

Matter of Drucker v Commissioner of the N.Y.S. Div. of Hous. & Community
2011 NY Slip Op 30801(U)
April 1, 2011
Supreme Court, New York County
Docket Number: 115077/2010
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

Drucker, John
- v -
Commissioner of NYS D.H.C.R.

INDEX NO. 115077/2010
MOTION DATE 4/23/11
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-4</u>
Answering Affidavits — Exhibits _____	<u>5-7</u>
Replying Affidavits _____	<u>12, 13</u>

Cross-Motion: Yes No *Cross motions* *Opp to Cross motions 10, 11*

Upon the foregoing papers, it is ordered that this ~~motion~~ *petition and*
cross motions are decided in accordance
with the annexed decision & order.

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Dated: April 1, 2011 Paul G. Feinman
J.S.C.

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):

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12
-----X

In the Matter of the Application of
JOHN DRUCKER and JACQUELIN DRUCKER for
an Order Pursuant to Article 78 of the
Civil Practice Law and Rules,
Petitioners,

-against-

Index No.: 115077/2010
Mot. Seq. No. 001
Submission Date 2/23/2011

COMMISSIONER of the NEW YORK STATE
DIVISION OF HOUSING and COMMUNITY
RENEWAL, NANCY MAURO as EXECUTRIX OF
THE ESTATE OF JOHN MAURO,
Respondents.
-----X

Appearances:

Petitioners

Irwin, Lewin, Cohn & Lewin, P.C.
By: Edward Cohn, Esq.
845 Third Avenue
New York NY 10022
(212) 759-2600

Respondent DHCR

Gary R. Connor, Esq.
General Counsel
By: Christina S. Ossi, Esq.
25 Beaver Street, Rm. 707
New York NY 10004
(212) 480-6790

Respondent Mauro

Poch & Luckow, P.C.
By: Howard Poch, Esq.
40 Exchange Pl., Suite 1606
New York NY 10005
(212) 344-4184

Papers considered on review of this Article 78 proceeding and cross motion to dismiss:

Notice of Petition, Petition, Exhibits, Memorandum of Law, Affs. of Service	1-4
Respondent Mauro's Verified Answer	5
Respondent Mauro's Affs. in Opposition to Petition, Exhibits	6, 7
Respondent Mauro's Notice of Cross Motion, Affs., Exhibits	8
Respondent DHCR's Notice of Cross Motion to Remit, Aff., Exhibit	9
Petitioner's Affs. in Opposition to Cross Motion to Dismiss, Exhibits	10
Respondent DHCR's Aff. in Opposition to Cross Motion to Dismiss, Exhibits	11
Respondent Mauro's Reply Affirmations	12, 13

PAUL G. FEINMAN, J.:

Petitioners move, pursuant to Article 78, to set aside the order of the New York State Division of Housing and Community Development (DHCR), dated September 23, 2010, alleging that the order was based on an error of law, was arbitrary and capricious, and constituted an abuse of discretion.

Respondent Nancy Mauro cross-moves, pursuant to CPLR 7804 (f), to dismiss the petition.

Respondent DHCR cross-moves for an order remitting the matter to DHCR for further consideration.

For the reasons which are set forth below, the respondent DCHR's cross motion to remit the matter to it for further consideration is granted. The petition and the respondent Mauro's cross motion to dismiss it are both denied.

Background

Petitioners are tenants residing 432 East 58th Street, Apartment 2, New York, New York, and respondent Nancy Mauro is the executrix of the estate that owns that property. The instant petition seeks to annul the final order issued by DHCR on September 23, 2010, under docket numbers XL 410025 RT and WL 410022 RO. Petition, Ex. A. In this order, DHCR affirmed a prior Rent Administrator's order which, among other things, determined the legal regulated rent relating to petitioners' apartment.

DHCR's final order was based on an administrative proceeding initially commenced by the property's owner in June of 2002. In that proceeding, the owner sought to have the petitioners' apartment deregulated pursuant to the High Rent/High Income provisions of the Rent Stabilization Law (RSL). The Rent Administrator determined that the legal rent for petitioners' apartment exceeded \$2,000 per month as of April 2002.

Later in 2002, petitioners commenced a court proceeding in this court seeking to enforce a 1995 agreement that they made with the owner, which circumvented the RSL. The Supreme Court, Appellate Division, First Department, determined that said agreement was void and unenforceable, and this court, as a consequence of that decision, remitted the matter to DHCR for the purposes of recalculating the lawful rent for the unit. Petition, Ex. C.

After the matter was remitted to DHCR, DHCR re-opened the 2002 deregulation proceeding and issued a new order in November, 2009, which denied the owner's 2002 petition for deregulation, basing this determination on the Rent Administrator's finding that the legal regulated rent for petitioners' apartment was \$1,882.52 per month, and therefore did not exceed the statutory threshold of \$2,000 per month for deregulation. Petition, Ex. A. To arrive at this figure of \$1,882.52, the Rent Administrator started calculating the base rent from the rent charged in 1992.

Both petitioners and respondent Mauro filed Petitions for Administrative Review (PAR) of the November 2009 order, and DHCR issued its final order on September 23, 2010, affirming the findings of the Rent Administrator.

In the instant petition, petitioners claim that the Rent Administrator's calculation is erroneous, in that he relied on an unreliable 1992 rent. Petitioners maintain that the lawful rent should be computed according to DHCR's default formula, which allows DHCR to compute the rent-stabilized rent by using the monthly rental figures of similar apartments in the same building. In making this assertion, petitioners argue that DHCR acted improperly by using records more than four years old to determine the lawful rent.

