Matter of BRG 3715 LLC v New York City Hous. Auth.
2012 NY Slip Op 30656(U)
March 15, 2012
Supreme Court, New York County
Docket Number: 109180/2011
Judge: Alice Schlesinger
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 3/19/2012

[* 1]

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

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 1
IA PART 16

Index Number : 109180/2011
BRG 3715 LLC
vs
NYC HOUSING AUTHORITY
Sequence Number : 002
DISMISS

INDEX NO. ______
MOTION DATE ______
MOTION SEQ. NO. ______
MOTION CAL. NO. ______

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion to dismiss by NYCHA is granted and the petition is denied and the proceeding is dismissed in accordance with the accompanying memorandum decision.

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

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).

Dated: MAR 15 2012

ALICE SCHLESINGER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COOURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

--X

In the Matter of the Application of
BRG 3715 LLC,

Index No. 109180/2011
Motion Seq. No. 001 & 002

Petitioner,

For a Judgment Pursuant to Article 78 of the CPLR

-against-

NEW YORK CITY HOUSING AUTHORITY and NEW YORK CITY HOUSING AUTHORITY CHAIRMAN JOHN B. RHEA,

Respondents.

--X

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).

SCHLESINGER, J:

At issue in this Article 78 proceeding is whether Public Housing Law §157(1) required petitioner BRG 3715 LLC ("BRG") to serve respondent New York City Housing Authority ("NYCHA") with a notice of claim prior to commencing this proceeding to obtain the retroactive reinstatement of Section 8 rent subsidies for three apartments located in 3715 Kings Highway, Brooklyn, New York. BRG argues that because it is requesting the reinstatement of the subsidies rather than suing for damages, its claim is for equitable relief and thus the notice of claim requirements are inapplicable. NYCHA counters that the requested relief really is monetary in nature and that, in any event, the language of the statute is broad enough to encompass both monetary and equitable relief. Also at issue are NYCHA's claims that this proceeding is barred by the statute of limitations and that BRG is not entitled to attorney's fees.[1]

[1]The petition was originally granted on respondent's default by decision dated September 16, 2011. On consent of the parties, that decision is hereby vacated and this decision determines the petition in its place.

Background Facts

BRG is the owner and landlord of the building located at 3715 Kings Highway, Brooklyn, New York. BRG participates in the federal Section 8 program of the United States Department of Housing and Urban Development ("HUD") which provides rent subsidies on behalf of lower-income families. Landlords participating in the Section 8 program must enter into a Housing Assistance Payments Contract ("HAP Contract") with HUD. Pursuant to the HAP Contract, NYCHA pays the landlord monthly rent subsidy payments known as "Housing Assistance Payments" which equal the difference between the total rent for an apartment leased and the total rent paid by the Section 8 qualifying tenant. The monthly subsidy is subject to the landlord's compliance with minimum housing quality standards ("HQS") as established by HUD. Failure to meet the minimum HQS results in subsidy suspension.

The subject dispute involves three apartment units 4H, 5F, and 6G at the building, all of which received Section 8 subsidies. On August 18, 2010 NYCHA inspected apartment 6G and found two HQS violations, including a blocked fire exit and window that would not stay up. NYCHA then sent BRG a written notice indicating that its failure to correct the violations by September 17, 2010 would result in subsidy suspension.[2] The notice advised the owner of the following available options to resolve the HQS violations:

1. Within 20 days after inspection, notify the NYCHA inspection unit via phone that repairs have been completed, in which event NYCHA will re-inspect the apartment.

---

[2]According to the Affirmation of Stephen W. Goodman in Support of NYCHA's Motion to Dismiss, NYCHA sent the notice in August 2010, but the copy attached as Exhibit 3 to the Affirmation was dated October 5, 2011 because it was printed on that date.

[* 4]

2. Within 20 days after the inspection, complete the required repairs and submit the attached Certification of Completed Repairs without the tenant's signature, NYCHA will thereafter reinspect the apartment.

3. Within 20 days after the inspection, if NYCHA receives and accepts the attached Certification of Completed Repairs signed by both the landlord and tenant, then no reinspection will be required and subsidy will continue (or be reinstated if it has already been suspended).

In addition, the notice advised the owner of the penalty for the failure to timely correct and certify the violations:

> Failure to complete repairs, notify NYCHA's inspection unit, and have the authority verify that the repairs are done within 30 days after the inspection shall result in suspension of subsidy. Reinstatement of subsidy will not be considered until NYCHA receives and accepts the certification, or until NYCHA receives notification of completed repairs from the landlord and NYCHA reinspects the apartment to determine that the unit again complies with HQS.

NYCHA suspended the subsidy of unit 6G on November 1, 2010. The landlord claims that the violations were corrected on November 4, 2010, nearly two months after the deadline in the notice, and that it faxed NYCHA a Certification of Completed Repairs signed by the landlord on November 8, 2010. However, NYCHA had not reinspected the unit or reinstated the subsidy as of the date this proceeding was commenced in August 2011.

Similarly, on September 27, 2010 NYCHA inspected apartment 5F and found four HQS violations, including a window missing a bottom section, damaged ceiling, a cracked wall and no gas. NYCHA sent BRG a written notice dated September 29, 2010, with the same language as the notice quoted above, which indicated that BRG's failure to correct the violations by October 27, 2010 would result in subsidy suspension.

[* 5]

The landlord claims it corrected the violations on November 1, 2010 and that it faxed NYCHA a Certification of Completed Repairs signed by the landlord on December 22, 2010. NYCHA suspended the subsidy on December 1, 2010. Also, on January 28, 2011 the landlord sent NYCHA another copy of the Certification of Completed Repairs via certified mail and fax. Although NYCHA did not immediately reinspect the unit or reinstate the subsidy, as of the January 11, 2012 oral argument date NYCHA had reinstated the subsidy for apartment 5F, albeit not retroactively.

In addition, on December 13, 2010, NYCHA inspected apartment 4H and found two HQS violations, including a warped oven door and a double-key lock door. NYCHA sent BRG a written notice dated December 15, 2010, including the same language as that in the notice quoted above, indicating that the failure to correct the violations by January 12, 2011 would result in subsidy suspension. On February 1, 2011 the landlord claims it sent NYCHA a Certification of Completed Repairs signed by the landlord via certified mail. NYCHA suspended the subsidy on March 1, 2011. NYCHA did not immediately reinspect the unit or reinstate the subsidy; however, as of the January 11, 2012 oral argument date NYCHA had reinstated the subsidy for apartment 4H, albeit not retroactively.

BRG commenced this CPLR Article 78 proceeding against NYCHA in August 2011 requesting the retroactive reinstatement of the subsidies for all three apartment units and attorney's fees. NYCHA moved to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7) based on BRG's failure to file a notice of claim and pursuant to CPLR 3211(a)(5) as barred by the four-month Article 78 statute of limitations. NYCHA also asks that BRG's claim for attorney's fees be dismissed pursuant to CPLR § 3211(a)(1) and (7).

[* 6]

Discussion

NYCHA argues that BRG failed to file a notice of claim pursuant to Pub. Hous. Law §157(1), which mandates dismissal as a matter of law. That section provides that:

> In every action or special proceeding, **for any cause whatsoever,** prosecuted or maintained against an authority, other than a claim arising out of a condemnation proceeding, the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims upon which such action or special proceeding is founded were presented to the authority for adjustment and that it has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment. [Emphasis added].

BRG argues that because it seeks retroactive reinstatement of subsidies, its claim is one for equitable relief and thus the notice of claim rules are not applicable. BRG relies on case law that indicates that where equitable or mandamus relief is sought or where money damages are ancillary to the claim for equitable relief, petitioner is not required to serve a notice of claim. See, e.g., *Grant v. Kirkland,* 10 AD2d 474 (4th Dept 1960); *Dutcher v. Shandaken*, 97 AD2d 922 (3rd Dept 1983); *Watts v. Gardiner*, 90 AD2d 615 (3rd Dept 1982). However, all of these cases are governed by General Municipal Law §50-e rather than Public Housing Law §157(1).

Since Gen. Mun. Law §50-e limits its application to tort claims, Pub. Hous. Law §157(1) is controlling. A plain reading of the statute indicates that every cause of action, including those for equitable relief or ancillary monetary damages are covered by the notice of claim requirements of Pub Hous. Law §157(1), as evidenced by the language "for any cause whatsoever." Whether BRG's claim is one of monetary damages, equitable relief, or ancillary monetary damage, makes no difference for purposes of the notice of claim requirement under Pub Hous. Law §157(1). See, e.g., *Potter v. Atarien,*31 Misc. 3d 846 (Sup. Ct. Queens Co. 2011).

Even if the Court were to find that equitable relief or claims with ancillary monetary damages fall outside of the scope of Pub Hous. Law § 157(1), BRG's argument that its claims is for equitable relief rather than monetary damages must fail. Although BRG commenced this action pursuant to CPLR Article 78 to compel NYCHA to retroactively reinstate subsidies, essentially what BRG seeks is monetary damages. Retroactive reinstatement of the subsidies would result in the payment of $19,731.51 to BRG. This fact confirms that the monetary relief is not ancillary to a claim for equitable relief; rather, it is BRG's ultimate relief. Therefore, BRG was required to file a notice of claim prior to commencing this proceeding against NYCHA.[3]

BRG argues, in the alternative, that NYCHA had sufficient notice of the claim prior to the petition based on the landlord's submission to NYCHA of the Certifications of Completed Repair. Further, BRG claims that in its opposition papers that it is clear from this statute [Pub. Hous. Law §157(1)] that a mere allegation of the claim is sufficient. Even assuming that a "mere allegation of the claim is sufficient," BRG failed to allege in its petition that it complied with the notice of claim requirement, as is expressly required by the statute quoted above. Therefore, its claim must fail.

