Ahmed v State of New York Div. of Hous. & Community Renewal
2021 NY Slip Op 32234(U)
November 9, 2021
Supreme Court, New York County
Docket Number: Index No. 154835/2021
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** **PART** **35**

Justice

----------X

MANZOOR AHMED,

Petitioner,

- v -

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

Respondent.

----------X

INDEX NO. 154835/2021

MOTION DATE 08/26/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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

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

Upon the foregoing documents, it is

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

ORDERED AND ADJUDGED that the Clerk of the Court shall enter judgment dismissing this proceeding; and it is further

ORDERED that counsel for respondent State of New York Division of Housing and Community Renewal shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

In this Article 78 proceeding, petitioner Manzoor Ahmed (Ahmed) seeks a judgment to overturn an order of the respondent State of New York Division of Housing & 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

Ahmed is the tenant of record of apartment 206, a "single room occupancy" (SRO) unit in a residential apartment building located at 184 11th Avenue in the County, City and State of New York, and known as the "Chelsea Highline Hotel" (the building). *See* verified petition, ¶¶ 1,8. Co-respondent Audthan, LLC (Audthan) is the triple net lessee of the building's fee owners, non-party Nick & Duke LLC, and is authorized to operate it as landlord pursuant to the 48 ½ year net lease that it acquired by assignment. *Id.*, exhibit A. The DHCR is the administrative agency that oversees rent stabilized housing units in New York City. *Id.*, ¶ 5.

Apartment 206 became subject to the Rent Stabilization Law and Code (RSL and RSC) as a result of an order issued by the Appellate Term, First Department, in *Ahmed v Chelsea Highline Hotel* (49 Misc 3d 139[A], 2015 NY Slip Op 51577[U] [App Term, 1st Dept 2015]), which granted Ahmed's "illegal lockout petition," and found that he "qualified as a 'permanent tenant' entitled to rent stabilization protection at the time he was forcibly removed." After that decision was issued on October 30, 2015, Audthan commenced an administrative proceeding before the DHCR on December 4, 2015 to determine apartment 206's legal regulated rent. *See* verified petition, exhibit A. On March 27, 2017, a DHCR rent administrator (RA) issued a decision that utilized the RSC's "sampling formula" (9 NYC Admin Code § 2522.6 [b] [3] [iv]) to calculate the unit's legal regulated rent at $384.96 per month (the RA's order). *Id.* Ahmed filed a petition for administrative review (PAR) to challenge the RA's rent determination on May

4, 2017. *See* administrative transcript, part B. On April 1, 2021, the DHCR Deputy Commissioner's Office issued a decision that partially granted Ahmed's PAR to the extent of modifying the RA's sampling method calculations and finding that apartment 206's correct legal regulated rent was actually $353.50 per month (the PAR order). *See* verified petition, exhibit A. The relevant portion of the PAR order found that:

> "The petitioner [i.e., Ahmed] asserts that because the owner attempted to evade their obligations to and violated various provisions of the Rent Stabilization Code, the agency is required to use the lowest registered rent in the building for a similar rent-stabilized room, specifically, the rent for David Glasser in Room 401, which is registered as $82.84 monthly. However, the record supports that Glasser entered into a stipulation with the prior owner of the subject property in 1997, where the parties agreed that Glasser would pay no rent for the remainder of his tenancy, and his rent was never adjusted (*Matter of David Glasser*, Docket Nos. MI410012RK etc., issued July 6, 2001). Therefore, the rent for Room 401 cannot be used as the lowest and/or comparable rent as it is not reliable in this case.
>
> "The petitioner further asserts that the building's rental history is unreliable (n1); however, in the alternative, if the rent for Room 401 cannot be used as the lowest rent, the following rooms should be used when calculating and averaging the rent for room 206:
>
> | | | |
> |---|---|---|
> | "Leone, Frank | 301 | $227.00 |
> | "Brooks, Ted | 308 | $160.00 |
> | "Astin (Worthy), D | 312 | $271.00 |
> | "Ogunrinde, A.C. | 315 | $1,368.00 |
> | "Stevens, Joe | 319 | $208.00 |
> | "Caitlin, Robin | 320 | $208.00 |
> | "Vaughn, Johnny | 321 | $200.00 |
> | "Glasser, David | 401 | $82.84 |
> | "Durden, Barbara | 404 | $270.00 |
> | "Ortiz, Maria | 410 | $125.00 |
> | "Ortiz, Maria | 411 | $125.00 |
> | "Total: | | $3,245.00/11 = $295.05 |
>
> "(n1. The Commissioner notes that the tenant's submitted purported rental history is unreliable, thus the tenant's adjusted rent is based on the 2014 Registration Rent Report)
>
> "The Commissioner notes that the default method is used to ascertain a base rent when there is not sufficient evidence in the rental history to determine same rent. In the instant matter, records reveal that the subject accommodation was temporarily exempt on the base date, and further, it does not appear that there were any prior rent-stabilized tenants for the subject accommodation. Given the unreliability of rents and the lack of a base date rent and residential rental history for the subject apartment, the Commissioner

