

**Foerster v New York State Division of Housing &
Community Renewal**

2005 NY Slip Op 30366(U)

August 31, 2005

Supreme Court, New York County

Docket Number: 0103434/2005

Judge: Karen Smith

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

PRESENT: KAREN S. SMITH
Justice

PART 44

MARGARET FOERSTER

INDEX NO. 103434/2005

MOTION DATE 08/24/2005

- v -

MOTION SEQ. NO. 001

THE NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL and ROX
RIV 83 PARTNERS

MOTION CAL. NO. _____

The following papers, numbered 1 to 8B were read on this Petition pursuant to CPLR Article 78

Notice of Petition/ Order to Show Cause — Affidavits — Exhibits ...Memorandum
Answering Affidavits — Exhibits
Replying Affidavits Memorandum of Law of answer
Return of Record before the Division of Housing and Community Renewal

PAPERS NUMBERED

1
2- 3 & 4- 5
6 - 7
8A & 8B

Cross-Motion: Yes No

Upon the foregoing papers, it is ORDERED that this Petition Pursuant to CPLR Article 78 is granted, the determination of the New York State Division of Housing and Community Renewal dated January 14, 2005 is annulled and vacated and Apartments 11G and 11H at 420 Riverside Drive, New York, New York shall be deemed two separate living accommodations for the purposes of luxury deregulation of high rent apartments during the time periods relevant to the proceedings herein.

The petitioner (hereafter referred to as "Foerster") brought this proceeding pursuant to Article 78 of the CPLR to review the decision of the New York State Division of Housing and Community Renewal (hereafter referred to as "DHCR") which determined that apartments 11G and 11H at 420 Riverside Drive, New York, New York should be deemed a single living accommodation for purposes of luxury deregulation of a high rent apartment. In this proceeding Foerster asserts that the determination is arbitrary, capricious, contrary to law and violates Foerster's civil rights.

DHCR opposes the petition. DHCR argues that this determination is not arbitrary, capricious, erroneous or contrary to law, that the determination should be affirmed by the court and that the instant petition should be dismissed.

Rox Riv 83 Partners (hereafter referred to as "Rox Riv"), the owner of the subject apartments, also opposes the petition. Rox Riv contends that DHCR's decision has a rational basis and must be upheld by the court.

FACTS

In 2001, Rox Riv commenced proceedings to deregulate the rent for Foerster's apartment (11H) at 420 Riverside Drive, New York New York and for apartment 11G at the same property. Rox Riv sought to have the rents for the two apartments combined for purposes of determining that the housing accommodation's monthly rent exceeded \$2,000.00. Both apartments are leased to Thomas P. Ettinger (hereafter referred to as "Ettinger"), the petitioner's husband. Rox Riv contended that Foerster and Ettinger occupied the two apartments with the intent that they be used as a single household living accommodation. In support of its petition, Rox Riv submitted an affidavit of the superintendent at the apartment complex which states that the

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

UNREVERSED JUDGMENT
This judgment has not been entered and no writ of habeas corpus or writ of certiorari has been granted. The Division of Housing and Community Renewal is not to be served based hereon. To appear in person at the Judgment Clerk's Desk (Room 141B), Counsel or authorized representative must

superintendent has "examined" the subject apartments "... many times over the last several years...", that; "The tenants utilize apartments 11G and 11H as a single integrated living unit. ... apartment 11G does not have a kitchen at all. ... the tenants removed a bathroom from apartment 11G." (See Affidavit attached to Return of Record at Item A-16).

For their part, Foerster and Ettlinger contended that, although they remained legally married, they have been estranged and separated since in or around 1969. They further contended that they each maintain their own separate households and have done so since their separation (Foerster living in apartment 11H and Ettlinger living in apartment 11G).

It is undisputed that Foerster and Ettlinger remained legally married at all times relevant to the proceedings herein. It is further undisputed that the two apartments are not contiguous or physically integrated in any fashion.

As part of the de-regulation proceedings, DHCR obtained a report from one of its inspectors. This report contradicts the superintendent's affidavit by stating that, on March 26, 2002, the two apartments were: "... totally separate entity..." (sic) and that the inspector "...observed the kitchen in Apt 11H and a kitchenette in Apt 11G...". It must be noted that DHCR's request for inspection made no request for information about bathrooms in either unit (See Return of Record Item A-18).

