

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

2014 NY Slip Op 31336(U)

May 21, 2014

Sup Ct, New York County

Docket Number: 100186/13

Judge: Shlomo S. Hagler

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

PRESENT: SHLOMO HAGLER
J.S.C. Justice

PART 17

Index Number : 100186/2013
MAURO, CHRIS
vs.
NYS DIVISION OF HOUSING
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits + Intervenor's AFF _____ | No(s). 2, 3

Replying Affidavits _____ | No(s). 4

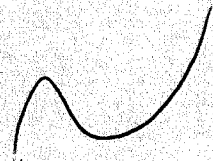
Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Decision/Order.

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 141B).

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

Dated: 5/21/14


SHLOMO HAGLER, J.S.C.
J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Part 1 SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----X
In the Matter of the Application of CHRIS and NANCY
MAURO as Executors of the ESTATE OF JOHN
MAURO, and 428-430-432 E. 58th STREET LLC,

Index No. 100186/13

Petitioners,

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

- against -

The NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

DECISION/ORDER

Respondent,

For an Order directing the Division of Housing and
Community Renewal to reverse their order and opinion
dated November 29, 2012 or, in the alternative
remanding the Order and Determination of the DHCR,
dated November 29, 2012, for reconsideration.

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).

-----X
HON. SHLOMO S. HAGLER, J.S.C.:

Petitioners Chris and Nancy Mauro, Executors of the Estate of John Mauro, and 428-430-432 E. 58th Street LLC ("petitioners" or "Owners") brought this Article 78 proceeding by notice of petition and verified petition to set aside or to remand an order of the New York State Division of Housing and Community Renewal ("DHCR") dated November 29, 2012, which utilized a "default formula" to reduce the lawful legal rent from \$1,882.52 to \$1,700 per month. Tenants John H. Drucker and Jacquelin Drucker ("the Druckers") cross-moved to intervene as respondents. The Druckers' cross-motion was granted on the record on November 23, 2013, and this Court accepted their written submissions and permitted them to participate in oral argument. The DHCR and the Druckers opposed the verified petition.

BACKGROUND

Petitioners are the owners of the building located at 432 East 58th Street, New York, New York ("subject building"). The Druckers reside at apartment 2 ("subject premises") in the subject building.

The dispute between the landlord and the Druckers dates back to 1992. As related in *Drucker v Mauro* (30 AD3d 37 [1st Dept 2006]), the Druckers moved into the subject premises in 1981. In 1992, the landlord was required to offer the Druckers a renewal lease effective November 1, 1992. Instead of offering the Druckers a renewal lease, the landlord applied to the DHCR seeking a ruling that the subject building, including the subject premises, was not subject to the rent stabilization laws. After negotiations, in May 1995, the Druckers and the landlord entered into a lease for a rent of \$1,700 a month, which was more than the legal regulated rent of \$1,529. In February 1996, DHCR issued a determination that the subject building, including the subject premises, was subject to rent stabilization. (Exhibit "B" to the Verified Petition).

The Druckers' lease was last renewed in November 2000. In or about April 26, 2002, the landlord sent the Druckers a DHCR income certification form ("ICF") because they alleged that the legal regulated rent exceeded \$2,000 a month at that time. The Druckers did not return the form. Instead, they commenced an action on May 21, 2002 and amended their complaint on June 17, 2002, seeking a declaration that they were not required to respond and the parties were bound by the 1995 lease as well as an injunction barring the landlord from seeking deregulation of the subject premises based on luxury decontrol. The Supreme Court denied the injunction, and later declared the 1995 lease to be enforceable.

In on about June 27, 2002, the landlord filed an application with DHCR seeking high income deregulation based on the Druckers' income and the rent exceeding \$2,000 a month. DHCR deregulated the apartment on October 31, 2003.

