

**Matter of Riggini v Department of Hous. &
Community Renewal**

2017 NY Slip Op 32366(U)

November 9, 2017

Supreme Court, New York County

Docket Number: 152481/2017

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32**

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**In the Matter of the Application of
HEATHER RIGGIN,**

Petitioner,

**Index No. 152481/2017
Motion Seq: 001**

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

-against-

**DECISION & ORDER
ARLENE P. BLUTH, JSC**

**DEPARTMENT OF HOUSING AND COMMUNITY
RENEWAL, STAHL NEW YORK AVENUE CO. LLC,
MADAI PERSAUD, and KAMALDAI CHIN-SANG,**

Respondents.

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The cross-motion by respondent Department of Housing and Community Renewal (“DHCR”) to remit this proceeding back to that agency for further consideration is granted.

Background

This illusory tenancy proceeding arises out of petitioner’s residency at 423 East 64th Street, New York, New York. Petitioner claims that she moved into an apartment at this premises in 2006 after signing a lease with respondent Chin-Sang, whom she believed to be the owner. When she moved in, petitioner lived with a roommate, Manisha Panwala, who was already living in the apartment.

Petitioner insists that beginning in Fall 2008, she took responsibility for paying rent to Chin-Sang— petitioner’s roommates would pay her and she would make the full rent payment to Chin-Sang. Petitioner eventually discovered that the prime tenant for the apartment was

respondent Madai Persaud and that petitioner was paying rent to Persaud's daughter (Chin-Sang). Neither Persaud nor Chin-Sang lived in the apartment during petitioner's subtenancy.

In 2012, petitioner filed a rent overcharge complaint with DHCR. Eventually, DHCR issued an order awarding petitioner damages stemming from her overcharge complaint. DHCR also rejected petitioner's illusory tenancy claim on the ground that there was no evidence of collusion between the landlord (respondent Stahl) and the tenant (Persaud).

Petitioner filed a petition for administrative review ("PAR") on the illusory tenancy issue. DHCR affirmed its prior decision on the ground that petitioner failed to establish a sufficient link or knowledge by Stahl concerning the illusory tenancy.

Petitioner claims the PAR was arbitrary and capricious because the facts in this proceeding clearly support a finding of an illusory tenancy. Petitioner further claims that the PAR misapplied relevant case law by finding that the *Primrose* case was irrelevant and also holding that the *Primrose* decision was a succession rights case.

DHCR cross-moves to remit the matter back to DHCR for further review. DHCR states that "[u]pon remit, DHCR will review the relevant case law and its application to the facts of this case" (NYSCEF Doc. No. 29).

The landlord, Stahl, opposes remitting this proceeding on the ground that DHCR failed to provide a reason why the proceeding should be remitted. Stahl observes that DHCR does not admit it made a mistake or that it needs to consider additional evidence.

Petitioner claims that she has demonstrated all the elements of an illusory prime tenancy and that the PAR should be modified to reflect that claim. She also argues, in the alternative, that the Court should grant DHCR's cross-motion to remit.

Discussion

In an Article 78 proceeding, a Court may review “whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed” (CPLR 7803[3]).

Remittal to the DHCR may be “necessary in order for the [DHCR] to function efficiently and render substantial justice to the parties concerned” (*Matter of 47 Clinton St. Co. v New York State Div. of Hous. & Community Renewal*, 161 AD2d 402, 203, 555 NYS2d 332 [1st Dept 1990]).

Here, the Court must remit the proceeding back to DHCR because the PAR clearly misapplied relevant case law. Specifically, the PAR mischaracterized *Primrose Mgt. Co. v Donahoe* (253 AD2d 404, 405, 676 NYS2d 585 [1st Dept 1998]). To ensure that substantial justice is rendered to all parties, DHCR should have another opportunity to render a decision that correctly applies precedent.

Primrose involved a summary holdover proceeding against subtenants who had lived in a building for nearly 20 years (*id.* at 405). One subtenant raised the issue of an illusory tenancy as a defense to an eviction proceeding (*id.*). The Appellate Division affirmed the Civil Court’s dismissal of that proceeding and found that “[a]n illusory tenancy exists where rent laws have been violated in a way that has permitted the prime tenant to rent the apartment for the purpose of subleasing for profit or otherwise depriving the subtenant of rights under the Rent Stabilization Law” (*id.* [internal quotations and citations omitted]).

Here, the PAR attempted to distinguish the applicability of *Primrose* by stating that “The instant case is an overcharge proceeding and does not deal with the issue of succession. Given that *Primrose* was a succession proceeding in which the prime tenants were not in possession for 20 years, and that the instant case is an overcharge proceeding in which the prime tenants were not in occupancy for a maximum of six years, *Primrose* is not controlling herein” (NYSCEF Doc. No. 3 at 3). Contrary to the PAR, *Primrose* was not a succession rights case.

The First Department also held that “while there should be a showing of at least constructive knowledge on the part of the landlord of the subleasing arrangement, there is clearly no requirement that there be evidence of collusion on the part of the landlord before an illusory tenancy will be found. Here, while the landlord apparently did not benefit, it did know or should have known of the subterfuge, which was clearly within the knowledge of the former superintendent of the building” (*Primrose*, 253 AD2d at 405-06).

Despite this precedent, the PAR specifically concluded that “It is not contested that the owner did not profit from the prime tenants’ overcharging of the subtenant. Nor is it alleged that the owner colluded with the prime tenants in such overcharging” (NYSCEF Doc. No. 3 at 3). Those conclusions are irrelevant under *Primrose*—petitioner merely had to make a showing of the landlord’s constructive knowledge. While the PAR does address the parties’ *arguments* about whether the instant landlord, Stahl, had constructive knowledge of petitioner’s subtenancy (*id.*), the agency never made an explicit finding about whether this landlord knew or should have known of petitioner’s occupancy. Such a finding is essential under *Primrose*, the controlling case.

The Court cannot ignore the PAR's misapplication of the law. Although the ultimate outcome may not change upon remittal (DHCR could still find that petitioner failed to show that Stahl had constructive knowledge of her subtenancy), it is beyond the scope of this Court's power in an Article 78 proceeding to speculate how DHCR may have ruled if it had correctly applied the law. Put another way, this Court cannot, for example, overlook this error, draw its own conclusions and find that petitioner would have lost even if *Primrose* were properly applied.

The Court remits this proceeding despite the fact that DHCR's affirmation fails to specify the reason it wants this proceeding remitted. The closest DHCR gets to an explanation is where it states "DHCR is requesting that this Court remit this proceeding for further review. Upon remit, DHCR will review the relevant case law and its application to the facts of this case" (NYSCEF Doc. No. 29).

DHCR should have disclosed that the PAR contained blatant deficiencies and that DHCR wanted an opportunity to make it right. The Court recognizes that mistakes happen. But instead of admitting its mistake, DHCR decided to offer a coy affidavit that carefully omits any acknowledgment that the PAR contained errors of law. Lawyers should be better than that, and government lawyers, who do not even have to worry about losing a client, must stay away from such questionable practices. That type of practice employed by the DHCR here is unacceptable and unfair to the other parties in this proceeding and diminishes that agency's credibility.

DHCR is supposed to be an expert on the issues raised in this proceeding. Courts are even empowered to dismiss a case pursuant to the doctrine of primary jurisdiction where DHCR has not weighed in (*see e.g., Davis v Waterside Hous. Co., Inc.*, 274 AD2d 318, 319, 711 NYS2d 4 [1st Dept 2000]). But in order to justify that expertise, DHCR must be more forthcoming when

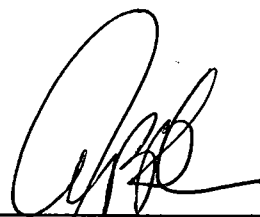
it makes a mistake. Despite DHCR's reluctance to admit its error, this Court has no interest in forcing DHCR to stand by a determination that is clearly sloppy and contains mistakes. That does not serve petitioner or the landlord.

Accordingly, it is hereby

ORDERED that the cross-motion of respondent DHCR is granted and the matter is remitted to that agency for further consideration.

This is the Decision and Order of the Court.

Dated: November 9, 2017
New York, New York



ARLENE P. BLUTH, JSC