On or about August 2, 2002, DHCR issued an Order of Deregulation which stated: "Based upon the evidence in the record, the Rent Administrator has determined that the maximum rent for apartment 11G and 11H can be combined for the purpose of Luxury Deregulation." The order itself provided no other indication of the basis for the Rent Administrator's decision.

In response to DHCR's August 2, 2002 determination, Ettlinger filed a Petition for Administrative Review (hereafter referred to as the "PAR"). Foerster appeared in the PAR proceeding and was represented by the attorney who also represented Ettlinger.

After allowing both sides to submit documents and information for the record, DHCR concluded that it needed to hold a fact finding hearing as part of the administrative review. The notice of the hearing specifically stated:

"The purpose of this hearing is: to determine whether the two subject apartments were used and utilized together as one integrated family residence during the relevant time period (the period relevant to the ICF which was served on the tenant) and should therefore be considered as one unit and their rents combined for the purposes of luxury decontrol. The owner and/or tenant must submit the following specified evidence or information to the Hearing Officer at this hearing: any evidence bearing on the above-mentioned issue not previously submitted and already a part of the record. Both the owner and tenant are requested to appear and may be represented by counsel. Witnesses and written evidence in support of all contentions may be presented. If you fail to appear, the DHCR will proceed without you and will, without further consultation with you, make a determination based solely on the evidence of record, including that received at the hearing." (Return of Record, Item B-9)

Though Foerster and Ettlinger did not attend the hearing in person, they both appeared therein by their then counsel, Jason Deutschmeister, Esq. Rox Riv appeared by its counsel, Niles Wellikson, Esq., and by one of its principals, Mr. Moshe Barkochboa.

Foerster's and Ettlinger's submissions in connection with the PAR included, *inter-alia*, nine affidavits from neighbors and three affidavits from employees at the apartment complex. Each affidavit indicated, based upon the respective affiants' observations and knowledge, that, to all outward appearances, Foerster and Ettlinger each maintain their own separate living accommodations at their respective apartments. In addition to the affidavits, Foerster's and Ettlinger's submissions included numerous documents indicating that their individual addresses were at their respective apartments rather than each others or at a combined apartment. The record also included the inspection report of the DHCR inspector who had found that the two apartments were completely separate units and that there was a kitchen in one and a kitchenette in the other. Therefore,

Foerster and Ettinger elected (as the notice of the hearing indicated they could) to rely upon the contents of the documents and submissions in the record before the DHCR rather than offering any testimonial evidence at the hearing.

In the face of Foerster's and Ettinger's reliance upon the documents and information in the record and despite Ettinger's absence, Rox Riv's counsel, without being sworn as a witness and without providing any foundation, offered various documents¹ into the record which he stated he had intended to use to cross-examine Ettinger. The submission of the documents constituted the overwhelming majority of Rox Riv's presentation at the hearing (Return of Record, Item B-14 Page 15, Line 10 through Page 31, Line 9). The balance of the case presented by Rox Riv's counsel consisted of the testimony of Mr. Barkochboa which indicates that he was in apartment 11G at 420 Riverside Drive 12 years ago while accompanying an inspector who was being shown violations by Ettinger but that he did not see the kitchen (because Ettinger would not allow Mr. Barkochboa to go into the kitchen) and that, about two years ago, when Mr. Barkochboa attempted to accompany an inspector into the same apartment, Ettinger refused to allow Mr. Barkochboa into the apartment at all (Return of Record, Item B-14, Page 34, Line 23 through Page 37, Line 17).