In her cross motion, Mauro asserts that the four-year lookback sought by petitioners is not applicable because that statutory limitation (Administrative Code of the City of New York § 26-516) only applies to overcharges and other proceedings challenging the rent, and that it may only be sought to be applied by landlords. Since it was the owner who instituted the proceedings to deregulate the apartment, and not the petitioners to challenge the rent, Mauro contends that they cannot avail themselves of the lookback rule. Furthermore, Mauro alleges that all of the parties agreed that the 1992 rent used by DHCR was the correct rent at that time, which no one has challenged, so that there

can be no harm in DHCR using that as the starting point for its calculation of the correct rent. Hence, Mauro argues that DHCR's determination was rational, that it should not be disturbed, and that the petition should be dismissed.

In its cross motion, DHCR seeks to have the matter remitted to it for further consideration, based on the Court of Appeals decision in *Matter of Grimm v State of New York Division of Housing and Community Renewal Office of Rent Administration* (15 NY3d 358 [2010]), which remanded that matter to DHCR for further proceedings based on allegations that that owner entered into a scheme to fraudulently deregulate apartments, in contravention of the RSL. *Matter of Grimm* was decided days after DHCR issued its final ruling, and would have a decided effect on DHCR's considerations.

In opposition to Mauro's cross motion, petitioners argue that Mauro did not challenge the four-year lookback period at the administrative proceedings and, therefore, she cannot challenge its application now, for the first time, in the instant Article 78 proceeding. Moreover, petitioners dispute that only landlords can seek to apply the four-year lookback rule. In addition, petitioners contend that Mauro violated the RSL by failing to offer a rent-stabilized renewal lease for 18 years.¹

In reply, Mauro states that since she is a respondent in the instant proceeding, she is not estopped from asserting arguments not raised at the administrative level, and, contrary to petitioners' assertions, they were offered a rent-stabilized lease in 2004, which they refused to sign. Mauro Cross Motion, Ex. G. Lastly, Mauro asserts that the matter should not be remitted to DHCR.

In opposition to Mauro's cross motion, DHCR re-asserts its position that the matter should be remitted to it so that it may reconsider the facts in light of *Matter of Grimm, supra*, which set forth a

¹The court notes, without going into detail, that the earlier proceedings between the parties concerned an agreement that circumvented the rent-stabilization laws, which, at the time of its execution, was considered favorable to both petitioners and Mauro's decedent.

three-part test for DHCR to consider whether there has been a fraudulent deregulation scheme.

In reply to DHCR's opposition, Mauro states that DHCR has misconstrued *Matter of Grimm* and that the matter should not be remitted.

Discussion

It is well settled that "a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citation omitted] [emphasis in original]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 232 (1974). The test is whether the action taken is justified or without foundation in fact. *Id.* at 231. "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." *Id.*

Moreover, a court's

"review of DHCR's interpretation of the statutes it administers is limited. 'Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld' [internal citation omitted]."

Matter of Ansonia Residents Association v New York State Division of Housing and Community Renewal, 75 NY2d 206, 213 (1989).

In its cross motion, DHCR states that it wishes to reconsider its determination based on a Court of Appeals decision that was rendered shortly after its ruling. In that case, *Matter of Grimm, supra*, the Court of Appeals held that DHCR is precluded from looking back beyond the four-year

statutory period in determining an apartment's lawful rent unless the rent records are tainted by a fraudulent scheme to evade the RSL. Subsequent to that Court of Appeals decision, both the First and Second Departments have applied this standard to DHCR determinations. *Matter of Gomez v New York State Division of Housing and Community Renewal*, 79 AD3d 878 (2d Dept 2010); *425 Third Avenue Realty Co. v Greenfield*, 78 AD3d 542 (1st Dept 2010).

In the case at bar, DHCR has requested the opportunity to review its earlier decision and to gather additional evidence to ascertain whether the rental agreement entered into by the parties in the 1995, which was declared void as against public policy by the Supreme Court, Appellate Division, First Department, was indeed a fraudulent scheme. This aspect of the proceeding was not considered by DHCR prior to rendering the determination at issue in this Article 78 proceeding.

“Rent Stabilization Code (9 NYCRR) § 2527.8 provides that ‘DHCR, on application of either party, or on its own initiative, and upon notice to all parties affected, may issue a superceding order modifying or revoking any order issued by it under this or any previous Code where the DHCR finds that such order was the result of illegality, irregularity in vital matters or fraud.’ This Court of Appeals has confirmed DHCR’s broad powers and authority to alter its prior determinations on remission, and this Court has held that remission for further fact-finding and determination is appropriate where, as here, DHCR concedes an error in the issuance of its determination ... [internal citations omitted].”

Matter of Porter v New York State Division of Housing and Community Renewal, 51 AD3d 417, 418 (1st Dept 2008).

This court has the inherent power to remit a matter to a respondent agency without reaching a determination on the merits for further fact finding and in order to render substantial justice to all the parties concerned. *Matter of 47 Clinton Street Company v New York State Division of Housing and Community Renewal*, 161 AD2d 402 (1st Dept 1990); *Matter of Mott v Division of Housing and*

Community Renewal of State of New York, 160 AD2d 803 (2d Dept 1990).

This court can only review an agency determination that is final and, in the instant matter, the agency in question has indicated that further hearings are necessary. Accordingly, the court grants DHCR's cross motion to remit and denies the petition and Mauro's cross motion to dismiss.

It is therefore

ORDERED that the petition to set aside the order of the New York State Division of Housing and Community Renewal dated September 23, 2010, is denied; and it is further

ORDERED that the cross motion of the Commissioner of the New York State Division of Housing and Community Renewal is granted and the matter is remitted to that agency for further determinations; and it is further

ORDERED that the cross motion of Nancy Mauro as Executrix of the Estate of John Mauro is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: April 1, 2011



J.S.C.

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APR 05 2011

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