

**Matter of 291 Edgecombe Ave. LLC v New York
State Div. of Hous.& Community Renewal**

2013 NY Slip Op 31123(U)

May 22, 2013

Supreme Court, New York County

Docket Number: 100378/13

Judge: Cynthia S. Kern

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

PRESENT: Korn
Justice

PART SS

291 BDBECOMBE AVE

- v -

NY STATE DHC

INDEX NO. 100378/13
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

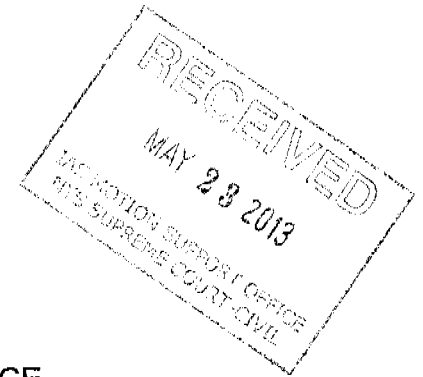
Upon the foregoing papers, it is ordered that this motion

FILED

MAY 23 2013

COUNTY CLERK'S OFFICE
NEW YORK

is decided in accordance with the annexed decision.



Dated: 5/22/13 PK
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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
In the Matter of the Application of
291 EDGECOMBE AVENUE LLC AND
GEMSTONE MANAGEMENT, LLC,

Petitioners,

Index No. 100378/13

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

FILED

MAY 23 2013

Respondent.

COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for
:

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>

Petitioner owner has brought the present article 78 proceeding to challenge the determination of the respondent Division of Housing and Community Renewal ("DHCR") granting the tenant's Petition for Administrative Review ("PAR") solely to the extent of remanding the proceeding to the Rent Administrator for further fact finding and processing regarding the tenant's claim of alleged fraud by petitioner owner in concealing the regulatory status of the subject apartment and the

application of *Grimm v. DHCR*, 15 N.Y.3d (2010) to the facts of the proceeding. Respondent DHCR has brought a cross-motion to dismiss the proceeding on the ground that it is premature and petitioner has failed to exhaust its administrative remedies. As will be explained more fully below, the cross-motion to dismiss the proceeding is granted.

The relevant background is as follows. The tenant of apartment 6C at 291 Edgecombe Avenue filed a rent overcharge complaint with DHCR. The tenant alleged that the rent of \$1,650 per month charged by the owner in August 2005 when the tenant assumed occupancy constituted an overcharge. In October 2010, after submissions by the tenant and owner, the Rent Administrator issued an order determining that there was no overcharge. The Rent Administrator did not address the issue of fraud in this determination. The tenant filed a PAR of this determination. The tenant's PAR alleged that the Rent Administrator improperly failed to address his allegation of fraud and *Grimm v. DHCR*, 15 N.Y. 3d 3 (2010) to the facts of the proceeding. In December 2012, the DHCR issued an order granting the tenant's PAR and remanding the proceeding back to the Rent Administrator for further processing regarding the tenant's alleged claim of alleged fraud by petitioner in concealing the regulatory status of the apartment and the application of *Grimm*. According to the remand decision, the *Grimm* decision requires DHCR to look at the rental history of an apartment more than four years prior to the filing of a complaint where it appears that there may have been fraud on the part of the owner in setting the rent under a lease. The petitioner then brought the present Article 78 proceeding appealing the PAR determination remanding the tenant's overcharge complaint.

Petitioner argues in its Article 78 proceeding that it was incorrect for the Deputy Commissioner to first address the issue of fraud during the PAR proceeding where that issue had

not been raised below before the Rent Administrator. However, what the petitioner was not aware of until it received the cross-motion in the present Article 78 proceeding is that the tenant did raise the allegation of fraud and the *Grimm* case during the proceeding before the Rent Administrator. In a submission to DHCR dated June 10, 2010, tenant's counsel alleged that petitioner fraudulently concealed the legal regulated rent from the tenant by not providing a proper rent stabilized lease containing the required rent stabilization lease rider and alleged that the DHCR should take into consideration the *Grimm* case. This submission was not served by DHCR on the petitioner during the Rent Administrator's proceeding and the submission by the tenant and the *Grimm* case was not addressed by the Rent Administrator in the determination. Nor is it possible for either this court or the DHCR to determine from reviewing the decision of the Rent Administrator whether the Rent Administrator considered the issue of fraud and the application of *Grimm*.

Based on the foregoing procedural history, the court finds that the present Article 78 proceeding is premature as no final determination has yet been made by the DHCR on tenant's claim that there was fraud by the owner in setting the rent under the lease. Although tenant raised the issue of fraud in the underlying proceeding, DHCR failed to serve these papers on petitioner and the Rent Administrator failed to address the fraud issue in the determination. It was therefore proper for the Deputy Commissioner to grant the PAR to the extent of remanding the matter to the Rent Administrator to make a determination of the issue of fraud. Since there has been no final administrative determination on the fraud issue, the present proceeding is premature. Petitioner must first allow the Rent Administrator to make a determination on the fraud issue and if it disagrees with the substantive determination of the Rent Administrator, it can then bring a PAR to challenge that determination. Until all of these steps take place, however, petitioner has failed to

exhaust its administrative remedies and cannot now challenge the determination of DHCR to remand the proceedings for a determination of this issue.

Based on the foregoing, this Article 78 proceeding is dismissed. This constitutes the decision and order of the court. The clerk is directed to enter judgment accordingly.

Dated: 5/22/13

CJC

J.S.C.

FILED

MAY 23 2013

COUNTY CLERK'S OFFICE
NEW YORK