Thereafter, the landlord appealed the Supreme Court's order and the Appellate Division in April 2006 held that 1995 lease was unlawful and unenforceable because it did not comport with the Rent Stabilization Law. The First Department stated "that the parties to a lease governing a rent-stabilized apartment cannot, by agreement, incorporate terms that compromise the integrity and enforcement of the Rent Stabilization Law" (*Drucker*, 30 AD3d at 39). The fact that it was "the tenants [rather than the landlord] who seek to gain advantage by enforcing the unlawful lease provision to evade the operation of the law and regulations is of no moment" (*id.* at 41).

DHCR then revoked its decision deregulating the apartment and reconsidered the matter. In a November 18, 2009 decision, DHCR denied the landlord's petition for deregulation (Exhibit "I" to the Verified Petition). In that decision, DHCR stated that the tenant was served the ICF on April 26, 2002, as of which date the legal registered rent was \$1,882.52 per month, less than the \$2,000 threshold for deregulation. Thus, the Druckers' apartment was subject to rent stabilization.

The tenants and the landlord filed petitions for administrative review ("PAR") of the November 18, 2009 decision. DHCR denied the PARs and affirmed the November 18, 2009 decision on September 23, 2010 (Exhibit "J" to the Verified Petition). As related in the September 23, 2010 decision, the tenants argued in the PAR that DHCR acted improperly by using records more than four years old to set the rent in the November 18, 2009 decision, that

DHCR should not have examined records further back than June 17, 1998, which was four years before the tenants amended their complaint in the *Drucker* action, and that the lawful rent should be determined according to DHCR's default formula, using June 17, 1998 as the base date.

In the September 23, 2010 decision, the DHCR recited the procedural history and made certain conclusions as follows. A proceeding began on June 17, 1992 seeking a determination of the rent regulated status of the building. It was in June 1992 that DHCR first considered the rent regulated status of the apartment and the related issue about the rent. The proceeding presently under review was merely the most recent development in an ongoing dispute. The record below included "an undisputedly valid renewal lease which expired on October 31, 1992 with a monthly lawful rent of \$1,529.71" (*id* at p. 5). The rent on that lease was not in dispute. Thus, the DHCR concluded that utilization of the 1992 lease did not violate the four-year limitation on reviewable rental history.

The DHCR further noted that all appropriate increases had been calculated from October 31, 1992 through October 31, 2002, resulting in a determination that the legal regulated rent as of April 26, 2002 was \$1,882.52. The DHCR established that April 26, 2002 was the relevant date in the underlying decontrol proceeding. It was on that date that the landlord served the ICF on the tenants. In the September 23, 2010 decision, the DHCR clearly stated that the default formula, which the tenants wanted to apply, was not an appropriate way to determine the rent. The default formula was used only where there were no valid rent records or leases available to establish a legal regulated rent, which the DHCR ruled was inapplicable to this case. Thus, DHCR's September 23, 2010 decision upheld its November 18, 2009 decision.

It appears that the DHCR does not state in its November 18, 2009 decision that it

reviewed the rent existing in 1992, and the DHCR's re-calculation computations only start with 1994 (Exhibit "H" to the Verified Petition). Nonetheless, the decision of September 23, 2010 uses the rent on the 1992 lease to justify and explain the rental amount determined in the November 18, 2009 decision. Thus, the DHCR determined that the 1992 lease showed a valid, legal regulated rent. The next lease was in 1995 and the rent shown on that lease violated the Rent Stabilization Law. Presumably, that is why DHCR ignored the 1995 lease and the leases after that, which were based on the void 1995 lease. Instead, DHCR went back to the valid 1992 lease to find out what the rent was then, and calculated forward from there.

The Druckers then brought an Article 78 proceeding (Index No. 115077/2010) to nullify the DHCR's September 23, 2010 decision. The Owners cross-moved to dismiss the petition and DHCR cross-moved to have the matter remitted to it for further consideration based on a recently issued decision, *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.* (15 NY3d 358 [2010]). Justice Paul Feinman determined the motions in his April 2011 decision (Exhibit "K" to the Verified Petition,) (*Matter of Drucker v Commissioner of the N.Y. State Div. of Hous. & Community Renewal*, 2011 NY Misc LEXIS 1406, 2011 NY Slip Op 30801[U] [Sup Ct, NY County April 1, 2011]).

