

To be argued by
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NEW YORK SUPREME COURT
APPELLATE DIVISION—FIRST DEPARTMENT

In the Matter of the Application of
ROZMAE REALTY,

Petitioner-Respondent,

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

against

STATE DIVISION OF HOUSING AND COMMUNITY
RENEWAL, Office of Rent Administration,

Respondent-Appellant.

BRIEF OF RESPONDENT-APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from a judgment of the Supreme Court (Pecora, J.) entered in the office of the New York County Clerk on December 14, 1988. The judgment remanded an administrative determination by the New York State Division of Housing and Community Renewal (hereinafter "DHCR") for a redetermination of the lawful rent stabilized rent for the subject apartment and the amount of rent overcharges.

STATEMENT OF THE QUESTION PRESENTED

1. Where DCHR's calculation of the lawful rent stabilized rent and the amount of the rent overcharge was based on information provided by the landlord, did the court below improperly substitute its own judgment for that of the agency by ignoring that evidence and relying upon other evidence which was outside the administrative record, in reaching its finding that DHCR's determination was arbitrary and capricious, and in remanding the proceeding to DHCR for a redetermination as to the calculation of the lawful rent and amount of overcharges?

The court below found that the administrative record was devoid of evidence to support DHCR's rent calculation.

STATEMENT OF THE CASE

The Commissioner, in this proceeding, concluded that the subject housing accommodation is within the jurisdiction of the rent stabilization law, established the lawful rent stabilized rent, and determined the amount of rent overcharges by applying DHCR's court approved alternative procedure which is used where a landlord has failed to provide a full rent history for the housing accommodation. See, 61 Jane Street Associates v. CAB, 65 N.Y.2d 898, 493 N.Y.S.2d 455 (1985), affg, 108 A.D.2d 636, 486 N.Y.S.2d 694 (1st Dept. 1985); Lavanant v. State Division of Housing and Community Renewal, 148 A.D.2d 185, 544 N.Y.S.2d 331 (1st Dept.).

The court below affirmed DHCR's finding that the housing accommodation is subject to the Rent Stabilization Law and concluded that the use of DHCR's alternative default procedure for determining the lawful stabilized rent and overcharges was proper. However, the court erred in substituting its own judgment as to the calculation of the lawful rent and amount of overcharges, notwithstanding the fact that there was a rational basis in the record for DHCR's calculation, and

further notwithstanding the fact that the owner did not challenge the calculation during the administrative proceeding but only raised the issue for the first time during judicial review.

DCHR's calculation of the lawful rent stabilized rent and the amount of the rent overcharge was based on information provided by the landlord. The court below, in reaching its finding, not only ignored that evidence, but relied upon other evidence which was outside the administrative record and of no probative value.

The owner has not appealed the rulings of the court below on any of the many issues raised in its Article 78 petition in this litigation.

The test upon judicial review of a determination rendered by an administrative agency is whether the determination has a rational basis in the record and is in accord with applicable law. Where the determination has a rational basis, the Court may not substitute its own judgment for that of the agency. As this brief makes manifest, the administrative determination in the instant case fully meets that test. The decision and judgment of the court below improperly concluded otherwise as to DHCR's calculation of the rent overcharge. It should thus be reversed on appeal, and the petition dismissed as it is devoid of merit.

FACTS

This proceeding concerns the housing accommodation known as 184 Ninth Avenue, New York, New York, Apartment 1D.

The tenants filed a rent overcharge complaint on February 23, 1984, with DHCR's predecessor agency, the Conciliation and Appeals Board. The complaint alleged that the prior tenant had paid a rent of \$450.00 per month; that, when the prior tenant vacated, the owner offered the

apartment to the upstairs neighbor for \$550.00 but then placed an advertisement in the New York Times for \$750.00; and that the complaining tenants rented the subject apartment for \$750.00 per month beginning May 1, 1979, received a three-year lease renewal in 1981 at \$700.00 per month for the first year and \$750.00 per month for the remaining two years, and another two-year renewal in 1984 at \$802.50. (Return: A-1)

Attached to the overcharge complaint were copies of the tenants' leases. Their 1979 lease was a standard form of loft lease. The tenants' second lease, commencing May 1, 1981 for three years, contained a rent stabilization rider stating, among other things, that

Prior tenant's rent in this space was \$465.75. Space was completely renovated. Standard vacancy increase and 1/40th cost of renovation set rental at \$650.00.

