

This opinion is uncorrected and subject to revision in the Official Reports. This opinion is not available for publication in any official or unofficial reports, except the New York Law Journal, without approval of the State Reporter or the Committee on Opinions (22 NYCRR 7300.1)

MEMORANDUM

SUPREME COURT : QUEENS COUNTY
CIVIL TERM IAS PART 3

In the Matter of the Application of : X BY: Justice John A. Milano
Lois D. Lumberger, : : Index No. 14901/00
 : :
Petitioner, : : Motion Date: December 5, 2000
 : :
for a judgment pursuant to Article 78: Motion Cal. No. 27
of the Civil Practice Law and Rules, : :
 : :
-against- : :
 : :
PAUL RODAN, Deputy Commissioner of : :
the Office of Rent Administration, : :
for the New York State Division of : :
Housing and Community Renewal, : :
 : :
Respondent. : :
X

In this Article 78 proceeding petitioner Lois D. Lumberger seeks a judgment vacating the decision and order of respondent Paul Roldan, Deputy Commissioner of the Office of Rent Administration, for the New York State Division of Housing and Community Renewal (hereinafter "DHCR"), dated April 26, 2000.

Petitioner Lois D. Lumberger is a rent stabilized tenant in a housing accommodation located at 110-37 64th Avenue, first floor apartment, Forest Hills, New York. On August 10, 1994, Bracha and Reuven Azachi, the owner of the subject housing unit, filed an application with the DHCR for a modification of services so that the tenant would pay for electricity and cooking gas. The application was filed at the direction of the Civil Court so that the agency could review the matter and ascertain the appropriate rent adjustment, if any, for the exclusion of those services from the tenant's base rent. The owners, in their application, stated

that the tenant had been given her own gas and electric meters. The premises consist of a two-family house, with the tenant occupying the first floor. The premises were previously known as the Villas at Forest Hills or Central Gardens, a garden apartment complex, which underwent a conversion to individual ownership. On February 2, 1989, the remaining tenants of this garden apartment complex entered into a stipulation of settlement of an enforcement proceeding prosecuted by the DHCR with the prior owners. Mrs. Lumberger was one of the remaining tenants, and pursuant to the stipulation, was given a rent stabilized lease with a base service date of January 1, 1989. The Stipulation of Settlement was accepted by the Commissioner of the DHCR on June 29, 1989. Paragraph 35 of the rider to the rent stabilized lease applicable in accordance with the stipulation provided that "[w]here in each apartment: 6. [l]andlord will pay for electricity service where Landlord has installed or will install electric stove as per paragraph 36." Paragraph 36 provided that "[w]ith respect to electrical stoves the Landlord will be obligated to pay for said stoves and the Villas of Forest Hills Company or any successor or assigns or subsequent purchaser waives any right to apply to DHCR or any other governmental authority for a rent increase based upon this subject improvement, further under no circumstances will the Tenants be obligated to pay for the electricity and the Villas of Forest Hills Company or any successor or assign or subsequent purchaser waives any right to apply for a rent increase based upon this subject improvement and waives any right to terminate the

respective electrical accounts which will fuel the subject electric stove."

In 1988, the then landlord provided Mrs. Lumberger with a gas fueled cooking stove that has an electric ignition. In February 1993, the tenant began paying for her own cooking gas when the owner unilaterally eliminated the service and installed a separate gas meter for the first floor apartment. In addition, from December 1982 to June 1992, the tenant paid electricity from a shared meter for her apartment and for other areas of the building, including the common areas and boiler. In June 1992, the owner installed a separate electric meter and the tenant thereafter only paid electric charges for her apartment.

On January 4, 1994, the Civil Court issued a stipulation of settlement, whereby the owner and the tenant agreed to refer for the DHCR's determination what amount of the rent reduction, if any, was appropriate for the gas exclusion and the owner's assumption of electric charges previously paid by the tenant.

The owner thereafter filed the August 10, 1994 petition with the DHCR. On July 29, 1997, the District Rent Administrator issued an order permitting the owner to exclude electric current service from the rent and granted the tenant a corresponding rent adjustment, and permitted the owner to eliminate cooking gas and provided the tenant with a 10% reduction of the rent for the cooking gas.

The tenant filed a petition for administrative review ("PAR") on October 31, 1997, in which she stated that she did not

object to the Rent Administrator's order, but requested that the termination of the gas be as of February 25, 1997 and that the effective dates be set as February 25, 1997 to July 1997. On November 19, 1997, the tenant's PAR was denied as it was not filed within 35 days after the issuance of the Rent Administrator's order of July 25, 1997.

The owner filed a PAR on August 13, 1997 in which it was asserted that there should be no rent adjustment for the exclusion of electricity as the tenant had always paid for her own electricity, and it was not a service included in her rent. The owner also asserted that the 10% decrease in rent for the exclusion of cooking gas was excessive. The DHCR notified the tenant of the owner's PAR on September 26, 1997, and the tenant, in a letter dated January 6, 1998, requested that the effective date for the rent reduction for her cooking gas be set at February 25, 1993. The Deputy Commissioner of the DHCR, Paul Roldan, issued a decision and order on April 26, 2000, in which he found that the provision of electricity was not a service provided by the owner on the base date of January 1, 1989, and, therefore, the Rent Administrator should not have granted a rent reduction for electrical inclusion. The Deputy Commissioner, therefore, revoked that part of the Rent Administrator's order which directed the owner to reduce the tenant's rent for electrical exclusion. The Deputy Commissioner, however, found that cooking gas was a service provided by the owner on the base date of January 1, 1989 and that the tenant had not filed a PAR objecting to the elimination of cooking gas. The

Deputy Commissioner reviewed the tenant's gas account records and determined that her median monthly gas payment from November 1993 to November 1996 was \$23.58. The Deputy Commissioner, therefore, found that a 10% reduction per month, at the time the application was filed in August 1994, was an excessive adjustment. The Deputy Commissioner, therefore, modified the adjustment to \$24.00 a month, effective August 1, 1997.

