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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: PETER H. MOULTON _____ PART 4/6B

Justice

Index Number : 113601/2011
WHITE, MARTA
vs.
N.Y.S.D.H.C.R.
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 Petition and cross motions are decided per attached

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

Dated: 9/28/12

_____, J.S.C.
PETER H. MOULTON

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 40 B

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In the Matter of the Application of
MARTA WHITE,

Petitioner,

FOR A JUDGMENT PURSUANT TO ARTICLE 78 OF THE CIVIL PRACTICE LAW AND RULES

-against-

Index No.: 113601/11

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL

Respondent,

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PETER H. MOULTON, J.S.C.:

Petitioner, a rent controlled tenant, moves pursuant to CPLR Article 78 to annul, reverse and set aside (1) a 2010-2011 Maximum Base Rent Order of Eligibility (the "MBR Order") issued by respondent New York State Division of Housing and Community Renewal ("DHCR" or the "agency"), (2) a June 15, 2010 Rent Administrator Order of Modification, Revocation or Affirmation-Maximum Base Rent (the "Rent Administrator's Order"), and (3) an October 7, 2011 Order and Opinion Denying Petition for Administration Review (the "PAR Order"). Petitioner maintains that the Rent Administrator's Order and the PAR Order are arbitrary and capricious, without rational basis, and in violation of lawful procedure because they are based on the "exparte" submission of the owner's amended answer, and, that all the determinations are improperly based on the owner's false room count. Petitioner demands that DHCR physically inspect the building to resolve the room count issue.

DHCR cross moves to dismiss the proceeding as time-barred in light of petitioner's failure to serve the petition within 15 days of filing it, as required under CPLR § 306-b. In the event that the cross motion is denied, DHCR seeks time to answer the petition.[1]

In response to DHCR's cross motion, petitioner cross moves for an order pursuant to CPLR § 306-b retroactively extending petitioner's time to serve respondent to February 8, 2012, and for an order deeming such service timely made, nunc pro tunc.

Arguments Regarding the Exparte Submission

Petitioner acknowledges receipt of the owner's answer, but states that she never received a copy of the owner's amended answer during the appeal before the Rent Administrator, depriving her of the opportunity to respond. The parties appear to agree that the amended answer merely corrects the physical description of the premises.[2] Petitioner complains that this failure is a violation of Rent Stabilization Code § 2527.3 (a) (1) which provides that "where the application or complaint or any answer or reply thereto is made by an owner or tenant, the DHCR shall serve all parties adversely affected thereby with a copy of such application, complaint, answer or reply." Although this proceeding was brought by a rent controlled, and not a rent stabilized tenant, petitioner notes that rent stabilization and rent control laws are read *in pari materia*. Further, petitioner maintains that the agency's failure to serve her with a copy of

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[1]85th Columbus Corp., the owner of the building, joins in DHCR's motion, as an "Intervenor-Respondent." However, the owner has made no motion, and in any event, the papers in support of DHCR's motion merely restate DHCR's arguments.

[2]The court has waded through the stacks of documents annexed to the various exhibits to the petition. However, a complete copy of the answer is not conspicuously attached, nor can the court locate a copy of the amended answer.

the amended answer violates the New York Administrative Procedure Act § 307 (2) which forbids ex parte communications, unless otherwise authorized by law. Petitioner also cites *Matter of Spedicato v New York State Div. of Hous. & Community Renewal* (269 AD2d 233 [1st Dept 2000]), where the appellate court found that trial court properly vacated the agency's determination in light of the Commissioner's improper reliance on evidence never seen by the parties.

DHCR maintains that petitioner's citation to the rent stabilization code is misplaced because the apartment is rent controlled. The applicable regulation, DHCR maintains, is RER § 2207.3 (a) (1), and that provision only requires that the district rent administrator forward a copy of the application to all affected parties. Further, the agency argues that due process does not require that petitioner receive copies of every document filed in the proceeding.

