This is the NYS Supreme Court ruling in the initial case Grimm vs. DHCR. The case was sent on appeal to the Appellate Court. The Appellate Courts ruling is listed below.

Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.

2009 NY Slip Op 06653 [68 AD3d 29]

September 24, 2009

Acosta, J.

Appellate Division, First Department

Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.

As corrected through Wednesday, February 3, 2010

[*1]

In the Matter of Sylvie Grimm, Respondent,
v
State of New York Division of Housing and Community Renewal Office of Rent Administration, Appellant, and 151 Owners Corp., Intervenor-Appellant.

First Department, September 24, 2009

Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin., 2007 NY Slip Op 34184(U), affirmed.

APPEARANCES OF COUNSEL

Gary R. Connor, New York City (*Martin B. Schneider* of counsel), for [*2]appellant.

Belkin Burden Wenig & Goldman, LLP, New York City (*Magda L. Cruz*, *Sherwin Belkin*, *S. Stewart Smith* and *Kristine L. Grinberg* of counsel), for intervenor-appellant.

Kenneth B. Hawco, New York City, for respondent.

{**68 AD3d at 30} OPINION OF THE COURT

Acosta, J.

In this appeal we are asked to consider the obligation of respondent Division of Housing and Community Renewal (DHCR) when a rent overcharge complainant makes a colorable argument that there are genuine issues that an owner committed fraud by charging an illegal rent, even if more than four years passed before the complaint was filed.

The basic facts are undisputed. The rent-stabilized apartment at issue was registered with DHCR in 1999 at a monthly rent of $578.96. The following year, instead of using the required rent-setting formula to determine the rent that it could legally charge the next tenants of the apartment, the owner, through an agent, notified prospective tenants Tracy Hartman and Jon Bozak that the rent for the subject apartment was a fictitious and illegal $2,000 per month, but that if Hartman and Bozak agreed to make repairs and paint the apartment at their own expense, the rent would be reduced to an equally fictitious and illegal $1,450. The offer was accepted, and the rent was memorialized in a nonregulated written lease agreement. Neither Hartman nor Bozak ever received a statement showing the apartment was registered with DHCR. The rent for the year 2000 represented a 250% increase over the previous year.{**68 AD3d at 31}

On April 1, 2004 petitioner moved into the apartment, at the preexisting illegal rental rate of $1,450. Thereafter, on July 19, 2005, petitioner filed a rent overcharge complaint with DHCR. In its answer, the owner, intervenor 151 Owners Corp., acknowledged that the premises had not been registered since 1999. In September 2005, 151 Owners Corp., through its purported managing agent, Michelle Goldstein, filed registration statements for 2001, 2002, 2003, 2004 and 2005.

In an order dated June 21, 2006, the DHCR Rent Administrator denied petitioner's complaint of rent overcharge on the ground that the base date of the proceeding is July 19, 2001, which was four years prior to the filing date of the complaint (at which time the rent was $1,450), and that the rent adjustments subsequent to the base date have been lawful, so that there was no rent overcharge. The Rent Administrator erroneously failed to address the issue of whether the registration statement in effect on the base date was unreliable because of the possibility that the owner had committed fraud by charging an illegal rent to the previous tenants of the apartment. Petitioner subsequently filed a petition for administrative review, which was denied by DHCR.

The determination simply calculated the rent, assuming without discussion that the registration on the base date was legitimate.

The Rent Regulation Reform Act of 1997 (RRRA) (L 1997, ch 116) clarified and reinforced that [*3]the statute of limitations for a rent overcharge complaint is four years.[FN*] However, as this Court has previously held, a default formula "should be used to{**68 AD3d at 32} determine the base rent in an overcharge case where . . . no valid rent registration statement was on file as of the base date" (*Levinson v 390 W. End Assoc., L.L.C.*, 22 AD3d 397, 401 [2005], citing *Thornton v Baron*, 5 NY3d 175, 180 n 1 [2005]). That is, while the applicable four-year statute of limitations reflects a legislative policy to "alleviate the burden on honest landlords to retain rent records indefinitely" (5 NY3d at 181), and thus precludes us from using any rental history prior to the base date, where there is fraud or an unlawful rent, the lease is rendered void. The legal rent should be established by using the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the base date.