Also attached to the complaint was the owner's December, 1983 offer for a lease renewal as of May, 1984, indicating that the offer was being made in accordance with the Rent Stabilization Law. (Return: A-1)

On March 8, 1984, the Conciliation and Appeals Board notified the owner of the tenants' complaint and brought to the attention of the owner that it would be required to produce rent records for the subject premises dating back to at least June 30, 1974 and that it would be given an opportunity to respond to the complaint. (Return: A-2)

On April 1, 1984, the New York State Division of Housing and Community Renewal assumed the responsibility of regulating rental housing subject to the Rent Stabilization Law, pursuant to Chapter 403, Law of 1983. Thus DHCR assumed responsibility for processing and determining the lawful stabilized rent for the subject premises.

On September 24, 1984, DHCR notified the owner of the tenants' complaint, gave the owner

an opportunity to answer, and informed it that failure to answer would be considered a default. (Return: A-3). The owner failed to answer.

On December 3, 1985, the District Rent Administrator issued an Order finding the owner in default for failure to answer the complaint; determining the lawful stabilized rent to be \$191.37 by application of the DHCR's alternative procedure used when an owner fails to provide a rent history as required by Section 42A of the Rent Stabilization Code. In addition, the District Rent Administrator directed the refund of \$47,401.87 in rent overcharges including treble damages for the overcharges occurring after April 1, 1984. (Return: A-7) The computation of the rent and amount of overcharges was based upon the rent roll for the subject premises as provided by the owner (Return: A-5 and 6)

The owner filed a Petition for Administrative Review (hereinafter "PAR") on January 6, 1986 alleging (1) that the apartment was not covered by the Rent Stabilization Law and Code because (a) it was leased solely for commercial or professional use, that is, as an artist's studio, (b) its use for residential purposes violates the certificate of occupancy, and (c) it cannot unilaterally be converted to residential use by the tenants; (2) the rent charged by the owner was the lawful rent in that this was the first residential rent after prior commercial use of the space; and (3) treble damages should not have been imposed. (Return: B-1)

The tenants answered the owner's PAR on March 7, 1986, alleging, among other things, that the apartment was initially rented for residential use. They stated that (1) when they first looked at the apartment in 1979, the owner was in the process of replacing the stove, refrigerator, dishwasher and kitchen cabinets with new appliances and equipment, (2) the owner provided a humidifier for the apartment, and (3) the owner did a number of things, as shown by documentary evidence, which

demonstrated residential use of the premises, including painting, floor scraping, retiling the bathroom, and filing a registration form with DHCR listing the apartment as rent stabilized. The answer also included an affidavit from the prior tenant stating that he had occupied the apartment from 1972 on for residential purposes only, and that it had appeared that the prior tenant had also use the apartment residentially. (Return: B-4)

The owner replied to the tenants' answer claiming that despite the appliances found in the apartment, it was rented as commercial space and the leases are the best evidence of the intent of the parties. (Return: B-5)

On March 5, 1987 the Deputy Commissioner issued an Order and Opinion granting the owner's PAR in part. The Deputy Commissioner ruled that the imposition of treble damages was improper because the owner was not served with notice that treble damages would be imposed. But the Commissioner concluded that the apartment was rented for residential as well as commercial use and was thus protected by the Rent Stabilization Law. He also found that the apartment was used as a residence prior to 1979, when the current tenants moved in, so that the determination of the lawful stabilized rent was proper. Finally the Commissioner recalculated the rent overcharge to be \$46,246.07, including \$611.13 for excess security deposit, and including overcharges from May 1, 1984 to April 30, 1985, which had not been previously accounted for.

On judicial review, the court below affirmed the Commissioner's determination that the tenants' occupancy is residential in nature, as was that of the previous tenants, and that they are protected under the Rent Stabilization Law. The court also affirmed the Commissioner's conclusion that treble damages should not be imposed, and that it was proper to base the calculation of the amount of the rent overcharge on an apartment in the adjoining building since they both were

registered as one with DHCR. However, the court found that the basis for computing the rent overcharge was arbitrary and capricious, stating in pertinent part:

However, the record before the agency is completely devoid of any evidence that the apartment used for computation purposes was the same size or similar to the subject apartment. Moreover, petitioner has submitted persuasive evidence that the two apartments are not at all alike.

