

**Tulip Apts. Inc. v State of New York**

2007 NY Slip Op 30570(U)

March 21, 2007

Supreme Court, New York County

Docket Number: 0108128/2006

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN

PRESENT: \_\_\_\_\_ J.S.C. \_\_\_\_\_

PART 11

Index Number : 108128/2006

TULIP APARTMENTS

vs  
STATE OF NEW YORK

Sequence Number : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...  
Answering Affidavits -- Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ *Article 78 proceeding* is determined in accordance with the annexed decision, order and judgment.

**UNFILED JUDGMENT**  
This judgment has not been filed with the County Clerk and notice of entry shall not be deemed hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: March 21, 2007 \_\_\_\_\_ 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: PART 11

-----X  
TULIP APARTMENTS INC.,

Petitioner,

INDEX NO. 109128/06

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

-against-

THE STATE OF NEW YORK and THE STATE OF NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondents.

-----X  
JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner-owner challenges the decision by respondent New York State Division of Housing and Community Renewal ("DHCR") which granted the tenants' Petition for Administrative Review ("PAR"), revoked the Rent Administrator's order of deregulation, and remanded the matter for a determination on the merits as to the owner's application for high income deregulation.

Susan Sutherland and Ian Sutherland are the rent stabilized tenants of apartment #123 at 412 West 110<sup>th</sup> Street in Manhattan. On May 31, 2005, the owner filed with DHCR a petition for high income deregulation, challenging the household income as stated by the tenants in their income certification form, and requesting verification that tenants' income was \$175,000 or less in either of the two preceding calendar years. On July 29, 2005, DHCR sent the tenants a copy of the owner's petition for high income deregulation and an answer form. The form notified the tenants that they had 60 days to submit an answer and provide certain information necessary to

**UNIFIED JUDICIAL DEPARTMENT**  
**This judgment has been entered in the County Clerk's Office and notice of entry has been mailed to the parties. To obtain entry, counsel or the unrepresented person must appear in person at the Judgment Clerk's Desk (Room 1215).**

verify their income. The form further stated that the failure to respond would be deemed a default and that based on such default the apartment would be deregulated. It is undisputed that the tenants did not timely respond within the 60 day period, and based on that default, DHCR issued an order on December 12, 2005, deregulating the apartment.

On December 29, 2005, the tenants filed a PAR challenging the Rent Administrator's order of deregulation. In support of the PAR, the tenants asserted that their income did not exceed \$175,000 in 2003 or 2004, that they received and completed two income certification forms dated April 15, 2005 and April 23, 2005 and returned both forms to the owner, and that they did not have any recollection of receiving from DHCR the notice of the owner's petition for deregulation and the answer form. The letter explained that Susan Sutherland normally handled this type of paper work and prior to receiving the order of deregulation, she was not aware of any papers from DHCR, as she was away in Virginia from May through September, caring for her ailing parents. The tenants further explained that after receiving the order of deregulation, Ian Sutherland, at first, did not remember receiving any papers from DHCR or the owner, but then he looked in the drawer where they keep their tax information, and he found the documents and recalled that he thought they were just duplicates of what had already been sent to the landlord, i.e. the two income certification forms, so he filed them with their tax papers. Apologizing for the oversight, the tenants said that they were unacquainted with the paperwork and procedures, as [i]t is not something we have had to do before." They enclosed a completed answer form with their PAR, along with copies of their 2003 and 2004 tax returns.

On May 12, 2006, the DHCR Deputy Commissioner issued an Order and Opinion

granting the tenants' PAR, finding that they had established good cause for the default. The Commissioner thereby revoked the Rent Administrator's order deregulating the apartment, and remanded the matter to DHCR for a determination on the merits as to whether the apartment qualifies for high income deregulation.

On June 13, 2006, the owner commenced the instant Article 78 proceeding, seeking to overturn DHCR's decision granting the tenants' PAR. By an order dated October 12, 2006, this court granted the motion by tenant Susan Sutherland to intervene in this proceeding.

