Matter of Hicks v New York State Div. of Hous. & Community Renewal
2007 NY Slip Op 34516(U)
March 8, 2007
Sup Ct, New York County
Docket Number: 112371/06
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 21
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In the Matter of the Application of
VICTORIA HICKS,

Petitioner,

INDEX NO. 112371/06

For a Judgment under CPLR Article 78

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

Administrative Review Docket #: UE420004RP
Related Administrative Review Docket #: TD420027RO
Rent Administrator's Docket #: SI420054R

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HON. DONNA MILLS, J.:

This is an Article 78 proceeding wherein petitioner tenant seeks an order and judgment (i) vacating respondent's Order and Opinion dated July 5, 2006 which established petitioner's rent at $852.97 per month as of January 1, 2005, and (ii) remanding this proceeding for a determination of petitioner's maximum collectible rent in a manner consistent with this court's determination.

In April 1998 petitioner became the tenant of a rent controlled apartment located at 102 East 4th Street in Manhattan. On September 13, 2004 she filed a rent overcharge complaint with respondent DHCR alleging that the owners were not entitled to an increase because they failed to serve petitioner with RN 26 forms reflecting fuel cost increases for the years 2002 through 2005.

The owners' answer stated (accurately) that no fuel cost increase had been charged since 1992. Petitioner replied that she had not received notices that the owners properly cancelled the fuel cost increases and requested respondent to examine all fuel cost reports from 1980 to date. By order dated March 24, 2005 respondent's Rent Administrator dismissed petitioner's complaint while finding that the maximum collectible rent for petitioner's apartment was $688.34 per month as of January 1, 2005. This was a good result for petitioner because it lowered her rent from $739.15. The owners filed a petition for administrative review (PAR) contending that the Rent Administrator's calculation of the maximum collectible rent was incorrect. The computer read-out of the apartment's rental history dating back to 1978 and other documents including rent orders and schedules dating back to 1990 were annexed to the PAR. By order and opinion dated July 5, 2006 (the Order), respondent's Deputy Commissioner granted the owners' PAR and found that the maximum collectible rent was $852.97 per month, effective January 1, 2005. In reaching his determination, the Deputy Commissioner examined the rental history of the apartment back to April 1, 1978, considered orders of eligibility for rent increases from the 1988-1989 biennial period, the 1990-1991 biennial period, the 1992-1993 biennial period, and the 1998-1999 biennial period and granted retroactive increases for the 1992-1993 biennial period and the 1998-1999 biennial period (see petitioner's exhibit L, pp 2-3). Petitioner responded with this Article 78 proceeding.

Petitioner's fundamental argument is that the Order was arbitrary and capricious and erroneous as a matter of law because respondent impermissibly examined the rental history of the subject premises "for more than two years, or in the alternative, more than four years prior to the Petitioner's filing of her overcharge complaint" (see petition ¶ 24). According to petitioner, the

four year maximum look-back period for examination of the rental history of a housing accommodation set forth in CPLR 213-a is not limited to rent stabilization as respondent contends. Petitioner then argues that respondent impermissibly charged petitioner with increases based on time periods when she was not the tenant of record or when she was not served with any notice of increases in the absence of substantial evidence that proper notices and forms for increases had been served.

In opposition, respondent contends that "[t]here is no statute, regulation or policy prohibiting DHCR from examining the prior rental history for more than two or four years on rent controlled apartments" and that the maximum base rent was properly calculated based on the facts and the record. According to respondent, the four-year period set forth in CPLR 213-a, relied on by petitioner, applies to court proceedings (as opposed to proceedings before the DHCR) relating to rent stabilized (as opposed to rent controlled) apartments. Attached as exhibit B to respondent's answer is an order of its Deputy Commissioner in an unrelated proceeding (Matter of Giaimo) which set forth respondent's position that "the Rent Regulatory Reform Act is not applicable to [rent controlled apartments] and the four year period accordingly is not applicable. The two year statute of limitations with respect to Rent Control is only applicable to recovery of overcharges in a court of competent jurisdiction and not to determining the rent."

As an preliminary matter, the court agrees with petitioner that she was not required to file a PAR from the Rent Administrator's March 24, 2005 order because she was not aggrieved by that order which decreased her rent to $688.34.

The parties equivocate as to whether the applicable period is two or four years because the law appears to be confusing. With respect to rent controlled apartments, a two year statute of

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limitations applies to recovery of overcharges (see *Westmoreland Associates, LLC v. Kispert*, 2002 WL 31777885 *2-3 [Civ Ct, NY Co, 2002]; *Christy v. Lynch*, 259 AD2d 324, 326-327 [1st Dept 1999]). However, in this Article 78 proceeding petitioner is not seeking to recover an overcharge. Rather, she is seeking a review in the nature of declaratory relief of respondent's determination of the owners' PAR. That determination, i.e., the Order, examined the rental history of the subject apartment for more than four years prior to petitioner's filing of her overcharge complaint in September 2004. CPLR 213-a provides that:

> An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action.

The statute applies to a "residential rent overcharge," without distinguishing between rent stabilized and rent controlled residences. The severability clause set forth in L. 1997, c 116, § 45 refers to "the entire system of rent control or stabilization." The court finds that CPLR 213-a prohibits the review of rental histories prior to the four years before an overcharge complaint is filed (see *Matter of Hatanaka v. Lynch*, 304 AD2d 325, 326 [1st Dept 2003]; *Thelma Realty Co. v. Harvey*, 190 Misc 2d 303, 306 [App Term, 2d Dept, 2001]; *78/79 York Associates v. Rand*, 175 Misc 2d 960, 965 [Civ Ct, NY Co, 1998], affd 180 Misc2d 316 [App Term, 1st Dept, 1999]). Furthermore, the amendments to CPLR 213-a expressly apply to proceedings before the DHCR, not just court proceedings as urged by respondent. Laws of 1997, c 116, § 46 provides as follows:

> The provisions of sections twenty-nine through thirty-four, thirty-nine

> through forty-three and forty-three-a of this act shall apply to any action or proceeding pending in any court <u>or any application, complaint or proceeding before an administrative agency</u> on the effective date of this act, as well as any action or proceeding commenced thereafter (emphasis added).

The court concludes that the four-year statute of limitations in CPLR 213-a applies to proceedings before the DHCR pertaining to rent controlled housing accommodations and that respondent's failure to limit its review of the rental history of the subject apartment to the period of four years prior to the filing of the overcharge complaint was arbitrary and capricious and an abuse of discretion (see CPLR 7803[3]; *Colton v. Berman*, 21 NY2d 322, 329 [1967]).

Accordingly, petitioner's application is granted and it is hereby

ORDERED and ADJUDGED that respondent's Order dated July 5, 2006 is hereby vacated, and it is further

ORDERED and ADJUDGED that this matter is hereby remanded to respondent for further proceedings in accordance with this decision.

This constitutes the decision, order and judgment of the court.

DATED: 3/8/2007

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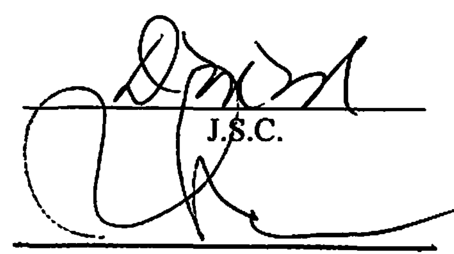

J.S.C.