On the basis of this finding the court remanded the matter to DHCR to redetermine the amount of the overcharge "based upon the rent for another apartment or apartments similar to the subject apartment."

ARGUMENT

THE COURT BELOW ERRED BY IMPROPERLY SUBSTITUTING ITS OWN JUDGMENT FOR THAT OF DHCR, IGNORING EVIDENCE PROVIDED TO DHCR BY THE OWNER, UPON WHICH EVIDENCE THE AGENCY RATIONALLY BASED ITS DETERMINATION; AND BY RELYING UPON OTHER EVIDENCE WHICH WAS OUTSIDE THE ADMINISTRATIVE RECORD.

The sole issue in this appeal is whether the court erred as a matter of law and improperly substituted its own judgment in concluding that the basis used by the DHCR for computing the rent overcharges was arbitrary and capricious. The respondent-owner has not appealed the rulings of the court below on any of the many issues raised in its Article 78 petition.

Under the procedure applied in the administrative proceeding herein, the determination of the lawful rent is based upon the rental history of the apartment if the owner supplies complete rental data back to the base date. If the owner fails to produce the rent history records, the lawful rent is established using the lowest of three amounts under a tripartite test: (1) the lowest stabilized rent for the same size apartment as the subject apartment as indicated in the DHCR's apartment registration,

(2) the complaining tenants' initial rent, minus the initial guidelines adjustment and vacancy allowance lawfully chargeable when the tenants took occupancy, and (3) the last rent paid by the prior tenant. The procedure and the rationale in support of it has been upheld in the courts numerous times. See, e.g., Lavanant v. DHCR, 148 A.D.2d 185, 544 N.Y.S.2d 331 (1st Dept. 1989), 61 Jane Street Associates v. CAB, 65 N.Y.2d 898, 493 N.Y.S.2d 455 (1985), affg, 108 A.D.2d 636, 486 N.Y.S.2d 694 (1st Dept. 1985); Charles H. Greenthal Co., Inc. (DHCR), 126 Misc.2d 795, 484 N.Y.S.2d 445 (Sup. Ct., N.Y. Co., Price, J., 1984); Farhadian v. CAB, February 24, 1984, n.o.r. (Sup. Ct., N.Y. Co., Sherman, J.), aff'd, ___ A.D.2d ___, 496 N.Y.S.2d 595 (1st Dept. 1985).

In the case at bar the lowest of the three figures under the tripartite procedure was the first, i.e., the lowest rent for the same size apartment as indicated in the DHCR's apartment registration. This figure was based upon the apartment registration forms filed by the owner with the DHCR, as reflected in the Division's computerized rent roll. That rent roll (which was part of the administrative record herein) lists the rent stabilized apartments in the premises containing two rooms. (Return: A-5) Thus, contrary to the finding of the court below, there was clearly a sound evidentiary basis in the administrative record--derived from the owner's own registration statements--for DHCR's calculation of the lawful rent and the amount of the overcharge.

The court below upheld DHCR's use of the tripartite procedure, but erroneously concluded that the DHCR incorrectly computed the amount of the overcharge, finding that "the record before the agency in completely devoid of any evidence that the apartment used for computation purposes was the same size or similar to the subject apartment".

The court below erred in its conclusion in three respects: (1) since the owner never challenged the basis for computation during the administrative proceeding, the issue was not

properly a subject for judicial review; (2) the court erred in relying on evidence, which not only lacked probative value, but which was not part of the administrative record and was submitted for the first time in the Article 78 proceeding; and (3) even were the issue properly before the court, it nevertheless erred in concluding that there was no evidence in the administrative record "that the apartment used for computation purposes was the same size or similar". In addition, even had the court been correct in its conclusions as to the rent computation, it erred as a matter of law by substituting its own judgement in limiting which apartments could be used as a basis for recomputing the rent.

