

Strauchen v New York State Div. of Hous. & Community Renewal
2007 NY Slip Op 31035(U)
April 26, 2007
Supreme Court, New York County
Docket Number: 0116919/2006
Judge: Donna Marie Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

VIVIENNE STRAUCHEN,
Petitioner,
-v-
NEW YORK STATE DIVISION OF HOUSING, et. al.,
Defendant.

INDEX NO. 116919/06
MOTION DATE _____
MOTION SEQ. No. 001
MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion for Article 78 relief.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1
Answering Affidavits- Exhibits 3 + 3A
Replying Affidavits _____
CROSS-MOTION: YES NO

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 147B).

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 4-26-07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X
Vivienne Strauchen,

Petitioner,

Index No. 116919/06

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

-against-

The New York State Division of Housing
and Community Renewal, and ALTA
Apartments LLC,

Respondents.

-----X

Donna Mills, J.:

In this Article 78 proceeding, petitioner Vivienne Strauchen seeks an annulment of the September 14, 2006 New York State Division of Housing and Community Renewal (DHCR) order which denied Mrs. Strauchen's petition for an administrative review (PAR) and affirmed the DHCR's October 6, 2005 order that deregulated the rent stabilized apartment she occupies. She argues that the DHCR's determination is arbitrary, capricious and without a rational basis in fact or in law. Based on the record, her petition should be denied.

The tenancy currently occupied by Mrs. Strauchen is apartment #17R, located at 65 East 96th Street in the City of New York (the apartment). ALTA Apartments LLC (Alta) is the owner of the apartment building (the premises). Pursuant to the Rent Regulation Reform Act of 1993 (L 1993, ch 253), the owner of each housing accommodation for which the legal regulated rent is \$2,000.00 or more may seek to have the rent deregulated if the income of the tenants exceeds the statutory threshold of \$175,000.00 (Rent Stabilization Law of 1993 [Administrative Code of the City of New York] § 26-504.3 [b]). Upon a request by the building owner, tenant[s] are required

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to complete an income certification form (ICF) which may be subject to verification by the New York State Department of Taxation and Finance (DTF) in accordance with section 171 (b) of the New York State Tax Law (id. § 26-504.3 [b]; see also New York City Rent Stabilization Code [9 NYCRR] § 2531.4 [a]). The owner may also petition DHCR to verify the tenants' income (Rent Stabilization Law, § 26-504.3 [c] [1]).

The October 6, 2005 DHCR Deregulation Order

Alta sent an ICF form to Mr. and Mrs. Strauchen. Mrs. Strauchen apparently filled out and returned the ICF form. On the ICF form, Mrs. Strauchen indicated that the tenants' household income was less than \$175,000.00. This estimate was based upon the alleged vacatur of the apartment by her husband on December 29, 2002. On May 4, 2004, Alta filed an owner's petition for deregulation (OPD) with the DHCR for a high-income rent deregulation (luxury deregulation) of the apartment. On May 19, 2004, the DHCR mailed the OPD answer form to the Strauchens at the apartment address. The Rent Stabilization Code requires a tenant to answer an OPD within 60 days and to provide the DHCR with such information as the DHCR and DTF shall require to verify whether the relevant annual total household income exceeds the specified \$175,000.00 statutory threshold (NY City Rent Stabilization Code [9 NYCRR] § 2531.4 [b]). The tenant whose tenancy is being considered for deregulation is required to submit a copy of either the preprinted mailing label used on the New York State income tax return for applicable years or the first page of the actual tax return for applicable years with social security numbers and calculations omitted. If neither is available, then the tenants must provide a written explanation why the applicable income tax returns were not filed (id., § 2531.4 [a] [1]).

On or about July 12, 2004, Mrs. Strauchen submitted an incomplete answer. In the

answer, she reiterated that the annual income of the apartment tenants was less than \$175,000.00 and that the occupants of the apartment consisted of only herself and her two daughters, aged 16 and 25, both of whom were dependents without a taxable income. She restated that her husband had vacated the apartment on December 29, 2002. She further informed DHCR that, even though no tax returns had been filed for the years 2002 and 2003, tax extension forms (IT-370) had been filed for those years. The address captions on the redacted IT-370s reflected the address for "James A. and Vivienne S. Strauchen" as being "370 East 76th Street, New York, New York 10021." The IT-370s for 2002 and 2003 reflected postmark mailings of April 15, 2003 and April 15, 2004, respectively.

In an attempt to get a completed answer, a number of additional requests and responses were exchanged between Mrs. Strauchen, Alta, the DHCR and the DTF for purposes of verifying the annual household income as declared by Mrs. Strauchen. In a January 30, 2005 response to a particular DHCR request, Mrs. Strauchen stated that (1) she does her own tax returns; (2) she did not request further extensions other than the original extension requests; and (3) all taxes due were paid (see Official DHCR file, February 7, 2005 Attachment A-11). On March 12, 2005, Mrs. Strauchen amended her answer to the May 19, 2004 OPD form by filling in and initialing sub-sections 7 (a), (b), (c) and (d) in her answer. She indicated in subsection 7 (d) that, even though she was filing joint tax returns with her husband, the percentage of gross income based on his alleged vacatur should be .0252% and .0214% for the years 2002 and 2003, respectively (see February 13, 2007 Reply Affirmation, Exhibit F, at 6; Official DHCR file, March 15, 2005 Attachment A-15, at 6).

Despite Mrs. Strauchen's statement in her January 30, 2005 letter that all taxes were paid,

a June 17, 2005 notice from the DTF indicated that the DTF was unable to match names and addresses provided in the OPD answer with income tax returns on file with the DTF. The June 17, 2005 DTF notice directed the Strauchens to submit redacted photocopies of the first page of their New York State income tax returns to the DHCR Luxury Decontrol Unit within 14 days (id., Attachment B-3, Exhibit F). This was not done.

On September 8, 2005, the DHCR sent petitioner a final notice, (1) requesting definitive proof that Mr. Strauchen had vacated the premises, such as a bank statement or tax return; and (2) informing the Strauchens that they “must submit photocopies of either the preprinted mailing labels or the first page of the 2002 & 2003 New York State Income Tax Returns (with social security number(s) and income figures deleted) for James & Vivienne Strauchen as the tax information that you previously submit[ted] failed to be sufficient for the NYS Department of Taxation & Finance (DTF)” [emphasis added]. Mrs. Strauchen responded to that final notice by sending a blank copy of the front page of a 2001¹ “State of New York - City of New York” income tax return form, duplicate copies of the previously provided expired IT-370 forms, a photocopy of a 2002 New York State DTF preprinted label, and a statement that they had never received a 2003 pre-printed label. These submissions failed to supply the tax data requested in the DHCR’s final notice.

The Rent Stabilization Law provides that in the event the tenants fail to provide the

¹Curiously, the caption address on the 2001 tax form reads “James A Strauchen, Vivienne S Strauchen, 370 E 76 St, A703, New York, NY 10021-2570.” This address, which is claimed to be that of the relative with whom Mr. Strauchen took up residence after allegedly vacating the apartment, predates, and, therefore, conflicts with the stated dates in Part C subsection (1) of the May 19, 2004 OPD answer form filled out by Mrs. Strauchen, wherein she indicated that Mr. Strauchen had not vacated the apartment to reside at 370 East 76th Street A703, until December 29, 2002.

information required pursuant to subdivision 26-504.3 (c) (1) of the Rent Stabilization Law, then the DHCR division “shall issue on or before December 1, of such year, an order providing that such housing accommodation shall not be subject to the provisions of this law upon the expiration of the current lease” (Rent Stabilization Law § 26-504.3 [c] [3]). Based on this failure, on October 6, 2005, the DHCR Rent Administrator (RA) deregulated the apartment due to the tenant’s default (compare with *Matter of Szaro v New York State Div. of Housing and Community Renewal*, 13 AD3rd 93, 93-94 [1st Dept 2004] [tenant default upheld where there was no proof of an answer]).

The September 16, 2006 DHCR Order

On November 10, 2005, Mrs. Strauchen filed a petition for an administrative review (PAR). Mrs. Strauchen’s counsel argued that the RA’s October 6, 2005 deregulation order violated section 307 of the State Administrative Procedure Act (SAPA) by failing to make a concise and explicit statement of the underlying facts supporting the finding. She stated that she had responded in good faith to each of the DHCR notices. The three exhibits attached to her PAR in support of her claim that Mr. Strauchner had permanently vacated the apartment, asserted (1) that Alta was aware that Mr. Strauchner had vacated the premises; (2) that on June 30, 2003, she had sent a letter to Alta advising it for the second time that Mr. Strauchen had permanently vacated the premises; (3) that on December 19, 2003, only she had signed the renewal lease; and (4) that the emergency contact form attached to the lease listed only petitioner and her two children as occupants of the apartment. Despite her claims of good faith responses to the DHCR requests, in her PAR, she still failed to include copies of any of the redacted tax documents requested in the June 17, 2005 DIF notice or the DHCR’s final notice, which served as the basis

for the default (compare with *Matter of Szaro*, 13 AD3d at 94).

Alta's counsel counter-argued that the RA's deregulation order did not violate SAPA § 370 in that it clearly spelled out on its face the reasons for the deregulation order. In the October 6, 2005 deregulation order, the RA stated that the DIICR served Alta's OPD on the Strauchens with:

a notice requesting certain information necessary to verify household income. The tenant was advised that the failure to provide the required information would be deemed a default

After consideration of the entire record, the Rent Administrator finds that the tenant did not submit a response to this notice or has failed to provide all of the information required to verify the household income.

(see Official DHCR file, Attachment A-20).

Alta also rebutted Mrs. Strauchen's claim that Mr. Strauchen had permanently vacated the apartment back on December 29, 2002, by submitting affidavits from three doormen, one non-employee resident, and the building superintendent which all stated that they still saw Mr. Strauchen on a daily basis leaving the apartment premises in the morning and entering again at night (id., Attachment B-3, Exhibits E, and G-K).

Regarding her alleged good faith responses to DHCR's request for the pertinent DTF financial data, Alta argued that the repetitive submission of the expired IT-370 forms, in light of the alleged submission of the 2002 and 2003 tax returns and payment of taxes in her January 30, 2005 letter, constituted the basis for a default on petitioner's part (see Official DHCR file, Attachment B-3).

The eight-page September 16, 2006 DHCR order indicated that the issue of whether or not Mr. Strauchner's "income should be included in the household income" based on his

residency was “not relevant to the issue concerning whether the tenant defaulted in the proceeding below, which [wa]s the issue before the Commissioner in this PAR proceeding.” In denying the PAR, the DHCR Commissioner found that:

the order here under review clearly spells out on its face the reasons for the Administrator’s determination to grant the owner’s petition for deregulation in accordance with both SAPA and the governing laws and regulations pertaining to high income rent deregulation

and:

the Administrator properly relied on tenant’s failure to provide accurate income verification information and to submit the required documentation in the proceeding below... .

The Article 78 Petition Sub Judice

Rent Stabilization Law § 26-504 (c) (3) provides that the failure of the tenants to provide the information requested by the DHCR in order to verify statements about the tenants’ income will result in an order of deregulation (see also NY City Rent Stabilization Code [9 NYCRR] § 2531.4 [b] [1], [2], and [3]; *Matter of Zitron v DHCR*, [Sup Ct, NY County, April 29, 2003, Lippman, J., Index No. 124216/02] [attached to DHCR Verified Answer as Exhibit B]).

This court has reviewed all the petition papers and the entire Official DHCR file and it finds that the DIICR’s order was not arbitrary and capricious, but had a rational basis both in fact and in law (see *Matter of Clancy-Cullen Storage Co. v Board of Elections in City of New York*, 98 AD2d 635, 636 [1st Dept 1983]). The DHCR’s eight-page September 16, 2006 order laid out its rationale for denying tenant’s PAR. The finding, that the tenant defaulted by failing to comply with the repeated DHCR requests for tax records which it and the DITF requested for comparison with the declared household income in tenant’s OPD answer, is adequately supported by the record (compare with *Matter of Zimak Corp. v Division of Housing and Community*

Renewal, NYLJ, May 26, 2004, at 17, col 1 [Sup Ct, NY County, Cahn, J.] [where DTF unable to locate tenant tax return and DHCR denies OPD on that basis, the determination will be vacated as arbitrary and capricious as DHCR may as an alternative obtain a certified “complete copy of the tax returns from tenants”] [attached to Notice of Petition as part of Exhibit E]; *190 Riverside Drive L.L.C. v New York State Division of Housing and Community Renewal*, NYLJ, September 27, 2000, at 27, col 1 [Sup Ct, NY County, J. Figueroa] [DHCR’s denial of owner OPD, due to DHCR’s inability to obtain income verification from DTF caused by tenant’s procrastination in filing taxes, was vacated as arbitrary and capricious and inconsistent with the intent of Rent Stabilization Laws] [attached to Notice of Petition as part of Exhibit E]).

Accordingly, it is

ORDERED and adjudged that the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of this court.

Dated: 4-26-07

ENTER:



UNFILED JUDGMENT
 J.S.C. This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or party must appear in person at the Judgment Clerk's Desk (Room 141E).