STATE OF NEW YORK
DIVISION OF HOUSING AND COMMUNITY RENEWAL
OFFICE OF RENT ADMINISTRATION
GERTZ PLAZA
92-31 UNION HALL STREET
JAMAICA, NEW YORK 11433

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IN THE MATTER OF ADMINISTRATIVE APPEAL OF:	ADMINISTRATIVE REVIEW DOCKET NO: DV410047RT
Lawrence Mills	RENT ADMINISTRATOR'S DOCKET NO: DP410006RK
PETITIONER	

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ORDER AND OPINION DENYING TENANT'S PETITION FOR ADMINISTRATIVE REVIEW

The above-named Petitioner-tenant filed a timely Petition for Administrative Review (PAR) of an order issued by the Rent Administrator on September 10, 2015, concerning the housing accommodations known as 245 West 25th Street, Apartment 5D, New York, NY 10001. The Rent Administrator's Order that is the subject of the tenant's PAR found that apartment 6G, which apartment was submitted by the owner as a comparable apartment (a "comparable") in the same building as the apartment at issue, should be used as a comparable in this case; that the rent charged the tenant of apartment 6G on December 1, 2010 was $3,000.00 per month; that, pursuant to Special Guideline Order #42, which was in effect on the date that the first rent stabilized tenant to challenge the rent took occupancy, the 2010 Maximum Base Rent (MBR) of $692.87 per month was adjusted by an additional 50% resulting in a rent of $1,039.31 per month; that averaging the adjusted apartment rent of $1,039.31 per month and the $3,000.00 per month rent of comparable apartment 6G yields a rent for the subject apartment of $2,019.66 per month; that, because this amount exceeds $2,000.00 per month, the apartment is exempt from rent regulation pursuant to Section 2520.11(r)(4) of the Rent Stabilization Code (RSC); and that for this reason, the Agency lacks jurisdiction over the subject apartment and the proceeding is terminated.

The tenant's PAR alleges that apartment 6G was only used as a comparable after the owner submitted several other apartments that were found not to be acceptable comparables; that the tenant was served with summary notices regarding the Rent Administrator's intention to use apartments 2D and 3G as comparables, and was therefore able to successfully challenge the use of these apartments; that the tenant was not, however, served with a summary notice that apartment 6G was to be used as a comparable and was thereby prejudiced and deprived of his right and opportunity to challenge the rent of apartment 6G; that PAR Order CB410228RO held that failure to serve a summary notice in a Fair Market Rent Appeal (FMRA) proceeding is error requiring remanding of the proceeding; that, although the tenant's responses to owner submissions addressed the propriety of the rent of apartment 6G and the regulatory status of said apartment, the tenant was never served with a summary notice regarding apartment 6G; that, had the tenant been so served, he would have made a more focused review and challenge regarding this apartment; and that the tenant believes that apartment 6G is a larger apartment than the subject apartment and was fraudulently deregulated, so the matter must be remanded to give the tenant a full and fair opportunity to challenge the use of apartment 6G as a comparable.

The tenant further alleges that he established that there was a pattern and practice of fraud by the owner in that the owner often failed to serve required notices of decontrol and deregulation on the tenants; that filing a false registration is deemed fraud by the Courts, and a decision based on a fraudulent registration must be remanded for full review (citing PAR Order DO210006RP); that, despite a pattern of fraudulent acts by the owner, the Rent Administrator did not review the deregulation of apartment 6G; that this deregulation may be reviewed because RSC Section 2526.1 allows review of rental events prior to the base date when there is an issue of fraud or of the regulatory status of an apartment; that, when an apartment is used as a comparable, the owner must prove that said apartment was properly deregulated and that there was compliance with deregulation requirements; that apartment 6G was not properly deregulated pursuant to Altman v 285 West Fourth LLC, 127 AD3d 654 (1st Dept 2015) because the tenant's rent prior to the deregulation of apartment 6G was less than $2,000.00 per month; that, even without considering Altman, RSC Section 2523.7(b) requires that the owner had to produce rent history for apartment 6G for four years prior to the deregulation of said apartment; and that the Rent Administrator properly investigated rental events more than four years prior to the filing of the complaint in rejecting apartment 2D (finding this apartment was improperly deregulated while there was an outstanding 1987 rent reduction order) but did make a similar investigation of apartment 6G (citing RSC Sections 2526.1(a)(2)(iii) and (iv)).

