2023-03-07

Matter of Tsegai v. New York State Div. of Hous. & Community Renewal

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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INDEX NO. 452263/2022

MOTION DATE 11/14/2022

MOTION SEQ. NO. 001

In the Matter of

ZUFAN TSEGAI,

Petitioner,

- v -

THE NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL and WOODY PASCAL, as Deputy Commissioner of The New York State Division of Housing and Community Renewal,

DECISION, ORDER and JUDGMENT

Respondents,

2162-68 8TH AVENUE REALTY, LLC,

Intervenor-Respondent.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

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

In this proceeding pursuant to CPLR article 78, the petitioner seeks judicial review of a June 15, 2022 New York State Division of Housing and Community Renewal (DHCR) determination. That determination denied her petition for administrative review (PAR) of the Rent Administrator's (RA) July 15, 2021 denial of her administrative rent overcharge complaint. By stipulation dated September 13, 2022, the parties agreed to permit the owner of the subject building, 2162-68 8th Avenue Realty, LLC (the owner), to intervene in the proceeding as a party respondent. The DHCR submits the administrative record and answers the petition. The owner separately answers the petition. The petition is denied, and the proceeding is dismissed.

On May 12, 2008, the petitioner, as tenant, entered into a one-year residential lease with the owner, as landlord, with respect to Apartment 3B at 2166 Eighth Avenue in Manhattan, also known as 282 West 117th Street, with a term commencing on June 1, 2008 and terminating on

May 31, 2009. The rent was fixed at $1,300.00 per month. The petitioner and owner thereafter entered into consecutive one-year leases for 2009/2010 and 2010/2011, although the record does not reflect the monthly rent for those two years. The petitioner and owner additionally entered into consecutive one-year leases for 2011/2012 at $1325.00 per month, 2012/2013 at $1,355.00 per month, 2013/2014 at $1,500.00 per month, 2014/2015 at $1,700.00 per month, 2015/2016 at $1,900.00 per month, 2016/2017 at $1,950.00 per month, and 2017/2018 at $1,975.00 per month.

The DHCR's rent roll reports indicated that, as of April 1, 1984, the subject apartment was rent stabilized pursuant to the Rent Stabilization Law (Admin. Code of City of N.Y. §§ 26-501-26-520; hereinafter RSL) and the Rent Stabilization Code (9 NYCRR 2520.1-2531.9; hereinafter RSC). The DHCR published several rent roll reports in 1992. One of the 1992 reports indicated a legal regulated rent of $215.00 per month, and identified the name of a tenant, but did not report the term of the applicable lease, although other entries suggested that the term under consideration was for 1984/1985. Another 1992 report omitted the legal regulated rent, but indicated that the apartment was vacant, presumably during 1985/1986. A third 1992 reported stated that the legal regulated rent was $250.00 per month during 1985/1986, and that the apartment was occupied. A 1988 rent roll report, as well as another 1992 report, identified the occupant of the apartment, and both indicated that the legal regulated rent for 1987/1988 was fixed at $375.00 per month. Two 1990 reports suggested that the apartment was vacant during 1988/1989, and neither reported a legal regulated rent. A 1991 report and yet another 1992 report similarly indicated that the apartment was vacant, presumably during 1990/1991. A 1993 report also suggested that the apartment was vacant, this time during 1991/1992.

A DHCR 1994 rent roll report indicated that the apartment was occupied, identified the tenant, and noted that the legal regulated rent was $490.00 per month for a one-year 1993/1994 lease. A 1995 report, referable to a one-year 1994/1995 lease applicable to an identified tenant,

indicated that the legal regulated rent was $499.80 per month. A 1996 report, referable to a one-year 1995/1996 lease applicable to an identified tenant, indicated that the legal regulated rent was $509.80 per month. The 1997 report indicated that the legal regulated rent for a one-year 1996/1997 lease was $535.29 per month. The 1998 report indicated that the legal regulated rent for a one-year 1997/1998 lease was $540.00 per month. The 1999 report indicated that the legal regulated rent for a one-year 1998/1999 lease was $644.28 per month, but that only $540.00 per month was actually paid. The 2000 and 2001 reports indicated that the legal regulated rent for a two-year 1999/2001 lease was $670.05 per month, but that only $531.27 per month was actually paid. The 2002 report indicated that the legal regulated rent for a one-year 2002/2003 lease was $1,145.49 per month, but that only $760.00 per month was actually paid. The DHCR's Registration Apartment Information sheet, covering the period from 1984 to 2014, indicated that, between 2001 and 2002, the owner claimed both a 20% vacancy increase (*see* Admin. Code of City of N.Y. § 26-511[c][5-a][i]), and an increase for individual apartment improvements (IAIs) (*see* 9 NYCRR 2522.4[a][1]; *see also* 9 NYCRR 2522.4 [a] [2]; DHCR Policy Statement 90-10 [Jun. 26, 1990]; *Matter of Rockaway One Co., LLC v Wiggins*, 35 AD3d 36 [2d Dept 2006]). The 2003 report indicated that the legal regulated rent for a one-year 2003/2004 lease was $1,168.40 per month, but that only $775.20 per month was actually paid. The 2004 report indicated that the legal regulated rent for a one-year 2003/2004 lease issued to an incoming tenant was $1,378.71 per month, but that only $699.00 per month was actually paid. The 2005 and 2006 reports indicated that the legal regulated rent for a two-year 2004/2006 lease was $1482.11 per month, but that only $751.43 per month was actually paid. The 2007 and 2008 reports indicated that the legal regulated rent for a two-year 2006/2008 lease was $1,563.63, but that only $795.00 per month was actually paid.

The apartment became vacant in or about April or May 2008 and, according to the owner, it undertook another IAI prior to re-letting the apartment, which, along with the 20% vacancy allowance, increased the legal regulated rent from $1,563.63 per month to $2,083.36

per month. The owner submitted an invoice dated April 16, 2008, showing that it had incurred $10,000.00 in undertaking the improvements. In 2008, luxury deregulation was triggered either when (a) the unit became vacant and the legal regulated rent thereupon exceeded $2,000.00 per month (high rent vacancy deregulation) (*see* L 1993, ch 253; $2,500.00 after June 24, 2011; *see* L 2011, ch 97; $2,700.00 after June 26, 2015; see L 2015, ch 20), or (b) the legal regulated monthly rent of the unit exceeded $2,000.00 ($2,500.00 after June 24, 2011, $2,700.00 after June 26, 2015) and the tenants' annual household income exceeded $175,000.00 for two consecutive years (high rent/high income deregulation) (see Admin. Code of City of NY §§ 26-403.1, 26-504.1). As the Court of Appeals later explained, high-rent vacancy deregulation is warranted where, after a stabilized apartment becomes vacant, its legal regulated rent exceeds $2,000.00 ($2,500.00 after June 24, 2011, $2,700.00 after June 26, 2015), *inclusive of vacancy increase allowances and increases permitted for landlord improvements* (*see Altman v 285 W. Fourth, LLC*, 31 NY3d 178 [2018]).

The DHCR's 2009 rent roll report thus indicated that, when the petitioner entered into her initial lease with the owner on May 12, 2008, the owner already had concluded that the apartment had been deregulated because the legal regulated rent exceeded $2,000.00 per month, and that it thus was entitled to charge a high-rent vacancy rate, and that, notwithstanding the legal regulated rent, the actual rent was set at rate of $1,300.00 per month. Consequently, the DHCR rent roll reports for the years from 2010 to 2017 do not list the subject apartment, as the owner did not register it with the DHCR because the apartment was characterized as an "exempt apartment" for which registration was not required.

On March 27, 2018, the petitioner filed an administrative rent overcharge complaint with the DHCR. The RA fixed the "base date" for the complaint as March 27, 2014, or four years prior to the submission of the complaint. In a July 15, 2021 determination, the RA concluded that "[e]vidence in the record indicates that the subject apartment was deregulated prior to the base date when the plaintiff began occupancy on June 1, 2008." The RA explained that,

> "[p]ursuant to [RSC 9 NYCRR] Section 2520.11(r)(6), the housing accommodation qualifies for high rent vacancy deregulation whether or not the next tenant in occupancy is actually charged or pays $2,000 or more per month.
>
> "Therefore, the subject apartment was no longer under the jurisdiction of this agency when the complainant began occupancy.
>
> "Therefore, it is found that there is no overcharge, and it is ordered that the relief requested is denied."

The petitioner submitted a PAR, requesting that the Commissioner of the DHCR review the RA's determination. In her PAR, the petitioner asserted that the RA "ignores the substantial evidence of fraud" that she submitted to the RA that would allow the RA to "look beyond the base date" to determine whether she had been overcharged. She further asserted that, in light of the fact that she challenged the regulatory status of the apartment, the RA could and should have looked back prior to the base date to determine whether she had been overcharged.

According to the petitioner, the owner offered her a market-rate lease in 2008 that included a clause requiring her to certify that it had completed more than $10,000.00 worth of renovations before she moved in. She asserted that the owner failed to include a "legally required" lease rider that delineated the alleged improvements. The petitioner averred that she had no personal knowledge that the improvements actually had been undertaken, and asserted that "the apartment did not appear to be newly renovated." She further asserted that, as part of an allegedly fraudulent scheme to deregulate the apartment, the owner engaged in a "building-wide preferential rent scheme," frequently registered the apartment with DHCR in an untimely manner during the 1980s and 1990s, and failed to register the apartment after the legally regulated rent first exceeded $2,000.00 per month. She also claimed that she had submitted evidence establishing that the owner inflated the costs of the appurtenances that it ultimately claimed to have purchased and installed, as well as the labor that it ultimately claimed to have undertaken in providing the improvements.

The owner answered the PAR, contending that the apartment was properly deregulated in 2008, just prior to the commencement of the petitioner's tenancy, when the combination of a

permissible IAI increase ($250.00 per month) and a permissible vacancy increase ($269.73) raised the legal regulated rent to $2,083.36 per month from $1,563.63 per month. The owner contended that a detailed invoice that it submitted to the RA demonstrated the validity of its calculations as to the cost of the 2008 IAI. In reply, the petitioner asserted that the invoice was "noncontemporaneous" with the alleged improvement and rehabilitation work and, hence, was not credible evidence supporting the owner's claim of entitlement to an IAI in 2008. She reiterated her contention that her lease with the owner contained an illegal clause in the 2008 lease, in which she certified the veracity of the IAI and the amounts incurred by the owner in connection therewith, despite the absence of an itemized statement as a rider to the lease.

The Commissioner denied the petitioner's PAR. The Commissioner first noted that, notwithstanding the RA's conclusion that a look-back period of four years was applicable to the instant dispute, the RA nonetheless did indeed consider prior rental information in order to ascertain whether the owner engaged in a fraudulent scheme to deregulate the subject apartment. The Commissioner explained that

> "The tenant's allegations of pre-base date rent increases from 1984 through 1994 are insufficient evidence of a fraudulent scheme to deregulate. As *Grimm* (15 NY3d 358 [2010]) and its progeny have found, mere increases in rent alone are insufficient evidence of fraud. The . . . preferential-rent scheme [allegation] is similarly without merit. The tenant was not charged a preferential rent and was not duped into believing she had a preferential rent. Preferential rents are the product of rent stabilization, not market leases. Once the deregulation threshold is reached, the owner need not charge rents above the threshold in market leases, such as the one offered to the tenant in 2008. Overall, preferential rents are permitted by the Rent Stabilization Law and Code and are not fraudulent. The legal regulated rent is what is examined to determine a vacancy deregulation and the legal regulated rent surpassed the threshold of $2,000 per month for the subject apartment in 2008."

