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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR Justice

PART 33

Index Number : 102267/2012
KOBRICK, STEVEN
vs.
NYS DIVISION OF HOUSING
SEQUENCE NUMBER : 002
LEAVE TO INTERVENE

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). 1-8

Answering Affidavits — Exhibits _____ | No(s). 9-34; 35-36

Replying Affidavits _____ | No(s). ~~36~~ 37-39

Upon the foregoing papers, it is ordered that this motion is

See memorandum order and judgment annexed hereto.

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

Dated: 8/20/12

ALEXANDER W. HUNTER JR, 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: PART 33

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In the Matter of the Application of
Steven Kobrick and Gary Schwedock,

Index No.: 102267/12

Petitioners,

Order and Judgment

For a Judgment pursuant to C.P.L.R. Article 78

-against-

New York State Division of Housing
and Community Renewal,

Respondent.

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HON. ALEXANDER W. HUNTER, JR.

Proposed respondent-intervenor Sherwood Associates' ("Sherwood") motion to intervene as a respondent in the instant Article 78 proceeding is granted, without opposition. Sherwood's motion to dismiss petitioners' application pursuant to C.P.L.R. §§ 3211(a)(10), 7804(f) for failure to timely name a necessary party is denied.

Respondent-intervenor is the owner of a building located at 447 Tenth Avenue, New York, New York ("Building"). Petitioners are the tenants of Apartment 4 at the subject premises.

Section 2520.11 of the Rent Stabilization Code ("RSC") exempts buildings with fewer than six units from rent stabilization. There are only two residential units in the Building. In previous related proceedings, petitioners alleged that the Building is subject to the RSC because it is part of a Horizontal Multiple Dwelling ("HMD") with an adjacent building located at 500 West 35th Street, New York, New York. An HMD is two or more separate buildings which share certain sufficiently integrated common elements to consist of six or more residential units.

On November 17, 2008, the Honorable Lewis Bart Stone issued a decision and order remanding the proceeding back to DHCR to conduct a new inspection and fact finding process.

In the instant proceeding, petitioners challenge the order issued by respondent New York State Division of Housing and Community Renewal ("DHCR") on January 27, 2012, which determined that the Building was not part of an HMD and therefore was not subject to the Rent Stabilization Law ("RSL") and RSC. Petitioners did not name Sherwood as a respondent in its petition.

Sherwood argues that the petition must be dismissed because petitioners failed to timely name a necessary party pursuant to C.P.L.R. 1001(a). **See also, Windy Ridge Farm v. Assessor of the Town of Shandaken, 11 N.Y.3d 725 (2008).** As the owner of the Building, it would be directly and negatively affected by a judgment in petitioners' favor. Petitioner had sixty (60) days from the date of the Petition for Administrative Review ("PAR") order to challenge DHCR's determination. **RSC § 2530.1.** As such, the statute of limitations to challenge the PAR order expired on March 27, 2012. Therefore, upon the granting of its motion to intervene, Sherwood asserts that its motion to dismiss the petition should also be granted pursuant to C.P.L.R. 3211(a)(10) and 7804(f).

In the alternative, Sherwood argues that the proceeding should be transferred to Justice Lewis Bart Stone. Sherwood contends that Justice Stone's previous involvement and familiarity with the prior related proceeding warrants transfer.

Petitioners assert that they timely commenced the proceeding in March 2012. As a courtesy, on March 29, 2012, petitioners' counsel e-mailed Sherwood's counsel and notified them of the proceeding and annexed a copy of the notice of petition and petition. At that time, petitioners had no objection to Sherwood intervening and expected it to do so. Petitioners never received a response from Sherwood. Thereafter, petitioners and respondent entered into a stipulation to adjourn the proceeding from April 27, 2012 to June 27, 2012. A week after the proceeding was adjourned, Sherwood filed its motions to intervene and to dismiss the petition.

Petitioners argue that Sherwood's motion to dismiss is baseless and without merit because DHCR and the Attorney General are the only parties that must be served in an Article 78 proceeding against DHCR and any other interested parties may be permissively joined after commencement. Petitioners do not oppose Sherwood's motion to intervene.