In support of the petition, the owner argues that the December 12, 2005 order of deregulation was proper under Rent Stabilization Code §2531.6, which states that where a tenant fails to provide the information required by law, "the DHCR shall, on or before the next December 1<sup>st</sup>, issue an order providing that such housing accommodation shall not be subject to the provision of the Rent Stabilization Law and this Code upon the expiration of the current lease." The owner also argues that the tenants' PAR was statutorily time-barred because they did not respond to DHCR's request for income verification within 60 days from May 31, 2005, the date that the notice was mailed, and they did not retain proof of the delivery of such information to the DHCR, as required by statute. The owner further argues that the DHCR's determination that the tenants had established excusable default was arbitrary and capricious, as neither confusion, inadvertent neglect, nor caring for ailing parents, is sufficient to excuse the tenants' delay. The owner also asserts that the Deputy Commissioner relied on "gratuitous and non-existent allegations" by the tenants, claiming that it had no document from the DHCR or the tenants, containing the statements and excuses as set forth in the Commissioner's May 12, 2006

decision.

In reviewing the action of an administrative agency, such as the DHCR, the court's inquiry is limited to whether the determination is arbitrary and capricious, or without a rational basis in the record and a reasonable basis in law. See CPLR 7803(3); Classic Realty LLC v. New York State Division of Housing & Community Renewal, 2 NY3d 142 (2004).

As a result of the Court of Appeals decision in Dworman v. New York State Division of Housing & Community Renewal, 94 NY2d 359 (1999), it is clear that the DHCR has the discretion to accept late filings in a high income deregulation proceeding upon a showing of good cause. Contrary to the owner's assertions, DHCR is not statutorily mandated to issue an order of deregulation where, as here, the tenants submit a response after the 60<sup>th</sup> day, but rather, "where good cause is shown, DHCR has the discretion to permit a late filing either before or after the Rent Administrator has issued a deregulation order, until the Commissioner has taken final action." Id at 373.

Likewise, no factual or legal basis exists for concluding that the PAR was untimely based on the tenants' late submission of the documents to DHCR, or their failure to retain proof of delivery of such documents to DHCR. When the tenants filed their PAR, they included a completed answer form and provided their income tax returns for the two prior years. At that stage of the proceeding, where DHCR had yet to take final action, DHCR had discretionary authority to consider such documents in the context of the PAR, and in determining whether the tenants demonstrated good cause for their delay in responding. Id.

The owner's argument that DHCR relied on "gratuitous and non-existent" facts, is belied

by the record. In response to question nine on the PAR form filled out by the tenants, they explicitly wrote "See attached letter" when asked to explain what the "error of fact and/or law in the Order being appealed is." Annexed to the tenants' PAR, which is submitted with the DHCR's administrative return, is a one-page letter from the tenants dated December 27, 2005, which is date-stamped as received by the DHCR Rent Administrator on December 30, 2005. That letter contains all of the facts DHCR recited in its decision, and those are the facts DHCR relied on in determining that the tenants had established good cause. Thus, the owner's assertion that DHCR relied on excuses "not made by the Tenants, but . . . made by the Deputy Commissioner on his own initiative," is without merit.

Finally, the owner argues that the excuses offered by the tenants, i.e. confusion, inadvertent neglect and caring for ailing parents, were insufficient to establish good cause. This argument also lacks merit.

In Dworman, supra, the Court of Appeals decided three separate Article 78 proceedings involving three separate tenants, and remanded two of the cases to DHCR for an evaluation under the good cause standard. In one of the proceedings that was remanded, the tenant filed late because she was in Europe for three months and did not see the notice from DHCR until she returned, which was after deadline expired. The Court of Appeals noted that in its several communications with the tenant, DHCR never asked for an explanation for her late filing, and only asked for proof that her response had been timely filed. The Court also found that on remittal "DHCR may consider, in its discretion, whether the [tenant's] 11-day delay was so minimal to be excusable under the maxim of *de minimus non curat lex*." In the other case that was remanded, the Court of Appeals found that the tenant "alleged what might possibly be good

cause,” in claiming that he mistakenly sent the information to the landlord rather than DHCR, because his wife was away when he received the papers and he was suffering from clinical depression. In the third case, where the tenant acknowledged that she received the notice from DHCR and stated only that she had neglected to mail it, the Court of Appeals did not disturb the order of deregulation, finding that DHCR was within its discretion to determine that the tenant’s “inadvertent neglect,” which concededly caused the five-month delay, did not excuse her default.

