2022-11-03

Matter of Giordano v. Visnauskas

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2022 NY Slip Op 33888(U)
November 3, 2022
Supreme Court, New York County
Docket Number: Index No. 150852/21
Judge: Alexander Tisch

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 18
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In the Matter of the Application of

PAUL GIORDANO and SIMON MATHIS,

Petitioners,

Index No.: 150852/21
DECISION/ORDER

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

Mot. Seq. 001

-against-

RUTH ANNE VISNAUSKAS, as Commissioner of the New York State Homes and Community Renewal and NEW YORK STATE HOMES AND COMMUNITY RENEWAL, and 722-724 TENTH AVENUE HOLDING LLC,

Respondents.
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ALEXANDER M. TISCH, J.:

In this Article 78 proceeding, petitioners Paul Giordano (Giordano) and Simon Mathis (Mathis; together, petitioners) seek a judgment to overturn part of an order issued by the respondent New York State Division of Housing and Community Renewal (DHCR) pursuant to a "petition for administrative review" (PAR; motion sequence number 001).[1] For the following reasons, this petition is denied and the proceeding is dismissed.

FACTS

Petitioners are the tenants of record of apartment 4A, a rent-stabilized unit in a building located at 724 Tenth Avenue in the County, City and State of New York (the building). *See* NYSCEF document 1 (verified petition), ¶ 1. The respondent DHCR is the New York State agency charged with overseeing rent-stabilized housing accommodations located inside of New

[1] Petitioners bring this action against the New York State Homes and Community and Renewal instead of the New York State Division of Housing and Community Renewal. The Court will treat them as one in the same.

York City.[2] *Id.*, ¶ 3. Co-respondent 722-724 Tenth Avenue Holdings, LLC (landlord) is the building's corporate owner. *Id.*, ¶ 2.

Petitioners filed a rent overcharge complaint with the DHCR on January 25, 2017. *See* NYSCEF document 1 (verified petition), exhibit A (PAR order). On January 2, 2018, an DHCR rent administrator (RA) issued an order disposing of it (the first RA order). *Id.* Petitioners then filed a request for reconsideration of the first RA order on January 29, 2018. *Id.* On May 28, 2019, the RA issued a second decision that revoked the first RA order (the second RA order). *Id.*, exhibit B (the second RA order). Both petitioners and landlord thereafter filed separate PARs to challenge the second RA order. *Id.*, verified petition, at 2 (paragraphs not numbered). On November 30, 2020, the HCR Deputy Commissioner's office issued an order and opinion that granted both PARs in part and denied them both in part (the PAR order). *Id.*, ¶ 5; exhibit A. The portion of the PAR order that is germane to this proceeding[3] found as follows:

> "Tenants' PAR (HS410009RT)
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> "On PAR, the tenants allege that, subsequent to the base date, the agency incorrectly included two vacancy rent increases in calculating the rent; that there should only have been one vacancy rent increase after the base date; that the prior tenant resided in the subject apartment from 2005 through 2016; that the petitioners are the first tenants to commence occupancy in the subject apartment after the vacancy of the prior tenant; that the rent agency 'erred in concluding that the refund involved herein rebutted the presumption of willfulness'; that the owner did not refund any rent overcharges to the tenants within the initial period to submit a response to the tenants' January 25, 2017 overcharge complaint; that the order which dismissed the overcharge complaint was reopened by the issuance of an order of the rent agency dated February 12, 2018; that approximately one year later, the owner sent the tenants a notice along with a refund check of $87,226.64; that the notice indicated that the refund was conditioned upon the agency's finding of an overcharge, but the owner reserved the right to have the tenants return the check in the absence of such a finding; that a conditional refund is not a valid refund; that the owner did not issue a refund until approximately two years after the initial filing of the overcharge complaint; that the agency's order does not show that it had reviewed the issue of the refund in conjunction with any other evidence to determine the

[2] Ruth Visnauskas is DHCR's Commissioner, and is sued here in her professional, not personal capacity. *See* NYSCEF document 1 (verified petition), ¶ 3.

[3] The Court notes that landlord commenced a separate article 78 proceeding to challenge the balance of the November 30, 2020 PAR order under Index Number 151054/21.

issue of willfulness; that there is no excuse for the owner not to have been aware of the rent reduction order issued in 1993; that by ignoring the legal impact of the rent reduction order and by attempting to fraudulently deregulate the subject apartment, the owner failed to rebut the presumption that the overcharge was willful, and that as the overcharge was willful, the imposition of treble damages of the overcharge amount is warranted.

