

Matter of Tipadis v Bronstein Props.

2011 NY Slip Op 33090(U)

November 29, 2011

Supreme Court, New York County

Docket Number: 400350/2011

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

Index Number : 400350/2011
TIPADIS, ANASTASIA
vs.
BRONSTEIN PROPERTIES, D.H.C.R.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. 001

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION, ORDER +
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 141B).

Dated: NOV 29 2011

[Signature]
HON. JUDITH J. GISCHE *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

UNFILED JUDGMENT

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

*In the matter of the application of
Anastasia Tipadis,*

Petitioner

DECISION/ ORDER

Index No.: 400350-2011

Seq. No.: 001

*For a judgment pursuant to article 78 of
the Civil Practice Laws and Rules*

-against-

Bronstein Properties and DHCR,

Respondents.

PRESENT:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Notice of Pet and Verif Pet	1,2
DHCR x/m (remit) w/ET affirm, exhs, "Return"	3
Bronstein opp to pet w/ RD affirm, SS affid, exhs	4
Pet's affid (4/28/11, 7/20/11)	5,6
Bronstein opp to x/ w/RD affirm, exhs	7
DHCR reply to Bronstein w/ET affirm	8
Steno record 7/28/11	9

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is a summary proceeding brought pursuant to Article 78 of the CPLR.

Petitioner Anastasia Tipadis seeks a judgment from this court vacating, reversing or otherwise annulling a decision by respondent the State of New York Division of Housing and Community Renewal, Office of Rent Administration s/h/a "DHCR" ("DHCR") dated

December 9, 2010 ("order") which denied her petition for administrative review. DHCR has cross moved for an order allowing the matter to be remitted to it so it can reconsider its order. Bronstein Properties ("landlord") has answered and raises points of law in opposition to the petition. The landlord separately opposes DHCR's cross motion, to have the matter voluntarily remitted to it for reconsideration.

Where a respondent has answered the petition and raised points of law seeking the dismissal of the petition (CPLR §7804 [f]), only the petition and the exhibits attached thereto may be considered and all the allegations contained therein are deemed to be true (Green Harbour Homeowners' Ass'n, Inc. v. Town of Lake George Planning Board, 1 AD3d 744 [3rd Dept 2003]). The court's decision is as follows:

Facts considered and arguments presented

On March 1, 2010, Bronstein applied for a Fuel Cost Adjustment ("FCA") to apartment 3A, located at 118 Post Avenue, New York, New York. The application was granted and the landlord increased the fuel charge effective April 1, 2010. Petitioner denies she was ever served with the landlord's application (known as a "Fuel Cost Adjustment Report") and claims the first time she learned of an increase in the fuel charges were when she received the April 2010 rent bill showing a \$63.44 increase. Petitioner did not take any action, except to make the payments each month.

In August 17, 2010, petitioner filed a "Tenant Challenge to the FCA 2010" [Docket No. YH-420003-F] in the name of "Theodota and Anastasia Tipadis," alleging that she had never been served with the FCA report supporting the increase in the fuel charge, and that the FCA reported by the landlord was incorrect. The challenge is signed by Anastasia where the form indicates the "tenant or representative" must sign.

The landlord answered the challenge, submitting proof of the increased fuel oil consumption at the apartment and that the FCA report had been mailed to petitioner on March 1, 2010. The Rent Administrator issued an order dated October 5, 2010 terminating the proceeding and denying petitioner's challenge for the following reasons:

After consideration of all evidence in the record and upon grounds stated in section 2202.13 of the regulations, the rent administrator finds:

On 8/17/10, Apt. 3-A Tenant filed a fuel challenge alleging the owner did not serve a copy of the 2010 Fuel Cost Adjustment Report. Our records indicate:

Owner filed the 2010 FCA report with DHCR on 3/1/10 & submitted a certificate of mailing showing a copy of the report was mailed to tenant. Please note, under the current law, a challenge must be filed within 35 days from the date of receipt of the report. This challenge was filed more than 35 days. As such, the challenge is deemed untimely & is hereby denied. Therefore, it is ordered that this proceeding is terminated.

If you believe this order is based on an error in law and/or fact, you may file a petition for administrative review (PAR) within 35 days of issuance of the order.

Petitioner filed a PAR on November 22, 2010, stating that she was never notified by landlord of the increase in the fuel charges and that she had contacted her Assemblyman who informed her she might qualify for a refund of all fuel adjustments charged in violation of law. Petitioner's PAR was denied in an order and opinion by the commissioner dated December 9, 2010 ("denial of PAR"). The reasons stated for the denial are as follows:

[t]he subject landlord has established that the 2010 fuel cost adjustment report was served upon the subject

tenant on March 1, 2010. The record reflects that the subject tenant's challenge to the 2010 FCA was filed with the rent agency on August 16, 2010. Based upon the above, the Commissioner finds that the subject tenant did not file a challenge within the requisite [35] days of being served with the 2010 FCA report. As the subject tenant did not file a timely challenge to the 2010 fuel cost adjustment report, the...subject tenant is time-barred from raising any issues upon administrative review pertaining to the propriety of the landlord's 2010 fuel cost adjustment report.

Following the denial of her PAR, petitioner commenced this action on February 8, 2011, challenging DHCR's order. To explain her admitted delay in filing the challenge, petitioner states that she was never served with the landlord's application for a fuel charge increase and when she saw the increase on the rent bill, she did not know what to do or that she could challenge it. According to petitioner she only learned she could challenge the increase when she visited her assemblyman.

Although DHCR stands by its order, DHCR states that enforcement of the 33 (or 35) day deadline to challenge the landlord's application for a fuel increase reflects the agency's long standing practice, but in actuality, the agency has the discretion to excuse a late filing so that it can address petitioner's challenge on the merits. Therefore, DHCR asks that this court allow the matter to be remitted to itself on its own motion.

The landlord argues that not only was petitioner's challenge untimely, she also filed the PAR too late. The landlord contends that the challenge and the PAR are each subject to a statutory 35 day deadline and DHCR does not have the discretion to waive these deadlines. The landlord also points out that the PAR was signed by "Theodota

Tipadis," who is now deceased, but this action is brought by "Anastasia Tipadis" her daughter. Furthermore, the tenant of record is "Thomas Tipadis" who pre-deceased Theodota and the landlord has no idea who Anastasia is or whether her claim of having lived with Theodota prior to her death is true.

Discussion

Section 2202.13 of the New York City Rent and Eviction Regulations ("NYC Rent and Eviction Regulations § ___") applies to fuel cost adjustments in Rent Controlled apartments. Under NYC Rent and Eviction Regulations § 2202.13(a), such fuel-cost adjustments are part of the legally regulated rent a landlord may charge. NYC Rent and Eviction Regulations § 2202.13 sets forth the procedure a landlord must follow to obtain an increase (or decrease) in the fuel charges the can then be passed along to the tenant. Among the requirements for such an increase is notice to the tenant of the landlord's application. Such notification shall be "upon forms prescribed by the administrator." Although the tenant may challenge the application by filing DHCR Form RAC-2202.13 ("Tenant's Challenge to Owner's Report and Certification of Fuel-cost adjustment and Eligibility"), and the form indicates the challenge has to be filed with the rent administrator within 35 days after receipt of the owner's report, this deadline is not embodied in the regulations (i.e. "NYC Rent and Eviction Regulations § 2202.13) itself.

NYC Rent and Eviction Regulations § 2208 et seq applies to administrative reviews. Pursuant to NYC Rent and Eviction Regulations § 2208.2, a PAR must be filed with the administrator "within 33 days after the date such order is issued" Section 2529.2 of the N.Y.C. Rent Stabilization Code, relief upon by landlord, similarly provides

that the PAR has to be filed "within 35¹ days after the date such order is issued." A PAR may be filed by "any person aggrieved by these regulations" (NYC Rent and Eviction Regulations § 2208.2). Although the landlord argues that petitioner has no standing to bring this summary proceeding because the PAR was brought in the name of "Theodota Tipadis" and Anastasia is not the tenant of record, that argument is rejected as a reason to deny the petition. This point was not raised by the owner in its answer to the PAR. Judicial review of administrative determinations under Article 78 is confined to the facts and record adduced before the agency (CPLR 7801 et seq; Matter of Featherstone v Franco, 95 N.Y.2d 550 [2000]).

It is unrefuted that petitioner did not challenge the landlord's application for a fuel increase within the time proscribed on DHCR Form RAC-2202.13. She also failed to file her PAR within 35 days of DHCR's order. The issue here is whether these deadlines are jurisdictional, akin to a statute of limitations that cannot be extended or, as DHCR contends, regulatory requirements that DHCR may, in its sole discretion, waive.

In Dworman v. New York State Division of Housing and Community Renewal, 94 NY2d 359 [1999] ("Dworman"), the issue before the Court of Appeals was whether DHCR could take into consideration information submitted by a tenant more than 60 days after service of the landlord's petition for luxury decontrol. In deciding that DHCR could consider the submission, the court stated that the statute at issue did not prohibit

¹The landlord cites the provisions applicable to the Rent Stabilization Code. Fuel Charges are, however, associated with rent controlled apartments. The court makes no decision about the regulated status of this apartment.

the agency from considering a late submission or "divest [it] of authority to forgive a late filing or excusable default in the exercise of sound discretion" (Dworman supra at 372). In Elkin v. Roldan as Deputy Commissioner of DHCR (94 NY2d 853 [1999]) ("Elkin") the Court of Appeals expounded that DHCR has the authority to excuse a late filing, particularly where the delay was de minimus. The court may grant DHCR's own motion for a remission for further fact finding, particularly if DHCR seeks to correct some error or irregularity in its decision (Porter v. New York State Division of Housing and Community Renewal, 51 AD3d 417 [1st Dept 2008]). Unlike Jemrock Realty Co v. DHCR (7 AD3d 338 [1st Dept 2004]), DHCR in the proceeding at bar is not simply recalling its initial finding without any basis. Here, DHCR is asking that the matter be remitted so it can make a determination on the merits. In Jemrock, DHCR had already made a determination on the merits but then, for seemingly arbitrary reasons, reconsidered its initial determination, that the landlord had filed a timely PAR.

NYC Rent and Eviction Regulations § 2208.6 allows DHCR to, "in [its] discretion and for good cause shown, extend the time within which to [file an] answer [to a PAR]" although this subdivision sets a 15 day limit on the time in which any person served with a PAR may answer. NYC Rent and Eviction Regulations § 2208.7 pertains to "Actions by administrator." Subdivision (d) provides that the DHCR may "for good cause shown, accept for filing any papers, even though not filed within the time required by these regulations."

Applying the foregoing principles of law and examining the applicable regulatory provisions, this court holds that DHCR has broad powers and the authority to alter its prior determinations on remission (Matter of Sherwood 34 Assoc. v New York State Div.

of Hous. & Community Renewal, 309 A.D.2d 529 [1st Dept 2003] internal citations omitted). Therefore, DHCR's cross motion to have the present matter remitted to it is granted. The deadline in NYC Rent and Eviction Regulations § 2208.2 does not divest DHCR of jurisdiction over this matter.

In accordance with the foregoing,
It is hereby

ORDERED that DHCR's cross motion, to have the within matter remitted to respondent DHCR is hereby granted; and it is further

ORDERED ADJUDGED AND DECLARED that the petition is hereby denied; and it is further

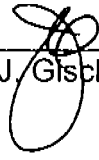
ORDERED that this constitutes the decision, order and Judgment of the court.

Dated: New York, New York
November 29, 2011

So Ordered:

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).



Hon. Judith J. Gische, JSC