

In the Matter of Burge v New York State Div. of Hous. & Community Renewal
2009 NY Slip Op 30303(U)
February 10, 2009
Supreme Court, New York County
Docket Number: 110137/08
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
EILEEN A. RAKOWER

PRESENT: _____
J.S.C.
Justice

PART 5

Index Number : 110137/2008
BURGE, WILLIAM H.
VS.
NEW YORK STATE D.H.C.R.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

1, 2, ~~3, 4, 5, 6, 7, 8, 9, 10~~
3, 4, 5, 6, 7, 8, 9, 10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
FEB 11 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 2/9/09


EILEEN A. RAKOWER
J.S.C. 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: PART 5

-----X

In the Matter of the Application of
WILLIAM H. BURGE,

Index No.
110137/08

FILED
Petitioner,

-against-

DECISION
and ORDER

FEB 11 2009

NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENTAL,

COUNTY CLERK'S OFFICE
NEW YORK

Respondent.

Mot. Seq. 001

-----X

HON. EILEEN A. RAKOWER:

Petitioner, William H. Burge ("Burge") brings this Article 78 petition to challenge the New York State Division of Housing and Community Renewal's ("DHCR") May 27, 2008 determination, denying his Petition for Administrative Review ("PAR"). In the PAR, petitioner sought for DHCR to review a Rent Administrator's March 17, 2008 order, instructing that petitioner's residence, apartment 29D, 45 East 89th Street, New York, New York (the "apartment"), was to be deregulated, upon expiration of the existing lease. DHCR opposes petitioner's motion, as does Aspenly Company LLC ("Aspenly"), owner of the apartment where petitioner and his spouse reside.

In support of his verified petition, Burge submits the following documents: (1) the DHCR order and opinion denying his PAR (exhibits attached); (2) the notice of petition (2) petitioner's affidavit; (3) counsel's affirmation; (4) the PAR; (5) DHCR's order of deregulation; (6) a notice of right to an administrative review, and notice of right of first refusal; (7) a letter from petitioner's counsel to DHCR requesting an adjournment and DHCR's reply; (8) Burge's sworn statement, dated March 17, 2008; (9) a document entitled "Answer to Notice And/Or Application (signed by petitioner and dated February 7, 2008, (9) petitioner's application for an extension in filing his New York State Tax Return; and (10) DHCR's regulations relating to high-rent /high income decontrol (printed July 24, 2008 and last updated December 16, 2004). Petitioner argues that this court should reverse DHCR's

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denial of his PAR because: (1) DHCR did not timely issue a notice providing him the opportunity to comment for the 2006 filing period; and (2) the Commissioner's determination was arbitrary and capricious. Petitioner also emphasizes that deregulation of the apartment would create significant hardships for himself and his family due to his age and poor health.

DHCR, in opposition, submits its verified answer and memorandum of law. DHCR contends, first, that its delay in sending the notice did not deprive petitioner of due process, because petitioner himself contributed to the delay and because, not only did the notice issued allow petitioner the full thirty day response period set forth in §26-504.3(c)(2), but petitioner also requested and was granted an additional month's extension to respond. DHCR further asserts that Burge has not challenged the accuracy of the New York State Department of Finance and Taxation's ("DTF") or DHCR's findings concerning his income in the subject years. Finally, DHCR notes that the high rent/high income deregulation provisions of the Rent Stabilization Law and Rent Stabilization Code provide no exception for elderly or infirm tenants and that the law requires the owner to offer the deregulated apartment to the tenant at market rent.

Aspenly submits a verified answer and counsel's affirmation in opposition, also noting that petitioner has not challenged the accuracy of DTF or DHCR's findings concerning his income in the subject years.

The determination petitioner seeks to vacate resulted from consideration of the following facts and circumstances. On May 15, 2006, Aspenly filed a petition for high income rent deregulation of the apartment, and requested verification of the household income. Stating that the legal monthly rent for the subject apartment was \$2,000.00 or more, and alleging that Burge's total annual household income exceeded \$175,000.00 in each of the two preceding calendar years, Aspenly asserted that the apartment was subject to deregulation, pursuant to the Rent Stabilization Code §2520.11(s). On May 30, 2006, in accordance with DHCR policies, the Administrator sent Burge a copy of the owner's petition for deregulation and the form for tenant's verification of household income. Burge submitted a response, asserting that the household income did not exceed \$175,000.00 in either of the two relevant tax years (2004 and 2005). Petitioner returned DHCR's answer form on or about June 16, 2006, attaching his application for an automatic extension to file his 2005 tax return and stating in the form that he and his wife had filed a joint tax return in 2004 but had not yet filed their 2005 tax

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return due to their request for the extension. Petitioner also affirmed that the total annual income for all persons in occupancy of the apartment was \$175,000.00 or less in each of the two subject calendar years.

On or about November 9, 2007, petitioner provided DHCR with the cover pages of his 2004 and 2005 joint New York State income tax returns with the dollar amounts redacted. DHCR forwarded the income tax verification information to DTF, which determined that Burge's total household income exceeded \$175,000.00 in each subject tax year. DHCR then sent a notice to the owner and tenant, dated January 8, 2008, giving Burge and the owner an opportunity to comment on the DTF finding. The notice originally provided for a thirty day response period, but DHCR granted petitioner's attorney an additional month's response time. The Administrator then issued a March 17, 2008 order that the apartment be deregulated, upon expiration of the existing lease, based on DTF's finding. On April 18, 2008, petitioner filed a PAR appealing the March 17, 2008 order, and on May 17, 2008, DHCR issued an order denying the PAR.