Based on the facts in this case, DHCR acted arbitrarily, capriciously and in disregard of its obligation in failing to consider whether the rent charged to petitioner was unlawful, and thus whether establishing a rental rate based on the *Thornton* formula was appropriate. The tenants immediately preceding petitioner were never given a rent-stabilized lease rider, were never provided with annual registration statements, and were not told how their initial monthly rent was calculated. Therefore, if the rent in 2001 was established at an illegal rate, that lease as well as petitioner's lease at the same rate is a nullity, and the default formula would be the appropriate [*4]mechanism for determining the base rent. Sanctioning the owner's behavior on a statute of limitations ground "can result in a future tenant having to pay more than the legal stabilized rent for a unit, a prospect which militates in favor of voiding agreements such as this in order to prevent abuse and promote enforcement of lawful regulated rents" (*Drucker v Mauro*, 30 AD3d 37, 40 [2006], *lv dismissed* 7 NY3d 844 [2006]). Knowing that the owner agreed to "lower" the rent to the previous tenants should have caused DHCR to determine whether the owner complied with rent regulations rather than to summarily dismiss petitioner's rent overcharge complaint.

The dissent attempts to distinguish *Thornton* in order to support its contention here that DHCR acted rationally. The dissent correctly points out that the Court of Appeals properly applied the default formula in *Thornton*, since the landlord in that case improperly removed the apartment from rent stabilization,{**68 AD3d at 33} thus rendering the leases void ab initio. However,

that is precisely why remand to DHCR is appropriate here, where there are indicia of fraud. Given the specific facts of this case, DHCR should not be allowed to turn a blind eye to what could be fraud and an attempt by the landlord to circumvent the Rent Stabilization Law. Our holding merely follows the holding in *Thornton*. If DHCR fulfills its obligation to investigate whether there was fraud by the landlord, and finds that there was indeed fraud, then use of the default formula would be necessitated. Unlike what the dissent suggests, our holding does not summarily mandate use of the default formula in the instant case.

The dissent also ignores our explicit holding in *Drucker*, based on well-settled law 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. Any lease provision that subverts a protection afforded by the rent stabilization scheme is not merely voidable, but void" (*Drucker*, 30 AD3d at 39). The dissent seems to conflate when the default formula should be applied with DHCR's affirmative obligation to determine whether fraud has been committed in instances such as this.

Here, DHCR also inexplicably failed to examine the peculiar nature of the transfer of the building and to consider the connection between the prior owner and the current owner. The current owner contends that it purchased the building from a previous owner, giving the impression that there was no connection between the two. However, although the two owners have different corporate names, they are both controlled by the same individual. In fact, title to the building was transferred without any purchase price or tax being paid. In circumstances where, as here, there is an indication of possible fraud that would render the rent records unreliable, it is an abuse of discretion for DHCR not to investigate it. To be sure, if DHCR is permitted to turn a blind eye to a situation such as this, the limited exception to the four-year statute of limitations is nugatory, and the protections afforded by the Rent Stabilization Law can be subverted to the detriment of those in need of affordable housing.

Finally, the fact that the owner filed registration statements with DHCR for 2001, 2002, 2003, 2004 and 2005 is not dispositive of whether the rent of $1,450 is the legal rent under the Rent Stabilization Code. If the owner engaged in fraud in setting an excessive rent, the Court of Appeals has made it clear{**68 AD3d at 34} that it should not be allowed to hide behind the four-year statute of [*5]limitations. "[A]n unscrupulous landlord . . . could register a wholly fictitious, exorbitant rent and, as long as the fraud is not discovered for four years, render that rent unchallengeable. That surely was not the intention of the Legislature when it enacted the RRRA" (*Thornton*, 5 NY3d at 181).

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 11, 2008, which vacated a February 21, 2007 determination of respondent DHCR denying petitioner's rent overcharge complaint and remanded the matter to DHCR to consider whether the registration statement for petitioner's apartment on the base date (July 19, 2001) was reliable, should be affirmed, without costs.

