

To be argued by:

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New York Supreme Court

APPELLATE DIVISION—FIRST DEPARTMENT

ALEX MOREIRA and MAMIE CHAMBERS,

Plaintiffs-Respondents/Cross-Appellants,

—against—

DONALD M. HALPERIN, as Commissioner of the New York
State Division of Housing and Community Renewal,

Respondent-Appellant/Cross-Respondent.

**REPLY BRIEF FOR RESPONDENT-APPELLANT/
CROSS-RESPONDENT**

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

In the Matter of the Application of
ALEX MOREIRA and MAMIE CHAMBERS,

Plaintiffs-Respondents,

- against -

DONALD M. HALPERIN, as Commissioner
of the NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL,

Defendant-Appellant.

REPLY BRIEF OF DEFENDANT-APPELLANT
DIVISION OF HOUSING AND COMMUNITY RENEWAL

PRELIMINARY STATEMENT

This brief is in reply to respondents' answering brief and in answer to their cross-appeal with regard to the ruling by the Court below that its decision is to apply prospectively.

Respondents' brief misses what is a key factor in this case - that the specific statutory provisions in question are designed to establish a mechanism for the collection of registration fees from by the City of New York. DHCR, in Policy Statement 92-1, has devised a reasonable mechanism to assure fee collection by the City. Respondents have not shown that DHCR lacks discretion under the law to have issued Policy Statement 92-1, or that the policy

statement constitutes an unreasonable interpretation of the law. As this reply brief will demonstrate, the points made by respondents are lacking in merit.

POINT I

RESPONDENTS LACK STANDING TO CHALLENGE POLICY STATEMENT 92-1

Respondents claim that to deny them standing "would be to erect 'an impenetrable barrier' to judicial scrutiny." This is not so. The real party in interest is the City of New York. The statutory provisions in question and the DHCR Policy Statement issued thereunder are designed to establish a mechanism for the collection of registration fees by the City of New York. The City, if it believed itself to be aggrieved, would have standing to sue.

DHCR did not deny in its main brief that respondents have an economic interest at stake, the anticipation of receiving a windfall. However, as shown in DHCR's main brief, that interest is not the one cognized by the statute in question. As made plain in Buckingham Apartments, Inc. v. Doody, 165 A.D.2d 855, 560 N.Y.S.2d 318 (2nd Dept. 1990), a party may not have standing even though he or she is economically affected by a governmental action where that economic interest is not within the scope of interests covered by the law involved.

Respondents claim to be within the statutory zone of interest "in enforcing the law and paying affordable rents at levels no greater than the lawful amounts". With regard to enforcing the law, as already noted, the party with the requisite interest to

have standing would be the City of New York, not the within respondents suing on the basis of their individual interests. With regard to paying affordable rents, though the prevention of unreasonable rent increases is the central purpose of the Rent Stabilization Law, the rent freeze penalty for non-payment of registration fees is not related to that overriding statutory purpose. In sum, respondents having not shown that their interests falls within that zone which would give them standing.

POINT II

THE RESPONDENTS' ACTION SHOULD BE DISMISSED BECAUSE OF LACHES.

In arguing that there was no prejudice or reliance on Policy Statement 92-1, respondents ignore the fact that their delay would result in an accumulation of penalties against owners, including the inability to collect regular rent guideline increases. This, of course would result in an increase of rent refunds to tenants to the substantial detriment of owners who relied on DHCR's policy statement. There is prejudice sufficient to warrant dismissal of the action on the ground of laches.

As for respondents attempt to create the impression that the policy statement was merely an internal document, this attempt ignores the fact that issuance of policy statements, operational bulletins, and similar documents have been utilized by DHCR and its predecessor rent agencies for decades as a means of publicizing and disseminating significant policy determinations. See e.g., Rasch, New York Landlord and Tenant, Rent Control and Rent Stabilization,

2d ed. (1987) et passim. Moreover, with regard to Policy Statement 92-1 itself, even the Record on Appeal, pages 120-123, has evidence of its wide dissemination.

As discussed more fully in DHCR's main brief, the delay in challenging the policy statement is most certainly prejudicial to the DHCR and the real estate industry. The respondents' action should be dismissed on the ground of laches.

POINT III

**POLICY STATEMENT 92-1 CONFORMS WITH
THE REQUIREMENTS OF THE RENT LAWS
AND CONSTITUTES A REASONABLE INTER-
PRETATION OF THOSE LAWS.**

Respondents argue that Policy Statement 92-1 is out of harmony with and contravenes the plain language of the statute, and that the statute in question is "strikingly similar" to the statutory provision construed by the Court in Tenants of Hyde Park Gardens v. DHCR, 140 A.D.2d 351, 527 N.Y.2d 841 (2d Dept. 1988), aff'd., 73 N.Y.2d 998, 541 N.Y.S.2d 345 (1989), which mandates a rent reduction upon DHCR's finding a failure to maintain services. These arguments have no merit.

The registration fee penalty provision differs in an important respect from the services rent reduction provision construed in Tenants of Hyde Park Gardens in that the timing of the registration penalty is left open; the Legislature does not specify at what point in time an owner is deemed to have failed to pay the fee. That is a factual question left open to the administrative agency to determine; and as DHCR is the agency given authority under

Section 8628(d) of ETPA with regard to compliance, it, not the City's Department of Finance, is vested with the authority to determine when an owner has been deemed to fail to pay the fee. Contrary to the ruling of the Court below, the statute does not require the penalty to go into effect "immediately". DHCR's policy statement does not violate the plain language of the statute; nor is it out of harmony with the statute. Indeed, it is a reasonable exercise of the broad discretion provided to DHCR by the Legislature. For example, Section 26-516(b) of the Rent Stabilization Law provides:

In addition to issuing the specific orders provided for by other provisions of this law, the state division of housing and community renewal shall be empowered to enforce this law and the code by issuing, upon notice and a reasonable opportunity to be heard, such other orders as it may deem appropriate.

