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

PRESENT: EMILY JANE GOODMAN PART 17

Index Number : 101856/2009
NELSON, GREGORY
VS.
NEW YORK STATE DHCR
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Petition is denied

for attached

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

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

Dated: 6/21/10

EMILY JANE GOODMAN J.S.C.

Check one: ☑ FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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In the Matter of the Application of
GREGORY NELSON,

Petitioner,

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

Index No.: 101856/09
DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent,

-and-

RESIDENTIAL MANAGEMENT, INC.,

Intervenor-Respondent.

----------X

HON. EMILY JANE GOODMAN, JSC:

In this Article 78 proceeding, petitioner seeks a judgment to overturn an administrative ruling by the respondent agency (motion sequence number 001). For the following reasons, this petition is granted.

FACTS

Petitioner Gregory Nelson (Nelson) is the tenant of record in apartment 2D, a rent-controlled unit in a building located at 1925 7th Avenue (the building) in the County, City and State of New York. *See* Petition, ¶ 1. Intervenor-Respondent Residential Management, Inc. (Residential) is the building's managing agent. *Id.*, ¶ 3. The respondent New York State Division of Housing and Community Renewal (DHCR) is the state agency charged with overseeing all rent-controlled and rent-stabilized housing in New York City. *Id.*, ¶ 2.

In 2007, Nelson had evidently been paying monthly rent in mounts ranging from $757.23

to $880.07. *See* Return, Exhibit A-1. On April 4, 2008, Nelson filed a rent overcharge complaint with the DHCR. *Id.* Residential did not respond to that complaint. On August 28, 2008, a DHCR rent administrator (RA) issued an order (the RA's order) that found as follows:

> After consideration of all the evidence in the record, the [RA] finds that the Maximum Collectible Rent for the above housing accommodation is $290.10 effective as of January 1, 2008. A complete rent history is attached.

Id., Exhibit A-4.

On October 3, 2008, Residential filed a petition for administrative review (PAR) of the RA's order with the DHCR Commissioner's Office. *Id.*, Exhibit B-1. Nelson did not respond to Residential's PAR. On December 12, 2008, the DHCR Commissioner's Office granted Residential's PAR in an order (the Commissioner's order) that found, in pertinent part, as follows:

> After a careful consideration of the evidence of record, the Commissioner is of the opinion that the landlord's PAR should be granted.
>
> The Commissioner finds that the definition of an essential service, the diminution of which would bar the collection of maximum base rent (MBR) rent increases, is stated in Section 2202.3 (b) (2) of the City Rent and Eviction Regulations and Policy Statement 90-1. The above provisions define an essential service as follows:
>
> > [H]eat during that part of the year when required by law, hot water, cold water, superintendent services, maintenance of front and entrance door security (including but not limited to maintenance of lock and buzzer), garbage collection, elevator service, gas, electricity and other utility services to both public and required private areas, and such other services wherein failure to provide and/or maintain such would constitute a danger to the life or safety of, or would be detrimental to the health of, the tenant or tenants.
>
> Based upon the rent agency's records, the Commissioner finds that there are no longer any rent reduction orders outstanding based upon a diminution of an essential service, as previously defined. Accordingly, the Commissioner finds

> that the order herein under review should be modified to reflect that the January 1, 2008 "rent in effect" (which is the rent the landlord would have been permitted to collect but for the previous bar on collecting rent increases), as noted in the computer printout attached to the [RA]'s order, should become the subject apartment's maximum collectible rent (the amount the landlord may collect). As noted in the printout, the "rent in effect" for the subject apartment was $688.11 per month, effective January 1, 2008. The Commissioner notes that any subsequent adjustments to the subject apartment's maximum collectible rent should be based upon the amount of $688.11 per month.
>
> As indicated in this order and opinion, the Commissioner finds that the subject apartment's maximum collectible rent was $688.11 per month, effective January 1, 2008. The Commissioner points out that this rent does not include any adjustments to the maximum collectible rent based upon any orders which may have been issued having an effective date after January 1, 2008, nor does it include fuel cost adjustments which the landlord may be entitled to collect.

Id., Exhibit B-1.

Nelson now claims that the Commissioner's order is incorrect because the Commissioner inaccurately reviewed apartment 2D's rental history, and ignored three rent reduction orders whose inclusion would have resulted in a lower maximum collectible rent. *See* Petition, ¶ 10. Nelson asserts that these reduction orders were granted for diminution of essential services, that they were in effect as of January 1, 2008, and that they remain in effect today. *Id.* Specifically, two of those reduction orders were imposed for failure to provide security guard service at the building's front door, and one of the orders was imposed as a result of Residential's failure to maintain the building's marble baseboards. *Id.*

The DHCR asserts that Nelson's claims regarding the three rent reduction orders are without merit. *See* Answer, ¶ 13. Residential makes the same assertion, and claims that none of those orders regarded an "essential service," within the statutory meaning of that term. *See* Berman Affirmation in Opposition, ¶¶ 33-55. With respect to the violations issued for

inadequate security guard service, Residential specifically claims that the DHCR issued two prior orders in separate, building-wide rent reduction proceedings (on May 16, 2002 and April 21, 2005, respectively) that did not classify security guard service as an "essential service." *Id.*, ¶¶ 35-41; Exhibits C, D. With respect to the violation issued for inadequately maintained marble baseboards, Residential claims that DHCR Fact Sheet 14 (reissued as revised in November 2004) specifically exempts such a violation from the agency's definition of "essential services." *Id.*, ¶¶ 50-53; Exhibit F.

