

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

2011 NY Slip Op 30026(U)

January 4, 2011

Supreme Court, New York County

Docket Number: 106098/2010

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

SIGNE BAUMANE and MATTHEW LEIKER,

Petitioners,

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL and
165 WILLIAM STREET, LLC,

Respondents.

INDEX NO. 106098/2010

MOTION DATE Aug. 17, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO. 9

The following papers, numbered 1 to 5 were read on this motion Article 78


	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2-3</u>
Replying Affidavits _____	<u>4</u>
Sur-Reply Affidavits _____	<u>5</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion pursuant to CPLR Article 78 is decided in accordance with the accompanying decision and order.

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 115).

Dated: January 4, 2011


O. PETER SHERWOOD, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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 61

-----X

In the Matter of the Application of
SIGNE BAUMANE and MATTHEW LEIKER,

DECISION, ORDER
AND JUDGMENT

Petitioners,

Index No.: 106098/2010

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

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL and
165 WILLIAM STREET, LLC,

Respondents.

-----X

O. PETER SHERWOOD, J.:

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
11B).

In this proceeding pursuant to CPLR Article 78, commenced by two individuals who are subtenants of a rent stabilized loft apartment that was leased to Mel Geary (Geary), petitioners seek a judgment annulling an order of the New York State Division of Housing and Community Development ("DHCR") which order vacated an order of the Rent Administrator directing, *inter alia*, the landlord of the building located at 163-165 William Street, New York, New York to give petitioners and other identified sub-tenants vacancy leases.

The underlying facts are described in the Decision and Order of Justice Judith J. Gische of this court, dated August 8, 2008 in *165 William Street, LLC v. Baumane*, Supreme Court, New York Co., Index No. 116050/2007 and need not be recounted here except as necessary to an understanding of the issues before this court. It appears that Wanda Coffee moved into the loft apartment in 1978 and lived there with Geary until her death in 1997. Geary continued renting the apartment until his death in July 2007. It is alleged that at sometime around 1998 Geary subdivided the apartment and sub-let it. At the time of his death, he had a rent stabilized lease on the loft apartment expiring December 2007.

Following Geary's death, the subtenants, including petitioners tendered payment of the rent for August and September 2007 to the landlord. The checks were cashed. In September 2007, the subtenants wrote to the landlord advising of Geary's death and inquiring about a renewal lease. Later that month petitioners filed a complaint with DHCR alleging that they are entitled to a renewal

lease but that the landlord refused to give it to them. They contended that having permanently moved out of the loft apartment in 1998, Geary was an illusory tenant who charged more than the legal rent for the apartment.

The landlord then commenced an action against DHCR and the subtenants, including petitioners, for a declaration that there was no illusory tenancy, that the individual subtenants have no right to a renewal lease in their own names and therefore are illegal occupants without rights to continue in possession of the apartment. Justice Gische refused the landlord's request for a preliminary injunction and deferred to DHCR to decide the complaint.

By order dated August 10, 2009, the Rent Administration directed the landlord to give petitioners a vacancy lease and set a maximum allowable rent. The landlord filed a Petition for Administrative Review ("PAR") of the order. By order dated November 27, 2009, in a separate rent proceeding, the Rent Administrator directed the Estate of Mel Geary to give refunds to the subtenants. No PAR was filed against that order.

In an opinion and order dated March 12, 2010, on the PAR, the DHCR Commissioner revoked the order of the Rent Administrator. The Commissioner found that the record does not support the Rent Administrator's finding that by accepting rent payments from petitioners after Geary's death, the landlord had entered into a landlord-tenant relationship with the petitioners so as to entitle them to a vacancy lease. The Commissioner also found that the Rent Administrator erred in finding that such a relationship was created by waiver or otherwise. The Commissioner also held that there had been no determination by the Rent Administrator as to the illusory *prime* tenancy issues. The Commissioner remanded the matter to the Rent Administrator for an oral hearing to determine whether Geary's tenancy was illusory.

