Administrative Delay

Majority Applies New Law, Finds Overcharge

Warren A. Estis, a founding partner at Rosenberg & Estis, and Jeffrey Turkel, a partner at the firm, review a recent decision where the majority saw a dishonest former landlord who had abused the stabilization scheme by installing an illusory tenant, and the dissent saw a tenant who was savvy in real estate matters and who was going back on her word to obtain a windfall.

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01-02-2008

In the recent case of *Partnership 92 LP v. State Division of Housing and Community Renewal*, N.Y.L.J., Dec. 24, 2007, at 27 col. 6 (1st Dept), DHCR took 17 years to determine a tenant's overcharge complaint. While the complaint was pending, the Legislature enacted the Rent Regulation Reform Act of 1997 (L. 1997, ch. 116) ("RRRA-97"), which altered DHCR's method of computing rent overcharges. Had DHCR promptly decided the tenant's complaint using its existing overcharge methodology, there would have been no overcharge. But due to DHCR's delay, and its application of the RRRA-97 overcharge procedure, the overcharge amounted to a whopping $58,169.89.

Partnership 92 concerns the issue of the effect, if any, of an administrative agency's delay in determining a pending complaint. The First Department majority in *Partnership 92* held that DHCR properly used the RRRA-97 methodology, while the dissent held that DHCR should have found no overcharge at all.

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Partnership 92 is not the first case to address the effect of undue administrative delay. In *Estate of Goldman v. New York State Division of Housing and Community Renewal*, 270 AD2d 169, 706 N.Y.S.2d 381 (1st Dept. 2000), Supreme Court (Goodman, J.) ruled that DHCR's delay barred the agency from reconsidering the tenant's fair market rent appeal under the RRRA-97 methodology. The First Department reversed:

> Administrative delay will not defeat the agency, absent a showing that the delay was willful or a result of negligence. The tenant makes no attempt to show that the delay herein was the result of negligence or willful conduct on the agency's part, and, despite the delay, the current law should govern. The RRRA clearly specified that its terms were to take effect immediately and were to apply to any pending proceeding (internal citations omitted).

270 A.D.2d at 169. See also, *Evans v. New York State Division of Housing and Community Renewal*, 284 AD2d 193, 726 N.Y.S.2d 262 (1st Dept. 2001).

In *One Three Eight Seven Assoc. v. Division of Housing and Community Renewal*, 269 AD2d 296, 703 N.Y.S.2d 44 (1st Dept. 2000), the First Department affirmed DHCR's delayed determination, citing the owner's lack of prejudice:

> . . . it was not arbitrary and capricious for DHCR, on petitioner's PAR decided in 1998, to direct petitioner to refund the excess rent collected by the prior landlords as well as by itself. Such direction is consistent with respondent's policy, enforced since 1993, of entitling a tenant to collect rents ordered refunded by reason of an overcharge determination

entirely from the current landlord. Nor does petitioner, who should have been escrowing any rent it was collecting over and above the fair market rent as determined by the District Rent Administrator, show prejudice or hardship as a result of the delay in the decision on its PAR (internal citations omitted).

If "prejudice" is a relevant consideration, what constitutes prejudice? In *Corning Glassworks v. Ovsanik*, 84 NY2d 619, 624-25, 620 N.Y.S.2d 771 (1994), the Court of Appeals held that mere financial injury is not enough:

Increased exposure for back pay liability does not implicate a party's ability to defend. While the party's purse is affected, its ability to mount a defense is not.

'Partnership 92'

The tortured history of administrative delay in *Partnership 92* is not easily summarized. As of March 1, 1981, the rent stabilized apartment at issue was rented by Patricia Moore at a lawful stabilized rent of $583.30 per month. Beginning in August of 1981, the apartment was rented to one Robert Klimecki, who was simultaneously renting three other apartments in the building. Klimecki never lived in the subject apartment, and instead sublet the unit to commercial entities for use by their employees or officers.