On February 9, 2009, Nelson commenced this Article 78 Proceeding by filing a petition that requests an order: 1) vacating the Commissioner's order as arbitrary and capricious; 2) directing the DHCR to recalculate the maximum collectible rent for apartment 2D; and 3) finding that the Commissioner's order was not "substantially justified," pursuant to CPLR Article 86. *See* Petition. The DHCR eventually filed an answer on July 14, 2009. *See* Answer. In the meantime, however, Residential had intervened in this proceeding and filed opposition papers to Nelson's petition on June 16, 2009. *See* Berman Affirmation in Opposition.

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. Of Union Free School Dist. No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. and Community Renewal*, 232 AD2d 302 (1st Dept 1996). Further, "[t]he interpretations of respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational." *Matter of Metropolitan Assoc. Ltd.*

Partnership v New York State Div. of Hous. & Community Renewal, 206 AD2d 251, 252 (1st Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988). After a review of this record, the court finds that the Commissioner's order should be vacated and remanded to the DHCR.

Nelson's first argument in support of his petition is that the "DHCR's policy of permitting rent increases during periods in which essential services are denied violates the rent law and public policy." *See* Petitioner's Memorandum of Law, at 1-6. Nelson specifically asserts that:

> Under this policy, during a period when essential services are denied, owners are nevertheless credited, upon the issuance of a Rent Control History Report ... with maximum Collectible Rent Increases to which they are *not* entitled. This "Rent In Effect" lurks silently in the background until the day that the owner is granted a rent restoration, when it suddenly transforms into a rude awakening for the tenant, who may be faced with a sudden and enormous rent increase.

Id. The DHCR responds that Nelson did not raise this argument before the agency during either the RA proceeding or the PAR (in which he did not participate), and that the law does not permit him now, for the first time, to present his argument for judicial review. *See* DHCR's Memorandum of Law, at 13-15. The DHCR is correct. *See e.g. Matter of Muller v New York State Div. of Hous. & Community Renewal*, 263 AD2d 296 (1st Dept 2000). The DHCR also notes that at least one other decision by this court, *Matter of Lowe v State of N.Y. Div. of Hous. & Community Renewal* (3 Misc 3d 1105[A] NY Slip Op 50427 [u] [Sup Ct Queens County 2004]), has upheld a DHCR order that utilized the so-called "rent in effect" policy. *See* DHCR's Memorandum of Law, at 12. Although the court does not address Nelson's argument here, it does note that the "rent in effect" policy appears to be no more than a system of record keeping

that the DHCR uses to notate the difference between the amount of rent that a landlord is *currently* allowed to charge for a given apartment, and the amount that it *would be* allowed to charge if it rectified certain rent impairing violations. It hardly appears sinister. Therefore, the court rejects Nelson's first argument.

Next, Nelson argues that the Commissioner's order was arbitrary and capricious because it "disregarded ongoing rent reductions for deprivations of essential services." *See* Petitioner's Memorandum of Law, at 6-9. Nelson notes that the Commissioner's order itself quotes the definition of "essential services," set forth in 9 NYCRR § 2202.3 (b) (2), as including "maintenance of front or entrance door security," and "such other services wherein failure to provide and/or maintain such would constitute a danger to the life or safety of, or would be detrimental to the health of, the tenant or tenants." *See* Petitioner's Memorandum of Law, at 7-8. Nelson then cites an unpublished decision by the Civil Court of the City of New York, *Kiss v O'Grady* (NYLJ, Oct 29, 1993, at p 22, col 6), for the proposition that "door security is one of the 'essential services' delineated in DHCR Policy Statement 90-1." *Id.* at 8. The DHCR responds that whether or not a given service is an "essential service" is a factual determination that must be made by the agency. *See* DHCR's Memorandum of Law, at 5-11. The DHCR then notes that, in the orders that it issued in the two building-wide rent reduction proceedings on May 16, 2002 and April 21, 2005, it did not classify the front door security guard service as an "essential service." *Id.* at 10-11. The DHCR argues that both of those orders specifically recite that all services designated as "essential" would be marked with an asterisk, and that no asterisk appeared beside "security guard service" in either order's list. *Id.* Residential repeats the DHCR's argument. *See* Berman Affirmation in Opposition, ¶¶ 35-46. Nelson replies that,

despite the absence of the asterisk, the statute still defines door security as an "essential service," and urges that the court not read the statute "so as to reach an absurd result." *See* Petitioner's Reply Memorandum, at 11-13. After careful consideration, the court finds that Nelson is correct.

