

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

2008 NY Slip Op 30203(U)

January 22, 2008

Supreme Court, New York County

Docket Number: 0110896/2007

Judge: Joan Madden

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

PRESENT: MADDEN
Justice

PART 11

~~RE~~ RICHARD DZINBA

- v -

NY STATE DHER

INDEX NO. 110896/07
MOTION DATE _____
MOTION SEQ. NO. 001
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 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 170).

Dated: January 22, 2008

[Signature]
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: IAS PART 11

-----X

In the Matter of the Application of
RICHARD DZIUBA,

Petitioner,

INDEX NO. 110896/07

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL AND
STAHL ASSOCIATES CO., INC.,

Respondents.

-----X

JOAN A. MADDEN, J.:

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).

In this Article 78 proceeding involving luxury deregulation of a rent stabilized apartment, petitioner tenant Richard Dziuba seeks to annul the June 13, 2007 order of respondent New York State Division of Housing and Community Renewal ("DHCR"), which denied his Petition for Administrative Review ("PAR"). For the reasons stated below, the petition is granted and the matter is remanded to the DHCR for a determination on the merits.

The apartment which is the subject of the dispute is Apartment PH-G located at 405 East 54th Street in Manhattan. Respondent landlord Stahl Associates Co., Inc. ("Stahl Associates") owns the building, which is managed by non-party Charles H. Greenthal Management ("Greenthal"). Non-party Ingram Yuzek Gainen Carroll & Bertolotti, LLP is the law firm that represents the landlord and has provided such representation to Stahl Associates for over 18 years since 1989

Prior to the commencement of this Article 78 proceeding, Richard and Marianne Dziuba had instituted divorce proceedings. The court computer reflects that the divorce was originally commenced on May 14, 2004 under Index No. 350265/04. Subsequently, on July 25, 2006,

another index number for an uncontested divorce, that being Index No. 350426/06, was purchased. Marianne Dziuba was listed as the plaintiff in both actions. On January 19, 2007, a separation agreement was entered under the 2004 index number. On January 26, 2007, another separation agreement was entered under the 2006 index number. Subsequently, note of issue was filed and a judgment of divorce was granted on March 21, 2007 under the 2006 index number.

Petitioner submits excerpts from their divorce settlement agreement stating that he would retain the rights to the lease of the subject apartment, which is denominated as the "marital residence" and that his ex-wife would retain the "rights to her lease at 185 East 85th Street, Apt. 21-G, New York, which is denominated as the "wife's residence." The agreement indicated that the two buildings had the same managing agent, Greenthal.

A simple time line reveals the following sequence of facts and events that occurred leading up this Article 78 proceeding. At some point, either prior to or after the commencement of their divorce, Richard Dziuba retained Apartment PH-G as his residence and Marianne Dziuba moved elsewhere. In or about April 2006, the landlord through its managing agent, sent Richard Dziuba an income certification form (ICF) for him to fill out. Richard Dziuba completed the ICF, signed and dated it April 28, 2006, and returned it to the managing agent, Greenthal. Richard Dziuba indicated on the ICF that he was the only tenant and occupant of the apartment, that his total income was "\$175,000.00 or less in either of the two preceding calendar years," and that he filed New York State income tax returns for both 2004 and 2005.

Subsequently, on or about July 3, 2006, the landlord through its managing agent filed with DHCR a Petition for High Income Rent Deregulation of Richard Dziuba's apartment. The landlord's petition provided in Paragraph F that Richard Dziuba's monthly legal regulated rent

had increased from \$1992.41 to \$2,047.20 for the month of April 1, 2006, and gave the reason for such increase as “renewal.” In Paragraph G, the landlord listed Richard Dziuba as the “tenant named on the lease or otherwise occupying” the apartment. In Paragraph H, the landlord listed Marianne Dziuba as another person, “who, although not named on the lease or not listed as such by the tenant on the attached Income Certification Form, occupies the housing accommodation as a primary residence.” Although Paragraph H required the landlord to “explain the basis” for its contention as to Marianne Dziuba’s occupancy, the landlord did not provide any explanation.

Thereafter, in or about July 2006, the landlord through its managing agent sent Richard Dziuba a renewal lease, stating that his lease was due to expire on October 31, 2006 and that he was required to sign the renewal lease within 60 days. The 2006 renewal lease, unlike the prior 2005 renewal lease, had a separate page of “Additional Clauses” that were “attached to and forming part of the lease.” Those additional clauses stated that the landlord had filed a Petition for High Income Deregulation of the apartment on April 28, 2006, that such proceeding “is now pending before DHCR,” and that if “DHCR grants the petition for deregulation, this renewal lease shall be cancelled and shall terminate after 60 days from the date of issuance of an order granting such petition.”

On September 12, 2006, the DHCR sent the landlord a request for additional information asking for a copy of the lease in effect on the date the ICF was served on Richard Dziuba, April 28, 2006. On September 18, 2006, the DHCR received the landlord’s response and a copy of the renewal lease in effect for the period November 1, 2005 through October 31, 2006; that 2005 renewal lease listed the monthly rent for a one-year renewal as \$2,027.20, and for a two-year

renewal as \$2101.99.

On September 25, 2006, the DHCR mailed to Richard Dziuba an "Answer to Petition and Notice to Tenant to Provide Information for Verification of Household Income." Richard Dziuba acknowledges that he received this mail, but admits he did not open it and consequently, did not return to the DHCR an answer or the requested income verification information.

Coincidentally or ironically, Richard Dziuba subsequently received two documents, both dated January 12, 2007. One document was an Order of Deregulation from the DHCR, and other was a letter from the law firm representing Stahl Associates. The DHCR Order of Deregulation stated that Richard Dziuba's apartment was deregulated upon default due to his failure to respond to DHCR's notice requesting an Answer and his failure to provide the tax information required to verify the household income. The Order of Deregulation reflected that a copy was also sent to Stahl Associates, care of its managing agent, Greenthal.

The January 12, 2007 letter from the law firm for Stahl Associates, was from attorney Dean G. Yuzek, who stated that he was "authorized to confirm on behalf of the Landlord its understanding that you [Richard Dziuba] are the tenant of the Apartment [Apt. PH-G at 405 E. 54th Street], that Marianne Dziuba no longer resides there, and that your continued entitlement to occupy the Apartment is not linked to her income." Attorney Yuzek further stated that he was "authorized to confirm that, as of the date of this letter, the Landlord is not aware of any basis on which to contest your continued occupancy of the Apartment."

On February 9, 2007, Richard Dziuba timely filed a PAR challenging the DHCR's order of deregulation; a copy of the PAR was sent to Stahl Associates, care of its managing agent. Item 9 on the PAR is a statement as to what petitioner believed was "the error of fact and/or law

in the Order being appealed.” On a separate sheet, petitioner responded to item 9 as follows:

Tenant, Richard Dziuba, did not answer and provide certain information in response to the Petition for High Income Rent Deregulation [“Petition”] on account he was negotiating a settlement in a divorce proceedings with his wife, Marianne Dziuba and he incorrectly assumed that the Petition was correspondence related to the divorce proceeding and did not open the correspondence or in any manner address the Petition.

Richard Dziuba mistakenly was under the belief that the Petition was addressed in the divorce proceeding on account Marianne Dziuba is a shareholder of owner/landlord and an executive at Owner’s parent company.

Moreover, Tenant had erroneously assumed that the underlying grounds of the Petition was [sic] addressed in the parties’ stipulation of settlement on account of the following: (I) Tenant’s attorney was in direct contact with Owner’s attorneys; (ii) the apartment was addressed in the settlement agreement; and (3) Marianne Dziuba’s attorney in the divorce proceeding stated to Richard Dziuba’s attorney in the divorce proceeding that he had confirmed with the landlord/owner and landlord/owner’s counsel that the Tenant, Richard Dziuba was in good standing and no application or legal proceeding was pending with regard to the subject rent stabilized apartment.

Tenant respectfully requests that he be given an opportunity to submit an answer and provide documentary proof that he has not earned annual income in excess of \$175,000.00 for each of the relevant periods. Annexed heretofore are copies of Tenant’s New York State and Federal Income Tax Returns for the 2004 and 2005 tax years.

In the alternative, Tenant respectfully requests that the Order of Deregulation, issued January 12, 2007, be reversed in its entirety.

On February 22, 2007, the DHCR sent the landlord through its managing agent, a “Notice of Filing PAR and Opportunity to Respond.” By letter dated March 6, 2007, the law firm representing Stahl Associates, transmitted its answer to the DHCR. The letter and the Answer are signed by attorney Jennifer Schwartz of Ingram Yuzek Gainen Carroll & Bertolotti, LLP. Asserting that the PAR should be denied, attorney Schwartz argued that neglect in failing to respond, even if inadvertent, is not a basis for excusing a default, citing Matter of Dworman v

New York State Division of Housing and Community Renewal, 94 NY2d 359, 375 (1999).

Attorney Schwartz also addressed petitioner's allegations in the PAR as to his ex-wife's relationship with the landlord and the aspects of the divorce proceedings pertaining to his apartment:

The Tenant also alleges that his wife, with whom he was involved in a divorce proceeding, "is a shareholder of owner/landlord and an executive at Owner's parent company." The Tenant's wife is not a shareholder of the Owner or an executive at its purported 'parent company.'

It is further alleged that the attorney for the Tenant's wife in the divorce proceeding stated to the Tenant's attorney that "he had confirmed with the landlord/owner and landlord/owner's counsel that the Tenant . . . was in good standing and no application or legal proceeding was pending with regard to the subject rent stabilized apartment." In fact, what the Owner's attorney stated is memorialized in a January 12, 2007 letter to the Tenant, annexed hereto as Exhibit A, as follows: "I am also authorized to confirm that, as of the date of this letter, the Landlord is not aware of any basis on which to contest your continued occupancy of the Apartment." This statement was true when made since the Order of Deregulation was not issued until January 12, 2007 and, accordingly, had not yet been received by the Owner or its representatives.

On June 13, 2007, DHCR Deputy Commissioner Leslie Torres issued an Order and Opinion denying Richard Dziuba's PAR. Concluding that "the Administrator properly relied on the tenant's default in the proceeding below in granting the owner's petition for high income rent deregulation and that the tenant has offered insufficient reason to disturb the Rent Administrator's determination," the Deputy Commissioner reasoned as follows:

Section 2431.4 of the Rent Stabilization Code requires a tenant to file an answer to the owner's petitioner for deregulation within 60 days. Section 2531.6 of the Code provides that if a tenant fails to provide such information, DHCR shall issue an order deregulating the subject apartment. The record reveals that the tenant never filed an answer to the owner's petition for deregulation in the proceeding below. In addition, the record reveals that the notice and answer form were mailed to the tenant at the subject apartment at the correct address and that this mailing was never returned to DHCR by the U.S. Postal Service. Furthermore, the record also reveals that a delivery confirmation was received from the United States Postal Service confirming delivery at the specified address

on September 26, 2006, thereby establishing that the notice and answer form were properly served on the tenant. The Commissioner further notes that the tenant does not deny receiving the notice and answer form mailed to him by DHCR in the proceeding below.

Therefore, the tenant was provided with explicit notice of his obligation to submit the required answer form and income verification information to DHCR and the Commissioner finds that the Administrator properly found the tenant to be in default. The tenant was given notice of his obligation to answer the Administrator's 60-day notice and was advised of the consequences if he elected to disregard the notice.

Furthermore, the Commissioner notes that although the New York State Court of Appeals, in Dworman v. DHCR, 94 NY2d 359, ruled that DHCR has the authority, in the sound exercise of its discretion, to accept an answer filed after the expiration of the specified 60 day period where good cause is shown, in the instant case the tenant has not offered an adequate explanation for his failure to respond.

The Commissioner notes that the tenant was required to submit an answer within the specified time period and the fact that the tenant may [have] been involved in divorce proceedings at the time and mistakenly thought that the notice of petition related to those divorce proceedings does not relieve the tenant of his expressly stated obligation to submit a timely answer to DHCR. The Commissioner notes that the September 25, 2006 mailing of the notice and answer form were specifically addressed to "Richard Dziuba" at the subject apartment. The tenant had a legal obligation to open and attend to the mailed notice that was directly addressed to him. Further, the notice and answer form explicitly set forth what the tenant's legal responsibilities were in the deregulation proceeding here under review.

Therefore, the Commissioner finds that, under the facts and circumstances of this case and the standards enunciated by the Court of Appeals in Dworman v. DHCR, 94 NY2d 359, the assertions in the tenant's PAR do not establish good cause for his failure to submit the required answer form to DHCR in the proceeding below.

Richard Dziuba thereafter commenced the instant Article 78 proceeding, contending that the DHCR Commissioner's finding that good cause was not shown, was arbitrary, capricious and an abuse of discretion "based on the circumstances that transpired." Specifically, the Article 78 petition asserts that "petitioner has made the requisite show of good cause in that he was entangled in divorce proceedings with his then wife, Marianne Dziuba, an officer and

shareholder of respondent Stahl during the time the deregulation petition was pending” and that the status of petitioner’s rent stabilized apartment “was being addressed in settlement negotiations in the divorce proceedings and he had received assurances from his wife, an officer of landlord and additional agents of respondent Stahl that the status quo of Apartment PH-G would be uninterrupted.”

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). If the challenged determination is rational, it must be upheld, even though the Court, if viewing the case in the first instance, might have reached a different conclusion. See Mid-State Management Corp. v Conciliation & Appeals Board, 112 AD2d 72 (1st Dept), aff’d 66 NY 2d 1032 (1985). As a result of the Court of Appeals decision in Matter of Dworman v. New York State Division of Housing & Community Renewal, supra, the DHCR has the discretion to accept late filings in a high income deregulation proceeding upon a showing of “good cause.”

Here, viewing the underlying circumstances in their entirety, the court concludes that the DHCR abused its discretion and lacked a rational basis for finding that petitioner did not make an adequate showing of “good cause.” The landlord’s petition for high income rent deregulation (dated June 30, 2006 and filed July 4, 2006) directly controverted the information provided by Richard Dziuba on his ICF (dated April 28, 2006) that he was the only tenant and occupant of the apartment. In the petition, the landlord simply stated its belief that Marianne Dziuba also occupied the apartment, without the required explanation as to the “basis for [its] contention.”

Thus, when the landlord commenced the high income deregulation proceeding, its request for such relief was premised on the alleged occupancy of the apartment, at least as of June 30, 2006, by both Richard and Marianne Dziuba. The record, however, indicates that at since 2004, the Dziubas had been involved in divorce proceedings, and that the landlord and its attorney were actively engaged in some of the negotiations of the divorce proceedings to the extent issues had been raised as to Richard Dziuba's right to the subject apartment.

The record also indicates that Marianne Dziuba was employed in some capacity by an entity related to the landlord¹ and was apparently residing not in petitioner's apartment, but in an apartment in another building also managed by Greenthal. Although it is unclear exactly when the landlord's attorney first became involved in the Dziubas' divorce proceedings, the record shows that on January 12, 2007, attorney Yuzek personally confirmed that Marianne Dziuba no longer resided in the apartment and that Richard Dziuba's "continued entitlement to occupy the Apartment is *not linked to her income*" (emphasis added). These statements by the landlord's attorney in January 2007, which explicitly referred to the connection between Richard's interests in the apartment and Marianne's income, directly contradicted the landlord's prior statements six months earlier in its petition for deregulation that Marianne Dziuba occupied the apartment. The landlord, however, made no attempt to correct or withdraw its petition for deregulation, before it received the DHCR's Order of Deregulation.

¹Petitioner states that his ex-wife has a "powerful management position" and is an "officer and shareholder" of an entity related to respondent Stahl. In a carefully worded affidavit, the attorney for respondent Stahl, Dean Yuzek, states that Marianne Dziuba "is neither a partner nor an executive of Stahl." However, he does not deny that she is *employed* by Stahl or an entity related to Stahl.

It is unclear whether Stahl owns the building where Marianne Dziuba resides, but her building is managed by the same managing agent, Greenthal.

Under these circumstances, where petitioner's apartment was an issue raised and resolved in the divorce proceedings, and petitioner's wife was working for the landlord, and the landlord's attorney participated in the divorce proceedings, petitioner's neglect in answering should have been excused, particularly where, as here, petitioner identified contradictory information in the record that was patently material to landlord's right to high income deregulation. Further, Richard Dziuba's timely response to the landlord's request for income verification, evinced an intent on his part to comply with, rather than neglect requests for income information. Contrary to respondents' assertion, the record establishes much more than "inadvertent neglect," and the policy of deciding cases on their merits overrides the statutory mandate that information be provided expeditiously. See Matter of Dworman v. Division of Housing & Community Renewal, *supra* at 375.²

Moreover, the DHCR's reliance in considering the landlord's petition is premised upon the presumption that the statements in the petition as to the basis for luxury deregulation, *ab initio*, are accurate and reliable. Where as here, the record as a whole reflects that the DHCR's reliance on the accuracy the statements in the deregulation petition may not have been justified, the DHCR's determination denying the PAR lacked a rational basis, and was arbitrary and capricious.

In light of the foregoing, the DHCR Order and Opinion Denying petitioner's PAR is annulled, and the matter is remanded to DHCR for a determination on the merits of the landlord's petition for high income deregulation.

²The petition further asserts that the delay in providing the DHCR with the requisite income verification information "was so minimal as to be excusable as *de minimis*." In light of the determination above, this issue need not be resolved.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the petition is granted and the DHCR's Order and Opinion Denying Petition for Administrative Review is annulled, and the matter is remanded to the DHCR for a determination on the merits of the landlord's Petition for High Income Rent Deregulation.

DATED: January 22, 2008

ENTER:



J.S.C.

UNFILED JUDGMENT
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