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

PRESENT: ALICE SCHLESINGER Justice

IA PART 60

Donavin White

- v -

NYSDOHCRS Et Al.

INDEX NO. 103580/12

MOTION DATE

MOTION SEQ. NO. 1

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 petition is denied and the proceeding is dismissed in accordance with the accompanying memorandum decision.

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).

FEB 19 2013

Dated: February 19, 2013

ALICE SCHLESINGER J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

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In the Matter of the Application of
DONAVIN WHITE,

Petitioner,

Index No. 103580/12
Motion Seq. No. 001

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 THE ATTORNEY
GENERAL OF THE STATE OF NEW YORK,

Respondents,

-and-

511 WEST 143rd LLC.,

Respondent.

----------X

SCHLESINGER, J:

This case illustrates the oftentimes harsh result to a tenant whose rent overcharge complaint is restricted by the four-year rule. The tenant here, Donavin White, seeks to reverse the Order and Opinion issued by the Deputy Commissioner of respondent New York State Division of Housing and Community Renewal (DHCR), which affirmed the Rent Administrator's Order denying Mr. White's rent overcharge complaint. The basis for the denial was that DHCR saw no irregularities in the rental history during the four-year period preceding the tenant's filing of his complaint, and any irregularities before that date did not constitute evidence of fraud sufficient to permit the agency to look beyond the four-year period. As a result, the agency found that Mr. White's apartment was exempted from the Rent Stabilization Law following a vacancy when the rent exceeded $2000.00, and Mr. White and his family may be subject to eviction upon the expiration of his lease.

Background Facts

Donavin White commenced his occupancy of the subject apartment 51 at 511 West 143rd Street in Manhattan on May 1, 2010 pursuant to a one-year lease signed by him and his co-tenant Lillian Velasquez at a rent of $1,800.00 monthly. Shortly after the lease was renewed for another year at a monthly rent of $1,880.00, Mr. White filed a Complaint of Rent Overcharges with the DHCR on June 17, 2011. (See Administrative Return, A-1). In his Complaint, Mr. White claimed that the rent was "not in fact the legally regulated rent." In support of his claim he provided a copy of his lease, which was a standard form lease for apartments "not subject to the Rent Stabilization Law," and the one-page renewal indicating that the rent was "a preferential rent" valid for the one-year period through April 30, 2012.

DHCR forwarded the tenant's complaint to the owner on June 21 (A-2), and the owner answered on June 29 (A-3). The owner provided the rental history dating back to 2005 and asserted that the apartment had been exempt from the Rent Stabilization Law as of that date due to a "High Rent Vacancy;" that is, because the apartment was vacated and then rented to a new tenant in 2005 at a rent that exceeded $2000.00. In support of that assertion, the owner submitted the first page of a copy of a standard form lease for apartments not subject to the Rent Stabilization Law. The lease was for the period from March 1, 2005 through February 28, 2007 at a monthly rent of $2,300.00, and the named lessees were John David Gardner, Stacy Liman Cohen and Elizabeth Irene Mirachi. In addition, the owner provided a copy of a renewal lease for Gardner and Mirachi at a monthly rent of $2,400.00 for March 2007 through February 2009 and another one-year renewal for those same tenants at the same rent for the

period March 2009 through February 28, 2010. Mr. White's lease followed, effective May 1, 2010 at a monthly rent of $1,800.00.

Having heard nothing from the agency or the owner, the tenant wrote directly to DHCR Commissioner Towns on November 12, 2011, indicating that he had filed a rent overcharge complaint and expressing general concerns about the ethics of the real estate industry in New York City and the problems faced by tenants. (A-4). Attached to the letter was a printout of the rental history for Mr. White's apartment dating back to 2004. The history showed a rent-stabilized lease for a tenant named "Kimberly Butter" dated July 31, 2004 at a monthly rent of $1166.00 and a 2005 registration showing that the apartment was exempt from regulation due to "high rent vacancy." That lease was for the period from March 1, 2005 through February 28, 2007 at an unspecified rent for an unspecified tenant. However, the dates are consistent with the lease provided by the owner with his answer for the tenants John David Gardner, Stacy Liman Cohen and Elizabeth Irene Mirachi. More significantly, however, Mr. White did not include in his letter to DHCR any specific comments about the rental history or any specific statements in support of his claims.

DHCR responded to Mr. White's letter on December 6, 2011. (A-5). There the agency acknowledged Mr. White's "concern regarding government malfeasance and corruption" and assured him that DHCR would render an unbiased determination. Mr. White responded on December 9, 2011, again emphasizing in general terms the challenges faced by tenants without offering any evidence or arguments in support of his claims. (A-6). Mr. White again wrote to the agency on January 28, 2012. (A-7). Here he emphasized the importance of receiving a determination before his lease expired on April 30, 2012 so as to preserve his family's right to remain in the apartment.

On February 8, 2012 DHCR finally forwarded to the tenant a copy of the owner's July 11, 2011 Answer with notice of the tenant's right to comment. (A-8). The notice is clear on its face. It is entitled "Request for Additional Information/Evidence" and it states in the very brief pre-printed form that: "We are attaching a copy of the reply submitted by the Owner on 07/11/11. Please respond to it within twenty-one (21) days from the date of this mailing and enclose any substantiating documentation available."

Despite the clarity of the notice, Mr. White completely misconstrued it. He promptly wrote to DHCR on February 11, 2012, referring to the February 8 notice as a "decision" by DHCR and describing it as "criminal." (A-9). Accepting that letter as the tenant's response to its February 8 notice, and not having heard anything further from the tenant, DHCR proceeded to render its determination on February 21, 2012.[1] In a document sent to Mr. White and the Owner entitled "ORDER DENYING APPLICATION OR TERMINATING PROCEEDING," the Rent Administrator explained the denial as follows:

> On 06/15/11, the tenant filed a rent overcharge complaint, alleging that the rent of $1,880.00 charged and collected by the owner is in excess of the legal regulated rent.
>
> In response to the complaint, the owner stated that the subject apartment was deregulated as of 03/01/2005 because the legal regulated rent exceeded $2000.00. A copy of the vacancy lease with a begin date of 03/01/2005 that reflected a legal regulated rent of $2300.00 per month was attached to the owner's response. A copy of the owner's submission was forwarded to the tenant on 02/08/2012. The tenant did not dispute the owner's statements/submission.

[1]Although DHCR waited only 13 days before rendering its determination, rather than the 21 days referenced in its notice, it reasonably treated the tenant's intervening February 11 letter as his final statement on the case and responded to his request for an expeditious determination by rendering one.

> Pursuant to Section 2520.11(r)(4) of the Rent Stabilization Code, housing accommodations which became or become vacant on or after June 19, 1997, with a legal regulated rent of two thousand dollars or more per month, shall no longer be subject to the Rent Stabilization Law and Code.
>
> Based on the above and the DHCR data base, the legal regulated rent as of 03/01/2005 exceeded $2000.00. Therefore, the apartment became deregulated and is no longer protected by the Rent Stabilization Law and Code.

The tenant timely filed a Petition for Administrative Review (PAR) on February 28, 2012, challenging the Rent Administrator's Order, this time with the apparent assistance of counsel. (B-1). He first argued that he had not been given the full 21 days to respond to the owner's answer, and he offered evidence for the first time which he claimed he would have submitted in the proceeding below had the Rent Administrator not rushed to judgment. Specifically, the tenant contended in his PAR that the $2,300 rent in the 2005 lease was fraudulent in that it represented an excessive increase above the $1,166.00 paid by the prior tenant KIMBERLY BUTLER a/k/a KIMBERLY BUFFER a/k/a KIMBERLY BUTTER and that Ms. Butler's rent also was excessive in that it should have been $954.61 at most. Applying lawful increases to that rent, the rent should have remained below $2000.00 at all times, Mr. White contended. He added that his initial rent should have been $1,173.61, rather than $1,800.00, and that his renewal lease should have been $1,202.95, instead of $1,1880.00, resulting in an overcharge of $14,892.23, with treble damages for wilfulness, thereby entitling him to a total award of $44,892.69. Citing *Grimm v DHCR,* 15 NY3d 358 (2010), the tenant urged the agency to examine this entire rental history, including leases that preceded the four-year period, based on what he described as evidence of "fraud".

On March 6, 2012, DHCR forwarded the tenant's PAR to the owner for review and comment within 20 days. (B-2). Before the owner responded, the tenant wrote to DHCR on March 11, urging the agency to demand that the owner produce original leases, as well as copies of all relevant rent and security deposit checks and identifying documentation relating to the tenants such as a driver's license. (B-3).

The owner answered the tenant's PAR in a letter of barely more than one page in length dated March 16, 2012. (B-4). Noting that the "base date" was 2007 (four years before the tenant filed his rent overcharge complaint), the owner noted that it had provided all free market leases dating back to 2005, which was two years before the base date. The owner further argued that Mr. White had not offered any basis for overturning the Rent Administrator's decision.

