Supreme Court, Appellate Division, Second Department, New York.
ROCKAWAY ONE COMPANY, LLC Respondent,
v.
Deborah WIGGINS, Appellant.
No. 2004-08794.
February 9, 2005.

Respondent's Brief

Michael R. Koenig, Esq., Attorney for Respondent, 524 North Avenue, New Rochelle, NY 10801, (914) 235-3200, On the Brief: Hal D. Weiner, Esq., Santo Golino, Esq.

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***1** *PRELIMINARY STATEMENT*

Respondent/Landlord commenced the underlying summary non-payment proceeding and Appellant/Tenant raised the defense of "rent overcharge". Prior to Appellant taking occupancy, Respondent increased the rent by improving the apartment as permitted under the Rent Stabilization Law and Code. At trial, Respondent demonstrated the premises had not been renovated in over 20 years and submitted bills and proof of payment to demonstrate both that the improvements were made and that they were necessary. The Trial Court disregarded the undisputed proof and held it insufficient to qualify for rent increases, solely on Respondent's alleged failure to provide a cost breakdown for each improvement.

The Appellate Term, noting that Respondent had demonstrated a likelihood of success on the claim for individual apartment improvement ("IAI") increases, determined that DHCR has exclusive original jurisdiction over IAI challenges.

Exclusive jurisdiction of rent overcharge issues lies with DHCR. It is respectfully submitted that the Civil Court of the City of New York lacks subject matter jurisdiction to hear a tenant's overcharge defense and counterclaim since it is located within a city with a population of over 1,000,000. Moreover, even assuming *arguendo* that concurrent jurisdiction over rent overcharges exists between DHCR and the Courts, DHCR should have primary jurisdiction over IAI claims. The Appellate Term properly notes that the procedures provided in the Rent ***2** Stabilization Code for the determination of entitlement to IAI increases are administrative in nature. Further, as these determinations are technical and peculiarly within DHCR's expertise, the application of primary jurisdiction is wholly appropriate.

The trial court's insistence on a cost breakdown was misplaced and not supported by law. No such requirement exists in the law. The decisional law relied on by the Trial Court for its conclusion was derived from CPLR Article 78 proceedings, wherein the standard of review is different and each proceeding is case specific. Each of the improvement items installed by Respondent has been deemed worthy of an improvement rent increase by the New York State Division of Housing and Community Renewal (hereinafter "DHCR").

***3** *COUNTER-STATEMENT OF FACTS*

The lower court conducted a trial of this non-payment proceeding on February 18, 1999 and February 19, 1999. Prior to the commencement of the trial, Respondent's counsel moved the court for an order severing Appellant's overcharge defense and counterclaim. The trial court denied this motion.

Marc Goldfarb, a managing member of Respondent, presented oral and documentary evidence based on personal knowledge in the form of invoices and cancelled checks [FN1] demonstrating that Respondent had made improvements totaling $4,756.40 prior to the occupancy of the Appellant.

FN1. The invoice and cancelled checks were introduced by Tenant during cross-examination as "Respondent's A".

Specifically, an invoice for kitchen improvements totaling $3250.00 read as follows:

"Installation of white Euro Style 90 degree wall and base cabinets. Installation of one white Formica counter tops. Installation of a stainless steel sink with a Gerber faucet and all necessary plumbing. Install new 1/4 inch sub floor. Installation of 12 X 12 Black & White Vinyl floor tiles with new toe moldings. Install 20" White range hood. Installation of new outlets, switches complete with cover plates. Installation of fluorescent light fixtures."

The same invoice for the bathroom improvements totaling $800.00 read as follows:

Installation of 21" white vanity with cultured marble top and center faucet. Install shatterproof glass shower door enclosure.

***4** Finally, receipts for the installation of a new stove at $282.53 and a new refrigerator at $395.11 were submitted.

Appellant signed a lease for 2 years at $525.38 per month [FN2]. Appellant testified that when she first moved in to the apartment there was a new refrigerator and new stove and the bathroom contained a new vanity and shower door. Appellant did not dispute any of the Respondent's proofs or have an expert or witness testify that the cost were excessive or any witness to testify that the improvements were not done or were not warranted.

