2023-08-30

65 Spring Realty LLC v. New York State Div. of Hous. & Community Renewal

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 02TR

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65 SPRING REALTY LLC,

Petitioner,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, SERGE KREIKER

Respondent.

INDEX NO. 156324/2022

MOTION DATE 07/29/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 36, 37

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

In this Article 78 proceeding, petitioner 65 Spring Realty LLC ("Petitioner") seeks a judgment reversing, annulling, and setting aside the June 1, 2022 Order of respondent New York State Division of Housing and Community Renewal ("DHCR") or, in the alternative, remanding the administrative proceeding to the DHCR for reconsideration or review. Respondents DHCR and Serge Kreiker ("Tenant") oppose the petition.

This petition and the underlying proceedings before the DHCR concern the rent regulation status of Apartment 7A located at 65 Spring Street, New York, New York (respectively "the Apartment" and "the Building"). Petitioner has owned the Building since 2016 and tenant has resided in the Apartment since December 2003.

The pertinent history of the Building and Apartment is as follows: nonparties Elssy Losada-Depiante and Clovis Depiante ("prior owners") owned the Building from 1982 to 2016. The Apartment was rented to a tenant until October 23, 1989, at which time it was surrendered to the prior owners. The DHCR registration record for the Apartment reflects that its last legal rent

was registered in 1993 at $324.78 (NYSCEF Doc. No. 17). The Apartment remained vacant until 1996, at which time the prior owners began renovating the Apartment while allowing family members to reside in it without paying rent. According to the prior owners, their niece Carolina Soto ("Soto") was the last such family member to occupy the Apartment. Soto moved out of the Apartment in late 2002. After Soto moved out, she purportedly subleased the Apartment, first to nonparty Jose Martos ("Martos") and then to Tenant.

On February 10, 2003, Soto and Martos executed a document titled "Sublease Agreement" by which Martos rented the apartment from Soto for a term beginning February 1, 2003 and ending January 31, 2004 for $1,800 per month (NYSCEF Doc. No. 18, Ex. B). On July 17, 2003, the prior owners filed a registration with the DHCR for the Apartment that listed it as exempt from legal regulated rent with "High Rent Vacancy" given as the reason (NYSCEF Doc. No. 17). Martos apparently vacated the Apartment before the end of the term. Soto then entered into another purported lease with Tenant on November 24, 2003 via another document tiled "Sublease Agreement" for a one year term from December 1, 2003 through November 30, 2004 with rent set at $1,800 per month (NYSCEF Doc. No. 18, Ex. C). The prior owners attested that because they "were neither professional landlords nor a large company" they "simply used a sublease form with all rents being turned over to the Landlord" (*id*. ¶ 3). However, the record contains no further documentation about purported payments from Soto to the prior owners and both purported subleases name the prior owners as landlords and Soto as overtenant (*id*. Ex. B, C). On January 1, 2005, the prior owners and Tenant executed a "Lease Agreement" that provided for a term lasting through December 31, 2005 and a rent of $1,850 per month (*id*., Ex. D). None of these agreements were registered with DHCR (*see* NYSCEF Doc. No. 17).

Tenant filed a lease non-renewal complaint with the DHCR on April 17, 2017, alleging that Petitioner had not furnished him with a renewal lease offer for the Apartment since December 31, 2016. Tenant contended that the Apartment was rent regulated and had been illegally deregulated by Petitioner. The DHCR issued an Order Granting Application on December 17, 2018 that found Petitioner had illegally deregulated the Apartment. This determination was upheld first in a November 15, 2021 Order Pursuant to Reconsideration. Petitioner filed a Petition for Administrative Review ("PAR") seeking to reverse this order; the PAR was denied by the Deputy Commissioner of the DHCR in a June 1, 2022 Order (NYSCEF Doc. No. 26, "PAR Order").

