MEMORANDUM

SUPREME COURT : QUEENS COUNTY
IA PART 14

In the Matter of EDITH WIESENTHAL, X etc. - against - PAUL A. ROLDAN, etc., et al. X	INDEX NO. 14513/06 BY: ELLIOT, J. DATED: March 6,2007

In this Article 78 proceeding, petitioners Edith Wiesenthal and Phyllis Wiesenthal seek a judgment declaring that the implementation of the decision and order of respondent Paul A. Roldan Deputy Commissioner of the Office of Rent Administration, New York State Division of Housing and Community Renewal (DHCR) dated May 3, 2006, is arbitrary and capricious, and seek to modify the Rent History Report so that it conforms to the language of the Commissioner's order, to recalculate the maximum collectible rent to $387.86 a month, and to modify the rent overcharge period. Petitioners also seek to recover costs and attorneys' fees from the respondent agency.

Petitioners Edith Wiesenthal and Phyllis Wiesenthal are rent controlled tenants in a housing accommodation known as Apartment 4B, 85-32 143rd Street, Briarwood, New York. On January 6, 2000, the Wiesenthals filed a rent overcharge complaint with the DHCR, stating that they had moved into the subject apartment in October 1965 at which time the rent was

$124.00 per month, and that the current rent was $282.32 per month, pursuant to a DHCR rent reduction order. The tenants asserted that the landlord had disregarded rent reduction orders and had been overcharging them since 1996, that they were not served with RN-26 forms in contravention of the Rent Control Law, that they had been overcharged for fuel costs after the ending of the fuel cost program, and that they had been sent rent bills with differing amounts. The landlord, Crescent Five Associates, served an answer on February 8, 2001, in which it asserted that the claimed overcharge was for a period beyond the 2 year look back period under the Rent Control Law; that the Report of Maximum Rent issued on August 16, 1999 which provided that the rent was $282.32 a month from January 1, 1999, and the Report of Maximum Rent issued on August 30, 2000 which provided that the rent was $444.10 from January 1, 2000, were not incompatible and could be reconciled; that as the last rent was set at $444.10 there was no overcharge and no new report was necessary; and that it would investigate the service of the RN-26 forms and that even if the service was defective the owner had not forfeited its right to collect a prospective Maximum Base Rent (MBR) increase.

On January 17, 2003 the Rent Administrator issued an order establishing the Maximum Collectible Rent (MCR) for the subject apartment as $537.70 per month, effective January 1, 2001. The Rent Administrator determined that the MBR increases for the 1992-1993 biennial period were not included in the

calculation of the MCR, as the agency's records did not indicate that the owner had filed a requisite master building rent schedule for that period. In addition, notwithstanding the tenants' allegations regarding the landlord's failure to serve RN-26 forms for 1994-1995, and the late service of the RN-26 forms for 1999-1999 in March 2000, the Rent Administrator determined that the MBR rent increases for this period should be included in calculating the MCR, as the agency's records indicated that the landlord had filed the relevant master building rent schedules in which it affirmed that the requisite RN-26 forms had been timely served on the subject tenants. The Rent Administrator stated that as the DHCR does not have the authority to issue an order in an overcharge case that can be entered as a judgment, the tenants would have to commence a plenary action as regards any possible fuel overcharges. Attached to the Rent Administrator's order was a computer generated printout of the subject apartment's rental history from January 1, 1972 through January 1, 2001, with a brief explanation of each rent adjustment.

On February 21, 2003 the tenants filed a Petition for Administrative Review (PAR) in which they asserted that the DHCR had issued an order on April 21, 1989 denying the landlord a MBR rent increase for 1986-1987, and therefore the Rent Administrator had incorrectly included MBR rent increases for the 1986-1987 biennial period when calculating the MCR for the subject

apartment; that the Rent Administrator should not have included the MBR rent increases for the 1994-1995 biennial period as the tenants were not served with the RN-26 forms; and as the 1998-1999 RN-26 forms were not served until March 2000, MBR rent increase for this period should not have been included in calculating the MCR.

On February 27, 2003 the DHCR mailed a copy of the PAR to the landlord, along with a notice informing the landlord that it had 20 days in which to submit an answer. The landlord did not file an answer to the PAR.

Paul A. Roldan, the Deputy Commissioner of the DHCR issued a decision and order dated May 3, 2006 in which he granted the PAR in part, and recalculated the MCR in order to take into account that the landlord was not eligible to collect MBR rent increases during the 1986-1987 biennial period, due to a prior final order issued by the agency on April 21, 1989. The Deputy Commissioner reviewed the evidence in the agency's records, as well as the evidence submitted by the tenants, and found that:

> "As the record reflects that the subject apartment's maximum collectible rent was not increased from 1993 through 1996, which is contrary to the subject apartment's maximum collectible rents listed in the 1994 and 1995 "Master Building Rent Schedule(s)," the Commissioner finds that the subject tenants' allegation that they were not served with the 1994 and 1995 RN-26 forms is credible. Moreover, the Commissioner points out that the landlord did not submit a copy of the 1994 and 1995 RN-26 forms in this proceeding, although afforded ample opportunity to do so. Accordingly, the Commissioner finds that the landlord has

> forfeited his right to collect MBR rent increases for the 1994-1995 biennial period for the subject apartment. Based upon the above, the Commissioner finds that the Administrator's order herein under review should be modified to recalculate the subject apartment's maximum collectible rent taking into account that the landlord is not eligible to collect MBR rent increases during the 1994-1995 biennial period.
>
> The rent agency's records reflect that the 1998 and 1999 RN-26 forms that were served upon the subject tenants were both dated March 14, 2000, which is contrary to the landlord's affirmation in its 1998 and 1989 "Master Building Rent Schedule(s)" that the relevant RN-26 forms had been timely served within 60 days of September 1998. The Commissioner notes that when an RN-26 form has been untimely served the rent increase is to be collected prospectively. However, the Commissioner finds that the 1998-1999 MBR rent increases cannot be effective in the year 2000 because the landlord may not collect more than 7.5% in MBR rent increases during a calendar year, pursuant to Section 2201.6(a)(1) of the City Rent and Eviction Regulations. As the 1998-1999 RN-26 forms were served on the subject tenants during a subsequent biennial period, the Commissioner finds that the subject landlord has forfeited the right to collect MBR rent increases for the 1998-1999 biennial period for the subject apartment. Based upon the above the Commissioner finds that the Administrator's order herein under review should be modified to recalculate the subject apartment's maximum collectible rent taking into account that the landlord is not eligible to collect MBR rent increases during the 1998-1999 biennial period."

The Deputy Commissioner noted that the rents in this proceeding "do not include adjustments to the maximum collectible rents which may be effective after January 1, 2001, nor do they

include fuel cost adjustments the landlord may be entitled to collect". Attached to the opinion and order was a revised computer printout which recalculated the subject apartment's maximum collectible rent, taking into account the modifications set forth in the Commissioner's order. The Commissioner determined that the Rent Administrator's order should be modified to reflect that the maximum collectible rent was $432.34 per month, effective January 1, 2001.

Petitioners thereafter commenced this proceeding and seek a judgment declaring that the respondent's implementation of the decision and order of May 3, 2006 was arbitrary and capricious, modifying the Rent History Report so that it conforms to the language of the Commissioner's order, recalculating the maximum collectible rent to $387.86 a month, modifying the rent overcharge period, and directing the DHCR to pay petitioners' costs and attorneys' fees. Petitioners assert that although the Commissioner initially did not include in its calculations the MCR rent increases for the 1986-1987, 1994-1995 and 1998-1999 biennial periods as the landlord failed to properly serve the RN-26 forms, the Rent History Report reflects that rent increases were added prospectively, and therefore the calculation of the amount of rent for the subject apartment is arbitrary and capricious, fails to conform to agency precedent, and lacks a rational basis. Petitioners seek a judgment directing the issuance of a new Rent History Report which conforms to the

language of the Commissioner's order, recalculates the maximum collectible rent, and modifies the date of the rent overcharge period, thereby reducing petitioners' monthly rent to $387.86. Petitioners further seek a judgment directing the DHCR to pay their costs and attorneys' fees.

Petitioners' second cause of action against the landlord has been discontinued pursuant to a stipulation dated October 27, 2006.

Respondent, in opposition, asserts that its decision and order of May 3, 2006, the Rent History Report, and its calculation of the maximum collectible rent for the subject apartment, is neither arbitrary nor capricious, nor contrary to agency precedent and has a rational basis in the law and the record.

It is well settled that the court's power to review an administrative action is limited to whether the determination is in accordance with law and is neither arbitrary nor capricious (Administrative Code of the City of New York § 26-411[b]; see also Matter of Colton v Berman, 21 NY2d 322 [1967]; Matter of 36-08 Queens Realty v New York State Div. of Hous. and Community Renewal, 222 AD2d 440 [1995]). In the case at bar, the court finds that the DHCR's decision and order of May 3, 2006, which granted the tenant's PAR, and modified the Rent Administrator's order by recalculating the maximum collectible rent to be $432.34 a month, as well as the subject Rent History Report, has a

reasonable basis in the law and record, and is neither arbitrary nor capricious and, therefore, will not be disturbed.

It is well within the DHCR's scope of authority to determine the lawful rent for rent-controlled housing accommodations. (See 9 NYCRR 2202.22, Administrative Code of the City of New York, § 26-405). In the within proceeding, the Deputy Commissioner in his decision and order determined that the landlord had forfeited its right to collect MBR rent increases for the subject apartment for the 1994-1995 and 1998-1999 biennial periods, and recalculated the maximum collectible rent, taking into account that the landlord was not eligible to collect MBR rent increases during those periods. MBR rent increases thus were excluded for the 1986-1987, 1994-1995 and 1998-1999 biennial periods. Petitioners' assertion that it was an error for the MBR rent increases to be added back into the rent prospectively, and that this resulted in a mathematical error which is in conflict with the Commissioner's determination, is rejected. The court finds that the Rent History Report is consistent with the Deputy Commissioner's order, which explicitly stated that the MBR increases could not be collected during the stated periods, and were prospective only. Contrary to petitioners' assertions, the DHCR does not have a written policy which prohibits such rent increases from being applied on a prospective basis. The RN-26 form relied upon by petitioners states that a failure to timely serve the form will result in such an increase being granted only

prospectively. There is nothing in the RN-26 form, in DHCR policy, or the Rent Control Law and Regulations which permanently bars an owner from collecting an MBR increase, on a prospective basis. Since the violations which resulted in the 1989 order were corrected in 2000, the Deputy Commissioner properly included in his calculations the applicable MBR rent increases on a prospective basis. The court also notes that the rent calculations properly included applicable adjustments for rent controlled apartments which are provided for in Section 26-405 of the Administrative Code of the City of New York and DHCR Policy Statement #22.

Contrary to petitioners' assertions, the provisions of 9 NYCRR 2201.6(c) do not permanently bar a landlord who failed to serve a RN-26 form from collecting the maximum collectible rent. Rather, this provision provides that:

> "No increase in maximum rent pursuant to this section, in any year other than a year in which a maximum rent, established pursuant to section 2201.4 if this Part or adjusted pursuant to section 2201.5, takes effect, shall be collectible until the landlord shall have given notice thereof to the tenant on a form prescribed by the administrator. A copy of such form shall be filed with the administrator within 30 days of its transmittal to the tenant. Failure to comply with the provisions of this paragraph shall authorize the administrator to revoke the landlord's entitlement to any such increase."

Thus, there is nothing in this language which requires the respondent to permanently revoke the landlord's entitlement

to a rent increase due to its failure to timely serve the RN-26 forms. To the extent that petitioners assert that DHCR Fact Sheet #22 requires a different result, the court finds that said Fact Sheet does not carry the weight of law, and does not serve as a legal basis for establishing the eligibility for collecting a rent increase. The court therefore finds that the Deputy Commissioner properly included MBR rent increases in his calculations for the period of time after the RN-26 notices were in 2000.

Accordingly, petitioner's request to modify the DHCR's order of May 3, 2006, to modify the rent history chart, and for attorney's fees, costs and disbursements is denied in its entirety, and the petition is dismissed.

Settle judgment.

_____

J.S.C.