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**Yunwei Yao v New York State Div. of Hous. &
Community Renewal**

2020 NY Slip Op 32316(U)

July 16, 2020

Supreme Court, New York County

Docket Number: 153594/2019

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2EFM

Justice

-----X

INDEX NO. 153594/2019

YUNWEI YAO,

MOTION SEQ. NO. 001

Petitioner,

- v -

**DECISION, ORDER and
JUDGMENT**

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL and 154 EAST 106 LLC,

Respondents.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26

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

In this CPLR article 78 proceeding, petitioner Yunwei Yao moves, pursuant to CPLR 7803 (3), to reverse an order of the New York State Division of Housing and Community Renewal ("the DHCR"), dated February 6, 2019 ("the 2/6/19 order"), which denied her petition for administrative review ("PAR") and affirmed an order by the Rent Administrator ("RA"), dated June 28, 2018 ("the 6/28/18 order"), which found, *inter alia*, that petitioner had no contractual right to a preferential rent for the entire term of her tenancy (Docs. 2, 5-6). In the alternative, petitioner requests that this matter be remanded to the DHCR for further proceedings (Doc. 2). Respondent 154 East 106 LLC ("the landlord") opposes the application (Doc. 13, 19). After a review of the parties' contentions, as well as a review of the relevant statutes and case law, the petition is decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

In March 2017, petitioner, a tenant since January 2010 of an apartment at the premises located at 154 East 106th Street, New York, NY, filed an overcharge complaint with the DHCR against her landlord, alleging, *inter alia*, that the landlord failed to offer a renewal lease after her seventh renewal lease expired on December 31, 2016 (Doc. 1 ¶ 14). Petitioner also claimed that her landlord failed to honor a preferential rent rider executed by the parties on January 28, 2010 ("the rider"), pursuant to which, petitioner asserted, she was entitled to preferential rent for life (Doc. 1 ¶ 14).

In the 6/28/18 order, the DHCR's RA determined, *inter alia*, that the rider only applied to the vacancy lease commencing on January 1, 2010 and did not extend to any subsequent lease renewals (Doc. 5). Petitioner filed a PAR of the 6/28/18 order, arguing, *inter alia*, that the RA's findings regarding the preferential rent were conclusory; that the ambiguous terms of the rider should be construed against the drafter (the landlord); that the landlord had afforded her a preferential rent from 2011 through 2016; and that the preferential rent previously afforded by the landlord should remain in effect for as long as she occupied the apartment (Doc. 6). In the 2/6/19 order, the Deputy Commissioner affirmed the RA's determination, reasoning, in relevant part, that the rider did not guarantee petitioner a preferential rent for the entirety of her tenancy (Doc. 6). The DHCR also found that the fact that the landlord had continued to offer a preferential rent for several years after the end of the initial lease term had no bearing on the landlord's right to charge a legal regulated rent upon the most recent renewal (Doc. 6).

Petitioner now moves, by notice of petition, to vacate the 2/6/19 order, arguing, *inter alia*, that the DHCR deviated from established procedure when analyzing the terms of the rider and when determining that said agreement did not preclude the landlord from applying the legal

regulated rent to future rent renewals (Doc. 1 ¶ 19). Specifically, petitioner argues that the rider allowed the landlord to apply the legal regulated rent only after the expiration of the initial lease term and, thus, that its failure to impose the legal regulated rent at such time precluded it from imposing the legal regulated rent for the duration of petitioner's tenancy (Doc. 1 ¶ 25). Further, petitioner asserts that "[t]he manner in which the parties initially renewed the lease in 2010 created an ambiguity as to whether the preferred rent or legal rent would be used in the future" and that "[s]uch ambiguity should be interpreted against" the landlord (Doc.1 ¶ 28). Petitioner claims that the DHCR's determination was arbitrary and capricious, an abuse of discretion, and a denial of due process (Doc. 1 ¶ 18-19).¹

Although the landlord concedes that an owner and a tenant may agree to have a preferential rent apply to future lease renewals, it contends that no such obligation was imposed by the subject rider (Doc. 13 ¶ 35-41). Thus, claims the landlord, the cases cited in support of petitioner's proposition that she is contractually entitled to a preferential rent for the duration of her tenancy is misguided (Doc. 13 ¶ 35). Moreover, the landlord insists that petitioner's due process argument is without merit because the DHCR reviewed, *inter alia*, the preferential rent rider, and it afforded petitioner ample opportunity to be heard before rendering a decision (Doc. 13 ¶ 33-34).

¹ In a reply brief, petitioner argues, *inter alia*, that the Housing Stability and Tenant Protection Act of 2019 ("the HSTPA"), which went into effect on June 14, 2019, applies to the disputed rent increase and, thus, precludes the landlord from applying the legal regulated rent (Doc. 16). However, this Court need not address these arguments insofar as they are raised for the first time in this CPLR article 78 proceeding (*see Matter of Wells v New York City Hous. Auth.*, 2011 NY Slip Op 31963[U], 2011 NY Misc LEXIS 3531, *7-8 [Sup Ct, NY County 2011]).

LEGAL CONCLUSIONS:

It is well-settled that, “[i]n reviewing an administrative agency determination, courts must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious” (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009] [internal quotation marks, brackets, and citations omitted]; see *Matter of London Terrace Gardens L.P. v New York State Div. of Hous. and Community Renewal*, 149 AD3d 521, 521 [1st Dept 2017]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Matter of Peckham v Calogero*, 12 NY3d at 431 [citation omitted]). Moreover, “[i]f the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency” (*id.* [citation omitted]).

The petition is denied. The rider provided, in relevant part, that:

"Owner agrees to accept and Renter agrees to pay a monthly preferential rent of \$950, and shall pay this same amount as a security deposit. If Renter chooses to renew this lease upon the expiration of the initial term, the legal regulated monthly rent plus all applicable lawful increases shall be used to establish the renewal rent. Thereafter, each successive renewal rent shall be established based upon lawful increases to the preceding rent for as long as Renter remains in occupancy" (Doc. 3).

It is clear from the rider that the legal regulated monthly rent was the basis for determining the renewal rent. Thus, it was not unreasonable for the DHCR to conclude that the rider's reference to "the preceding rent" pertained to the legal regulated monthly rent discussed in the preceding sentence and not, as petitioner maintains, to the preferential rent. Further, while it is undisputed that the parties intended to apply a preferential monthly rent of \$950 for the initial lease term, absent from the rider is any indication that this rate would apply to any subsequent renewals such that a contractual right to a preferential rent for the duration of petitioner's tenancy was created by the agreement (*compare 448 W. 54th St. Corp. v Doig-Marx*, 5 Misc 3d 405, 408 [Civ Ct, NY

County 2004] [finding that the tenant was entitled to a preferential rent since the rider provided that said rent would be charged "during the *terms* of tenant's occupancy" (emphasis added)]; *East Side Mgrs. Assoc., Inc. v Goodwin*, 26 Misc 3d 1233[A], 2010 NY Misc LEXIS 474, 10 [Civ Ct, NY County 2010] [finding that the rider was "open-ended concerning the duration of the preferential rent," warranting a hearing on the issue of intent]; *see also 764 Madison Ave. LLC v Risse*, 17 Misc 3d 330, 335-336 [Civ Ct, NY County 2007]). Moreover, this Court agrees with the DHCR that the landlord's use of the preferential rent in assessing the rent for the renewal leases is irrelevant to the question of whether the rider, as drafted, afforded petitioner a preferential rent for life.

Since the DHCR afforded petitioner ample opportunity to be heard and reviewed, *inter alia*, the preferential rent rider before reaching its determination, petitioner's claim that she was denied due process is without merit (*see Matter of London Terrace Gardens L.P. v New York State Div. of Hous. and Community Renewal*, 149 AD3d at 522) .

Therefore, in accordance with the foregoing, it is hereby:


ORDERED and **ADJUDGED** that the petition is denied, and the proceeding is dismissed; and it is further

ORDERED that, within 20 days of entry of this order, respondent 154 East 106 LLC is directed to serve a copy of this order, with notice of entry, upon petitioner Yunwei Yao, as well as on the Clerk of the Court (60 Centre Street, Room 141 B), who is directed to enter judgment accordingly; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supetmanh); and it is further

ORDERED that this constitutes the decision and order of this Court.

7/16/2020
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE