Rent Control

First Department Splits on Hardship Eviction

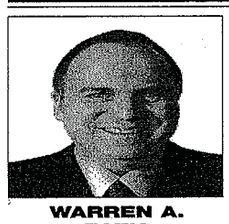
"There must be an end to lawsuits," the New York State Court of Appeals famously declared in *Matter of Huie*.[1] Most judges would agree. But the question occasionally arises as to when a lawsuit should end, i.e., when is it too late for a litigant to submit "new facts" that might affect the outcome of a case? In *Rizzo v. New York State Division of Housing and Community Renewal (DHCR)*[2] a three-justice majority of the Appellate Division, First Department held that enough was enough, and that certain alleged new facts could not be used to overturn DHCR's issuance of a certificate of eviction. The two dissenting justices held that the case should be remanded to DHCR to determine whether the certificate should still be granted.[3]

'Rizzo'

Rachel Crespin purchased a four-unit Manhattan brownstone in 1981. Each unit was approximately 1,200 square feet and comprised a full floor of the building. Two rent controlled tenants, George Rizzo and Elaine Bloedow, lived on the third and fourth floors, respectively. Crespin lived on the second floor; the first floor unit was occupied by a market rate tenant.

The presence of two long-term rent controlled tenants sharply restricted the building's income potential. So in 1996, Ms. Crespin seized upon a little known and rarely used provision available to landlords under rent control. Section 26-408(b)(3) of the City Rent Law (implemented by §2204.7 of the Rent and Eviction Regulations) allows a landlord to recover a portion of a large, underutilized unit for the purpose of creating a new housing accommodation. Crespin asked DHCR to evict Rizzo and Bloedow from the front portions of their apartments so that she could create a market rate duplex in the recaptured space. Rizzo and Bloedow would have their rents rolled back accordingly, and would have to retreat to the rear of their apartments.

RENT REGULATIONS



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Of the many obstacles in Ms. Crespin's path, the greatest was the Sound Housing Act. The legislature passed the Act (L. 1974, ch. 1022, as amended by L. 1975, ch. 360) to protect reasonably priced housing from demolition. The Sound Housing Act primarily did so by providing that a landlord could not obtain a certificate of eviction in certain instances without first affirmatively proving that:

> (1) there is no reasonable possibility that the landlord can make a net annual return of 8-1/2 percent of the assessed value of the subject property without recourse to the eviction sought; and
>
> (2) neither the landlord nor immediate predecessor in interest [sic] has intentionally or willfully managed the property to impair the landlord's ability to earn such return.[4]

Undaunted, Ms. Crespin proceeded to offer proof before a DHCR Administrative Law Judge (ALJ) that there was no possibility that the building — for calendar year 1996, the year in which she filed her application — could earn a net annual return of 8-1/2 percent of assessed value. The ALJ, after a full hearing, found for the landlord and rejected Rizzo's assertion that Ms. Crespin was financially unable to construct the proposed duplex apartment.

On Sept. 18, 2000, based upon the ALJ's recommendation, DHCR's Rent Administrator issued an order determining the landlord's application. The administrator held that the landlord had indeed satisfied the Sound Housing Act with respect to the 1996 calendar year, and that the two apartments were sufficiently large, and sufficiently under-populated, to qualify as "underutilized" under §2204.7 of the Regulations. The Rent Administrator then authorized the landlord to recover the front portions of the Rizzo and Bloedow apartments.

Rizzo filed a Petition for Administrative Review against the Rent Administrator's Sept. 18, 2000 order. Rizzo argued that the landlord was not acting in good faith, that the landlord did not have the financial ability to complete the project, and that Rizzo's apartment contained six rooms, not seven rooms as required by §2204.7.

On Jan. 2, 2002, DHCR's commissioner denied Rizzo's petition in all respects. More than four years after the landlord had originally filed her application, she had finally won.

Or had she? The very same day the commissioner issued his order — or possibly the next day (the record is unclear) — Elaine Bloedow died. The landlord was now free to re-rent her formerly rent controlled apartment at a market rate.

In March of 2002, Rizzo brought an Article 78 proceeding to challenge the Commissioner's order. He reiterated his prior arguments, and mentioned that Ms. Bloedow had died. But he did not, as the Appellate Division majority would later note, "interpose that fact as a basis for modification or reversal."