"After a careful consideration of the evidence of record, the Commissioner finds that the tenants' petition should be granted in part.

"The Commissioner notes that the rent calculation chart included in the RA's order indicated that there was a vacancy rent increase added to the legal regulated rent for the lease period commencing on November 1, 2014 and expiring on October 31, 2015, and another vacancy rent increase added to the legal regulated rent for the lease period commencing on August 1, 2016 and expiring on July 31, 2018. The record reflects that the prior tenant commenced occupancy in the subject apartment in 2005 and vacated the subject apartment in 2016, and that there was no other tenancy in the subject apartment until the subject tenants commenced occupancy on August 1, 2016.

"Based upon the above, the Commissioner finds that there should not have been a vacancy rent increase added to the legal regulated rent for the lease period commencing on November 1, 2014 and expiring on October 31, 2015. Based upon the above finding, the Commissioner notes that the subject apartment's legal regulated rent will be recalculated in the below determination of the owner's PAR. In that PAR, the owner raises the issue of the calculation of the legal regulated rent.

"The Commissioner notes that any modification of the legal regulated rent has no bearing on the overcharge amount and penalties imposed as set forth in the RA's rent calculation chart.

"The rent calculation chart shows that the overcharge amount is calculated by the monthly rent collected in excess of the $439.82 collectible rent (i.e., the rent paid minus $439.82). The overcharge amount has been calculated to be $77,660.58 plus $9,329.80 in interest penalties plus $722.74 in excess security for a total amount of $87,713.12 minus the refund of $87,226.64, leaving a balance of $486.48 owed to the tenants.

"Section 2526.1 (a) (2) of the RSC provides that the amount of the rent collected in excess of the legal regulated rent shall be subject to a penalty of refunding to the tenant three times the amount collected in excess rent. However, also within that same section of the RSC, the statute states the following: 'If the owner establishes by a preponderance of the evidence that the overcharge was not willful, the DHCR shall establish the penalty as the amount of the overcharge plus interest . . .'

"As noted above, the subject tenants' overcharge complaint was filed on January 25, 2017. The tenants disputed the high-rent vacancy deregulation of the apartment in 2004. Based upon the agency's default rent computation formula of taking the average monthly rent of comparable apartments within the same zip code as the subject building, the RA's order issued under Docket No. FM410138R determined that the average comparable monthly rent was $4,207.91. The RA's order also determined that the subject apartment was deregulated in 2004, as the rent indicated had exceeded the statutory threshold for a finding of high rent vacancy deregulation.

"The RA's use of the default rent computation formula in establishing the legal regulated rent and the determination that the subject apartment has been high-rent vacancy deregulated, evidences that during that proceeding neither the rent agency nor the subject owner were aware of the pending rent reduction order issued on October 7, 1993 under Docket No. GE430006B. Moreover, in the proceeding under reconsideration, the owner asserts that the rent reduction is due to a finding of no intercom service for the subject apartment; that since 1993, there have been no further complaints relating to intercom service, and that the issuance of the rent reduction order is approximately twenty-four years prior to the filing of the overcharge complaint. Based upon the above, the Commissioner finds that the owner's assertion that it was not aware of the pending rent reduction order during the initial proceeding is credible.

"The Commissioner notes that on February 12, 2018, the RA granted the tenants' request to reopen and reconsider the initial proceeding, based upon the tenants' assertion that the incorrect room count was used in the default rent computation zip code analysis. The Commissioner points out that there had been no mention or calculation of a monthly collectible rent in the initial proceeding and in the notice reopening that proceeding. Based upon the above, the Commissioner finds that this is further corroboration that the owner and the rent agency were not aware of the 1993 rent reduction order, on or before February 12, 2018.

"As noted in Policy Statement 89-2 (Application of the Treble Damage Penalty), the burden of proving lack of willfulness will have been met, based upon the following:

> "'Where an owner adjusts the rent on his or her own within the time afforded to interpose an answer to the proceeding and submits proof to the DHCR that he or she has tendered, in good faith, to the tenant a full refund of all excess rent collected, plus interest.'

"The record reflects that on April 16, 2019 and May 6, 2019, the rent agency mailed to the owner final notices to 'Owner-Imposition of Treble Damages on Overcharge.' Both notices afforded the owner twenty-one days from the mailing dates of the notices within which to show either there has been no overcharge, or that any overcharge was not willful.

