West 122 LLC v New York State Div. of Hous. & Community Renewal
2021 NY Slip Op 31782(U)
May 26, 2021
Supreme Court, New York County
Docket Number: 158634/2020
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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WEST 122 LLC,

Plaintiff,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, ANGEL LAMERIQUE

Defendant.

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INDEX NO. 158634/2020

MOTION DATE 10/15/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

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 West 122 LLC (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that respondent New York State Division of Housing and Community Renewal shall serve a copy of this order along with notice of entry in ten (10) days.

In this Article 78 proceeding, petitioner West 122 LLC (landlord) seeks a judgment to overturn an order of the respondent New York State Division of Housing and Community Renewal (DHCR) as arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

FACTS

Landlord is the owner of a seven-unit, residential apartment building located at 8 West 122nd Street in the County, City and State of New York (the building). *See* verified petition, ¶ 1. Co-respondent Angel Lamerique (Lamerique) was the tenant of record of apartment 3 in the building, a rent stabilized unit, from 2010 until December 2015. *Id.*, ¶¶ 3, 8; exhibit C. The DHCR is the administrative agency charged with the oversight of all rent stabilized apartment units located in New York City. *Id.*, ¶ 2.

Lamerique filed a rent overcharge complaint with the DHCR on June 12, 2012. *See* verified answer, ¶ 6. On May 19, 2015, a DHCR Rent Administrator (RA) issued an order that found in Lamerique's favor (the first RA's order). *Id.*, ¶ 6. Landlord thereafter filed a petition for administrative review (PAR) to challenge the first RA's order, which the DHCR Deputy Commissioner's office denied in an order dated February 2, 2016 (the 2016 PAR order). *Id.*, ¶ 7. Landlord then commenced an Article 78 proceeding to challenge that order which resulted in a decision by this court (Hagler, J.) that remanded the matter to the DHCR for further consideration (Index No 100460/16). *Id.*, ¶ 7. On November 27, 2018, the DHCR Deputy Commissioner's office issued a second decision which modified its earlier PAR order (the 2018 PAR order). *Id.*, ¶ 8; verified petition, exhibit C.

In the meantime, Lamerique had filed a second rent overcharge complaint with the DHCR on April 26, 2016. *See* verified answer, ¶ 10. On January 31, 2020, a DHCR RA issued

another decision that found in Lamerique's favor (the second RA's order). *Id.*, ¶ 11. Landlord thereafter filed another PAR to challenge the second RA's order, which resulted in a decision by the DHCR Deputy Commissioner's office, dated August 26, 2020, that modified that order (the 2020 PAR order). *Id.*, ¶¶ 13-14; verified petition, exhibit A. The 2020 PAR order made the following findings:

> "As a first matter, the Commissioner amends the base date to April 26, 2012 because the RA incorrectly determined that the base date for this proceeding was six years before the filing of the overcharge complaint. At the time that the April 26, 2016 overcharge complaint was filed, Rent Stabilization Code (RSC) §2526.1 (a) (2) provided that the base date for computing the legal regulated rent in a rent overcharge proceeding shall be 'the date four years prior to the date of the filing of such appeal or complaint.' The RA's application of the overcharge provisions of the Housing and Stability Act and Tenant Protection Act of 2019 (HSTPA) to this 2016 complaint and a six-year look back period was improper. *See Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal*, 2020 NY Slip Op 02127, *9 (the overcharge calculation amendments of HSTPA cannot be applied retroactively to overcharges that occurred prior to their enactment). However, the RA's incorrect base date determination did not change the overcharge period which occurred within the applicable four-year look back period (i.e. the overcharge began April 1, 2013 which was within four years of the filing of the complaint). The award of treble damages on the entire overcharge, however, was improper and in violation of the *Regina Metro* ruling and must be amended, as discussed below.
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> "The owner's assertion that there was no overcharge from April 1, 2013 through July 31, 2015 is without merit. Using the rent established in the prior order ($1,909 per month effective March 31, 2013), the RA properly added annual guideline increases to calculate the rent from April 1, 2013 - July 31, 2015. The Commissioner notes that the owner's chart annexed to its PAR establishes that it charged the tenant more than the legal regulated rent established by the RA. According to the owner's chart, which is in accord with that of the RA, the tenant paid the full amount of the rent charged from April 1, 2013 through July 31, 2015, and the Commissioner finds that said amount constituted an overcharge because it was more than the monthly rent [and the] applicable annual guideline increases permitted. The Commissioner notes that the amount owed by the tenant according to the owner's chart includes calculations of rental payments before April 1, 2013, a period beyond the scope of the RA order. Any arrears before April 1, 2013 therefore cannot be discounted against the overcharge. The RA properly calculated underpayment of rent from August 1, 2015 through December 2015 and discounted said amount against the overcharge ($3,312.05). The Commissioner notes that the owner may pursue any alleged additional arrears in a court of competent jurisdiction.
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> "The owner's assertion that it could not register the apartment from 2013 is without merit. Following issuance of the Commissioner's order on November 27, 2018, the owner could have registered the apartment anytime from April 1, 2019 through July

31, 2019 for both 2019 and any prior missing years. The November 27, 2018 Commissioner's order could also have served as a basis for correcting any prior registration errors to conform to the rent established by the Commissioner. Based on the foregoing, the RA's decision to freeze the collectible rent based on non-registration from 2013 is reasonable. To date, the last registration filed by the owner was on May 26, 2010.

"The owner's claim that treble damages should be eliminated is without merit. While pre-HSTPA law provided that overcharges based solely on non-registration were not subject to treble damages, the Commissioner finds that said overcharges in this case were not caused solely by the failure to register and the freezing of the rent. Indeed, both the RA's calculation chart and the information provided by the owner establish that the owner was charging more than the legal regulated rent regardless of the freeze. Moreover, the underpayments of rent do not cancel out the entire overcharge and the owner did not provide a refund to invoke the safe harbor provisions of the previous law to avoid treble damages. The Commissioner's order under docket number FN410005RP did not prohibit the RA from assessing treble damages on the current overcharge.

"However, under pre-HSTPA law, the overcharges occurring more than two years before the complaint was filed were not subject to treble damages. As such, the RA improperly applied treble damages on the entire overcharge in this case. Overcharges occurring from April 1, 2013 through April 2014 should be assessed interest only accrued up to the date of the issuance of the RA order. The overcharges occurring from May 1, 2014 through July 31, 2015 are subject to treble damages. The calculation chart is modified as follows:

"Overcharge:	$7,178.
"Interest:	$1,211.15
"Treble:	$10,084.60
"Refund	- $3,312.05
"Total owed to Tenant:	$15,162.66

"THEREFORE, in accordance with the relevant Rent Regulatory Laws and Regulations, it is

"ORDERED, that this petition be, and the same hereby is, granted in part, and that the Rent Administrator's order be, and the same hereby is modified in accordance with this order and opinion, and having been so modified is affirmed."

Id., verified petition, exhibit A.

Landlord commenced this Article 78 proceeding to challenge the 2020 PAR order on November 12, 2020. *See* verified petition. The DHCR filed an answer on January 11, 2021, which the court accepted over landlord's objection. *See* verified answer. The matter is now fully submitted (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine whether, upon the facts before an administrative agency, 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 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). 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 there is a rational basis for the administrative determination, 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. It is also well settled that "[t]he interpretations of [a] 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). Here, landlord contends that three of the findings in the 2020 PAR order were arbitrary and capricious. However, the court finds that landlord's arguments are unpersuasive.

First, landlord argues that "the [DHCR] incorrectly imposed a rent overcharge upon Petitioner." *See* verified petition, ¶¶ 11-39. Landlord specifically asserts that "[i]n [the 2020 PAR order], DHCR did not list a proper calculation of how they determined the final amounts of overcharge, interest, or treble damages." *Id.*, ¶¶ 22-24. The DHCR responds that it "properly calculated the legal rent based on the appropriate Rent Guidelines Board (RGBO) orders . . .

[and] reasonably determined that a rent overcharge occurred commencing with the one-year renewal lease that took effect April 1, 2013." *See* verified answer, Huss affirmation, ¶¶ 21-25. Having itself reviewed the 2020 PAR order, the court concludes that the Deputy Commissioner included the appropriate rent calculations in it, and that he arrived at them reasonably. The Deputy Commissioner first correctly determined that any overcharge should be calculated using a four-year "base date,"[1] given the Court of Appeals holding in *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332 [2020]) that the current, amended version of the rent overcharge statute,[2] which specifies a six-year "base date," cannot be applied retroactively to rent overcharge claims that were filed before the June 14, 2019 effective date of the HSTPA.[3] *See* verified petition, exhibit A. The Deputy Commissioner then specified a "base date rent" of $1,909.00 per month effective as of March 31, 2013, and increased it by adding the applicable RGBO percentage increases for each of Lamerique's subsequent lease renewal terms.[4] *Id.* Finally, the Deputy Commissioner compared the resulting list of legally collectible rents for apartment 3 from 2013-2015 against the amounts that Lamerique actually paid during those years, and concluded that landlord was liable for a rent overcharge, since it had collected more than the legally permitted rent from Lamerique for the majority of 2013-2015. *Id.* The court finds that landlord's assertion that the 2020 PAR order "did not list a proper calculation of how [the DHCR] determined the final amounts of

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[1] I.e., the date four years prior to the filing of the DHCR rent overcharge proceeding, or April 26, 2012 in this case, since Lamerique had filed his second rent overcharge complaint on April 26, 2016.

[2] Rent Stabilization Law (RSL) § 26-526.

[3] Housing Stability and Tenant Protection Act of 2019.

[4] The Deputy Commissioner correctly noted that (a) landlord was precluded from challenging the $1909.00 "base date rent" because it failed to file a timely Article 78 petition to challenge the 2018 PAR order which established that figure, and (b) landlord accepted the $1,909.00 figure in the second PAR proceeding. *See* verified petition, exhibit A.

overcharge" is belied by the text of the 2020 PAR order. As a result, the court rejects landlord's argument, and finds that there was a rational basis for the Deputy Commissioner's overcharge finding in the 2020 PAR order.

Next, landlord argues that "DHCR is wrong to impose treble damages." *See* verified petition, ¶¶ 11-39. Landlord specifically asserts that "due to the DHCR's prolonged litigation of this matter and their final finding in [the 2018 PAR order], the Owner was not at fault for the failure to register eight years after the fact." *Id.*, ¶ 20. The DHCR responds that "[l]andlord presented an argument sounding in estoppel," in that it "claimed that DHCR may not impose treble damages on overcharges collected after April 1, 2013 because in the previous overcharge proceeding DHCR did not impose treble damages on overcharges collected on and before March 31, 2013." *See* verified answer, Huss affirmation, ¶¶ 26-35. The DCHR cites the decision by the Appellate Division, First Department, in *Matter of Lavanant v State Div. of Hous. & Community Renewal* (148 AD2d 185 [1st Dept 1989]) for the proposition that that such an estoppel-based argument must fail, as a matter of law. The court finds that the DHCR's position is persuasive for three reasons.

First, *Matter of Lavanant* held that, because the then-effective version of RSL § 26–516 contained the a presumption that any landlord found to have collected an overcharge from a tenant did so willfully, "notice to petitioners was given, [and] the Division could [therefore] impose a treble damage penalty for overcharges occurring after April 1, 1984." 148 AD2d at 189-190. Here, the pre-HSTPA version of RSL § 26–516 containing the presumption of willfulness was certainly in effect when Lamerique filed both the first and the second DHCR overcharge complaints. As a result, landlord was on the same "notice" described in the *Lavenant* holding that it might be liable for treble damages at the resolution of those proceedings, and it

may not now be heard to complain of undue surprise. Second, the DHCR correctly notes that a quantity of appellate precedent holds that "estoppel be invoked to prevent an agency from discharging its regulatory duties." *See e.g.*, *Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776, 779 (2008), citing *Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282 (1988), cert denied 488 US 801 (1988); *Matter of Kiselgof v New York State Div. of Hous. & Community Renewal*, 22 AD3d 853 (2d Dept 2005); *Matter of Pronina v New York State Div. of Hous. & Community Renewal*, 22 AD3d 858 (2d Dept 2005); *Matter of Vaynshteyn v New York State Div. of Hous. & Community Renewal*, 22 AD3d 860 (2d Dept 2005); *Matter of Plazinska v New York State Div. of Hous. & Community Renewal*, 22 AD3d 857 (2d Dept 2005). The court has been unable to discover, and landlord has not cited, any contrary appellate precedent under which the DHCR may be estopped from imposing treble damages pursuant to the willfulness presumption in RSL § 26–516. That is because no such precedent appears to exist. Finally, the court credits the Deputy Commissioner's finding that the "overcharges in this case were not caused solely by the [landlord's] failure to register [apartment 3] and the freezing of the rent," because the parties' submissions "establish[ed] that the owner was charging more than the legal regulated rent regardless of the freeze." *See* verified petition, exhibit A. For these reasons, the court rejects landlord's "willfulness" argument, and finds that it was reasonable for the Deputy Commissioner to have imposed the treble damages penalty upon landlord's failure to present evidence to rebut the statute's presumption of "willfulness."[5]

Finally, landlord argues that "a rent freeze is inappropriate if the rent is legal." *See* verified petition, ¶ 25. Landlord does not explain this argument further, and the DHCR responds

[5] The court also notes that it was reasonable for the Deputy Commissioner to have limited the imposition of treble damages to the two-year period specified in the pre-HSTPA version of RSL § 26–516. *See* verified petition, exhibit A.

by noting that, ever though there was a rent freeze in effect from April 1, 2014, and April 1, 2015 as a result of landlord's failure to register apartment 3, the 2020 PAR order determined that apartment 3's rent was *not* "legal" during the balance of the 2013-2015 overcharge period. *See* verified answer, Huss affirmation, ¶¶ 24-25, 30-31. For its part, the court notes that the rent freeze was imposed in the 2018 PAR order which landlord did not challenge in a timely Article 78 proceeding. Therefore, the court finds that landlord's "rent freeze" argument is not properly before it in this proceeding.

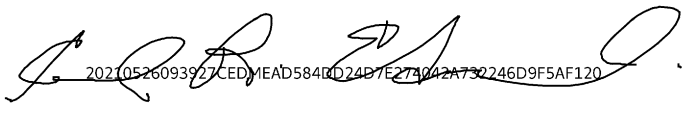
In conclusion, the court finds that the 2020 PAR order was supported by a "rational basis," and that landlord has failed to establish that it was an arbitrary and capricious ruiling. Accordingly, the court finds that landlord's Article 78 petition should be denied as meritless, and that this proceeding should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner West 122 LLC (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that respondent New York State Division of Housing and Community Renewal shall serve a copy of this order along with notice of entry in ten (10) days.



5/26/2021
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