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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HAROLD BEELER J.S.C. PART 9
Justice

Norwood

-v-

NYS DHCR

INDEX NO. 122490/02

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this motion to/for ____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

SCANNED AUG 12 2003

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is granted and the cross-motion is denied; see annexed order.

Dated: 7/30/03

HAROLD BEELER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

At IAS Part 9 of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 71 Thomas Street, New York, New York on the 30" of July, 2003.

PRESENT: **HON. HAROLD B. BEELER,**
Justice

In the Matter of the Application of
ANGELA T. NORWOOD,
Petitioner,

FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CIVIL LAW AND RULES,

-against-

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,
Respondent,

-and-

THE ESTATE OF PETER SHARP,
Intervenor-Respondent.

INDEX NUMBER 122490/02
MOTION SEQUENCE 001 & 002
DECISION & JUDGMENT

Petitioner moves, pursuant to CPLR § 7803(3), to vacate the denial of an application for reconsideration of a high income rent deregulation order (MS001). Respondent New York State Division of Housing and Community Renewal ("DHCR") opposes and cross-moves for dismissal for failure to state a cause of action. Intervenor-respondent Estate of Peter Sharp ("the landlord"), owner of the shares assigned to Apartment 4F, 444 East 52nd Street, New York County ("the apartment") in the co-operative building, moves to dismiss the petition (MS002).

Background

Petitioner is 79 years old. She is the tenant in possession of the apartment and has lived there since 1961. Until issuance of the high income rent deregulation order of February 12, 2002, the apartment was subject to the New York City Rent Control Law. Claiming hardship, the landlord received 4 rent increases in the period beginning April 1998 through June 2001 when this dispute began. Petitioner's monthly rent went from $1,663.14 to $2,516.13.

The landlord petitioned for high income rent deregulation on June 7,2001.[1] DHCR mailed petitioner the Answer to Petition and Notice to Tenant to Provide Income Verification (Form RA-93N) on July 13,2001. The US Postal Service provided confirmation of delivery. Form RA-93N advised petitioner of a 60-day period to complete and return it and that failure to do so would result in deregulation. DHCR claimed petitioner failed to respond and it mailed a second copy on January 22,2002 in care of petitioner's daughter at the same address. This second copy of Form RA-93N required a response within ten days. No response was forthcoming and an order of deregulation was issued on February 12,2002 effective March 1, 2002.

Petitioner did not file a petition for administrative review ("PAR") which is a matter of right within 35 days of the administrative order. 9 NYCRR § 2529.2. Instead, on April 15,2002 petitioner submitted an application for reconsideration to DHCR pursuant to 9 NYCRR §

'The New York State Rent Regulation Reform Act of 1997 (NY CLS Unconsol Ch 249, § 2 *et seq*.) provides that DHCR shall issue, upon the landlord's application, an order of decontrol for a housing accommodation under rent control or rent stabilization where the the maximum rent is two thousand dollars or more per month whose tenants have a total annual income in excess of one hundred seventy-five thousand dollars in each of the two preceding calendar years. The tenant is required, if requested by DHCR, to fill out an income certification form and the information is verified by the Department of Taxation and Finance. If an order of decontrol is issued, the landlord shall offer the housing accommodation to the tenant at a rent not in excess of the market rent, meaning a rent obtainable in an arm's length transaction.

2208(13)(a).[1] Petitioner claimed to be an ill and elderly person receiving kidney dialysis treatments three times a week. Attached to her application was a letter from petitioner's doctor confirming these dialysis treatments three times per week. The doctor characterized this as a "lifesaving procedure" and further stated that petitioner's medical condition, which includes dialysis fatigue, difficulty in controlling hypertension and a history of ischematic cerebral attack, "may impair her capability to cope with her daily personal issues management." Petitioner averred that she has ''become less able to handle my daily affairs. I have trouble remembering things." She recollected receiving notices from DHCR, "but I honestly thought I had responded to them."

In her Affidavit, dated April 12,2002, accompanying her application for reconsideration, petitioner claimed a monthly income of about $2,861, far below the $175,000 annual level that legislatively defines high income.

On August 14,2002, DHCR denied petitioner's application on the grounds "there was no irregularity in a vital matter in this proceeding." Petitioner then commenced this action on October 15,2002.