finds that it was appropriate for the Rent Administrator to use the sampling method in accordance with RSC Section 2522.6 (b) (2) and (b) (3). Accordingly, the Commissioner finds that the Rent Administrator therefore correctly applied the sampling method established in Section 2522.6 (b) (3) (iv) as this is the only available and appropriate method to use in this case under the RSC.

"The Commissioner finds that the record supports that the rent for A.C. Ogunrinde (Room 315) is questionable as it is excessive in comparison to similarly situated rent-stabilized rooms and is not reliable in this case and therefore, is not to be included in the calculation of the legal regulated rent for the subject room at the time the tenant became rent stabilized.

"Additionally, as noted by the Decision and Order of Honorable Debra A. James, JSC, issued on October 25, 2019 in *Ouattara v DHCR*, Supreme Court of the State of New York, New York County, Index No. 158454/2018, the data used by the Rent Administrator is flawed as the inclusion of Maria Ortiz's (Rooms 410/411) in the sampling data cannot be used as it is a double apartment and not comparable to a one-room unit. As such, the Commissioner finds that based on the 2014 Registration Rent Roll Report, the lawful rent should be recalculated using the average of Room 308 ($160.00), Room 312 ($270.84), Room 319 ($866.67), Room 321 ($200.00), and Room 404 ($270.00). Therefore, the Commissioner finds that the subject tenant's lawful rent should be adjusted to $353.50 per month, and the Rent Administrator's order should be modified accordingly."

Id., exhibit A.

Aggrieved, Ahmed commenced this Article 78 proceeding to challenge the PAR order on June 3, 2021. *See* verified petition. Respondents filed a joint answer on August 12, 2021. *See* verified answer. With the filing of Ahmed's reply papers, this 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 deemed "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 the opposite is the case, then there is a "rational basis" for the agency's determination, and 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, Ahmed raises two arguments that the PAR order was arbitrary and capricious. The court will consider them in turn.

First, Ahmed argues that "the failure of DHCR to properly interpret the RSC and its failure to implement a proper default formula was an arbitrary and capricious abuse of discretion and must annulled as unlawful." *See* verified petition, ¶ 39. The "default formula" is the first of four methods for setting apartment rents that the RSC authorizes the DHCR to employ. As was noted in the PAR order, the operative RSC regulation is found in NYC Admin Code § 2522.6 ("Orders where the legal regulated rent or other facts are in dispute, in doubt, or not known, or where the legal regulated rent must be fixed") the pertinent portions of which provide that:

> "(a) Where the legal regulated rent . . . is in dispute between the owner and the tenant, or is in doubt, or is not known, the DHCR . . . may issue an order in accordance with the applicable provisions of this Code determining . . . the legal regulated rent . . .
> "(b)
> "(1) Such order shall . . . establish the legal regulated rent in accordance with the provisions of this Code . . .
> "(2) Where either:
> "(i) *the rent charged on the base date cannot be determined*; or
> "(ii) a full rental history from the base date is not provided; or
> (iii) the base date rent is the product of a fraudulent scheme to deregulate the apartment; or
> "(iv) a rental practice proscribed under section 2525.3 (b), (c) and (d) of this Title has been committed, *the rent shall be established at the lowest of the following amounts set forth in paragraph (3) of this subdivision*.
> "(3) These amounts are:
> "(i) *the lowest rent registered pursuant to section 2528.3 of this Title for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment*; or