The January 14, 2005 final determination of the Deputy Commissioner of the DHCR states that it is adopting the "ALJ's recommendation" (Return of Record Item B-13, Page 4, last paragraph) and that the Foerster and Ettinger have; "...offered insufficient reason to disturb the Rent Administrator's determination" (Return of Record Item B-13, Page 5, first paragraph)². It also indicates that the documents offered by Rox Riv's counsel were accepted into the record of the proceedings and were relied upon by DHCR's Deputy Commissioner in reaching the final decision in this matter (see Return of Record, Item B-13, Page 3, first full paragraph). Furthermore, the decision of the DHCR's Deputy Commissioner specifically states that; "...the presiding Administrative Law Judge (ALJ), based on the tenants failure to appear and testify at the hearing, as well as the evidence and testimony presented at the hearing, found that the Rent Administrator's original determination that the rents for Apartments 11G and 11H were to be combined for the purposes of luxury decontrol should be confirmed..." (Return of Record, Item B-13, Page 4, third full paragraph). It must also be noted that DHCR's deputy commissioner cites DHCR Operational Bulletin 95-3 as authority for defining the relevant issue in the instant proceeding (Return of Record, Item B-13, Page 2, fifth paragraph).

DISCUSSION

A. Errors Affecting the Conduct of the Hearing Before DHCR's Administrative Law Judge

"One of the questions to be determined in an article 78 proceeding is -- 'Whether, in making the determination, any rule of law affecting the rights of the parties thereto has been violated to the prejudice of the petitioner.' That statute (Civ. Prac. Act §1295, subd. 5, now CPLR 7803, subd. 3 in part) of course, does not change the fundamental rule that any deprivation of the right to . . . a fair trial is, in itself, a basis for annulment of a determination resulting therefrom (U.S. Const. 6th. Amendt.; N.Y. Const., art. I, §6; . . .)" (Internal case citations omitted) (*Romeo v Union Free School District No. 3, Town of Islip*, 82 Misc. 2d 336, 339 [Suffolk County, 1975]; cf. *Fusco v Moses*, 304 N.Y. 424 [1952]).

"When dealing with the public, the functions of an administrative agency fall into two broad categories, legislative and judicial. . . . 'A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed to already exist. . . .' . . . The hearing held by an administrative tribunal acting in a judicial or quasi-judicial capacity may be more or less informal. Technical legal rules of evidence and procedure may be disregarded. Nevertheless, no essential part of a fair trial can be dispensed with unless waived" (internal case citations omitted) (*Hecht v Monaghan*, 307 NY 461, 469-470 [1954]).

¹ The court has not considered the content of the documents offered because the petitioner has challenged the prejudice caused by the procedures undertaken rather than the weight of the evidence submitted at the hearing. Additionally, the court notes that the documents were not provided to the court in the Return of the Record.

² Although Item B-14 if the Return of the Record is labeled "Hearing Report" it consists only of the transcript of the fact finding hearing and does not contain any recommendations of the Administrative Law Judge.

"Where a hearing is required before the body or officer making a determination, no essential element of a fair trial may be dispensed with, and thus questions of due process, as well as of statutory procedure, may be reviewed" (67 NY Jur 2d, Article 78 and Related Proceedings § 49).

In the matter presently before this court, the errors in the procedure followed at the fact finding hearing before DHCR's Administrative Law Judge deprived the petitioner of the right to a fair hearing. Therefore, DHCR's final determination based upon the hearing was arbitrary and capricious.

First, the Administrative Law Judge incorrectly determined that Foerster and Ettinger failed to "appear" at the hearing. Second, even assuming *arguendo*, that Foerster and Ettinger failed to appear at the hearing, the Administrative Law Judge failed to follow DHCR's procedure as provided in the notice of hearing. Third, the Administrative Law Judge allowed Rox Riv's counsel to testify at the hearing without being sworn as a witness and to submit documents into evidence without any foundation being offered for the admission thereof. Fourth, DHCR incorrectly placed the burden of persuasion in the hearing upon Foerster and Ettinger rather than Rox Riv.

The notice of the hearing in the instant matter specifically indicated to Foerster and Ettinger that they were "... requested to appear and may be represented by counsel." By the terms of the notice, Foerster's and Ettinger's attendance at the hearing was not mandatory and could be fulfilled by the appearance of legal counsel representing their interests. Foerster and Ettinger appeared at the hearing by their counsel rather than attending in person. Their counsel's participation therein was consistent with the procedures set forth in the notice of the hearing. Thus, the Administrative Law Judge incorrectly determined that Foerster and Ettinger failed to "appear" at the hearing.

