

Matter of Doyle v Calogero

2007 NY Slip Op 30723(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0100321/2007

Judge: Carol R. Edmead

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

PRESENT: _____

CAROL EDMEAD
J.S.C.

PART 35

Justice

Index Number : 100321/2007

DOYLE, JENNIFER

vs

COLAGER, JUDITH A.

Sequence Number : 001

ARTICLE 78

INDEX NO. 100321/07

MOTION DATE 4/9/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered _____ this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

PAPERS NUMBERED _____
FILED
APR 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

This matter is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the motion of petitioner Jennifer Doyle is denied in its entirety. It is further

ORDERED that the determination of the Deputy Commissioner for Rent Administration in issuing his order dated November 9, 2006 under docket number UG410037-RT was not arbitrary, capricious, erroneous, or contrary to law and is entirely in accordance with the RSL and Code and the order is fully entitled to judicial affirmance, the Petition is dismissed, and the Clerk of the Court is directed to enter judgment accordingly. It is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

Dated: 4/12/07


CAROL EDMEAD J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

_____ x
In the Matter of the Application of

JENNIFER DOYLE,

Petitioner,

Index No. 100321/07

-against-

DECISION/ORDER

JUDITH CALOGERO, Commissioner of the New York
State Division of Housing and Community Renewal,
Office of Rent Administration

and

THE NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,
Office of Rent Administration,

Respondents.

FILED
APR 16 2007
NEW YORK
COUNTY CLERK'S OFFICE

_____ x
EDMEAD, J.S.C.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Jennifer Doyle ("petitioner") moves for an order:

(1) reversing the determination of respondent The New York State Division of Housing and Community Renewal ("DHCR") deregulating the apartment PHB at 320 East 52nd Street, New York, New York 10022 (the "subject apartment") upon expiration of the existing lease pursuant to the terms of the rent stabilization code on the grounds that such a determination violates applicable law, is arbitrary, capricious and an abuse of discretion, and violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution for which a cause of action is created by 42 U.S.C. Section 1983; (2) reversing DHCR's determination that the subject apartment be deregulated upon the expiration of the existing lease because the income of the

occupants in the two years preceding the service of an Income Certification Form (“ICF”) exceeded \$175,000.00 on the grounds that such a determination violates applicable law, is arbitrary, capricious, and an abuse of discretion, and violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution for which a cause of action is created by 42 U.S.C. Section 1983; (3) declaring the DHCR’s regulation at 9 NYCRR Sections 2531.1 et seq. null and void to the extent that they allow, or are interpreted and applied to allow the inclusion of income for luxury deregulation purposes of occupants at the time the ICF is served rather than the income of the occupants of the premises in the preceding two calendar years as required by Rent Stabilization Law (“RSL”), Sections 26-504.1 and 26-504.3(a) and (b); (4) declaring the DHCR’s Operational Bulletin 95-3 null and void to the extent that it allows, or is interpreted and applied to allow the inclusion of income for luxury deregulation purposes of occupants at the time the ICF is served rather than the income of the occupants of the premises in the preceding two calendar years as required by RSL, Sections 26-504.1 and 26-504.3 (a) and (b); (5) staying the Order of the DHCR in Administrative Review Docket No. UG410037RT pending the resolution of this special proceeding; and (6) ordering that respondents pay costs and reasonable attorneys’ fees for this proceeding pursuant to 42 U.S.C. 1988.

Respondents counter and argue that the actions of the Deputy Commissioner for Rent Administration in issuing his order dated November 9, 2006 under docket number UG410037-RT was not arbitrary, capricious, erroneous, or contrary to law and is entirely in accordance with the RSL and Code and the order is fully entitled to judicial affirmance.

Petitioner's Contentions

The RSL on its face, requires that DHCR consider only the incomes of permanent tenants and occupants in making high income rent deregulation determinations. While giving lip service to the language of the statute it is bound to enforce, the DHCR nevertheless has both promulgated and applied regulations and an operational bulletin that omit crucial elements required by the RSL. In doing so, rather than protecting tenants and occupants in a severely limited housing market as is their charge, the DHCR has put tenants and occupants of rent stabilized apartments "at risk" by subjecting them to market rents at times and under conditions not contemplated by the legislature and the RSL.

The mandates of Section 26-504.1 clause (1) are clear: the persons who occupy the accommodation, that is, "the occupants" must have an aggregate annual income of \$175,000 in each of the two preceding calendar years. Notably, therefore, the principal provision of the RSL's high income exception makes it clear from the outset that it is occupant income that must exceed \$175,000 for the two preceding calendar years, not non-occupant income. If the DHCR asks the Department of Taxation and Finance ("DTF") to verify the income of someone who was a non occupant in each of the two preceding calendar years, it does so in derogation of the RSL.

In enacting and enforcing a regulation and a bulletin inconsistent with Section 26-504.1 of the RSL, the Commissioner and the DHCR have acted in excess of their authority, and the Order and Opinion dated November 9, 2006 is *ultra vires*.

Respondents' Contentions

The Commissioner's Order, affirming the Rent Administrator's Order of Deregulation upon finding that the legal rent exceeded \$2,000 per month and the total household income of those persons in occupancy on the operative date of March 9, 2005 exceeded \$175,000 in each of the two preceding tax years, is supported by a rational basis in the record and the law and is entitled to judicial affirmance.

In applying the statute, the identity of the present occupants whose incomes are to be verified has to be fixed as of some record date. The DHCR used the date upon which the landlord served the ICF upon the tenant as the record date. This was rational for a number of reasons: (1) the date of such service was selected by the landlord, there is an antecedent in the rent law for establishing a record date based upon the landlord's service of a legal notice - i.e., the service by a landlord of a Form DC-2 notice or a Form RR-1 initial registration notice commenced the running of the 90-day statute of limitations for filing a Fair Market Rent Appeal; and (2) the service of an ICF upon the tenant is the initial step in commencing the process for determining high income rent deregulation and therefore may logically serve as the record date.

The statute looks to the present for purposes of identifying persons who are to be included in "total income." Only the income examination is retrospective.

In the instant case, the DHCR correctly found that since the ICF was served on March 9, 2005 and that Marshall Babson was occupying the subject apartment on that date, his income was properly considered in determining the amount of the relevant household income. The DHCR was not required to consider whether Mr. Babson resided in the subject apartment during 2003 and 2004. Further, the Commissioner properly relied on DTF's finding that the household

exceeded the required threshold amount in granting the owner's petition for high income rent deregulation.

Petitioner's Reply

That the rent component of the statute focuses on the present, and does not look back to rent in the past as respondent argues, is not a persuasive reason to ignore the statutory text of the occupancy component. The requirement that the rent of the subject apartment be over \$2,000 per month on the date the notice is served is a threshold issue. Unlike the occupancy requirement, when the statute speaks to the rent of the apartment, it does so with no reference whatsoever to temporal stability.

Given the permanency of de-stabilization, and the reduction in the rights of tenants whose apartments are de-stabilized, both the language of the statute and the policy underlying the rent stabilization laws are ignored and impaired by the DHCR's construction. Such a result is neither reasonable nor rational, and must not be allowed to stand.

Analysis

CPLR 7803 states that the court review of a determination of an agency, such as DHCR, consists of whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed. CPLR 7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1st Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1st Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1st Dept.1987], *lv. den.* 70 N.Y.2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts." *Matter of Pell v Board of*

Education, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. *Matter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's function is completed on finding that a rational basis supports the DHCR's determination (see *Howard v Wyman*, 28 N.Y.2d 434 [1971]). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (see *Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1st Dept.], aff'd 66 N.Y.2d 1032 [1985]).

Pell v Board of Ed. of Union Free School Dist. No...., 356 N.Y.S.2d 833

N.Y. 1974, is instructive on the basic standard of Article 78 review:

In article 78 proceedings: the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence. (Cohen and Karger, Powers of the New York Court of Appeals, s 108, p. 460; 1 N.Y.Jur., Administrative Law, ss 177, 185; see *Matter of Halloran v. Kirwan*, 28 N.Y.2d 689, 690, 320 N.Y.S.2d 742, 743, 269 N.E.2d 403 (dissenting opn. of Breitel, J.)). The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals. The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious. (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460--461; see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7803.04 Et seq.; 1 N.Y.Jur., Administrative Law, ss 177, 184; *Matter of Colton v. Berman*, 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 650--651, 234 N.E.2d 679, 681--682).

Pell at 839.

As to Petitioner's argument that the DHCR misapplied the relevant statutes, the court is guided by the Court of Appeals in *Howard v Wyman*, 28 N.Y.2d 434 N.Y. 1971, wherein the

Court stated:

It is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld. (See, e.g., *Matter of Mounting & Finishing Co. v. McGoldrick*, 294 N. Y. 104, 108; *Matter of Colgate-Palmolive-Peet Co. v. Joseph*, 308 N. Y. 333, 338; *Udall v. Tallman*, 380 U. S. 1, 16-18; *Power Reactor Co. v. Electricians*, 367 U. S. 396, 408.) As this court wrote in the *Mounting & Finishing Co.* case (294 N. Y., at p. 108), "statutory construction is the function of the courts 'but where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited' (*Board v. Hearst Publications*, 322 U. S. 111, 131). The administrative determination is to be accepted by the courts 'if it has "warrant in the record" and a reasonable basis in law' (same citation). 'The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body' (*Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, 146)."

Howard at 434.

In the case of *A.J. Clark Real Estate Corp. v. New York State Division of Housing and Community Renewal*, 307 AD2d 841, 763 NYS2d 577 (1st Dept 2003), the First Department affirmed the trial court denial of petitioner landlord's application to annul respondent DHCR's determination denying the landlord's application to deregulate the subject apartment under the luxury decontrol law, and dismissal of the petition.

The landlord served an ICF in March 2000, shortly after it was advised by the tenants of record, respondent parents, that they would be vacating the subject apartment by December 31, 1999 and that their daughter, also a respondent herein, would be continuing her occupancy and succeeding to their rights under the RSL. DHCR denied luxury deregulation upon findings that the daughter was the only permanent occupant of the apartment at the time the ICF was served, and that her income was less than \$175,000 in 1998 and 1999. The landlord argued that DHCR

was required to include the parents' income in determining the \$175,000 limit on household income since they resided in the apartment for all of 1998 and 1999, the two tax years relevant to the proceeding, never surrendered the lease and remained the tenants of record. DHCR disagreed, ruling that only the incomes of actual occupants of an apartment are to be included in household income, and that, in accordance with its Operational Bulletin 95-3, the relevant date for determining occupancy is service of the ICF.

The First Department held that the DHCR's ruling correctly reflected a statute that speaks in the present tense about the persons whose incomes are to be considered. Rent Stabilization Law of 1969 (Administrative Code of City of NY) § 26-504.3 (a) defines "total annual income" as "the sum of the annual incomes of all persons whose names are recited as the tenant or co-tenant on a lease *who occupy the housing accommodation* and all other persons that occupy the housing accommodation as their primary residence on other than a temporary basis" (emphasis added). As DHCR argues, if the Legislature had intended inclusion of the incomes of all persons named on the lease, or all persons in occupancy of the apartment at a specified time prior to service of the ICF, it would have said so. *Id.* At 842-843

Petitioner provides no case law that persuades the court to find contrary to *A.J. Clark Real Estate Corp. v New York State Division of Housing and Community Renewal*.

Conclusion

Based on the foregoing, it is hereby

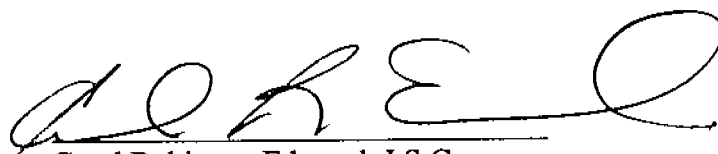
ORDERED that the motion of petitioner Jennifer Doyle is denied in its entirety. It is further

ORDERED that the determination of the Deputy Commissioner for Rent Administration in issuing his order dated November 9, 2006 under docket number UG410037-RT was not arbitrary, capricious, erroneous, or contrary to law and is entirely in accordance with the RSL and Code and the order is fully entitled to judicial affirmance, the Petition is dismissed, and the Clerk of the Court is directed to enter judgment accordingly. It is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: April 12, 2007



Carol Robinson Edmead, J.S.C.

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APR 16 2007
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