The Commissioner thereupon found that the RA correctly determined that the petitioner failed to present evidence to support her contention that the pre-base date IAIs in 2001 and 2008 were fraudulent. The Commissioner further stated that the evidence set forth in the record indicated that the "owner produced invoices and proof of payment and an affidavit to support the 2008 IAI

rent increase, which is more than sufficient evidence" to meet the requirements of DHCR Policy Statement 90-10, which was in effect during the relevant period of time.

The Commissioner additionally noted that

> "[t]he tenant is not contesting that IAIs were performed, but merely the standard of proof submitted by the owner after 14 years. Under *Boyd [v New York State Div. of Hous. & Community Renewal* (23 NY3d 999 [2014])], the RA need not review every aspect of the 14-year old IAIs in the context of determining whether there was a fraudulent scheme to deregulate the apartment. The owner produced sufficient evidence for a finding that the IAIs were not themselves fraudulent and were not part of fraudulent scheme to deregulate in 2008. Had the tenant wanted a full review of the owner's evidence concerning IAIs, of which she was aware from the rider in the market lease of 2008, she could have filed an overcharge complaint within the first four years of her tenancy."

This proceeding ensued.

Where, as here, an administrative determination is made, and there is no statutory requirement of a trial-type hearing, that determination must be confirmed unless it is arbitrary and capricious, affected by an error of law, or made in violation of lawful procedure (*see* CPLR 7803[3]; *Matter of Madison County Indus. Dev. Agency v State of N.Y. Auths. Budget Off.*, 33 NY3d 131, 135 [2019]; *Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523, 528 [2018]; *Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435, 435 [1st Dept 2015]; *Matter of Batyreva v New York City Dept. of Educ.*, 50 AD3d 283, 283 [1st Dept 2008]; *Matter of Rumors Disco v New York State Liquor Auth.*, 232 AD2d 421, 421 [2d Dept 1996]). Inasmuch as the petitioner made no allegations that the DHCR's determination was made in violation of lawful procedure, the DHCR's determination to deny the PAR in this proceeding involving an alleged rent overcharge must be confirmed unless it was arbitrary and capricious or affected by an error of law (*see Matter of 81st Realty Corp. v. New York State Div. of Hous. & Community Renewal*, _____AD3d_____, 2023 NY Slip Op 01058, *1 [1st Dept, Feb. 28, 2023]).

A determination is arbitrary and capricious where it is not rationally based, or has no support in the record (*see Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624, 624 [1st Dept 2015]), or where the decision-making agency fails to consider all of the factors it is

required by statute to consider and weigh (*see Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604, 608 [2d Dept 2008]). Stated another way, a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

"Courts have rarely singled out error of law by name . . . as a question for consideration in an Article 78 proceeding" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 7803:1). "The question of whether an administrative agency's determination is affected by an error of law is often implicit in the nature of the grievance, and will often turn on the underlying substantive law applicable to the determination" (*Matter of Held v State of New York Workers' Compensation Bd.*, 2008 NY Slip Op 52741[U], *7, 2008 NY Misc LEXIS 10881, *20-21 [Sup Ct, Albany County, Jul 7, 2008]; *see also* 14-7803 Weinstein-Korn-Miller, NY Civ Prac P 7803.01[3]). Hence, an administrative determination is affected by an error of law where the agency incorrectly interprets or improperly applies a statute, regulation, or rule (*see Matter of New York State Pub. Empl. Relations Bd v Board of Educ. of City of Buffalo,* 39 NY2d 86, 92 [1976]; *see generally Matter of CVS Discount Liquor v New York State Liq. Auth.*, 207 AD2d 891, 892 [2d Dept 1994]), or where its determination violates some other statutory or constitutional provision (*see Matter of New York State Pub. Empl. Relations Bd v Board of Educ. of City of Buffalo,* 39 NY2d at 93 [Fuchsberg, J., concurring] ["an order which is specifically and expressly forbidden by . . . statute is an error of law"]).