The PAR Order that denied Petitioner's application upheld the finding that Petitioner had illegally deregulated the Apartment, that the Apartment was subject to the Rent Stabilization Law ("RSL") and Rent Stabilization Code ("RSC"), and that Tenant was therefore entitled to a lease renewal. The DHCR found that the prior owners never treated any tenant after 1989 as a rent stabilized tenant, reasoning that: Soto was not a tenant of the prior owners, and therefore could not create a subtenancy with Martos or Tenant; because no subtenancy was created with either Martos or Tenant, no legal rent was created with respect to Tenant; because no legal rent was created, no deregulation occurred as deregulation may only be based on a valid legal regulated rent; rents established in the absence of rent stabilized leases following an extended vacancy cannot form the basis of a legal regulated rent; Soto was an exempt non-tenant who was unable to facilitate deregulation via alleged subtenancies; and that it was impossible for the prior owners to have legally deregulated the Apartment with the July 17, 2003 registration with the DHCR as this took place during Martos's occupation. In rendering its decision, the DHCR considered arguments by Petitioner and Tenant that the parties reiterate in the instant action.

Petitioner now seeks reversal of the PAR Order, arguing that it was arbitrary, capricious, or otherwise resulted from an error of law. Article 78 proceedings provide for judicial review of administrative determinations based on a claim that a determination was made in violation of lawful procedure, arbitrary and capricious, affected by an error of law, or an abuse of discretion (CPLR § 7803[3]; *Gilman v N.Y. State Div. of Hous. & Cmty. Renewal*, 99NY2d 144, 149 [2002]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (*Pell v Bd. of Educ.*, 34 NY2d 222, 231 [1974]). The Court must review the entire record and "determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated" (*Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]).

Here, Petitioner submits that DHCR determination was erroneous and arbitrary and capricious because the Apartment's legal regulated rent exceeded the deregulation threshold of $2,000 at the time Tenant took possession in 2003. Petitioner claims that the legal rent for the Apartment had been set by the sublease agreement between Soto and Martos at $1,800 per month, and that it increased by 17% to $2,106 per month with the sublease agreement between Soto and Tenant in accordance with RSL 26-511(c)(5-a). The Apartment therefore became deregulated, Petitioner argues, because the legal rent was over $2,000 at the beginning of Tenant's lease in 2003. It further maintains that the fact that Tenant and Martos signed agreements titled "Sublease" with Soto is of no object as these should be treated as regular leases due to the prior owners' inexperience and that the documents' labels are irrelevant. It argues that Soto was acting as an agent of the prior owners when she executed the purported leases in 2003 because she forwarded all rent paid to her by Martos and Tenant to the prior owners. Finally, Petitioner claims that the prior owners' failure to register the Apartment's legal regulated rent during these tenancies does not invalidate the legal regulated rent, citing the Second

Department's decision in *Matter of Cipolla v New York State Div. of Hous. & Community Renewal*, 153 AD3d 920 (2d Dept 2017).

In opposition, Respondents contend that Petitioner and the prior owners failed to file annual rent registration statements with the DHCR as required by RSL 26-517, thereby making any purported vacancy deregulation of the Apartment impossible. They argue that Petitioner's reliance on *Cipolla* regarding an owner's failure to register is misplaced as the First Department has held that a lease cannot function to set first rent under RSC 2526.1(a)(3)(iii) if the lease did not establish a stabilized rent pursuant to a stabilized lease and that a stabilized lease must comply with "rigorous requirements" rather than merely provide for rent below the deregulation threshold (NYSCEF Doc. No. 26, citing *AEJ 534 E. 88th LLC v DHCR*, 194 AD3d 464 [1st Dept 2021]). Respondents maintain that the purported leases at issue here did not comply with these requirements by not being properly identified as a rent stabilized lease, failing to include the required DHCR rent stabilization rider, and failing to properly register with the DHCR. They also argue that the purported lease between Tenant and Soto could not establish a legal regulated rent as Soto was never a tenant of the prior owners. Tenant further contends that the rent relied upon by Petitioner in its vacancy deregulation claim was not a legal regulated rent because it was not agreed upon as such between Tenant and the prior owners and that vacancy deregulation of the Apartment at the commencement of his tenancy was impossible under the former RSL 26-504.2 because he was never provided with a mandatory vacancy deregulation rider.

