New York Law Journal
Real Estate Trends
WWW.NYLJ.COM
An ALM Publication
VOLUME 258—NO. 02
WEDNESDAY, JULY 5, 2017

RENT REGULATION

Luxury Deregulation: Excuses, Excuses


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It is often the case that a tenant defaults in a luxury deregulation proceeding, and that the Division of Housing and Community Renewal's (DHCR) rent administrator issues an order of deregulation. Although the governing statute appears to mandate a default if the tenant fails to answer, or answers late, Court of Appeals authority authorizes DHCR to forgive a default for "good cause shown." As the DHCR orders discussed below establish, DHCR will frequently forgive tenant defaults and remand the proceeding to the Rent Administrator for a determination on the merits.

DHCR's capacity for forgiveness, however, is not unlimited. In several recent cases, DHCR has refused to vacate a default, and has ordered that the apartment be deregulated.

The Statute

Section 26-504.3 of the Rent Stabilization Law provides for the luxury deregulation of apartments renting above the rent deregulation threshold (currently $2,700 or more per month) where the tenant's income exceeds the income threshold (currently $200,000 per year). Section 26-504.3(c)(1) states that DHCR shall serve the owner's petition for deregulation on the tenant, and that the tenant shall have 60 days to answer the petition and provide DHCR with information allowing the Department of Taxation and Finance to verify the tenant's income. Section 26-504.3(c)(3) states that if the "tenant or tenants fail to provide the information required pursuant to subparagraph one of this subdivision, [DHCR] shall issue… an order providing that such housing accommodation shall not be subject to the provisions of this law upon the expiration of the current lease."

Inevitably, some tenants fail to respond within 60 days, while others fail to respond at all. DHCR initially interpreted the statute as requiring the agency to issue default orders of deregulation in all such instances. In the litigation that followed, the Appellate Division, First Department, initially upheld DHCR's policy, ruling that deregulation was mandated where the tenant failed to abide by the statute. See *Nick v. New York State Div. of Hous. & Community Renewal*, 244 AD2d 299 (1st Dept. 1997); *Bazbaz v. New York State Div. of Hous. & Community Renewal*, 246 AD2d 388 (1st Dept. 1998).

Thereafter, the First Department modified its stance, holding that it was arbitrary and capricious for DHCR to deregulate an apartment

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where the default was excusable or where the delay was de minimus, especially where the tenant's income did not appear to justify luxury deregulation. See *Elkin v. Roldan*, 260 AD2d 197 (1st Dept. 1999).

In *Dworman v. New York State Div. of Hous. & Community Renewal,* 94 NY2d 359 (1999), the Court of Appeals held that DHCR had authority under the governing statute to forgive a tenant who files a late answer to a owner's petition for deregulation, provided that the tenant establishes "good cause." The Court of Appeals added that "DHCR may reasonably interpret 'good cause' to mean more than 'any cause.'" 94 NY2d at 374.

Default Forgiven

DHCR is most likely to forgive a default where the tenant is elderly, mentally disabled, physically disabled, or all three. For example, in *Matter of Rae*, DHCR Adm. Rev. Dckt. No. UK410006-RP, issued April 5, 2017, the 85-year-old tenant claimed that she had good cause for her default "in that she suffers from the onset of age related forgetfulness and severely deteriorated mental capacity and memory function, as well as mild dementia and physical deterioration, which may have caused her not to file a timely answer below." The tenant also submitted tax returns for the years in question purporting to show that her income was below the statutory threshold for deregulation. DHCR vacated the defendant and remanded the matter for a determination on the merits.

In Matter of Curtis, DHCR Adm. Rev. Dckt. No. EQ-410076-RT, issued December 20, 2016, the defaulting tenant submitted with her PAR "a letter from her psychiatrist setting forth various psychological and physical ailments," along with the psychiatrist's conclusion that "these conditions affected her ability to address her affairs." The tenant also submitted with her PAR copies of her income tax returns for the relevant years. DHCR, citing the psychiatrist's letter, forgave her default and remanded the matter to the Rent Administrator. In so ruling, DHCR notably observed that "DHCR records reveal that the tenant submitted an answer to DHCR in each of the five prior luxury decontrol proceedings in which she had been requested to do so." This, according to DHCR, constituted further evidence that the tenant had not intended to default.

> DHCR will frequently forgive tenant defaults. The division's capacity for forgiveness is not unlimited, however. In several recent cases, it has refused to vacate a default, and has ordered that the apartment be deregulated.

Other cases wherein DHCR has recently reopened defaults based on psychological and/or physical ailments include Matter of Levy, DHCR Adm. Rev. Dckt. No. ER-410069-RT, issued January 24, 2017 (tenant alleged that he suffered from a progressive lung disease that has "adversely affected his mental capacity and memory, has impaired his ability to concentrate, and has rendered him unable to fully sort out his financial issues"); *Matter of Corbitt*, DHCR Adm. Rev. Dckt. No. EO-410032-RT, issued June 15, 2016 (tenant alleged unspecified "personal medical issues which affected her ability to respond to the notice and submit an answer"); *Matter of Johnson*, DHCR Adm. Rev. Dckt. No. DU-410067-RT, issued Dec. 21, 2015 (tenant alleged degenerative eye disease which "made reading extremely difficult and sometimes impossible"); *Matter of Glass*, DHCR Adm. Rev. Dckt. No. CP-410058-RT, issued July 9, 2015 (tenant submitted doctor's letter confirming that tenant suffered from dementia and could not manage her affairs).

A different scenario presented itself in *Matter of Barry,* DHCR Adm.

Rev. Dckt. No. FM-410004-RP, issued Feb. 13, 2017. There, in the proceeding before the rent administrator, the tenant repeatedly stated that she had been unable to file the required tax returns due to problems resulting from her employer's protracted closing and going out of business. After so informing DHCR, the tenant did not respond to three additional DHCR notices. DHCR initially denied the tenant's petition for administrative review (PAR), but was directed in the subsequent Article 78 proceeding to determine the matter on the merits, including a review of the 2009 and 2010 tax returns that tenant had now filed. Although DHCR has issued no final determination in the matter, it appears, at least to Supreme Court, that a refusal to respond to DHCR notices is justified if a tenant's employer somehow prevents the tenant from filing tax returns.

Default Not Forgiven

This is not to say the DHCR will forgive any default. In *Matter of Kowalska*, DHCR Adm. Rev. Dckt. No. DW-410012-RT, issued April 13, 2016, the tenant, inter alia, asserted that she had in fact timely answered in the deregulation proceeding. Notwithstanding, she could not prove that she had done so. DHCR's commissioner affirmed the default order of deregulation, writing:

> The Commissioner notes that in the case of *In Re Szaro v. New York State DHCR*, 13 AD2d 93, 786 N.Y.S.2d 37 (1st Dept., 2004), the New York State Appellate Division upheld the DHCR regulations requiring tenants to retain proof that an answer to an owner's petition for deregulation has been submitted to the agency.
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> The Commissioner further notes that in order for any governmental agency to properly function, there must be a presumption of regularity as to its mailing procedures and its receipt of mail. The mere assertion by the tenant without any of the specified required proof of mailing that something was mailed to the agency is insufficient to rebut the presumption of regularity.

DHCR is most likely to forgive a default where the tenant is elderly, mentally disabled, physically disabled, or all three.

See also, *Eisenberg v. New York State Div. of Hous. & Community Renewal*, 62 AD3d 494 (1st Dept. 2009).

In *Matter of Ferris*, DHCR Adm. Rev. Dckt. No. DN-910025-RT, issued July 8, 2015, the tenant failed to submit appropriate income tax information for 2009 and 2010. DHCR rejected the tenant's contention that she was "confused" by the fact that there were two pending luxury deregulation cases with DHCR, and that "she thought the 2012 tax return was required." DHCR noted that "[t]he five notices from the rent administrator specifically referred to one docket number (ZE910419LD) and unambiguously requested the 2009 and 2010 tax information."

Finally, in *Matter of Goldman*, DHCR Adm. Rev. Dckt. No. EN-410010-RT, issued May 3, 2016, and Matter of Sheinin, DHCR Adm. Rev. Dckt. No. CL-410003-RT, issued July 22, 2015, DHCR refused to vacate defaults simply because the tenant alleged that his or her income was below the statutory threshold for deregulation. Thus, DHCR's policy appears to be that where tenant does not adequately explain why he or she failed to answer a petition for deregulation, the mere assertion that the tenant's income is insufficient will not merit opening a default.