[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Peter H. Moulton PART 40 B
Justice

Matter of
MARTHA White
V.
NYS DTCR

INDEX NO. 113601/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	Papers Numbered
Notice of Motion/Order to Show Cause — Affidavits— Exhibits	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No (previously decided by separate decision)

Upon the foregoing papers, it is ordered that the Petition is decided per attached

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 4/9/13

J.S.C.
HON. PETER H. MOULTON

New York, New York
PETER H. MOULTON

1. Check one: ..... ☑ Case Disposed ☐ Non-Final Disposition

2. Check as Appropriate: ..... Motion is: ☐ Granted ☐ Denied ☐ Granted in Part ☐ Other

3. Check if Appropriate: .....: ☐ Settle Order ☐ Submit Order

☐ Do Not Post ☐ Fiduciary Appointment ☐ Reference

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 40 B

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In the Matter of the Application of
MARTA WHITE,

Petitioner,

FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES

-against-

Index No.: 113601/11

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL and 85th Columbus Corp.

Respondents,

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PETER H. MOULTON, J.S.C.:

Petitioner, a rent controlled tenant, challenges a 2010-2011 Maximum Base Rent Order of Eligibility (the "MBR Order"), and the orders which upheld it, because they are based on the "exparte" submission of the owner's amended answer and the owner's false room count. The petition was held in abeyance pending further submissions in accordance with the Decision and Order, dated September 28, 2012. By Stipulation of Intervention, dated February 1, 2012, the owner was added as a party respondent to this proceeding.[1] The court deems the caption of the proceeding amended per above.

[1]As the owner's arguments are substantially the same as the agency's arguments, the court will only refer to the agency's arguments.

Arguments Regarding the Exparte Submission

Petitioner acknowledges receipt of the owner's answer, but states that she never received a copy of the owner's amended answer during the appeal before the Rent Administrator, depriving her of the opportunity to respond. The parties appear to agree that the amended answer merely corrects the physical description of the premises. Petitioner complains that this failure is a violation of Rent Stabilization Code § 2527.3 (a) (1) which provides that "where the application or complaint or any answer or reply thereto is made by an owner or tenant, the DHCR shall serve all parties adversely affected thereby with a copy of such application, complaint, answer or reply." Although this proceeding was brought by a rent controlled, and not a rent stabilized tenant, petitioner notes that rent stabilization and rent control laws are read *in pari materia*. Further, petitioner maintains that the agency's failure to serve her with a copy of the amended answer violates the New York Administrative Procedure Act § 307 (2) which forbids ex parte communications, unless otherwise authorized by law. Petitioner also cites *Matter of Spedicato v New York State Div. of Hous. & Community Renewal* (269 AD2d 233 [1st Dept 2000]), where the appellate court found that trial court properly vacated the agency's determination in light of the Commissioner's improper reliance on evidence never seen by the parties.

DHCR maintains that petitioner's citation to the rent stabilization code is misplaced because the apartment is rent controlled. The applicable regulation, DHCR maintains, is RER § 2207.3 (a) (1), and that provision only requires that the district rent administrator forward a copy of the application to all affected parties. Further, the agency argues that due process does not require that petitioner receive copies of every document filed in the proceeding, and also points out that the amended answer was served on petitioner at the PAR level.

Arguments Regarding the Room Count

In seeking the maximum base rent ("MBR") increase, the owner listed a total of 42 apartments.[2] However, in prior agency proceedings, the evidence submitted indicated that the owner made inconsistent references to other agencies as to the number of apartments (40 or 41 apartments).

The agency maintains that, excluding the initial MBR computations in 1972, the issue of the room count is irrelevant. Instead, the agency explains that pursuant to Rent Control Law § 26-405 a (3), increases are based on a small sampling of rent controlled buildings, which takes into account factors including real estate taxes, water and sewer charges, and operating and maintenance expenses for these buildings. The sampling is then applied citywide, because, as noted in *Tenants' Union of the West Side, Inc. v Beame*, 40 NY2d 133 [1976]), it was too time consuming and expensive for the agency to calculate the MBR for each individual building, and a sampling method is sound and fair.[3]

Petitioner complains that the Rent Administrator's Order improperly rejected her room count argument on this basis of the agency's finding in a prior fuel cost challenge under Docket number YC420005F. In that proceeding, the agency rejected the tenant's room count argument, stating that "the owner has consistently stated that there at 41 apts, 5 stores and 224 rooms and

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[2]The MBR is the cap on the rent that can be charged and the maximum collectible rent, the MCR, is the rent that is actually charged.

[3]Pursuant to Rent and Evictions Regulations § 2202.3 (c) and (h), the owner must certify that all rent impairing violations and 80 percent of other violations have been cleared during the requisite period, that 90 percent of the allowance for operating and maintenance expenses applicable to the building have been expended or incurred and that essential services are maintained.

the tenants never previously challenged the issue." In that proceeding, however, evidence was submitted demonstrating that the owner made a 2010 filing with the New York City Department of Finance, indicating that the building had 40 residential units, and filed a Multiple Dwelling Registration, reflecting 40 Class A residential units. However, that decision was not appealed.

Unlike the Rent Administrator's rejection of petitioner's room count argument, the Deputy Commissioner found that "any misstatement by the landlord as to the buildings room count cannot be used to impugn the landlord's certification of other statements required for the filing of the landlord's MBR application." Thus, the agency did not uphold the Rent Administrator's rejection of the room count argument on the ground that the room count argument was already decided, but rather because the issue is simply irrelevant.

Petitioner maintains that the false room count issue is not irrelevant because the inconsistencies mandate closer scrutiny of all of the owner's statements concerning its 2010-2011 MBR application.[4] In fact, in reply, petitioner goes one step further and argues that "these undisputed misrepresentations made to DHCR by Landlord in seeking DHCR approval for the MBR increase preclude DHCR as a matter of law, from accepting as true any representations by Landlord." Petitioner cites the doctrine of falsus in uno falsus in omnibus and *Matter of Artha Mgt. v New York State Div. of Hous. & Community Renewal* (143 Misc 2d 717 [Sup Ct, New York County 1989] ["The court agrees with DHCR, that where the contractor or supplier (or their principals) of the improvements have an equity interest in the owner, the figures must be

[4]Petitioner also states that during the pendency of the Petition for Administrative review, the Department of Buildings issued a Stop Work Order for work performed without a permit at the cellar level and at "6th Fl residence altered from 12 to 14 Apts."

extremely carefully scrutinized; very possibly the scrutiny must be more careful than the scrutiny in a normal case"]).

Discussion

Generally, courts will not interfere with the determinations of agencies unless "there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious" (*Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974] [internal quotation marks omitted]). "This settled standard requires the Court to assess whether the action in question was taken 'without sound basis in reason and ... without regard to the facts'" (*Matter of County of Monroe v Kaladjian*, 83 NY2d 185, 189 [1994]). However, where the issue of one of law, the agency is not entitled to deference because the issue is for the court (*see e.g, Matter of Bikman v New York City Loft Bd.*, 14 NY3d 377 [2010] [agency is not entitled to deference in interpreting the multiple dwelling law and the RCNY; matters of statutory interpretation do not require specialized agency knowledge]).

The agency determination denying petitioner's challenge to the MBR Order is neither arbitrary, capricious or irrational, nor does it violate due process or law. As to the false room count issue, the doctrine of falsus in uno is a doctrine which permits the fact finder, as a matter of discretion, to conclude that other statements are not worthy of belief. It does not compel any findings, as a matter of law (*see People v Johnson*, 225 AD2d 464 [1st Dept 1996] [the fact finder is "at liberty to disregard all of his testimony on the principle that one who testifies falsely as to one material fact may also testify falsely to other facts" and "accept so much of his testimony you believe to be true and reject only such part you conclude is false"]; *People v*

Whaley, 277 AD2d 151 [1st Dept 2000] [the fact finder has the "option" to disregard testimony]). Petitioner cites absolutely no authority for its contention that due to the inconsistencies in the room count, the agency is precluded *as a matter of law* from accepting the owner's representations as true. Because the doctrine is based on discretion, the court cannot find that the agency's determination was arbitrary, capricious or irrational. Notably, petitioner has produced no evidence disputing the Deputy Commissioner's finding that "the landlord's certification of violation removal has found to be accurate" and therefore, cannot point to how the agency abused its discretion.

Further, it was not arbitrary, capricious or irrational, nor did the agency violate due process or law in upholding the prior determinations, despite the purported exparte submission. Assuming that the referenced rent stabilization provision applies to her, and under that provision or the SAPA, she should have received a copy of the amended answer, petitioner cannot demonstrate that the proper remedy is to vacate the prior decisions and remand the issue to the agency "for processing and determination in compliance with legally mandated procedure." Petitioner has apparently conceded that the difference between the amended exparte answer and the original answer relates to the property description. As the Rent Administrator and Deputy Commissioner noted, petitioner responded to the original answer, point by point. Petitioner has advanced no argument as to why the matter must be remanded to the agency where the difference between the answers is not substantive and the resulting determination will remain unchanged.

It is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed, without costs and disbursements.

This Constitutes the Decision and Judgment of the Court.

Dated: April 9, 2013

ENTER:

J.S.C.

HON. PETER H. MOULTON