Rent Stabilization

A Luxury Decontrol Regulation Survives

IN the recent case of *Szaro v. New York State Division of Housing and Community Renewal*,[1] the Appellate Division, First Department, unanimously upheld a DHCR regulation that requires tenants to retain proof that they have timely answered an owner's petition to luxury deregulate a rent stabilized apartment. The Court also affirmed DHCR's ruling that the tenant had failed to submit such proof, such that his apartment was luxury deregulated.

The Statute

Section 26-504.3 of the Rent Stabilization Law (RSL) provides for the "luxury deregulation" of apartments renting for $2,000 or more per month where the tenant's income exceeds $175,000 in each of the past two years.

The law sets forth a detailed procedure for luxury deregulation cases. First, the owner must serve an income certification form on the tenant, whereby the tenant must certify whether his or her income is above or below the statutory level.[2] If the tenant claims to be under the income limit, or if the tenant does not respond to the form, the owner can file an owner's petition for deregulation with the Housing Division, whereby the owner requests the agency, via the New York State Department of Taxation and Finance, to independently verify the tenant's income.[3]

RENT REGULATIONS

WARREN A. ESTIS

JEFFREY TURKEL

Before such independent verification, however, the law interposes one final step. The division must serve the owner's petition for deregulation on the tenant, along with a form commonly known as the 60-day notice. The notice again asks the tenant to certify his or her income level and requires the tenant to provide additional information to help the Department of Taxation and Finance locate the relevant tax returns. The statute provides that if the tenant does not respond within 60 days, the Housing Division must issue an order deregulating the apartment.[4] The statute even requires the 60-day notice to contain a warning, in bold faced type, to this effect.[5]

The Defaults Begin

Predictably, many tenants failed to respond within the 60-day deadline. The Division of Housing and Community Renewal adopted a strict default policy: if the tenant did not respond within 60 days, the division would default the tenant and issue an order deregulating the apartment.

The Appellate Division, First Department, initially endorsed the division's stringent policy. For example, in *Nick v. DHCR*, 244 A.D.2d 299, 664 N.Y.S.2d 777, 778 (1st Dep't. 1997), the First Department affirmed the division's order of deregulation, holding:

> Since petitioners failed to timely submit a proper verification statement of their total adjusted gross income for the subject period, the Administrator was mandated to issue the deregulation order (Administrative Code §26-504.3[a], [c], [1]).

Thereafter, the First Department began to hint that there could be exceptions to the division's default policy. In *Pledge v. DHCR*, 257 A.D.2d 391, 683 N.Y.S.2d 76 (1st Dep't 1999), the court upheld the agency's finding of default but indicated that an adequate excuse for a tenant's default might be sufficient to reopen a proceeding on the merits. Similarly, in *Sudarsky v. DHCR*, 258 A.D.2d 405, 685 N.Y.S.2d 704 (1st Dep't 1999), the court again upheld a default order but stated that it might have reached a different result had the tenant's excuse not been "belated."

In *Elkin v. Roldan*, 268 A.D.2d 197, 688 N.Y.S.2d 61 (1st Dep't 1999), the First Department held, for the first time, that the Housing Division was empowered — if not obligated — to excuse de minimis tenant defaults in luxury deregulation cases, at least where the tenant's response was merely late. The First Department issued similar rulings in *Seymour v. DHCR*, 261 A.D.2d 176, 689 N.Y.S.2d 499 (1st Dep't 1999) and *Shapiro v. DHCR*, 262 A.D.2d 18, 690 N.Y.S.2d 583 (1st Dep't 1999).

Court of Appeals Weighs In

The Division of Housing and Community Renewal thereafter sought, and obtained, leave to appeal to the Court of Appeals. In December 1999, the Court decided no less than six luxury deregulation default cases.

Generally, the Court of Appeals, like the First Department, held that the state Housing Division was empowered, if not obligated, to excuse de minimis defaults in luxury deregulation cases. In *Dworman v. DHCR*, 94 N.Y.2d 359, 704 N.Y.S.2d 192 (1999), Chief Judge Judith S. Kaye, writing for a unanimous Court of Appeals, rejected the division's claim that §§26-504.3(c)(1) and (3) of the Rent Stabilization Law required the agency to issue default orders where a tenant's response was submitted after the 60-day deadline:

> While subdivision (c)(1) indeed requires the tenant to return the information "within sixty days of service," it does not divest the Division of authority to forgive a late filing or excusable default in the sound exercise of its discretion. Notably, subdivision (c)(3) requires the Division to enter an order of deregulation only if "the tenant or tenants *fail to provide the information*" (emphasis added). Significantly, the statute does not — as DHCR contends — state that such an order must be issued if the tenant does not respond within 60 days. Rather, the implication is that an order must be issued only if the tenant fails to respond at all.[6]

A court has upheld the requirement that tenants retain proof of having given a timely answer to an owner's petition for luxury deregulation of a rent-stabilized apartment.

