

**Matter of Zango-Haley v New York State Div. of
Hous. & Community Renewal**

2009 NY Slip Op 30151(U)

January 26, 2009

Supreme Court, New York County

Docket Number: 112661/2008

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 112661/2008
ZANGO-HALEY, LINDA
vs.
HOUSING & COMMUNITY RENEWAL
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 11/20/08
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause — ~~Affidavits~~ — Exhibits _____
Answering Affidavits — Exhibits _____
Replying Affidavits _____

UNFILED JUDGMENT
and notice of entry cannot be entered by the County Clerk
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
1415).

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The instant application is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the application of Petitioner-Tenant, Linda Zango-Haley, for an order and judgment (1) reversing the order and decision of Deputy Commissioner Leslie Torres dated July 25, 2008 (the "Determination"), denying petitioner's PAR; (2) remanding the proceeding to the DHCR to grant petitioner's petition for a Petition for Administrative Review, is denied in its entirety, and the instant Petition is dismissed; and it is further

ORDERED that counsel for respondent shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner and intervenor-respondent.

Dated: 1/26/09


HON. CAROL EDMEAD 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: PART 35

In the Matter of the Application of
LINDA ZANGO-HALEY,

Petitioner,

Index No. 112661/2008

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

DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent.

-and-

HITCHCOCK PLAZA INC.,

Intervenor-Respondent.

EDMEAD, 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
141B).

MEMORANDUM DECISION

This Article 78 proceeding is commenced by the Petitioner-Tenant, Linda Zango-Haley, ("petitioner") seeking judicial review of a determination by the Deputy Commissioner of respondent New York State Division of Housing and Community Renewal ("DHCR") which denied petitioner's "Petition for Administrative Review (PAR)" and affirmed an order of the Rent Administrator which deregulated the subject apartment based upon Petitioner's failure to answer the "Owner's Petition for High Income Deregulation" for which no reasonable excuse for the default was offered.

Petitioner seeks and order an judgment (1) reversing the order and decision of Deputy Commissioner Leslie Torres dated July 25, 2008 (the "Determination"), denying petitioner's PAR; (2) remanding the proceeding to the DHCR to grant petitioner's petition for a Petition for

Administrative Review.

Background

The petitioner is the tenant of an apartment known as 7B located at 200 West 90th Street, New York, New York (the "Apartment"). Hitchcock Plaza Inc., (the "Owner") the Co-Respondent, is the owner of the subject apartment.

On or about April 3, 2007, the Owner proceeded to take the required steps to deregulate the subject apartment by serving the petitioner with an "Income Certification Form" for the 2007 Filing Period (ICF). The ICF stated that the petitioner "must return this completed certification to the Owner (not to DHCR) at the address indicated on the form within thirty days after the Owner served you with the form." The ICF further stated that "[F]ailure to reply may ultimately result in the deregulation of the subject housing accommodation." The petitioner failed to respond and return the ICF to the Owner.

The procedural aspects to the luxury decontrol process permit an owner to file an owner's Petition for High Income Deregulation (OPD) where the tenant had not returned the ICF or where the content of the returned ICF is disputed by the owner . (see Rent Stabilization Law~(RSL) Section 26-504.3(c)(1)).

As the Petitioner failed to respond to the ICF, the Owner filed an OPD with the DHCR. The OPD was dated stamped as filed with DHCR on May 31, 2007. The OPD was assigned RA docket number VE 411136 LD. The OPD included a copy of the ICF and a certificate of mailing to evidence the service of the ICF for the petitioner.

The petitioner was served by the Rent Administrator with a notice requiring her to answer the OPD within 60 days. The notice was served by mail on July 3, 2007 and included a

copy of the filed OPD and an answer form for the petitioner's use. The cover document in that package, the "Notice 2007 Filing Cycle" stated in pertinent part on its face: The law provides that you are required to answer the Petition by Owner for High Income Rent Deregulation (on the form entitled "Answer to Petition and Notice to tenant to Provide Information for Verification of Household Income") within sixty (60) days of the mailing date of such Petition and answer form to you. In the event that you fail to answer, this agency will issue an order deregulating your apartment. The owner may file a new petition for deregulation every year. In such cases, you will be required to file a new answer with this agency within sixty (60) days of the mailing by us to each new petition and answer form to you in order to avoid.

The petitioner failed to return the answer to the OPO to the DHCR.

On or about November 8, 2007, the Rent Administrator sent the Owner a "Request for Additional Information/Evidence" wherein the Owner was requested, among other things, to submit a copy of Petitioner's lease which was in effect on April 3, 2007, the date the ICF was served and May 31, 2007, the date the OPD was filed.

On or about November 16, 2007, the Owner submitted a response to the Rent Administrator's request. On December 12, 2007, the Rent Administrator sent a notice to the Petitioner entitled "Request for Additional Information/Evidence, 2007 Filing Period." The request set forth as follows: 1. Attached is the Verification of Household Income Form (Form RA-93N). You are afforded a FINAL opportunity to complete this form for Linda Haley-Zango....2. You MUST submit copies of the first page of the 2005 and 2006 N.S. Income Tax Returns • You are being afforded this final notice to submit this information. No further request will be made to obtain the completed Verification of Household Income (Form RA93N)

along with copies of the 2005 and 2006 N.S. Income Tax Returns. 3 • The tenant is cautioned that this information must be provided to this agency. Failure to submit this information may be deemed as a default for the purposes of Luxury Decontrol. • The Rent Regulation Reform Act requires that you provide this information so that the total annual income can be determined for the 2007 Filing Period for all the persons residing in the subject apartment as of April 2, 2007, the date the Income Certification Form was served to the tenant by the owner/agent of the subject building. Attached to the notice was another answer form and income verification form.

Notwithstanding the fact that the notice clearly advised the Petitioner of the consequences of her failure to respond to the notice, the Petitioner failed to respond. Petitioner failed to file an answer to the OPD and the income verification form, although she was given a second opportunity to do so. As a consequences of the Petitioner's failure to answer the OPD, and as mandated by the RSL Section 26-504.3(c)3, The Rent Administrator issued an order on February 13, 2008 immediately deregulating the Petitioner's apartment at the expiration of the existing lease.

On March 13, 2008, the Petitioner filed a PAR challenging the Rent Administrator's order of deregulation of the subject apartment. The Petitioner's challenge consisted solely of two sentences. The Petitioner simply stated in the PAR that "[Income requirements are well below decontrol requirements - Income requirements for decontrol rent met." The Petitioner did not offer any excuse as to her failure to submit an answer to the OPD. Moreover, the Petitioner failed to submit the necessary tax information as required by the RSL. Indeed, the Petitioner failed to submit any tax information or submit the income verification form.

The Owner submitted an answer to the Petitioner's PAR. In the answer the Owner

asserted that as the Petitioner failed to submit a timely answer opposing the OPD at the Rent Administrator's level, Petitioner may not raise any claims opposing such deregulations on the PAR level. The Owner noted that the Petitioner, even at the PAR level, failed to provide DHCR with evidence of her income. The Owner specifically noted the Petitioner's failure to attach copies of her income tax returns to the PAR.

On or about July 25, 2008 DHCR issued an "Order and Opinion Denying Petition for Administrative Review."

The Petitioner commenced this Article 78 proceeding wherein Petitioner seeks to have the proceeding before DHCR reopened. The Petitioner and DHCR consented to permit the Owner to intervene in this proceeding.

Petitioner's Contentions

Petitioner has been a rent-stabilized tenant in this apartment for a period of 15 years and lives there with her extremely ill husband who is in and out of the hospital.

The reason the apartment became deregulated has nothing to do with the petitioner's income, which is less than \$175,000. It is because of medical conditions of petitioner's husband and the extreme emotional stress that it has caused the petitioner and her lack of ability to properly and timely file the requisite response to the Owner's petition for deregulation.

Petitioner's default was not wilful and there is no prejudice to DHCR in remanding this case and allowing petitioner to submit her income taxes.

Petitioner had no idea of what her rights were, and was under so much stress due to the illness of her husband that she was incapable of addressing the legal requirements to contest the

Owner's application for high income deregulation.

What has occurred here is a tragedy. Petitioner cannot afford market rent for this Apartment. To be forced to move out of the Apartment will cause untold hardship upon petitioner.

Respondent's Contentions

In this proceeding the Petitioner does not deny receiving the ICF from the Owner. The Petitioner does not deny that she received the OPD which was served by DHCR. Rather, the Petitioner for the first time in this Article 78 proceeding attempts to offer an excuse for her failure to respond to the ICF and OPD. The Petitioner, in the Article 78 petition claims that the medical condition of her husband and the emotional stress that it caused resulted in a lack of her ability to properly and timely file her answer. In support of this claim the Petitioner submitted copies of various medical records concerning her husband. It should be noted that the ICF and the OPD were served on the Petitioner in 2007; however, the majority of the medical records are dated in 2008. Additionally, the Petitioner failed to submit a doctor's affidavit in support of the medical records and place the Petitioner's husband medical condition in context of her ability to perform everyday activities.

Moreover, conspicuously absent from the Article 78 Petition is an affidavit from the Petitioner setting forth her husband's medical condition and how his condition impaired her ability to submit a response to DHCR.

The Petitioner attached to her Article 78 Petition copies of purported federal tax returns for the years 2005 and 2006. These tax returns are dated April 2008, well after DHCR's

deregulation order was issued. The tax returns are not signed by the Petitioner. There is no indication that the tax returns were submitted to the Internal Revenue Service. The tax returns attached to the Petition are clearly self-serving. Additionally, the RSL requires DHCR to examine New York State Income Tax Returns and not the Federal Income tax returns.

RSL Section 26-504.3 provides a method for an owner to apply for high income deregulation of a housing accommodation, and the procedures by which a tenant is to reply and oppose an application. RSL Section 26-504.3(c)(1) requires that a tenant respond to DHCR's notice of OPD with the "Information for Verification of Household Income," and a tenant's failure to respond shall result in DHCR issuing a deregulation order. In this case the Petitioner failed to respond to the OPD and verify the household income as required by the RSL. Accordingly, DHCR properly granted the Owner's petition for high income rent regulation. Moreover, during the administrative proceeding the Petitioner failed to offer any explanation for her failure to respond.

In this Article 78 proceeding, the Petitioner impermissibly for the first time offered an excuse for her default and submitted the unsigned federal tax returns. The Courts have held that new evidence or arguments not raised in the administrative proceeding and submitted for judicial review may not be considered by the Court.

Analysis

Collateral Estoppel

Collateral estoppel “requires ‘that an issue in the present proceeding be identical to that necessarily decided in a prior proceeding, and that in the prior proceeding the party against whom preclusion is sought was accorded a full and fair opportunity to contest the issue’ ” (*Adam v Cutner & Rathkopf*, 238 A.D.2d 234, 242, 656 N.Y.S.2d 753 [1997], quoting *Allied Chem. v Niagara Mohawk Power Corp.*, 72 N.Y.2d 271, 276, 532 N.Y.S.2d 230, 528 N.E.2d 153 [1988], cert. denied 488 U.S. 1005, 109 S.Ct. 785, 102 L.Ed.2d 777 [1989]; see also *Aryeh v Altman*, 36 A.D.3d 492, 829 N.Y.S.2d 47 [2007].

This court finds respondent’s collateral estoppel argument unpersuasive. Petitioner is - rightly - seeking Article 78 review of the DHCR determination, not a *de novo* review of this issue.

However, the petitioner’s application is denied.

Article 78 Review

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 Pluce 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]).

On judicial review of an agency action under CPLR Article 78, the courts must uphold the agency's exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." *Pell v Board of Ed. Union Free School District*, 34 NY2d 222, 230-31, 356 NYS2d 833, 839 (1974) "The arbitrary and capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." 34 NY2d at 231, 356 NYS2d at 839 *See also Jackson v New York State Urban Dev Corp.*, 67 NY2d 400, 417, 503 NYS2d 298, 305 (1986) (on review of agency action under CPLR Article 78, the courts may not "second guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence").

In the instant case, the forum for petitioner to raise her excuse for her failure to provide DHCR with the requested income verification information was before the agency. This excuse cannot be raised for the first time before this court. *See Londin v N.S. Div. Of Hous. & Comm.*

Renewal, 259 AD2d 398, 687 NYS2d 111 (1st Dept 1999):

The apartment was properly deregulated upon petitioner's failure to provide DHCR with the income verification information it had requested more than 60 days before (Administrative Code of City of NY § 26-504.3 [c] [1], [3]; *see, Matter of Nick v State of N. Y. Div. of Hous. & Community Renewal*, 244 AD2d 299; *Matter of Bazbaz v State of N. Y. Div. of Hous. & Community Renewal*, 246 AD2d 388; *Pledge v New York State Div. of Hous. & Community Renewal*, 257 AD2d 391, 393-394). Petitioner's excuse for such failure was not raised in the administrative proceeding and therefore may not be considered in this judicial proceeding (*see, Matter of E.G.A. Assocs. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302).

Petitioner's challenge consisted solely of two sentences. The Petitioner simply stated in the PAR that "[Income requirements are well below decontrol requirements - Income requirements for decontrol rent met." The Petitioner did not offer any excuse as to her failure to submit an answer to the OPD. Moreover, the Petitioner failed to submit the necessary tax information as required by the RSL. Indeed, the Petitioner failed to submit any tax information or submit the income verification form.

The instant case is not a case where petitioner filed a late response - outside of the sixty day window *See Dworman v New York State Division of Housing and Community Renewal*, 94 NY2d 359, 704 NYS2d 192, 725 N.E.2d 613. ("We hold that DHCR has authority to accept late responses, and therefore we remit *Dworman* to the Division for consideration of the reasons for the tenants' tardiness in providing the required information.") In the instant case, petitioner totally defaulted in responding to the OPD.

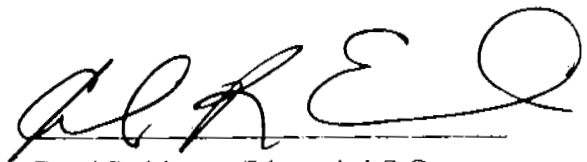
Conclusion

This court is truly mindful of petitioner's plight, and dismayed by petitioner's personal tragedies. However, the court is compelled to dismiss the Petition. Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of Petitioner-Tenant, Linda Zango-Haley, for an order and judgment (1) reversing the order and decision of Deputy Commissioner Leslie Torres dated July 25, 2008 (the "Determination"), denying petitioner's PAR; (2) demanding the proceeding to the DHCR to grant petitioner's petition for a Petition for Administrative Review, is **denied in its entirety, and the instant Petition is dismissed**; and it is further

ORDERED that counsel for respondent shall serve a copy of this Order with notice of entry within twenty days of entry on counsel for petitioner and intervenor-respondent.

Dated: January 26, 2009



Carol Robinson Edmead, J.S.C.

HON. CAROL EDM EAD

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).