Justice Feinman wrote that the Court of Appeals issued *Grimm* days after the DHCR issued the September 23, 2010 ruling, and that the DHCR argued that *Grimm* would have a material effect on that ruling. Justice Feinman granted DHCR's cross-motion for remittal. Subsequently, DHCR issued the determination of November 29, 2012, which petitioners seek to set aside on their instant article 78 petition. The Druckers and the DHCR oppose the petition.

Previously, in the September 23, 2010 decision, the DHCR determined the rent by going

back to October 1992. In the November 29, 2012 decision presently under review, the DHCR determined the rent as of April 26, 1998, which was four years before the landlord mailed the tenants an ICF on April 26, 2002.

The DHCR in its latest November 29, 2012 decision states that the tenants' legal regulated rent as of April 26, 1998 should be determined using the default formula. The decision states that all the 1998 registrations filed with respect to the subject building "appear to have been unreliable" (Exhibit "L" to the Verified Petition at p. 5), and that using the default formula was consistent with *Grimm* (15 NY3d 358), *Thornton v Baron* (5 NY3d 175 [2005]), *Drucker* (30 AD3d 37), and with Justice Feinman's decision. The DHCR found that the "only reasonable way" to apply "the default method to the calculation of the tenants' base date rent is to utilize the rent which was actually charged and paid on April 26, 1998: \$1,819" (*id.*). Further applying the default formula, the DHCR reduced the figure of \$1,819 "by the renewal lease adjustment provided for by the applicable guidelines order (Order No. 28: 7% for two-year renewal leases) to \$1,700 to arrive at the tenants' [legal regulated rent]" (*id.*). The rent of \$1,700 was frozen, until such time that the owner offered the tenants a renewal lease in accordance with the rent stabilization laws.

ARGUMENTS

The landlord contends that the DHCR in its November 29, 2012 decision misapprehended the law as follows: 1) it fixed April 26, 1998 as the base date; 2) it employed the default method wrongly; 3) it found that the 1998 building registrations were unreliable without stating a basis for this conclusion; 4) despite finding that the 1998 building registrations were unreliable, it determined that the tenants' rent had to be based on the same rent charged on April 26, 1998; and

5) it reduced the rent to \$1,700, not permitting all the applicable increases since April 26, 1998. The DHCR and the Druckers argue that the DHCR correctly decided the legal regulated rent by utilizing the default method.

DISCUSSION

STANDARD OF REVIEW

In reviewing a determination of DHCR, the court is limited to a review of the record which was before the agency and to the question of whether its determination was arbitrary and capricious and without a rational basis (*Matter of Flagg Ct. Realty Co. v Holland*, 265 AD2d 327, 328 [2d Dept 1999]). A decision is arbitrary if it is “without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). The reviewing court may not substitute its judgment for that of the agency’s determination, but must decide if the agency’s decision is supportable on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of N.Y.*, 98 AD2d 635, 636 [1st Dept 1983]). Once the court finds a rational basis exists for the agency’s determination, its review is ended (*Matter of Sullivan County Harness Racing Assn., Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]).

Judicial review of the propriety of an administrative determination is limited to those grounds invoked by the agency in its determination (*Matter of Montauk Improvement v Proccacino*, 41 NY2d 913, 913-914 [1977]), and the court will not consider arguments or evidence not included in the administrative record (*Brusco v New York State Div. of Hous. & Community Renewal*, 170 AD2d 184, 185 [1st Dept 1991]).