Supreme Court (Shafer, J.) sua sponte remanded the matter to DHCR for further proceedings. The court held that:

> [t]he impact of the recent deregulation of Ms. Bloedow's apartment must be considered by the DHCR in determining the owner's ability to meet the 8-1/2 percent return requirements of the Sound Housing Act.

DHCR then appealed the Supreme Court's determination.

Majority

The Appellate Division Majority Justice Peter Tom, joined by Justices David B. Saxe and George D. Marlowe, reversed the Supreme Court and reinstated DHCR's order. The majority saw the case in terms of basic principles of administrative and appellate law. According to the majority, Bloedow died after the administrative record was closed, and a court "may not consider evidence not contained in the administrative record."

The majority noted that with respect to an Article 78 proceeding from a DHCR order, the rent control statute provides that:

> ... either party may make application to the court 'for leave to introduce additional evidence which was either offered and not admitted or which could not reasonably have been offered or included in such proceeding before the city rent agency.' Notably, the record before us is devoid of any such application by petitioner.

The majority then ruled even if it had been properly raised, Bloedow's death was irrelevant to the Sound Housing Act audit:

> In any event, the court's reasoning that remand is necessary to permit the agency to reconsider its determination in light of new evidence is flawed. While it is axiomatic that the death of Ms. Bloedow is not a 'fact' that could have been presented to the administrative agency at any time prior to the issuance of its final determination, it is equally apparent that her passing, in 2002, had no bearing on DHCR's evaluation of the profitability of the subject building during the test year of 1996.

The majority summed up its decision as follows:

> As noted, the practical effect of the court's decision to remit for reconsideration of facts which occurred subsequent to the agency's final determination is to order a de novo review. This would have to be based on a new test year, since it would be fundamentally unfair to allow Rizzo to present evidence of Bloedow's death in 2002 without allowing the landlord an opportunity to show the changes in her circumstances in response to the new evidence. Thus, the admission of subsequent events which occurred after the final agency order

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would defeat finality and could subject an otherwise final order to endless recurring review.

Dissent

The dissent, authored by Justice Eugene Nardelli and joined by Justice Richard T. Andrias, framed the issue as follows:

> There can be no dispute that Ms. Bloedow's death, and the subsequent decontrol of her apartment, 'could not reasonably have not been offered' at the proceeding before DHCR. The question before this Court, however, is whether the Supreme Court properly directed the admission of that evidence, or whether, as DHCR contends, any review of its determination to grant the owner's application for partial eviction should be limited to the facts on record for the [1996] 'test year' on which the Sound Housing audit was conducted (material in brackets supplied).

The dissent determined that the City Rent Law, particularly as amended by the Sound Housing Act, was remedial in nature and should be liberally interpreted to protect tenants from eviction:

> In the matter at bar, we are, likewise, addressing a statute which is remedial in nature, which applies to any application for a certificate of eviction 'pending or made on or before the effective date hereof' (Administrative Code §26-408[b][5][a]), and which suspends certificates of eviction already issued until it can be shown that there is no reasonable possibility that the landlord can realize the requisite net annual return. Moreover, the statute provides that '[t]he pendancy of any judicial proceeding or appeal shall in no way prevent the taking effect' of such a suspension (Administrative Code §26-408[b][5][b][ii]).

Justice Nardelli then concluded:

> I find that despite DHCR's prior ruling in the owner's favor, we cannot ignore such a substantial change in the nature of the building, which, in essence, consists of the loss of 50 percent of the rent-control apartments therein. Clearly, restricting the scope of DHCR's review to a financial schematic which, plainly no longer exists, would inure not to the benefit of the tenant, but would, quite possibly, provide a windfall to the landlord ... .

The 3-2 split allows for an appeal as of right to the Court of Appeals. Linda Rzesniowiecki, counsel for Mr. Rizzo, has indicated that the tenant intends to appeal. The Court of Appeals, then, will have to decide whether the remedial purposes of the City Rent Law and the Sound Housing Act should prevail over more general principles of administrative and appellate law.

1. 20 NY2d 568, 572, 285 NYS2d 610 (1968).
2. New York Law Journal, Feb. 15, 2005, p. 18, col. 1.
3. In the interest of full disclosure, the authors note that Rosenberg & Estis, P.C. briefly represented Rachel Crespin, the landlord in *Rizzo*, before she filed her application for a certificate of eviction.
4. Rent and Eviction Regulations, §2204.4(g).