Again appearing to misunderstand the situation, the tenant on March 26, 2012 forwarded to DHCR a letter he had received from the owner advising him that his lease would not be renewed; at the bottom of the letter, Mr. White hand wrote a notation to DHCR complaining that the owner had received the agency's decision while he had not. (B-5). DHCR responded that while no decision had been rendered, the case would be expedited. (B-6). Mr. White replied on May 5 that, due to the continuing uncertainty, his wife had left him with the children. (B-7). As Mr. White had copied the Attorney General on his correspondence to DHCR, the AG notified him that they would urge action by the agency. (B-8). Mr. White wrote the agency again on May 22, 2012, advising that the owner had commenced eviction proceedings against him. (B-9). On May 28, Mr. White wrote to the agency yet again, urging that the *Grimm* decision compelled a finding in his favor. (B-10). None of these letters included any evidence.

Finally, on July 12, 2012, DHCR's Deputy Commissioner issued an Order and Opinion Denying Petition for Administrative Review. (B-11). The Deputy Commissioner began by recounting the procedural history and the Rent Administrator's finding that the apartment had been permanently deregulated as of March 1, 2005, before Mr. White had moved in, by virtue of high rent/vacancy deregulation under RSL §26-504.2. The agency expressly acknowledged the tenant's argument that *Grimm, supra,* and *Thornton v Baron*, 5 NY3d 175 (2005), justified an examination of the rental history preceding the four-year period based on fraud.

The Commissioner then did an analysis of the tenant's complaint by applying the four-year rule set forth in Rent Stabilization Law 26-516(a)(2), as amended by the Rent Regulation Reform Act of 1997. As the complaint had been filed on June 15, 2011, the "base date" for calculating rent overcharges was June 15, 2007. According to the owner, he had rented the apartment to new tenants following a vacancy for the period from March 1, 2005 through February 28, 2007 at a rent of $2300 and had thereafter renewed that lease for a two-year period and then a one-year period at a rent of $2400 monthly. Because the 2005 vacancy lease was for a rent that exceeded $2000, the apartment had been permanently removed from the Rent Stabilization Law in 2005 pursuant to RSL §26-504.2, and the owner had filed an "exit" rent registration statement with DHCR in October 2006 confirming that fact. Therefore, the owner was free to charge Mr. White any rent the parties agreed upon in 2010, as the apartment was exempt from rent regulation.

The Commissioner then discussed at length the various exceptions to the four-year rule developed by the courts that permit the agency to examine the rental history

preceding the base date, including those instances as in *Thornton* and *Grimm,* relied upon by Mr. White, where evidence of fraud by the owner existed. *Thornton* was readily distinguishable, the Commissioner stated, because it concerned "an elaborate scheme to systematically deregulate several apartments in one of the most desirable rent regulated buildings on the Upper West Side of Manhattan."

Grimm, however, had some similarities to Mr. White's case, the Commissioner acknowledged, as it involved a single tenant who had alleged that the rent on the base date was a product of fraudulent representations by the owner. Unlike the instant case, though, the tenant in *Grimm* had supported her assertions with sworn statements from the base date tenants who had occupied the apartment before Ms. Grimm. In affirming the lower court's decision that the facts presented justified the agency's examination of the rental history preceding the four-year period, the Court of Appeals held that some evidence of a fraudulent deregulation scheme, beyond a mere increase in rent, was needed before DHCR was required to examine the rental history before the base date, the Commissioner explained in the PAR decision.

Nevertheless, without finding that the tenant had made a sufficient showing, the Commissioner proceeded to examine the rental history for Mr. White's apartment dating back to the first registration in 1984. Other than a typographical error, the agency found no irregularities from 1984 through 2001 when the apartment was occupied by Denise Cornelius. Thereafter, DHCR acknowledged, some irregularities appeared, as follows.

The 2002 registration reported a regulated rent of $400 for "Kimberly Butler." The 2003 registration reported a rent of $1,166 for "Kimberly Buffer." The 2004 registration was for the same amount, but the tenant's name was "Kimberly Butter." While

surmising that the tenant was the same throughout that period and that the different names were mere typographical errors, the agency did note some inconsistencies between the leases described in 2002 and 2003. Specifically, both of those leases were described in the rent history as having commenced on September 1, 2002, yet one was a one-year lease and the other was a two-year lease. The final registration, filed for 2005, reported the free market vacancy lease for Garner, Cohen and Mirachi discussed above. That lease and the renewals for those tenants immediately preceded Mr. White's lease.

In deference to the tenant's concerns about the irregularities in the rent history during the "Butler" period, the Commissioner took the inquiry one step further and took a hard look at the complete rental history, stating as follows:

> The Commissioner notes that the inconsistencies in the three Kimberly Butler registrations cannot be reconciled based on the record herein. However, comparing the Butler rent with the Cornelius rent [immediately before it], there is only about $100.00 increase which needs to be explained over and above the applicable statutory vacancy allowance and the lower of the two possibly applicable Guidelines increases. That gap could be explained by $4,000.00 worth of Individual Apartment Improvements (IAIs); and IAI rent increase is equal to 1/40th of the allowable costs. The Commissioner also notes that the increase in rent from $1,166.00 (reported as Kimberly Butler's last rent) to the [free market] rent of $2,300.00 in the exit registration is not explained in this record. After the applicable 20% vacancy allowance, there is a gap of $900.80 that could be filled with something like $36,032.00 worth of IAI costs.
>
> The tenant points out these inconsistencies in the registrations, but proffers nothing more than what is in these registration statements in support of his contention that some, or all, of the last four registration statements filed for the subject apartment contain fraudulent recitations of the legal regulated rent.

The Commissioner then posed the question: "Is this enough, under the holding in *Grimm* to warrant further investigation by this agency into the reliability of the base date rent reported in this exit registration." Distinguishing the instant case from *Grimm* on the ground that the tenant had failed to produce any evidence whatsoever beyond the registration statements, such as information from prior tenants or occupants of the building, to support a claim of fraud, the Commissioner found that he "must answer this question in the negative." Absent fraud, the agency could not look beyond the four-year period preceding Mr. White's complaint, and the rental history and leases revealed no irregularities during that period. Thus, no basis for a finding of rent overcharges existed.

Discussion

The standard of review in an Article 78 proceeding such as this one is well established. If the DHCR Commissioner's order has a rational basis in the record and is not arbitrary and capricious or affected by an error of law, it may not be judicially disturbed. *I.G. Second Generation Partner, L.P. v New York State Div. Of Housing and Community Renewal,* 284 AD2d 149 (1st Dep't 2001), *lv denied* 98 NY2d 607 (2002); *citing Matter of Pell v Bd. of Educ.,* 34 NY2d 222, 230-31(1974); *Greystone Mgt. Corp. v Conciliation and Appeals Bd.,* 94 AD 2d 614 (1st Dep't 1983), *aff'd* 62 NY2d763 (1984); *see also* CPLR §7803(3). Here, Mr. White has failed to offer any reasonable basis for this Court to annul the Commissioner's decision. As demonstrated above, the Commissioner thoroughly reviewed the record and, giving the tenant the benefit of the doubt, examined the rental history preceding the four-year period applicable to rent overcharge complaints pursuant to CPLR §213-a and Rent Stabilization Law §26-516. While some inconsistencies in the rental history were noted, Mr. White failed to offer

any evidence whatsoever beyond the rental history itself to demonstrate fraud on the part of the owner. Absent proof of fraud, the agency may not look beyond the four-year period *[Grimm v State of NY Div. of Hous. & Comm. Renewal,* 15 NY3d 358 (2010)], and the rental history failed to reveal any rent overcharges during that period.

Mr. White has offered various arguments in support of his petition, but none are persuasive. He first argues that the Rent Administrator rendered a decision before the tenant's time to reply to the owner's answer had expired, and he offers evidence that he claims he would have offered to the agency if he had been given the opportunity. While it is true that the agency waited only 13 days before rendering its determination, rather than the 21 indicated in its notice as explained above, Mr. White did, in fact, submit something to DHCR during that period. (See n. 1, *supra*). Unfortunately, all he submitted was a letter misconstruing the notice as a "decision" and calling it "criminal"; nothing was submitted on the merits.

What is more, Mr. White failed to submit to the agency the evidence he offers to this Court when he filed his Petition for Administrative Review (PAR). Attached to his Reply papers in this proceeding, Mr. White has offered new evidence in the form of affidavits from other occupants of the building. However, this Court may not consider those affidavits, as the law is clear that a party may not introduce new evidence in an Article 78 proceeding that was not presented to the agency during the administrative proceeding. *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757 (1st Dep't 1982), *aff'd* 58 NY2d 952 (1983).

