplicable because they required knowledge of a legal rent for or prior tenant in apartment 201 (id. ¶ 19). Thus, DHCR claims, the sampling method was not only rational but was the only appropriate default method (id. ¶ 23).

DHCR also argues that its decision about Audthan's standing was rational. Although the Rent Stabilization Code specifies that an owner must commence a proceeding (*see* 9 NYCRR § 2527.2), a net lessee is an owner for the purposes of the statute (*see* 9 NYCRR § 2520.6 [i]). It argues that Women's Interart does not apply here because that case expressly dealt with a net lessee's standing to commence an eviction proceeding, an issue DHCR specifically left open in its decision. Furthermore, DHCR relied on Judge Kraus' description of Audthan as a net lessee, and DHCR stated that res judicata and collateral estoppel applied (NYSCEF Doc. No. 9 §§ 27-28, relying on Ouattara, 2015 NY Slip Op 51496 [U] at *1).

Ouattara's reply reiterates his arguments that the rent should be set at $82.84, and further argues that this court need not defer to DHCR's determination because DHCR clearly violated the Rent Stabilization Code and accompanying rules and regulations. He contends that DHCR ignored the statutory mandate when it used the sampling method instead of choosing the lowest registered rent for the building. Sampling is only recommended where there is insufficient documentary evidence to establish the lowest registered rent for a comparable apartment in the building,

the initial rent for the subject apartment is not available, and the last registered rent for the subject apartment also is not available (*see* 9 NYCRR § 2522.6 [3] [iv]). Here, Ouattara asserts, the lowest registered rent for a comparable apartment is ascertainable, and therefore DHCR's resort to sampling was improper.

ANALYSIS

The Court first examines the threshold issue of standing. DHCR properly found that Audthan had standing to commence the DHCR proceeding. The lease and assignments which Audthan submitted showed it was the net lessee of the Hotel (Return, Part II at *340-341 [Order and Opinion Granting in Part Petition for Administrative Review]) and thus had the right to sue. Ouattara's contention that Audthan is not a true net lessee because the lease only empowers it to collect rent is simply incorrect. Contrary to Ouattara's contention, although the landlord retained the right of reentry and various actions required the landlord's approval, the lease expressly states "[a]ll costs, expenses and obligations of every kind and nature whatsoever relating to the [Hotel] which may arise or become due and payable . . . shall be paid for by [Audthan]" with a limited exception relating to taxes and pre-existing code violations [Return, Part I at *18, ¶ 3.5 [i] [Lease]). Audthan also assumed duties to care for, maintain, and provide certain insurance for the Hotel (id. ¶¶ 7.1, 8.1, 9.1), and had the power

to "use the Property for any lawful purpose" (id. ¶ 7.2). Ouattara's reliance on Women's Interart is misplaced, which case acknowledges that a net lessee has standing if it has control of the premises.

Next, the court turns to DHCR's substantive determination. "The court's role . . . 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" (Matter of AEJ 534 E. 88th LLC v New York State Div. of Hous. & Community Renewal, 2019 NY Slip Op 31906 [U], at *8 [Sup Ct, NY County 2019]). This deference is appropriate in light of the agency's legal authority and its expertise in the subject matter (Matter of Tockwotten Assoc., v New York State Div. of Hous. & Community Renewal, 7 AD3d 453, 454 [1st Dept 2004]). Moreover, courts must consider rent-related challenges like the one at hand in light of DHCR's "broad mandate to administer the rent regulatory system . . . [and] its interpretation and application of the laws it is responsible for administering, so long as its interpretation is not irrational" (Matter of Hicks v New York State Div. of Hous. and Community Renewal, 75 AD3d 127, 130 [1st Dept 2010]). "[A] court may not substitute its judgment for that of the agency" (Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of New York Div. of Hous. & Community Renewal, 46 AD3d 425, 429 [1st Dept 2007], *affd*, 11 NY3d 859 [2008]). However, "[t]he

reasonableness of [DHCR's] determination must be judged solely on the grounds stated by the agency at the time of its determination" (Matter of Clarendon Props. NY LLC v New York State Div. of Hous. & Community Renewal, 40 Misc 3d 1242 [A], 2013 NY Slip Op 51533 [U] at *3-4). Neither the court nor a party can superimpose a justification that is not in the challenged order (see Matter of Peckham v Calogero, 12 NY3d 424, 430 [2009]).

Finally, "as a general proposition . . . administrative agencies are required to follow their own precedent" (Matter of Terrace Ct., LLC v New York State Div. of Hous. & Community Renewal, 18 NY3d 446, 453 [2012] [Terrace Court]). Accordingly, DHCR must explain any deviation from its statutory guidelines (id.; see Matter of London Leasing L.P. v Division of Hous. & Community Renewal, 153 AD3d 709, 711-712 [2nd Dept 2017], lv denied, 31 NY3d 905 [2018]). Failure to do so renders the ruling irrational (see Matter of Rego Estates v Division of Hous. & Community Renewal, 20 AD3d 539, 540-541 [2d Dept 2005]).