Respondent complains that the policy statement "does not require DHCR to send notices to delinquent landlords at any particular time". This is inaccurate. The policy statement requires DHCR to send notice to the landlord upon being advised of non-payment by the City of New York. (Record: 122) If DHCR has not sent out notices, the onus is on the City for not having provided the necessary information to DHCR. Again, the key is that the fees are due to the City, not DHCR. DHCR has not taken action under the policy statement, except with regard to one owner, because the City has not forwarded to DHCR information regarding non-payment of registration fees by owners.

Respondents complain that DHCR raises "new policy arguments" for the first time on appeal. To the contrary, DHCR's "new policy arguments" are simply an elaboration of arguments previously raised, based on a common-sense analysis of the likely effects on the City's housing stock should the lower Court's decision be upheld. DHCR has not raised new issues but only made more transparent the consequences of the lower Court's decision. When a question of statutory interpretation is before a court, it is of vital importance that the policy consequences of the competing interpretations be evaluated. The avoidance of unintended consequences is one of the guides to statutory interpretation.

Finally, contrary to respondents' argument, this Court should defer to DHCR's interpretation of the statute if it is found to be reasonable. This case does not involve a determination "of pure statutory construction", but rather involves interpretation where the agency's expertise is necessary. DHCR's main brief, pages 23-26 details the administrative complexities involved in enforcing the registration fee provisions. The Legislature left open significant areas of agency discretion with regard to compliance, areas in which DHCR's expertise is of prime importance. There should be deference in the absence of unreasonableness.

POINT IV

WERE THIS COURT TO UPHOLD THE NULLIFICATION OF POLICY STATEMENT 92-1, THERE IS NO REASON TO REVERSE THE PROSPECTIVE EFFECT OF THE RULING OF THE COURT BELOW.

Under the state law standards enunciated by respondents, were the ruling of the Court below to be upheld, it properly gave that ruling prospective effect only. The New York Court of Appeals in Gurnee v. Aetna Life and Casualty Co., 55 N.Y.2d 184, 448 N.Y.S. 2d 145, 147 (1982), relied upon a United States Supreme Court case which "outlined three factors to consider in determining if a ruling should be prospective only":

"First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed" (404 U.S., at p. 106, 92 S.Ct., at p. 355). Second, the prior history of the rule at issue and the impact of retroactive application upon its purpose and effect should be considered. Finally, the court should take into account any inequity that would be created by retroactive application (id.).

The Court of Appeals in Gurnee also stated that rulings should be given prospective effect "where there has been such a sharp break in the continuity of law that its impact will 'wreak more havoc in society than society's interest in stability will tolerate'".

In light of these factors the Court below properly gave its ruling prospective effect. First, the ruling of the Court in effect did overrule "clear past precedent". That precedent was not a prior court ruling, but DHCR's Policy Statement 92-1, a policy

statement which constituted an official interpretation of the law and had legal effect until nullified by the Court. That policy statement has now been "overruled" or nullified. The Court below also decided a question of first impression, the validity of DHCR's policy statement. And most certainly, owners of rent stabilized buildings, as well as DHCR, relied upon that policy statement to their detriment until it was nullified.¹

Second, the impact of retroactive application of the Court's ruling would go way beyond the purpose of the ruling, which is to mandate immediate rent freezes upon non-payment of registration fees. The retroactive application of the ruling would likely involve rent rollbacks and rent refunds going back a decade or more in thousands of rent stabilized buildings, thus seriously endangering the legislative goal of preserving the housing stock.

Third, the inequity of such a result is clear when weighed against the absence of harm to tenants of applying the ruling prospectively, other than their getting much less of a windfall.

Finally, this is clearly a case "where there has been such a sharp break in the continuity of law that its impact will 'wreak more havoc in society than society's interest in stability will tolerate'". The chaos which would be caused is described in DHCR's main brief.

The United States Supreme Court rulings on retroactivity which are discussed in respondent's brief are not applicable to the case

¹ As noted above, DHCR policy statements are widely disseminated and relied upon by the public.

at bar. As the Court of Appeals held in People v. Mitchell, 80 N.Y.2d 519, 591 N.Y.S.2d 990, 993 (1992):

If no Federal constitutional principles are involved, however, the question of retroactivity is one of State law. The Supreme Court has no concern with the uniformity of our law and if only a local question is presented, the "state courts generally have the authority to determine the retroactivity of their own decisions" (see, American Trucking Assns. v. Smith, 496 U.S. 167, 177, 110 S.Ct. 2323, 2330, 110 L.Ed.2d 148)

As the question in the case at bar is purely local, the retroactivity question should be based on State law. Under State law, it was proper for the Court below to apply its ruling prospectively only.

CONCLUSION

For all of the foregoing reasons, this Court should vacate the judgment of the court below, deny respondent's motion for summary judgment, grant DHCR's cross-motion for summary judgment, and award such other and further relief as is deemed just, or in the alternative, uphold the lower Court's ruling that its judgment is to be effective prospectively.

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