BASE DATE

Petitioners disagree with the DHCR's decision to use April 26, 1998 as a base date. In relevant part, the base date is the date four years prior to the date of the filing of a rent overcharge complaint (Rent Stabilization Code [9 NYCRR] § 2520.6 [f] [1]) or four years prior to the commencement of an action challenging the rent (*Wasserman v Gordon*, 24 AD3d 201, 202 [1st Dept 2005]). The legal regulated rent, also referred to as the base date rent, is the rent chargeable on the base date, together with any subsequent lawful increases and adjustments (9 NYCRR §§ 2520.6 [e], [f], 2526.1 [a] [3] [i]). The base date rent is shown on the rent registration statements that the landlord is required to file annually with DHCR (9 NYCRR 2528.3 [a]).

FOUR-YEAR LOOK-BACK RULE

Determinations of rent amounts are governed by the four-year look-back rule (*see Matter of Cintron v Calogero*, 15 NY3d 347, 355 [2010]). Under CPLR 213-a, the court is precluded from examining any rental history of the unit prior to the four-year period immediately preceding the commencement of the action. "Where the amount of rent set forth in the annual rent registration statement filed four years prior to the most recent registration statement is not challenged within four years of its filing, neither such rent nor service of any registration shall be subject to challenge at any time thereafter" (Rent Stabilization Law [Administrative Code of City of NY] § 26-516 [a] [i]). The four-year limitations period is applicable whether the relief sought is the recovery of a rent overcharge, and/or an adjustment of the legal regulated rent (*Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002]; *Matter of Muller v New York State Div. of Hous. & Community Renewal*, 263 AD2d 296, 303-304 [1st Dept 2000]).

INTERPLAY BETWEEN THE BASE DATE AND THE FOUR YEAR RULE

During oral argument, there was much discussion as to the DHCR's reason for selecting April 26, 1998 as the base date. The DHCR claimed that it was adjusting an overcharge. Also, DHCR stated that the landlord sent the ICF to the Druckers on April 26, 2002, and that it worked backwards from that date.

According to the above authority, it appears that the four-year look-back period runs backward from the time that the complaint or application is filed, not from the date that the landlord sends an ICF to the tenants. It was in June 2002 that the landlord filed a petition with DHCR seeking high income deregulation of the subject premises, so it would appear that the base date was in June 1998. Thus, it unclear why the DHCR determined that April 26, 1998 was the base date. Nonetheless, during oral argument, the parties agreed that the rent was the same whether the base date was April or June 1998.

OVERCHARGES

During oral argument, the petitioners stated that there is no justification for going back four years because the Druckers neither complained about overcharges nor did the DHCR mention overcharges in its latest decision. In response thereto, the DHCR stated that it could *sua sponte* raise overcharges pursuant to Administrative Code of City of NY § 26-516 (a) and (b) and 9 NYCRR § 2522.6 (a) and (b). While the DHCR has the authority to determine overcharges, the decision under review says nothing about overcharges. If overcharges had been an issue, the petitioner had a due process right to be informed, and an opportunity to be heard on that particular question (Administrative Code § 26-516 [a], [b]; 9 NYCRR § 2526.1 [a] [1]).

RENT REGISTRATIONS

The DHCR stated in its decision that the 1998 rent registrations are not reliable. Nonetheless, the DHCR determined the tenants' base date rent by using the "rent which was actually charged and paid on April 26, 1998" (*id.* at 5). Presumably, this is a reference to the rent on the lease as of that date. This is not clearly stated in the decision.

The lease of April 1998 was based on the 1995 lease which was void. The law does not support using a void lease as the basis for determining rent (*390 West End Assoc. v Harel*, 298 AD2d 11, 14-16 [1st Dept 2002]). As previously stated, leases based on the evasion of rent regulations are invalid (*id.* at 16).

CONFORMITY WITH GRIMM AND THORNTON

The DHCR posits that its decision is consistent with *Grimm* and *Thornton*. According to *Thornton*, rental history before the four-year period 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 (*Thornton*, 5 NY3d at 180-181). *Thornton* concerned a scheme to evade the rent regulations through an illusory tenancy. In *Grimm*, the Court of Appeals declined to limit the *Thornton* holding to cases involving illusory tenancies and "conclude[d] that, where the overcharge complaint alleges fraud, as here, DHCR has an obligation to ascertain whether the rent on the base date is a lawful rent" (*Grimm*, 15 NY3d at 366). This obligation was not limited to the four-year look-back period as follows:

"On this appeal, we are asked to determine whether the rationale employed in *Thornton* * * *, which allowed the parties to look back farther than four years, applies in a situation where it is alleged that the standard base date rent is tainted by fraudulent conduct on the part of a landlord. We conclude that it does, and

that such base date rent may not be used as a basis for calculating subsequent regulated rent if fraud is indeed present”

(*id.* at 362).

In reliance on *Thornton* and *Grimm*, courts have found exceptions to the four-year look-back rule. Courts have turned to examining rental histories before the four-year look-back period to determine the rent in cases where the rent on the four year base date is untrustworthy (*see Conason v Megan Holding, LLC*, 109 AD3d 724, 726 [1st Dept 2013] [the four-year statute of limitations is not a bar in a rent overcharge claim where there is significant evidence of fraud on the record]; *Matter of Boyd v New York State Div. of Hous. & Community Renewal*, 110 AD3d 594, 595 [1st Dept 2013] [evidence that the landlord falsified records of improvements in the apartment to justify rent increases justifies looking beyond four years]; *Bogatin v Windermere Owners LLC*, 98 AD3d 896, 896 [1st Dept 2012] [it was proper to look at rents before the four-year period because of evidence that landlord engaged in a fraudulent scheme to remove the apartment from rent regulation]).

As petitioners⁷ assert, there is no claim of fraud in this case, but there is a void 1995 lease and evidence of intent to violate rent regulations. The DHCR failed to explain in its decision the rationale for reliance on rent which was charged and paid on April 26, 1998, when the lease for that period was based on the void 1995 lease.

DEFAULT FORMULA

The DHCR also claims that it used the default formula to set the rent in its decision. The default method is utilized when no reliable rent records are available to establish the legal regulated rent on the base date (*Thornton*, 5 NY3d at 180; *Levinson v 390 W. End Assoc., L.L.C.*,

22 AD3d 397, 401 [1st Dept 2005]). The default formula “uses the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the relevant base date” (*id.*). The relevant base date for the default formula is four years prior to the filing of a complaint or application to DHCR (*id.*).

The DHCR did not use the default method in the decision under review as per *Thornton* and *Grimm* because it did not compare the Druckers’ apartment with other apartments with the same number of rooms in the same building on the relevant base date. While the DHCR explained that it could not look to other apartments in the subject building or the adjacent building at 430 East 58th Street because the rent registrations “appear to be unreliable,” it imposed a different methodology and not the default formula set forth in *Thornton* and *Grimm*. An aspect of the arbitrary and capricious test is that the reasonableness of the agency's determination must be judged solely on the grounds stated by the agency at the time of its determination (*Matter of Rizzo v New York State Div. of Hous. & Community Renewal*, 16 AD3d 72, 75 [1st Dept], *affd* 6 NY3d 104 [2005]). Inasmuch as the DHCR in its decision dated November 29, 2012 claims to have used methodologies that it did not use, said decision cannot stand and must be remitted to the agency for further clarification and final determination.

CONCLUSION

Accordingly, it is hereby

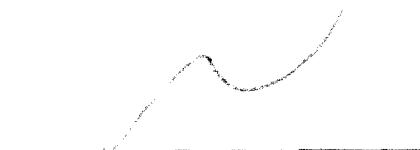
ORDERED and ADJUDGED that the petition is granted to the extent of remitting this matter back to New York State Division of Housing and Community Renewal for further clarification and final determination; and it is further

ORDERED that the cross-motion of John H. Drucker and Jacquelin Drucker to intervene as respondents is granted; and it is further

ORDERED that the clerk shall enter a judgment accordingly.

The foregoing constitutes the decision and order of this Court. Courtesy copies of this decision and order have been provided to counsel for the parties.

Dated: May 21, 2014
New York, New York



Hon. Shlomo S. Hagler, J.S.C.

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).