FN2. The previous rent was $351.03 as reflected in Petitioner's 3, the DHCR apartment rent history. Rent Guidelines Board Order 28 allowed an increase of 16% (7% for a 2 year vacancy lease; 9% vacancy increase) for a total of $407.19. The addition of the one-fortieth rent increase pursuant to RSC § 2522.4 brings the allowable rent to $526.10.

On March 22, 1999, the lower court rendered a decision after trial finding that the installation of, *inter alia*, a new stove, a new refrigerator, new kitchen wall and floor cabinets, new kitchen countertops, and new bathroom marble top and faucet did not entitle Respondent to a rent increase under the Rent Stabilization Code.

Appellant appealed that determination. The Appellate Term of the Supreme Court of the State of New York, 2nd and 11th Judicial Districts (hereinafter "Appellate Term") vacated the trial court's order denying Respondent's motion to sever the overcharge claim. The Appellate Term held that DHCR has exclusive jurisdiction to hear IAI challenges.

***5** *QUESTIONS PRESENTED*

1. Whether the Court can properly exercise jurisdiction over challenges to individual apartment increases in rent stabilized apartments. The Court below answered in the negative.

2. Whether concurrent jurisdiction over rent overcharge claims exists between DHCR and the Courts. The Court below answered in the affirmative.

3. Whether the Lower Court erred in failing to allow the statutory rent increases for individual apartment improvements. The Appellate Term did not explicitly reach this issue.

***6** *POINT I*

THE CIVIL COURT LACKS SUBJECT MATTER JURISDICTION TO ENTERTAIN OVERCHARGE COMPLAINTS

The Emergency Tenant Protection Act of 1974 (hereafter "ETPA") expressly provides in relevant part, as follows:

§ 12. Enforcement and procedures.

a. (1) Subject to the conditions and limitations of this paragraph, any owner of housing accommodations in a city having a population of less than one million ... who, upon complaint of a tenant or of the state division of housing and community renewal, after reasonable opportunity to be heard, to have collected and overcharge...

(f) Unless a tenant shall have filed a complaint of overcharge with the division which complaint has not been withdrawn, nothing contained in this section shall be deemed to prevent a tenant or tenants, claiming to be overcharged, from commencing an action or interposing a counterclaim in a court of competent jurisdiction for damages equal to the overcharge ... (Emphasis added)

Appellant incorrectly cites the section above as support for its contention that the Court has concurrent jurisdiction over overcharge claims in New York City. These claims are governed by ETPA Section 12 b., which expressly states:

b. Within a city having a population of one million or more, the state division of housing and community renewal shall have such powers to enforce this act as shall be provided in the New York City Rent Stabilization Law of nineteen hundred sixty-nine, as amended, or as shall otherwise be provided by law. (Emphasis added)

It is respectfully submitted that the court lacks subject matter jurisdiction of Appellant's rent overcharge counterclaim, ***7** since such claims are within the exclusive subject matter jurisdiction of the NYS Division of Housing and Community Renewal (hereafter "DHCR") pursuant to the express terms of the law which provides that within cities of one million (1,000,000) or more, only the DHCR has subject matter jurisdiction to hear overcharge complaints.

It is further submitted that this position is supported by the seminal Court of Appeals decision of *Sohn v. Calderon,* 78 N.Y.2d 755, 579 N.Y.S.2d 940, 587 N.E.2d 807 (1991). *Sohn v. Calderon,* supra, involved an appeal of a demolition application under the rent stabilization law and code, which was brought in the Supreme Court and later affirmed by the Appellate Division. On the tenant's appeal the Court of Appeals noted that:

"However, it has never been suggested that every claim or dispute arising under a legislatively-created scheme may be brought to the Supreme Court for original adjudication. To the contrary, in *Lovetto v. Teleprompter Manhattan CATV Corp.* (58 NY2d 143, 152-153) this court observed that concurrent original jurisdiction is not necessarily conferred on the Supreme Court when the legislature provides for the adjudication of regulatory disputes by an *administrative agency* within the executive branch, as distinguished from a court within the judicial branch. (Emphasis added)

Id at 766. [FN3]

FN3. While Appellant argues that several lower appellate courts have held that the Civil Court has concurrent jurisdiction to hear overcharge complaints, it is respectfully submitted that this court is bound to follow the holding of the Court of Appeals and examine the statute as written. A statute that differentiates jurisdiction based on the population of a city can only be intended to confer exclusive subject matter jurisdiction, otherwise there was no need for the Legislature to distinguish between the size of cities when conferring powers on the agency or, in smaller cities, the courts.

