Tremada W. End Ave. LLC v New York State Div. of Housing & Community Renewal
2021 NY Slip Op 32204(U)
November 8, 2021
Supreme Court, New York County
Docket Number: Index No. 161200/2020
Judge: Frank Nervo

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANK NERVO** **PART** **04**

Justice

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TREMADA WEST END AVE. LLC

Plaintiff,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendant.

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INDEX NO. 161200/2020

MOTION DATE 12/23/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 27, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 47

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

This matter was recently transferred to Part IV.

The instant action has a lengthy procedural history. By order of September 27, 2013, respondent Division of Housing and Community Renewal (hereinafter "DHCR" or respondent) issued an order deregulating the subject apartment due to the tenant's failure to submit required household income verifications (NYSCEF Doc. No. 2). In August of 2015, the tenant filed a petition for administrative review (PAR), seeking to reverse the deregulation order on the basis that her income did not exceed the threshold for deregulation and that due to depression she was unable to complete activities of daily life

(NYSCEF Doc. No. 3). The tenant's PAR was denied by respondent's final decision dated April 13, 2016 (*id.*). Thereafter, tenant brought an Article 78 proceeding seeking, inter alia, to vacate and set aside the final decision, and respondent cross-moved to remand the matter to itself for further proceedings; Justice Engoren, of the Supreme Court, granted the cross-motion of DHCR to remand the matter for reconsideration and further proceedings (NYSCEF Doc. No. 10).

Following the remand for reconsideration, the parties in this action brought an Article 78 seeking to deem the pending reconsideration denied by respondent, as no decision had been rendered for approximately 1 ½ years (NYSCEF Doc. No. 16). Justice Carmen St. George dismissed that petition in accordance with the parties' stipulation agreeing, inter alia, that respondent would issue a decision within 75 days (NYSCEF Doc. No. 17 & 21). Thereafter, respondent issued an order dated May 17, 2019 finding the tenant's household income did not meet the deregulation threshold and denying the petition for high income rent deregulation during the 2009 cycle, effectively reversing its earlier determination (NYSCEF Doc. No. 24). Following that decision, petitioner filed a PAR, which was denied in an October 27, 2020 order of the

Deputy Commissioner and gives rise to the instant Article 78, seeking to vacate that order.

As an initial matter, the Court notes that respondent's opposition papers and petitioner's reply papers fail to comply with the Court's Uniform Rule 202.8-b, requiring an attorney certify the number of words does not exceed 7,000 for papers in chief and 4,500 words for replies (22 NYCRR § 202.8-b).[1] This Court's review of these non-complying papers reveals that respondent's opposition, entitled answering affirmation, exceeds 9,000 words, well beyond the 7,000 permissible, and that petitioner's reply does not exceed the 4,500 word limit for replies. "Page limits on submissions are appropriate, as is the rejection of papers that fail to comply with those limits" (*Macias v. City of Yonkers*, 65 AD3d 1298 [2d Dept 2009]). Accordingly, the Court has not considered respondent's counsel's answering affirmation (NYSCEF Doc. No. 34).

[1] The current Uniform Rules had been in effect for more than one month prior to the filing date of respondent's affirmation in opposition and petitioner's reply affirmation. Public comment on these rules was sought in August 2020, and the rules were published, via Administrative Order 270/20, in December 2020. Additionally, the Uniform Rules are available on the Court's website. This is not a situation where counsel can reasonably argue they were caught unawares of the Uniform Rules.

The standard of review of an agency determination via an Article 78 proceeding is well established. The Court must determine whether there is a rational basis for the agency determination or whether the determination is arbitrary and capricious (*Matter of Gilman v. New York State Div. of Housing and Community Renewal*, 99 NY2d 144 [2002]). "An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts" (*Peckham v. Calogero*, 12 NY3d 424 [2009]; *see also 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]). When an agency determination is supported by a rational basis, this Court must sustain the determination, notwithstanding that the Court would reach a different result than that of the agency (*Peckham v. Calogero*, 12 NY2d at 431).

Here, the Court finds the Deputy Commissioner's October 27, 2020 decision arbitrary and capricious. The PAR decision erroneously applied the doctrine of law of the case by finding that Justice Engoren's order, which remitted the matter to the DHCR, amounted to a decision on the merits regarding the acceptance of the tenant's untimely PAR. Justice Engoren's decision explicitly held, in relevant part, "[t]he petition is denied solely as moot, not on the merits" (NYSCEF Doc. No. 10). It is beyond cavil that the

doctrine of law of the case requires a decision on the merits on an issue between the parties (*see e.g. Baldasano v. Bank of New York*, 199 AD2d 184 [1st Dept 1993]). Justice Engoren's decision did no such thing. The October 27, 2020 PAR decision directly contradicts the plain meaning of Justice Engoren's decision and is therefore without basis in law and fact. As the October 27, 2020 PAR decision erroneously and expressly found it was foreclosed from considering petitioner's arguments related to the timeliness of the tenant's underlying August 2015 PAR, it cannot stand.

Turning to the issue of timeliness of the tenant's PAR filing, "a PAR must be filed within 35 days after the date the order was issued, a requirement that is strictly enforced (*see Matter of Windsor Place Corp. v. New York State Div. of Hous. & Community Renewal*, 161 AD2d 279 [1st Dept 1990] internal citation omitted; 9 NYCRR § 2529.2). Rent Stabilization Code § 2529.7(d) is likewise clear that the DHCR may "for good cause shown, accept for filing any papers, **other than a PAR**, even though not filed within the time required by this Part." The Court notes that any argument by respondent against the applicability of the 35-day PAR deadline directly contradicts its own prior decision (*see West Fifth Ave Realty L.P. v. Visnauskas*, 2020 NY Slip Op 33962(u) "The aforesaid [PAR] was not filed within 35 days after the issuance date of the order as

required... There is no provision under said applicable regulations permitting an extension of time for the filing of a [PAR]... The Commissioner finds that [West Fifth] has failed to comply with the requirements set forth above and that the [PAR] must therefore be dismissed").

Here, the tenant filed the initial PAR nearly two years late, and well after a determination had been rendered by the DHCR deregulating the apartment. Consequently, the tenant's late filing is dispositive; her failure to timely file the PAR amounts to a forfeiture to have the determination reviewed (*Matter of Windsor*, *supra*; *see also Matter of Clarendon Mgt. Corp v. New York State Div. of Hous. & Community Renewal*, 271 AD2d 688 [2d Dept 2000]). As such, respondent was without authority to accept or excuse the late filing, and the subsequent orders must be vacated.

Assuming, *arguendo*, that tenant's failure to timely file a PAR is not dispositive, and respondent was authorized to accept a late filing, the Court would likewise find it's October 27, 2020 decision arbitrary and capricious.[2]

[2] Such argument assumes, erroneously, the inapplicability of 9 NYCRR § 2529.2; *Matter of Windsor Place Corp. v. New York State Div. of Hous. & Community Renewal*, 161 AD2d 279 [1st Dept 1990]; *Matter of Ross v. New York State Div. of Hous. & Community Renewal*, 125 AD3d 434 [1st Dept 2015]; *Matter of JP & Assoc. Corp. v. New York State Div. of Hous. & Community Renewal*, 122 AD3d 739 [2d Dept 2014]).

Rent Stabilization Code § 2531.4 requires a tenant to file an answer to deregulation proceedings within 60 days. Notwithstanding, DHCR may accept a late filing where a good cause excuse is found (*Dworman v. New York State Div. of Hous. & Community Renewal*, 94 NY2d 359 [1999]). However, respondent's reliance on *Dworman* for the proposition that it may accept papers nearly two years after the statutory deadline is misplaced (94 NY2d 359 [1999]). *Dworman* addressed an **eleven-day** late income verification filing, where the landlord and agency suffered no prejudice from the brief delay (*id.* at 369). Furthermore, the late documents were filed prior to the agency rendering a determination (*id.*). Finally, despite the papers being eleven-days late, the Court of Appeals did not determine that the excuse in *Dworman* amounted to good cause for the brief delay, only that it may, and that the DHCR may find the delay minimal, but was not required to do so (*id.* at. 374-75; *see also Elkin v. Roldan*, 94 NY2d 853, 857 [1999] remitting to DHCR to consider 3-day and 10-day late filings under good cause standard).

A review of the applicable case law by this Court reveals no matters where such a substantial years-long delay has been properly excused by respondent. Consequently, respondent's equating a days-late filing in *Dworman* with the years-late filing here is without basis. "By fixing timetables for

income verification and deregulation, the Legislature made plain its desire that these proceedings not languish but that they be conducted, and resolved, expeditiously. While ameliorating undue severity, DHCR's discretion to excuse a default should not be viewed as an invitation to ignore filing deadlines" (*id.* at 374). In other matters, respondent has found initially timely, yet incomplete, income verifications submitted by an accountant on behalf of a tenant sufficient to deregulate an apartment where the tenant failed to respond to the agency's letters advising of the deficiency (*see e.g. Marroche v. New York State Div. of Hous. & Community Renewal*, 2003 NY Slip Op 50683(u)). Put simply, DHCR's determination here accepting two-year late filings is not rationally based in the record.

The tenant's assertion that her depression hindered her ability to complete tasks associated with daily life, including responding the requests to verify her household income, and therefore amounts to good cause for her tardy filings, is belied by her continuing to work, publishing hundreds of articles in the New York Times during the same period, as well as seeking psychiatric treatment from practitioners in Woodstock, NY, over 100 miles away.[3] While

[3] The Court takes judicial notice that Woodstock, NY is located, by most direct route, 103 miles from the subject apartment, and 113 miles by highway.

the evidence before respondent supports that the tenant was under treatment for her condition during the period that several warnings were sent to her regarding the delinquent income verifications, the evidence submitted by tenant's treating medical doctor that she was in "the midst of a major depressive episode" is inconsistent with the length of the delay, in this matter, , several years, as well as her continuing to work during these periods (*see e.g. Hernandez-Vega v. Swanger Pesiri Radiology Group*, 39 AD3d 710 [1st Dept 2007] experts' submissions contradicted by the evidence or otherwise unsupported should not be considered).

Respondent decision cites two prior luxury decontrol proceedings involving the tenant, where she timely submitted responses, as evidence that the tenant was aware of the substantial consequences of not responding here and, thus, her failure to submit same in these proceedings is due to good cause. This Court finds the respondents' reasoning flawed and arbitrary. There is no factual support that because the tenant was previously aware that her apartment may be decontrolled if she failed to respond, on account her two prior decontrol proceedings, that her failure to respond here is due to good cause. Put simply, a tenant's knowledge of the possible deregulation of their apartment does not render their failure to respond to such proceedings *ipso facto* good cause. Under

these circumstances, the tenant's excuse for a two-year delay in responding to proceedings does not amount to good cause.

Given the tortured procedural history of this matter and prior remand, the Court finds no basis to remand this proceeding to respondent.

Accordingly, it is

ORDERED that the Deputy Commissioner's October 27, 2020 PAR order is vacated and the order of April 13, 2016 is reinstated; and it is further

ORDERED that the subject apartment shall be declared decontrolled pursuant to respondent's April 13, 2016 order.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

11/08/2021
DATE

FRANK NERVO, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE