

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

2009 NY Slip Op 31301(U)

June 12, 2009

Supreme Court, New York County

Docket Number: 401768/08

Judge: Shirley Werner Kornreich

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

~~JUSTICE SHIRLEY WERNER KORWEICH~~

PART 59

Index Number : 401768/2008

FERNANDEZ, EDNA

VS.

N.Y.S.D.H.C.R.

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO.

MOTION DATE

6/30/09

MOTION SEQ. NO.

MOTION CAL. NO.

Is motion to/for

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

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

1-4

5-7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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).

Dated:

6/2/09

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 54

----- X
In the Matter of the Application of
EDNA FERNANDEZ and CORNELIA BENTON,

Petitioners,

Index No.: 401768/08

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

DECISION
and ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL
and
NEW YORK STATE PUBLIC SERVICE COMMISSION,

Respondents.

----- X
KORNREICH, SHIRLEY WERNER J.:

Motion Sequence No. 001 and 002 are consolidated for disposition.

Petitioners Edna Fernandez and Cornelia Benton (collectively, "petitioners"), tenants at 1365 St. Nicholas Avenue, institute this proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules. Petitioners seek judgment: 1) annulling the New York State Public Service Commission's (PSC) decision granting the Rachel Bridge Corporation (Rachel) permission to submeter pursuant to 16 NYCRR §§ 92.6(a), (b), issued and effective on June 30, 2006 (PSC Case 04-E-0103), 2) annulling the New York State Division of Housing and Community Renewal's (DHCR) rejection of petitioners' Petition for Administrative Review (PAR) contesting DHCR's grant of permission to Rachel to exclude from rent electrical utility charges, dated March 23, 2008 (docket number VI-410025-RT), and 3) requiring release to petitioners of the Administrative Record in this proceeding (Return). Respondent PSC seeks, in the alternative to dismissal on various procedural grounds, an order transferring venue to Albany

County as to the portion of this case pertaining to them. Respondent DHCR seeks, in addition to dismissal, a grant of 30 additional days to facilitate petitioners' inspection of the Return at DHCR's offices. For the reasons specified below, this Court now dismisses petitioners' Article 78 motion with respect to both respondents.

I. Background

On January 27, 2004, Herbert E. Hirschfeld, P.E., on Rachel's behalf, petitioned PSC by letter for approval of Rachel's proposed submetering of the following properties: 1365 St. Nicholas Avenue, 111 Wadsworth Avenue, 260 Audubon Street, and 1370 St. Nicholas Avenue (all located in New York, NY, 10033). Collectively, these properties consist of 960 residential units, all of which are rent stabilized and within the jurisdictional authority of DHCR.

On February 25, 2004, the petition was noticed in the State Register under I.D. No. PSC-08-04-00010-P and opened to public comment for 45 days. On April 11, 2006, Mr. Hirschfeld filed a second letter, this time including documentation and proof of mailing from the United States Postal Service, indicating that tenants in these properties received notice and information about the proposal. Although contested by the petitioners, the record indicates that Rachel held an informational meeting for tenants of 111 Wadsworth Avenue and 1365 St. Nicholas Avenue on March 29, 2006. Rachel held a similar meeting for tenants of 260 Audubon Street and 1370 St. Nicholas Avenue on April 5, 2006.

Rachel's proposal is, generally, as follows. All 960 units at the four properties in question will have individual electricity meters installed and will no longer receive electricity as part of their rental price. Installed meters will record electricity usage data and transmit it electronically to a central computing system. By applying this data to the actual bulk residential rate charged by Consolidated Edison Company of New York, Inc. (ConEd) and modifying the result by

metering and billing fees, each tenant's monthly electrical charges will be calculated and rendered as individual bills payable to Rachel. In turn, Rachel will be billed by ConEd based on their Bulk Residential Redistribution Rate, S.C. 8.

To alleviate the financial burden imposed by tenants' new utility bills, a \$20 per air conditioner per month appliance fee (figure is approximate) will be eliminated and, in accordance with DHCR guidelines specified by DHCR Operational Bulletin 2003-1 (2003-1), each tenant will be granted a rent reduction of a variable amount based on the total number of rooms in their apartment. Room counts will be calculated using DHCR guidelines specified by Policy Statement 93-2 (93-2). Tenants will not risk termination of service for non-payment, although Rachel will retain the same enforcement mechanisms as to electricity bill collection that it does as to rent collection. Those tenants receiving a Senior Citizen Rent Increase Exemption will continue to have their electricity charges included as part of the rental price as per 9 NY ADC §2522.4(d)(3)(iii).

On June 5, 2006, the New York State Department of Public Service, Office of Consumer Services (OCS) issued a statement recommending that PSC adopt as proposed Rachel's submetering plans. As part of its recommendation, OCS noted that Rachel's "application to submeter meets the Commission's requirements for submetering of master-metered residential units owned or operated by private or governmental entities" and that "[t]he submetering equipment to be employed at the complex complies with [the American National Standards Institute's] C-12 standards for accuracy and reliability." On June 30, 2006, PSC approved Rachel's proposal as per OCS' recommendation and without any modifications.

On September 26, 2006, Mr. Hirschfeld, again on Rachel's behalf, mailed a letter as per 9 NY ADC §2522.4(d)(3)(ii) to DHCR requesting permission to exclude electrical utility charges

from each affected unit's rental price. On October 26, 2006, DHCR mailed the tenants of these units a "Notice of Commencement of Proceeding Upon Owner's Application for Permission to Change or Decrease Dwelling Space, Etc." containing a copy of Rachel's September 26 request and inviting input from tenants via an attached answer form. On November 6, 2006, DHCR received the first of these answers from a tenant at 1365 St. Nicholas Avenue, one Fernando Polanco. From November 9, 2006, through December 8, 2006, DHCR received a number of additional answer forms filed by other affected tenants.

At this time the Bridge Apartments Tenant Association (BATA) began corresponding with DHCR, principally via requests for repeated extension of the comment period. Eventually, BATA produced a detailed response contesting the legality of Rachel's proposal. Rejecting this, the New York State Division of Housing and Community Renewal, Office of the Rent Administrator, Gertz Plaza (Rent Administrator) issued an order, on August 2, 2007, 1) granting permission to terminate rent inclusion of electricity at all four properties, 2) clarifying the room count formula employed by Rachel and DHCR, and 3) informing interested parties of their right to file a PAR contesting this decision. The Rent Administrator forwarded copies of this order to affected tenants.

On September 7, 2007, the Rent Administrator received a PAR from BATA to which BATA had attached a detailed statement of its position. Concurrently, petitioner Cornelia Benton filed a separate PAR to which she had attached a letter from Council Member Miguel Martinez (10th District) written in November of 2006 and, thus, prior to the Rent Administrator's actual decision. While Council Member Martinez' letter primarily concerned itself with the financial, rather than legal, ramifications of the proposal, it also listed several reasons why Council Member Martinez believed the application process to have been faulty, viz.: 1) 111 Wadsworth

Avenue was listed under the New York City Department of Finance (DOF) as owned by the New York Department of Administrative Services, not Rachel, 2) 260 Audubon Avenue was listed under the DOF as owned by the New York Port Authority, not Rachel, and 3) Rachel had transferred whatever interest it had in the affected properties to The George Units LLC (The George Units), a Delaware corporation. Petitioner Benton attached a second letter to the Rent Administrator, dated August 24, 2007, in which Council Member Martinez decried PSC's decision as being rendered without due process.

On March 23, 2008, Deputy Commissioner Leslie Torres, writing for the Rent Administrator and having consolidated petitioner Benton's and BATA's PARs for review, upheld DHCR's termination order. Deputy Commissioner Torres acknowledged DHCR's "long-standing policy of permitting, and indeed encouraging[,] submetering. As to BATA and the Martinez letters' dissatisfaction with 2003-1's rent reduction formula, Deputy Commissioner Torres pointed out that 2003-1 was the product of repeated revision and the joint efforts of both DHCR and the New York State Energy Research and Development Agency (NYSERDA). Moreover, she cited to the First Department's decision in *Car Barn Flats Residents Assoc. v. New York State Division of Housing and Community Renewal*, 27 A.D.3d 240 (1st Dept. 2006), *appeal denied*, 7 N.Y.3d 704 (2006), upholding 2003-1's formula as not arbitrary and capricious. Relying on ease of use and consistency benefits, Deputy Commissioner Torres upheld DHCR's use of 93-2's room count guidelines as applicable to 2003-1's rent reduction formula. Finally, she rejected any and all due process arguments, citing DHCR's compliance with the State Administrative Procedures Act.

This Article 78 motion by petitioners followed. BATA has not filed an Article 78 and its arguments, therefore will not be addressed here.

II. Discussion

Service upon state agencies must occur via personal delivery or certified mail bearing the legend "URGENT LEGAL MAIL." CPLR §307(2). Such service must be upon either the chief executive, or equivalent, of the agency over which petitioner seeks to acquire personal jurisdiction or upon a person whom the chief executive has designated as agent for such purpose.

Id. In the alternative, if respondent agency is a commission without a chairperson, service may be effected upon any member thereof. CPLR §312. Article 78 petitions employ a procedure identical to that for a summons. CPLR §§ 403(c), 7804(c).

In the instant case, petitioners failed to effect service in the manner specified by law. In place of the procedure outlined in CPLR §§ 307(2), 312, and 403(c), petitioners attempted to serve respondent PSC via regular United States Postal Service mail addressed to "Counsels [sic] Office (518) 474-2510 New York State Dept. of Public Service." Even assuming arguendo that the Public Service Commission Office of Counsel is a designated agent as per CPLR §307(2), petitioners' method of mailing and omission of the requisite "URGENT LEGAL MAIL" legend renders the attempted service inadequate.

Petitioners' chosen service method also fails to pass muster under the alternative, regular mail-based approach provided by CPLR §312-a. PSC never filed a signed acknowledgment of receipt, nor does the record suggest that petitioners' included as part of their mailed petition any of the supplemental material required by CPLR §312-a(a), viz.: an answer form as defined by CPLR §312-a(d); two copies of a statement of mailed service; and a pre-paid, self-addressed return envelope.

Petitioners' *pro se* statuses do not reduce or remove the procedural burden outlined above. *Brooks v. Inn at Saratoga Association*, 188 A.D.2d 921, 921 (3d Dept. 1992) ("A *pro se*

litigant acquires no greater rights than those of any other litigant and cannot use such status to deprive defendant of the same rights as other defendants.”); *Pickering v. Flacke*, 115 Misc.2d 264, 265 (Sup. Ct., N.Y. County, 1982). The due process guarantee, of which proper notice is a critical part, operates to protect the State and its agencies, even against Article 78 petitions filed *pro se*, just as it operates to protect the citizenry. *Id.* at 265. That petitioners’ flawed service may have nevertheless provided actual notice to PSC will not cure it of defect. *See Goldmark v. Keystone & Grading Corp.*, 226 A.D.2d 143, 144 (1st Dept. 1996).

Therefore, to the extent it concerns respondent PSC, petitioners’ motion must be dismissed for want of personal jurisdiction. *See, e.g., Wittie v. State, Office of Children & Family Services*, 55 A.D.3d 842, 843 (2d Dept. 2008); *and see Russo v. New York State Dept. of Motor Vehicles*, 181 A.D.2d 774, 775 (2 Dept. 1992). Accordingly, as no judgment rendered here may legally bind PSC, the substance of petitioners’ challenge as to PSC’s June 30, 2006, order, as well as PSC’s motion for a change of venue, need not be addressed.

Respondent DHCR, however, has not claimed improper service. Therefore, it must be determined whether the denial of petitioners’ PAR by Deputy Commissioner Leslie Torres constitutes a “violation of lawful procedure, was effected by error of law or was arbitrary and capricious or an abuse of discretion.” CPLR §7803(3). In determining arbitrariness and capriciousness, this Court limits its analysis to the question of whether a rational basis exists upon which the PAR order might have been founded. *See Burke's Auto Body, Inc. v. Ameruso*, 113 A.D.2d 198, 198 (1st Dept. 1985); *Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974) (“Arbitrary action is without sound basis in reason.”).

To the extent it relates to the financial impact of Rachel’s proposal as outlined in 2003-1, petitioners’ case has already been partially resolved in *Car Barn Flats*, 27 A.D.3d 240, 241 (1st

Dept. 2006) (upholding the rent reduction formula employed by DHCR as not arbitrary or capricious). Of the remaining arguments petitioners raise, the primary one appears to be that the underlying DHCR order upheld by Deputy Commissioner Torres was itself arbitrary and capricious. Presumably, it is petitioners' hope that in undermining the integrity of the original DHCR order they will thereby undermine that of the PAR order upholding it.

Petitioners begin by suggesting that DHCR's knowledge of electrical conservation and the economics associated therewith is so inadequate that their decision approving Rachel's proposal could not have been rendered non-arbitrarily. Petitioners, however, overlook the years of experience in this area to which DHCR lays claim. Petitioners also overlook the substantial breadth of publically available information upon which DHCR might, and in fact did, base its opinion. For example, NYSERDA, with whom DHCR worked closely to create 2003-1's rent reduction formula and whose incentives will defray 50% or more of Rachel's implementation costs, reported demonstrated savings of 18-26% in their 86-8 report on submetering. Additionally, it is fact that ConEd's direct metering rate (S.C. 1) is 25% higher than the S.C. 8 submetering rate it will charge Rachel under the proposal.

Petitioners also suggest, although without evidentiary support, that each building has a unique consumption pattern. Assuming this is true, exactly what this means – and exactly why, as petitioners argue, DHCR should have considered this – is simply unaddressed. Nowhere does it appear that Rachel's proposal hinges upon some assumed initial “pre-submetering consumption” value. Indeed, *change in use* is the relevant consideration, and various materials in the record repeatedly note that this change will invariably be characterized by a net decrease post-submetering *without reference to initial patterns or values*. Moreover, this Court fails to see the relevance of these usage patterns in disproving at least that portion of NYSERDA's predicted

savings that relates to billing rate differences. Under this same logic, petitioners' argument, to the extent it serves as an attempted indictment of DHCR's knowledge and supposed arbitrariness, that each tenant's individual situation should have been considered prior to the rent exclusion order must also be rejected. *Compare Carol Management Corp. v. Commissioner, State of N.Y. Div. of Housing and Community Renewal*, 140 Misc.2d 673, 675 (Sup. Ct., N.Y. County, 1988) (landlord may increase rent pursuant to Major Capital Improvements schedule despite failure to renovate apartment of every tenant in building).

In light of the above, this Court holds that a rational basis for DHCR's decision, as well as Deputy Commissioner Torres' rejection of petitioners' PAR, existed. Consequently, neither decision is arbitrary or capricious.

Petitioners argue further that DHCR's decision and the PAR order were conducted in "violation of lawful procedure." CPLR §7803(3). The administrative code requires that, prior to exclusion of electrical utilities from rental price, "an *owner* . . . file an application to decrease required services for a reduction of the legal regulated rent on forms prescribed by DHCR." 9 NY ADC §2522.4(d)(3) (emphasis added). Relying on this, petitioners claim that Rachel itself did not own two of the buildings in question (111 Wadsworth Avenue and 260 Audubon Avenue) and that approval should be rescinded now because Rachel has transferred whatever interest it possessed in those properties it did own to The George Units.

Unfortunately, the record is quite unclear on this matter, a problem which is in part compounded by an ambiguity as to whether the correct address of 111 Wadsworth Avenue is really 101 Wadsworth Avenue. What is known is that OSC's recommendation preemptively rejected the idea that any change in ownership would obsolete its recommendation. Furthermore, the record indicates in very clear terms that PSC acted on OSC's recommendation *without any*

modification whatsoever thereto. The owner's identity is not mentioned as significant to the application procedure anywhere else, and petitioners' do not offer any reason why it would be. Therefore, provided that Rachel was the owner of the buildings in question at the time it filed its application with DHCR, this Court sees no reason to overturn DHCR's decision or the PAR order. This is particularly true as petitioners have not alleged that uncertain building ownership has prejudiced their ability to be heard or contest DHCR's decision. Even if Rachel was not the owner, there is simply insufficient evidence to justify judicial interference with DHCR's implicit determination that Rachel could rightfully file for rent exclusion under 9 NY ADC §2522.4(d)(3). *Cf. Salvati v. Eimicke*, 72 N.Y.2d 784, 791 (1988) (requiring deference to DHCR's interpretation of statutes it administers unless irrational); *Sewell v. New York*, 182 A.D.2d 469, 473 (1st Dept. 1992) (requiring deference to administrative agency's factual determinations).

Second, petitioners argue that the DHCR determination and the PAR order were both biased because DHCR has admitted to a longstanding policy of submetering encouragement. Also, petitioners argue that the PAR order was additionally biased because only a single DHCR employee, Deputy Commissioner Torres, handled its disposition. Without more, this Court must reject both of these contentions.

Finally, petitioners argue that DHCR violated lawful procedure by: 1) their failure to consult the individual affected tenants and 2) their failure to release to those tenants various records, including the Return which petitioners now request be released to them. 9 NY ADC §2522.4 nowhere requires DHCR to consult with affected tenants in deciding whether or not to approve proposals such as Rachel's. Tenant interests are instead protected by the need to pass an approval process itself, rent reduction, and grievance procedure such as the PAR process. As to

the second argument, DHCR complied with New York law when it filed the Return with the court. CPLR §7804(e). There is no requirement that DHCR reproduce for petitioners free copies of the Return. *White v. Joy*, 95 A.D.2d 757, 757 (1st Dept. 1983). This Court notes that the Return is available and open for petitioners' inspection, reminding them that DHCR itself has offered to produce copies at a reasonable fee.

Accordingly, it is

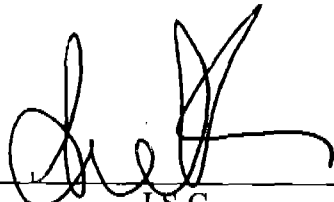
ORDERED and ADJUDGED that respondent New York State Public Service Commission's motion to dismiss the present Article 78 petition to the extent it involves them is granted for want of personal jurisdiction; and it is further

ORDERED and ADJUDGED that petitioners' application for annulment of respondent New York State Division of Housing and Community Renewal's PAR order upholding their approval of the properties at 111 Wadsworth Avenue, 260 Audubon Avenue, 1365 St. Nicholas Avenue, and 1370 St. Nicholas Avenue for termination of rent inclusion of electricity is denied; and it is further

ORDERED and ADJUDGED that petitioners' request for the Administrative Record in this proceeding is denied.

ENTER:

Date: June 2, 2009
New York, N.Y.



J.S.C.