Matter of Talts (New York State Div. of Hous. & Community Renewal)
2019 NY Slip Op 33257(U)
November 1, 2019
Supreme Court, New York County
Docket Number: 157971/2018
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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In the Matter of the Application of
SEAN TALTS,

Petitioner,

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

Index No.
157971/2018

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL and 12th STREET
REALTY,

Respondents.

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Crane, J.:

In this Article 78 proceeding, the petitioner, Sean Talts, seeks review of a determination of the New York State Division of Housing and Community Renewal (DHCR) dated June 28, 2018, denying his petition for administrative review (PAR) of an order issued on April 4, 2017, which awarded him rent overcharges and interest in the amount of $2,227.60. Respondents DHCR and 12th Street Realty (the Owner) oppose.

The petitioner's underlying rent overcharge complaint alleged that the Owner engaged in a fraudulent scheme to deregulate the subject apartment, known as apartment 23 at 437 West 12th Street, New York, NY (the Apartment). Specifically, he alleged that he moved into the Apartment on November 1, 2013, pursuant to a one-year vacancy lease, at a monthly rent of $1,975.00, but that the Apartment was improperly registered in 2011 as permanently exempt from rent stabilization due to a High Rent/Vacancy Deregulation. He asserted that, based on the

last registration of the apartment in 2007 at a rent of $410.45, his vacancy rent, instead, should have been $531.26 per month.

The Owner contended that it made a mistake that the Apartment was exempt from rent stabilization when it registered it in 2011, based on a multi-year vacancy and significant renovations. It asserted that apartments 23 and 22 were previously combined into one apartment until 2008, when a gut renovation was performed making the apartments separate. It maintained that it spent $58,942.59 in renovations on the Apartment (apartment 23). The Owner submitted an estimate/invoice from Carrick Contracting Inc. (Carrick) for that work, along with the Owner's cancelled checks payable to Carrick, and an affidavit from the principal of Carrick. It further submitted an invoice from Carrick, and proof of payment of $61,750, for the gut renovation of apartment 22. It also provided a lease for the Apartment with tenant Prisca Bommeli, commencing October 1, 2010, charging rent in the amount of $1,875 per month, as a first rent since the creation of the Apartment as a separate unit had no prior rental history. The Owner conceded that since the first rent for the Apartment was below the deregulation threshold of $2,000 per month, it was still subject to rent stabilization. The Owner also provided a lease for the next tenant, Pamela Inbasekaran, commencing July 6, 2011, at a monthly rent of $1,925, with an extension the following year, in 2012, at a monthly rent of $1,940.

Petitioner challenged whether the apartments were ever joined, and the Owner's proof of the improvements. He submitted the affidavit of Chris Leahy, a "Chief Estimator," who opined that the work performed on the Apartment varied from the estimate the Owner submitted. He also opined that the renovations could have been done less expensively. Petitioner contended that the Owner's fraudulent scheme to deregulate the Apartment included improper apartment registrations, a false claim of separating the apartments, incomplete and exaggerated records of

improvements, and a misrepresentation that the Apartment was exempt from the rent stabilization law.

On April 4, 2017, the Rent Administrator (RA) awarded the petitioner $2,337.60 in rent overcharges, finding that the "base date" for this proceeding was October 30, 2010, four years prior to the filing of petitioner's complaint, and determined that the rent was frozen at $1,925 per month when petitioner took occupancy on November 1, 2013, based on the Owner's failure to file registrations for 2012 and 2013. It found that this overcharge was not willful, and petitioner failed to establish that the Owner engaged in a fraudulent scheme to deregulate the apartment.

Both petitioner and Owner filed PARs, challenging the RA's order. Petitioner claimed that the RA should have found a fraudulent scheme to deregulate. The Owner claimed that the RA improperly froze the rent, since the Owner had filed a late registration for both 2012 and 2013.

DHCR denied both PARs, finding no fraudulent scheme to deregulate the apartment, and no willful overcharge (the DHCR Order). It also found that the rent was properly frozen because the Owner did not file the 2012 and 2013 registrations until July 26, 2017, after the RA issued the order and not during the pendency of that proceeding.

Petitioner challenges the DHCR Order, arguing that the Owner never produced evidence of its mistaken belief that the Apartment was deregulated, such as an affidavit or emails. He contends that DHCR did not review the Owner's individual apartment improvement (IAI) records in sufficient detail, and points to the affidavit of Mr. Leahy who attests that the cost of the IAIs should have been much lower than the Owner claims to have paid. He asserts that DHCR improperly found no fraud based on the inaccuracy of the Owner's registrations for the Apartment. He further points to DHCR's failure to consider that tenant Bommeli was not given

notice required by Rent Stabilization Code § 26-504.2(b) that she was the first non-stabilized tenant as proof of a fraudulent scheme.

DISCUSSION

The petition is denied and dismissed. Judicial review of an agency determination is limited to whether the decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803[3]). In determining whether an agency's decision was arbitrary or capricious, the test is whether it "is without sound basis in reason and . . . without regard to the facts" (*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]). Thus, the agency's decision will not be overturned unless it lacks any rational basis (*Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 164 AD3d 420, 423 [1st Dept 2018]). Moreover, an administrative agency's interpretation of its own regulations 'is entitled to deference if that interpretation is not irrational or unreasonable'" (*id.*, *quoting Matter of Gaines v New York State Div. of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997]).

Rent overcharge claims are subject to a four-year limitations period (CPLR 213-a; New York City Administrative Code § 26-516 [a][2] [Rent Stabilization Law]; and the Rent Stabilization Code [RSC], 9 NYCRR § 2526.1(a)(2)). Examination of an apartment's rental history beyond the four-year period is precluded. As the First Department stated, both "9 NYCRR 2526.1(a)(2)(ii) and CPLR 213–a are 'categorical in barring any examination of a unit's rental history beyond the four-year limitations period,' with the sole exception being cases in which there is evidence that the landlord committed fraud in order to avoid the regulatory scheme" (*Raden v W 7879, LLC*, 164 AD3d 440, 441 [1st Dept 2018], *quoting Matter of Grimm v*

State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin., 15 NY3d 358, 366 [2010]). Where a tenant overcharge complaint alleges fraud, however, the agency, DHCR, must examine the rental history even beyond the four-year period to determine "whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date" (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d at 367; 9 NYCRR § 2526.1[a][2][iii][2014 amendment to RSC adding exceptions to the limitation on examination of rental history as carved out by Court of Appeals in *Grimm*, including to determine whether there was a fraudulent scheme to deregulate]; *Conason v Megan Holding, LLC*, 25 NY3d 1, 16 [2015] [where tenants alleged substantial evidence of fraudulent stratagem devised by the owner to remove the apartment from rent stabilization then DHCR may look back more than four years at the apartment's rental history]). A mere allegation of fraud nor an increase in the rent alone are sufficient to establish such fraud (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 15 NY3d at 367; *see Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 164 AD3d at 425-426; *Stulz v 305 Riverside Corp.*, 150 AD3d 558, 558-559 [1st Dept 2017]; *Matter of Park v New York State Div. of Hous. & Community renewal*, 150 AD3d 105, 114-115 [1st Dept 2017]; *Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 23 NY3d 999, 1000-1001 [2014]).

Here, the DHCR's ruling that the four-year limitations period (9 NYCRR § 2526.1[a][2]; CPLR 231-a) precluded examining the Apartment's rent history more than four years before petitioner's overcharge complaint on October 30, 2014, was rational and supported by the law. The DHCR's determination that the Owner did not fraudulently deregulate the apartment has a rational basis. The fact that there was a sizable increase in the rent for the petitioner's Apartment prior to the four-year look back period does not, alone, support or establish that petitioner has a

colorable claim of fraud. This is true even though the increase in the rent was based on the installation of IAIs which did not require approval from DHCR (*see Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 110 AD3d 594, 597 [1st Dept 2013] [dissent]). Contrary to the petitioner's contentions, DHCR clearly considered the Owner's submissions of proof of those improvements, including the contractor's invoice, the Owner's canceled checks in payment, and the contractor's affidavit, and found sufficient information in support of the pre-base date renovations. Petitioner's challenge to the quality and cost of the improvements by the affidavit by Mr. Leahy, whose inspection of the Apartment was conducted almost six years after the renovation and primarily challenges the cost, was considered and rejected by the DHCR (*see Breen v 330 E. 50th Partners, L.P.*, 154 AD3d 583, 584 [1st Dept 2017] [neither a sizable increase in rent due to apartment improvements, nor the tenant's challenge to the quality of those improvements, is sufficient to establish a colorable claim of fraud]; *see also Spatz v Valle*, 63 Misc 3d 134[A] [App Term, 1st Dept 2019]). This court notes that the cost spent on separating and gut renovating these apartments, after being occupied for over 28 years by the prior tenants, including rewiring, new plumbing, new walls, ceiling, insulation, along with an entirely new kitchen and bathroom, did not appear to be an inordinate amount (*see Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 110 AD3d at 597 [dissent]).

DHCR also rationally considered and rejected the petitioner's claim that the apartments were not combined prior to 2008-2009, based on the contractor's affidavit and the invoices and work records, indicating that they were so separated. The Owner's improper registration of the Apartment also does not support a finding of a fraudulent scheme (*see Matter of Trainer v State of N.Y. Div. of Hous. & Community Renewal*, 162 AD3d 461, 463 [1st Dept 2018] [a significant increase in rent and some discrepancies in the registration statement is not sufficient indicia of

fraud]; *Butterworth v 281 St. Nicholas Partners, LLC*, 160 AD3d 434, 434 [1st Dept 2018] ["neither an increase in rent, standing alone, nor plaintiffs' skepticism about apartment improvements suffice to establish indicia of fraud"]). DHCR relied upon the fact that the Owner produced leases and rent ledgers in effect from the base date, which the agency considers the best evidence in determining the legal regulated rent. Making a credibility determination, DHCR found that the Owner's exempt registration of the Apartment in 2011 may have been prompted by the Owner's mistaken belief that the premises were deregulated following a more than four-year period of vacancy and then the significant IAIs, particularly where the Owner never charged rent in excess of the deregulation threshold. The record demonstrates that DHCR properly made decisions based on the credibility of the proof submitted to it and applied the law accordingly.

On petitioner's objection that there was no notice to the first tenant, Ms. Bommeli, that she was the first non-stabilized tenant, fails to provide a basis to find the DHCR's decision arbitrary. Again, DHCR found the Owner's mistaken belief as to deregulation credible, the Owner conceded that the tenant was never charged above the deregulation threshold, and so the Apartment remained regulated. This does not establish fraud.

DHCR also did not abuse its authority or misapply the law when it froze the collectible rent at $1,925.00 per month based on the Owner's failure to properly and timely comply with the rent registration requirements in RSC § 2528.4 (9 NYCRR § 2528.4) until such registration is filed. When an owner fails to file a "proper and timely" annual rent registration statement, the rent is frozen at the legal regulated rent listed in the preceding registration statement until such registration is filed (*see Bradbury v 342 W. 30th St. Corp.*, 84 AD3d 681, 683-684 [1st Dept 2011]; *Jazilek v Abart Holdings, LLC*, 72 AD3d 529, 531 [1st Dept 2010]). Here, DHCR determined that the records indicated that the Owner did not file the 2012 and 2013 registration

statements until July 26, 2017, after the RA issued his order, and so the rent was frozen at the level as of April 1, 2012, the last effective date of the properly filed registration statement, which was $1,925.00 per month (instead of the $1,975.00 per month petitioner was charged). This rent reduction applied to petitioner from the date he took possession on November 1, 2013 through to February 28, 2017, when he vacated. Again, DHCR made a credibility determination, accepted the Owner's contention that he mistakenly believed the premises were deregulated, noted that lease agreements and rent ledgers were submitted, and that rent was never charged over the regulation threshold, and decided that the Owner did not act willfully in overcharging (NYC Admin Code § 26-516[a]; *see Draper v Georgia Props.*, 230 AD2d 455, 459–60 [1st Dept 1997], *affd* 94 NY2d 809 [1999] [presumption of willfulness in rent overcharge cases may be overcome by owner with preponderance of evidence]). Because DHCR determined that the Owner established that the overcharge was not willful, treble damages were not warranted under RSC § 2526.1(a)(1). This record sufficiently supports DHCR's resolution of this issue.

Accordingly, it is

ORDERED and ADJUDGED that the motion to dismiss is granted, the petition is denied in its entirety and the proceeding is dismissed.

Dated: November 1, 2019

ENTER:

J.S.C.
HON. MELISSA A. CRANE
J.S.C.