In *Matter of Regina Metro. Co., LLC v New York State Div. of Hous. & Community Renewal* (35 NY3d 332 [2020]), the Court of Appeals, in a controversial 4-3 decision, struck down, as an unconstitutional violation of property owners' due process rights, those provisions of the Housing Stability and Tenant Protection Act of 2019 (HSTPA) that (a) retroactively applied the newly enlarged six-year limitations period set forth in the amended version of CPLR 213-a to all rent overcharge claims, and (b) permitted a court or the DHCR to look back at the

rent history for more than four years prior to the filing an overcharge complaint in situations other than those involving a fraudulent scheme to deregulate an apartment (*see, e.g.*, RSL § 26-516[h] [a court "shall consider all available rent history which is reasonably necessary" to investigate overcharges and determine the legal regulated rent, including (i) rent registration and other records filed with DHCR or other government agencies, regardless of the date to which the information refers; (ii) orders issued by government agencies; (iii) records maintained by the owner or tenants; and (iv) public records kept in the regular course of business by any government agency]; RSL § 26-516[a] [the legal regulated rent for purposes of determining most overcharges "shall be the rent indicated in the most recent reliable annual registration statement filed and *served upon the tenant six or more years prior to the most recent registration statement*, . . . plus in each case any subsequent lawful increases and adjustments"] [emphasis added]; *see generally Dugan v London Terrace Gardens, L.P.*, 177 AD3d 1, 9-10 [1st Dept 2019] [analyzing contours of the HSTPA]).

In light of the decision in *Regina*, for the petitioner to prevail on her claim that the DHCR should have looked back for more than four years prior to the filing of her administrative complaint on March 27, 2018, she was obligated to establish the existence of a fraudulent scheme to deregulate her apartment. Inasmuch as she filed her administrative complaint prior to the enactment to the HSTPA, she cannot avail herself of the expanded look-back period and the more liberalized, non-fraud based reasons for looking back beyond the otherwise applicable limitations period of CPLR 213-a.

The court concludes that the Commissioner rationally concluded, based on evidentiary support in the record, that none of the rent increases imposed between 1984, when the apartment first became regulated, and 2008, when the petitioner first leased the subject apartment, including the vacancy and IAI increases imposed in 2001 and 2008, was in excess of legally permitted increases, let alone part of a fraudulent scheme to deregulate the apartment. The petitioner's primary contention is that the invoices and payment records

submitted by the owner to the DHCR to support the IAI increases constituted inadequate evidence that was given too much weight by the RA and the Commissioner, and that this documentary evidence lacked credibility because it was not assembled contemporaneously with the improvement work that was actually performed. "It is beyond dispute that the credibility determinations of an administrative law judge are entitled to great weight" (*Matter of Albany Manor Inc. v New York State Liq. Auth.*, 57 AD3d 142, 144-145 [1st Dept 2008]). "'[I]t is the function of the administrative agency, not the reviewing court, to weigh the evidence'" (*Matter of Isaksson-Wilder v New York State Div. of Human Rights*, 43 AD3d 921, 922 [2d Dept 2007], quoting *Matter of Curto v Cosgrove*, 256 AD2d 407, 408 [2d Dept 1998]). The only inquiry that this court may make in connection with the quality of that evidence is whether it rationally supported the DHCR's final determination, not whether it should have been given greater or lesser weight by the decisionmaker. The court concludes that the evidence submitted to support the 2008 IAI increase rationally supported the DHCR's final determination that there was no fraudulent scheme to deregulate the apartment, that there thus was no basis to look back earlier than March 27, 2014 to ascertain whether there had been a rent overcharge, and that, consequently, there was no basis for finding that there was such an overcharge.

Finally, the court further concludes that the DHCR did not make any errors of law in applying the relevant provisions of the RSL and RSC, in determining that the apartment was legally deregulated prior to the commencement of the petitioner's lease term, or in concluding that the owner's alleged acceptance of preferential rents in the building was relevant to her deregulated apartment or somehow caused it to be "re-regulated" (*see generally Matter of B.G.R. Realty, LLL v Stein*, 194 AD3d 634, 635 [1st Dept 2021]).

In light of the foregoing, it is

ORDERED that the petition is denied; and it is

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.

3/7/2023
DATE

JOHN J. KELLEY, 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