

**Matter of Myer v New York State Div. of Hous. &
Community Renewal**

2012 NY Slip Op 32020(U)

July 30, 2012

Sup Ct, NY County

Docket Number: 102409/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 102409/2012
MYER, RICHARD A.
vs.
N.Y.S.D.H.C.R.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s) _____
Answering Affidavits — Exhibits _____	No(s) _____
Replying Affidavits _____	No(s) _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

AUG 02 2012

NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED

AUG 1 - 2012

MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 7/30/12

eg, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
In the Matter of the Application of

RICHARD A. MYER,

Petitioner,

Index No. 102409/12

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent,

-and-

EAST END TOWER, LLC,

Intervenor-Respondent

FILED

AUG 02 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Affirmations in Opposition to the Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	5

Petitioner Richard A. Myer ("petitioner") commenced this Article 78 proceeding seeking to challenge the determination made by respondent the New York State Division of Housing and Community Renewal ("DHCR") denying petitioner's Petition for Administrative Review ("PAR") which sought to vacate the DHCR's Rent Administrator's ("RA") order deregulating

petitioner's rent-stabilized apartment. The DHCR cross-moves for an Order remanding the matter to the DHCR for further consideration and the issuance of a new determination. For the reasons set forth below, the DHCR's cross-motion is granted and the petition is denied.

The relevant facts are as follows. East End Tower, LLC ("East End") is the owner of the residential apartment building located at 85 East End Avenue, New York, New York (the "building"). Petitioner is the rent-stabilized tenant of Apartment 14B in the building (the "Apartment"). On April 24, 2009, pursuant to Rent Stabilization Code ("RSC") § 2531.2, East End served an Income Certification Form ("ICF") for the 2009 High Income Rent Deregulation filing period upon petitioner in order to begin the process of deregulating petitioner's rent-stabilized Apartment. Petitioner failed to return the ICF to East End within thirty (30) days as required by RSC § 2531.2(d).

On June 15, 2009, pursuant to RSC § 2531.4(a), East End filed a Petition by Owner for High Income Rent Deregulation - 2009 Filing Period (the "Deregulation Petition") with the DHCR for high-rent, high-income deregulation of the Apartment. The DHCR then served a copy of the application upon petitioner together with a notice requesting that petitioner answer and provide certain necessary information to verify household income. In the notice, the DHCR advised petitioner that his failure to answer and provide the requested information would be deemed a default. Pursuant to RSC § 2531.4(b), the DHCR mailed such notices to petitioner on four separate occasions - June 11, 2010, July 26, 2010, April 1, 2011 and May 23, 2011. Petitioner acknowledges receipt of all four of the DHCR's notices but there is no indication in the administrative record that petitioner responded to any of the notices. However, petitioner alleges in his affidavit accompanying his petition that he recalls "that there were multiple forms

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printed by the DHCR asking about [his] income in past years, but [he could not] recall more detail about all the forms or how [he] responded to them.” Petitioner alleges that he has in his records a letter, dated April 26, 2010, from attorneys for East End with a DHCR form enclosed requesting verification of his income for years 2008 and 2009. Petitioner further alleges that his records indicate that he “filled out the form and mailed it to the owner’s lawyers on August 5, 2010.”

On September 27, 2011, the RA issued an Order of Deregulation based on the petitioner’s failure to provide the necessary information to verify his household income. The Order advised that if petitioner wished to challenge the Order of Deregulation, he must file a PAR by hand-delivering to the agency or mailing to the agency no later than 35 days after the date the Order was issued and that PARs filed after the time limit would be considered untimely and dismissed, as required pursuant to RSC § 2529.2.

On or about January 31, 2012, 126 days after the Order of Deregulation was issued, petitioner filed a PAR, bearing Docket No. AM-4410047-RT, requesting reversal of the Order of Deregulation. In the PAR, petitioner explained that the Apartment should not be deregulated as he is under-income and that due to health conditions, he is not able to work or earn money. On February 17, 2012, the DHCR’s Commissioner rejected petitioner’s PAR because it was not filed within 35 days after the RA issued its decision as required by RSC § 2529.2. The Commissioner did not reach the merits of the issue. Thereafter, petitioner commenced the instant Article 78 proceeding challenging the DHCR’s denial of his PAR and requesting that the court order that the DHCR process the PAR on the merits.

The court first turns to the DHCR’s cross-motion for an order remanding the case back to

[* 5]

the DHCR for further consideration and the issuance of a new determination. The court now determines, based on the following legal framework, that the DHCR's cross-motion to remand the case is granted. Under New York Law, the protections of rent regulation serve a remedial purpose and are intended to protect elderly, long-term and disabled tenants from the hardship of eviction. *See McMurray v. DHCR*, 72 N.Y.2d 1022 (1988). Pursuant to Rent Stabilization Law ("RSL") § 26-504.3, housing accommodations which have a legal regulated rent of at least \$2,000.00 per month are eligible for deregulation when the occupants' combined annual income exceeds \$175,000.00 for each of the two calendar years preceding the owner's application for deregulation. This process is called high-income deregulation. RSC § 2531 sets forth the procedures for deregulating a rent-stabilized apartment. Pursuant to RSC § 2531.2, an owner seeking to deregulate an apartment must serve an ICF upon the tenant to determine the tenant's household income. Pursuant to RSC § 2531.4,

(a) "[i]n the event that the tenant or tenants...fail to return the completed ICF to the owner..., the owner may, on or before June 30th of such year, file an owner's petition for deregulation which petitions the DHCR to verify, pursuant to Tax Law § 171-b, whether the total annual income exceeds \$175,000 in each of the two preceding calendar years.

