

**Matter of Extell 607 W. 137th St., LLC v New  
York State Div. of Hous. & Community  
Renewal**

2007 NY Slip Op 31329(U)

May 22, 2007

Supreme Court, New York County

Docket Number: 0117625/2006

Judge: Kibbie F. Payne

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

PRESENT: KIBBIE F. PAYNE  
*Justice*

PART 4

In the Matter of the Application of

EXTELL 607 WEST 137<sup>th</sup> STREET, LLC,

INDEX NO. 117625/06

Petitioner,

MOTION DATE 3/29/07

For a Judgment pursuant to Article 78 of the New York Civil Practice Law and Rules,

- v -

MOTION SEQ. NO. 001

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

MOTION CAL. NO. \_\_\_\_\_

Respondent.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_


PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, this CPLR article 78 petition is denied and the proceeding is dismissed in accordance with the accompanying memorandum.

This judgment has been entered by the County Clerk and notice of entry shall be mailed to the person. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1415).

Dated: May 22, 2007

  
 J.S.O.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 4

In the Matter of the Application of  
EXTELL 607 WEST 137<sup>th</sup> STREET LLC,

Index No. 117625/06  
Motion Seq. 001

JUDGMENT

Petitioner,

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

-against-

NEW YORK STATE DIVISION OF HOUSING AND  
COMMUNITY RENEWAL,

Respondent.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B)

KIBBIE F. PAYNE, J.:

In this CPLR article 78 proceeding, petitioner Extell 607 West 137<sup>th</sup> Street, LLC seeks a judgment annulling the determination of respondent New York State Division of Housing and Community Renewal, which determined that non-party Hildeliza Vinuela is entitled to succession rights and that the maximum collectable rent on the subject apartment is \$448.00 (see Rent and Eviction Regulations [9 NYCRR] § 2204.6 [d]; see also Rent Control Law [Administrative Code of the City of New York] § 26-403.2). Respondent opposes the petition on the ground that the determination is rationally based, and not arbitrary or capricious. For the reasons that follow, the petition is denied and the proceeding is dismissed.

In February 2001, non-party Hildeliza Vinuela (Vinuela) filed a complaint of rent overcharge with respondent New York State Division of Housing and Community Renewal (DHCR) against petitioner's predecessor Cromwell Associates (Cromwell). Vinuela alleged that, on January 22, 2001, Cromwell wrongfully changed the status of her apartment from rent controlled to rent stabilized, raising her rent from \$429.91 to \$588.93. Vinuela further alleged that she was the prime tenant of the subject apartment, having moved in on September 26, 1962 to live with her sister Teresa Hernandez (Hernandez) and her sister's husband Luis Ayala (Ayala). Ayala was the tenant of record. However, Vinuela contended that he moved to Cuba in 1963, leaving his wife in the apartment with her. In 1969, Hernandez moved out and Vinuela remained in the apartment; she continued to pay the rent in Ayala's name.

Cromwell sought to have the complaint dismissed on the ground that Vinuela was not the record tenant. It submitted to DHCR a surrender of apartment form that Hernandez and Ayala executed on January 22, 2001. The form provided "we have vacated the apartment on 01 day of January, 2000, and hereby voluntarily surrender possession of same to the owner." Cromwell alternatively argued that, even if Vinuela was entitled to succession rights, she would only be entitled to succession rights beginning in 2000 when her sister vacated the apartment.

Cromwell contended that Hernandez was the first successor to Ayala as his wife. Cromwell maintained that Vinuela could not succeed Ayala as they did not have a family relationship pursuant to the Rent and Eviction Regulations § 2204.6 [d]."<sup>1</sup>

The Rent Administrator denied Cromwell's application to dismiss the overcharge complaint, initiating an administrative proceeding to determine the status of the subject apartment, and consolidating that proceeding with the overcharge complaint proceeding. Vinuela and Cromwell submitted documents in support of their respective positions. Thereafter, the rent administrator determined that the maximum collectable rent on the apartment was \$448.00 per month, and that Vinuela is eligible for succession rights pursuant to the Rent and Evictions Regulations § 2204.6 (d). Cromwell filed a petition for administrative review (PAR), contending that Vinuela failed to establish that she was a family member of Ayala or that she had a two-year occupancy with him to qualify as a first successor. Cromwell argued that Vinuela "only has rights to succeed in this apartment [through] her sister Teresa Hernandez . . .," who moved out in 2000. Claiming that Vinuela was a successor as of 2000, Cromwell

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<sup>1</sup> The Rent and Eviction Regulations § 2204.6 [d] [3] [i] provides in part: "'family member' us defined as husband, wife, son, daughter, stepson, stepdaughter, father, mother, stepfather, stepmother, brother, sister, grandfather, grandson, granddaughter, father-in-law, mother-in-law, son-in-law, or daughter-in-law of the tenant."

contended that it was entitled to increase the maximum collectable rent.