Buckley, J. (dissenting). I would find that the Division of Housing and Community Renewal (DHCR) acted rationally in complying with the legislative intent expressed in the statute of limitations set forth in CPLR 213-a and Rent Stabilization Law (Administrative Code of City of NY) § 26-516 (a).

CPLR 213-a provides:

> "An action on a residential rent overcharge shall be commenced within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years before the action is commenced. This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action."

The CPLR thus expressly states that the four-year statute of limitations applies to both an initial determination of whether there was an overcharge and any calculation of the amount of an overcharge. The statute goes even further in specifically declaring that the rental history predating the four-year period shall not be examined.

Similarly, Rent Stabilization Law § 26-516 (a) states:

> "Except as to complaints [not pertinent herein], the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual{**68 AD3d at 35} registration statement filed four years prior to the most recent registration statement, . . . plus in each case any subsequent lawful increases and adjustments. 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. . . .

> " (2) Except as provided under clauses [not applicable herein], a complaint under this subdivision shall be filed with [DHCR] within four years of the first overcharge alleged and no determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed. . . . This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision."

The only basis for finding an overcharge with respect to the subject apartment, as alleged in petitioner's July 2005 complaint, is an examination of the rental history in 1999, which is beyond the four-year period permitted by the statutes. The statutes specifically prohibit an examination of the rental history more than four years before the complaint for the purpose of finding an overcharge: "no determination of an overcharge . . . may be based upon an overcharge having occurred more than four years before the action is commenced" (CPLR 213-a); "no determination of an overcharge . . . may be based upon an overcharge having occurred more than four years before the complaint is filed" (Rent Stabilization Law § 26-516 [a] [2]). To eliminate any confusion, the Legislature added: "This section shall preclude examination of the rental history of the housing accommodation prior to the four-year period immediately preceding the commencement of the action" (CPLR 213-a; *see* Rent Stabilization Law § 26-516 [a] [2] [using nearly identical language]). As this Court has previously recognized, that "legislative scheme specifically preclude[s] examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of the complaint even where the{**68 AD3d at 36} prior rental history clearly indicates that an unauthorized rent increase had been imposed" (*Matter of Hatanaka v Lynch*, 304 AD2d 325, 326 [2003] [citations and internal quotation marks omitted]).

The majority disregards those express legislative statements by using the 1999 rental history to establish that there was an overcharge. The majority's use of a default formula (the lowest rent charged for a rent-stabilized apartment with the same number of rooms in the same building on the base date) rather than the rental history to calculate the amount of the alleged overcharge does not cure the statutory elision, but merely complies with the second part of the statutes, that "no award or calculation of an award of the amount of any overcharge may be based upon an overcharge having occurred more than four years" before the action is commenced (CPLR 213-a; Rent Stabilization Law § 26-516 [a] [2]).

As justification for ignoring the explicit legislative language, the majority asserts that the statute of limitations was intended to alleviate the burden on honest landlords, not fraudulent ones, in maintaining rent records. However, the same general goal is

true of all statutes of limitations: to grant defendants repose from claims that have lain dormant past a certain specified time, at which point evidence may have been lost, memories faded, and witnesses disappeared (*see Blanco v American Tel. & Tel. Co.*, 90 NY2d 757, 773 [1997]). By their very nature, [*6]statutes of limitations are bright-line rules that will result in the preclusion of some meritorious claims. The fact that some fraudulent landlords might escape liability is not a valid ground for ignoring the statute of limitations; indeed, even causes of action for fraud are subject to time limitations periods (*see* CPLR 213 [8]).