Petitioner Lois Lumberger now seeks a judgment vacating the DHCR's decision and order of April 26, 1997. Mrs. Lumberger asserts that the owner was required to pay for the electricity that ignites her cooking stove, pursuant to the rider to the lease that was issued following the 1989 stipulation, and that the amount of the reduction in rent for the elimination of the cooking gas service was too little. Mrs. Lumberger asserts that she is a senior citizen and that the amount of rent she is presently paying is excessive.

Respondent DHCR, in opposition, asserts that the issue of the tenant's permission to modify or eliminate the gas and electric service had already been settled in the Civil Court and that the only issue for the agency to determine was the proper rent. It is further asserted that its decision and order of April 26, 1997 is neither arbitrary nor capricious, has a reasonable basis in law and is supported by the evidence in the record.

Petitioner, in a reply affirmation by counsel, who was apparently retained after the within proceeding was commenced, asserts that she should have received an electric stove in 1989,

paid for by the landlord, and that the dollar amount of the rent reduction set by the landlord is arbitrary and unreasonable.

The DHCR asserts that the issues raised by the petitioner in her reply constitutes new evidence and testimony by counsel relating to events that took place in 1989, which were not part of the administrative record, and, therefore, not subject to review here.

An affidavit has also been submitted by the attorneys for the owners of the subject premises. Inasmuch as the owners never sought nor were granted intervenor status in this proceeding, this affidavit shall not be considered by the court.

It is well settled that the court's power to review an administrative action is limited to whether the determination was warranted in the record, had a reasonable basis in law and was neither arbitrary nor capricious. (Colton v Berman, 21 NY2d 322; Matter of 36-08 Queens Realty v New York State Div. of Hous. and Community Renewal, 222 AD2d 440.) In the case at bar, the court finds that the Deputy Commissioner's decision and order of April 26, 2000 is supported by substantial evidence in the record, has a reasonable basis in law, and is neither arbitrary nor capricious.

Section 2520.6(r) of the Rent Stabilization Code defines required services as including a service that was maintained on the base date or that was provided by the owner thereafter. Although section 2520.6(r)(4) provides possible base dates for a variety of circumstances, the tenant and the owner agreed to make January 1,

1989 the base date pursuant to the January 30, 1989 Stipulation of Settlement. The Deputy Commissioner properly determined that the electricity usage for the apartment was not included in the rent as of January 1, 1989, and, therefore, it was proper for him to correct the Rent Administrator's order which granted a rent reduction based on the elimination of electrical usage. The court finds that contrary to petitioner's assertions that provisions of the lease and stipulation that pertain to electricity only refer to electric stoves, and make no provision for the owner to provide electricity used to ignite the stove used by petitioner.

The court further finds that the Deputy Commissioner properly determined that the cooking gas was a service provided by the owner on January 1, 1989, that the tenant and the owner had agreed to eliminate this service, and that the rent reduction of 10% for the gas meter modification was excessive, as it would, in effect, reduce the rent by nearly double the average monthly amount the tenant paid for cooking gas. The Deputy Commissioner examined the tenant's gas bills for a period of three years and determined that the median amount paid for cooking gas was \$24.00. The court finds that this figure was accurate, reasonable and supported by the evidence in the record and, therefore, was neither arbitrary nor capricious. The court notes that the tenant in her submissions to the agency admitted that she would turn the stove on in order to warm the apartment in the winter, and this resulted in higher gas bills. This act by the tenant, however, does not entitle her to any greater reduction in rent based on the elimination of cooking

gas. To the extent that the tenant alleges that the owner fails to provide adequate heat, she may file a complaint with the agency for a rent reduction based upon the reduction in essential services. The tenant may also file a complaint with the agency in the event that she believes that she is being overcharged in her rent. These issues, however, were not before the administrative agency and, therefore, cannot be considered here for the first time. (See generally, Matter of Simkowitz v Division of Housing and Community Renewal, 251 AD2d 5; Matter of Birdoff & Co. v New York State Div. of Housing and Community Renewal, 204 AD2d 630; Matter of Fanelli v New York City Conciliation & Appeals Board, 90 AD2d 756, affd 58 NY2d 952.)

The court further finds that to the extent that the tenant asserts that the owner failed to provide her with an electric stove pursuant to either the lease or stipulation, she may commence an action to enforce the stipulation, or for breach of contract. Finally, it is not within the agency's jurisdiction to direct the owner to refund any money that may be owed to the tenant for gas or electric service that should have been billed to the owner instead of the tenant.

In view of the foregoing, the tenant's petition to vacate the DHCR's decision and order of April 26, 2000 is denied, and the petition is dismissed.

Settle judgment.

Dated: March 5, 2001

Justice John A. Milano