Rent Stabilization

Late-Appealing Tenants Allowed to Join Suit

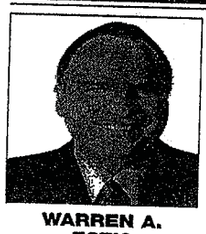
It is axiomatic in law in that a party who fails to appeal from an adverse order is relegated to what that order provides. In the recent case of *427 West 51st Street Owners Corp. v. Division of Housing and Community Renewal*,[1] a sharply divided Appellate Division, First Department, held that this rule may not apply to certain rent-stabilized tenants.

The case began in October 1996, when various tenants of 427 West 51st Street in Manhattan filed a complaint with DHCR alleging decreased building-wide services. Some 51 tenants affixed their original signatures to the complaint form. Specifically, the tenants alleged that the owner had curtailed use of the basement laundry room and trash areas.

On Sept. 8, 1997, DHCR's rent administrator denied the complaint and refused to grant a rent reduction, holding that the tenants' allegations, even if true, did not rise to the level of a service reduction. DHCR then mailed copies of its order to the owner and to all 51 complainants. A notice annexed to the order informed the aggrieved tenants that they had 35 days to file a Petition for Administrative Review (PAR).

One of the original 51 complainants timely filed a PAR on his own behalf. In addition, Gail Turner, another of the original 51, filed a PAR on Sept. 22, 1997. Ms. Turner purported to be both a petitioner and a tenant representative. Annexed to the Turner PAR was a statement signed by five tenants. The statement authorized Ms. Turner as their representative. Thus, the Turner PAR contained just six original signatories. DHCR eventually consolidated the two PARs.

RENT REGULATIONS



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Some 44 of the original 51 tenants did not sign any PAR. Accordingly, Ms. Turner attached to her PAR a photocopy of the 51 signatures that had been appended to the original complaint. Of course, the photocopied signatures merely indicated the willingness of those tenants to join in the original decreased services complaint, not to challenge DHCR's Sept. 8, 1997, denial thereof.

Curiously, the Turner PAR was filed three weeks before the Oct. 13, 1997, deadline for filing. Thus, she had 21 extra days to obtain the missing signatures. It is not clear why she declined to do so.

On April 22, 1998, in the first of many DHCR twists and turns, the agency's commissioner remanded the proceeding to its rent administrator for further consideration of the basement access issue. The owner failed to appear in the remanded proceeding.

On March 28, 2000, the rent administrator ruled in favor of the tenants, finding that the owner's reduction in access to the basement qualified as a decrease in services. The rent administrator then awarded a rent reduction to all 51 original complainants. This undoubtedly came as a pleasant surprise to the 44 tenants who had never expressed any desire to appeal the original order.

The owner, who was less pleasantly surprised by DHCR's determination, filed a PAR, alleging, inter alia, that only the seven actual signatories to the two tenant PARs were entitled to a rent reduction. DHCR agreed, and on Oct. 3, 2000, issued an order limiting the rent reduction to the tenants who actually appealed.

Various tenants aggrieved by DHCR's order filed an Article 78 petition to challenge the action in state Supreme Court. In yet another reversal, DHCR refused to defend its order and took the case back for further processing. In late 2001 (over four years after the seven tenants filed their original PARs), DHCR wrote to the 44 non-signing tenants, inviting them to sign an affirmation retroactively authorizing their representation in the 1997 Turner PAR. Because DHCR had already granted that PAR on the merits, and had correspondingly granted rent reductions, there was every reason for these tenants to sign. Apparently, 28 tenants did so.

On Jan. 9, 2002, DHCR issued an order holding that the seven original signatories and the 28 retroactive signatories were entitled to a rent reduction.

The owner brought an Article 78 proceeding, which Supreme Court denied. The court wrote:

> Because the PAR in question indicated that it was being filed in a representative capacity, it was proper for DHCR to give tenants an opportunity to indicate whether they wished to participate in the administrative appeal brought by the putative representative. This is especially true where 33 tenants responded to the Rent Administrator's notice of rehearing, placing DHCR and the owner on notice that a large number of tenants agreed that basement access was not satisfactory.