Finally, the tenant alleges that, because the owner did not prove proper deregulation of apartment 6G, because the Rent Administrator did no required the owner to prove proper deregulation of apartment 6G pursuant to the RSC exception to the four year rule, and because apartment 6G was not properly deregulated pursuant to Altman, such apartment may not be used as a comparable unless the owner proves that it was lawfully deregulated; and that the apartment should therefore be found to be rent stabilized, the rent should be set at $1,049.31 per month pursuant to Special Guideline #42, and all excess rents paid by the tenant should be refunded.

The owner answered the tenant's PAR by alleging that the tenant has not disputed the dispositive facts that apartment 6G was deregulated in 2005, that neither the status of apartment 6G nor the registrations for said apartment were ever challenged, and that the formula used to calculate the FMR for the subject apartment in 2010 based upon the rent of apartment 6G is legally correct and resulted in an initial rent for the apartment that exceeds $2,000.00 per month; that the same result would have been reached using apartment 3H as a comparable; that, prior to his tenancy in the subject apartment, the tenant was unlawfully subletting apartment 5G; that the prior owner agreed to resolve this illegal sublet by allowing the tenant to move to the subject apartment under a standard unregulated lease, which lease was signed by the tenant; that the tenant began this proceeding two and a half years later, attempting to take advantage of the current owner's acquisition of the premises in 2012; and that, after expiration of the original lease, the owner commenced a holdover proceeding, which proceeding is stayed pending the determination of the instant proceeding.

The owner further alleges that, on May 14, 2015, it submitted apartments 6G and 3H as comparable apartments; that apartment 6G was deregulated on September 1, 2005 and apartment 3H was deregulated on July 28, 2010, both deregulations having occurred 90 days or more prior to the date of the first unregulated lease for the subject apartment; that apartment 6G contains four rooms, as does apartment 3H, which is the same number of rooms as the subject apartment; that the lease in effect on December 1, 2010 for apartment 6G was at a rent of $3000.00 per month, while the lease in effect on December 1, 2010 for apartment 3H was at a monthly rent of $2,995.00; that, using the proper formula using either apartment 6G or apartment 3H yields a monthly rent above $2,000.00 per month; that, because application of the undisputed formula yields a rent over $2,000.00 per month, the apartment is exempt from rent regulation pursuant to RSC Section 2520.11(r)(4); and that the tenant admits submitting responses on May 15, 2015 and July 28, 2015 challenging applicability of the comparables submitted by the owner, so the tenant therefore had full opportunity to dispute said comparables.

The owner also alleges that, within those responses, the tenant disingenuously argued that the owner was required to provide additional documentation establishing that the comparables were properly deregulated; that the Rent Administrator properly rejected this argument, finding that the owner is precluded by law from producing any documentation regarding the comparable apartments because the rents for said apartments had not been challenged for four years; that this proceeding is governed by RSC Section 2526.1(2)(ii) which states that the rental history of an apartment prior to the four year period preceding the filing of a complaint, pursuant to Section 2522.3 (the Section dealing with FMRAs such as this proceeding) "shall not be examined"; that, therefore, the registered rent of comparable apartments in a FMRA may not may be considered after passage four years without a challenge (citing PAR Order MJ410013RP, Matter of Muller v NYSDHCR, 263 AD2d 296 (1st Dept 2000), and Matter of Perry v NYSDHCR, 281 AD2d 629 (1st Dept 2001); that Agency Order MJ410013RP states that the four year limitation on examination of the rental history of a comparable apartment is precluded in FMRA proceedings when there has been a "lapse of four years without a challenge" to the legal regulated rent "regardless of whether an initial rent notice (RR-1 or DC-2) was served on the tenant"; and that the express language of the RSC states that the registered rents for such apartments are the legal regulated rents and are no longer subject to challenge.