"The record reflects that in a letter dated February 22, 2019, the owner, by counsel, informed the tenants of the following: 'Based on advice from [HCR] in connection with your complaint alleging rent overcharge, your landlord has directed us to issue to you a refund of $87,226,64.' The letter also informed the tenants of the following: 'Additionally, your monthly rent has been conditionally adjusted to $439.82, the legal regulated rent for the apartment prior to issuance of the 1993 order. Please note that the rent shall be restored upon the issuance of an order restoring rent for the apartment by the HCR, or upon the HCR advising that the 1993 order has no effect.' The letter also informed the tenants of the following:

> "'Since the 1993 order was issued more than twenty-six (26) years ago, and was based on a condition that no longer exists, our client verily believes that the order may not now be the basis for a finding of rent overcharge. Nevertheless, in an abundance of caution, our client has elected to issue you the enclosed refund, without prejudice.

> "Please note that, should the HCR determine that the 1993 order no longer has any effect, you will be required to immediately return the enclosed monies in full.'
>
> "The Commissioner notes that the above letter and the refund to the tenants had been done two months and three months before the mailing of the agency's two final notices to the owner on April 16, 2019 and May 6, 20I9, respectively. Given the history of the overcharge proceeding, followed by a reopening of same, and as the owner adjusted the rents to the monthly collectible rent of $439.82, and refunded to the tenants the estimated overcharge and interest amount of $87,226.64 prior to the time the owner was afforded to interpose an answer in the reopened proceeding, the Commissioner accordingly finds that the refund was timely under the RSC and the Policy Statement, and that the owner established by a preponderance of the evidence that the overcharge was not willful.
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> "The tenants' allegation that the owner's conditioning the refund on an actual finding of overcharge was evidence of the owner's willfulness is without merit. The owner was within its right to reserve the right to get the refund, or a portion of it, back if the RA did not find an overcharge or found an amount less than the refund.
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> "There is no evidence of a fraudulent scheme to deregulate the subject apartment. The application of a 26-year-old rent reduction order freezing the rent does not support a ease that the owner was trying to illegally remove the subject apartment from rent regulation.
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> "Based upon all of the above, the Commissioner finds that the tenants' PAR is granted in part as set forth in this order and opinion."

Id., exhibit A.

Petitioners commenced this Article 78 proceeding to challenge the PAR order on January 29, 2021. *See* NYSCEF document 11 (aff of service). After the parties stipulated to an extension of time, DHCR filed an answer on April 9, 2021. *See* NYSCEF document 14 (verified answer). This the matter is now fully submitted (motion sequence number 001).[4]

DISCUSSION

Pursuant to CPLR 7803 (3):

> "The only questions that may be raised in a proceeding under this article are:
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> * * *
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> "3. 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

[4] The Court notes that it previously granted petitioners' separate motion for leave to change counsel (motion sequence number 002) in a decision dated August 3, 2021. *See* NYSCEF Doc. No. 49.

> discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; . . ."

CPLR 7803 (3) (emphasis added); *see e.g.*, *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). 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*, 34 NY2d at 231. However, if there is a "rational basis" in the administrative record for a challenged agency determination, there can be no judicial interference with it. *Matter of Pell*, 34 NY2d at 231-232. Further, it is well settled that "[t]he interpretations of [a] respondent agency of [the] 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, tenants argue that the PAR order was arbitrary and capricious in two ways.

First, tenants argue that the "HCR improperly failed to treble the overcharge damages." *See* NYSCEF document 1 (verified petition), ¶¶ 12-29. The Court notes that the argument describes the purportedly improper failure as "arbitrary and capricious," and *not* as an "error of law" or an "abuse of discretion" as those three terms are understood in the caselaw interpreting CPLR 7803 (3). *Id.*, ¶¶ 8-11. Indeed, tenants do not cite any caselaw to support an assertion that DHCR's decision not to impose treble damages herein was incorrect as a matter of law. Instead, tenants take the position that that decision was "arbitrary and capricious" because it improperly disregarded the DHCR's own guidelines for imposing treble damages. *Id.*, ¶¶ 12-29. Those guidelines are specifically set forth in the DHCR's "Amended Policy Statement 89-2," and provide as follows.