The "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]). Additionally, if a penalty is imposed by the agency, "the sanction must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." (*Featherstone v. Franco*, 95 NY2d 550, 554 [2000]).

New York City Administrative Code §26-504.3(c) states in pertinent part:

§26-504.3. High income rent decontrol

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(c)(1) ...the owner may...petition the state division of housing and community renewal to verify, pursuant to...the tax law, whether the total annual income exceeds one hundred seventy-five thousand dollars in each of the two preceding calendar years. Within twenty days after the filing of such request with the division, the division shall notify the tenant or tenants named on the lease that such tenant or tenants must provide the division with such information as the division and the department of taxation and finance shall require to verify whether the total annual income exceeds one hundred seventy-five thousand dollars in each such year. The division's notification shall require the tenant or tenants to provide the information to the division within sixty days of service upon such tenant or tenants...

(c)(2) If the department of taxation and finance determines that the total annual income is in excess of one hundred seventy-five thousand dollars in each of the two preceding calendar years, the division shall, on or before November fifteenth of such year, notify the owner and tenants of the results of such verification. Both owner and the tenants shall have thirty days to comment on such verification results...

Although §26-504.3(c) specifies certain dates and time frames, the court has interpreted the provisions governing high income/high rent deregulation to grant DHCR some discretion to accept submissions and issue notices outside the prescribed times, noting that, "within the framework set by the statute, the Legislature intended for deregulation proceedings to be decided on the merits." (*Dworman v. New York State Division of Housing and Community Renewal* 94 N.Y.2d 359, 371-372 [1999].) Finding that the 60 day time frame in Administrative Code §26-504.3(c)(1) and (c)(3) "does not divest the Division of authority to forgive a late filing or excusable default [by petitioner] in the sound exercise of its discretion, the court further held "[t]o be sure, DHCR's delay in sending [...] notifications did not deprive it of jurisdiction over the proceedings, nor is there any allegation that the delay was so unreasonable as to constitute 'extraordinary circumstances' warranting judicial intervention." (*Id.* at 371-372, citing *Matter of Cortland Nursing Home v. Axelrod*, 66 N.Y.2d 169, 180 [1985], cert denied [holding that judicial intervention for excessive delay in administrative proceeding[s] is warranted only under extraordinary circumstances]; See also *Elkin v. Roldan* 94 N.Y.2d 853, [rejecting DHCR's argument that it lacked authority to accept a tenant's late filings and stating that DHCR may consider

whether a delay is “so minimal as to be excusable” as *de minimus*] and *Elkin v. Roldan* 688 N.Y.S.2d 61, 62 [1st Dept. 1999] [Specifying that, “[d]espite the mandatory language of these provisions, DHCR apparently considers the deadlines as merely advisory, and there is authority supporting this view.”].)

The court has also held that, where DTF has matched a tenant with a tax return, DHCR is entitled to rely on the yes or no response provided by DTF as to whether the tenant’s income exceeds the \$175,000.00 threshold in two consecutive years. (*London Terrace Gardens v. New York State Division of Housing and Community Renewal* 6 Misc.3d 1020(A) [N.Y. Sup. Ct. 2005]. See also *Giffuni Bros. v. New York State Division of Housing and Community Renewal* 742 N.Y.S.2d 205 [1st Dept. 1002], *leave to appeal denied*.)

Petitioner did not provide DHCR with his complete tax information until November 9, 2007. Per the procedures set forth in §26-504.3(c), DHCR then submitted an inquiry to DTF and, upon receipt of its findings, issued a notice to petitioner and owner on January 7, 2008, providing them the requisite thirty day response period. Petitioner was then granted an additional month’s response time.

Moreover, the Commissioner has articulated a rational basis for denying petitioner’s PAR. The Commissioner found that DHCR properly relied on the findings reported by DTF. As discussed above, DTF’s records indicate that petitioner’s household income exceeded \$175,000.00 for two consecutive tax years. Petitioner previously claimed that his household income did not exceed that amount, but the Commissioner’s report notes that “the tenant has not challenged or refuted DTF’s findings concerning the amount of the relevant household income and did not assert in his PAR that the household income was below the required statutory threshold amount in the two relevant tax years.” The DHCR decision denying the PAR also indicates that the Commissioner considered the health and repair issues asserted by petitioner in the present matter, as well as the potential hardship to Burge’s family. It further states that he considered and rejected as irrelevant arguments raised by petitioner concerning his 2007 tax extension, because 2004 and 2005 constitute the relevant tax years for DHCR’s determination of deregulation. Having evaluated the evidence and the arguments asserted, the Commissioner opined that the PAR should be denied. Under the circumstances presented here, it cannot be said that respondent DHCR’s decision to deny petitioner’s PAR was arbitrary, capricious or an abuse of discretion.

Wherefore, it is hereby

ORDERED that petitioner's Article 78 petition is denied.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: February 10, 2009



EILEEN A. RAKOWER, J.S.C.

FILED
FEB 11 2009
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NEW YORK