Thornton v Baron (5 NY3d 175 [2005]) is not to the contrary. In *Thornton*, the Court of Appeals reiterated that an apartment's rental history beyond four years prior to the filing of an overcharge complaint "may not be examined" and that any rent before that four-year period is "of no relevance" (*id.* at 180). Thus, the Court of Appeals expressly rejected the proposition embraced by the majority, that whenever there are indicia of fraud, DHCR must investigate, no matter how old those indicia are. The Court in *Thornton* used the default formula to ascertain the correct rent because there were no valid registration statements for the base date. There was no question that the landlord in *Thornton* had improperly attempted to remove{**68 AD3d at 37} multiple apartments from rent stabilization by colluding with the tenants to falsely represent in the leases that the apartments were nonprimary residences, and therefore exempt from rent stabilization, and to obtain consent judgments to that effect. The nonstabilized leases were therefore void ab initio, and the rent registration statements upon which they were based were also a nullity, thus leaving the Court no recourse but to utilize the DHCR default formula. Unlike *Thornton*, the instant case does not involve an apartment that was improperly taken out of rent stabilization. *Thornton* is further distinguishable in that the Court of Appeals did not consider the rental history prior to the base date for any purpose, whereas the majority can only establish a rent overcharge by examining the rental history predating the four-year period. Moreover, DHCR's decision here, to only consider the rental history within the allowable time frame, is consistent with its approach in *Thornton*; in contrast to the Court of Appeals, which deferred to the determination of DHCR, the agency with expertise in rent stabilization, the majority would reject DHCR's decision as arbitrary and irrational. [*7]

For the reasons discussed, *supra*, I would find that DHCR was not arbitrary or capricious in obeying the legislative mandates set forth in CPLR 213-a and Rent Stabilization Law § 26-516 (a).

Andrias, J.P., and Catterson, J., concur with Acosta, J.; Friedman and Buckley, JJ., dissent in a separate opinion by Buckley,

J.

Order and judgment (one paper) of the Supreme Court, New York County, entered January 11, 2008, affirmed, without costs.

Footnotes

Footnote *:

"Except as to complaints [not pertinent here], the legal regulated rent for purposes of determining an overcharge, shall be the rent indicated in the annual registration statement filed four years prior to the most recent registration statement, . . . plus in each case any subsequent lawful increases and adjustments. 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. . . .

"Except as provided under clauses [not applicable here], a complaint under this subdivision shall be filed with [DHCR] within four years of the first overcharge alleged and no determination of an overcharge and no award or *calculation* of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed . . . This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision" (Rent Stabilization Law [Administrative Code of City of NY] § 26-516 [a] [2] [emphasis added]).

The Appellate Courts ruling on Grimm vs. DHCR is listed below.

Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.
2010 NY Slip Op 07379 [15 NY3d 358]
October 19, 2010
Ciparick, J.
Court of Appeals
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
As corrected through Wednesday, December 8, 2010

[*1]

In the Matter of Sylvie Grimm, Respondent,
v
State of New York Division of Housing and Community Renewal Office of Rent Administration, Appellant.
151 Owners Corp., Intervenor-Appellant.

Argued September 13, 2010; decided October 19, 2010

Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin., 68 AD3d 29, affirmed.

{**15 NY3d at 362} OPINION OF THE COURT

Ciparick, J.

On this appeal, we are asked to determine whether the rationale employed in *Thornton v Baron* (5 NY3d 175 [2005]), 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 [*2]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.

I.

In 1999, prior to the tenancy of petitioner Sylvie Grimm, the rent-stabilized apartment at issue here was registered with the Division of Housing and Community Renewal (DHCR) at a monthly rent of $578.86. In 2000, upon a vacancy in the apartment, rather than using the required rent-setting formula to determine the rent that it could legally charge the next tenants of the apartment, the owner notified prospective tenants that the rent for the subject apartment was $2,000 per month. However, the owner informed the prospective tenants that, if they agreed to make certain repairs and improvements to the apartment at their own expense, the rent would be reduced to{**15 NY3d at 363} $1,450. Both sums were unlawful because of the rent-stabilized status of the apartment. The tenants accepted the offer, and signed a written lease agreement without a rent-stabilized lease rider. The owner apparently did not provide those tenants with a statement showing the apartment was registered with DHCR.

In 2004, petitioner moved into the apartment, agreeing to the rental rate of $1,450. Her initial lease did not specify that the apartment was rent stabilized. Thereafter, in July 2005, petitioner filed a rent overcharge complaint with DHCR. The landlord, intervenor 151 Owners Corp., soon after receiving the overcharge complaint, sent petitioner revised versions of her 2004 and 2005 leases which advised that the apartment was subject to rent stabilization. In its answer to the overcharge complaint, 151 Owners Corp. admitted that the apartment had not been registered with DHCR since 1999. At the same time it filed the answer to the overcharge complaint, 151 Owners Corp. filed registration statements with DHCR for the years 2001 through 2005.

In an order dated June 21, 2006, the DHCR Rent Administrator denied petitioner's overcharge complaint on the ground that the rent on the "base date"—i.e., the date four years prior to the filing of the complaint—was $1,450, and the rent adjustments subsequent to the base date had been lawful. The Rent Administrator did not address the issue whether the registration statement in effect on the base date was reliable or set forth a lawful rent. DHCR denied petitioner's request for administrative review of the Rent Administrator's determination, and denied her request for reconsideration.

Petitioner thereafter commenced this CPLR article 78 proceeding challenging DHCR's determination denying administrative review. The petition sought (1) a declaration that she was the legal rent-stabilized tenant of the apartment and (2) remand to DHCR "with the direction that the rent for the subject apartment should be frozen at the 1999 amount, because the [*3]owner failed to register the subject apartment for 2000, and computing the rent overcharge amount."

Supreme Court granted the petition, vacated DHCR's determination and "remanded [the matter] . . . for reconsideration in accordance with [the court's] decision" (2007 NY Slip Op 34184[U], *5). Supreme Court noted that DHCR's determination simply calculated the rent by assuming, without actually determining, that the registration in effect on the base date was{**15 NY3d at 364} reliable. The court also noted that DHCR did not specifically reject petitioner's allegations of fraud. The court reasoned, under *Thornton v Baron* (5 NY3d 175, 181 [2005]), that DHCR's failure to consider petitioner's allegations of fraud and the reliability of the rent charged on the base date warranted remand to the agency for de novo review of the overcharge complaint.

DHCR and 151 Owners Corp. separately appealed. The Appellate Division affirmed, with two Justices dissenting (*Matter of Grimm v State of N.Y. Div. of Hous. & Community Renewal Off. of Rent Admin.*, 68 AD3d 29 [1st Dept 2009]). The court reasoned:

> "Given the specific facts of this case, DHCR should not be allowed to turn a blind eye to what could be fraud and an attempt by the landlord to circumvent the Rent Stabilization Law . . .
>
> "[W]here, as here, there is an indication of possible fraud that would render the rent records unreliable, it is an abuse of discretion for DHCR not to investigate it" (*id.* at 33).

The two dissenting Justices voted to reverse and "would [have found] that [DHCR] acted rationally in complying with the legislative intent expressed in the statute of limitations set forth in CPLR 213-a and [the] Rent Stabilization Law" (*id.* at 34 [Buckley, J., dissenting]).

DHCR and 151 Owners Corp. appealed by permission of the Appellate Division, which certified the following question: "Was the order of Supreme Court, as affirmed by this Court, properly made?" We now affirm and answer the certified question in the affirmative.

II.

As we have previously explained, rent overcharge claims are generally subject to a four-year statute of limitations. Specifically, Rent Stabilization Law of 1969 (Administrative Code of City of NY) § 26-516 (hereinafter Rent Stabilization Law),

as amended by the Rent Regulation Reform Act (RRRA) of 1997, states:

> "[A] complaint under this subdivision shall be filed with [DHCR] within four years of the first overcharge alleged and no determination of an{**15 NY3d at 365} overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed . . . This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision" (Rent Stabilization Law § 26-516 [a] [2]; *see also* CPLR 213-a).

[*4]The RRRA "clarified and reinforced the four-year statute of limitations applicable to rent overcharge claims . . . by limiting examination of the rental history of housing accommodations prior to the four-year period preceding the filing of an overcharge complaint" (*Thornton*, 5 NY3d at 180, citing *Matter of Gilman v New York State Div. of Hous. & Community Renewal*, 99 NY2d 144, 149 [2002]; *see also Matter of Cintron v Calogero*, 15 NY3d 347 [2010] [decided today]; Governor's Approval Mem, Bill Jacket, L 1997, ch 116). To effectuate the purpose of the four-year limitations period, in rent overcharge cases DHCR regulations, as relevant here, set the "legal regulated rent" as the rent charged on the "base date," which is the "date four years prior to the date of the filing of [the overcharge] complaint" plus any subsequent lawful increases (9 NYCRR 2520.6 [e], [f] [1]; 2526.1 [a] [3] [i]).

The four-year limitations period was explained in our decision in *Thornton* (5 NY3d 175 [2005]), where we held that a lease provision purporting to exempt an apartment from the Rent Stabilization Law in exchange for an agreement not to use the apartment as a primary residence was void as against public policy (*see id.* at 179-180). Our ruling was made in connection with a scheme between a landlord and an illusory tenant to agree that an apartment would not be used as the named tenant's primary residence, resulting in the elimination of the rent-stabilized status of the apartment. Acknowledging that the apartment's prior rental history could not be examined, and that the stabilized rent before the fraudulent scheme was of no relevance, we nonetheless rejected the owner's contention that "the legal regulated rent should be established by simple reference to the rental history" on the date four years prior to the commencement of the overcharge action (*id.* at 180-181). We explained that the lease was "void at its inception" because its "circumvent[ion of] the Rent Stabilization Law" violated public policy (*id.* at 181). As a result, the rent registration statement in effect on the base date "listing this illegal rent was also a{**15 NY3d at 366} nullity"

(*id.*). Rather than using the registration statement to ascertain the rent on the base date, we instructed DHCR to use the so-called default formula to calculate the rent on the base date, as it does when no reliable records are available (*see id.*; *see also Levinson v 390 W. End Assoc., L.L.C.*, 22 AD3d 397, 400-401 [1st Dept 2005]).[FN1]

DHCR contends that our holding in *Thornton* should be constrained to the narrow set of circumstances described in that case and that we should limit its application to cases involving illusory tenancies. We disagree and conclude that, where the overcharge complaint alleges fraud, as here, DHCR has an obligation to ascertain whether the rent on the base date is a [*5]lawful rent. Accordingly, here, as the Appellate Division concluded, DHCR acted arbitrarily and capriciously in failing to meet that obligation where there existed substantial indicia of fraud on the record.

In particular, here it is alleged that the tenants immediately preceding petitioner paid significantly more than the previously registered rent, and were not given a rent-stabilized lease rider.[FN2] Moreover those tenants were informed that their rent would be higher but for their performance of upgrades and improvements at their own expense. Almost simultaneously with the substantial increase in the rent for the affected unit, the owner ceased filing annual registration statements (*see* Rent Stabilization Code [9 NYCRR] § 2528.3 [a] [requiring annual registration statements be filed with DHCR]) and later filed several years' registration statements retroactively after receiving petitioner's overcharge complaint. Finally, petitioner's initial lease did not contain a rent-stabilized rider. The combination of these factors should have led DHCR to investigate the legality of the base date rent, rather than blindly using the rent charged on the date four years prior to the filing of the rent overcharge claim.

Our holding should not be construed as concluding that fraud exists, or that the default formula should be used in this case.{**15 NY3d at 367} Rather, we merely conclude that DHCR acted arbitrarily in disregarding the nature of petitioner's allegations and in using a base date without, at a minimum, examining its own records to ascertain the reliability and the legality of the rent charged on that date.

DHCR also argues that, under the Appellate Division's holding, any "bump" in an apartment's rent—even those authorized without prior DHCR approval, such as rent increases upon installation of improvements to an apartment (*see* Rent Stabilization Law § 26-511 [c] [13])—will establish a colorable claim of fraud requiring DHCR investigation. Again, we disagree. 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 deregulation 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. [*6]

In sum, the Appellate Division correctly applied *Thornton* to this rent overcharge proceeding and properly concluded that DHCR has an obligation to ascertain whether petitioner's allegations of fraud warrant the use of the default formula when calculating any rent overcharge that may have occurred. Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

Smith, J. (dissenting). In *Thornton v Baron* (5 NY3d 175 [2005]) and *Matter of Cintron v Calogero* (15 NY3d 347 [2010] [decided today]), the Court carved out exceptions to the command of the Rent Regulation Reform Act of 1997 that a rent charged more than four years before a tenant complains may not be considered in deciding an overcharge claim. But in this case, the majority goes far beyond making an exception. The majority has, in substance, largely repealed the statute—or, perhaps, has turned it into a source of endlessly complex litigation. I am not sure which it has done, and I am not sure which is worse.