The owner then appealed to the Appellate Division, First Department, which affirmed the lower court by a 3-2 majority. The majority adopted DHCR's position that the failure of the 44 tenants to sign the September 1997 PARs represented a correctable defect, not an unwillingness to appeal. The majority wrote:

> Contrary to the position taken by the dissent, this is not a case where the PAR was filed beyond the 35-day time limit imposed by Rent Stabilization Code (9 NYCRR) §2529.2. Rather, petitioner contests the extent of the representative capacity of the tenant who brought the timely PAR, asserting that pursuant to Rent Stabilization Code §2529.1(b)(2) she was 'a representative for some, but not all.'
>
> Under the circumstances, we consider the filing of the PAR to be in substantial compliance with the Rent Stabilization Code ... and any deficiency was appropriately deemed to be a correctable error. The filing of the PAR represents a good faith attempt to pursue an administrative appeal on behalf of all the complaining tenants, and DHCR appropriately provided an opportunity to remedy the defect in the petition. That authorizations were given long after the PAR was filed does not preclude relief.

The dissent argued that the 44 non-signatories had simply not appealed, and could not "cure" many years after the fact their failure to timely do so:

> Respondent DHCR asserts, and the majority agrees, that the Commissioner properly 'allow[ed] the tenants a chance to correct the defective PAR,' and defends the Commissioner's conclusion that there was 'substantial compliance' by the tenants in filing the PAR. As to the tenants who failed to give proper authorization, however, this cannot be considered a case of 'substantial compliance'; there was no compliance at all. This is not, as respondent would have it, a mere 'technical defect' in filing; it was, rather, as to those tenants, a failure to file within the 35-day period mandated by Rent Stabilization Code §2529.2. Furthermore, their authorizations were not solicited until 4 years thereafter, well after it had become clear that those who joined the PAR received a rent reduction based on the determination that had been made on remand from the order granting the 1997 PAR.

The dissent continued and concluded:

> While the majority considers the filing of the PAR as a 'good faith attempt' to pursue an appeal on behalf of all the complaining tenants, this 'good faith attempt' was made only by the signatory, not by the other affected tenants, each of whom was served with a copy of the 1997 order and a Notice of Right to Administrative Review, which contained instruction for filing a PAR. Further, no explanation has been given for the tenants' failure to join the PAR in accordance with proper procedure. ... Respondents mistakenly rely on Rent Stabilization Code §2529.7(a), which provides that '[w]ithin a reasonable time after the filing of the PAR,' the commissioner may '[r]eject a PAR which is timely filed if it is insufficient or defective, but may provide a specified period of time within which to perfect the PAR.' The Code provision expressly applies to timely filed PARs that may be insufficient or defective. This, however, is not an instance in which an insufficient or defective PAR was filed; in this case, as to the non-signing tenants, no PAR was filed at all.

Patrick Munson, counsel for the owner, has indicated that the owner will take an as of right appeal to the Court of Appeals. DHCR counsel Marcia P. Hirsch defended the majority's decision, stating that "DHCR's tough filing requirements for PARs are tempered by its policy of offering an opportunity to correct errors where there is substantial compliance with DHCR's regulations."

In the 1999 case of *Matter of Dworman*,[2] the Court of Appeals faulted DHCR for inflexibly defaulting tenants in luxury deregulation proceedings who had failed to provide income information within the statutory 60 day deadline. The challenge for the owner in *427 West 51st Street* in the upcoming Court of Appeals battle will be to convince the Court that this was not an inadvertent, correctable error, but a conscious decision by 44 tenants to not appeal an order pertaining to basement access. To date, that position has not prevailed. A Court of Appeals decision will probably come later this year.

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(1) N.Y.L.J. Feb. 23, 2004, at 25, col. 5.
(2) 94 N.Y.2d 359, 704 N.Y.S.2d 192 (1999).