'Rizzo II'

Court of Appeals Rejects 'New' Evidence

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In our column of March 2, 2005, we examined *Rizzo v. New York State Division of Housing and Community Renewal,* 16 A.D.3d 72, 789 N.Y.S.2d 139 (1st Dep't 2005). In *Rizzo*, the Appellate Division, First Department, by a 3-2 margin, held that DHCR properly refused to consider evidence pertaining to events that occurred after DHCR had issued a final order granting the landlord's partial eviction application.

On Dec. 20, 2005, the Court of Appeals affirmed the First Department, over a lengthy dissent by Judge Carmen Beauchamp Ciparick.[1]

Background

Rachel Crespin[2] bought 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.

The presence of two long-term rent controlled apartments sharply limited the building's income. Accordingly, in 1996, Ms. Crespin filed an application with DHCR under Section 26-408(b)(3) of the City Rent Law for permission to evict the two tenants from front portions of their respective spaces so that the landlord could create a rear duplex. If Crespin were successful, Rizzo and Bloedow would have their rents reduced, and would continue to live in the rear of their apartments.

RENT REGULATIONS

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To qualify for the relief requested, Crespin had to establish, under the Sound Housing Act ("SHA"),[3] that there was no reasonable possibility that she could earn a net annual return of 8.5 percent of the assessed value of the property without recourse to the evictions sought. After a full hearing before a DHCR Administrative Law Judge, the landlord proved that she could not make the required return for 1996, the "test year" in question.

Accordingly, on Sept. 18, 2000, DHCR issued an order authorizing the landlord to recover the front portions of the Rizzo and Bloedow apartments. Rizzo thereafter filed a Petition for Administrative Review ("PAR"), arguing, on various statutory and regulatory grounds, that the landlord did not qualify for the partial eviction.

Sudden Death

On Jan. 2, 2002, DHCR's Commissioner denied Rizzo's PAR in all respects. Then, something extraordinary happened: the very next day, Elaine Bloedow died.

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. Supreme Court (Shaffer, J.) sua sponte remanded the matter to DHCR for further proceedings, holding that DHCR must determine the effect of Ms. Bloedow's death on the landlord's ability to earn an 8.5 percent return on investment. The Appellate Division, by a 3-2 margin, reversed, holding that a court cannot consider evidence that is not contained in the administrative record.

The Court of Appeals Affirms

Because the Appellate Division had split 3-2, the case went to the Court of Appeals as of right. In a December 20, 2005 opinion, authored by Judge Albert M. Rosenblatt, the Court of Appeals affirmed the First Department. Judge Ciparick was the lone dissenter.

The majority saw the case in terms of fundamental principles of administrative law and judicial review. The majority wrote:

> In reviewing the orders of the DHCR, courts are limited to the factual record before the agency when its determination was rendered. As a rule, the court may not consider evidence concerning events that took place after the agency made its determination. This follows from a fundamental principle of article 78 review, that '[j]udicial review of administrative determinations is confined to the facts and record adduced before the agency.' That, of course, is merely another way of saying that an appellate court is bound by the record. In short, 'judicial review of an administrative determination is limited to the grounds invoked by the agency' [internal citations omitted].

The majority next considered Rizzo's reliance on Section 26-411(a)(2) of the City Rent Law, which creates an exception to the general rule set forth above. That section states in relevant part:

> If application is made to the court by either party for leave to introduce additional evidence which was either offered and not admitted or which could not reasonably been offered or included in such proceedings before the city rent agency, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the city rent agency.

The majority held that Section 26-411(a)(2) did not apply, stating:

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> This language, however, should not be interpreted as permitting a court to engage in, or order, a de novo review based on events that took place after the agency made its determination. As the Appellate Division noted, 'the admission of subsequent events which occurred after the final agency order would defeat finality and could subject an otherwise final order to endless recurring review.' We agree with DHCR that it could not have been the intent of the Legislature to subject the agency's rulings to the prospect of such endless review, based on submissions by tenants or by landlords as to post-determination events.
>
> We therefore hold that in judicial review of a rent agency decision ...the 'additional evidence' that may be admitted under §26-411(a)(2) is limited to facts that arose before the agency made its determination [internal citations omitted].

Finally, the majority held that in any event, the effect of Bloedow's death in 2002 on the building's 1996 financial picture was irrelevant:

> DHCR's inquiry was whether Crespin could make an 8.5% net annual return in the test year 1996. Bloedow's death in 2002 was irrelevant to the DHCR determination and it should not have been considered by Supreme Court. By ordering that the evidence of Bloedow's death be presented to DHCR, the court exceeded the permissible scope of its review.

Judge Ciparick saw the case in terms of effectuating the Legislature's intent, in both the City Rent Law and SHA, of "avoiding unwarranted evictions and preserving affordable housing." Judge Ciparick wrote that based on that intent, DHCR could be compelled to consider "new evidence...which tangibly called into question the justification for evicting petitioner from over half of his apartment."

The dissent observed that the avowed purpose of the SHA was to prevent "indiscriminate demolition," tenant displacement, and to stem the loss of affordable housing accommodations. Judge Ciparick further observed that the memorandum in support of the SHA stated that "[t]he housing being destroyed also houses many of the City's elderly people whose only income is a Social Security check...."

Judge Ciparick's analysis raises disturbing questions in a demolition context, but may be less persuasive in the instant case, where the landlord sought to evict Mr. Rizzo from only a portion of his 1,200-square-foot apartment. If the landlord succeeds in such a case, the number of rent controlled housing accommodations will remain the same, the tenant will not be displaced, and, if anything, the reduced rent the tenant will pay for his or her smaller apartment will be more affordable than the prior rent.

A primary point of contention between the majority and the dissent was the time period measured by the SHA. The majority, following DHCR's long-standing procedure, found that 1996 was the test year for evaluating the building's economic health. Judge Ciparick, in contrast, wrote that a tenant should not be partially evicted "based on an obsolete snapshot computation of the building's finances."

While Judge Ciparick certainly raises a legitimate point, her solution—a kind of free-floating, year to year analysis—has its own problems. First, when does the administrative record close? As the Court of Appeals held in *Matter of Huie*, "[t]here must be an end to lawsuits."[4] Second, Judge Ciparick's approach will hurt tenants as much as it helps them: a landlord who initially fails to qualify under the SHA may come back years later during the administrative review process with evidence of increased costs, thus resulting in a tenant's eviction.

Judge Ciparick was also concerned about a result that appeared to be based on the timing of Ms. Bloedow's death:

> What the majority misconstrues is that remedial laws do not always fit squarely into a bright-line rule. By the majority's own account, had the rent controlled tenant died one day prior to the issuance of the DHCR order, rather than on or about the day of its issuance, remittal would have then been appropriate and the agency would have been compelled to consider the new evidence. The arbitrary cut off date does nothing to enforce the rent control laws but instead undermines them by allowing another rent controlled unit to be removed from the market.

While the majority did indeed hold that DHCR could consider any fact "that arose before the agency made its determination," the majority also held that events occurring in 2002 were irrelevant to the state of the building's finances in 1996. According to the majority, Bloedow died five years too late to help Mr. Rizzo, not one day late.

In the final sentence of our 2005 article, we stated that the Court of Appeals "will have to decide whether the remedial purposes of the City Rent Law and the SHA should prevail over more general principles of administrative and appellate law." The Court of Appeals has now answered this question.

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1. *Rizzo v. New York State Division of Housing and Community Renewal*, 2005 WL 3477778 (N.Y.), 2005 N.Y. Slip Op. 09655.

2. In the interest of full disclosure, the authors note that Rosenberg & Estis, P.C. briefly represented Rachel Crespin before she filed her application for a certificate of eviction.

3. L. 1974, ch. 1022, as amended by L. 1975, ch. 360.

4. 20 N.Y.2d 568, 572, 285 N.Y.S.2d 610 (1968).