Here, as in Dworman, tenant Susan Sutherland explained that she normally handled household paper work, that she was away in Virginia from May through September, caring for her ailing parents, and that she did not become aware of the notice from DHCR until she received the order of deregulation in December. Similarly, when his wife was away and he received the papers from DHCR, Ian Sutherland thought they were duplicates of the two income verification forms they had previously completed and returned to the owner in April 2005, so he filed them away. This is not a case of “inadvertent neglect,” as the DHCR reasonably concluded that the tenants’ timely responses to the owner’s two requests in April 2005 for income verification, evinced an intent on their part to comply with, rather than neglect requests for income information. DHCR also reasonably relied on the tenants’ statement that they were “unacquainted with the paperwork and procedures,” noting that the agency’s records revealed that this was the first high income deregulation proceeding commenced with respect to the tenants’ apartment, so they had no prior experience with such proceedings.

While the owner cites to several cases decided after Dworman, which uphold DHCR’s determination that the owner was entitled to an order of high income deregulation, the facts in those cases are readily distinguishable from those in the instant proceeding. See Bennissim v.

Calogero, 19 AD3d 135 (1<sup>st</sup> Dept 2005)(First Department held that the Supreme Court properly found that the Article 78 petition was untimely, but even if it were timely, “we would not find, in light of the entire record, that respondent agency lacked a rational basis for its determination that there was not good cause for petitioner’s admitted failure to answer two separate notices of a decontrol petition”; court also noted that “most of petitioner’s factual averments are made for the first time in this article 78 proceeding, and were not presented at the agency level”); Klein v. New York State Division of Housing & Community Renewal, 17 AD3d 186 (1<sup>st</sup> Dept 2005) (where the deceased tenant of record was listed on various correspondence from the owner and DHCR, and on the order of deregulation, and one of several tenants occupying the apartment actually participated in the process by filling out and returning the income certification form, the First Department found that it was “abundantly clear” that the tenants occupying the apartment were fully notified of the proceedings and the decision decontrolling the apartment, and of the time limits for filing a PAR; thus, the tenants had no acceptable excuse for failing to file a timely PAR, which was more than three years late); Marroche v. New York State Division of Housing & Community Renewal, 2003 WL 1906777 (Sup Ct, NY Co 2003)(n.o.r.)(Supreme Court upheld DHCR’s determination that the tenant failed to show good cause for the delay; tenant did not respond to the landlord’s request for income verification and explained that he relied on his accountant to answer the landlord’s petition for high income deregulation; in support of the PAR, tenant submitted an affidavit from the accountant and copy of the alleged answer, but the accountant’s letter did not provide all the necessary income verification information required by the answer form and included incomplete copies of the tenant’s tax returns; tenant failed to respond to two additional notices from DHCR and during the entire time the administrative

proceedings were pending, failed to submit the specified required documents to enable DHCR to obtain the tax returns from the State Department of Taxation).

Based on the foregoing, DHCR's determination that the tenants in their PAR "established an adequate explanation for their failure to submit an answer in the proceeding below," was supported by a rational basis, and was not arbitrary and capricious. The owner, therefore, is not entitled to Article 78 relief.


Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is denied and dismissed.

This constitutes the decision, order and judgment of the Court.

DATED: March 21, 2007

ENTER:

  
\_\_\_\_\_  
J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been filed with the County Clerk and notice of entry of judgment has not been placed hereon. To obtain entry, contact the County Clerk's Office. A representative must appear in person at the Judgment Clerk's Desk (Room 141B).