Upon review, the commissioner, granted the petition in part, finding that Vinuela was the second successor tenant after June 19, 1997 and that the maximum rent was therefore \$537.60 per month (see Rent Control Law [Administrative Code of the City of New York] § 26-403.2).<sup>2</sup> The commissioner remanded the proceeding to the rent administrator for a determination consistent with his finding. In support of his determination, the commissioner relied on the surrender of apartment form Hernandez and Ayala executed and Vinuela's payment of rent in Ayala's name until 2001.

Vinuela commenced a CPLR article 78 proceeding, challenging the commissioner's order and opinion. On motion of DHCR, this court remanded the matter back to DHCR for review of all of petitioner's submissions to the agency (see Vinuela v Calogero, Sup Ct, NY County, Nov. 18, 2003, York, J., Index No. 402627/03).

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<sup>2</sup> Administrative Code § 26-403.2 provides in pertinent part: "Notwithstanding any provision of this law to the contrary in the case where all tenants occupying the housing accommodation on the effective date of this section [June 19, 1997] have vacated the housing accommodation and a family member of such vacating tenants is entitled to and continues to occupy the housing accommodation subject to the protections of this law, if such accommodation continues to be subject to this law after such family member vacates, on the occurrence of such vacancy the maximum collectable rent shall be increased by a sum equal to the allowance then in effect for vacancy leases for housing accommodations covered by the rent stabilization law . . . ."

Upon remand, the commissioner, among other things, denied Cromwell's PAR, modified its previous order and opinion accordingly and affirmed the rent administrator's determination that Vinuela's maximum collectable rent should be \$448.00. The commissioner reasoned that Hernandez continuously resided in another apartment since 1979, vacating the subject apartment prior to June 19, 1997 and leaving Vinuela therein. Thus, the commissioner found that Cromwell was not entitled to a 20% increase on the maximum collectable rent pursuant to Rent Control Law § 26-403.2.

The commissioner found incredible the statement in the surrender of apartment form that Hernandez and Ayala left the apartment unoccupied in 2000. The commissioner determined as truthful Vinuela's allegations that her sister signed the surrender of apartment form "as a condition set forth by the landlord for [Vinuela] to be given a lease for the subject apartment in her own name . . . ." Vinuela claimed that she needed a lease in her name to apply for Senior Citizen Rent Increase Exemption. When she informed Cromwell of that need, Cromwell requested the surrender of apartment form in exchange for a lease in her name. Based on credibility determinations, the commissioner found that Vinuela "was not the second successor tenant to the rent-controlled subject apartment after June 19, 1997, and that the subject apartment's maximum collectible rent

should not have been increased in an amount equal to the vacancy allowance for rent-stabilized housing accommodations" (see Rent Control Law [Administrative Code of the City of New York] § 26-403.2).

Petitioner Extell 607 West 137<sup>th</sup> Street LLC, successor to Cromwell, commenced this CPLR article 78 proceeding seeking a judgment annulling the commissioner's order and opinion and holding Vinuela to be a second successor tenant subsequent to June 19, 1997. DHCR opposes the application on the ground that the commissioner's determination was not arbitrary and capricious. CPLR 7803 (3) authorizes a challenge of an agency determination only where it was "made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . . ." It is well-settled that judicial review in an article 78 proceeding is thus limited to whether the determination was rationally based (see generally Matter of Hughes v Doherty, 5 NY3d 100, 105 [2005]; see also Matter Pell v Bd. of Education, 34 NY2d 222, 231 [1974]).

However, "[a]n administrative agency's determination need not be the only rational conclusion to be drawn from the record" (Matter of Jennings v New York State Office of Mental Health, 90 NY2d 227, 239 [1997]). "[T]he existence of other, alternative rational conclusions" is no ground for annulment of an administrative determination (id.). "[W]here from the evidence

either of two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely upon the [administrative agency]. The courts may not weigh the evidence or reject the choice made by such agency where the evidence is conflicting and room for choice exists'" (Matter of Berenhaus v Ward, 70 NY2d 436, 444 [1987] [citation omitted]).

On the administrative record, there exists conflicting evidence of when Hernandez moved out of the subject apartment and hence when Vinuela's succession rights began. Thus, applying the required principles of CPLR article 78 review, the court will not disturb the commissioner's rational credibility determinations. To the extent that petitioner argues the commissioner determined that Vinuela was the first successor to Ayala, it misreads the opinion and order. The commissioner's opinion explicitly provides that the only issue before him was "whether the landlord was entitled to collect the allowance in effect for vacancy leases for rent-stabilized housing accommodations based upon the finding that [Vinuela] was the second 'family member' (second successor) entitled to succession rights to the rent-controlled subject apartment after June 19, 1997, based upon the applicable provisions enacted pursuant to the Rent Regulation Reform Act of 1997" (emphasis added). Key in the agency's determination was the date in which Vinuela's sister vacated the subject apartment.

The court has reviewed petitioner's remaining contentions and finds them without merit. Accordingly, it is

ORDERED that the petition is denied and the proceeding is dismissed.

The foregoing constitutes the decision and judgment of the court.

DATED: *May 22, 2007*

A handwritten signature in black ink, appearing to read "KFP", is enclosed within a hand-drawn circle. The signature is positioned above a horizontal line that serves as a separator between the signature and the printed name below.

KIBBIE F. PAYNE, J.S.C.