Petitioner maintains that the Apartment became deregulated at the beginning of Tenant's occupancy pursuant to RSC 2520.11(r)(4), RSC 2500.9(m), and the former NYC Admin. Code 26-504.2(a). In relevant part, these regulations provide that housing with a legal regulated rent of $2,000 or more per month that became vacant after certain dates between 1997 and 2011 are

exempt from RSC rent regulation. During the time at issue, an apartment's legal regulated rent following vacancy or temporary exemption:

> [S]hall be the rent agreed to by the owner and the first rent stabilized tenant taking occupancy after such vacancy or temporary exemption, and reserved in a lease or rental agreement; or, in the event a lesser amount is shown in the first registration for a year commencing after such tenant takes occupancy, the amount shown in such registration, as adjusted pursuant to this Code.

(*Matter of AEJ 534 88th, LLC*, 194 AD3d at 470, citing former RSC 2526.1[a][3][iii]).

The Court finds that the DHCR's determination in the PAR Order had a rational basis in the record and was neither arbitrary nor capricious and was not an error of law. Although Petitioner contends that the purported sublease between Soto and Martos created a legal regulated rent for the Apartment in February 2003 and that the November 2003 agreement between Soto and Tenant increased this legal regulated rent, the DHCR reasonably determined that Soto was not a tenant within the definition of RSC 2520.6(d). The record shows that Soto was neither "named on a lease as lessee" nor was she a party to a rental agreement with the prior owners in which she was "obligated to pay rent for the use and occupancy of a housing accommodation" (9 NYCRR § 2520.6[d]). Furthermore, the record includes the prior owners' affidavit which states that Soto was allowed to reside rent-free in the Apartment, and the DHCR registration statements which list the Apartment as temporarily exempt due to being "owner occupied/employee [occupied]" for the years Soto lived there (NYSCEF Doc. No. 17). Hence, the DHCR had a rational basis to conclude that Soto was not a tenant who could create a valid sublease with Martos or Tenant.

The DHCR also had a rational basis to determine that the purported subleases to Martos and Tenant could not create a legal regulated rent. To have deregulated an apartment and obtained a high-rent vacancy increase in 2003, an owner had to comply with the requirements of RSL 26-504.2(b), which included notice to the first tenant after the apartment became exempt

and sending the DHCR registration statement to the tenant. The notice to the tenant had to indicate the last regulated rent, the reason the apartment no longer was rent regulated, a calculation of how the rent was calculated to exceed $2,000 per month, a statement that the last legal regulated rent or maximum rent may be verified by contacting the DHCR, and the DHCR's address. It is well-established that a "high-rent vacancy increase of an apartment was never automatic," and that an owner's failures to comply with the "rigorous requirements of a rent-stabilized lease" or to abide by the notice requirements of RSL 26-504.2(b) are fatal to an owner's claim that it set legal regulated rent (*Matter of AEJ 534 E. 88th LLC*, 194 AD3d at 471). Here, the record contains no indication that any of these notices or forms were furnished to either Martos or Tenant.

Finally, the DHCR had a rational basis to find that the prior owners' July 2003 registration of the Apartment as deregulated was legally impossible due to Martos's occupancy at the time. The Apartment's registration history shows that the prior owners registered the Apartment as exempt from legal regulated rent on July 17, 2003 with the explanation given as "High Rent Vacancy," where it had previously been listed as "Owner Occupied/Employee" (NYSCEF Doc No. 17). However, there is no dispute in the record that Martos occupied the Apartment pursuant to the agreement with Soto from February through November 2003 and that it was not vacant at the time of the filing. Petitioners fail to adduce any facts to the contrary. Additionally, even had a vacancy existed at the time of the 2003 registration, the prior owners did not register any purported legal regulated rent and therefore failed to adhere to the procedural requirements for deregulation.

Accordingly, it is hereby:

ADJUDGED that the application is denied and the petition is dismissed, with costs and disbursements to respondents.

This constitutes the Decision and Order of the Court.

8/30/2023
DATE

LORI S. SATTLER, 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