2022-10-11

Ouattara v. State of N.Y. Div. of Hous. & Community Renewal

Ouattara v State of N.Y. Div. of Hous. & Community Renewal
2022 NY Slip Op 33660(U)
October 11, 2022
Supreme Court, New York County
Docket Number: Index No. 155068/2021
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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INDEX NO. 155068/2021

OLTIMDJE OUATTARA,
Petitioner,

MOTION SEQ. NO. 001

For a Judgment pursuant to Article 78 of the Civil Practice Law and Rules,

- against -

DECISION + ORDER ON MOTION

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

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 8, 9, 10, 11, 12, 13, 14, 15 were read on this motion to/for **ARTICLE 78**.

Petitioner commenced this article 78 proceeding, alleging that respondent violated the statutory scheme governing the establishment of the legal regulated rent concerning unit 201 within the Chelsea Highline Hotel (formally known as the Chelsea Inn) ("hotel"), located at 184 11th Avenue, New York, New York ("subject premises"), insofar as it failed to implement the proper formula in establishing the lawful rent for the apartment. This, claims petitioner, was "an arbitrary and capricious abuse of discretion and must be annulled as unlawful" (first cause of action). Petitioner further claims 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" (second cause of action) (NYSCEF Doc. No. 1, *petition*).

The facts of this case are set forth in detail in the decision and orders of both the Civil Court of the City of New York, New York County (Kraus, J.) ("civil court action"), as well as the related Article 78 proceeding in this court (James, J.) ("related article 78 proceeding").[1] Summarized briefly, petitioner made a reservation for a room at the hotel for the night of August 3, 2015, and he checked in to the subject unit. On that same day, petitioner attempted to become a permanent tenant of the subject premises by requesting a six-month lease from the building management but said request was rejected and, even after petitioner asserted his right to remain in possession, he was removed from the hotel. Petitioner commenced an action in the Civil Court of the City of New York, New York County, for unlawful eviction. On October 9, 2015, the civil court found that petitioner qualified as a permanent tenant of the subject premises, entitled to rent stabilization protection, and that he had been unlawfully evicted from the subject premises. The civil court directed Audthan

[1] Although petitioner does not include the decisions to his petition, the court takes judicial notice of the same (see (*Ouattara v NY State Div. of Hous. & Community Renewal*, 2019 NY Slip Op 33195[U] [Sup Ct, NY County 2019]; *Ouattara v Audthan LLC*, 49 Misc 3d 1206[A], Civ Ct, New York County [2015].)

LLC, the owner of the hotel, to restore petitioner to the subject premises. (see *Ouattara v Audthan LLC*, 49 Misc 3d 1206[A], Civ Ct, New York County [2015].)

Audthan filed for an administrative determination with respondent, to ascertain the legal regulated rent amount for the subject room. By order dated March 27, 2017, respondent determined that, since there was no record that the subject room was previously occupied by a rent stabilized tenant, the best method for establishing the legal regulated rent should be the average rent of comparable stabilized units in the subject building, at the time the tenant took occupancy. Applying said method, respondent determined that the legal regulated rent for the subject apartment, based on the average of seven (7) rent stabilized comparable rents, was $340.52 per month (NYSCEF Doc. No. 12, *DHCR's order*).

Petitioner filed a petition for administrative review (PAR) of the March 26, 2017 order, arguing, among other things, that the rent administrator should have applied the default formula in determining the rent of the subject room, i.e., the lowest registered rent for a similar rent stabilized room. According to petitioner, the only last known reliable registered rent for a similar room was that of tenant David Glasser of Room 401, which was registered at a monthly rental of $82.84 from 2003 through 2010. By Order and Opinion dated July 20, 2018, the Commissioner determined that "the [r]ent [a]dministrator appropriately chose to not use the $82.84 rental as the lowest comparable rent" because "Glasser entered into an agreement with the prior owner (Chelsea Inn) in 1997 whereby Glasser received compensation, inclusive of $5,171.60 to cover rent overcharges, with the further stipulation that Glasser shall not be charged any rent for as long as he resides in the Hotel." Thus, the Commissioner concluded that "the registered monthly rent for Apartment 401 cannot be deemed to be reliable for purposes of comparability." However, the Commissioner modified the March 26, 2017 order only to the extent it determined the rent administrator's calculation relied on flawed data. The lawful rent for the subject apartment was adjusted to $233.96 per month (NYSCEF Doc. No. 13, *PAR Order*).

On September 12, 2019, petitioner commenced an article 78 proceeding seeking review of the DHCR's PAR Order. By decision and order dated October 25, 2019, this court (James, J.) annulled the PAR Order dated July 20, 2018, reasoning "the DHCR did not adequately explain its decision to apply Rent Stabilization Code § 2522.6(3)(iv), which directs DHCR to use the sampling method only if it cannot explain the rent using the first three alternatives, instead of Rent Stabilization Code § 2522.6(3)(i), which sets forth the lowest registered rent formula." Although the court found DHCR "sufficiently explained why the rent of $82.84 for apartment 401 was inappropriate" – given its explanation that the rent for apartment 401 was established by agreement between the predecessor owner and the tenant rather than a DHCR ruling, that it was not a real rent as the tenant paid nothing, and that the registered rent had never been adjusted — it nevertheless annulled the PAR Order on the ground that it "offer[ed] no rational explanation as to why DHCR did not select the lowest appropriate registered rent, which was $207.84 per month for apartment 312" and remitted the matter to DHCR for resolution. In a footnote, the court also noted that "the decision to treat Maria Ortiz's two rooms as comparable to apartment 201, a one-room unit, was irrational." (NYSCEF Doc. No. 17, *Decision & Order, Ouattara v New York State Division of Housing and Community*, Sup Ct, NY County, index No. 158454/2018.)

On remand, the deputy commissioner stated, in relevant part: "the lowest rent registered in the building was not comparable and was inappropriate for use in determining the rent for the subject room as the lowest registered rent was based on an agreement between the owner and tenant where

the tenant was not required to pay rent for the remainder of his tenancy. Therefore, the Commissioner finds that the Rent Administrator was correct to use the sampling method permitted under Section 2522.6(b)(3)(iv) of the RSC." It further stated that, "as noted by the [c]ourt's October 25, 2019 [d]ecision and [o]rder, the data used by the [r]ent [a]dministrator is flawed as the inclusion of Maria Ortiz's (Rooms 410/411) in the sampling data cannot be used as it is a double room and not comparable to a one-room unit" and it modified the rent administrator's order to reflect a lawful rent for the subject room in the amount of $228.61 per month (NYSCEF Doc. No. 11, *Order on Remand*).

Now, petitioner seeks to annul respondent's prior determination on the ground that the administrative determination challenged herein failed to provide any rationalization as to why "the lowest recorded rent that was reliable and had a rational basis was not utilized." (NYSCEF Doc. No. 1, *petition*). In opposition, respondent contends, in pertinent part, that "the statutory default formula does not provide for the use of the second lowest rent when the lowest rent is inappropriate or unreliable" and, thus, that petitioner has failed to establish that the final order was in violation of lawful procedure, was affected by an error of law, or was arbitrary or capricious, or an abuse of discretion (NYSCEF Doc. No. 10, *affirmation in opposition*). In reply, petitioner argues that DHCR contradicted its own decision-making process in this proceeding by characterizing Aston's apartment as the second lowest registered rent. According to petitioner, DHCR's prior administrative rulings eliminated the Glasser apartment from consideration and, therefore, the Aston apartment became the lowest registered rent (NYSCEF Doc. No. 15, *reply affirmation*).

"It is well recognized that DHCR has a broad mandate to administer the rent regulatory system" (*Matter of Hicks v NY State Div. of Hous. & Community Renewal*, 75 AD3d 127, 130 [1st Dept 2010], citing *Rent Stabilization Assn. of N.Y. City v Higgins*, 83 NY2d 156, 165 [1993]) and, therefore, "courts regularly defer to its interpretation and application of the laws it is responsible for administering, so long as its interpretation is not irrational." (*Matter of Hicks v NY State Div. of Hous. & Community Renewal*, 75 AD3d 127 [1st Dept 2010], citing *Matter of Gaines v New York State Div. Of Hous. & Community Renewal*, 90 NY2d 545, 548-549 [1997].)

"The Rent Stabilization Code requires that a 'base date' be established for calculating the legal regulated rent for an apartment (*see* 9 NYCRR 2522.6 [b] [2]). Generally, the legal regulated rent is the rent registered with the Division of Housing and Community Renewal (DHCR) for the apartment six years before the overcharge proceeding was commenced (CPLR 213-a). The base date is used in the calculation of overcharges, i.e., overcharges result from improper rent increases after the base date (9 NYCRR 2526.1). The default formula for establishing the base date rent is applied where (1) the base date rent cannot be determined, (2) a full rent history is not provided, or (3) the owner has engaged in fraudulent practices (*see* 9 NYCRR 2522.6 [b] [3]; 2526.1 [g])." (*Simpson v 16-26 E. 105, LLC*, 176 AD3d 418 [1st Dept 2019].)

"The default formula provides for the base date to be established at the lowest of (1) the lowest registered rent for a comparable apartment in the building at the time the complaining tenant moved in, (2) the complaining tenant's initial rent reduced by a certain percentage, (3) the last registered rent paid by the prior tenant within the lookback period, or (4) if none of those is appropriate, an amount set by DHCR based on its relevant data (9 NYCRR 2522.6 [b]" [3]; 2526.1 [g])." (*Simpson v 16-26 E. 105, LLC*, 176 AD3d at 418.)

It is not contested here that, because there was no legal stabilized rent for the apartment in question, 9 NYCRR § 2522.6(b)(2), (3) applies. 9 NYCRR § 2522.6(b)(2), (3) provides that

"(2) [w]here 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."

Here, although petitioner argues respondent was required to apply the lowest "reliable" rent under 9 NYCRR § 2522.6(b)(3)(i), no such language exists in the statutory text compelling respondent to apply the second lowest registered rent after finding that the rent of $82.84 was not "available or inappropriate." Moreover, considering the applicable principle that "DHCR's interpretation of the statutes it administers, if not unreasonable or irrational, is entitled to deference" (*Salvati v Eimicke*, 72 NY2d 784, 791 [1988]; *Rodriguez v Perales*, 86 NY2d 361, 367 [1995]), the petition seeking to annul respondent's final order applying the sampling method is denied, insofar as this court finds that there is a rational basis to respondent's final decision on remand that, upon determining 9 NYCRR § 2522.6(b)(3)(i) did not apply to the instant facts, given the agreement entered into between the owner and the tenant for the $82.84, the law allows DHCR to implement the alternative method set forth in 9 NYCRR § 2522.6(b)(3)(iv), without more. Accordingly, it is hereby

ORDERED that the petition is denied and dismissed in its entirety; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for respondent shall serve a copy of this decision and order, with notice of entry, upon petitioner.

This constitutes the decision and order of this court.

October 11, 2022

HON. VERNA L. SAUNDERS, JSC

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