NYCHA's second argument is that BRG's claim should be dismissed pursuant to CPLR 3211(a)(5) because the four-month Article 78 statute of limitations began to run when NYCHA suspended the subsidies as that act constituted a final and binding determination. *Royal Charter Properties, Inc. v. New York City Hous. Auth.*, Index No. 100189/10, slip op. at 1 (Sup. Ct. N.Y. Co. 2010); *Boston Associates, LLC v. Tino Hernandez*, Index No. 101765/08 (Sup. Ct. N.Y. Co. 2008); *BNS Buildings, LLC v. Rhea*,

[3] To the extent that BRG is requesting NYCHA's reinspection of apartment 6G, that limited relief sounds in mandamus and would not require a notice of claim. Therefore, at the conclusion of oral argument, the Court directed NYCHA to schedule an inspection.

Index No. 3778/10, slip op. at 2 (Sup. Ct. Queens Co. 2010). However, the cases cited by NYCHA are distinguishable from the present case. For example, in *Boston Associates*, unlike in the present case, NYCHA reinspected the unit and following such inspection issued a second written notice to the petitioner and ultimately a third and final notice. NYCHA, here, did not reinspect the unit or provide BRG with any subsequent written notices after BRG provided NYCHA with the Certifications of Completed Repairs.

The Court of Appeals has held that there are two requirements when determining when an agency action is "final and binding." *Best Payphones, Inc. v. Dep't of Info. Tech & Telecomms,* 5 N.Y.3d 30, 34 (2008). In addition to the requirement of an actual, concrete injury caused by the agency, the injury "may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." *Id.* Here, further action was available. Each of the written notices provided that once the subsidies were suspended, NYCHA would consider reinstatement of the subsidies once it received and accepted the certification, or once it received notification of completed repairs from the landlord and NYCHA reinspected the apartment to determine that the unit again complied with HQS. Thus, although the subsidies were suspended and BRG had sustained an actual, concrete injury, there was still steps available to BRG and possible administrative action available to remedy the problem.

It has been held that a "petitioner cannot be said to be aggrieved by the mere issuance of a determination when the agency itself has created an ambiguity as to whether or not the determination was intended to be final." *Biondo v. New York State Bd. of Parole*, 60 N.Y.2d 832 (1983). There is certainly an ambiguity created in that the written notices indicated that as long as BRG provided the certifications to NYCHA, the authority would either deny the certification or reinspect the units. Yet NYCHA failed to notify BRG either

that it had denied the certification or that it would not reinspect the units. NYCHA's silence during this period entitled BRG to assume, for a reasonable time, that NYCHA would either deny its certifications or reinspect the units. NYCHA's failure to notify BRG that it had denied the certifications or that it would not reinspect the units created an ambiguity which did not provide BRG with notice of a final determination by the agency. Since BRG commenced this proceeding within a reasonable time after filing the Certification of Repairs, the proceeding is timely and NYCHA's motion on that point must be denied.

NYCHA's final argument is that BRG's claim for attorney's fees should be dismissed based on a defense founded upon documentary evidence and failure to state a cause of action pursuant to CPLR 3211(a)(1) and (7). For its attorney's fees claim, BRG relies on CPLR section 8601(b), which provides in pertinent part that "a court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust." However, CPLR 8601(a) does not provide for an award of attorney's fees against a city agency. *Hemandez v. Hammons*, 98 NY2d 735 (2002). Furthermore, BRG is not a prevailing party. Therefore, NYCHA's motion to dismiss this claim is granted.

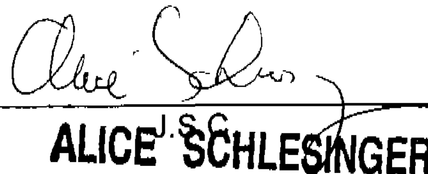
Accordingly, it is hereby

ORDERED that NYCHA's motion to dismiss this proceeding is granted based on petitioner's failure to file a notice of claim; and it is further

ADJUDGED that the proceeding is dismissed. The Clerk shall enter judgment accordingly.

Dated: March 15, 2012

UNFILED JUDGMENT
MAR 15 2012
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).



J.S.C.

ALICE SCHLESINGER