Ouattara argues that DHCR committed legal error when it did not use the lowest registered rent for a comparable apartment at the Hotel, and when it did not explain why it chose the sampling method to determine his rent.[4] The default methods by which DHCR

[4]He also claims that, due to Housing Court finding that the Hotel intimidated those who sought permanent residency and otherwise schemed to violate the Rent Stabilization laws, Thornton v Baron (5 NY3d 175 [2005]) mandated that DHCR set his rent at the lowest

sets an apartment's rent when it cannot determine the unit's base rent are:

> (i) the lowest rent registered . . . for a comparable apartment in the building in effect on the date the . . . tenant first occupied the apartment; or
>
> (ii) the complaining tenant's initial rent reduced by the percentage adjustment authorized by section 2522.8 [which discusses vacancy increases]; or
>
> (iii) the last registered rent paid by the prior tenant (if within the four year period of review); or
>
> (iv) *if the documentation set forth in subparagraphs (i) through (iii) . . . 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.

(9 NYCRR § 2522.6 [b] [3] [emphasis supplied]). It is not contested that, because there was no legal stabilized rent for the apartment in question, DHCR rationally chose to apply one of the default methods (see Matter of Notarberardino v New York State Div. of Hous. & Community Renewal, 58 Misc 3d 1210[A], 2017 NY Slip Op

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rent-stabilized rent for a comparable apartment in the building. However, Thornton, an overcharge case, imposes the lowest rent-stabilized rent for a comparable apartment in the building under 9 NYCRR § 2522.6 (b) (2) (iii) and 9 NYCRR § 2522.6 (b) (3) (i) where there is evidence of fraud (see Matter of 160 East 84th St. Assoc. LLC v New York State Div. of Hous. & Community Renewal, 160 AD3d 474, 474-475 [1st Dept 2018]). Since there was no fraud in 160 East 84th St. Assoc. LLC, the First Department upheld DHCR's use of the less punitive sampling method.

51964 [U] at *4 [Sup Ct, NY County 2017]). In addition, DHCR states that as there was no registered rent on file for Ouattara or for apartment 201, the second and third default methods were unavailable (*see* 9 NYCRR § 2522.6 [3] [ii, iii]).

After careful consideration, the court finds that DHCR did not adequately explain its decision to apply Rent Stabilization Code § 2522.6 (3) (iv), which directs DHCR to use the sampling method only if it cannot ascertain the rent using the first three alternatives, instead of Rent Stabilization Code § 2522.6 (3) (i), which sets forth the lowest registered rent formula. The RA and PAR Orders sufficiently explained why the rent of $82.84 for apartment 401 was inappropriate.[5] However, the PAR Order offers no rational explanation as to why DHCR did not select the lowest appropriate registered rent, which was $207.84 per month for apartment 312. Although the RA's order did not consider Audthan's untimely reply papers, which presented this option, the RA possessed the rental information for apartment 312 – indeed, he included it in his sampling of legal rents in the building – and was aware of the governing law.

[5] Although "inappropriate" is not expressly defined in the Rent Stabilization Code (9 NYCRR § 2522.6 [b] [3]), the court applies the normal definition of the word, not proper or suitable (*see* https://dictionary.cambridge.org/us/dictionary/english/inappropriate).

Further, the PAR Order refused to consider the prior reply papers merely because that would have required a remand to the RA. This is not an adequate justification for deviating from the directive in the statute (see Terrace Court, 18 NY3d 446, 453 [2012]). As DHCR did not explain the deviation sufficiently, the RA and PAR Orders cannot stand (*id.*).[6]

"[P]ursuant to the doctrine of primary jurisdiction," DHCR, which has expertise in rent regulation, should determine the legal rent (Olsen v Stellar W. 110, LLC, 96 AD3d 440, 441-442 [1st Dept 2012], lv dismissed 20 NY3d 1000 [2013]). Accordingly, the court shall remit the matter to DHCR for resolution. If DHCR again deviates from the statutory norm and uses the sampling method, it must provide its rationale for that decision (Rego Estates, 20 AD3d at 541).

10/25/2019
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:	X	CASE DISPOSED			☐	NON-FINAL DISPOSITION	
	X	GRANTED	☐	DENIED	☐	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER			☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN			☐	FIDUCIARY APPOINTMENT	☐ REFERENCE

[6] Although the parties do not discuss the issue, the court notes that the decision to treat Maria Ortiz's two rooms as comparable to apartment 201, a one-room unit, was irrational. The law requires DHCR to sample equivalent apartments.