At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse at, Civic Center, Brooklyn, New York, on the 24th day of March 2025.

P R E S E N T:
HON. WAYNE SAITTA, Justice.

----------X

TOMMIEKA TEXIERA,

Petitioner,

-against-

Index No. 796/2023
Decision & Order

ANTHONY ARTHER, and NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

MS 2 & MS 3

Respondents.

----------X

The following papers read on this motion:

	NYSCEF Doc Nos
Notice of Motion/Order to Show Cause/ Petition/Affidavits (Affirmations) and Exhibits	3-6,10
Cross-motions Affidavits (Affirmations) and Exhibits	17-23, 24-37
Answering Affidavit (Affirmation)	
Reply Affidavit (Affirmation)	44,45
Supplemental Affidavit (Affirmation)	

This case concerns the rent stabilization status of 996 Park Place in Brooklyn, Apartment 3R, where Petitioner TOMMIEKA TEXIERA resides. TEXIERA seeks judicial review of a determination by the New York State Division of Housing and Community Renewal (DHCR) that her apartment is not subject to rent stabilization. This determination reverses an earlier determination by DHCR that building was subject to rent stabilization.

TEXIERA initially filed an administrative complaint with DHCR, seeking a determination that the building was rent stabilized. Based on an inspection conducted on September 8, 2021, DHCR issued a determination that the building contained at least six units, making it subject to rent stabilization.

The building owner, ANTHONY ARTHER, challenged that determination in an Article 78 proceeding, arguing the inspection was incomplete. DHCR and ARTHER settled the matter by stipulating to remand for reconsideration and a second inspection. TEXIERA was not a party to the Article 78 proceeding or the stipulation.

A second inspection, conducted on June 12, 2023, found that there were fewer than six units, and that basement bathroom and two single-room occupancy (SRO) units previously identified were no longer there. Based on this reinspection, DHCR reversed its prior decision, and ruled that the building was not rent-stabilized.

DHCR, in its reversal, did not address that fact that a bathroom and SRO units had been found during the first inspection, and whether they had been removed or altered prior to the second inspection. Following the reversal TEXIERA filed this present Article 78 proceeding.

DHCR and ARTHER now move to dismiss the petition, arguing TEXIERA's claim is barred by collateral estoppel and that the second inspection provided a rational basis for DHCR's decision. DHCR also argued that the Petition should be dismissed due to improper service because TEXIERA originally sent the petition by regular mail instead of certified mail. However, DHCR admits it has now received the petition by service.

TEXIERA states that she personally served DHCR on October 11, 2024, and asks that the time to serve DHCR be extended nunc pro tunc to October 11, 2024.

The court must determine whether DHCR was properly served and whether TEXIERA's claims are precluded by the prior Article 78 proceeding.

DISCUSSION

Service of Process

TEXIERA initially failed to serve it properly under CPLR 307(2), which requires personal delivery or service by certified mail, but subsequently personally delivered the pleadings to DHCR more than 120 days past the commenced of the action. It is not contested that the proceeding was timely commenced.

Under CPLR 306-b, courts have discretion to extend time for service if there is good cause or if an extension is warranted in the interest of justice. In *Matter of Nelson v. New York State Dept. of Motor Vehs.*, 188 A.D.3d 692 [2d Dept 2020], the court held that noncompliance with CPLR 307(2) is a jurisdictional defect unless an extension is justified. In *Matter of Certified Collision Experts, Inc. v. New York State Dept. of Motor Vehs.*, 232 A.D.3d 783 [2d Dept 2024], the court reaffirmed that an extension may be granted where diligence is shown, or fairness requires the claim be heard on the merits.

Here, an extension is warranted. DHCR timely received the Notice of Petition and Petition, although not by certified mail, participated fully in the litigation, and has not shown any prejudice. Courts consistently hold that dismissal is inappropriate when a respondent has notice and suffers no prejudice (See *Matter of Nelson*, 188 A.D.3d at 694; and *Matter of Certified Collision*, 232 A.D.3d at 785). Unlike *Certified Collision*, where an extension was denied due to lack of diligence and resulting prejudice, TEXIERA attempted timely service, DHCR acknowledged receipt, and she has since properly served them.

Because TEXIERA has raised valid concerns about DHCR's decision and no prejudice exists, the Court will extend TEXIERA's time to serve DHCR nunc pro tunc to October 11, 2024, and finds service proper.

Collateral Estoppel

TEXIERA argues in the present Article 78 proceeding that DHCR's finding that DHCR finding, upon reconsideration, that the building is not rent stabilized is arbitrary and a capricious because it did not address that fact that it found in its first inspection that the building had six units. This is relevant because if the building had six units in 2021 it remains rent stabilized even if units were subsequently removed, and it had less than six units in 2023.

The first inspection on September 8, 2021, documented a basement bathroom with a toilet and two SRO units. The second inspection on June 12, 2023, found that the bathroom "now only has a sink," yet DHCR did not address the removal of the toilet or acknowledge the absence of the previously identified SRO units. DHCR failed to reconcile these findings or assess whether the landlord's modifications impacted the building's regulatory status.

Respondent ARTHER argues that the first inspection was invalid because the inspector did not gain access to the two SRO units on the basement.

Respondent ARTHER also argues that TEXIERA is collaterally estopped from using the first inspection of September 2021 (the first inspection) to attack the findings of the inspection of June 12, 2023 (the second inspection).

TEXIERA is not collaterally estopped from challenging the reconsideration based on the first inspection for two reasons.

First, she was not made a party to the first Article 78 proceeding and thus not bound by the agreement to refer the matter to DHCR for a reconsideration.

Second, while the agreement to remand for reconsideration meant that DHCR's initial determination that the building was rent stabilized was no longer res judicata, it did not erase the findings from the first inspection on September 8, 2021, which showed the building had six units. TEXIERA is not estopped from raising this inspection to argue that the building remains rent stabilized even after units were removed and DHCR erred in not addressing this issue.

WHEREFORE, it is hereby ORDERED that Petitioners time to serve Respondent DHCR is extended nunc pro tunc to October 11, 2024; and it is further

ORDERED that Respondent DHCR's motion to dismiss is denied; and it is further,

ORDERED that Respondent ARTHER's motion to dismiss is denied; and it is further,

ORDERED that Respondents are granted leave to serve and file an answer to the petition within twenty (20) days of service of this Decision and Order with notice of entry; and it is further,

ORDERED that this proceeding is adjourned to May 21, 2025.

This constitutes the Decision and Order of the Court.

E N T E R:

JSC