

**Matter of Drennan v New York State Division of
Housing & Community Renewal**

2005 NY Slip Op 30255(U)

September 30, 2005

Supreme Court, New York County

Docket Number:

Judge: Paul G. Feinman

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: HON. PAUL G. FEINMAN

PART 52

Index Number : 101956/2005

DRENNAN, CAROLYN

vs

NYS DIVISION OF HOUSING

Sequence Number : 001

ARTICLE 78

INDEX NO.

101956/2005

MOTION DATE

5/25/05

MOTION SEQ. NO.

001

MOTION CAL. NO.

3

... remaining papers, numbered 1 to _____ were read on this motion to/for Art 78

Notice of Motion/ ^{petition} Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — ^{Resp Brief} Exhibits Answer, Amended Answer

Replying Affidavits _____

PAPERS NUMBERED

1

2, 3, 4

5

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this ~~motion~~ ^{petition} is decided in accordance with the decision, order + judgment annexed hereto.

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 interested parties must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 9-30-05

JAF

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

-----X

In the Matter of

CAROLYN DRENNAN and BERNADETTE
O'GRADY ANDROS, on behalf of themselves
and all rent regulated Tenants residing at the
premises known as 160 BLEECKER STREET,
NEW YORK, NY 10012,

Petitioners,

Index No. 101956/2005

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

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,
Respondent.

-----X

PAUL G. FEINMAN, J.:

Motions bearing sequence numbers 001 (petition pursuant to Article 78) and 002 (motion for leave to intervene) are consolidated for disposition.

In this Article 78 proceeding, petitioners, tenants of a rental apartment building, seek to vacate two orders of respondent, New York State Department of Housing and Community Renewal (DHCR), which granted the applications of the landlord, Bleecker Street Management Corp. (Bleecker) for Maximum Base Rent (MBR) increases covering the subject rent-controlled apartments for the 1996-1997 and 2000-2001 cycles. In the motion filed under motion sequence number 002, the landlord Bleecker seeks leave to intervene in the Article 78 proceeding. There is no opposition to Bleecker's application to intervene, and accordingly that motion is granted. For

the reasons set forth below, the petition is denied in part and granted in part.

Factual and Procedural Background

The New York Rent Control Law and the Rent and Eviction Regulations provide for MBR adjustments. The MBR is a ceiling rent level which is determined every two years as a city-wide percentage above the previous MBR. In an application to obtain the MBR, the landlord must certify that it is maintaining, and will continue to maintain, all essential services (N.Y.C. Admin. Code § 26-405 [h] [2]; Rent and Eviction Regulations [RER] §§ 2200.3 (b), 2201.2 and 2202.21 [a]). Moreover, the landlord must certify that, six months prior to the effective date of the MBR increase, it has corrected all rent-impairing Housing Code violations, and 80% of all non-rent-impairing Housing Code violations (N.Y.C. Admin. Code § 26-405 [h] [6]).

In its application for a 1996-1997 MBR increase, Bleecker certified that it had resolved all of the rent-impairing violations and at least 80 percent of the non-rent-impairing violations against the premises on record with the New York City Department of Housing Preservation and Development (HPD) as of January 1, 1995, one year prior to the effective date of the requested 1996-97 MBR increase. In April 1997, DHCR denied the increase, in part because it found that the owner had failed to meet the violations certification criteria. Bleecker challenged the denial, and submitted HPD inspection reports in support of its position. In February 1998, HPD generated a revised list of pending violations. In June 1998, DHCR reversed its prior determination, and found that Bleecker had met the violations certification requirement, and that Bleecker had been providing the required services for tenants. Accordingly, in July 1998, DHCR issued an Order of Eligibility for the 1996-97 MBR, with an effective date of January 1, 1996.

On April 11, 2003,¹ DHCR issued an Order of Modification-Maximum Base Rent, which stated in pertinent part:

The owner has met the prescribed violation certification requirements for current MBR increases with an effective date of January 1, 1996. This order amends the previous 1996-1997 MBR Computed Order of Eligibility issued July 17, 1998, which contained incorrect room counts for the subject apartments. Therefore, it is ordered that the MBR order issued on July 17, 1998...is...modified.

DHCR also issued (in April 2003) a Computed Order of Eligibility- 1996-1997 Maximum Base Rents.

The tenants brought a Petition for Administrative Review (PAR). The tenants contended, among other things, that the premises were being unlawfully used as a hotel, and that Bleecker was not providing essential services.

On December 15, 2004, DHCR issued an order denying the PAR. The order stated the following:

- (1) the tenants had failed to rebut the landlord's assertion that violations of record as of January 1, 1995 have been cured;
- (2) as of January 1, 1995, there were no orders issued finding that any essential services were not being provided;
- (3) if the tenants contended that the alleged use of the premises as a hotel was illegal, their remedy was to file a complaint with the appropriate agency; and
- (4) if the tenants contended that their services were being diminished as a result of the alleged use of part of the building as a hotel, their remedy was to bring a services complaint before DHCR.

In a separate proceeding, Bleecker applied for an increase in the MBR for the 2000-2001 cycle. Bleecker certified that, within 30 days of the filing, at least 80 percent of the non-rent-impairing violations that were recorded against the premises as of January 1, 1999 would be

¹ There were a series of intervening administrative and court decisions, the details of which are not critical to the instant petition.

[* 5]
corrected.

On March 30, 2000, DHCR issued an MBR Interim Order of Eligibility. The agency found that the owner had satisfied the violations criteria.

The tenants then filed a challenge to the 2000-2001 MBR order. They contended that they were not served with the April 22, 1997 order, which had denied Bleecker's application for MBR increases for 2000-2001; that room counts for their apartments were inaccurate, and that essential services (cable television and heat) were not being provided.

On July 9, 2003, DHCR issued an order affirming the MBR increase. On August 18, 2003, the tenants brought a PAR. On October 21, 2004, DHCR issued an order denying the PAR.

While Bleecker's applications for MBR increases were pending, it was also applying for a Major Capital Improvement (MCI) rent increase. On July 25, 2005, DHCR issued an order in connection with the MCI case. Certain kitchens have been deemed too small to constitute "rooms," and these have been removed from the room count. According to DHCR, the subject premises are deemed to contain 286 rooms. The number of rooms, for purposes of the MCI increase, is now the same as the number of rooms for purposes of the MBR rent increase.

Legal Analysis

As a threshold matter, petitioners contend that DHCR was legally obligated to give them a free copy of the "return" of the administrative proceedings. However, in *White v Joy*, 95 AD2d 757 [1st Dept 1983], the court held that a party was not entitled to a free copy of the return. The tenants here are entitled to examine the original return, at the office of DHCR, during normal business hours, but must pay for any copies that they choose to make.

N.Y.C. Admin. Code §§ 26-411 (a) (1) and 26-516 (d) both state that an Article 78 proceeding must be brought within 60 days of the determination of a case by DHCR. The PAR order dismissing petitioners' challenge to the 2000-2001 MBR was rendered on October 21, 2004, but petitioners did not commence the instant proceeding until February 10, 2005, 112 days later. Thus, insofar as this petition relates to the 2000-2001 MBR, it must be dismissed as untimely.

Insofar as the petition relates to the 1996-1997 MBR increase, the agency's determination must be upheld, provided that it has a rational basis and is neither arbitrary nor capricious (Matter of Various Tenants of 123 Guernsey Street v DHCR, 19 AD3d 503 [2d Dept 2005]). This court cannot simply substitute its judgment for that of the agency (Tockwotten Assocs. v DHCR, 7 AD3d 453 [1st Dept 2004]). However, in the instant case, the agency refused to render any judgment at all regarding the issues raised by the tenants in opposition to Bleecker's application for an MBR increase. Even though HPD found that past violations had been corrected, DHCR should not have granted the MBR increase unless it determined that the premises were not being operated unlawfully as a hotel for transient persons, or at least that such use as a hotel did not diminish residential services to the pre-existing rent controlled tenants. In other words, the agency should not have forced the tenants to pay MBR increases while waiting, perhaps for years, for a determination of their complaints regarding illegal use and the alleged resulting diminution of services.

The appropriate remedy is to remand the case to DHCR for adjudication of petitioners' complaints regarding illegal use and diminution of services. However, in fairness to both petitioners and Bleecker, who have been litigating this matter for years, it is appropriate for the

court to impose a time frame within which DHCR must make a determination and thereby bring some promise of closure to a longstanding dispute. Courts have the power to direct the agency to decide matters within a specified time frame (see Daniel v DHCR, 179 Misc 2d 452 [Sup Ct NY County 1998]) and this case requires one to be set.

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied insofar as it seeks to set aside the issuance of the 2000-2001 MBR increase, and it is further

ORDERED and ADJUDGED that insofar as the petition seeks to set aside the approval of the 1996-1997 MBR increase, the petition is granted to the extent that the case is remanded to respondent New York State Division of Housing and Community Renewal for the purpose of adjudicating petitioners' allegations regarding use of the premises as a hotel and the resulting diminution of services; and it is further

ORDERED and ADJUDGED that the agency's re-determination of the application for a 1996-97 rent increase be rendered within 75 days after receipt of all papers from the parties.

The foregoing constitutes the decision, order and judgment of this court.

Dated: September 30, 2005
New York, New York

ENTER:



J.S.C.

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 self-represented party must appear in person at the Judgment Clerk's Desk (Room 141B).

Pt 52 Dec & Order/101956_2005_001 & 002