

RENT REGULATION

Ruling Affirms Grace Period For Payment of Rent Arrears



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On Feb. 25, 2009, Supreme Court Justice Shirley Werner Korneich affirmed a DHCR ruling that gave a tenant 48 months to pay approximately \$20,000 in rent arrears she owed as a result of DHCR's reversal of a prior order in a Fair Market Rent Appeal (FMRA) proceeding.

The decision, *Matter of IG Second Generation Partners, L.P. v. DHCR*, NYLJ, Feb. 25, 2009, at 25, col. 1 (Sup. Ct. N.Y. Co.), marks the latest twist in a long-running landlord-tenant dispute that has reached the Court of Appeals.

Fair Market Rent Appeal

In 1990, rent-stabilized tenant Dru Arstark filed an FMRA with DHCR claiming that her initial stabilized rent of \$830 per month exceeded the legal fair market rent.

DHCR's rent administrator granted the tenant's FMRA on Jan. 6, 1995, reducing her rent to \$556.82 per month.

Five years later, on Jan. 20, 2000, DHCR's deputy commissioner granted the landlord's administrative appeal of the rent administrator's order to the extent of declaring that the lawful monthly rent was in fact \$798.07.

During the five years, between the two DHCR orders, the tenant paid the lower rent, and, as such, owed thousands of dollars to the landlord.

First Article 78 Proceeding

The tenant then filed an Article 78 proceeding to challenge the deputy commissioner's order. DHCR, rather than defending the order, asked Supreme Court Justice Nicholas Figueroa to send the case back to the agency. Justice Figueroa did so on July 7, 2000.

DHCR's deputy commissioner issued an order on remand on May 25, 2004. In the four years between the remand order and the prior order, however, DHCR's FMRA regulation (Section 2522.3 of

the Rent Stabilization Code [RSC]), had changed, allowing owners greater flexibility when submitting "comparable" rents for purposes of establishing the so-called fair market rent.

Under the new regulation, DHCR declared the legal rent for the subject apartment to be \$1,078.30 per month. Because the \$830 monthly rent actually charged the tenant was less than that figure, DHCR

and for preserving the regulated housing stock."

DHCR also relied on RSC § 2527.7, captioned "Pending Proceedings," which states in its entirety:

Except as otherwise provided herein, unless undue hardship or prejudice results therefrom, this Code shall apply to any proceeding pending before the DHCR, which proceeding commenced on or after April

occasioned by DHCR's initial determination in her favor.

Second Article 78 Action

The landlord brought an Article 78 proceeding to challenge DHCR's May 25, 2004 order. The matter was assigned to Justice Edward H. Lehner, who ruled on Feb. 9, 2005.¹ Justice Lehner held that DHCR, even though broadly empowered to consider the "equities," had no authority to forgive rent arrears:

DHCR acknowledges that there are no specific regulations or guidelines in effect at the agency to enable it to determine in which cases past due rent may be waived. Its reliance on § 2522.7 is misplaced as the consideration of the equities authorized therein relates to the issuance of an 'order adjusting or establishing any legal regulated rent'. Whatever discretion is provided therein thus only authorizes the consideration of equitable principles in fixing the amount of the legal rent.

Here, DHCR fixed the legal rent as that agreed to between the owner and the Tenant which rent is unchallenged herein. However, in prohibiting petitioner from collecting the arrears owing as a consequence of the legal rent thus established it acted in an arbitrary and capricious manner as the forgiveness of legal obligations owing as a result of its decisions is not within the power granted to it by the legislature.²

dismissed the tenant's FMRA.

DHCR then did a curious thing. It ruled that it would be an undue hardship to the tenant if she had to pay the rent arrears occasioned by its new order, approximately \$20,000, and thus forgave those arrears.

In so holding, DHCR relied on RSC § 2522.7, captioned "Consideration of Equities," which states:

In issuing any order adjusting or establishing any legal regulated rent . . . the DHCR shall take into consideration all factors bearing upon the equities involved, subject to the general limitation that such adjustment, establishment, or determination can be put into effect with due regard for protecting tenants and the public interest against unreasonably high rent increases consistent with the purposes of the RSL

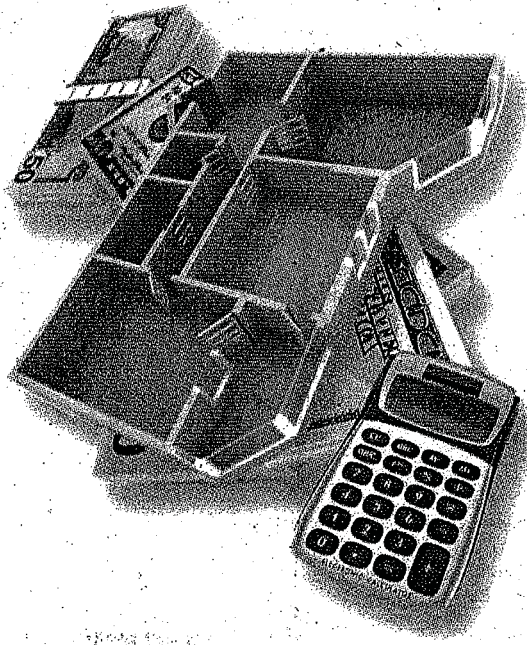
1, 1984, or where a provision of this Code is amended, or an applicable statute is enacted or amended during the pendency of a proceeding, the determination shall be made in accordance with the changed provision.

While the various courts of this state have ruled that DHCR is not authorized to forgive rent arrears, they have held that DHCR has discretion to set a lengthy payout period for tenants to repay arrears occasioned by DHCR's reversals of its prior notices.

DHCR, attempting to balance the equities, ruled that the landlord would get the benefit of the new regulation (which resulted in the dismissal of the tenant's FMRA), while the tenant, in turn, would be relieved of the obligation of paying rent arrears

Justice Lehner then remanded the matter to DHCR "for the sole purpose of determining the amount of arrears and setting a period for its repayment."³

The tenant then appealed to the Appellate Division, First Department, which affirmed



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Justice Lehner on Nov. 30, 2006.⁴ In a per curiam opinion joined by Justices Peter Tom, David Friedman, George D. Marlow and Bernard J. Malone, the majority adopted Justice Lehner's rationale, and added:

We further note that DHCR in the past has permitted tenants to pay the differential between the lease rent and the interim rent set by the Rent Administrator in monthly installments. We agree with the IAS court that the matter should be remanded to DHCR for the sole purpose of determining the exact amount of arrearage and setting terms for its repayment.⁵

Justice Angela M. Mazzarelli dissented, citing RSC §§ 2522.7 and 2527.7.

Justice Mazzarelli wrote:

Notably, neither of these provisions limits the remedies available to the DHCR upon a finding that the application of the amended statute would result in 'undue hardship or prejudice.' Here DHCR applied the amended statute to establish the tenant's fair market rent, and it determined that upon consideration of the equities, the amendment should be applied prospectively only. Thus, the DHCR was doing precisely what the statute has empowered it to do — establish the legal regulated rent and the date upon which it shall begin to become due.⁶

Court of Appeals Ruling

The Appellate Division granted DHCR and the tenant leave to appeal.

On May 6, 2008, Court of Appeals Judge Eugene F. Piggot, in an opinion joined by Judges Judith Kaye, Victoria A. Graffeo, Robert S. Smith and Theodore T. Jones, affirmed, largely for the reasons already stated by Justice Lehner and the First Department.

The majority was also unpersuaded by the tenant's claim of "undue hardship:"

Nor does the record support DHCR's finding of undue hardship to the tenant. The fact that a tenant owes substantial back rent as a result of a DHCR determination alone is insufficient to support a finding of undue hardship. A rent administrator's order allowing a tenant to pay a lower rent is not a final determination, but an interim order subject to review by DHCR, which has the authority to issue a final determination.⁷

Judge Susan T. Read dissented in an opinion joined by Judge Carmen B. Ciparick.

The dissent stated:⁸

The majority takes the position that DHCR's reliance on section 2522.7 is 'misplaced' because, once having determined the lease rent to be fair, DHCR exhausted its equitable authority under this provision. Thus, the majority reads section 2522.7 narrowly, as authorizing DHCR to 'take into consideration all factors bearing upon the equities' only when figuring out the actual dollar amount for the legal regulated rent. DHCR, however, reads section 2522.7 more broadly, as allowing it to make payment of the legal regulated rent prospective only when justified by equitable circumstances. This is not, in my view, an irrational or unreasonable interpretation of what DHCR may do.⁹

Addressing RSC § 2527.7, Judge Read wrote:

The majority also reads this regulation narrowly, interpreting 'undue hardship or prejudice' to refer solely to a tenant's 'personal financial circumstances.' But DHCR takes these words to encompass additional sources of hardship and prejudice; for example, as in this case, the hardship and prejudice caused tenant by the inordinate length of time (nearly a decade) it took DHCR to dispose of the PAR.¹⁰

Third Article 78 Proceeding

In the meantime, DHCR had reprocessed the case on remand, and issued an order on April 7,

2006. The order gave the tenant 48 months to pay rent arrears set by DHCR at \$20,423.06.

On the landlord's Article 78 challenge, Justice Korneich affirmed DHCR's determination. Citing *Matter of Meyer v. New York State Division of Housing and Community Renewal*, 192 A.D.2d 375, 596 N.Y.S.2d 358 (1st Dep't 1999), which Justice Lehner had cited in his earlier decision, Justice Korneich found ample precedent for a 48-month payout period:

In *Meyer*, the Court held that a direction by DHCR for repayment over a 12-month period was 'grossly inequitable as to render this aspect of the decision arbitrary and capricious,' and directed that the repayment period for \$8,140.97 to be increased 48 months. In this case, DHCR based its decision on 'the length of time that this proceeding has been pending and the amount of arrears due,' which is rational and reasonable based on the record.

Thus, while the various courts of this state have ruled that DHCR is not authorized to forgive rent arrears, they have held that DHCR has discretion to set a lengthy payout period for tenants to repay arrears occasioned by DHCR's reversals of its prior orders.

1. *Matter of IG Second Generation Partners, L.P. v. New York State Division of Housing and Community Renewal*, 7 Misc.3d 229, 789 N.Y.S.2d 873 (Sup. Ct. N.Y. Co. 2005).

2. 7 Misc.2d at 232.

3. Id. at 233.

4. *Matter of IG Second Generation Partners, L.P. v. New York State Division of Housing and Community Renewal*, 34 A.D.3d 379, 825 N.Y.S.2d 452 (1st Dep't 2006).

5. 34 A.D.3d at 380-81 (internal citations omitted).

6. Id. at 384.

7. 10 N.Y.3d at 482 (internal citations omitted).

8. *Matter of IG Second Generation Partners, L.P. v. New York State Division of Housing and Community Renewal*, 10 N.Y.3d 474, 859 N.Y.S.2d 598 (2008).

9. 10 N.Y.3d at 484.

10. Id. at 485.