Even assuming *arguendo* Foerster and Ettinger had failed to appear at the hearing, the notice of hearing specifically provided, in such an event, that the hearing would proceed in their absence and DHCR would make its determination from the evidence before it. Therefore, the Administrative Law Judge was not free to draw any adverse inference against Foerster and Ettinger based solely upon their non-appearance at the hearing. Instead, if a party failed to appear at the hearing, the Administrative Law Judge was obligated to conduct a fair hearing and reach an impartial determination based upon the evidence properly before him. That is not what occurred in the instant matter.

Instead, Rox Riv's counsel requested that the Administrative Law Judge presume that any testimony of Foerster and Ettinger would have been detrimental to their position (Return of Record, Item B-14 Page 8, Lines 1-8). Thereafter, Rox Riv's counsel offered documents into the record which he indicated he intended to use in his cross examination of Ettinger had Ettinger testified at the hearing. Since, the documentary evidence Rox Riv offered at the hearing was completely dependant upon Ettinger's testimony, it was incumbent upon Rox Riv's counsel to subpoena Ettinger rather than merely rely upon Ettinger's status as a party to the proceeding in order to secure his testimony. Under these circumstances, allowing Rox Riv's counsel to testify as an unsworn witness and to offer evidence into the record without any foundation for that evidence goes beyond permissible informality in administrative proceedings and deprived the petitioner of a fair hearing.

Furthermore, DHCR improperly placed the burden of persuasion upon Foerster and Ettinger in the fact finding hearing. The hearing notice indicated that the purpose of the hearing was; "... to determine whether the two subject apartments were used and utilized together as one integrated family residence during the relevant time period (the period relevant to the ICF which was served on the tenant) and should therefore be considered as one unit and their rents combined for the purposes of luxury decontrol." (Return of Record, Item B-9). Since the hearing was set up to consider the underlying issue in the proceedings, it was designed to provide facts DHCR had been unable to discern from the record before its Rent Administrator rather than reviewing the evidence before the Rent Administrator when the original determination was made. Under these circumstances, the burden of persuasion must, of necessity, have remained with Rox Riv (as the landlord in the proceedings) to show that high rent de-regulation of the subject apartments was appropriate. The failure to do so further prejudiced the petitioner.

B. DHCR's Arbitrary and Capricious Unexplained Departure From its Own Policy Statement

"From the policy considerations embodied in administrative law, it follows that, when an agency

determines to alter its prior stated course, it must set forth its reasons for doing so. Unless such an explanation is furnished, a reviewing court will be unable to determine whether the agency has changed its prior interpretation of the law for valid reasons, or has simply overlooked or ignored its prior decision... Absent such an explanation, failure to conform to agency precedent will, therefore, require reversal on the law as arbitrary, even though there is in the record substantial evidence to support the determination made..." (Internal case citations omitted) (*Charles A. Field Delivery Service, Inc. v Roberts*, 66 NY 2d 516, 520 [1985]; cf. *721 Ninth Avenue, LLC v New York State Division of Housing and Community Renewal*, 8 AD 3d 41 [1st Dept, 2004]).

"... Where a tenant occupies two or more contiguous housing accommodations which may or may not be structurally combined to some degree, but not to a degree that would qualify for a 'first rent,' will the rents of each be combined in determining whether the monthly legal regulated rent is \$2,000 or more?" (New York State Division of Housing and Community Renewal, Office of Rent Administration, Operational Bulletin 95-3).

In the instant matter DHCR's final determination is a substantial departure from its pre-existing policy statement contained in the operational bulletin it cited as support for its decision. This departure is arbitrary and capricious because DHCR did not explain of the reasons for the departure.

DHCR's operational bulletin 95-3 clearly states that the individual rents of: "...two or more contiguous housing accommodations which may or may not be structurally combined to some degree..." (emphasis added) may be combined and considered together for purposes of high rent luxury de-regulation. The operational bulletin specifically refers to contiguous housing accommodations. Since it is conceded that the apartments involved in the instant matter are non-contiguous, DHCR's policy of considering the appropriateness of combining rents of contiguous housing accommodations for purposes of high rent de-regulation is not applicable to the instant case. Therefore, the initial application herein should not have been entertained by DHCR without an explanation of its reasons for its departure from its announced policies.