In *Lowe v State of New York Div. of Hous. & Community Renewal* (3 Misc 3d 1105[A] *supra*), the court (Hart, J.) noted that DHCR Policy Statement 90-1, which was promulgated on February 8, 1989, acts as a dividing line for the purposes of determining whether or not a given service constitutes an "essential service" for the purpose of calculating maximum base rent increases. In those orders dated prior to that date wherein the DHCR failed to distinguish between "essential" and "non essential" services, all services would be deemed to be "essential." In those decisions rendered subsequently, wherein the DHCR likewise failed to distinguish between "essential" and "non essential" services, only those services delineated in Policy Statement 90-1 would be deemed "essential." In *Matter of Schaefer v New York State Div. of Hous. & Community Renewal* (19 Misc 3d 1132[A] [Sup Ct, NY County 2008]), the only decision that appears to be factually on point with the issues present in this proceeding, this court (Kornreich, J.) reaffirmed the DHCR's role as the determiner of what constitutes an "essential service," and left undisturbed a PAR order wherein the Commissioner weighed the equities and determined that the landlord's failure to repair a second floor security gate was not so serious a matter as to warrant cancelling the building-wide major capital improvement (MCI) rent increase that the landlord was otherwise entitled to. However, Justice Kornreich was at pains to note that the RA in the underlying rent overcharge proceeding *had* declared the security gate to be an "essential service," and specifically *rejected* the Commissioner's later argument in the Article 78 proceeding that the absence of an asterisk in a similar building-wide rent reduction order afforded

the DHCR a basis to declare that said service was "not essential." *Schaefer v New York State Div. of Hous. & Community Renewal*, 19 Misc 3d 1132(A), * 7 ("The Commissioner based his decision on both the 2004 order granting the second MCI application and the lack of an asterisk on the original rent reduction order denoting the east side gate as an 'essential' service. Neither supports the Commissioner's decision that the east side gate service was not 'essential,' as that term is used in the regulations"). This court likewise concludes that Residential's ongoing failure to provide front door security guard service at the building constitutes a deprivation of an "essential service," and that the DHCR Commissioner's failure to treat it as such when calculating Nelson's maximum collectible rent was an arbitrary and capricious act. Therefore, the court finds that Nelson's motion should be granted on this ground, that the Commissioner's order should be vacated, and that Nelson's rent overcharge proceeding should be remanded to the DHCR for recalculation of Nelson's maximum collectible rent in light of this decision.

Finally, Nelson argues that the Commissioner's order was arbitrary and capricious because it "it failed to explain the Commissioner's departure from the agency's normal practice under Operational Bulletin 90-1." *See* Petitioner's Memorandum of Law, at 9-12. Nelson specifically refers to the violation for failure to maintain the building's marble baseboards, which was issued in 1976 before the DHCR promulgated Operational Bulletin 90-1. *Id.* Nelson argues that, because of the age of this violation, it must be deemed to refer to an "essential service." *Id.* In light of the holding of *Lowe v State of New York Div. of Hous. & Community Renewal* (3 Misc 3d 1105[A], *supra*), Nelson appears to be correct. The DHCR nonetheless argues that, because the building's marble baseboards were found to have been properly maintained during a subsequent inspection in 1990, the violation had been properly removed. *See* DHCR's

Memorandum of Law, at 11-13. The court notes that the DHCR does not present any documentation relating to this inspection, but relies upon the rule that it "may rely upon its orders as well as other materials within its files." *Id.* However, in his reply papers, Nelson presents a copy of a 2009 decision by the DHCR that denied a rent-restoration application by Residential, wherein the agency specifically found that the building's baseboards were still *not* properly maintained. *See* Dobkin Reply Affirmation, ¶¶ 31-37; Exhibit C. Certainly, this decision was not part of the PAR record before the DHCR. However, it appears that the "other materials within its files" that the DHCR now argues that it has a right to rely on were not part of the PAR record either. Therefore, the court rejects the DHCR's argument, and finds that the Commissioner's failure to treat the violation recorded for inadequately maintained marble baseboards as the deprivation of an "essential service," pursuant to the holding of *Lowe v State of New York Div. of Hous. & Community Renewal*, was an arbitrary and capricious act. Therefore, the court finds that Nelson's motion should be granted on this ground, that the Commissioner's order should be vacated, and that Nelson's rent overcharge proceeding should be remanded to the DHCR for recalculation of Nelson's maximum collectible rent in light of this decision.

The final branch of Nelson's motion seeks a determination that the Commissioner's order was not "substantially justified," pursuant to CPLR Article 86. *See* Petition, ¶¶ 49-50. However, Nelson does not advance any argument to support this request in either his moving or his opposition papers. Therefore, the court deems that he has abandoned it, and declines to grant this relief.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition of for relief, pursuant to CPLR Article 78, of petitioner Gregory Nelson is granted as follows:

The determination of the respondent New York State Division of Housing and Community Renewal, dated December 12, 2008, is vacated and this matter is remanded to said respondent, which is directed to recalculate the maximum collectible rent for petitioner's apartment (2D at 1925 7th Avenue, New York, N.Y.) in a manner that accords with the findings of this decision.

This constitutes the decision and judgment of this Court.

Dated: New York, New York
June 21, 2010

ENTER:

Hon. Emily Jane Goodman, JSC