"The RSL assesses treble damages where the overcharge is 'willful.' The statute, in fact, creates a presumption of willfulness subject to rebuttal by the owner showing non-willfulness of the overcharge by a preponderance of the evidence. In the absence of such affirmative proof by the owner or after the submission of inadequate proof, DHCR staff shall assess treble damages where a determination of overcharge is made. When an owner receives notice that an overcharge has been determined and treble damages are about to be imposed, he or she will be notified to submit evidence within twenty-one (21) days to prove that the overcharge was not willful.

"The owner must prove by a preponderance of the evidence (examples are listed below) that the overcharge was not a willful act. This simply means that where an owner submits no evidence or where the evidence is equally balanced, the overcharge is deemed to be willful. The owner can submit such evidence after receiving notice of a tenant's filing of an overcharge complaint prior to the final order being issued.

"DHCR has determined that the burden of proof in establishing lack of willfulness shall be deemed to have been met and, therefore, the treble damage penalty is not applicable, in some situations, where it is apparent or where it is demonstrated that an overcharge occurred under certain specified circumstances. Such circumstances include the following examples:

"1) Purchase of a building at a judicial or bankruptcy sale, where no records to establish the legal regulated rent were available.

"2) Where an owner adjusts the rent on his or her own within the time afforded to furnish the DHCR with an initial response when initially served with the overcharge complaint initiated by the tenant, and submits proof to the DHCR that he or she has tendered, in good faith to the tenant, a full refund by cash or check of all excess rent collected, plus interest, as provided by CPLR Section 5004. *Refunds tendered after the initial period in which to respond will be reviewed in conjunction with other evidence to determine the issue of willfulness.*

"3) Where the overcharge is caused by the hyper-technical nature in computing the rent and the owner has not been previously put on notice of the technical error by the DHCR

"However, the burden of proof in establishing a lack of willfulness and no related treble damages cited in example two (2) above will not be met if the overcharge case was initiated by DHCR or another government agency, during which the owner, having been given notice, failed to take corrective action and issue a refund."

See NYSCEF documents 14 (verified answer, DHCR), 15 (Kelly affirmation in opposition), 19 (DHCR Amended Policy Statement 89-2) (emphasis added).[5] Tenants assert that "the existence

[5] The version of "DHCR Amended Policy Statement 89-2" which DHCR annexed to its answer has an effective date of April 26, 2013 and appears to contain the treble damages guidelines that were in effect at the time Giordano and Mathis filed their overcharge complaint with the agency on January 25, 2017. *See* NYSCEF Doc. No. 19. The Court's research indicates that DHCR has promulgated newer versions of the guidelines since that time.

of the refund is the only basis upon which the DHCR could conclude and/or hold that the overcharge was not willful," and argue that the HCR Deputy Commissioner arbitrarily and capriciously violated "DHCR Amended Policy Statement 89-2" by relying solely on landlord's tender of the refund check to find that the overcharge that gave rise to the refund was not willful. *See* NYSCEF document 1 (verified petition), ¶ 17. DHCR denies that the Deputy Commissioner relied solely on the tender of the refund check when he considered the issue of willfulness in the PAR order and argues that he therefore did not violate the treble damages guidelines. *See* respondent's mem of law (HCR) at 9. Upon examining the administrative record, the Court agrees. In the portion of the PAR order that reviewed the second RA's order, the Deputy Commissioner found that "*the owner's assertion* that it was not aware of the pending (23-year-old) rent reduction order during the initial proceeding *[was] credible*," based on the fact that the RA did not appear to have been aware of that order either. *See* NYSCEF document 1 (verified petition), exhibit A (emphasis added). The Deputy Commissioner inferred the RA's lack of awareness from "[t]he RA's use of the default rent computation formula in establishing the legal regulated rent and the determination that the subject apartment has been high-rent vacancy deregulated," which the RA would not have used had he known that the subject rent reduction order had frozen tenants' legal regulated rent at $439.82 per month as of October 7, 1993. *Id.* The foregoing text clearly shows that the DHCR Deputy Commissioner considered other evidence at the PAR hearing besides the refund check; i.e., landlord's testimony that it was unaware of the 1993 rent reduction order because it had not received any complaints about the condition that gave rise to is (a defective intercom) in the ensuing 24 years. The Deputy Commissioner specifically states that he found landlord's assertion "credible" because the RA's second order stated that the RA was also unaware of the 1993 rent reduction order. The foregoing shows that the HCR Deputy Commissioner's deliberations during the PAR included

his consideration of evidence other than landlord's simple tender of a refund check. This belies tenants' assertion that the Deputy Commissioner violated "DHCR Amended Policy Statement 89-2" by basing his determining of the issue of willfulness solely on the tender of that check. Therefore, the Court rejects tenants' assertion as unsupported.

Tenants also assert that the refund tender was untimely because landlord did not make it "for a period of approximately two (2) full years, given that "[l]andlord's initial answer was submitted March 2017 and [l]andlord's refund/cover letter was dated February 22, 2019." *See* NYSCEF document 1 (verified petition), ¶ 22. DHCR responds that the tender was timely since landlord made it on February 22, 2019, before the agency had issued "Final Notices to Owner" on April 16, 2019 and May 6, 2019, respectively. *See* respondents' mem of law at 9-10. The court finds that the timeliness issue is a "red herring," however, and declines to consider it given that example 2 in "DHCR Amended Policy Statement 89-2" plainly acknowledges that determinations of nonwillfulness can be made in certain circumstances that involve "refunds tendered after the initial period in which to respond." The DHCR Deputy Commissioner found that this case involved such a circumstance. Therefore, the Court rejects tenants' assertion as irrelevant.

Tenants also assert that it was improper for landlord to designate the February 22, 2019 refund check as a "conditional refund" that tenants might be required to return. *See* NYSCEF document 1 (verified petition), ¶ 21. DHCR responds that the PAR order considered and rejected that contention, noting that "[t]he owner was within its right to reserve the right to get the refund, or a portion of it, back if the RA did not find an overcharge or found an amount less than the refund." *See* respondents' mem of law at 10; NYSCEF document 1 (verified petition), exhibit D. The Court notes that tenants cited no legal authority to support their assertion that landlord's reservation of rights was improper. The Court also notes that ""[t]he interpretations

of [a] respondent agency of [the] statutes which it administers are entitled to deference if not unreasonable or irrational." *Matter of Metropolitan Assoc. Ltd. Partnership*, 206 AD2d at 252. Here, the Court sees nothing unreasonable about the Deputy Commissioner's finding that a party who pre-pays a disputed sum is entitled to a refund of that sum, or a portion of it, in the event that the dispute ultimately terminates in that party's favor. Therefore, the Court rejects tenants' final assertion and the entirety of their first "arbitrary and capricious" argument and finds instead that the portion of the PAR order which declined to impose treble damages on landlord for a willful rent overcharge was rationally based on the material in the administrative record.

Next, tenants argue that the "HCR improperly set tenants rent at $2,270.99," and that the decision to do so was arbitrary and capricious. *See* NYSCEF document 1 (verified petition), ¶¶ 30-40. The Court notes that the portion of the PAR order that fixed apartment 4A's legal regulated rent at $2,270.99 per month was the portion of the decision that disposed of landlord's PAR and *not* the portion that disposed of tenants' PAR. *See* NYSCEF document 1 (verified petition), exhibit D. The Court also notes that neither tenants nor DHCR address the rather glaring issue of whether tenants have standing to challenge an agency order pertaining to another party's PAR in their papers. For its part, landlord notes that: "[t]enants did not challenge the leases or the rent ledger during the proceedings before the [RA] or during the administrative review proceeding;" "[t]here was no finding that those rent records were unreliable;" and "[t]herefore, [t]enants cannot now belatedly claim the rent records are not reliable." *See* NYSCEF document 40 (respondent's mem of law [landlord]) at 7. The Court is mindful that it is improper to consider an argument made for the first time in an Article 78 proceeding which was not raised before DHCR. *See e.g.*, *Matter of 2084-2086 BPE Assoc. v State of N.Y. Div. of Hous. & Community Renewal*, 15 AD3d 288, 289 (1st Dept 2005), citing *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756 (1st Dept 1982), *affd* 58 NY2d 952 (1983);

Matter of Jane St. Co. v State Div. of Hous. & Community Renewal, 165 AD2d 758, 759 (1st Dept 1990). Therefore, it declines to do so and rejects tenants' second "arbitrary and capricious" argument as well.

Accordingly, having rejected both of tenants' arguments and determined that the PAR order was rationally based, the Court concludes that tenants' Article 78 petition should be denied and that this proceeding should be dismissed.

CONCLUSION

Accordingly, for the foregoing reasons it is hereby ORDERED and ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioners Paul Giordano and Simon Mathis (motion sequence number 001) is denied and the proceeding is dismissed.

This constitutes the decision, order and judgment of the Court.

11/3/2022
DATE

ALEXANDER TISCH, 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