

**Matter of Grimm v State of N.Y. Div. of
Hous. & Community Renewal**

2007 NY Slip Op 34184(U)

December 13, 2007

Supreme Court, New York County

Docket Number: 0105441/2007

Judge: Shirley W. Kornreich

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

PRESENT: JUDGE SHIRLEY WERNER KORNREICH

PART 54

Index Number : 105441/2007

GRIMM, SYLVIE

vs N.Y.S.D.H.C.R.

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 9/20/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-6

7

+ Administrative Return

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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).

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.

Dated: 12/12/07

HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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

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

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

Index No. 105441/07

SYLVIE GRIMM,

**DECISION, ORDER
AND JUDGMENT**

Petitioner,

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

-against-

STATE OF NEW YORK DIVISION OF HOUSING
AND COMMUNITY RENEWAL OFFICE OF RENT
ADMINISTRATION,

Respondent,

151 OWNERS CORP.,

Intervening-Respondent.

-----X

SHIRLEY WERNER KORNREICH, J.

In this Article 78 proceeding, petitioner, a rent stabilized tenant, challenges a February 21, 2007 determination of respondent Division of Housing and Community Renewal ("Determination"), which denied the tenant's Petition for Administrative Review ("PAR"). The Determination adhered to the June 21, 2006 determination of the Rent Administrator ("RA Decision"), which denied petitioner's rent overcharge complaint. Petitioner filed the overcharge complaint on July 19, 2005.

Petitioner entered into possession of apartment 7 ("Apartment") in the building located at 151 Ludlow Street, New York, NY ("Building"), under a one-year lease commencing April 1,

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2004 at a monthly rental of \$1,450.00. Ownership of the Building was transferred to the current owner, Intervening-Respondent, 150 Owners Corp., in October of 2004. Petitioner's rent was increased to \$1,500.75 upon the expiration of her initial lease.

The current owner admits that the prior owner of the Building "failed to file registrations for several years." When the current owner bought the Building, the last registration statement for the Apartment, which was filed in 1999 ("1999 Registration"), contained a legal regulated rent of \$578.96 and listed the Apartment as rent stabilized. Administrative Return A-8, Exh. B. Subsequently, the current owner filed annual registrations for the years 2001 through 2005.

The tenants in occupancy of the Apartment immediately preceding petitioner, were Tracy Hartman and John Bozak. They lived in the Apartment from April 2000 through March 2004. Their initial monthly rent was \$1,450.00. According to Mr. Bozak's affidavit, which was submitted to the Rent Administrator, the prior owner did not give him a rent stabilized lease rider, never provided him with annual registration statements and did not explain how their initial monthly rent was calculated. Administrative Return A-22, Exh. E. An affidavit submitted by Ms. Hartman confirmed that the rent for the Apartment was \$1,450 during her tenancy. Administrative Return A-19, Exh. B.

The Determination and the RA Decision were based strictly upon the 2001 registration statement. The Determination cited §2526.1(a)(2) of the Rent Stabilization Code, which provides as follows:

... no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed; additionally: ...

(ii) the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this section, and section 2522.3 of this Title, shall not be examined.

9 NYCRR §2526.1; *see also* C.P.L.R. §213-a.

The base date in this case was July 19, 2001, four years prior to the filing of the overcharge complaint. Neither the Determination nor the RA Decision specifically rejected petitioner's claim that there was evidence of fraud. Rather, the Determination reasoned that because the prior tenants actually resided in the Apartment, there was no illusory tenancy. Hence, neither the Determination nor the RA Decision discussed whether petitioner's evidence demonstrated that the registration statement in effect on the base date was unreliable, *i.e.*, that the rent for the Apartment increased 250% from 1999 to 2000 and that the immediately preceding tenants did not receive a rent stabilized lease rider or annual registration statements. The Determination simply calculated the rent assuming without discussion that the registration on the base date was legitimate.

In *Thornton v. Baron*, 5 N.Y.3d 175 (2005), the Court of Appeals held that where there are no reliable rent records, the rent must be established using the default formula – the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the base date. The court in *Drucker v. Mauro*, 30 A.D.3d 37, 40 (1st Dept. 2006), explained the reasoning behind the *Thornton* holding:

a landlord who can extract an unlawful rent for a sufficiently long period of time may be able to establish the stabilized rent at the unlawful level, to the detriment of a future tenant. This is so because the courts are generally prohibited from examining the rental history of an apartment beyond a four-year period (CPLR213-a; *see Thornton v. Barin*, ...) Thus, an illegal agreement can result in a future tenant having to pay more than the legal stabilized rent for a unit, a prospect which militates in favor of voiding agreements such as this in order to

prevent abuse and promote enforcement of lawful regulated rents. (*citations omitted*)¹

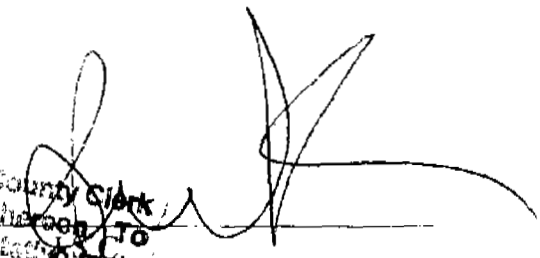
In light of *Thornton* and *Drucker*, the Rent Administrator and DHCR should have considered the issue of whether the registration statement in effect on the base date was reliable. Where an administrative determination is made without consideration of the central issue, remand for *de novo* review is appropriate. *Matter of Blackmer v. NYS Div. of Housing and Community Renewal*, 141 A.D.2d 334 (1st Dept. 1988); *Feickert v. McGoldrick*, 119 N.Y.S.2d 301, 304-305 (Sup. Ct. Kings Co. 1953) (remand where determination arbitrarily failed to consider issue of whether transfer of property was made to avoid rent regulations). Accordingly, it is

ORDERED, ADJUDGED and DECREED that the petition is granted, the February 21, 2007 Determination of the DHCR is hereby vacated and the matter is remanded to DHCR for reconsideration in accordance with this decision.

Dated: December 12, 2007

ENTER:

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



¹ In *Drucker*, the landlord and tenant had stipulated to a rent that violated the rent guidelines' allowances as part of a settlement. The tenant in *Drucker* had agreed to the subversion of the rent laws, and it was he, not an unsuspecting future tenant, who was claiming the overcharge. Thus, the equities in *Drucker* were less favorable to the landlord's position than that of respondent here.