Moreover, the cases cited by the respondents herein do not support DHCR's departure from its policy statement. None of the cited cases contain any indication that, for purposes of high rent de-regulation, anything other than structurally combined or contiguous apartments (whether on the same floor or immediately above and below one another) have had their individual rents combined. Instead, the cited cases relate to proceedings to determine if the tenants used the apartments as their primary residence.

The distinction between the two situations is critical. For many years the legislature has manifested an intent to include housing units within rent regulation for the purpose of generally protecting affordable housing stocks. The courts have consistently ruled in deference to that legislative goal (cf. *Tegreh Realty Corp v Joyce*, 88 AD 2d 820 [1st Dept, 1982]; *Wilson v One Ten Duane Street Realty Co.*, 123 AD 2d 198 [1st Dept, 1987]; *Federal Home Loan Mortgage Corporation v New York State Division of Housing and Community Renewal*, 87 NY 2d 325 [1995]).

In each court case cited by the respondents and dealing with primary residence challenges, the tenant leased two non-contiguous apartments in one building for various purposes identified as relating to family needs. In *Sharp v Melendez* (139 AD 2d 262 [1st Dept, 1988]) the tenant's parents assisted him in managing his medical condition and his original apartment was too small for all of them to share as their sole living space. In *Page Associates v Dolan* (NYLJ, Nov. 8, 1984 [App Term, 1st Dept]) the tenant leased a second apartment to provide a bedroom for a nephew who was the tenant's legal ward. In *Tracey Associates v Faust* (NYLJ, Apr. 15, 1987 [Civ Ct, NY County]) the court only stated that the second apartment was rented with the intent that it be used as an extension of the tenant's primary residence. In *224 East 18th Street Associates v Sjackl* (138 Misc. 2d 494 [Civ Ct, NY County, 1987]) one tenant in a building married another tenant in the building and both tenants began to use both apartments with the second apartment being used as a den/study, guest room, second dressing area and occasional sleeping area for one of the tenants. When landlords challenged the primary residence status of the respective tenants in the non-contiguous apartments, the courts ruled in favor of the tenants. Thus, the courts' rulings have held consistently with the legislative intent to keep the living accommodations subject to rent regulatory statutes and prevent hardships upon the tenants.

Were this court to blindly apply the above determinations concerning primary residence to the instant case, the intent behind them would be completely frustrated. None of the decisions cited by the respondents stands for the proposition that the rents of two distinct apartments will be combined for the purposes of high

rent deregulation merely because both apartments may (under certain circumstances) be considered the primary residence of one tenant. None of the parties to the instant proceeding has cited any court case so holding. Giving due consideration to the legislative goal of protecting rent regulated housing accommodations, absent a clear legislative mandate to the contrary, there is no basis for the court to extend the holdings of cases relating to primary residence determinations to cases concerning high rent de-regulation.

DECISION

Ordinarily, a court will not substitute its judgment for that of an administrative agency. Instead, the errors committed by DHCR would constitute grounds for vacating its determination and remanding it to DHCR for new proceedings in conformance with proper procedures to provide the petitioner with a fundamentally fair hearing and a determination which complies with DHCR's announced policies.

However, in the instant proceeding DHCR's determination relates to an annual certification period for the year 2001. There has been no showing of any change in DHCR's operational policies between the issuance of its 1995 operational bulletin and DHCR's 2005 final determination in this matter. Therefore, the only determination DHCR could reach upon a remand of the instant application without arbitrarily and capriciously departing from those policies would be to grant the PAR and conclude that the rents for the two apartments should not be combined for purposes of high rent de-regulation for the applicable time period. The same holds true for the annual certification periods for 2002-2005. Therefore, a remand of the instant proceeding to DHCR for a new hearing would be pointless.

Given this determination, the court need not address the remaining contentions raised by the parties herein.

ORDER AND JUDGMENT

It is;

ADJUDGED AND DECREED: that the petition in this matter is granted and it is;

ORDERED: the determination of DHCR dated January 14, 2005 is annulled and vacated and Apartments 11G and 11H at 420 Riverside Drive, New York, New York shall be deemed two separate living accommodations for the purposes of luxury de-regulation of high rent apartments during the time periods relevant to the proceedings herein.

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

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

Dated: 8-31-05

[Signature]
Hon. Karen S. Smith, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST