Rudin E. 55th St. LLC. v Division of Hous. & Community Renewal
2021 NY Slip Op 31576(U)
May 10, 2021
Supreme Court, New York County
Docket Number: 160537/2020
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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RUDIN EAST 55TH STREET LLC.

Plaintiff,

- v -

DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendant.

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INDEX NO. 160537/2020

MOTION DATE 12/04/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34

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

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR article 78, of petitioner Rudin East 55th Street (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent New York State Division of Housing and Community Renewal shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

In this Article 78 proceeding, petitioner Rudin East 55th Street (landlord) seeks a judgment to nullify an "explanatory addendum" that was issued by the respondent New York State Division of Housing and Community Renewal i/s/h/a Division of Housing and Community Renewal (DHCR) to clarify the terms of a previously issued rent-deregulation order (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

FACTS

Landlord is the owner of a residential apartment building located at 136 East 55th Street in the County, City and State of New York (the building). *See* verified petition, ¶ 1. The DHCR is the administrative agency that oversees rent-stabilized buildings located in New York City. *Id.*, ¶ 2. This proceeding concerns apartment 11-R in the building, whose tenant of record is non-party Alexander Papayannis (Papayannis), and which landlord had previously registered with the DHCR as a rent-stabilized unit. *Id.*; exhibit A.

On June 27, 2018, landlord filed a DHCR "petition for high income rent deregulation" concerning apartment 11-R that claimed that Papayannis's total annual income had exceeded the $200,000.00 deregulation threshold in 2014. *See* verified petition, ¶ 8; exhibit D. On November 7, 2016, Papayannis submitted an answer to the DHCR that alleged that his total annual income was below $200,000.00 in 2016. *See* verified answer, ¶ 5. However, the DHCR asserts that Papayannis failed to provide a completed 2014 income certification form, or supporting financial information, despite sending him four requests to do so. *Id.*, ¶¶ 4-12. As a result, the DHCR issued a Notice of Proposed Deregulation on January 3, 2018, and thereafter a DHCR rent administrator (RA) issued an Order of Deregulation for apartment 11-R on February 16, 2018 (the deregulation order). *Id.*, ¶¶ 13-14; exhibit B. The deregulation order found as follows:

> "After consideration of the entire evidence of record the Rent Administrator [RA] finds that:
> The housing accommodation is subject to the Rent Stabilization Law of 1969 and/or the Emergency Tenant Protection Act of 1974 and that the legal regulated rent was $2,500.00 or more per month on the applicable date(s). In addition, based on income verification in formation transmitted by the Division of Housing and Community Renewal, the New York State Department of Taxation and Finance (DTF) has determined that the sum of the annual incomes of the tenant(s) named on the lease who occupied the housing accommodation and of the other persons who occupied this housing accommodation as a primary residence on other than a temporary basis (excluding bona fide employees and bona fide subtenants) was $200,000.00 or more in each of the two preceding calendar years. Accordingly, and upon the grounds stated in the Rent Stabilization Code Section 2520.1 l(s) or Emergency Tenant Protection Regulations Section 2500.9(n), it is "ORDERED, that the subject housing accommodation is deregulated, *effective upon the expiration of the existing lease*."

Id., exhibit B (emphasis added). Papayannis's final renewal lease for apartment 11-R expired on June 30, 2019. *Id.*, exhibit E.

On June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA) became effective, and Part D thereof repealed the provisions of the Rent Stabilization Law (RSL) that had previously permitted "high rent" and "high income" deregulation of rent stabilized apartment units (NY Uncon Laws §§ 26-504.1, 26-504.2, 26-504.3). In a "cleanup bill" enacted several days after the HSTPA's effective date, the New York State Legislature amended Section (i.e., subparagraph) 8 of Part D to provide, in pertinent part, that:

> "This act shall take effect immediately; provided however, that (i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated . . .."

See L 2019, ch 39 Part Q, § 8.

On September 6, 2019, the DHCR sent both landlord and Papayannis an "explanatory addenda to order" that was intended to explain the impact of the HSTPA on previously issued deregulation orders (the explanatory addendum). *See* verified answer, ¶ 15; exhibit D. The relevant portion of the explanatory addendum stated as follows:

> "On February 16, 2018, the RA issued an order to above parties with respect to the owner's application for high rent/high income deregulation. It stated:

> "ORDERED that the subject housing accommodation is deregulated effective: Upon the expiration of the existing lease, as the subject housing accommodation is subject to the Rent Stabilization Law of 1969 and/or the Emergency Tenant Protection Act of 1974.
>
> "The language, which makes the deregulation contingent upon the expiration of the lease in effect on the day the Rent Administrator's deregulation order was issued, was taken from the applicable ETPA and RSL provisions authorizing such orders. Effective June 14, 2019, the Housing Stability and Tenant Protection Act of 2019 (HSTPA) and its subsequent amendments were enacted. HSTPA repealed the high rent/high income deregulation provisions under which the above order was issued and stated that the law is to 'take effect immediately.' Additionally, HSTPA provides that 'any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated.'
>
> "If the lease in effect on the day the Rent Administrator's deregulation order was issued expired before June 14, 2019 the housing accommodation is deregulated.
>
> "*If the rent stabilized lease in effect on the day the Rent Administrator's deregulation order was issued expires on or after June 14, 2019, the housing accommodation remains regulated to the Rent Stabilization Law or ETPA and pursuant to HSTPA is not deregulated.*
>
> "If a rent stabilized lease should have been in effect on the day the Rent Administrator's deregulation order was issued, the housing accommodation remains subject to the Rent Stabilization Law or ETPA and pursuant to HSTPA is not deregulated."

Id.; exhibit D (emphasis added).

On October 4, 2019, landlord filed a petition for administrative review (PAR) with the DHCR that claimed that the explanatory addendum sought to improperly change the terms of the deregulation order. *See* verified answer, ¶ 16. On October 7, 2020 the DHCR's Deputy Commissioner issued an order that denied landlord's PAR (the PAR order). *Id.*, ¶ 21; exhibit A. Because the PAR order is lengthy, this decision will not reproduce it in full, but will rather discuss the Deputy Commissioner's findings individually, as appropriate. It is sufficient to observe that the PAR order rejected all of landlord's legal challenges to the explanatory addendum. *Id.*; exhibit A.

Aggrieved, landlord thereafter commenced this Article 78 proceeding on December 8, 2020. *See* verified petition. The DHCR filed an answer on February 22, 2020. *See* verified answer. The matter is now fully submitted (motion sequence number 001).

DISCUSSION

In most cases, the court's role in an Article 78 proceeding is to determine, upon the facts before an administrative agency, whether a challenged agency 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, 230-231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1st Dept 1996). This proceeding purports to challenge the March 5, 2020 PAR order as an arbitrary and capricious ruling; however, landlord's PAR only challenged the analysis set forth in the DHCR's September 6, 2019 explanatory addendum, rather than the RA's findings in the February 16, 2018 deregulation order. *See* verified petition, exhibits A, M. This is anomalous, since the explanatory addendum is not a final agency determination, but is instead an "advisory opinion/operational bulletin," which 9 NYCRR § 2527.11 authorizes the DHCR to issue at its discretion. Since landlord's objections to the explanatory addendum flow from its concerns about its rights as the lessor of apartment 11-R, it might have been more appropriate for landlord to have proceeded via an action for declaratory judgment. Declaratory judgment is traditionally the vehicle that the courts use to determine the respective rights of all affected parties under a lease. *See e.g. Chekowsky v Windemere Owners, LLC*, 114 AD3d 541 (1st Dept 2014); *Riccio v Windermere Owners LLC*, 58 Misc 3d 1223(A), 2018 NY Slip Op 50230(U), * 4 (Sup Ct NY County 2018), citing *Leibowitz v Bickford's Lunch Sys.*, 241 NY 489 (1926). However, CPLR 7803 (3) also provides that courts may consider Article 78 petitions which question "whether a[n agency] determination was made in violation of lawful procedure, [or] *was affected by an error of law. . .* (emphasis added)." *See also Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d 142, 146 (2004) ("Our review of an

administrative agency's action is limited to 'whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion.'" [citation omitted]); *Matter of 107-10 Shorefront Realty, LLC v Division of Hous. & Community Renewal*, 140 AD3d 1071 (2d Dept 2016).

