

Matter of Haas v New York State Div. of Hous. & Community Renewal
2008 NY Slip Op 30715(U)
March 12, 2008
Supreme Court, New York County
Docket Number: 0108800/2007
Judge: Paul G. Feinman
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: FEINMAN
HON. PAUL G. FEINMAN Justice

PART 52

HAAS, BARBARA

INDEX NO.

108800/07

MOTION DATE

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -
N.Y.S. DIVISION OF HOUSING AND
COMMUNITY REFORMS, ET AL.

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

see Attached

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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 1412).

and cross motion are
PERMITTED IN ACCORDANCE WITH
THE ANNEXED DECISION, ORDER AND JUDGMENT.

Dated: 3/12/08

SAJ

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

EXHIBIT B & DR'S AFFIRMATION

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

an order that denies Aspenly's petition filed with the DHCR for High Income Rent Deregulation, and that compels Aspenly to accept *nunc pro tunc* as of June 16, 2006, her "Answer to Petition" (attached to the OSC/Petition as Exhibit G). Finally, she seeks an order pursuant to CPLR 7805 and 6301 enjoining and restraining Aspenly, its agents, and its attorneys from taking further steps to evict the petitioner and her daughter or from further prosecuting the holdover proceeding commenced in Housing Court (L&T Index No. 067069/2007). Respondent DHCR cross-moves for an order remitting the matter back to it for "further processing and consideration" (Not. of Cross-Mot. at 1). Aspenly opposes both the petition and the cross-motion. For the reasons which follow, the petition is granted in part and denied in part, and the cross-motion is granted.

Background

Petitioner is 66 years old and retired, and has lived in the same rent-stabilized apartment for more than 23 years. She is in ill health, having emphysema, diabetes, and a neurological disorder which substantially inhibits her ability to walk normally and has caused her to fall and sustain physical injuries; her daily prescription medications affect her cognitive abilities (Petition, Haas Aff. ¶ 4). She has suffered from depression and has been bed-ridden for periods of time and cared for by a home health aide, upon whom she depended for "all aspects of [her] physical livelihood including picking up [her] mail" from her apartment building's lobby (Petition, Haas Aff. ¶ 4).

The rental lease for petitioner's apartment is for a one year period, renewed annually with Aspenly. According to the petition, petitioner renewed her lease agreement on about July 5, 2006, for the period of August 1, 2006 - August 1, 2007 (Ver. Pet. ¶ 6). In early March 2006, she had also received the "Income Certification Form - 2006 Filing Period," which instructed that

it was to be completed and returned to the landlord within 30 days after she was served with it (Ver. Pet. ¶ 7; see OSC/Petition Ex. A).¹ However, she only signed the form on August 21, 2006, indicating that her income was less than \$175,000, and returned it thereafter (OSC/Petition Ex. A, p. 3).

In the meantime, because she had not returned the Income Certification Form in the required 30 days to her landlord, on May 15, 2006, Aspenly filed a petition, as it was entitled to, seeking to verify petitioner's income, as a prelude to seeking a high income rent deregulation petitioner's apartment based on petitioner's failure to return the form (OSC/Petition Ex. B; Rent Stabilization Code § 26-504.3 [c]; McKinney's Unconsol. Laws §§ 8601 *et seq.*). On May 30, 2006, the DHCR mailed to petitioner a "Notice 2006 Filing Cycle," which informed her that she was required to answer the landlord's petition within 60 days on the form provided (OSC/Petition Ex. B).²

Petitioner did not complete the form. Because she did not serve an answer, the DHCR issued a "final notice" on September 27, 2006, requesting that she complete the answer to the petition within 10 days (OSC/Petition Ex. C). Petitioner did not complete and return the form. She now explains that she presumed that by completing and returning the Income Certification Form to Aspenly in August 2006, she had satisfied the demand for an answer as concerned her income and that she did not need to also complete the forms sent by the DHCR (Ver. Pet. ¶ 2;

¹By law, this form had to be served on tenants before May 1 of each calendar year (Rent Stabilization Code §26-504.3 [McKinney's Unconsol. Laws §§ 8601 *et seq.*]).

²Landlords may, under the Rent Stabilization Code, file a petition for luxury deregulation annually; that a tenant serves and answer one year does not relieve her or him from the requirement to file a new answer in any year that a petition is filed (*see*, OSC/Petition Ex. B).

Haas Aff. ¶ 3). She presumed that the landlord would forward her completed Income Certification Form to the DHCR (Haas. Aff. ¶ 6).

On November 7, 2006, the DHCR issued an "Order of Deregulation" (OSC/Petition [Ex. D]). The Order of Deregulation noted that petitioner had not responded to its request that she answer Aspenly's petition seeking deregulation, and that accordingly, at the expiration of her lease, her apartment would be deregulated (Rent Stabilization Code § 26-504.3 [c] [3]; McKinney's Unconsol. Laws §§ 8601 *et seq.*). The order also indicated that the landlord was required to offer her a market rent and allow her 10 days to respond, after which, if she declined or did not respond, the landlord could commence an eviction proceeding (Rent Stabilization Code § 26-504.3 [e]; McKinney's Unconsol. Laws §§ 8601 *et seq.*). Petitioner swears that she "never actually received a copy" of the order within the 35-day appeal period to file a petition for an administrative review (PAR) (Haas Aff. ¶ 8). She admits she can only speculate as to why she did not receive it, and suggests that her home health aide did not give it to her or that the aide misplaced or discarded it, or it was perhaps misdelivered to a different mailbox in her building as sometimes occurred, or that her daughter may have misplaced or discarded it (Haas Aff. ¶ 8).

On January 24, 2007, petitioner was served with Aspenly's Notice of Cancellation which indicated that the landlord would not renew her lease pursuant to the Rent Stabilization Law and indicated that her new rent would be \$7,500 a month (Haas Aff. ¶ 8). This was the first time she learned of the determination by the DHCR to deregulate her apartment. She concedes that she did not file a PAR, and that she did not attempt to because the time to file an appeal had expired before she learned of the DHCR determination. According to her attorney, she did not file an untimely petition for review for fear that if her application were dismissed, any subsequent

Article 78 proceeding would be limited by the dismissal (Spinnell Aff. in Reply ¶ 4).

In April 2007, Aspenly landlord commenced a holdover petition in New York City Housing Court (OSC/Petition Ex. F).

Petitioner commenced the instant Article 78 proceeding by order to show filed on June 25, 2007. She seeks vacatur of the DHCR determination to deregulate her rent stabilized apartment, arguing that she has a reasonable excuse for her default and a complete defense to the landlord's petition. She argues that the DHCR determination was arbitrary and capricious, in that her income is consistently less than \$175,000 annually and her landlord has no reason to believe or represent otherwise. She includes copies of her 2004 and 2005 income tax returns to show her actual income, as well as a now signed Answer to the landlord's petition. She also seeks a preliminary injunction that stays the holdover proceeding pending a determination of this proceeding.³

The DHCR cross-moves for an order remitting the matter back to the agency based on "evidence submitted administratively in this proceeding and assertions made" (Cross-Mot. Lipovetsky Aff. ¶ 3). According to the agency's attorney, "[i]n all likelihood, remitting this proceeding will allow the Agency to hold a fact finding hearing" which would focus on whether it would accept a late response from petitioner as concerns her income (Cross-Mot. Lipovetsky Aff. ¶ 4). The DHCR attorney states that petitioner's medical file has been released and will be sent to the agency so petitioner can prove the existence of her health problems and possibly

³In granting the order to show cause, the court stayed the holdover proceeding (L&T Index No. 067069/2007), on the condition that petitioner continue to remit the monthly amount as set by the Housing Court.

establish an excuse for her failure to answer the DHCR notices (Cross-Mot. Lipovetsky Aff. ¶ 15-16).

Aspenly, the landlord, argues that the petition should be dismissed because petitioner failed to exhaust her administrative remedies prior to commencing this Article 78 proceeding, and that it is untimely, given the short statute of limitations connected with Article 78 proceedings. It also argues that petitioner has not substantiated her claims of ongoing illness and debilitation that could form the basis of an excusable default. Aspenly also argues that the cross-motion by the DHCR is an improper reaching out by the agency given that petitioner has not sought administrative remedies or used the administrative process as established by the Rent Stabilization Code.

Legal Analysis

An Article 78 proceeding against a public body may be commenced only when a matter has been finally determined (CPLR 7801 [1]). If there is further administrative action that could be taken to prevent or ameliorate the harm, then commencement of an Article 78 proceeding is improper (*see, Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 520, *cert denied* 479 U.S. 985 [1986]). Under the Rent Stabilization Code, a party must bring an Article 78 proceeding within 60 days of the rendering of a final agency determination (Rent Stabilization Code § 26-516 [d], McKinney's Unconsol. Laws §§ 8601 *et seq.*). Where an agency determination is unambiguous and its effect certain, the statutory period commences as soon as the aggrieved party is notified (*Matter of Edmead v McGuire*, 67 NY2d 714 [1986], citing *Matter of Biondo v State Bd. of Parole* 60 NY2d 832, 834 [1983]).

It is well-settled that judicial review pursuant to CPLR Article 78 of an administrative

determination is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination and only decides if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]). The test of whether a decision is arbitrary or capricious is "determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact." (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974], quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609).

Here, petitioner admits that she did not exhaust her administrative remedies, and did not attempt to do so because, if her petition for review of the deregulation determination was denied based on its late filing, the Article 78 proceeding following that denial could only concern the issue of whether the denial was reasonable, rather than examining the reasonable excuse for her default and the merits of her defense that her apartment should retain its rent stabilized status.⁴ In defense of her failure to commence this proceeding within 60 days of January 24, 2007, the date she learned of the DHCR determination, she alleges that she continued to be physically unwell in early 2007, that she hurt herself when she fell on January 25, 2007 in her bathroom, and that she only informed her attorney on about February 11, 2007 about the deregulation determination (Spinnell Aff. in Reply ¶¶ 5, 8). Her attorney then experienced difficulties in obtaining the file from the DHCR and commenced the proceeding within 60 days of obtaining

⁴She submits copies of her 2004 and 2005 income tax forms to show her annual income in both years was less than \$175,000, and an Income Certification Form signed on June 14, 2007 and stating that her annual income was under \$175,000 (OSC/Petitioner Ex. E, G).

the file from the DHCR, on June 25, 2007 (Spinnell Aff. in Reply ¶¶ 5-7, Ex. A [FOIL request]; B [denial of request by DHCR]; C [second request with authorization]).

Petitioner blames her physical and emotional condition, including her need for home health aides, for her failure to adequately handle the papers in this matter. She points out that she has always before timely filed her paperwork. She submits the affirmation by her physician Robert A. Kutnick, M.D., who states that he has treated her since 1996, and treated her on numerous specific dates throughout 2006 and 2007, although he does not specify what were the complaints and what was the treatment. He notes that she “may have” suffered a concussion on January 25, 2007, after her fall in the bathroom (Kutnick Aff. ¶ 7), which might partly explain why it was not until February 11, 2007 that she gave the deregulation notice which she had received earlier in January, to her attorney, and why it took so long to provide an authorization for medical records thereafter. Dr. Kutnick refers to “a multitude of problems” in 2006 experienced by petitioner with her daughter who had “attacked her” and caused her to be hospitalized. The doctor opines that that sort of trauma could affect petitioner’s memory as well as cause depression (Kutnick Aff. ¶ 9). He does not mention petitioner’s chronic health conditions, but concludes that the “traumas” sustained in the last year, “caused in part” by her daughter’s behavior, caused her mental capacities to deteriorate “substantially,” affecting her memory (Kutnick Aff. ¶ 10).

Petitioner points to *Matter of Dworman v New York State Div. of Hous. and Comm. Renewal*, 94 NY2d 359 (1999), which holds that the DHCR has authority to accept late responses when there is a justifiable tardiness, including income verification forms and answers to petitions for income verification. *Matter of Dworman* states for instance, that as concerns the 60-day

deadline for filing the income verification form with the DHCR, the DHCR is only divested from forgiving a late filing where the tenant fails to respond *at all*, and may otherwise entertain a late filing when the tardiness is justified (94 NY2d at 372). *Matter of Dworman* notes that the Rent Stabilization Code explicitly permits the DHCR to accept late filings for good cause shown “at any stage of the proceeding,” meaning “at any point before the Commissioner has entered a final order dismissing the PAR,” although there is a far heavier burden on a tenant to establish good cause for the delay when the order of deregulation has been entered (94 NY2d at 373-374). Presumably petitioner argues that her June 14, 2007 Answer to the landlord’s petition, and the copies of her 2004-2005 tax forms, although nearly a year late, should be deemed late filings which can be considered by the DHCR because the commissioner has never issued a final ruling. In sum, she requests that the court deem her Article 78 petition, brought without being based on a final administrative determination, and made more than 90 days after the expiration of the 60 days allotted under the rent rules for commencing a proceeding after receiving the agency determination, to be timely and proper.

Petitioner argues that the DHCR acted arbitrarily by entertaining the landlord’s petition for high income rent deregulation. She points out that under the Rent Stabilization Code, a rent stabilized apartment renting for more than \$2,000 a month can be deregulated where it is determined that the tenant’s income in both of the prior two years was at least \$175,000 (RSC § 26-504.1; McKinney’s Unconsol. Laws §§ 8601 *et seq.*). She notes that in 2004, Aspenly unsuccessfully brought a petition to deregulate her apartment at which time it was found that she did not make \$175,000 in either 2002 or 2003, after which Aspenly brought the same petition for the year 2005 (OSC/Petition Ex. H). That petition was denied by order and opinion dated

September 21, 2005, and the DHCR deputy commissioner noted that it would not be possible for the apartment to qualify for deregulation given that it had already been determined that for 2003 -- one of the two relevant years at issue in the 2005 application -- the petitioner had not made \$175,000.

Petitioner argues that the DHCR should not have entertained Aspenly's 2006 petition for deregulation, given that it denied the 2005 application, and that it was arbitrary and capricious to do so. However, there is nothing in the September 2005 order and opinion to show that the DHCR actually investigated petitioner's income for the second year at issue, namely 2004. It cannot be held that the DHCR was arbitrary or irrational in granting Aspenly's 2006 petition, which would concern the tax returns for 2004 and 2005, neither of which had yet been investigated.

Petitioner's Article 78 petition seeking vacatur of the DHCR deregulation determination as being arbitrary and capricious, and an order denying Aspenly's petition for High Income Rent Derugulation, and to compel Aspenly to accept *nunc pro tunc* as of June 16, 2006, her "Answer to Petition" cannot be granted. The DHCR acted with rationality and pursuant to the law. It could not possibly know that petitioner wrongly presumed that her untimely mailing of her Income Verification form would be forwarded to the DHCR and that she did not need to file the same information again with the DHCR, or that she allegedly did not receive the Order of Deregulation, possibly due to her physical condition. The decisions to circumvent the administrative appeals process, as well as the lengthy time taken to commence this proceeding, cannot be ignored.

DHCR's cross-motion to remit the proceeding for further consideration is granted,

however, because it has never issued a final determination. Remittitur is granted so that the agency may conduct a hearing to determine the circumstances surrounding the mailing of the Order of Deregulation in November 2007, and petitioner's health and the circumstances in her life from November 2006 through the filing of this proceeding in June 2007 and, based on those findings, shall then determine whether it properly ordered deregulation of her apartment.

Although a tenant's failure to timely respond to a request for verification of income may result in an order of deregulation (*see, Pledge v New York State Div. of Hous. & Comm. Renewal*, 257 AD2d 391 [1st Dept.], *aff'd* 94 NY2d 851 [1999]), where the agency did not have all the necessary evidence when it made its determination, remittitur is appropriate in the interest of justice (*see, Matter of 47 Clinton St. Co. v New York State Div. of Hous. & Comm. Renewal*, 161 AD2d 402 [1st Dept. 1990] [where DHCR concedes that the original determination was made without the benefit of complete documentation, the matter should be remitted for a new determination]).

Because the cross-motion has been granted, the last branch of the petition that seeks an order pursuant to CPLR 7805 and 6301 to enjoin and restrain Aspenly, its agents, and its attorneys from taking further steps to evict the petitioner and her daughter or from further prosecuting the holdover proceeding commenced in Housing Court (L&T Index No. 067069/2007), is granted to the extent that the stay put in place with the commencement of this proceeding, shall continue until 30 days after the DHCR makes a final determination concerning the status of the apartment. It is

ADJUDGED and ORDERED that the petition is granted to the extent that the stay of the Housing Court proceeding (L&T Index No. 067069/2007) shall continue and Aspenly and its

agents and attorneys are to do nothing to further the eviction proceeding until 30 days after the final determination by the DHCR concerning the status of petitioner's apartment, and is otherwise denied; and it is further

ORDERED that the cross-motion is granted and the matter is remitted to the New York State Division of Housing and Community Renewal for a hearing and determination as set forth above; and it is further

ORDERED that the Clerk of the Court and the Motion Support Office shall seal from disclosure to the public absent further court order and shall not post on the internet (1) Exhibit E attached to the OSC/Petition as it contains confidential tax records and (2) the Affirmation of Robert Kutnick, M.D., which contains confidential medical information.

The foregoing shall constitute the decision, order and judgment of this court.

ENTER :



Dated: March 12, 2008
New York, New York

J.S.C.

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 1412).