(b) Within 20 days after the filing of such request with the DHCR, the DHCR shall notify the tenant or tenants named on the lease that such tenant or tenants must provide the DHCR with such information as the DHCR and the DTF shall required to verify whether the total annual income exceeds...\$175,000...in each such year.

Pursuant to RSC § 2531.6, "[i]n the event the tenant or tenants fail to provide the information required pursuant to § 2531.4 of this Part, the DHCR shall, on or before the next December 1st, issue an order providing that such housing accommodation shall not be subject to the provisions

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of the RSL and this Code upon the expiration of the current lease.” This means that the RA will issue an Order of Deregulation for the apartment.

If the tenant wishes to challenge the Order of Deregulation, such tenant must file a PAR with the DHCR. RSC § 2529 sets forth the procedures for commencing and processing a PAR. Pursuant to RSC § 2529.2, “[a] [PAR] against an order of a rent administrator must be filed in person, by mail, or otherwise as provided by operational bulletin, with the DHCR within 35 days after the date such order is issued.” However, if a tenant files a PAR beyond the required deadline, New York courts have interpreted the provisions governing high-income deregulation to grant DHCR full discretion to determine “that a tenant’s late filing was excusable.” *Elkin v. Roldan*, 94 N.Y.2d 853, 857 (1999). New York courts have specifically held that the DHCR has discretion to excuse a tenant’s default in answering a high-income deregulation petition where good cause is shown or because the delay was so minimal as to be excusable. *See Dworman v. DHCR*, 94 N.Y.2d 359 (1999); *see also Elkin*, 94 N.Y.2d 853. This is based on the provision in the RSC that provides that the 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.” RSC § 2527.5

Although the DHCR is not permitted to *sua sponte* remit a matter back to the agency for further review once an Article 78 proceeding has been commenced in the Supreme Court, the Legislature, in adopting CPLR § 7806, granted the Supreme Court the discretion to remand to the DHCR for further review. In particular, the Supreme Court has the power to remit to the DHCR for the purpose of compiling a complete record, to engage in fact-finding and to issue a new determination, as that “is necessary in order for the [DHCR] to ‘function efficiently and render

substantial justice to the parties concerned.” *Clinton Street Co. v. DHCR*, 161 A.D.2d 402, 403 (1st Dept 1990), citing *Matter of Wiener v. Joy*, 100 A.D.2d 800, 801 (1st Dept 1984). The Court of Appeals has confirmed the DHCR’s broad powers and authority to alter its prior determinations after remand by a court. *See Alamac Estates v. McGoldrick*, 2 N.Y.2d 87 (1956).

Thus, it is clear that a tenant who untimely files under the RSC should be given an opportunity to show good cause for the late filing. “Of course a tenant who waits to supply the required information until an order of deregulation has been entered faces a far heavier burden in establishing good cause for the delay. Nevertheless, where good cause is shown, DHCR has the discretion to permit a late filing either before or after the Rent Administrator has issued a deregulation order, until the Commissioner has taken final action.” *See Matter of Dworman v. DHCR*, 94 N.Y.2d 359, 373 (1999). It has been found that “[w]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 [income verification information]..., DHCR abused its discretion in not allowing petitioner to establish good cause for missing the administrative deadlines.” 2003 WL 26094734 (Sup. Ct. N.Y. Cty. July 30, 2003).

In the instant action, the court determines that this case must be remanded to the DHCR to conduct further review to determine whether there is good cause to excuse petitioner’s late filing, and if so, accept a late response from petitioner providing evidence that his income is below the statutory threshold. Although petitioner’s PAR was submitted after the 35 day time-limit for filing such a complaint, the DHCR has the authority to allow petitioner to submit a late response if good cause is shown. In his petition, petitioner alleges that he was unable to answer East End’s deregulation petition in a timely and full fashion due to his serious medical condition.

Specifically, petitioner alleges in his affidavit that he tested positive for the human immunodeficiency virus (HIV) in 1983. Petitioner states that since then, he has developed full-blown AIDS and suffers from many illnesses related to HIV and AIDS, including renal failure, Kaposi's sarcoma, colorectal cancer, HIV-related pneumonia and sleep apnea. He also alleges that his illnesses require intensive treatments over sustained periods and very often he has to remain in the hospital for prolonged periods of time for tests and treatments, such as chemotherapy. Petitioner alleges that his illnesses, combined with memory loss which he began to experience after a 1997 attack in his home, make it difficult for him to engage in ordinary activities such as paperwork and record-keeping without assistance. He alleges that he "intended to file [his] PAR with the DHCR as soon as possible [after receiving notice of the Order of Deregulation], but [he] first had to endure about three months of aggressive chemotherapy to treat [his] Kaposi's sarcoma."

Petitioner also includes with his petition a letter from Peter Sultan, the Social Work Supervisor at New York Presbyterian Hospital, who states that petitioner "receives his primary medical care at the Center for Special Studies (CSS)", the hospital's HIV service and that maintaining petitioner's housing which is near the hospital is needed to provide petitioner access to the hospital's services. Further, petitioner alleges that he is under-income as his most recent earnings for tax years 2008-2011 are as follows: in 2008, petitioner earned \$10,139.00; in 2009, petitioner earned \$17,769.00; in 2010, petitioner earned \$17,646.00; and in 2011, petitioner earned \$11,800.00. These yearly earnings are well below the \$175,000.00 statutory threshold. Petitioner also submitted evidence that he is receiving benefits from the Human Resources Administration ("HRA") in order to make his monthly rent payments.

