

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

2019 NY Slip Op 31955(U)

July 9, 2019

Supreme Court, New York County

Docket Number: 154410/19

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

-----X  
In the Matter of the Application of

MADELEINE DZIENA,

Petitioner,

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

Index No.: 154410/19  
DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING &  
COMMUNITY RENEWAL, 333 EAST 49<sup>TH</sup>  
PARTNERSHIP, LP, 333 EA 4<sup>TH</sup> PARTNERSHIP, LP,  
330 EAST 50<sup>TH</sup> PARTNERS, LP and JOSEPH  
LOMBARDO,

Respondents.

-----X  
**HON. CAROL R. EDMEAD, JSC:**

In this Article 78 proceeding, petitioner Madeleine Dzienna (Dzienna) seeks a judgment to overturn an order of the respondent New York State Division of Housing & Community Renewal (DHCR) as improper (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

**FACTS**

Respondents 333 East 49<sup>th</sup> Partnership, LP, 333 Ea 4<sup>th</sup> Partnership, LP and 330 East 50<sup>th</sup> Partners, LP (landlords) are the corporate co-owners of a residential apartment building (the building) located at 333 East 49<sup>th</sup> Street in the County, City and State of New York. *See* verified petition, ¶¶ 1, 3. Dzienna is an officer of non-party Dennis Dzienna Associates LLC (Dzienna LLC), which claims to be the former tenant of record of apartment 5T at the building. *Id.*, ¶ 1. That

allegation is in dispute. Respondent Joseph Lombardo (Lombardo) is a former subtenant of Dzien LLC. *Id.*, ¶ 4. The DHCR is the agency charged with registration and oversight of all rent-regulated apartments in New York City. *Id.*, ¶ 2.

This is the second Article 78 petition that has been filed concerning apartment 5T. The salient facts are as follows. Dzien LLC is a limited liability corporation whose only members are Dzien and her husband, Dennis. *See* verified petition, ¶ 12. In 1995, another corporate entity called “Dennis Dzien Associates” executed a rent stabilized lease for apartment 5T with the landlords. *Id.*; exhibit B. In 2003, the newly incorporated Dzien LLC executed a sublease for apartment 5T with Lombardo. *Id.*; exhibit D. In 2009, Lombardo filed a rent overcharge complaint with the DHCR against Dzien LLC. *Id.*; verified petition, ¶ 19. During that proceeding, several orders were issued by a DHCR rent administrator (RA), and several subsequent petitions for administrative review (PAR) were decided by the DHCR’s deputy commissioner. *Id.*; exhibits E-K. When it was concluded, the landlords commenced an Article 78 proceeding against the DHCR to challenge the deputy commissioner’s last PAR order (the prior Article 78 proceeding). *Id.*; verified petition, ¶ 29. The prior Article 78 proceeding (Index No. 101608/15) was dismissed by an order of this court (Chan, J.) dated April 28, 2017. *Id.*; exhibit L. The court’s dismissal decision was modified by an order of the Appellate Division, First Department, dated August 9, 2018. *Matter of 333 E. 49th Partnership, LP v New York State Div. of Hous. & Community Renewal*, 165 AD3d 93 (1<sup>st</sup> Dept 2018). Thereafter, pursuant to the First Department’s order, Judge Chan remanded the issue of the calculation of Lombardo’s rent overcharge damages to the DHCR, which issued a final PAR order on February 28, 2019 (the PAR order). *See* verified petition, exhibit A.

The relevant portion of the First Department's August 9, 2018 decision found as follows:

"We agree with Supreme Court that DHCR did not act arbitrarily, capriciously or in violation of the law in holding the owner liable for treble damages.

\* \* \*

"However, we find that DHCR erred to the extent that it used *Thornton's* default method to set the stabilized rent. Rent overcharge complaints are subject to a four-year statute of limitations (RSL 26-516[a][2]; CPLR 213-a ). The New York Rent Regulation Reform Act (RRRA) of 1997 (L 1997, ch 116, § 33) amended RSL § 26-516 to preclude examination of the rent history of the housing accommodation before the four-year period preceding the filing of a rent overcharge complaint.

"9 NYCRR 2526.1 (a) (3) (i) provides that '[t]he legal regulated rent for purposes of determining an overcharge shall be deemed to be the rent charged on the base date, plus ... any subsequent lawful increases and adjustments' (see also 9 NYCRR 2520.6). The 'base date' is "the date four years prior to the date of the filing of such ... complaint" (9 NYCRR 2520.6 [f] [1]). '[W]here there exist[s] substantial indicia of fraud on the record,' DHCR may consider the rental history prior to the four-year look-back period.

\* \* \*

"Here, unlike in *Thornton*, the rent-stabilized lease that the owner entered into with the prime tenant was a legal one and it is not alleged to have included any improper provisions. While the lease served as a vehicle for the prime tenant's fraud, the rent-stabilized rent set forth therein, in the subsequent renewals, and in the rent registration records, are reliable in their own right. Unlike in *Thornton*, here the fraud was carried out via a separate vehicle, through the sublease. On this record, the base date rent was properly set by the RA in his December 4, 2009 order at \$1,524.32, the rent in effect on the base date, February 27, 2005, pursuant to the 2003 lease renewal.

"Finally, Supreme Court erred in holding that Madeleine Dziena is not personally liable. The lease, entered into in 1995, and renewal leases entered into between the owner and prime tenant were all with an entity identified as Dziena Associates. Dziena LLC did not exist until June 1997, almost two years after executing its lease with the owner for the subject apartment. There is no evidence that the owner was on notice that the prime tenant was operating or doing business as an LLC. This status would have shielded the LLC's members from personal liability and likely changed the course of the parties' relationship. Therefore, it

was improper for DHCR to ignore the distinction between the entity that entered into the original lease and had a relationship with the owner and the later created LLC that entered into a relationship with the subtenant, Joseph Lombardo.

“Given that Dzienia LLC did not exist at the time that the original lease was entered into and there was no evidence that it had any dealing with the owner in its purported capacity as an LLC, it could not have been the prime tenant. As such, it was improper to use Dzienia LLC’s status as an LLC to shield one of its members, Madeleine, from liability.

“Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Margaret A. Chan, J.), entered July 19, 2017, denying the petition to reverse a determination of DHCR concerning a rent overcharge complaint and dismissing the proceeding brought pursuant to CPLR article 78, should be modified, on the law and on the facts, to find Madeline Dzienia personally liable and to vacate DHCR’s improper use of *Thornton’s* default method to set the stabilized rent, set the base date rent at \$1,524.32, and remand for a recalculation of damages, and otherwise affirmed, without costs.”

*Matter of 333 E. 49th Partnership, LP v New York State Div. of Hous. & Community Renewal,*

165 AD3d at . The relevant portion of the DHCR’s February 28, 2019 PAR order states as

follows:

“Decision on Remand

“On November 21, 2018, the agency served the attorneys for the owner, the attorneys for the prime tenant, the attorneys for the sub-tenant and Madeline Dzienia with Notice of Proceeding to Reconsider Order. The Commissioner, pursuant to the order of the Appellate Division, First Department, finds that the owner’s PAR is granted in part and the Rent Administrator’s order under Docket Number BT410005RP be modified as set forth herein. As per the Appellate Division, the Commissioner’s order under CS410013RO is otherwise affirmed.

“In accordance with the directive of the Appellate Division, First Department, the Commissioner finds that Madeline Dzienia, the principal of the prime tenant, is hereby personally liable for the rent overcharges to the sub-tenant, including interest and treble damages, as set forth herein.

“The Commissioner further finds that the Rent Administrator’s use of the default rent formula in setting the base date rent was improper; that the base date rent be set at \$1,524.32 per month; and that rent overcharges, including interest and treble

damages be recalculated using \$1,524.32 as the base date rent.

“Applying a base date rent of \$1,524.32 per month results in the following amended overcharge calculations:

Overcharge Amount:	\$74,735.90
Treble Damages:	\$78,004.20
Interest:	\$42,138.60
Excess Security Deposit:	\$1,284.79
Subtotal:	\$196,163.49
Total Amount Due Sub-Tenant:	\$196,163.49

The Commissioner notes that interest is calculated up to the issuance date of the within order.

“Conclusion

“The Commissioner has determined in this order and opinion that the owner, the prime tenant and Madeline Dzienia are jointly and severally liable for the rent overcharge and must refund to the subtenant \$196,163.49. This order and opinion may, upon the expiration of the period for seeking review of this order and opinion pursuant to Article Seventy-eight of the Civil Practice Law and Rules, be filed and enforced as a judgment. Upon the filing of the judgment, the county clerk may assess additional interest in accordance with section 5004 of the Civil Practice Law and Rules.”

*See* verified petition, exhibit A. As can be seen, the DHCR’s February 28, 2019 PAR order carries out the directives set forth in the First Department’s August 9, 2018 decision exactly.

Dzienia, who was not a named party in the prior Article 78 proceeding, commenced this Article 78 proceeding on April 30, 2019 to challenge the DHCR’s PAR order as against her. *See* verified petition. The DHCR and the landlords filed their respective answers on April 30, 2019 and May 30, 2019. *See* verified answer (DHCR); verified answer (landlords). The matter is now before the court (motion sequence number 001).

DISCUSSION

Normally, a court’s role in an Article 78 proceeding is to determine, from the facts before

the administrative agency, whether its determination had a rational basis in the record or whether it was arbitrary and capricious. See *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1<sup>st</sup> Dept 1996). A determination is “arbitrary and capricious” if it is “without sound basis in reason, and in disregard of the facts.” See *Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. Thus, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232. Here, however, Dziena does not invoke the “arbitrary and capricious” standard of review. Instead, she raises two jurisdictional arguments which have no place in an Article 78 proceeding.

First, Dziena argues that the “DHCR failed to notify [her] of the prior Article 78 [proceeding] and [the] subsequent appeal therefrom.” See petitioner’s mem of law, at 3-4. She cites no authority to support this contention. Instead, Dziena alleges that “upon information and belief, it is standard DHCR policy to inform any party that may be affected by the filing of an Article 78 petition . . . of the filing of such a petition.” *Id.*, at 3. Dziena is incorrect. Pursuant to Rent Stabilization Code (RSC) § 2530.1, a party that wishes to challenge a DHCR order in an Article 78 proceeding must serve a copy of its petition and notice of petition on the DHCR. However, the RSC places no further notice obligations on the DHCR itself. Therefore, whatever the basis may be for Dziena’s “information and belief” concerning “standard DHCR policy,” she

is mistaken. Accordingly, the court rejects Dzienia's first argument.

Next, Dzienia argues that she "was a necessary party to the [prior Article 78] proceeding that resulted in a finding of personal liability against [her]." *See* petitioner's mem of law, at 4-6. Dzienia bases this argument on CPLR 1001, which governs "necessary joinder of parties." Dzienia particularly contends that, because "the sole basis for DHCR imposing personal liability . . . against [her] is the August 9, 2018 decision of the Appellate Division, First Department which overturned the Supreme Court's finding with respect to this issue," and because she "was not made a party to or aware of either of those proceedings," then "a determination based on the Appellate Division's decision that affects [her] rights . . . must be revoked." *Id.*, at 6. Firstly, it is clear that neither this court nor the DHCR has any authority to "revoke" a decision of the Appellate Division, First Department. Secondly, Dzienia's statement regarding the "sole basis" for her liability is misleading. The First Department's August 9, 2018 decision ruled on which law and legal standards were correct to apply to Lombardo's rent overcharge claim against Dzienia. However, Dzienia's liability was ultimately determined *not* in the prior Article 78 proceeding, but in the DHCR proceeding in which she actively participated. *See* Return, Parts I, II, III, IV. In particular, the deputy commissioner's July 1, 2015 decision denying Dzienia LLC's PAR plainly recited that Dzienia herself had made many evidentiary submissions to contest the agency's argument that she should be personally liable for the rent overcharges to Lombardo. *Id.*, Return, Part IV, exhibit I-8. The subsequent Article 78 proceeding before Judge Chan was *not* a plenary Supreme Court action to which CPLR 1001 would apply, but a special proceeding to review the agency's determination under the "arbitrary and capricious" standard. Further, the First Department's subsequent decision disposing of the appeal of Judge Chan's decision plainly

stated that the Supreme Court was *not* to calculate Dzien's liability itself, but to remand that task to the DHCR. Therefore, Dzien's second argument is misleading and meritless, and rejected by the court. Accordingly, the court concludes that Dzien's Article 78 petition should be denied, and that this proceeding should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

**ADJUDGED** that the petition for relief, pursuant to CPLR Article 78, of petitioner Madeleine Dzien (motion sequence number 001) is denied and the petition is dismissed, with costs and disbursements to respondents. And it is further

**ORDERED** that counsel for petitioner shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for respondents.

Dated: New York, New York  
July 9, 2019

ENTER:



Hon. Carol R. Edmead, JSC  
**HON. CAROL R. EDMED**  
J.S.C.