With regard to the first point, the owner improperly raised for the first time in the Article 78 proceeding the claim that DHCR based its rent determination on an apartment of a different size and layout. The issue was raised neither before the District Rent Administrator nor in the landlord's PAR. Furthermore, as noted in the second point of error, the issue relies on alleged facts regarding the location, size and layout of the apartment, based upon a floor layout purporting to represent the premises, which was never adduced before the agency in the course of the administrative proceeding. It is axiomatic that a court may not consider arguments or evidence not contained in the administrative record, but must determine whether an agency's determination is rational on the basis of the administrative record before the agency. The Appellate Division, Second Department, in Klaus v. Joy, 85 A.D.2d 603, 444 N.Y.S.2d 69 (2nd Dept. 1981), held:

In an article 78 proceeding, a specific objection to an order of the city rent agency cannot be considered by the court unless such objection has been first presented to the agency in the tenant's protest of the order (Administrative Code of the City of New York, Section YY51-9.0, subd. a, par. 2; Matter of La Russo v. McGoldrick, 232 App. Div. 720, 127 N.Y.S.2d 410). Petitioner's claims that (1), the order in question is violative of the equal protection clause of the United

States Constitution and the New York State Constitution; and (2) the District Rent Director was equitably estopped from issuing the order, appear nowhere in the petitioner's protest and therefore are not properly before this court.

Not only was the issue improperly considered by the court below, but, as this Court held in Fanelli v. New York City Conciliation and Appeals Board, 90 A.D.2d 756, 455 N.Y.S.2d 814 (1st Dept. 1982), aff'd, 58 N.Y.2d 952, 460 N.Y.S.2d 534 (1983), it was improper for the court to rely on "facts" asserted for the first time in the Article 78 proceeding which were never adduced before the agency:

Likewise improper was Special Term's reliance upon factual matter which had not been adduced before the CAB. The function of the court upon an application for relief under CPLR Article 78 is to determine, upon the proof before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. Disposition of the proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered (see Matter of Levine v. New York State Liquor Authority, 23 N.Y.2d 863, 298 N.Y.S.2d 71, 245 N.E.2d 804). The claim, advanced for the first time at Special Term that, in December 1980, a resolution had been passed to dissolve the corporate owner, was not made before the CAB. Accordingly, although we are in agreement that the issue is without legal effect here, the proof dehors the record should not have been considered by Special Term.

See also, Plaza Realty Investors v. New York City Conciliation and Appeals Board, 110 A.D.2d 704, 487 N.Y.S.2d 607 (2nd Dept. 1985); Celestial Food Corp. of Coram, Inc. v. New York State Liquor Authority, 99 A.D.2d 25, 471 N.Y.S.2d 654 (2nd Dept. 1984).

Clearly, the court below erred in considering not only the new issue raised by the owner, but the new "facts" introduced during the Article 78 proceeding.

With regard to second point noted above, the new "facts" first introduced in this Article 78

proceeding, even if they were properly before the court below, would not warrant a different determination of the rent than that reached by DHCR. This new evidence, which is termed "persuasive" by the court below, is a floor plan attached as an exhibit to the Article 78 petition. It allegedly establishes that the apartment selected as the basis for the DHCR's rent computation (apartment 2R) was of a different size and layout than the subject apartment (apartment 1D). However, even a casual perusal of this exhibit reveals that it proves nothing. The floor plans are practically unintelligible. It is impossible to discern what apartments are rendered in the plans. The plans do not even identify the premises by address (there is only a notation, "West 21st Street"). Nor is there an architect's certification as to its authenticity.

Clearly, the court, in finding that this was "persuasive evidence that the two apartments are not at all alike", was improperly substituting its own judgment for that of the agency. Furthermore, that judgment was based on evidence which was not only not before the agency, but which fails to demonstrate any error in DHCR's conclusion, which was based on clear evidence in the record.

As the DHCR's determination in the case at bar is supported by a rational basis in the record, even though the court may in the first instance have decided the issue differently, it could not substitute its views during judicial review for that of the agency. Mid-State Management Corp. v. New York City Conciliation and Appeals Board, 112 A.D.2d 72, 491 N.Y.S.2d 634 (1st Dept. 1985, aff'd, 66 N.Y.2d 1032, 499 N.Y.S.2d 398 (1985)). In Bambeck v. State Division of Housing and Community Renewal, 129 A.D.2d 51, 517 N.Y.S.2d 130, 132 (1st Dept. 1987) (reversing judgment entered May 13, 1986), Sup. Ct., N.Y. Co., Pecora, J.), this Court held that:

In our view....the court [below] inappropriately substituted its judgment for that of respondent on factual matters which were within respondent's primary jurisdiction to determine. The central issue at

Special Term was whether the determination had a rational basis and, although the court may, in the first instance, have decided the issue differently, it could not substitute its own views for those of the agency in the absence of a finding that the administrative determination was arbitrary, capricious or irrational.