***8** *Sohn v. Calderon* has been followed by lower courts when it comes to a determination of the exclusive subject matter jurisdiction of the DHCR regarding certain matter. *In People v Trabazo,* 180 Misc.2d 961, 690 NYS2d 829 (Crim. Ct. Queens, 1999) the court interpreted the *Sohn v Calderon* decision as follows:

In *Sohn v Calderon,* 78 NY2d 755, 756 [1991]), the Court of Appeals concluded that the Supreme Court had no jurisdiction over rent control and rent stabilization disputes. As the court stated:

Article VI, § 7 of the NY Constitution establishes the Supreme Court as a court of 'general original jurisdiction in law and equity' (NY Const, art VI, § 7 [a]). Under this grant of authority, the Supreme Court 'is competent to entertain all causes of action unless its jurisdiction has been specifically proscribed '[citation omitted], and

to that extent its powers are 'unlimited and unqualified' [citation omitted]. However ... rent control and rent stabilization disputes are a modern legislatively created category not encompassed within the traditional categories of actions at law and equity referred to in section 7 (a) article VI of the NY Constitution [citation omitted]...

Accordingly, the constitutionally protected jurisdiction of the Supreme Court does not prohibit the Legislature from conferring exclusive original jurisdiction upon an agency in connection with the administration of a statutory regulatory program. (Emphasis added)

See also, *Benjamin Shapiro Realty Co. v Henson,* 162 Misc.2d 1, 615 NYS2d 570 (Civ. Ct. NY 1994) (finding that the DHCR has exclusive subject matter jurisdiction regarding hotel classification); *Davis v Waterside Housing Co, Inc.,* 274 AD2d ***9** 318, 711 NYS2d 4 (1st Dept. 2000) (finding that DHCR has primary jurisdiction to determine rent regulatory status).

It is well settled that the express grant of power to one person excludes by implication the grant of the same powers to another. *Combs v. Lipson,* 44 Misc.2d 467, 254 NYS2d 143 (1964). See also, *People v. Ifill,* 127 Misc.2d 678, 487 NYS2d 647 (1985); *Golden v. Koch,* 98 Misc.2d 972, 415 NYS2d 330, aff'd 49 NY2d 690, 427 NYS2d 780, 404 N.E.2d 1321 (1979).

ETPA Section 6(c) provides that:

"the initial legal regulated rents for housing accommodations in *a city having a population of one million or more shall be the initial rent establish pursuant to the New York City rent stabilization law of nineteen hundred sixty-nine as amended* (emphasis added).

The RSL Section 26-512(4)(iii) provides in pertinent part:

"Where *the commissioner has determined* that the rent charged is in excess of the lawful rents..." (Emphasis added)

RSL Section 26-513(a) provides that:

"The tenant or owner...may...file *with the commissioner* an application for adjustment of the initial legal regulated rent... *The commissioner* may adjust..." (Emphasis added)

RSL Section 26-516(c) states:

c. If the owner is found *by the commissioner:*

(1) To have violated an order of the division...

It was exactly this type of general statutory language that the Court of Appeals relied upon in *Sohn v. Calderon,* supra, when it held that the Supreme Court of the State of New York lacked ***10** subject matter jurisdiction to hear a particular aspect of the rent stabilization law and code.

The statutory language relied upon by the Court of Appeals is very general in nature such as "the city rent *agency* shall issue..." and "the *agency* determines that..." and that the owner complies with "the *agency's* regulations." Id at 78 N.Y.2d 755, 765. As the Court of Appeals also noted in *Sohn v. Calderon:*

"the earlier described provisions of the rent-control and rent-stabilization laws demonstrate that the Legislature intended DHCR and HPD to be the exclusive arbiters of whether an owner has, in fact, met

these regulatory conditions. In addition to the many references to the need to establish the necessary facts to the agency's satisfaction and the other references to determinations and findings by the agency... the distinction drawn in the rent control provisions between eviction proceedings that may be commenced immediately in court without prior approval of the DHCR... and those that require agency-issued 'certificate of eviction'... evinces a legislative intent to have issues arising in the latter class of cases determined, in the first instance, by the agency."

Id at 767.

This statement amply demonstrates the Court of Appeal's opinion that despite the Supreme Court's *broad* original jurisdiction over matters of law and equity and new classes of actions unknown at common law (NYS Const. Art. VI Section 7(b)), it is deprived of subject matter jurisdiction over rent regulation matters. [FN4] If the Supreme Court lacks the ***11** jurisdiction to entertain certain matters simply because the Legislature stated that the "agency shall issue" or "the agency determines", then the Civil Court, a court of limited subject matter jurisdiction, cannot claim to have concurrent jurisdiction given the specific grant of powers based on the size of a city.

FN4. It must be noted that the Supreme Court is a court of "general original jurisdiction in law and equity" (NY Const. Art. VI, Sec.7(a)); yet the Court of Appeals makes clear in *Sohn v. Calderon,* supra, that this broad jurisdiction does not extend to matters where the Legislature has conferred exclusive jurisdiction with the State agency.

Further, the Court of Appeals reasoning makes perfect sense in a practical way. In 1983 when the Omnibus Housing Act was passed, the State Legislature expanded the DHCR from a small State agency with a budget of under $5 million to a large agency with a $24 million budget. Today, the DHCR's budget exceeds $30 million. Why would the Legislature create such a mega-agency to deal with rent stabilization matters in NYC unless it intended that the agency have exclusive jurisdiction over such matters? The DHCR is purportedly the second largest State agency.

As this court knows, the current judiciary is overburdened and under budgeted. Over the last decade, lawsuits by the Chief Judges of the Court of Appeals to obtain more funding for the courts was well publicized and well documented. It is clear to the Court of Appeals that the courts should not be burdened with rent stabilization matters when there exists a mega-agency to protect the rights and interests of tenants in these matters and where there exists a judicial review procedure to appeal from the agency's determinations. CPLR Art. 78.

In *Benjamin Shapiro Realty Co. v Henson,* supra, the court relied on similar language to determine that DHCR was vested with authority to classify buildings as hotels. 162 Misc.2d 1, 7. The same analysis is appropriate here.

The ETPA and RSL expressly provide that in cities of more than one million the DHCR is to determine rent overcharges and compliance with the rent stabilization laws. Thus, the legislative intent is clear in this regard. The DHCR has *exclusive* jurisdiction to determine compliance with the rent stabilization laws.

Here, not only do the applicable sections mirror the language relied upon by the Court of Appeals, but the ETPA expressly provides that a tenant may file an overcharge complaint ***12** in a court only in cities of less than one million and that the DHCR "shall have such powers to enforce this act" as well as the RSL.

It is axiomatic that subject matter jurisdiction cannot be acquired nor ever lost. A court has subject matter jurisdiction either by constitution, statute, common law or it does not lie in the particular court at all. The New York State constitution states only that the Supreme Court shall have general original jurisdiction in law and equity. However, since claims of rent overcharge are derived from a statute, and not from the common law, only a review of the statutes themselves can decide the issue of jurisdiction.

The controversy raised herein is governed by the Emergency Tenant Protection Act (ETPA), the Administrative Code known as the City Rent Stabilization Law of 1969 (RSL), and the Rent Stabilization Code ("RSC") promulgated by the DHCR.

None of these laws expressly confer subject matter jurisdiction upon the New York Supreme Court. In fact, ETPA § 12a(1) applies only to cities having a population of less than one million and 12a(1)(f) expressly provides that in such cities, a local court may hear a complaint of rent overcharge unless the tenant filed its complaint with the DHCR.

Thus, the State Legislature expressly conferred subject matter jurisdiction to local courts in cities of less than one million people. On the other hand, the State Legislature's intent that DHCR have *exclusive* subject matter jurisdiction in ***13** cities of more than one million is clear and unequivocal, as stated in ETPA § 12 b.