The owner further alleges that RSC Section 2523.7 states that an owner is not required to produce any rent records in connection with FMRA proceedings relating to a period that is prior to the base date; that Altman does not apply because that case does not deal with FMRAs, and because Altman dealt with an owner's obligation to establish that the tenant's apartment was properly deregulated, which is not the same as this case which addresses whether the owner must provide rent records for a comparable apartment that was deregulated more than 11 years ago; that there are no cases holding that an owner must provide records to show that the unchallenged rent of a comparable apartment is legitimate in a FMRA context; that PAR Order CB410288RO, cited by the tenant, is not analogous because in that case the owner was not afforded an opportunity to submit additional comparables because the Rent Administrator did not notify the parties that a prior comparable apartment submitted by the owner was rejected; and that, unlike CB410288RO, the tenant had two opportunities to challenge use of 6G as a comparable and actually did make such a challenge.

Finally, the owner alleges that, although the tenant alleges that he should be given yet another opportunity to challenge the use of apartment 6G as a comparable, the tenant has not provided any credible evidence or persuasive argument as to why apartment 6G is not an acceptable comparable apartment; that the tenant is seeking to delay the proceeding by filing a FOIL request for information in his possession; and that, pursuant to RSC Section 2529.8, the Agency should consider the fact that the tenant permanently vacated the premises after issuance of the Rent Administrator's Order dismissing the FMRA.

The owner then made another submission, dated July 11, 2016, alleging that, pursuant to RSC Section 2529.11, the PAR is deemed denied as a matter of law because more than 90 days had passed since the filing of the PAR; and that a formal order denying the tenant's PAR should accordingly be issued.

The tenant responded to the owner's answer by repeating allegations made in the PAR, and by additionally alleging that he wants to challenge the use of apartment 6G as a comparable based upon its fraudulent deregulation and upon its size, but did not have the opportunity to do so because he was not served with the summary notice; that the owner's argument that the tenant challenged apartment 6G as a comparable is not persuasive because the failure to serve the summary notice deprived the tenant of the opportunity to focus on, investigate, and research apartment 6G; that the tenant's FOIL was to scrutinize the individual apartment improvements (IAIs) that allegedly brought the rent of apartment 6G from a stabilized rent of $518.01 per month in one year to permanently exempt the next year; that, for such increase of rent to be legal, the owner would have had to have performed at least $59,000.00 in IAIs to apartment 6G; that it is crucial to the instant proceeding that the owner submit proof of such IAIs to see if apartment 6G was lawfully deregulated; that Muller dealt with whether a FMRA could be maintained when an apartment is decontrolled for a reason other than vacancy and did not involve comparable apartments, and is therefore not analogous to the instant proceeding; that the Perry case held that dismissal of a FMRA was improper when the tenants had filed a timely FMRA, and did not deal with the issue of whether a comparable rent could be challenged due to fraud; and that neither case addresses the applicability of the four year statute of limitations to comparable apartments.

The tenant further alleges that, even if the four year limitation applies to FMRAs, it applies to the subject apartment and not to the comparable; that the owner offers no authority to support its contention

that there is a four year limitation on investigation into the possibility of a fraudulent deregulation of a comparable apartment used in a FMRA proceeding; that, as there is fraud here, there should be no limit on investigation into the propriety of the deregulation of apartment 6G; and that the owner must retain records for four years prior to the most recent registration, so the owner should produce records for apartment 6G from four years prior to the most recent registration in which it claimed that the rent stabilized rent was $518.01, which rent increased in one year to a rent in excess of the threshold for deregulation.

Finally, the tenant alleges that the owner relies on PAR Order MJ410013RP, issued over 17 years ago, to argue that there is a four year limit on examination of the rent history of a comparable apartment; that said case is not persuasive because in that case the comparable apartment was stabilized and continuously registered without challenge for five years until it reached the deregulation threshold, while in the instant case the rent for apartment 6G increased dramatically from $518.01 per month to exempt in one year; that MJ410013RP is also different because there was no indicia of fraud in that case, as there is herein; that the law has changed in the last 17 years, providing many exceptions to the four year rule; that RSC Section 2526.1 provides for review of rental history beyond four years prior to the filing of a complaint when there is an issue of fraud and/or of the regulatory status of an apartment; that the exceptions to the four year rule set forth in RSC Section 2526.1 do not exclude FMRAs; that, contrary to the owner's allegation, the Order at issue did not make any determination that the owner need not produce documents going back more than four years for the comparable apartment; that the tenant's leaving the apartment is not relevant to this proceeding; and that, despite the owner's allegation regarding the non-stabilized lease signed by the tenant, the tenant cannot waive any of his rights under the RSC.