See also, Phelps Management Co. v. Gliedman, 86 A.D.2d 540, 446 N.Y.S.2d 72 (1982) (reversing judgment entered March 10, 1981, Sup. Ct., N.Y. Co., Pecora, J); Matter of Buhagiar v. DHCR, 138 A.D.2d 226, 525 N.Y.S.2d 202 (1st Dept. 1988) (reversing judgment entered April 20, 1987, Sup. Ct., N.Y. Co., Pecora, J); Matter of Rose Associates, 121 A.D.2d 185, 503 N.Y.S.2d 13 (1st Dept. 1988) (reversing judgment entered June 20, 1985, Sup. Ct., N.Y. Co., Pecora, J).

With regard to the third point noted above, the court below erroneously found that "the record before the agency is completely devoid of any evidence that the apartment used for computation purposes was the same size or similar to the subject apartment." In fact, the information from which DHCR chose apartment 2R for determining the rent was based on the owner's own registration statements filed with DHCR. Those registration statements showed that both apartment 2R and 1D (the subject apartment) have two rooms (Return: A-5). Hence, the owner's own submissions to the agency indicate that the apartments are comparable.

Plainly, there was warrant in the record for the DHCR's determination. Surely, it was reasonable for DHCR to rely on the owner's own representations. As the administrative record is otherwise devoid of evidence which would establish any meaningful differences between the two apartments, DHCR's determination is rationally based in the record. The rent determination was a correct application of DHCR's tripartite procedure¹. The court erred in its finding as a matter of law.

¹ The formula used by DHCR to determine the rent in the case at bar was developed to allow a uniform method for establishing the rent for an apartment where owners fail to comply with their obligations to maintain rent records. The formula was intended to provide uniformity,

Finally, even were the conclusion of the court below held to be correct as to the lack of an evidentiary basis in the record, it improperly limited on remand the apartments which might stand as the basis for recomputing the rent, by precluding use of the apartment previously chosen by DHCR. This ruling is once again an improper substitution by the court of its own judgment, in this instance prior to the agency's reconsideration of the matter. In Ansonia Associates v. State Division of Housing and Community Renewal, ___ A.D.2d ___, 538 N.Y.S.2d 259, 261 (1st Dept. 1989), this Court reversed an order issued by Justice Pecora because it "improperly limited the scope of the proceeding which is to be remitted to the DHCR." Even were the matter to be remanded to DHCR, the agency, as the trier of fact, should not be subject to unwarranted limits prior to a redetermination.

It is well settled that where there is a rational basis in the record to support an administrative determination, it should not be disturbed. Thus, the court cannot substitute its judgment for that of the administrative agency. See, Matter of Fresh Meadows Associates v. New York City Conciliation and Appeals Board, 88 Misc. 2d 1003, 390 N.Y.S.2d 351 (Sup. Ct., N.Y.Co., 1976, aff'd 55 A.D.2d 559, 390 N.Y.S.2d 69 (1st Dept. 1976), aff'd, 42 N.Y.2d 925, 397 N.Y.S. 2d 1007 (1977); Matter of Pell v. Board of Education, 34 N.Y.2d 222, 230, 356 N.Y.S.2d 833 (1974); Colton v. Berman, 21 N.Y.2d 322, 287 N.Y.S.2d 647 (1967). Clearly, the determination of the Deputy Commissioner for Rent Administration has a rational basis in fact, was rendered in full accordance with law, and is neither arbitrary or capricious. Contrary to the erroneous conclusion of the court below, it is thus entitled to judicial affirmance.

predictability, and equality of treatment and to streamline the processing of cases in which owners fail to provide the required rent records upon the filing of overcharge complaints. It was not meant to account for all variations among apartments. Were every variation to be taken into account, the agency would be faced with similar claims in numerous cases rendering the alternative procedure a dead letter.

CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed insofar as it remanded the proceeding for a redetermination of the amount of the rent overcharge, the determination of DHCR should be affirmed, and the petition dismissed with costs.

Dated: Bronx, New York
December 7, 1989

Respectfully submitted,

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