Even if the new evidence were considered, it fails to persuade the Court that the Commissioner erred. Mr. White first offers affidavits from Dwain Brathwaite and Clive

Brathwaite. Those individuals both state that they have lived in apartment 53 at the building for approximately twenty years and at no time did they every meet anyone in apartment 51 who identified herself as Kimberly Butler, Kimberly Buffer, or Kimberly Butter. They both conclude their affidavits with the following statement: "I recall a young lady residing there at the time named Jane Doe." These affidavits lack credibility and do not constitute proof of fraud under *Grimm*.

Mr. White also offers with his Reply papers a notarized letter from Terrell E. Wells, who lived with his mother in apartment 52 for about twenty years until 2011. He recalls speaking to a female in apartment 51; he cannot recall her name, but he recalls that it was not Kimberly. This affidavit lacks sufficient detail to give it persuasive effect. Similarly unpersuasive is the letter from Nicole Fianko, whose godmother Mamie E. Palmer lived in apartment 51 for forty years until 1990. She disputes as impossible a statement in the rental history that a person named Boyd Canto lived in apartment 51 in 1990 because she claims that Ms. Palmer lived there at the time. However, the 1990 registration was not even considered by the agency. Further, the letter lacks sufficient detail to make it persuasive, particularly since Ms. Fianko claims that she lived in apartment 54 since 1974, yet she offers no other information about the building or the tenants during the period of time considered by the Commissioner.

In addition to criticizing the evidence as a "joke," the owner has offered evidence to dispute it. Specifically, he has offered leases, letters, a copy of a check and detailed billing records relating to Kimberly Butler. These documents confirm a lease in the name of Kimberly Butler from September 1, 2001 through August 31, 2002 at a monthly rent of $1100.00 and a two-year renewal through August 31, 2004 at a monthly rent of

$1166.00, after which Ms. Butler wrote to the owner indicating her intent to vacate the apartment. The owner has also supplied copies of the registration statements relating to Ms. Butler that are consistent with the leases; the $400.00 figure listed in the rental history (p 8, *supra*), appears to be a data entry error. This detailed evidence is far more persuasive than the vague letters submitted by the tenant.

The tenant next argues that the Commissioner erred in justifying various rent increases by speculating that Individual Apartment Improvements (IAI) had been completed, when no evidence of those improvements had been offered by the owner. While it is true that the owner did not establish (nor even claim) that the rents charged were justified by an IAI, he was not required to do so because the increases at issue were outside the four-year period. The Commissioner properly distinguished Mr. White's case from *Grimm* on the ground that the tenant had not offered any evidence of a fraudulent scheme; the inconsistencies in the rent registration statements, which for the most part were typographical errors, did not constitute proof of fraud justifying a look-back beyond the four-year period. Thus, actual proof of IAI increases that pre-date the four-year period was not required.

In *Grimm,* ample evidence of fraud existed. For example, there was no base date lease. Further, the owner offered to charge the tenant a lower rent if the tenant made repairs himself. The lease did not include a rent stabilized lease rider, and the owner ceased filing registration statements. None of that evidence, nor anything similar, is present here to suggest a fraudulent scheme.

The *Grimm* court made clear that the "fraud" exception to the four-year rule is a relatively narrow one, stating (15 NY3d at 367) that:

> Generally, an increase in the rent alone will not be sufficient to establish a "colorable claim of fraud," and a mere allegation of fraud alone, *without more*, will not be sufficient to require DHCR to inquire further. What is required is evidence of a landlord's fraudulent scheme to remove an apartment from the protections of rent stabilization. As in *Thornton*, the rental history may be examined for the limited purpose of determining whether a fraudulent scheme to destabilize the apartment tainted the reliability of the rent on the base date.

DHCR properly applied that rule of law to the facts in the case at bar. The tenant has failed to offer persuasive evidence of fraud or to otherwise establish that the agency's decision was arbitrary and capricious or contrary to law. Accordingly, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed. The Clerk may enter judgment in favor of the respondents, noting that the proceeding was previously discontinued against the Attorney General of the State of New York by Stipulation filed on September 11, 2012.

Counsel for DHCR shall promptly pick up the Administrative Record from the Part Clerk in Room 222 at the courthouse at 60 Centre Street.

Dated: February 19, 2013

FEB 19 2013

J.S.C.

ALICE SCHLESINGER

UNFILED JUDGMENT

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