Klimecki thereafter vacated, and Andrea Bunis leased the apartment in early 1986 at a monthly rent of $903.62. The former owner, taking the position that Klimecki - a nonprimary resident - was not a stabilized tenant during his five year term, calculated Bunis' rent by applying Rent Guideline Boards increases for a three-year vacancy lease and a two-year renewal lease to Moore's last rent of $583.30.

Bunis filed an overcharge complaint with DHCR on May 8, 1987. Eight years later, on Oct. 5, 1995, DHCR's district rent administrator, using DHCR's existing methodology for computing rent overcharges, found no overcharge.

Bunis thereafter filed a PAR. While the PAR was pending, the Legislature enacted the RRRA-97, which contained a four-year statute of limitations for computing rent overcharges. DHCR granted the tenant's PAR on April 1, 1999, finding a substantial overcharge under the RRRA-97 methodology. DHCR adopted May 1, 1983 as the "base date" (i.e., the date four years prior to the date Bunis filed her overcharge complaint), and determined that the lawful rent for the apartment as of that date was $416.56 per month, far lower than the $583.30 figure that Patricia Moore was paying as of early 1981. DHCR calculated the $416.56 rental pursuant to its "default" rent methodology, reasoning that the owner was in default with respect to providing a rental history for the apartment "because it failed to provide an explanation as to why Klimecki was leasing four apartments in the building at the same time."

After various administrative twists and turns, DHCR issued a second PAR order on Feb. 25, 2004, which granted Bunis' PAR and, using DHCR's default methodology, directed the current owner to refund overcharges of $58,169.89.

The current owner thereafter commenced an Article 78 proceeding. Supreme Court (Smith, J.) dismissed the petition, and the Appellate Division, by a 3-2 margin, affirmed.

The majority, consisting of Justices Peter Tom, Eugene L. Nardelli and Luis A. Gonzales, wrote that DHCR's processing delay was "shocking," and found "disturbing" DHCR's failure to "so much as address this delay in submissions to this Court." Notwithstanding, the majority affirmed DHCR's use of the RRRA-97 methodology:

. . . we observe that the Court of Appeals has unequivocally stated that '[t]he Legislature specifically directed that the RRRA of 1997 apply to *all* cases pending before the DHCR,' and that the purpose behind this Legislative enactment was to alleviate the burden on honest landlords of having to retain rent records ad infinitum, and not to immunize dishonest ones from compliance with the law.

In the matter at bar, despite DHCR's inordinate delay, we decline to disturb its application of the RRRA in rendering its determination. We reach this conclusion not only in view of the Court of Appeals pronouncement that the RRRA applies to 'all' cases pending before the agency, but also in light of the public policy considerations raised with regard to the Rent Stabilization Law and the clearly illegal tenancy which sought to circumvent them (italics in original, internal citations omitted).

The dissenting opinion was authored by Justice E. Michael Kavanagh, and joined by Justice George D. Marlow. The dissent argued that the agency should have used its pre-RRRA-97 methodology:

If there is a change in the applicable law while a matter is pending before an agency, that law will be applied unless the delay encountered in processing the matter was unreasonable and the result of administrative neglect. However, where the agency is responsible for the delay and it appears that there is no justification for it, pre-existing law may be applied.

This is especially so where a party which has in all respects acted appropriately throughout the proceeding would be severely prejudiced by the change in the law. Here, no one has seriously argued that DHCR did not take too long to decide this matter or that petitioner has not been profoundly prejudiced by the application of the change in the law. It is also beyond question that if this ruling is allowed to stand, it will result in a substantial windfall for the tenant. An experienced real estate professional, she agreed to the rent set by the lease presumably because she believed it was a fair figure to pay for this apartment. Now she seeks an order which would set the rent for this apartment at a figure less than half of what she agreed to pay in the lease, and significantly less than what was paid in 1981 by the last stabilized tenant who occupied the apartment.

What is most interesting about the majority and dissenting opinions in *Partnership 92* is their differing view of the equities. The majority saw a dishonest former landlord who had abused the stabilization scheme by installing Klimecki, an illusory tenant. The dissent saw a tenant who was savvy in real estate matters and who was going back on her word to obtain a windfall.

The 3-2 decision, which appears to be a final order, may well be decided next year by the Court of Appeals.

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