

**Matter of Eisenberg v New York State Div. of  
Hous. & Community Renewal**

2007 NY Slip Op 31864(U)

June 25, 2007

Supreme Court, New York County

Docket Number: 0111391/2006

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 52

*Justice*

Index Number : 111391/2006

EISENBERG, SIDNEY

INDEX NO.

111391/2006

VS

STATE OF NY DIV. OF HOUSING

MOTION DATE

2/28/07

Sequence Number : 001

MOTION SEQ. NO.

001

ARTICLE 78

MOTION CAL. NO.

26

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

Article 78

PAPERS NUMBERED

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

*[Handwritten signature]*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*petition is decided in accordance with the annexed decision, order & judgment*

FOR THE FOLLOWING REASON(S):

**UNFILED JUDGMENT**  
his 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 41B)

Dated: 6/28/07

*[Handwritten signature]*

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: CIVIL TERM: PART 52

-----X  
In the Matter of the Application of  
SIDNEY EISENBERG,

Petitioner,

-against-

Index No. 111391/2006  
Submission Date Feb. 28, 2007  
Mot. Seq. No. 001  
Cal. No. 26

NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL and  
COLOMBUS LIMITED PARTNERSHIP and  
ROCKROSE DEVELOPMENT CORP.,

**DECISION , ORDER &  
JUDGMENT**

Respondents.

**UNFILED JUDGMENT**  
This judgment has not been entered by the DHCR  
and notice of entry cannot be served based on  
obtain entry, counsel or authorized person at the  
appear in person at the judgment clerk's office.  
41B)

Appearances:

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**Respondent DHCR**  
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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to reverse the determination of the Commissioner of the New York State Division of Housing and Community and Renewal:

<b>Papers</b>	<b>Numbered<sup>1</sup></b>
Notice of Petition and Affidavits Annexed.....	<u>1, 1a, 1b</u>
Brief for Respondent DHCR.....	<u>2</u>
Answer (DIICR) .....	<u>3</u>
Answer (Colombus/Rockrose).....	<u>4</u>

**PAUL GEORGE FEINMAN, J.**

Petitioner-tenant instituted this Article 78 proceeding seeking judicial review of a determination by the Commissioner of the New York State Division of Housing and Community Renewal (“DHCR”). The Commissioner denied the tenant’s Petition for Administrative Review (“PAR”) and affirmed the order issued by the Rent Administrator determining that the subject

<sup>1</sup>Also reviewed was the DHRCR’s return of the underlying proceedings which is not part of the file maintained by the Clerk of this Court.

apartment be deregulated upon the expiration of the existing lease. For the reasons set forth below, the tenant's petition is denied.

### *Facts*

Petitioner Sidney Eisenberg, who is 68 years old, has been the rent-stabilized tenant of apartment number 15D at 61 West 62<sup>nd</sup> Street, New York, New York since 1981. Immediately prior to the issuing of the deregulation order, Mr. Eisenberg's rent was \$2,359.00 per month. On June 24, 2005, Mr. Eisenberg's landlord filed a petition for high income rent deregulation. On September 16, 2005, the DHCR sent Mr. Eisenberg a copy of this petition and an answer form, which required that the tenant provide information regarding his household income. The answer form included a printed notice in block print stating that a failure to complete and return the answer form within sixty days would result in deregulation of the apartment. The form also included a notice stating that the tenant is required to retain proof of service of the answer upon the DHCR. Mr. Eisenberg admits that he received the petition and answer form. Mr. Eisenberg claims that he did mail the answer back to the DHCR, but the DHCR denies receipt. Mr. Eisenberg did not keep a copy of his answer, nor does he have any proof of service of his answer upon the DHCR.

On January 18, 2006, the Rent Administrator found Mr. Eisenberg in default for failing to submit an answer and issued an order deregulating Mr. Eisenberg's apartment. On January 23, 2006, Mr. Eisenberg sent a letter to the Rent Administrator requesting reconsideration of its decision. In his letter, he stated that he had sent the answer back, that his income is far below the \$175,000 per year threshold for high income deregulation, that he would be willing to fill out a new answer. He also noted his compliance with all previous requests for income information. In a letter dated January 26, 2006, the DHCR denied Mr. Eisenberg's request for reconsideration.

On February 16, 2006, Mr. Eisenberg filed a petition for administrative review in which he reiterated the contentions of his January letter and sent in his 2003 and 2004 tax returns. On July 3, 2006, the DHCR denied Mr. Eisenberg's PAR. Mr. Eisenberg subsequently brought this Article 78 proceeding.

### *Analysis*

Judicial review of an administrative agency's action is limited to determining whether the agency's action was "arbitrary and capricious" or an "abuse of discretion." (*Classic Realty LLC v NYS DHCR*, 2 NY3d 142 [2004]). An agency's decision is deemed to not be arbitrary and capricious if the agency had a rational basis for its decision. (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 230 [1974]). In a case nearly identical to the instant action, the Appellate Division held that it was not arbitrary and capricious for the DHCR to have decontrolled tenant petitioner's apartment when that tenant claimed to have mailed an answer to a petition for luxury decontrol but failed to provide any "objective proof of mailing of any kind, such as a certificate of mailing, or a contemporaneous affidavit of service giving the date, time, place content and circumstances of mailing" of the answer. (*In the Matter of Szaro v NYS DHCR*, 13 AD3d 93 [1<sup>st</sup> Dept 2004]). Although the DHCR may accept late filings when "good cause" is shown, it is within the DHCR's discretion to determine whether good cause has been established. (*In the Matter of Dworman v NYS DHCR*, 94 NY2d 359 [1999]). In *Dworman (Seymour)*, the court found that the DHCR did not abuse its discretion in finding that a tenant's "inadvertent neglect" in returning her answer did not rise to the level of good cause. (94 NY2d at 375). In addition, although that tenant later submitted her tax returns to the DHCR as part of her petition for administrative review, the court found that the DHCR's denial of her petition for administrative review and its denial of her request for reconsideration of the decontrol order were not arbitrary and capricious. (*Dworman* at 370, 375).

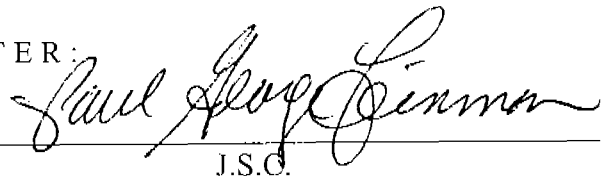
While this court recognizes that it is sometimes confusing to tenants who do not understand the need to repeatedly go through the process of contesting luxury decontrol, and that this is particularly true of some senior citizens, this court is not free to ignore the binding precedents of the Appellate Division. Thus, this court is constrained to find that it was not arbitrary and capricious for the DHCR to have issued the luxury decontrol order regarding Mr. Eisenberg's apartment. The notice the DHCR sent to Mr. Eisenberg advised him that a default in answering would result in a decontrol order for his apartment and further advised him that he was required to retain proof of service of his answer. It was within the discretion of the DHCR to find that Mr. Eisenberg did not show good cause for failing to submit his answer promptly (or to retain proof of service of his answer). (*Dworman*, 94 NY2d 359). Furthermore, it was within the discretion of the DHCR to issue the luxury decontrol order although Mr. Eisenberg submitted his tax returns along with one of his letters. (*See id.*).

The cases Mr. Eisenberg cites regarding long-term and senior citizen tenants are of no avail. They are not on point as they do not address the issue of whether it is arbitrary and capricious for the DHCR to issue a luxury decontrol order in the absence of *any objective* proof that the tenant responded to the notice sent by the DHCR other than an after-the-fact statement to that effect. Certainly, the proof of mailing here is not the kind of "objective proof" referred to by the Appellate Division, First Department in *Szaro*. Accordingly, it is

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

This shall constitute the decision, order and judgment of the court.

ENTER :

  
J.S.C.

Dated: June 25, 2007  
New York, New York

2007 Pt 52 D&O\_111391\_2006\_001\_rf

**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 the filer must appear in person at the County Clerk's Office (Room 411B)