The Court of Appeals then set forth the circumstances under which the division could forgive a late filing, grounding its holding on the Rent Stabilization Code itself:

> Significantly, the Rent Stabilization Code states that DHCR may, at 'any stage of a proceeding *** for good cause shown, except where prohibited by the RSL, accept for filing any papers, even though not filed within the time required by this Code'[citation omitted]. Since Administrative Code §26-504.3 does not prohibit DHCR from accepting late filings, it may exercise its discretion under the Code to accept late filings when good cause is established.[7]

Rather than determining, on a case-by-case basis, whether a tenant's excuse for failing to abide by the 60-day deadline was excusable, the Housing Division sought to obviate the issue by promulgating a new regulation, which it did in December 2000.

Specifically, §2523.4(b)(3) of the Rent Stabilization Code states that tenants in luxury deregulation cases are now required to retain proof that they have responded to the division's 60-day notice in a timely fashion. The regulation states in relevant part:

> The tenant or tenants shall provide the [income verification] information to DHCR within 60 days of service of the notice upon such tenant or tenants, which such notice shall include a warning in bold faced type setting forth the requirement that failure to respond by not providing any information requested by the DHCR shall result in an order being issued by the DHCR providing that such housing accommodations shall not be subject to the provisions of the RSL and this

Warren A. Estis *is a founding partner at Rosenberg Estis.* **Jeffrey Turkel** *is a partner at the firm.*

> Code. Section 2527.9 of this Title to the contrary notwithstanding, the tenant or tenants shall be required to retain proof of the delivery of such information to the DHCR, which proof shall consist of either, where delivery is made personally, a copy of the response with a timely DHCR date stamp acknowledging receipt, or where delivery is made by certified mail, a United States Postal Service receipt stamped by the United States Postal Service, or where delivery is made by regular first class mail, a United States Postal Service Certificate of Mailing stamped by the United States Postal Service ...

The 'Szaro' case

In *Szaro*, the owner filed an owner's petition for deregulation in 2002 to deregulate the tenant's apartment, which rented for more than $2,000 per month. The Housing Division served the tenant with a 60-day notice on July 8, 2002, but never received a response. The rent administrator then issued an order of deregulation, which the tenant administratively appealed.

In his petition for administrative review, the tenant argued that he had in fact responded to the 60-day notice, and that in any event his income was less than the $175,000 level required for deregulation.

The commissioner denied the tenant's petition based on §2531.4(b)(3) of the Rent Stabilization Code. The commissioner held that the tenant had failed to present acceptable proof, as required under the regulation, that he had timely served his response to the Housing Division's 60-day notice.

The tenant then brought an Article 78 proceeding, which was denied by Supreme Court Justice Faviola A. Soto. The court affirmed the Housing Division's determination and further noted that it would not consider the tenant's tax returns for the first time on judicial review.

The tenant then appealed to the Appellate Division, First Department. In affirming Justice Soto, the First Department upheld the division's authority to promulgate §2531.4(b) (3):

> Contrary to petitioner tenant's contention, the promulgation of Rent Stabilization Code §2531.4, which, in pertinent part requires a tenant contesting a luxury decontrol petition to retain proof that an answer to the petition was served, lay within DHCR's broad mandate from the Legislature [citations omitted]. The record discloses that DHCR complied with Rent Stabilization Code §2531.4, giving petitioner tenant appropriate notice of his obligation to retain proof of service on the front page of his answer form. While petitioner maintains that a hearing was required to ascertain whether he did in fact mail his answer, and whether it was received and discarded by DHCR because it was not sent by the prescribed form of mail, he did not submit objective proof of mailing of any kind, such as a Certificate of Mailing, or a contemporaneous affidavit of service giving the date, time, place, content and circumstances of mailing.

M. Bruce Solomon, the attorney for Mr. Szaro, has indicated that the tenant will seek leave to appeal to the Court of Appeals. Whether the Court will grant leave is another matter. For now, tenants are advised to answer the 60-day notice within the deadline, and to retain adequate and objective proof that they have done so.

1. 2004 WL 2793267.
2. RSL §26-504.3(b).
3. RSL §26-505.3(c)(1).
4. RSL §26-504.3(c)(1) and (3).
5. RSL §26-504.3(c)(1).
6. 94 N.Y.2d at 371-72.
7. 94 N.Y.2d at 373.