Petitioners argue that binding precedent states that the party opposite in an underlying DHCR administrative proceeding is not a necessary party in an Article 78 proceeding challenging DHCR's determination. **See, Matter of Whitney Museum of Am. Art (New York State Div. of Hous. & Community Renewal), 139 A.D.2d 444 (1st Dept. 1988), *affd* 73 N.Y.2d 938 (1989); Matter of Verbalis v. DHCR, 1 A.D.3d 101 (1st Dept. 2003).** In the **Matter of Whitney Museum of Am. Art**, the Appellate Division held that the tenants were not indispensable parties and remanded the proceeding back to DHCR for consideration. The court further found that in remanding the matter back to DHCR, the nonparty tenants would have an opportunity to appear and present evidence. In this case, petitioners argue that Sherwood would have the same opportunity to appear with counsel if this court remands the proceeding back to DHCR.

Petitioners further contend that RSC § 2530.1 and RSL § 26-516(d) govern Article 78 proceedings against the DHCR and supercedes otherwise applicable C.P.L.R. provisions. RSC § 2530.1 provides that an Article 78 proceeding to challenge a determination made by the DHCR must be commenced within sixty (60) days of the date of the determination and must be served

on the DHCR and the Attorney General. Petitioners argue that the statute's silence as to any others that must be served supports its contention that no other party is a necessary party. Petitioners argue that given the shortened statute of limitations, it would be nearly impossible to timely serve all of the parties within fifteen (15) days after the expiration of the statute of limitations.

As to Sherwood's request for the instant proceeding to be transferred to Justice Stone, petitioners assert that there is no basis for such a transfer. Petitioners maintain that Sherwood's motion to transfer the case is not only procedurally defective but also contains misrepresentations of the law. Petitioners argue that under the IAS system, a request for a transfer must be made to the Chief Administrator of the courts of his or her designee, not the assigned Judge. **22 N.Y.C.R.R. § 202.3.**

Respondent DHCR does not oppose Sherwood's motion to intervene as a respondent. DHCR asserts that although the RSL and RSC do not require that all administrative parties be named in an Article 78 proceeding, Sherwood is an interested party pursuant to C.P.L.R. 1012(a)(2). However, DHCR opposes Sherwood's motion to dismiss the petition for failure to join them as a necessary party, since there is no mandatory joinder provision in C.P.L.R. Article 78. DHCR also supports Sherwood's request for the reassignment of the instant proceeding to the Hon. Lewis Bart Stone.

In reply, Sherwood asserts that petitioners failure to name it as a necessary party within the sixty (60) day statute of limitations is fatal to its petition. Sherwood maintains that the failure to name a necessary party in an Article 78 proceeding is grounds for dismissal, especially after the expiration of the statute of limitations when the petition cannot be amended. Sherwood further argues that C.P.L.R. 1001 applies to Article 78 proceedings involving the DHCR.

There is no question that Sherwood should be permitted to intervene in this proceeding. However, contrary to Sherwood's arguments, it is not a necessary party. A party is deemed to be necessary if complete relief cannot be afforded without them or if that party will be inequitably affected by a judgment in that case. **C.P.L.R. 1001(a).** Mandatory joinder seeks to prevent inconsistent judgments, prejudice, and multiple litigation. To that end, the court may need to dismiss the action, however the Court of Appeals has held that dismissal should be the choice of last resort. **C.P.L.R. 1003; Saratoga County Chamber of Commerce, Inc. v. Pataki, 100 N.Y.2d 801, 820-821 (2003).**

Here, petitioners are seeking to annul respondent's determination and have the proceeding remanded back to DHCR for further review. At that point, Sherwood would have the opportunity to be heard and represented by counsel before the DHCR. As such, dismissal is unwarranted at this time. The nonjoinder of Sherwood after the expiration of the statute of limitations is not fatal to the underlying Article 78 proceeding. **See, Matter of Whitney Museum of Am. Art (New York State Div. of Hous. & Community Renewal), 139 A.D.2d**

444 (1st Dept. 1988), *affd* 73 N.Y.2d 938 (1989); Notre Dame Leasing LP v. Div. of Hous. & Community Renewal, 22 A.D.3d 667 (1st Dept. 2005).

This court finds Sherwood's remaining arguments without merit.

Accordingly, it is hereby

ADJUDGED that the motion to intervene is granted to the extent that Sherwood Associates is permitted to intervene as a party respondent in this proceeding; and it is further

ORDERED that respondent-intervenor Sherwood Associates shall file and serve its amended answer upon petitioners and respondent DHCR within thirty days of service of a copy of this order with notice of entry; and it is further

ORDERED that the caption hereinafter read:

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

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In the Matter of the Application of
Steven Kobrick and Gary Schwedock,

Index No.: 102267/12

Petitioners,

For a Judgment pursuant to C.P.L.R. Article 78

-against-

New York State Division of Housing
and Community Renewal and Sherwood 34 Associates,

Respondents.

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Dated: August 20, 2012

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR.