SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART ~~IA~~ PART 16

Index Number : 103952/2012
FRISCIA, DANIELLE
vs.
TOWNS, DARRYL C.
SEQUENCE NUMBER : 001
ARTICLE 78

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

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

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

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this ~~motion is~~ 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).

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

Dated: AUG 06 2013
AUG 06 2013

ALICE SCHLESINGER, 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

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

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In the Mater of the Application of
DANIELLE FRISCIA,

Petitioner,

Index No. 103952/12
Motion Seq 001

for a judgment pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

DARRYL C. TOWNS, COMMISSIONER OF THE STATE OF NEW YORK DIVISION OF HOUSING AND COMMUNITY RENEWAL and THE NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent,

-and-

LEM LEE 13TH LIMITED PARTNERSHIP,

Intervenor-Respondent

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SCHLESINGER, J.:

Petitioner commenced this Article 78 proceeding seeking to annul the August 6, 2012 Order and Opinion issued by the Deputy Commissioner of the New York State Division of Housing and Community Renewal (DHCR)(Petition, Exh A). The Order was issued after a hearing following the December 17, 2009 remand by this Court in a prior Article 78 proceeding in response to a cross-motion to remand by DHCR (see Slip Op., Index No. 110762/09, Reply Exh C). The petitioner also challenges the findings made by Administrative Law Judge Cecil Hollins in his July 26, 2012 Report on which the DHCR Order is based. (Petition, Exh B).

The history of these proceedings is quite extended at both the administrative and judicial levels and need not be recounted in detail here. Suffice it to say, the dispute revolves around the claim by the petitioner tenant that the respondent owner Lem Lee

13th Limited Partnership unlawfully increased the rent for the apartment and wrongfully deregulated the apartment in violation of the Rent Stabilization Law (RSL). Citing *Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.,* 15 NY3d 358 (2010), the tenant further asserts that, based on evidence of fraud, DHCR when considering and determining the issues should have more aggressively and rigorously scrutinized the apartment's rent history preceding the four-year period for rent overcharge claims set forth in RSL § 26-516(a)(2). In particular, the tenant challenges the rent increase from $415.00 to $2,300.00 during a vacancy in 1999, claiming that it was part of a fraudulent scheme to unlawfully deregulate the apartment.

In the Order and Opinion at issue, the Deputy Commissioner acknowledged the four-year rule and the exception based on fraud. He also cited the provision on which the owner was relying to claim "high rent vacancy deregulation", also known as "luxury decontrol"; namely, Rent Stabilization Code §2520.11(r)(4), which exempts from the RSL those apartments that "became or become vacant on or after June 19, 1997, with a legal regulated rent of $2,000.00 or more per month." He then summarized the evidence adduced at the hearing as follows:

> The tenant claimed that as part of the owner's scheme seeking high rent vacancy deregulation immediately prior to her tenancy, the owner had previously rented the subject apartment to certain "nominee tenants". This claim was unsupported by the credible evidence adduced at the hearing including testimony from the alleged "nominee tenant" who although having heard about it from someone he knew from school, paid full rent in a legitimate transaction and obtained the apartment through a broker. Moreover, the owner either through credible testimony or submissions established a non-fraudulent basis for its assertion that the rent could exceed the deregulation threshold, even if all of the proof would not necessarily meet the standard for establishing such increases, if the tenant's complaint had commenced within the four year period for standard overcharge review.

The Deputy Commissioner then stated his conclusion as follows:

> As there was no fraudulent scheme to deregulate the subject apartment and the review that the tenant is seeking is otherwise barred by the four year period of review with respect to overcharges, review of the rent to otherwise ascertain whether it appropriately exceeded $2,000.00 per month is time barred.

As a result, the Deputy Commissioner affirmed the District Rent Administrator's October 17, 2008 Order and denied the tenant's administrative appeal. In the 2008 Order, the DRA had determined that the subject Apartment 13 at 338 East 13th Street in Manhattan did qualify for high rent vacancy decontrol, explaining the reasoning as follows (DHCR Admin Return, C-16):

> A review of the information/evidence in the records indicates that the rent for the subject apartment was $2,500 for the year 2001, based upon the one year lease dated June 5, 2001 between the owner and the tenant Scott Taffet. Based on the DHCR four year statute of limitation, the agency cannot review rents prior to 2001, four years prior to the tenant's filing of the complaint in 2005.[1]

Discussion

In her petition, the tenant asserts that DHCR's Order should be annulled for the following reasons:

- The Administrative Law Judge (ALJ) who conducted the hearing improperly placed the burden of proof on the tenant, when the State Administrative Procedure Act § 306(1) places the burden on the owner, as 'the party who initiated the proceeding." (Petition, ¶ 16).

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[1] The referenced 2005 complaint was filed by the tenant in New York County Supreme Court for a declaratory judgment that the apartment was rent stabilized and for an award of rent overcharges. Justice Diamond dismissed the action, finding that the issues were more properly raised before DHCR. *Friscia v Lem Lee 13th Limited Partnership, et al.*, Index No. 108123/05, Slip Op Jan 31, 2006 (Admin Return A-1), and the Appellate Division affirmed. 37 AD3d 168 (1st Dep't 2007).The owner then commenced the administrative proceeding that led to the Order at issue here to confirm the regulatory status of the apartment and the legal rent. The tenant moved out in 2007.

- The ALJ treated the proceeding as though it was a plenary action for fraud, instead of an investigation by DHCR under *Grimm, supra*, failing for example to ask the owner to explain the significant rent increase in late 1999 and substantiate it with original contracts and cancelled checks referable to an itemized list of improvements. (¶¶ 17-18, 23 -24).

- The ALJ accepted oral testimony of the former managing agent to substantiate $33,000.00 in claimed apartment improvements to justify the 1999 rent increase, without demanding proper supporting documentation as required by DHCR Operational Bulletin 90-10 and prevailing case law. (¶¶ 19 - 22, 25).

- The ALJ failed to comply with the agency's September 4, 2007 remand order, which specifically directed an inquiry into whether the substantial rent increase in 1999 was fraudulent and therefore entitled the tenant to an exception from the four-year rule under *Thornton v Baron,* 5 NY3d 175 (2005). (¶¶ 27- 29).

In support of these claims, the tenant points (at ¶ 29) to the following language in DHCR's 2007 Remand Order:

> On this case, the tenant has questioned whether the prior tenancies and rents were bona fide or legitimate, and the Commissioner finds that this charge should be investigated by the rent administrator on remand. Such investigation is appropriate in this case because of the owner's claim of decontrol; the large jump in rent from 1998 or 1999 to 2000 without the installation of any improvements; the tenant's allegations that one or more of the prior [tenants] had a personal or family relationship with the owner; and the substantial decline in the listed rent from $2,500 per month in 2002 to $1,900.00 in 2003.

The Court rejects petitioner's claim that the ALJ improperly shifted the burden of proof to the tenant, when it was the owner who commenced the administrative proceeding. First, as discussed above (n 1), it was the tenant who raised the issue in the first instance by filing an action in Supreme Court in 2005; the owner commenced the administrative proceeding in 2007 only after the Appellate Division affirmed the Supreme Court's determination that the issues were more properly raised before the agency.

What is more, it is wholly consistent with *Grimm, supra,* to require that the tenant go forward in the first instance with evidence of fraud so as to trigger an inquiry into the rent history preceding the four-year period for rent overcharges. After the hearing, the ALJ determined (at ¶ 22) based on the "totality of the credible evidence admitted and testimony adduced" that sufficient evidence of fraud did not exist that "tainted the reliability of the rent on the base date." *Grimm,* 15 NY2d at 367. Thus, it cannot be said that the ALJ improperly placed the burden of proof on the tenant in violation of SAPA.

Nor has the tenant persuaded this Court that DHCR was obligated to complete an "investigation" of the fraud claims by serving subpoenas for the testimony of witnesses such as contractors who allegedly completed improvements at the premises or by demanding the production of additional documents. Petitioner has not cited any language in *Grimm* that obligated the agency to do more than it did; that is, conduct a hearing at which both sides were permitted to present evidence in their favor and cross-examine witnesses regarding the rental history for the subject apartment dating back to 1999, when the challenged rent increase and alleged deregulation occurred.

The Court of Appeals in *Grimm* had criticized DHCR for "blindly using the rent charged on the base date four years prior to the filing of the rent overcharge claim" and declining to question at all whether that rent was legitimate in light of a "colorable claim of fraud." *Id.* at 366-67. However, the Court did not direct the agency to take any specific steps to complete its investigation. On this particular record, this Court finds that the agency took appropriate action to investigate the tenant's claims by conducting a hearing at which witnesses and documents were examined.

Similarly unavailing is the tenant's claim that the ALJ violated DHCR Operational Bulletin 90-10 and prevailing law by accepting the oral testimony of the former managing agent and copies of various documents in connection with the owner's claim that the 1999 rent increase was justified in part by individual apartment improvements. As the ALJ noted in his findings (at ¶ 20), while the documentation provided was not as detailed and comprehensive as would be necessary to defeat a timely overcharge complaint, it was sufficient to enable the ALJ to determine whether the owner had engaged in "a fraudulent scheme to deregulate Apartment 13." Although the documentation did not address the work done to bring new plumbing lines and electrical risers from the basement to the Apartment, the managing agent credibly testified about that work based on his experience, custom and practice, and recollection, and petitioner's counsel had ample opportunity to cross-examine that witness and all others called by the owner, including a principal of the current owner's company.

Contrary to petitioner's claim, substantial documentation in the form of contracts or work orders and cancelled checks was submitted to substantiate much of the work done inside the apartment. To the extent that petitioner now objects that copies, rather than originals, of contracts and cancelled checks were considered, it is unclear whether that issue was properly preserved. In any event, it was not unreasonable for the ALJ to accept copies instead of originals in light of the fact that the work had been completed more than ten years ago. Moreover, while petitioner correctly notes that the *Grimm* court stated that DHCR was obligated to "ascertain whether the rent on the base date is a lawful rent," it did not dictate a determination of the precise legal rent using records outside the four-year period absent proof of a fraudulent scheme to increase rents. *Id.* at 366.

As further support for the claimed apartment improvements, the owner called as a witness Mr. Marceda, the first tenant to take occupancy after the renovations were completed. The ALJ found that Mr. Marceda credibly testified that he recalled that the apartment had been recently renovated when he moved in. The ALJ further found that Mr. Marceda's testimony was not tainted by any close relationship with the owner, as he had secured the apartment through a broker and regularly paid his rent in full. Thus, the evidence supported the ALJ's finding that Marceda was not a "nominee tenant" installed as part of a fraudulent scheme to unlawfully increase the rent.

Nor did the evidence compel a finding that the subsequent tenants Taffet and Kashman/Carey were "nominee tenants" installed as part of a fraudulent scheme. While they might have had some relationship with the son of one of the owner's principals and therefore had little incentive to file rent overcharge complaints, the owner documented that those tenants had actual leases and paid a reasonable rent amount on a regular basis. Along those lines, it is noteworthy that the complaining tenant here, Danielle Friscia, could have filed a timely rent overcharge complaint when she moved into the Apartment in 2003 that would have compelled the owner to establish the legality of the substantial rent increase in 1999, which was within the four year statute of limitations period.

Wholly without merit is petitioner's claim that DHCR failed to comply with its own remand order or that issued by this Court. Neither the agency, nor this Court, made a specific finding of fraud. Rather, the only finding made was that the tenant had raised legitimate issues triggering a further inquiry into whether the owner had set the rent pursuant to a fraudulent scheme. The inquiry proceeded at the hearing at which both

parties — represented by competent counsel — had a full and fair opportunity to be heard in accordance with due process of law.

The function of a court reviewing a DHCR determination such as the one at issue here is limited to the question whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary or capricious. CPLR § 7803. Absent such a determination, the court may not substitute its judgment for that of the agency, even if it would have decided differently if presented with the issues in the first instance. *Matter of Partnership 92 LP and Bldg. Mgt. Co., Inc. v State of New York Div. of Hous. and Community Renewal*, 46 AD3d 425, 429 (1st Dep't 2007), *aff'd* 11 NY3d 859 (2008).

As discussed above, this Court finds no errors of law or procedure, nor any violation of the *Grimm* decision, that would mandate the annulment of DHCR's decision. Nor does the Court find that the determination is arbitrary and capricious. The "arbitrary and capricious" test relates to "whether a particular action should have been taken or is justified and whether the administrative action is without sound basis in reason and is generally taken without regard to the facts." *Matter of Pell v Board of Education*, 34 NY2d 222, 231 (1974). The ALJ has broad discretion to determine the credibility of witnesses [*Berenhaus v Ward*, 70 NY2d 436 (1987)], and none of the witnesses who appeared on behalf of the owner were inherently incredible. Quite the contrary, much of the testimony was supported by documentation.

Enough evidence was presented to the ALJ to justify a finding that Apartment 13 was not deregulated pursuant to a fraudulent scheme, as would be necessary to allow the agency to scrutinize the rental history preceding the four-year period. The Rent

Regulation Reform Act of 1997 entitled the owner to a vacancy increase of 20%, plus an additional "longevity" bonus, and perhaps an additional increase because the rent was less than $500, when the prior long-term tenant vacated in or about 1999. See RSL § 26-511(c). The ALJ reasonably concluded that these increases, when coupled with the permitted increase based on the apartment improvements pursuant to Rent Stabilization Code § 2522.4, led to a rent of more than $2,000.00 at the end of 1999. That rent level was all that was needed to allow the owner to deregulate the apartment and charge all subsequent tenants, including Ms. Friscia whose occupancy commenced in 2003, whatever rent the market could bear.

Accordingly, it is hereby

ADJUDGED that the petition is denied and this Article 78 proceeding is dismissed without costs or disbursements. The Clerk may proceed accordingly.

Counsel for DHCR is directed to retrieve the Administrative Return from the Clerk in Part 16, Room 222.

Dated: August 6, 2013

AUG 06 2013

J.S.C.

ALICE SCHLESINGER

UNFILED JUDGMENT

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