Petitioner's Motion

Attached to petitioner's papers are copies of her semi-monthly payroll earnings statements from January 1,2000 through April 15,2000 showing gross pay of $1,750 per pay period, $45,500 annualized. For the next three pay periods through May 31,2000, petitioner

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[1] 9 NYCRR § 2208.13(a) provides that the administrator, on application of either party or on his own initiative, and upon notice to all parties affected, may, prior to the date that a proceeding for judicial review has been commenced in the Supreme Court, pursuant to article 78 of the Civil Practice Law and Rules, modify, supercede or revoke any order issued by him under these or previous regulations where he finds that such order was the result of illegality, irregularity in vital matters or fraud.

evidently received short-term disability payments of $1,750. Beginning June 6, 2000 through December 5, 2000, petitioner received long-term disability payments of $2,100 monthly, social security providing $1,422 and private insurance $678.[2] Her adult daughter lives with her, but is allegedly unemployed and no financial data are provided for her.

Petitioner claims the landlord had no reasonable basis to question her financial eligibility for continued rent-control protection. The landlord had filed for high income rent deregulation in 1999 and 2000. DHCR denied both requests because petitioner did not have the requisite high income in at least 1998, one of the two years prior, according to the New **York** State Department of Taxation and Finance. Petitioner argues that these previous rejections provided the landlord constructive knowledge of petitioner's financial status and the inapplicability of high income deregulation. Petitioner argues that her low income protected her from deregulation, she had nothing to hide from DHCR and the only reason she failed to respond to Form RA-93N on a timely basis was age and illness.

Petitioner submits evidence that the landlord has attempted, at least as far back as 1991, to terminate her rent-controlled tenancy. Their landlord-tenant dispute has gone as far as the Court of Appeals with petitioner prevailing. ***See Sharp v.*** *Norwood*, **89** NY2d 1068 (1997). In that case, the landlord instituted a summary holdover proceeding to recover possession of the apartment on the grounds that petitioner's chronic lateness in paying her rent constituted a nuisance warranting eviction. The Court of Appeals held that the landlord failed to prove that

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[2] Aside from this 2000 payroll and disability documentation, no other definitive information is provided by any party regarding petitioner's 1999 and 2000 income which would be the basis for a 2001 high income determination. Petitioner's Affidavit of April 12, 2002 listed her current monthly income sources as $1,000 alimony, approximately $1,500 social security and **$361** pension benefits.

chronic late payments interfered with its use or enjoyment of the property, the nuisance standard.

Exhaustion of Administrative Remedies

DHCR argues pursuant to 9 NYCRR § 2208.12, "filing and determination of a PAR is a prerequisite to obtaining judicial review of any provision of these regulations or any order issued thereunder," that the petitioner has not exhausted her administrative remedies by failing to file a timely administrative appeal. The landlord agrees, contending that judicial review is limited to final administrative orders citing CPLR § 7801(1) and *Fiesta Realty* ***Corp.*** *v. McGoldrick*, 308 N.Y. 869,870 (1955) (an order that "did not finally determine the rights of the parties . . . cannot be reviewed"). The landlord claims that since petitioner did not file a PAR she did not exhaust her administrative remedies. Her petition is, thus, "premature and improper."

In a case brought to the Court's attention by respondents, the First Department suggested in dicta that a petitioner should have filed a **PAR** challenging a DHCR order "regardless of the fact that such petition would have been untimely, since, as DHCR concedes, the Commissioner has discretion to assess the reasons for a delay in filing and in light thereof, when appropriate, to deem the filing timely." *77 Ave. D Assocs. v. State Div. of Hous. & Community Renewal,* 249 AD2d **113** (1st Dep't 1998).

Notwithstanding the above dicta, filing an untimely PAR has never been a viable path for a petitioner before DHCR. A search of case law uncovers no instance where DHCR accepted an untimely PAR. Time after time, the courts have affirmed the rejection of an untimely PAR by DHCR as "a failure to exhaust administrative remedies justifying dismissal of petitioner's subsequent article 78 proceeding." *Nelson Management* ***Group,*** *Ltd. v. New York State Div. of Housing and Community Renewal,* 259 AD2d 411,412 (1st Dep't 1999); *see also Clarendon Management* ***Corp. v.*** *New York State Div. of Housing and Community Renewal,* 271 AD2d 688

(2nd Dep't 2000); *Dowling v. Holland*, 245 AD2d 167 (1st Dep't 1997); *Duke 367 Realty Corp. v. Aponte*, 240 AD2d 667 (2nd Dep't 1997); *Ponds v. DHCR*, 191 AD2d 153 (1st Dep't 1993); *Lipes v. DHCR*, 174 AD2d 571 (2nd Dep't 1991).

Moreover, the rent regulations provide no specific authority for the filing of a late PAR. An administrative appeal which is limited to the record below (see 9 NYCRR § 2529.6) would have provided no meaningful review of petitioner's default.

By forswearing the fruitless process of filing an untimely PAR and seeking instead to vacate the default, petitioner availed herself of an authorized agency procedure that enabled DHCR to substantively examine the merits of petitioner's claim that her income was well below the deregulation threshold as well as the viability of her excuses for missing the filing deadlines. *See Yarbough v. Franco*, 95 NY2d 342, 347 (2000) ("A request to vacate a default affords the defaulting party an opportunity to develop a factual record setting forth the reasons for the nonappearance and any meritorious defenses that would justify re-opening the default"). In fact, DHCR accepted, reviewed and rejected the petitioner's application to vacate the default. In so doing, DHCR ended petitioner's prospects for any further agency review, thereby exhausting her administrative remedies and gaining the standing ordinarily conferred by the denial of a PAR.

Statute of Limitations for Judicial Review

NYC Administrative Code § 26-411(a)(1) reduces the usual four-month statute of limitations on bringing an Article 78 proceeding to 60 days after a final determination of the city rent agency. Prior to 1984, rent control disputes had a 30-day Statute of Limitations while rent stabilization disputes were allowed 4 months. *140 West 57th Street Corp. v. State Div. of Housing & Community Renewal*, 130 AD2d 237, 239 (1st Dep't 1987) ("The 1984 amendments under Laws of 1984 (ch 102) created a uniform system of administrative review for both rent

control and rent stabilization, and established a uniform 60-day Statute of Limitations"). NY CLS Unconsol Ch 249-A, § 1(8) states:

> Any person who is aggrieved by the final determination of the city housing rent agency in an administrative proceeding protesting a regulation or order of such agency may, in accordance with article seventy-eight of the civil practice law and rules, within sixty days after such determination, file a petition with the supreme court specifying his objections and praying that the regulation or order protested be enjoined or set aside in whole or in part.

Time is measured, however, from receipt of notice by the aggrieved party, not the date of the notice or its mailing. *Munice v. Board of Examiners*, 31 NY2d 683 (1972); *Yarbough v. Franco*, 95 NY2d at 345. When the date of receipt is in doubt, a hearing is required to resolve the factual issue. *Unger v. Joy*, 78 AD2d 680 (2nd Dep't 1980).

Respondents argue that the petition is improper because it arose more than eight months after the final determination, the high income rent deregulation order of February 12,2002. Petitioner concedes that were this order the final determination, the statute of limitations would have expired. The Court, however, regards the August 14,2002 rejection of the application for reconsideration to be the final determination as discussed above.

DHCR cites several cases where the Court of Appeals and/or the Appellate Division held that a request for reconsideration of an adverse administrative ruling did not extend the statute of limitations to bring an Article 78 proceeding. In ***Seidner*** v. *Town of Colonie*, 79 AD2d 751 (3rd Dep't 1980) *aff'd* 55 NY2d 613 (1981) the granting of a variance by the municipal zoning board was ruled to be the final administrative determination in spite of subsequent discussions between the parties about reconsideration that did not result in a rehearing. In ***De Milio*** v. ***Borghard***, 55 NY2d 216 (1982) the termination date of a governmental probationary employee stated in a letter from the commissioner of the department was judged the final administrative determination in

spite of a later negative response to petitioner's letter requesting reconsideration. In *Walsh v. Superintendent of Highways of Poestenkill*, 135 AD2d 968 (3rd Dep't 1987) the filing of a certificate of abandonment of a road was held the final administrative determination in spite of the town board's later refusal to rescind or modify in response to petitioner's letter and appearance at a town board meeting.

This Court relies upon *Yarbough v. Franco*, in contrast to the cases cited by respondents, for the current view of a situation most similar to the instant action. The New York City Housing Authority terminated petitioner Yarbough's tenancy by a default determination on December 3, 1996 when she failed to appear at a hearing. Petitioner actually received notice of the ruling on April 7, 1997 and the next day filed a request to vacate the default. The agency denied her request as untimely by decision dated June 24, 1997 sent by mail. On October 31, 1997, petitioner commenced an Article 78 proceeding seeking review of the December 3, 1996 default determination (almost 11 months earlier) and the June 24, 1997 denial of her request to vacate the default (4 months and 6 days earlier).

Supreme Court, Kings County denied the entire petition as time-barred for not having commenced within 4 months of the default determination. Appellate Division, Second Department agreed that judicial review of the December 3, 1996 default determination was untimely, but permitted the petition to stand in regard to the June 24, 1997 denial. The Court of Appeals affirmed the Appellate Division and annulled the agency's denial of the request to vacate the default because "the limitations period begins to run from receipt of the denial of the request to vacate." *Yarbough v. Franco*, 95 NY2d at 345. The Court of Appeals "reject[ed] the [Housing] Authority's argument that a motion to vacate a default is nothing more than a motion to reconsider, which does not toll the Statute of Limitations." Id. at 347 (citation omitted). "[A]

motion to vacate a default presents factual questions not previously passed upon by the administrative agency. . . . Under these circumstances, petitioner's application to vacate the default presents no **risk** of circumventing the four-month Statute of Limitations, and the instant article 78 proceeding was not untimely." *Id.* at 348 (citation omitted).

Respondents argue that petitioner failed to meet the 60-day requirement applicable in this action for filing an Article 78 petition even when measured from the latest date possible. Petitioner filed this petition October 15, 2002, 62 days after August 14, 2002, the date of the letter denying her application for reconsideration. Receipt of this rejection letter, however, was likely to have occurred two or three days after posting. If this were service of papers, five days would be added to the mailing date (CPLR 2103(b)(2)), so that the petition filing date would clearly be within the 60-day period.

Additionally, New York General Construction Law § 25-a provides an extension of time to the next succeeding business day when the performance of an act is due on Saturday, Sunday or public holiday. October 13, 2002, 60 days after August 14, 2002, was a Sunday and October 14, 2002 was Columbus Day. October 15, 2002 was the next succeeding business day.

Accordingly, the Court finds the filing of the Article 78 proceeding occurred within 60 days of notification of DHCR's final determination.

Standard of Judicial Review

There is limited judicial review of administrative actions pursuant to CPLR § 7803(3), in this case confined to:

> whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed[.]

Courts are limited to an assessment of whether a rational basis exists for the administrative determination without disturbing the underlyng factual determinations. *Heintz v. Brown, 80* NY2d 998 (1992); *WuidmannRealty* ***Corp. v.*** *Higgins,* 194 AD2d 303 (1st Dep't 1993).

Petitioner applied pursuant to 9 NYCRR § 2208.13(a) to reconsider DHCR's deregulation order on the grounds that it resulted from an irregularity in a vital matter. Such an application enables a party to create a factual record explaining the basis for the default as well as any meritorious defenses that would justify vacating the prior order. *Yarbough v. Franco,* 95 NY2d at 347. However, DHCR's response to petitioner's application failed to reflect any consideration of the factual record petitioner sought to develop.

DHCR's August 14,2002 denial of petitioner's application identified as the basis for its decision a review of the "file, your letter and your request for reconsideration." In spite of this claim, DHCR stated only one fact as the basis for its rejection – petitioner's failure to return the initial Form RA-93N within 60 days of mailing. DHCR did not mention petitioner's timely response to two immediately-prior requests for income verification in 1999 and 2000, petitioner's documentary income information, petitioner's age and the improbability of a dramatic upturn in her income, or petitioner's debilitated physical condition and extensive medical treatments as a possible explanation or mitigation of petitioner's condition.