> "(ii) the complaining tenant's initial rent reduced by the percentage adjustment authorized by section 2522.8 of this Title; 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) of this paragraph is not available or is inappropriate, an amount based on data compiled by the DHCR, using sampling methods determined by the DHCR, for regulated housing accommodations*."

NYC Admin Code § 2522.6 (emphasis added). Instead of the default method, both the RA's order and the PAR order employed the fourth rent-setting method (the "sampling formula") to fix apartment 206's legal regulated rent. Ahmed asserts that the DHCR's decision to use the sampling method formula than the default formula was arbitrary and capricious. *See* verified petition, ¶¶ 20-30. The DHCR responds that the Deputy Commissioner's decision "is supported by a rational basis in the record and the law and is fully entitled to judicial affirmance." *See* verified answer, Schneider affirmation, ¶¶ 11-19. After careful consideration, the court finds for respondents.

First, the DHCR Deputy Commissioner's determination confirming the RA's decision to calculate apartment 206's rent pursuant to the RSC regulations set forth in NYC Admin Code § 2522.6 had a rational basis in the administrative record. That record included the Appellate Term's decision in *Ahmed v Chelsea Highline Hotel* (49 Misc 3d 139[A], 2015 NY Slip Op 51577[U]) which found that Ahmed was entitled to the protection of the RSL. *See* verified answer, administrative transcript, part A. That decision obligated Audthan to seek a determination from the DHCR as to what legal regulated rent it should register for apartment 206, since the unit was not previously rent stabilized, and there was no legal regulated rent on record. The plain text of NYC Admin Code § 2522.6 provides that it applies "where the legal regulated rent . . . must be fixed." The court therefore finds that it was reasonable for the DHCR

to apply that regulation in this case. The court further notes that Ahmed does not dispute that the regulation applies.

Next, the DHCR Deputy Commissioner's determination confirming the RA's decision to employ one of the four rent-setting formulae set forth in NYC Admin Code § 2522.6 (b) (3) was also rationally based. The documentary evidence that the RA reviewed disclosed that the first of the criteria set forth in NYC Admin Code § 2522.6 (b) (2) was present; i.e., apartment 206's base date rent "could not be determined," because the unit had never been registered as rent stabilized. *See* verified answer, administrative transcript, part A. The court therefore finds that it was reasonable for the DHCR to proceed to the rent-setting formulae contained in NYC Admin Code § 2522.6 (b) (3), since the criteria for their use had been demonstrated. The court also again notes that Ahmed does not dispute that it was proper to use those formulae.

Finally, the DHCR Deputy Commissioner's determination confirming the RA's decision to employ the "sampling formula" set forth in NYC Admin Code § 2522.6 (b) (3) (iv) also had a rational basis in the administrative record. The regulation's plain language provides that the sampling formula should be used "if the documentation set forth in subparagraphs (i) through (iii) of this paragraph is not available or is inappropriate." The plain language of Admin Code § 2522.6 (b) (3) (i) (the "default formula") provides for the use of "the lowest rent registered . . . for a comparable apartment in the building in effect on the date the complaining tenant first occupied the apartment." The PAR order noted that the administrative record included DHCR filings reflecting that the lowest registered rent in 2015 for an apartment comparable to unit 206 was $82.84 per month for unit 401 (whose tenant was David Glasser). *See* verified answer, exhibit A; administrative transcript, part B. However, the PAR order also noted that apartment 401's rent was "unreliable" because it had been set in a private agreement between Glasser and

Audthan's predecessor-in-interest to settle a court case, rather than being set by the DHCR itself (and it had never been adjusted by the DHCR afterward). *Id.* Thus, the Deputy Commissioner concluded that "the lowest registered rent for a comparable apartment" was "available," but not "appropriate," and that fact satisfied the criteria for using the "sampling formula" instead of the "default formula." The court finds this conclusion reasonable since it was based on the apartment registration records that the DHCR reviewed.

Ahmed nevertheless argues that it was arbitrary and capricious for the DHCR not to simply disregard apartment 401's rent and to instead fix apartment 206's legal regulated rent at the same amount as that of the next lowest "reliably registered" comparable apartment; specifically, the $160.00 per month registered rent for apartment 308. *See* verified petition, ¶ 29. However, Ahmed's argument is unpersuasive. As the DHCR notes, the regulation plainly provides that the agency "shall" use the lowest registered rent for a comparable apartment (NYC Admin Code § 2522.6 [b] [3] [I]), *unless* that figure is "unavailable" or "inappropriate." In either of those cases, the DHCR "shall" instead use the "sampling method" which incorporates other registration data that it has compiled (NYC Admin Code § 2522.6 [b] [3] [iv])). The DHCR argues that the regulation does not accord it the authority to pick and choose between "reliably registered" rents - it must either use the lowest comparable rent, or the sampling method. *See* verified answer, Schneider affirmation, ¶ 14.

The DHCR further explains that the $82.84 monthly rent for apartment 401 "was not appropriate for inclusion in the sampling average" for two reasons: 1) the administrative record shows that the tenant of apartment 401 "entered into a stipulation with the prior owner of the subject property in 1997, where the parties agreed that [he] would pay no rent for the remainder of his tenancy, and his rent was never adjusted"; and 2) "it would be inequitable to graft upon

this instant proceeding the unique remedy provided for in a stipulation involving another tenant, years earlier." *See* verified answer, Schneider affirmation, ¶ 16. The court agrees that the foregoing explanations for the DHCR's "appropriateness" determination are reasonable.

The court further notes that appellate precedent repeatedly reiterates that "[t]he requirements of the Rent Stabilization Law and Code are not waivable, no matter how favorable the alternative terms are to the tenant." *River Tower Owner, LLC v 140 W. 57th St. Corp.*, 172 AD3d 537, 538 (1st Dept 2019), citing *Drucker v Mauro*, 30 AD3d 37, 39 (1st Dept 2006) ("Any lease provision that subverts a protection afforded by the rent stabilization scheme is not merely voidable, but void"); *see also 159 MP Corp. v Redbridge Bedford, LLC*, 33 NY3d 353, 361 (2019) ("Rent Stabilization Code [9 NYCRR] § 2520.13 states that '[a]n agreement by the tenant to waive the benefit of any provision of the [Rent Stabilization Law] or this Code is void'"). The administrative record before the DHCR herein shows that apartment 401 was registered as a rent stabilized unit. *See* verified answer, administrative transcript, parts A and B. However, it appears that the stipulation between apartment 401's tenant and Audthan's predecessor-in-interest violated RSC § 2520.13. The parties simply chose their own rent for the unit and re-registered that rent with the DHCR indefinitely without adjusting it per RSC guidelines, despite the unit's rent stabilized status. This is another rationale for deeming apartment 401's rent "inappropriate" for use as a comparable, legal regulated rent.

Ahmed argues that the foregoing rationales were determined to be insufficient in a recent unpublished trial order of this court (James, J.) in *Ouattara v New York State Div. of Housing and Community Renewal* (2019 NY Slip Op 33195[U] [Sup Ct, NY County 2019]). *See* verified petition, ¶ 29. That case involved the same building, the same issue of regulatory interpretation,

and similarly situated apartments.[1] Judge James remanded the tenant's Article 78 petition to the DHCR for further consideration because it did not adequately explain its decision to apply the sampling formula. She observed that:

> "The RA and PAR Orders sufficiently explained why the rent of $82.84 for apartment 401 was inappropriate. 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. . . . If DHCR again deviates from the statutory norm and uses the sampling method, it must provide its rationale for that decision."

Ouattara v New York State Div. of Housing and Community Renewal, 2019 NY Slip Op 33195(U), *7 (emphasis added). The PAR order in this case explains that "the rent for Room 401 cannot be used as the lowest and/or comparable rent as it is not reliable in this case." *See* verified petition, exhibit A. Although this does not explain why the DHCR "did not select the lowest appropriate registered rent," the PAR order plainly enunciates the DHCR's rationale that NYC Admin Code § 2522.6 (b) (3) (iv) requires it to employ the sampling formula whenever the "lowest registered rent" referred to in Admin Code § 2522.6 (b) (3) (i) is found to be "inappropriate" because it is unreliable. The court believes that this is a reasonable interpretation of Admin Code § 2522.6 (b) (3). In this, it is swayed by DHCR's argument that, if the agency kept successively rejecting "lowest registered rents" that were deemed unreliable until it reached one that was reliable and chose it at the legal regulated rent, there would never be any occasion fot the DHCR to use the sampling formula (or either of the other two formulae) to fix legal regulated rents at all. This would surely contravene the intent of the RSC's drafters that the DHCR have a selection of rent-setting formulae available to employ as circumstances warrant. The Court of Appeals cautions that the courts must "'interpret a statute so as to avoid an

[1] The complaining tenant in *Ouattara* resided in unit 201, wished to use unit 401's $82.84 monthly rent to fix unit 201's legal regulated rent, and was opposed by the DHCR, which selected unit 312 as comparable with a registered monthly rent of $207.84.

unreasonable or absurd application of the law,'" and that an interpretation of a statute "that produces inequitable and potentially absurd results, must be rejected." *Lubonty v U.S. Bank N.A.*, 34 NY3d 250, 255 (2019) (internal citations omitted). Therefore, the court rejects Audthan's proposed interpretation of Admin Code § 2522.6 (b) (3) as unreasonable. The court further finds that the DHCR's interpretation of the subject regulation is rational, Judge James's concerns notwithstanding, and moreover notes that it is "well settled that an agency's interpretation of the statutes and regulations it is responsible for administering is entitled to great deference, and must be upheld if reasonable." *Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State Div. of Hous. and Community Renewal*, 46 AD3d 425, 429 (1st Dept 2007), affd 11 NY3d 859 (2008), citing *New York City Campaign Fin. Bd. v Ortiz*, 38 AD3d 75, 80-81 (1st Dept 2006). Therefore, the court rejects Ahmed's argument that the DHCR misconstrued Admin Code § 2522.6 (b) (3).

Ahmed argues in the alternative that "DHCR's failure to render a reviewable administrative determination on its rationale for the utilization of its methodology in violation of the plain meaning of the statute, is an unlawful and arbitrary and capricious abuse of discretion." *See* verified petition, ¶ 41. This is a disingenuous "straw man argument." The PAR order plainly *is* "a reviewable administrative determination," and plainly *does* enunciate the DHCR's rationale for utilizing the rent setting formulae contained in Admin Code § 2522.6 (b) (3). The fact that Ahmed does not agree with the DHCR's rationale does not mean that there is no rationale in the subject PAR order. Therefore, the court rejects Ahmed's alternative argument.

The court notes in closing that Ahmed's reply papers merely restate the arguments advanced in his petition without adding anything new. *See* Lester reply affirmation, ¶¶ 1-22. Therefore, the court reiterates its rejection of those arguments.

Accordingly, for the foregoing reasons, the court concludes that Ahmed's Article 78 petition should be denied as meritless because the subject PAR order has a rational basis in the administrative record, and that this proceeding should be dismissed.

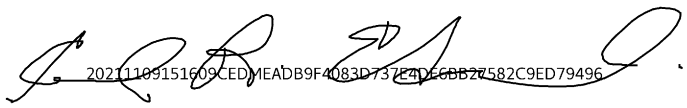
DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

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

ORDERED AND ADJUDGED that the Clerk of the Court shall enter judgment dismissing this proceeding; and it is further

ORDERED that counsel for respondent State of New York Division of Housing and Community Renewal shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.



11/9/2021
DATE

CAROL 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