Here, to the extent that landlord's petition argues that the explanatory addendum contained errors of law that adversely affected the deregulation order, the court finds that CPLR 7803 (3) encompasses review the explanatory addendum under the "error of law" standard. *See e.g., Terence Cardinal Cooke Health Ctr. v Commissioner of Health of the State of N.Y.*, 175 AD3d 435, 436 (1st Dept 2019) ("[W]here a quasi-legislative act by an administrative agency . . . is challenged on the ground that it was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . ., a proceeding in the form prescribed by article 78 can be maintained." [internal citation and quotation marks omitted]). To the extent that landlord's petition seeks to overturn the October 7, 2020 PAR order, CPLR 7803 (3) mandates judicial review under the "arbitrary and capricious" standard. This decision will apply each standard where appropriate, first addressing the explanatory addendum, and then the PAR order.

A judicial inquiry into whether an agency determination was "affected by an error of law," pursuant to CPLR 7803 (3), "is 'limited to the grounds invoked by the agency' in its determination." *Matter of Barry v O'Neill*, 185 AD3d 503, 505 (1st Dept 2020), citing *Matter of Madeiros v New York State Educ. Dept.*, 30 NY3d 67, 74 (2017). Appellate courts have recognized "errors of law'' to exist in agency determinations that relied on inapplicable case law (*see e.g. Solnick v Whalen*, 49 NY2d 224 [1980]), or misapplied governing statutes. *See e.g. Matter of Rossi v New York City Dept. of Parks & Recreation*, 127 AD3d 463 (1st Dept 2015);

Matter of Nestle Waters N. Am., Inc. v City of New York, 121 AD3d 124 (1st Dept 2014). On the latter point, the Appellate Division, First Department, recently reiterated the Court of Appeals' long-standing directive that:

> "[w]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld. Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. . . . [I]f the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight."

Matter of West 58th St. Coalition, Inc. v City of New York, 188 AD3d 1, 8 (1st Dept 2020), quoting *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 (1980). Here, the statutes that the DHCR identified in the explanatory addendum were "the applicable ETPA and RSL provisions authorizing [deregulation] orders . . . [and] the [HSTPA]." *See* verified answer, exhibit D. The two RSL provisions mentioned in the order (§§ 26-504.1 and 26-504.3) were both repealed by Part D of the HSTPA. The first governed "high income rent deregulation," and provided, in pertinent part, as follows:

> "Upon the issuance of an order by the [DHCR], 'housing accommodations' shall not include housing accommodations which: (1) are occupied by persons who have a total annual income, as defined in and subject to the limitations and process set forth in section 26-504.3 of this chapter, in excess of the deregulation income threshold, as defined in section 26-504.3 of this chapter, for each of the two preceding calendar years; and (2) have a legal regulated monthly rent that equals or exceeds the deregulation rent threshold, as defined in section 26-504.3 of this chapter."

RSL § 26-504.1. The second defined the "deregulation thresholds" referenced above, and provided, in pertinent part, as follows:

> "2. Deregulation income threshold means total annual income equal to one hundred seventy-five thousand dollars in each of the two preceding calendar years for proceedings commenced before July first, two thousand eleven. For proceedings commenced on or after July first, two thousand eleven, the deregulation income threshold means the total

annual income equal to two hundred thousand dollars in each of the two preceding calendar years.

3. Deregulation rent threshold means two thousand dollars for proceedings commenced before July first, two thousand eleven. For proceedings commenced on or after July first, two thousand eleven, the deregulation rent threshold means two thousand five hundred dollars. For proceedings commenced on or after July first, two thousand fifteen, the deregulation rent threshold means two thousand seven hundred dollars, provided, however, that on January first, two thousand sixteen, and annually thereafter, such deregulation rent threshold shall be adjusted by the same percentage as the most recent one year renewal adjustment adopted by the relevant guidelines board."

RSL § 26-504.3. The corresponding Rent Stabilization Code (RSC) provision that governed "high income rent deregulation"[1] applications provided, in pertinent part, as follows:

"This Code shall apply to all or any class or classes of housing accommodations made subject to regulation pursuant to the RSL . . ., except the following housing accommodations for so long as they maintain the status indicated below:

* * *

"(s) Upon the issuance of an order by the DHCR pursuant to the procedures set forth in Part 2531 of this Title, including orders resulting from default, housing accommodations which:

"(1) have a legal regulated rent of $2,000 or more per month as of October 1, 1993, or as of any date on or after April 1, 1994, and which are occupied by persons who had a total annual income in excess of $250,000 per annum for each of the two preceding calendar years, where the first of such two preceding calendar years is 1992 through 1995 inclusive, and in excess of $175,000, where the first of such two preceding calendar years is 1996 through 2009 inclusive, with total annual income being defined in and subject to the limitations and process set forth in Part 2531 of this Title;

"(2) have a legal regulated rent of $2,500 or more per month as of July 1, 2011 or after, and which are occupied by persons who had a total annual income in excess of $200,000 per annum for each of the two preceding calendar years, where the first of such two preceding calendar years is 2010 or later, with total annual income being defined in and subject to the limitations and process set forth in Part 2531 of this Title; . . ."

RSC § 2520.11. The relevant portion of RSC § 2531 that is referenced in RSC § 2520.11 (s) provides, in pertinent part, as follows:

"In the event that the total annual income as certified is in excess of $250,000, $175,000, or $200,000 in each such year, whichever applies, as provided in section 2531.2 of this Part, the owner may file an owner's petition for deregulation (OPD), accompanied by the ICF, with the DHCR on or before June 30th of such year. The DHCR shall issue within

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[1] The PAR order noted that the RA specifically relied on RSC § 2520.11 (s) in the February 16, 2018 deregulation order. *See* verified petition, exhibit A.

> 30 days after the filing of such OPD, an order providing that such housing accommodation shall not be subject to the provisions of the RSL upon the expiration of the existing lease."

RSC § 2531.3 As previously mentioned, Part D, Section 8 of the HSTPA, which codified the repeal of "high income rent deregulation," provides that:

> "This act shall take effect immediately; provided however, that (i) any unit that was lawfully deregulated prior to June 14, 2019 shall remain deregulated . . .."

See L 2019, ch 39 Part Q, § 8 (emphasis added).

After carefully analyzing all of the above statutes and regulations, the court concludes that the rationale which the DHCR followed in the explanatory addendum did not "run counter to the clear wording of a statutory provision." As of June 27, 2018, when landlord filed its deregulation petition, RSL §§ 26-504.1 and 26-504.3 authorized the "high income rent deregulation" of apartments where: 1) the tenant of record had reported a total income of $200,000.00 or more per year to the New York State taxing authorities for two consecutive years; and 2) the unit's legal regulated rent was $2,700.00 per month or more.[2] Landlord's deregulation petition alleged that Papayannis's total income exceeded the "deregulation income threshold" in 2014. *See* verified petition, exhibit D. It is clear that landlord's deregulation petition facially comported with the requirements of RSL §§ 26-504.1 and 26-504.3. Therefore, it was no "error of law" for the DHCR to process landlord's deregulation petition pursuant to those statutes (or any petition that properly pled the statutory requirements for "high income rent deregulation").

Also as of June 27, 2018, RSC §§ 2520.11 and 2531.3 authorized the DHCR to grant petitions for "high income rent deregulation" when a tenant's total annual income was certified as in excess of the applicable deregulation threshold amount. Here, the RA's deregulation order

[2] Landlord's petition and reply papers do not discuss either of these criteria. Instead, they assert that the deregulation of apartment 11-R became effective on the day that the DHCR issued the order. *See* verified petition; Hazen reply affirmation.

specifically noted that, pursuant to DTF tax information, "the annual incomes of the tenant(s) named on the lease . . . was $200,000.00 or more in each of the two preceding calendar years." *See* verified petition, exhibit H. Therefore, it was no "error of law" for the RA to have entered a deregulation order against apartment 11-R, pursuant to RSC §§ 2520.11 and 2531.3 (nor would it have been an "error of law" for the DHCR to enter a deregulation order where any tenant of record's certified annual income exceeded the applicable deregulation threshold amount for two years).

Further, the courts of this state have long and consistently acknowledged that the plain language of RSC § 2531.3 authorizes the DHCR to enter orders terminating an apartment's rent stabilized status "upon the expiration of the current lease," which is usually a different date that falls after the one on which the agency enters a deregulation order. *See e.g. Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d 142 (2004); *Rose Assoc. v Johnson*, 247 AD2d 222 (1st Dept 1998); *Matter of London Terrace Gardens v New York State Div. of Hous. & Community Renewal*, 6 Misc 3d 1020(A), 2005 NY Slip Op 50132(U) (Sup Ct, NY County, 2005); *see also Matter of Lacher v New York State Div. of Hous. & Community Renewal*, 25 AD3d 415, 417 (1st Dept 2006) ("the language of the rent stabilization system with respect to deregulation is prospective in nature"). Therefore, it was no "error of law" for the RA to have abided by the "lease expiration" instruction set forth in RSC § 2531.3 when he issued the February 16, 2018 deregulation order. *See* verified answer, exhibit H.

Finally, as was previously observed, the "clean up" Section 8 of Part D of the HSTPA provides that "any unit that was lawfully deregulated prior to June 14, 2019 (the HSTPA's effective date) shall remain deregulated," but that as to all other apartments, "this act shall take effect immediately," with the result that "high income rent deregulation" will no longer be

available because the statutes that authorized it (i.e., RSL §§ 26-504.1 and 26-504.3) were repealed effective as of that date. *See* L 2019, ch 39 Part Q, § 8; see also *Widsam Realty Corp. v Joyner*, 66 Misc 3d 132(A), 2019 NY Slip Op 52097(U), *2 (App Term, 1st Dept 2019) ("'the so-called "clean up" bill clarified, at Section 8 thereof, that HSTPA did not re-regulate any units lawfully deregulated before HSTPA's June 14, 2019 effective date'" [internal citation omitted). The statute's plain language makes it clear that it was no "error of law" for the DHCR to have concluded that it could not authorize the deregulation of any rent stabilized apartments after the HSTPA's June 14, 2019 effective date.

The court also finds that it is reasonable for the DHCR to read the plain language of HSTPA, Part D, Section 8, in conjunction with RSC § 2531.3 (and the case law that interprets those provisions), and to conclude that it could not authorize the deregulation of rent stabilized apartments after June 14, 2019, even pursuant to previously issued deregulation orders, if such orders provided for the subject apartments to remain subject to stabilization until their pending lease terms expired, and the expiration dates fell after June 14, 2019. The court makes this finding fully cognizant of the Court of Appeals' directive that it, and not the DHCR, is the proper tribunal to resolve "question[s] . . . of pure statutory reading and analysis . . .." *Matter of West 58th St. Coalition, Inc. v City of New York*, 188 AD3d at 8, quoting *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d at 459. In this instance, however, the court finds that the DHCR's interpretation of the statutes (i.e., that the applicable RSL and RSC provisions did not authorize apartment 8G's deregulation, despite the agency's previous approval of landlord's deregulation petition) did not "run counter to the clear wording of a statutory provision." Instead, the court finds that it was reasonable for the DHCR to read the plain language of the RSL and RSC provisions in conjunction with the HSTPA, and the court adopts that reading. As a result, the

court concludes that the DHCR's explanatory addendum did not contain an "error of law" that would adversely affect the February 16, 2018 deregulation order, in violation of CPLR 7803 (3). Consequently, the court finds that, to the extent that this Article 78 petition challenges the explanatory addendum, it lacks merit and should be denied. However, as was previously observed, landlord's petition purports to challenge the October 7, 2020 PAR order pursuant to CPLR Article 78.

At the beginning of this decision, the court noted that its role in an Article 78 proceeding is to determine whether, upon the facts before the DHCR, a challenged 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 at 230-231; *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d at 302. A determination will only be found "arbitrary and capricious" if it is "without sound basis in reason, and in disregard of the . . . facts . . .." *See Matter of 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. However, if a rational basis for the agency's determination can be drawn from the administrative record, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232. Here, landlord specifically raises three arguments that the PAR order was an arbitrary and capricious ruling.

First, landlord argues that "[t]he DHCR should be giving the Court of Appeals Decision in *Regina Metropolitan Co. v NYS Division of Housing & Community Renewal* . . . its proper interpretation." *See* verified petition, ¶ 5-a. Landlord proceeds from the erroneous assumption

that apartment 11-R was deregulated on the date of the January 3, 2018 deregulation order (rather than the date specified in the order), and asserts that the DHCR's policy (expressed in the explanatory addendum) that no deregulations could go forward after the HSPTA's June 14, 2019 effective date somehow caused "the revival of a time-barred claim." *Id.*, ¶¶ 23-40 (paragraphs mis-numbered). Landlord argues that this policy violates the portion of the *Regina Metropolitan* holding which discussed the "retroactive effect" of the HSTPA 's effective date. *Id.*, ¶¶ 23-40 (paragraphs mis-numbered). The DHCR responds that "*Regina's* ruling is not applicable to high income deregulation cases." *See* respondent's mem of law at 6-7. Having itself reviewed the entirety of the *Regina Metropolitan* holding, the court finds that the DHCR Deputy Commissioner's interpretation of it was rational.

The PAR order stated that:

"The Commissioner also rejects the petitioner's argument that *Matter of Regina* applies to this high rent/high income deregulation case. While the Court of Appeals disallowed the retroactive application of certain rent overcharge provisions contained in Part F of the HSTPA, it stated that:

> "'The question we address here is relatively narrow - we have no occasion to address the prospective application of any portion of the HSTPA, including Part F. We address the new legislation only to determine whether certain Part F amendments . . . must be applied retroactively . . . We conclude that the overcharge calculation amendments cannot be applied . . . to overcharges that occurred prior to their enactment . . .'"

See verified petition, exhibit A. The Court of Appeals took great pains to limit its holding in *Regina Metropolitan* to the question of "whether certain Part F amendments [of the HSTPA] . . . must be applied retroactively." *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 35 NY3d at 363. However, the Court recognized that the repeal of high income deregulation was governed by the amendments set forth in Part D of the HSTPA. 35 NY3d at 362, 373. The Court also expressly limited its "retroactive effect" analysis to HSTPA Part F, and quite clearly stated that "we have no occasion to address the prospective

application of any portion of the HSTPA," including Part D. *Id.*, at 352, 363. In light of the Court's clear explanation, there is no basis for landlord's contention that the "retroactive effect" analysis set forth in *Regina Metropolitan* should apply to high income deregulation cases governed by HSTPA Part D. Therefore, the court concludes that it was rational for the DHCR Deputy Commissioner to reject landlord's argument, and finds no merit in landlord's contention that the Deputy Commissioner acted arbitrarily and capriciously in doing so.

Next, landlord argues that "[t]he DHCR ignored the specific facts of this case," particularly that "the Tenant [Papayannis] FAILED to file a Petition for Administrative Review against that [deregulation] Order." *See* verified petition, ¶¶ 5b, 19-22 (emphasis in original). The DHCR responds that the fact that Papayannis's time to file a PAR of the deregulation order is irrelevant because "the courts have clearly specified that the cut-off date for luxury deregulation is whether the lease had expired before HSTPA repealed the statute." *See* respondent's mem of law at 9.

The PAR order stated as follows:

> "The Commissioner rejects the owner's contentions that DHCR erred by applying HSTPA's repeal of High Income/High Rent deregulation to the February 16, 2018 'final order.' The application of HSTPA to this matter is not based upon the independent judgement of the rent agency, but, rather, it is pursuant to the plain text in HSTPA, and the rent agency is statutorily obliged to apply HSTPA to this case. [The] HSTPA specifically stated that the law is to 'take effect immediately' and that 'if an apartment remains rent regulated on or after June 14, 2019, then that apartment is no longer subject to the statutory provisions of high rent/high income deregulation.' Here, if the apartment remained rent regulated because the qualifying event for the deregulation (i.e. a current lease expiration) had not yet taken place as of June 14, 2019, it could not be deregulated thereafter. The Commissioner notes that the legislature drew its own bright line test of deregulation as to those orders at the RA level where the order was not yet effective. Moreover, Rent Stabilization Law (RSL) §26-504.3 conditioned high income/high rent deregulation on the expiration of an existing lease. *See Hoy v NYS DHCR, N.Y. Co.*, Index Number 159513/19, (Kotler, J., May 19 , 2020) (Court agreed with DHCR's interpretation of HSTPA Part 'D,' since the Order of Deregulation provided that the premises was deregulated upon the expiration of the then-existing lease.) Therefore, the deregulation order was not final until the expiration of the existing lease, a condition that the owner was or should have been aware of when it filed its application."

See verified petition, exhibit A. This text shows that the Deputy Commissioner did not "ignore" the fact that Papayannis failed to file a PAR of the deregulation order, since he characterized it as a "final order" of the DHCR. It appears that landlord is actually arguing that the Deputy Commissioner did not accord the fact of Papayannis's non-filing the significance that landlord wished. However, as the court explained at length at the beginning of this decision, the DHCR's interpretation of the HSTPA in the explanatory addendum was reasonable. Under that interpretation, the fact that Papayannis did not file a timely PAR of the deregulation order is of no significance, since the DHCR recognized the viability of that order until it was superseded by Part D of the HSTPA. It is well settled that "[t]he interpretations of respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational." *Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251, 252 (1st Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988). Therefore, the court rejects landlord's contention that the Deputy Commissioner acted arbitrarily and capriciously by rejecting landlord's argument that Papayannis did not file a timely PAR of the deregulation order.

Finally, landlord argues that it "has unequivocally proven that this apartment should be found to have been properly deregulated." *See* verified petition, ¶ 5c. Landlord appears to base this argument on the assertions that the DHCR committed an "unreasonable" 16 month delay in issuing the deregulation order, and that "but for waiting for the expiration of the most recent Renewal Lease and Tenants' own delays in filing taxes from 2014, the apartment should be deregulated." *Id.*, ¶ 37 (paragraphs mis-numbered). The DHCR replies that landlord "cannot establish that the apartment should become deregulated due to 'unreasonable delay'," as a matter

of law, and recited the rationales that the DHCR Deputy Commissioner expressed in the PAR order. *See* respondent's mem of law at 10-13. The relevant portion of that order stated that:

> "The Commissioner rejects the owner's assertion that the Order of deregulation was untimely issued on February 16, 2018. The owner filed its petition for deregulation on June 27, 2014. The Commissioner finds that the RA continued to process the OPD through the ordinary course of business and to obtain certification of the tenant's income. The Commissioner finds no unreasonable delays in processing the owner's application. Further, under Rent Stabilization Code [RSC] § 2531.9, 'the expiration of the time periods prescribed by the applicable luxury deregulation sections of the Code, shall not divest the agency of its authority to process petitions and to issue final determinations.' As such, the expiration of the time periods asserted by the owner for processing its deregulation petition did not divest the agency from issuing the underlying order in 2018. Moreover, remedies for processing delays are only available where such delay is deliberate or negligent in anticipation of a change of statute. This matter was processed, and the order was issued before HSTPA and the agency could not have anticipated the impact of HSTPA on the RA's order."

See verified petition, exhibit A. After review, the court agrees that the Deputy Commissioner's findings were reasonable because: 1) the text of RSC § 2531.9 plainly states that the agency "shall not [be] divest[ed] . . . of its authority to process petitions," by "[t]he expiration of the time periods prescribed . . . for [agency] action"; and 2) appellate case law clearly provides that a party claiming unreasonable delay bears the burden of demonstrating that it was "the result of DHCR's negligent or deliberate conduct." *See e.g., Matter of IG Second Generation Partners L.P. v New York State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 10 NY3d 474 (2008); *Matter of McCarthy v New York State Div. of Hous. & Community Renewal*, 290 AD2d 313 (1st Dept 2002). The court notes that landlord's petition and reply papers are devoid of any evidence of negligent or deliberate conduct by the DHCR to support its conclusory allegation that the instant delay was "unreasonable." As a result, the court rejects landlord's argument as meritless.

The court also rejects landlord's repeated insinuations that the DHCR applied the HSTPA retroactively as disingenuous. The DHCR did *not* retroactively apply the deregulation repeal set

forth in Part D of the HSTPA. Instead, the explanatory addendum set forth the agency's determination that Part D of the HSTPA had caused a supervening change in the law of "high income rent deregulation" on June 14, 2019 which precluded the instant deregulation order from taking effect until Papayannis's lease for apartment 11-R expired on June 30, 2019. Had the Legislature given Part D of the HSTPA an effective date that fell after the lease's June 30, 2019 expiration date, then apartment 11-R might have been deregulated pursuant to the February 16, 2018 deregulation order. However, the repeal of "high income deregulation" took place on June 14, 2019, before Papayannis's lease expired. Thus, when that lease did end on June 30, 2019, New York law no longer permitted deregulation, and the unit remained rent stabilized.

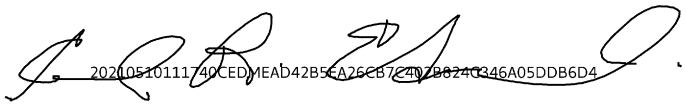
When RSC § 2531.3 formerly authorized the DHCR to issue "high income rent deregulation" orders that would take effect after the expiration of an existing rent-stabilized lease, New York's courts routinely acknowledged that regulatory authority. *See e.g.*, *Matter of Classic Realty v New York State Div. of Hous. & Community Renewal*, 2 NY3d 142, 142 (2004); *Rose Assoc. v Johnson*, 247 AD2d 222, 222 (1st Dept 1998); *Matter of Lacher v New York State Div. of Hous. & Community Renewal*, 25 AD3d 415, 417 (1st Dept 2006). However, landlord has cited no precedent upholding a statutory interpretation which measured the effective date of an apartment deregulation from the date that a DHCR deregulation order was issued, rather than the lease expiration date specified in such order. Therefore, the court rejects landlord's assertions about "retroactivity," and concludes that it has failed to demonstrate that the DHCR's PAR order was an arbitrary and capricious ruling. Accordingly, the court finds that so much of landlord's petition as challenged the PAR order on that ground lacks merit and should be denied.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR article 78, of petitioner Rudin East 55th Street (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent New York State Division of Housing and Community Renewal shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



5/10/2021
DATE

CAROL R. EDMEAD, J.S.C.

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