DHCR's unwillingness to consider the reasons behind petitioner's default reflects a rigidity not in keeping with the discretion afforded it in *Dworman v. DHCR,* 94 NY2d 359 (1999). In *Dworman*, decided under the comparable provisions of the Rent Stabilization Code,

DHCR deregulated the tenant's rent-stabilized apartment after the tenant, away on a foreign vacation, filed the requested income verification information 11 days after the 60-day deadline for response had elapsed. Rejecting DHCR's contention that it lacked the statutory authority to forgive late filings, the Court of Appeals held that "DHCR has discretion to review a case on its merits despite justifiable tenant tardiness." ***Id.*** at 372.

Respondents seek to distinguish *Dworman* on the grounds that, unlike petitioner herein, the tenant in *Dworman* filed a timely petition for administrative review. Respondents argue that under *Dworman,* DHCR's discretion to permit late filings is available only until such time as the Commissioner of DHCR has made a final ruling on a tenant's PAR.

In this Court's view, respondents take far too narrow a view of the scope of *Dworman.* Under the Rent Control Regulations at 9 NYCRR §2207.5(d), "at any stage of a proceeding the district rent administrator may, for good cause shown, accept for filing any papers, even though not filed within the time required by these regulations." Moreover, DHCR is empowered under the Rent Control Regulations at 9 NYCRR § 2207.8 to modify or revoke an order issued in a proceeding regardless of whether or not a timely petition for administrative review has been filed. See *Laub v. DHCR,* 176 AD2d 560 (1st Dep't 1991) interpreting a comparable regulation under the Rent Stabilization Code.

Where, as here, petitioner's failure to file a timely PAR was based on the same physical and mental conditions that caused her to fail to respond to FORM RA-93N for the first time in three years, DHCR abused its discretion in not allowing petitioner to establish good cause for missing the administrative deadlines. Moreover, DHCR's own rulings in prior administrative proceedings support the conclusion that it acted arbitrarily in denying the application to reconsider.

In *Ista Management v. DHCR*, 161 AD2d 424 (1st Dep't 1990), for example, the court let stand as reasonable DHCR's decision to reopen the underlying administrative rent proceeding where the landlord's improper service on the tenant's doorman of a notice of rent increase was found to constitute "an irregularity in a vital matter." More recently, in *Waverly Place Associates v. DHCR*, 292 AD2d 211 (1st Dep't 2002) the court upheld DHCR's determination that a prior order dismissing a tenant's complaint resulted from an "irregularity in a vital matter" where the tenant's failure to timely respond was due to her being away from her apartment while tending to an ill parent.

DHCR's determination in *Waverly Place Associates* that an "irregularity in a vital matter" encompasses an excusable default is not rationally reconcilable with its ruling to the contrary in the instant matter. Moreover, the facts herein calling for agency reconsideration are even more compelling in favor of petitioner than in *Waverly Place Associates* where DHCR accepted the tenant's tardiness excuse in the absence of any documentary corroboration thereof.

DHCR's ignoring evidence of a justifiable default by the petitioner herein, a tenant with plausibly a monthly income under $3000, seems, moreover, to be no less erroneous than other actions where DHCR reversed itself on the basis of an irregularity in a vital matter. *See e.g. Ortega v. Higgins*, 167 AD2d 343 (2nd Dep't 1990) (untimely PAR found to be timely); *Silverstein v. Higgins*, 184 AD2d 644 (2nd Dep't 1992) (rent overcharge found to be erroneous); *Regal Homes, Inc. v. New York State Div. of Housing and Community Renewal*, 287 AD2d 508 (2nd Dep't 2001) (apartment status changed from rent-stabilized to rent-controlled).

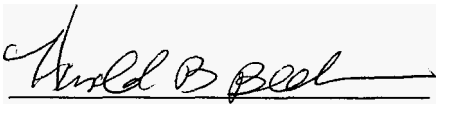
Accordingly, for all the aforesaid reasons, the denial by DHCR of petitioner's application to reconsider the high income rent deregulation order was arbitrary and capricious. The petition

is granted, DHCR's cross-motion to dismiss is denied, and the landlord's motion to dismiss is denied. The matter is remitted to DHCR to consider petitioner's application for reconsideration of the high rent deregulation order.

This constitutes the decision and judgment of this Court.

DATED: July 30,2003

E N T E R :



HAROLD B. BEELER, J.S.C.

HAROLD BEELER
J.S.C.