If the Legislature intended to give the courts in cities of more than one million jurisdiction over such matters it would have so provided. Statutes Section 240 (1 McKinney's Consolidated Laws, Sec. 240). "Expressio unius est exclusio alterius." [FN5]

FN5. The court should compare the rent stabilization code to the rent and eviction regulations, which govern rent-controlled apartments. Section 2206.8 of the Rent and Eviction Regs. (Civil action by tenant) specifically states that a tenant may bring a rent overcharge complaint in a court of competent jurisdiction. There is no similar provision in the ETPA, the RSL or the RSC for rent-stabilized units.

If the Legislature intended for stabilized tenants to have the same rights to bring these issues into court, it would have so provided. The fact that it is provided for rent controlled tenants but not for rent stabilized tenants evinces that the Legislature's intent was that only the DHCR would be empowered to hear these issues. Section 240 of *Statutes* (1 McKinney's, Consolidated Laws Section 240) provides:

240. Expression of one thing as excluding others. The maxim expressio unius est exclusio alterius is applied in the construction of the statutes, so that where a law expressly described a particular act, thing or person to which it shall apply, an *irrefutable inference* must be drawn that what is omitted or not included was *intended* to be omitted or excluded. (emphasis added)

See, *City of New York v. New York Telephone Co.*, 108 A.D.2d 372, 489 NYS2d 474, app. dismissed 65 NY2d 1052, 1053, 494 NYS2d 1060, 484 NE2d 1059 (failure of legislative body to include a matter within a scope of an act may be construed as indication that its exclusion was intended).

***14** This grant of exclusive subject matter jurisdiction is also supported by the fact that the NYC Rent Stabilization Law (RSL) of 1969 Sections 26- 516(a), (a)(1), (a)(2) and (a)(5), referred to in ETPA 12(b), expressly place issues of rent regulation and overcharge in the exclusive jurisdiction of the DHCR. In fact, the NYC RSL Section 26-516 b. expressly provides:

b. In addition to issuing the specific orders provided for by other provisions of his law, the state division of housing and community renewal shall be empowered to enforce this law and the code by issuing, upon notice and a reasonable opportunity for the affected party to be heard, such other orders as it may deem appropriate. (emphasis added)

Thus, both the State Legislature *and* the New York City Council have placed with the DHCR exclusive subject matter jurisdiction over issues arising from the various rent stabilization laws.

NYC RSL Section 26-516(2), which governs within New York City, expressly provides:

"Except as provided under clauses (i) and (ii) of this paragraph, a complaint under this subdivision [overcharge] shall be filed with the State division of housing and community renewal within four years of the first overcharge alleged and no award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed."

In addition to establishing a specific forum in cities of greater than one million for filing such complaints, it is obvious that, if in New York City the courts had jurisdiction, it would not be necessary for the City Council to pass this legislation. However, since the State Legislature stated in ETPA ***15** Section 12(b) that in cities of over one million the DHCR shall enforce the ETPA "as shall be provided in the New York City Rent Stabilization Law of nineteen hundred sixty-nine..." it is clear that CPLR 213(a) was only necessary to apply in courts outside of New York City, while the ETPA and RSL apply within New York City.

It may be suggested that it would be unfair to send a tenant's overcharge claim to DHCR and force him or her to continue to overpay while awaiting an inordinate amount of time. However, this too has been expressly and completely rejected by the Court of Appeals. In *Sohn v. Calderon* the court held:

"Furthermore, Supreme Court's consideration of the delays that purportedly typify the administrative adjudicative process was inappropriate, since that factor, to the extent it might ever be relevant at all, would apply only in the application of the doctrine of "primary jurisdiction".... While the rule is certainly not without exceptions, no such exception is possible where, as here, the Agency's original jurisdiction is exclusive.

Id at 78 N.Y.2d 755, 768.

Thus, after considering all possible ramifications of a ruling that declares that the Supreme Court does not have jurisdiction to consider all rent regulatory matters, the Court of Appeals held in exactly such a fashion. It is apparent that the Court of Appeals is of the opinion that all matters concerning rent regulation be handled by the State Agency established to adjudicate such claims: DHCR. The ETPA and RSL clearly grant the DHCR exclusive original jurisdiction to enforce compliance with the Rent Stabilization Laws. Therefore, the ***16** Civil Court lacks jurisdiction to hear Appellant's claim of alleged rent overcharge. This claim was properly severed.