The Commissioner is of the opinion that this PAR should be denied and that the Rent Administrator's order at issue should be affirmed.

First, regarding the owner's contention that RSC Section 2529.11 requires that the tenant's PAR be denied because more than 90 days have passed since the tenant filed the PAR, and that the PAR should therefore be deemed denied. RSC Section 2529.11 states that a PAR that is not processed within 90 days after it is filed, plus applicable extensions, may be deemed denied "by the petitioner for the purpose of commencing..." an Article 78 proceeding." The owner is not the petitioner. Nor does

RSC Section 2529.11 mandate that a proceeding be deemed denied if not processed within the 90 days provided. Rather, this Section of the RSC allows the petitioner, namely the tenant herein, to deem such a PAR denied for the purpose of going to court. RSC Section 2529.11 is not a provision for generally deeming denied a PAR that is not processed within the times set forth in said provision.

While the tenant was not served with a summary notice that apartment 6G was going to be used as a comparable apartment, the tenant did nonetheless have full opportunity to challenge, and did in fact challenge, the use of apartment 6G as a comparable. In the tenant's August 20, 2015 submission to the Rent Administrator, the tenant alleged that "the tenant has a right to challenge the deregulation of" said apartment; that "such challenge is excluded from the four year rule as it concerns the deregulation" of apartment 6G; that 6G must be rejected as a comparable because "the owner failed to submit the documentation necessary to prove the legal regulated rent for [this unit] ever reached the threshold amount for high rent vacancy deregulation"; and that "the owner also did not submit proof that exit registrations were ever served on the initial or subsequent" tenant(s) of apartment 6G.

In his June 25, 2015 submission to the Rent Administrator, the tenant alleged that apartment 6G may not be used as a comparable apartment "because the owner has not proved that [this apartment was] properly deregulated; that " the 2005 Rent Registration Apartment detail [for apartment 6G] indicates the last legal regulated rent was $556.86 and is permanently exempt due to "High Rent Vacancy," but the owner has not submitted any documentation demonstrating how the rent increased from $556.86 to the $2,000.00 deregulation threshold in effect in 2005"; that, because the owner is claiming that apartment 6G was properly deregulated, "and the registrations show that more than a vacancy allowance would be required for the apartment to reach the threshold for deregulation, the owner must prove that the rents were lawfully increased to $2000"; that "the owner has not demonstrated that the exit "PE" registrations and a notice of deregulation [was] actually serviced on the first deregulated tenant"; and that "a review of the rent history of [apartment 6G] is required in this instance pursuant to RSC Section 2526.1(2)(iv) because there appears to be a pattern of fraud to deregulate apartments at the subject building."

Therefore, before the Rent Administrator, the tenant made all but one of the arguments made again on PAR, as set forth above. The tenant was not, therefore, denied due process, and had a full and fair opportunity to address and challenge, and did in fact thoroughly address and challenge, the use of apartment 6G as a comparable apartment in this

proceeding. The only issue not raised by the tenant before the Rent Administrator, which issue is raised on PAR, is that apartment 6G is larger than the subject apartment. However, Agency records for apartment 6G show that it is a four room apartment, as is the subject apartment. Accordingly, for purposes of using apartment 6G as a comparable apartment, apartment 6G and the subject apartment are of the same size.

The deregulation of apartment 6G occurred in 2005. Pursuant to the RSC, investigation into the deregulation of said apartment is not permissible as said apartment was deregulated more than four years prior to the use of said apartment as a comparable. RSC Section 2523.7 states that an "owner shall not be required to produce any rent records in connection with proceedings under sections 2522.3…relating to a period that is prior to the base date." Section 2522.3 is the FMRA Section of the RSC. RSC Section 2523.7 is therefore clear and unambiguous in stating that there is to be no examination of rental events prior to the base date in FMRAs. This prohibition against examination of rental events prior to the base date in FMRAs applies to comparable deregulated apartments used in FMRAs as well. The deregulation of apartment 6G occurred well before the four years prior to the use of said apartment as a comparable and may therefore not be challenged or investigated at this time.

The exceptions to consideration of the rental history of an apartment prior to the four year base date of a proceeding do not apply to comparable apartments in FMRA proceedings. These exceptions are set forth in RSC Section 2526.1, which Section applies to overcharge proceedings and not to FMRA proceedings. Section 2522.3 of the RSC precludes "consideration of the rental history of the subject housing accommodation for the period prior to the four-year period preceding the filing of the" FMRA, and further states that, in setting the rent in a FMRA proceeding, the "rents for…comparable housing accommodations may be considered where such rents are…at the owner's option, market rents in effect for other comparable housing accommodations on the date the tenant filing the appeal took occupancy, as submitted by the owner." Accordingly, the RSC does not make any provision for examination of the pre-base date rental history of comparable apartments in FMRA situations. It is not contested that apartment 6G, the apartment proffered by the owner and used by the Rent Administrator, was deregulated in 2005, and that such deregulation was not challenged for four years following said deregulation. Accordingly, consideration of whether apartment 6G was or was not properly deregulated is precluded and may not be considered at this time, 11 years after the deregulation of such apartment. For this reason, the alleged failure of the owner to file proper notices of deregulation may not be considered.

Contrary to the tenant's allegations, for the reasons set forth above, the deregulation of apartment 6G may not be challenged or investigated even if there are allegations of fraud regarding such deregulation. The cases cited by the tenant, and other cases providing for investigation of the rental history of an apartment prior to the base date, do not involve comparable apartments, and do not involve FMRA proceedings. Regarding Altman, this case deals with when and how an apartment may be legitimately deregulated in the context of an overcharge proceeding. Altman does not address the issue of deregulation of an apartment that is used as a comparable apartment in a FMRA, which is the issue herein, and therefore is not relevant to the issue under consideration herein. Nor does Section 2526.1 of the RSC provide for any exception to the four year limit on examination of the rental history of a comparable apartment in a FMRA, as explained above. Section 2526.1 deals with overcharges and not with FMRAs, and applies to the apartment that is the subject of an overcharge proceeding and not to comparable apartments.

Further, as explained above, RSC Section 2522.3 of the RSC states that, in setting the rents pursuant to a FMRA, "consideration shall be given to the applicable guidelines", and that the rents of comparable apartments may be considered, including, "at the owner's option, market rents in effect for other comparable housing accommodations….". The special guideline allowed for apartments that have exited rent control is much higher than the regular vacancy and lease renewal guidelines. The owner is also allowed to choose to include apartments that are renting at free market rents as comparables in setting the FMR, and such rents can include any comparable free market rent apartment, whether such apartment was previously subject to rent regulation or not. These factors demonstrate that FMRAs are not to be treated in the same way as overcharge proceedings, and that it is expected and provided by the RSC that apartments that exit rent control will have a much higher rent thereafter. This also supports the above-conclusion that Altman does not apply to a comparable apartment in a FMRA context. Accordingly, there is no case law or provision of law or code that allows investigation or challenge of the deregulation of apartment 6G at this time.

The Commissioner finds that, contrary to the owner's contentions, the tenant was within his rights to file the FOIL that he filed and that there was no impropriety in the timing of the tenant's complaint herein. Nor does any alleged improper sublet prior to the tenancy at issue have relevance to the instant situation, which is confined to a determination of the tenant's complaint herein. The allegations that the tenant has

vacated the apartment, and that the owner has initiated a holdover proceeding, are also not relevant this matter, because, again and as explained above, this proceeding is confined to a determination of the tenant's complaint.

THEREFORE, in accordance with the provisions of the Rent Stabilization Code it is

ORDERED, that the owner's PAR of Rent Administrator's Order DP410006RK is denied.

ISSUED:

OCT 12 2016

Woody Pascal
Deputy Commissioner

Division of Housing and Community Renewal
Office of Rent Administration
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Right to Court Appeal

In order to appeal this Order to the New York Supreme Court, within sixty (60) days of the date this Order is issued, you must serve papers to commence a proceeding under Article 78 of the Civil Practice Law and Rules. No additional time can or will be given.

In preparing your papers, please cite the Administrative Review Docket Number which appears on the first page of the attached Order.

Court appeals from the Commissioner's orders should be served at Counsel's Office, Room 707, 25 Beaver Street, New York, New York 10004. In addition, the Attorney General must be served at 120 Broadway, 24th Floor, New York, New York 10271.

Since Article 78 proceedings take place in the Supreme Court, you may require the professional help of an attorney.

There is no other method of appeal.