

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

PRESENT: JANE S. SOLOMON

Justice

PART 55

Leroff J

INDEX NO.

107873-02

MOTION DATE

10/28/02

MOTION SEQ. NO.

11

MOTION CAL. NO.

DHCR etc

The following papers, numbered 1 to 15, were read on this motion to/for

Art 78 relief

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

1-3

SCANNED

4-13

JAN 09 2003

14-15

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion petition is decided in accordance with the annexed memorandum decision, order and judgment.

DHCR CANNOT RELY ON EX PARTE COMMUNICATIONS SUBMISSIONS FROM OWNERS

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 12/23/02

JANE S. SOLOMON  
J.S.C.

Check one: ☒ FINAL DISPOSITION

☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 55

-----X  
In the Matter of the Application of

JANET LEVOFF,

Index No. 107873/02

Petitioner,

-against-

THE NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL and CENTRAL PARK  
ASSOCIATES LLC,

DECISION, ORDER AND  
JUDGMENT

Respondents.

-----X  
JUSTICE JANE S. SOLOMON:

Petitioner Janet Levoff (Levoff) is the tenant in a rent stabilized apartment on West 64<sup>th</sup> Street near Central Park West. The apartment is a small one-bedroom that she rented for \$1850 per month, beginning August 1, 1999. After she moved in she learned that the previous tenant paid a substantially lower rent. She filed a complaint of rent overcharge with respondent New York State Division of Housing and Community Renewal (DHCR). She commenced this petition seeking to reverse and annul the DHCR's determination that there was no rent overcharge. For the reasons below, the petition is granted in part.

When Levoff moved into her apartment, it was newly renovated. Her landlord, respondent Central Park Associates LLC (CPA) argues that it spent more than \$50,000 on renovations, and that it increased the rent for the apartment within the legal guidelines by passing on the renovation cost. In the DHCR proceeding, Levoff claimed that the building superintendent, a CPA employee, was seen by other tenants performing the work

in her apartment. She also pointed to what she viewed as discrepancies between the contracts CPA allegedly made in connection with the renovation and the work actually performed, including the fact that **CPA** failed to provide to the DHCR a signed copy of the contract. Taken together with her allegation that the building superintendent, and not the contractor, performed the work, Levoff argued that the part of her rent increase resulting from the renovation expense was improper. By an order dated September **21**, 2000, the **DHCR** rent administrator denied Levoff's overcharge complaint. She filed a petition for administrative review (**PAR**), the denial of which is the subject of this action.

On November **21**, **2001**, while the **PAR** was under review, CPA's attorney submitted to the **DHCR** its answer and accompanying affidavits from the contractor and the building superintendent. The affidavits contest Levoff's allegations regarding the work performed, and provide an explanation regarding how the building superintendent was employed and compensated. CPA's attorney also submitted a copy of a signed contract with the contractor. The DHCR did not send a **copy of CPA's** submission to Levoff. In the order denying Levoff's **PAR**, the deputy commissioner of the DHCR CPA stated that "The record reflects that the owner did submit a copy of the contract . . . signed by both the owner and contractor in the proceeding below . . . [and] the contractor explained that it is his practice to use building employees in his work but that he pays them separate and apart from their

employment at the premises." These findings were stated in support of the **DHCR's** determination that Levoff's allegations regarding the work performed in her apartment, and its actual cost to **CPA**, were unfounded.

The petition alleges in its first cause of action that the **DHCR's** order denying **her** **PAR** was arbitrary and capricious, **and** was an abuse of discretion. The second cause of action alleges that Levoff is entitled to recover attorney's fees because the order was not substantially justified. **CPLR 8601(a)**. The petition is opposed by CPA and the **DHCR**.

## **DISCUSSION**

Generally, where a property owner can show that it installed **new** equipment or made substantial improvements in an apartment, it is entitled to a rent increase. Rent Stabilization Code (RSC) § 2522.4(a) (1). When the improvement is made to a vacant apartment, the incoming **tenant's** consent is not required.

**Id.** **DHCR** Policy Statement 90-10 provides that an apartment improvement cost must be supported by checks contemporaneous with completion of **the work**, a contemporaneous invoice marked paid in full, a signed contract agreement, **and** a contractor's affidavit indicating that the installation was completed and paid in full.

**In** this case, CPA provided material required under Policy Statement 90-10 after the rent administrator's initial **order** was issued denying Levoff's overcharge complaint, and while her **PAR** was under consideration. This presents a problem because

the scope of review for a PAR is limited to the facts or evidence before the rent administrator. **RSC § 2529.6.** A further problem is presented because the **DHCR** is required to serve a copy of any complaint, application, answer or reply upon all parties adversely affected by the document. **RSC § 2527.3 (a)(1).** The **DHCR** did not serve a copy of **CPA's** submission on Levoff, and she only learned of it after the order denying her **PAR** was issued.

The documentation submitted by **CPA** supports its claim that the rent increase was properly made. Therefore, it cannot be said that the **DHCR's determination** was arbitrary and capricious, or not substantially justified, so far as the facts it relies upon are supported by **CPA's** tardy documentation. However, the **DHCR's** failure to provide Levoff with the material submitted by **CPA**, material which it clearly relied upon in the order denying the **PAR**, constitutes a failure to adhere to lawful procedure. Moreover, the order denying Levoff's **PAR** was made in excess of the **DHCR's** jurisdiction because the record **relied** upon should have been limited to the material of record when the rent administrator made his **determination**. That material did not include the signed contract or the contractor's affidavit, **so it** did not satisfy the evidentiary requirements of **DHCR Policy Statement 90-10**. Levoff correctly argues that the material relied upon by the **DHCR** was improperly considered. See, RSC § 2529.6. The **DHCR's** reliance upon an ex parte communication from **CPA**, whether or not the result of a bureaucratic mistake, constitutes a violation of the due process to which Levoff is

entitled. At a minimum, fundamental fairness dictates that Levoff be provided the opportunity to respond to CPA's November 21, 2001 submission, and that the DHCR decide her rent overcharge complaint based on the entire record. Matter of 47 Clinton St. Co. v N.Y.S. Division of Housing and Community Renewal, 161 AD2d 402 (1<sup>st</sup> Dept 1990).

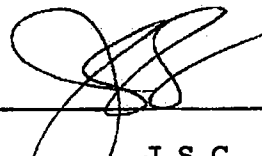
Accordingly, it hereby is

**ORDERED** and **ADJUDGED** that the second cause of action, which seeks attorney fees under CPLR Article **86**, is denied and dismissed; and it is further

**ORDERED** and **ADJUDGED** that the petition ~~is~~ granted to the extent that the matter is remanded to the DHCR for further proceedings consistent with this decision, and the Clerk of the Court is directed to enter judgment accordingly.

Dated: December *23*, 2002

ENTER :

  
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J.S.C.  
**JANE S SOLOMON**  
J.S.C.