Although they argue that there is a basis for finding that acceptance of rent from a subtenant creates a landlord-tenant relationship, petitioners do not challenge the grounds on which DHCR overturned the Rent Administrator's order. Instead, petitioners argue strenuously that the matter should not have been remanded because the issues of fact that were remanded for an oral hearing were established by "overwhelming evidence". Petitioners maintain that the record before DHCR establishes, as a matter of law, that as of the Spring of 1998 Geary had permanently vacated the apartment and that as of 2007 (and before) his tenancy was illusory.

In its cross-motion to dismiss, DHCR maintains that its remand order is not a final determination and that the petition must be dismissed pursuant to CPLR §7801(1). DHCR also

argues that petitioners have failed to exhaust their administrative remedies and that this proceeding is premature. DHCR maintains that the court does not have jurisdiction of the subject matter of this case.

DISCUSSION

CPLR §7801(1) provides that Article 78 shall not be used to challenge an administrative agency determination which is not final. An order of DHCR remanding a matter to the local rent administrator for further findings does not finally determine the rights of the parties and is not a final determination that is ripe for judicial review (*see Fiesta Realty Corp. v. McGoldrick*, 308 NY869 [1955]; *140 West 57th Street Corp. v. New York State Division of Housing and Community Renewal*, 130 AD2d 237 [1st Dept 1987]; *Martin v. Ambach*, 85 AD2d 869 [3d Dept 1981] *aff'd* 57 NY2d 1001 [1982]; *Lagudis v. DHCR*, 169 AD2d 638 [1st Dept 1991]).

Despite this well settled rule, petitioners state that the “rule is easier stated than applied” (*Essex County v. Zagata*, 91 NY2d 447, 453 [1998]) and argue the decision to remand the case for an oral hearing on the factual issues identified by DHCR constitutes a “final” determination in that it is DHCR’s last word on a discrete legal issue and thus is ripe for judicial review. Petitioners claim that by having to proceed to an oral hearing as to which no issue of fact was raised inflicts on them an injury which cannot be ameliorated. The specific injuries identified by petitioners are costs in time, in legal fees ... inconvenience and ... trouble of appearing unnecessarily to testify on issues which have already been resolved (*see* Affirmation of Steven Shackman in Opposition to Motion to Dismiss, ¶7).

The requirements of CPLR §7801(1) may be applied as easily to the circumstances of this case as they are to state. Unlike the circumstances at issue in *Essex County*, DHCR’s order of March 12, 2010 merely requires an oral hearing to develop facts that will determine whether an illusory tenancy existed and the prime tenants are entitled to a renewal lease in their own name. As the counsel for DHCR explained:

It is especially necessary to have an oral hearing in illusory tenancy cases, where witnesses who had first hand knowledge of the particular facts can testify before an administrative law judge experienced in rent regulation matters to determine if a (*sec*) illusory tenancy existed and where the owner can show proof of its knowledge of whether the prime tenant abandoned the premises and merely retained the tenancy for profit. A hearing officer can also determine credibility of witnesses better in person rather than reading their affidavits.

(Affirmation in Reply of Thomas Thol Lipovetsky, ¶6). This is not a case in which (in the words of the court in *Essex County*) the actions taken by DHCR “impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process” (*see id.*, at 453).

It is

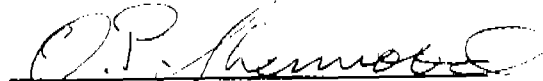
ORDERED and ADJUDGED that the application for a judgment annulling the order of DHCR dated March 12, 2010 is DENIED and it is further

ORDERED and ADJUDGED that the cross-motion to dismiss the petition is GRANTED; and it is further

ORDERED and ADJUDGED that the petition is hereby dismissed.

DATED: January 4, 2011

ENTER:



O. PETER SHERWOOD

J.S.C.

UNFILED JUDGMENT
his judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
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