The statute and the regulations implementing it are unequivocal.{**15 NY3d at 368}

> "[N]o determination of an overcharge and no award or calculation of an award of the amount of an overcharge may be based upon an overcharge having occurred more than four years before the complaint is filed . . . . This paragraph shall preclude examination of the rental history of the housing accommodation prior to the four-year period preceding the filing of a complaint pursuant to this subdivision" (Rent Stabilization Law [RSL] of 1969 [Administrative Code of City of NY] § 26-516 [a] [2]; *see also id.* § 26-516 [a] ["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 Code [9 NYCRR] § 2526.1 [a] [2]).

Thornton and *Cintron* presented special situations in which, for understandable reasons, a majority of the Court decided

that this language should not be taken literally. *Thornton* involved an elaborate fraudulent scheme, in which illusory leases containing false representations were created, collusive lawsuits brought and a court misled into entering orders that made it possible to collect illegal rents; the Court held that such an extreme form of misconduct should not be protected by the four-year time bar. *Cintron* presented the problem of how to reconcile the four-year limitation with another section of the statute providing for rent reduction orders of indefinite duration.

But this is a garden-variety overcharge case—perhaps the paradigm of the situation for which the four-year limitation was intended. The landlord charged an illegal rent, and the illegality went undetected for more than four years. The statute says plainly that in such a [*7]case, the rent charged four years previously shall not be subject to challenge. But the majority holds that a challenge is allowed.

The majority's justification for this result is that "the overcharge complaint alleges fraud" and that there are "indicia of fraud" —consisting essentially of allegations that the landlord lied to previous tenants about what the legal maximum rent was (majority op at 366). In other words, the majority seems to equate "fraud" with a wilful overcharge—as though the{**15 NY3d at 369} four-year limit were applicable only to landlords who overcharge by mistake. In fact, the statute contains its own remedy for wilful overcharges: treble damages (RSL § 26-516 [a]). It does not make the four-year limitation inapplicable in wilful overcharge cases—cases which, as the Legislature certainly knew, are a large number of the cases to which the limitation on its face applies.

The majority seemingly tries to temper its holding by saying that "an increase in the rent alone will not be sufficient to establish a 'colorable claim of fraud' " and that "a mere allegation of fraud alone, without more, will not be sufficient to require DHCR to inquire further" (majority op at 367). But obviously it does not take much "more" than an allegation of fraud—there is practically nothing more in this case. The majority adds that what DHCR is supposed to "inquire" about is whether there was a "fraudulent scheme to destabilize the apartment" (*id.*). It does not say what it takes to prove such a "fraudulent scheme." Simply a wilful overcharge? A wilful overcharge coupled with the hope that the overcharge will eventually result in the apartment's escape from rent stabilization?

If the majority opinion does not simply nullify the four-year limit in every case where the overcharge was not a good faith error, it requires DHCR to undertake an inquiry that the majority leaves wholly undefined. And what if DHCR's inquiry shows

that, though there was a wilful overcharge, there was no "fraudulent scheme"? Does this mean that, if the landlord has been charging an illegal rent for more than four years, it may continue to do so?

The majority opinion can be read to mean either that the four-year limitation has largely ceased to exist, or that any case to which the limit applies on its face must lead to a mini-litigation, in which DHCR tries to figure out whether the overcharge was "fraudulent" enough to escape the time limit. If the former, the majority has simply tossed aside the Legislature's command. If the latter, I do not envy DHCR its task.

Chief Judge Lippman and Judges Pigott and Jones concur with Judge Ciparick; Judge Smith dissents in a separate opinion in which Judges Graffeo and Read concur.

Order affirmed, etc.

Footnotes

Footnote 1: 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" (*Thornton*, 5 NY3d at 180 n 1; *Levinson*, 22 AD3d at 400-401).

Footnote 2: The Rent Stabilization Code requires that, for each vacancy or renewal lease for premises subject to the Rent Stabilization Code, the landlord "shall furnish to each tenant signing a vacancy or renewal lease, a rider in a form promulgated or approved by the DHCR, in larger type than the lease, describing the rights and duties of owners and tenants as provided for under" the Rent Stabilization Law (Rent Stabilization Code [9 NYCRR] § 2522.5 [c] [1]).