Furthermore, even assuming *arguendo* that concurrent jurisdiction exists, the Appellate Term's application of the doctrine of DHCR's primary jurisdiction to over IAI challenges was proper. As stated in *Davis v Waterside Housing Co, Inc.,* 274 AD2d 318, 711 NYS2d 4 (1st Dept. 2000):

"The doctrine of primary jurisdiction is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency's specialized field, to make available to the court in reaching its judgment the agency's views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency" *(Capital Tel. Co. v Pattersonville Tel. Co., 56 NY2d 11, 22).* "[W]hile concurrent jurisdiction does exist, where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a judicial tribunal should be withheld pending resolution of the administrative proceeding" (*Haddad Corp. v Redmond Studio,* 102 AD2d 730).

Thus, even if concurrent jurisdiction exists, as the Appellate Term properly notes, the procedures provided in the Rent Stabilization Code for the determination of entitlement to IAI increases are administrative in nature. Further, as these determinations are technical and peculiarly within DHCR's expertise, the application of primary jurisdiction is wholly appropriate.

***17** *POINT II*

RESPONDENT SUFFICIENTLY DEMONSTRATED ENTITLEMENT TO INDIVIDUAL APARTMENT RENT INCREASE

N.Y.C. Administrative Code Sections 26-501 - 26-520 known as the "Rent Stabilization Law of 1969" provides at 26-511, in pertinent part, as follows:

c. A code shall not be adopted hereunder unless it appears to the Division of Housing and Community Renewal that such code

(13) provides that an owner is entitled to a rent increase where there has been a substantial modification or increase of dwelling space or an increase in the services, or installation of new equipment or improvements or new furniture or furnishings provided in or to a tenant's housing accommodation, on written tenant consent to the rent increase. In the case of a vacant housing accommodation, tenant consent shall not be required. The permanent increase in the legal regulated rent for the affected housing accommodation shall be one-fortieth of the total cost incurred by the landlord in providing such modification or increase in the dwelling space, services, furniture, furnishings or equipment, including the cost of installation, but excluding finance charges.

[emphasis provided]

Implementing this section of the Rent Stabilization Law, the Rent Stabilization Code (9 NYCRR Parts 2520-2530) provides at § 2522.4, in pertinent part, as follows:

(a) Increased space and services, new equipment, new furniture or furnishings; major capital improvements; other adjustments.

(1) An owner is entitled to a rent increase where there has been a substantial increase, ... , of dwelling space or an increase in the services, or installation of new equipment or improvements, or new furniture or ***18** furnishings, provided in or to the tenant's housing accommodation, on written tenant consent to the rent increase. In case of vacant housing accommodations, tenant consent shall not be required.

Thus, a landlord is entitled to a rent increase where there have been improvements to an apartment equal to one-fortieth the cost of such improvements. During a period of vacancy tenant consent is not required to increase the rent. Prior to the Appellant's occupancy it is undisputed that substantial improvements were made to the subject apartment.

Further implementing both the Rent Stabilization Law and Code, the New York State Division of Housing and Community Renewal (hereinafter "DHCR") issued Policy Statement 90-10 (a copy of Policy Statement 90-10 is annexed hereto as appendix "1") that states, in pertinent part, as follows:

Any claimed MCI or individual apartment improvement cost must be supported by adequate documentation which should include at least one of the following:

1) Cancelled check(s) contemporaneous with the completion of the work;

2) Invoice receipt marked paid in full contemporaneous with the completion of the work;

3) Signed contract agreement;

4) Contractor's affidavit indicating that the installation was completed and paid in full.

Whenever it is found that a claimed cost warrants further inquiry, the processor may request that the owner provide additional documentation.

***19** In the instant case, Respondent submitted the invoices as well as cancelled checks. Thus, the owner had satisfied the requirements of Policy Statement 90-10.

Moreover, the law is clear that the improvements made by the Respondent were all improvements worthy of rent increases. Each of the improvements made to this apartment has been approved by DHCR for rent increases. [Please see the following annexed in the accompanying appendix: DHCR Adm. Rev. Dckt. No.: ARL 05216-B (appendix "2") (range, refrigerator, bathroom vanity, and kitchen cabinets); DHCR Adm. Rev. Dckt. No.: BE-210272-RO (appendix "3") (kitchen sink, faucet, and necessary plumbing); DHCR Adm. Rev. Dckt. No.: EI-410234-RO (appendix "4") (kitchen countertop, subfloor and floor); DHCR Adm. Rev. Dckt. No.: KA-410161-RT (appendix "5") (electric outlets and fixtures).]

