

To be argued by
RICHARD HARTZMAN

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.

REPLY BRIEF OF RESPONDENT-APPELLANT

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REPLY STATEMENT

This brief is submitted in reply to respondent's brief which attempts to challenge the underlying administrative finding through the use of evidence dehors the administrative record, which further continues the error of the court below by arguing that the court did not improperly substitute its judgment for that of the agency.

POINT I

RESPONDENT HAS IMPROPERLY RELIED UPON EVIDENCE AND ARGUMENTS FOR THE FIRST TIME IN ITS BRIEF ON APPEAL WHICH WERE NOT RAISED DURING THE ADMINISTRATIVE PROCEEDING OR IN THE COURT BELOW.

Respondent concedes that the only issue in this appeal is the decision of the court below concerning DHCR's choice of apartment for use in calculating the lawful stabilized rent under the alternative default procedure. However, respondent, in its brief on appeal, relies on a DHCR order in a separate proceeding, issued on November 18, 1986. This is the first time throughout the entire administrative and judicial proceedings in the matter that respondent has attempted to base its case on that order. On the basis of the well settled principle that a court may not consider arguments or evidence not contained in the administrative record (see cases cited on pages 11-12 of DHCR's main brief) this new "fact" should be disregarded by the Court. It was not even a basis for the erroneous decision rendered by the court below.

The November 18, 1986 order clearly was not part of the record before the District Rent Administrator in the instant case, having been issued almost a year after the District Rent Administrator issued the order herein--on December 3, 1985. Nor was it submitted by respondent to the Administrative Review Bureau during the administrative review proceeding in this case, although almost four months lapsed after issuance of the November 18, 1986 order before the proceeding was concluded. Thus, the November 18, 1986 order was not part of the administrative record herein.¹

¹ It should be noted that respondent's annexing of the order to its brief is a violation of this Court's rules. Not only was the document not part of the administrative record, but respondent

Nor did respondent raise, during the administrative proceeding, the issue of what apartment should be used in calculating the rent under the alternative default procedure.² Thus, its argument that the Administrative Review Bureau "is on administrative notice and deemed to have knowledge of its own administrative records and determinations", is totally vacuous. The Administrative Review Bureau did not have the issue of the choice of apartment before it. If an issue is not raised, the agency certainly has no obligation to search its records to see what if any other documents might affect the issue. Furthermore, during administrative review, which is analogous to appellate review in the courts, there is no requirement that there be further investigation beyond the administrative record developed during the prior proceedings. Finally, the burden is on the parties, not the agency, to bring before the agency any information and evidence which they believe relevant to the issues arising during the administrative proceeding. DHCR, which handles tens of thousands of cases every year, does not have the burden of searching its own records for what might or might not be relevant material, when the parties have neither made no effort to provide that material themselves, nor raised an issue warranting a search for such material.

Clearly, there was a rational basis in the record for the choice of apartment used in calculating the administrative record. That basis was respondent's own registration statements submitted to

conceded that it was erroneously attached to its Article 78 Petition. Indeed, while paragraph "7" of the Article 78 Petition refers to Exhibit "B" as respondent's PAR in the administrative proceeding under challenge herein, respondent erroneously attached its PAR challenging the November 18, 1986 order. The order in question is an exhibit to the latter PAR. Nowhere in the Article 78 Petition is reference made to the November 18, 1986 order. It is not cited in any way in the Article 78 Petition as a basis for the challenging the underlying administrative proceeding.

² Respondent falsely states in its brief that it raised the issue of the use of the apartment in its PAR. A perusal of the PAR, which is document B-1 of the Return, shows that the respondent did not question either the method of calculating the lawful rent under the alternative default procedure, or the choice of apartment used in that calculation.

DHCR showing that both the subject apartment and the apartment used to calculate the rent had two rooms. (See, appellant's main brief, pp. 14-15)

The District Rent Administrator properly relied upon a computer printout of registration information submitted to DHCR by the respondent. In addition, a copy of respondent's actual registration statement indicating that there were two rooms in the subject apartment was submitted as part of the tenants' answer to respondent's PAR (Return: B-4, Exhibit "P"). Despite the submission, respondent failed to challenge the information during its PAR. Certainly, if respondent did not challenge the evidence, the Administrative Review Bureau was not required to conduct a further investigation.

As for respondent's argument that DHCR should have taken account of the equities, this argument is also raised for the first time in its brief on appeal. Furthermore, the rent agency in developing the alternative default procedure, has taken account of the factors involved in rent overcharge proceedings, giving "due regard for protecting tenants and the public interest against unreasonable high rent increases". The circumstances in this case present nothing which would warrant a departure from the application of a procedure which has long been approved of by the courts. (See cases cited on page 9 of appellant's main brief.)

CONCLUSION

For the foregoing reasons, as well as those presented in DHCR's main brief, 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 reinstated in its entirety, and the petition dismissed with costs.

Dated: Bronx, New York
January 25, 1990

Respectfully submitted,

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