Further, DHCR has held that a cost breakdown is not necessary. In DHCR Adm. Rev. Dckt. No.: FF-110373-RO (appendix "6"), DHCR reversed its Rent Administrator's finding of a rent overcharge stating:

Further, the owner adequately confirmed the actual work and/or new equipment included in the contract price of $4,715.00 by the submission of the contractor's itemization of the work/new equipment included in the contract. A breakdown of costs was not a requirement because in fact a separate price per item was not charged. The cancelled check in the amount of $4,715.00 submitted to the Rent Administrator is sufficient evidence in the case that the contract price was actually paid by the owner.

[emphasis added]

***20** In affirming this policy, the D.H.C.R. held in *Matter of Park Towers South Co.,* Administrative Review Docket No.: KB-410019-RP (appendix "7") :

Further, Policy Statement 90-10 does not mandate an itemized list of costs, nor does it require that an owner produce more than one type of proof of improvements.

Additionally, in *Matter of Mautner Glick* Co., Administrative Review Docket No.: BC 410344-RO (appendix "8"), the D.H.C.R. held:

The Commissioner finds, therefore, that the Administrator's insistence that the owner specify the exact cost of each of some 47 individual items is an unreasonable interpretation of 2522.4 ...

The type of gut renovation done in the subject apartment is not always susceptible to a precise allocation of costs and is often contracted for based on an agreed price for the total job. The tenant's own architect, in coming up with any estimate of $21,488.00 conceded that his appraisal did not account for such unknown variables often encountered in renovation work on older buildings such as the degree to which walls had to be aligned, floors had to be leveled and pipes had to be replaced. Only someone who inspected the apartment before its renovation could give a realistic cost for such items and even then the estimate may not allow for unforeseen difficulties.

(emphasis added)

It has been held that:

It is well settled that in " 'recognition of the need for orderly and sensible coordination of the work of agencies and of courts ... a court normally should not act upon subject matter within the agency's specialized field without taking into account what the agency has to offer'." *(Saljen Realty Corp v Human Resources Admin. Crisis* ***21** *Intervention Servs.,* 115 misc.2d 553, 555, (App Term 1st Dept 1982), citing Davis, Administrative Law § 19.01 [3d ed]; see also, *Sohn v Calderon,* 78 NY2d 755 [1991]; *Missionary Sisters of the Sacred Heart v Meer,* 131 AD2d 393 [1st Dept. 1987]; *Fresh Meadows Assoc. v Conciliation & Appeals Board,* 88 Misc.2d 1003 [Sup. Ct, NY County 1976], *aff'd* 55 AD2d 559 [1st Dept. 1976] *aff'd* 42 NY2d 925 [1977]) [Emphasis added]

Benjamin Shapiro Realty Company v Henson, 162 Misc.2d 1, 615 NYS2d 570 (Civ. Ct. NY 1994); see also, *Davis v Waterside Housing Co, Inc.,* 274 AD2d 318, 711 NYS2d 4 (1st Dept. 2000).

As the Court of Appeals has stated:

We note at the outset that our review of DHCR's interpretation of the statutes it administers is limited. 'Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the government agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld.' (*Kurcsius v. Merchants Mut. Ins. Co.,* 49 N.Y.2d 451, 459, 426 N.Y.S.2d 454, 403 N.E.2d 159; see also, *Matter of Salvati v. Eimicke,* 72 N.Y.2d 784, 791, 537 N.Y.S.2d 16, 533 N.E.2d 1045; *Matter of Colt Indus. v. New York City Dept. Of Fin.,* 66 N.Y.2d 466, 497 N.Y.S.2d 887, 488 N.E.2d 817.)

Ansonia Residents Association et al v. New York State Division of Housing and Community Renewal, 75 N.Y.2D 206, 214, 551 N.Y.S. 2d 72.

***22** It has been consistently held that the DHCR's interpretation of the statutes and regulations that it administers is entitled to great weight. Great deference is paid to the agency's interpretation of its own regulations. Thus the Court cannot substitute its judgment for that

of the Agency. *Rudin Management Company, Inc. v. New York State Division of Housing and Community Renewal,* 215 A.D.2d 243, 626 N.Y.S.2d 487, 487-488 (1st Dept. 1995). See also, *Ista Management v. Ista Division of Housing and Community Renewal,* 161 A.D.2d 424, 555 N.Y.S. 2d 724 (1st Dept. 1990); *Matter of Fresh Meadows Associates v. New York City Conciliation and Appeals Board,* 88 Misc. 2d 1003, 390 N.Y.S. 2d 351 (Sup. Ct., N.Y. Co., 1976), *aff'd* 55 A.D.2d 559, 390 N.Y.S.2d 69 (1st Dept. 1976), *aff'd* 42 N.Y.2d 925, 397 N.Y.S. 2d 1007, 366 N.E.2d 1361 (1977).

Moreover, it is well settled that the rent agency's application and construction of statutes and regulations entrusted to its administration are entitled to judicial approval where they have a rational basis, *Salvati v. Eimicke,* 72 N.Y.2d 784, 537 N.Y.S. 2d 16, 533 N.E.2d 1045 (1988); *Cale Development, Inc. v. Conciliation and Appeals Board,* 94 A.D.2d 229, 463 N.Y.S.2d 814 (1st Dept. 1983), *aff'd,* 61 N.Y.2d 976, 475 N.Y.S.2d 278, 463 N.E.2d 619 (1984); *Plaza Management Co. v. City Rent Agency,* 48 A.D.2d 129, 368 N.Y.S.2d 178 (1975), *aff'd,* 37 N.Y.2d 837, 378 N.Y.S.2d 33, 340 N.E.2d 468 (1975).

***23** It is equally well settled that the agency's interpretation of the statutes and regulations that it administers is entitled to great weight. In *Cale Development Inc., v. Conciliation and Appeals Board, supra,* the Appellate Division, First Department stated in pertinent part:

As with all administrative agencies, the Board's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight. (*Matter of Herzog v. Joy, Temporary State Housing Rent Comm.,* 74 A.D.2d 372, 428 N.Y.S.2d 1, (1st Dept.) *Aff'd* 53 N.Y.2d 821, 439 N.Y.S.2d 922, 422 N.E.2d 582, also *Matter of Pell v. Board of Education,* 34 N.Y.2d 222, 356 N.Y.S. 2d 833, 313 N.E.2d 321 (1974).

See also, Minton v. Domb, 63 A.D.2d 36, 406 N.Y.S.2d 772 (1st Dept. 1978).

The trial court's reliance on the holdings in *Charles Birdoff & Co. v. DHCR,* 204 AD2d 630 (2nd Dept., 1994) and *985 Fifth Avenue Inc. v. DHCR,* 171 AD2d 572 (1st Dept., 1991) was misplaced. Both proceedings were brought pursuant to CPLR Article 78. The Court's limited role is to determine whether the agency's decision was rationally based. *Salvati* (supra.). Such determinations are, of necessity, case specific. Each decision is dependent on the facts of that proceeding.

DHCR, applying Policy Statement 90-10 6, would have requested further documentation where required. In *985* ***24** *Fifth Avenue,* DHCR repeatedly sought a cost breakdown based on the inclusion of items that were clearly not improvements. DHCR's order was based upon the landlord's failure to produce a cost breakdown despite DHCR's requests for it. In *Birdoff,* Policy Statement 90- 10 would have required that DHCR request further documentation if needed.

Note: footnote reference missing in original document

6. Whenever it is found that a claimed cost warrants further inquiry, the processor may request that the owner provide additional documentation.

Such documentation should not have been needed in the instant proceeding. As indicated, each of the items of improvement has been approved as an improvement by DHCR in the past. Furthermore, a separate price for each item was not charged, but rather, there was a contract for the whole renovation. DHCR, as indicated in the citations above, has

recognized these circumstances. DHCR's interpretation of the statute it administers is entitled to great weight. *Cale Development,* supra.

Accordingly, even if the court had jurisdiction over the claim, Appellant's counterclaim should have been denied.

***25** *CONCLUSION*

Accordingly, based upon the foregoing, the Appellate Term determination should be affirmed.

Appendix not available.