Arguments Regarding the Room Count

Petitioner contends that the agency erred in failing to consider her room count argument. She complains that the Rent Administrator's Order arbitrarily rejected her argument based on the agency's finding in a prior fuel cost challenge under Docket number YC420005F.[3] In that proceeding, the agency rejected the tenant's room count argument, stating that "the owner has consistently stated that there at 41 apts, 5 stores and 224 rooms and the tenants never previously challenged the issue." However, in that proceeding, as in this one, evidence was submitted to the agency demonstrating that the owner made a 2010 filing with the New York City Department of Finance, indicating that the building had 40 residential units, and filed a Multiple Dwelling

[3]The determination in that proceeding was not appealed.

Registration, reflecting 40 Class A residential units. These inconsistencies, petitioner argues, mandate closer scrutiny of any statement by the owner concerning its 2010-2011 MBR application.[4] The agency has already recognized the need for higher scrutiny in *Matter of Artha Mgt., Inc. v New York State Div. of Hous. & Community Renewal* (143 Misc 2d 717 [Sup Ct, New York County 1989] ["The court agrees with DHCR, that where the contractor or supplier (or their principals) of the improvements have an equity interest in the owner, the figures must be extremely carefully scrutinized; very possibly the scrutiny must be more careful than the scrutiny in a normal case"]).

Petitioner further faults the Deputy Commissioner's conclusion in the PAR Order that the room count issue is irrelevant. Unlike the Rent Administrator's rejection of the argument, based on the agency's earlier determination in the fuel cost proceeding, the Deputy Commissioner found that "any misstatement by the landlord as to the buildings room count cannot be used to impugn the landlord's certification of other statements required for the filing of the landlord's MBR application." The Deputy Commissioner also rejected petitioner's citation to *Matter of Trega Realty Co. v Joy* (62 AD2d 964 [1st Dept 1978]), because unlike the establishment of the initial MBR, where the room count is relevant, biennial MBR increases are based on a city-wide formula.

DHCR maintains that the Deputy Commissioner correctly found that the room count issue was irrelevant because the biennial MBR increases are based on a city-wide formula,

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[4]Petitioner also states that during the pendency of the Petition for Administrative review, the Department of Buildings issued a Stop Work Order for work performed without a permit at the cellar level and at "6th Fl residence altered from 12 to 14 Apts."

which is based on a statistical sampling of a small number of buildings. That formula, DHCR points out, has been upheld in *Tenants' Union of West Side v Beame* (40 NY2d 133 [1976]).

Arguments Regarding the Cross Motions

CPLR § 306-b provides in relevant part that whenever "the applicable statute of limitations is four months or less, service shall be made not later than fifteen days after the date on which the applicable statute of limitations expires" and if such service is not made, the court shall "dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service."

DHCR acknowledges that "it appears that the index number was timely purchased" on December 5, 2011. However, it complains that instead of being served by December 21, 2011, it was served on January 24, 2012. Accordingly, the 34-day delay in service has prejudiced the agency because "DHCR is entitled to finality of its orders so that everyone involved, including DHCR can get on with their affairs."

Petitioner explains that service was not made within the 15-day window because the attorney "mis-calendered the service deadline without taking into account the special 15-day rule for matter with an applicable SOL of four months or less." She points out that under CPLR § 306-b the court can grant an extension on good cause shown, or, in the interest of justice, and the latter standard does not require a showing of good cause, citing *Leader v Moroney, Ponzini & Spencer* (97 NY2d 95 [2001] [the interest of justice standard is more flexible than the good cause standard and accommodates late service that might be due to mistake, confusion or oversight, so long as there is no prejudice to the defendant]).

Discussion

Petitioner's cross motion is granted. In *Leader* (97 NY2d 95, *supra*), the Court of Appeals noted that unlike an extension request based on good cause, the interest of justice standard does not require that a plaintiff show diligent efforts at service as a threshold matter. Instead, the court may consider diligence (or the lack thereof) along with other factors to determine whether under the interest of justice standard, an extension of the time for service should be granted. The factors may include "[the] expiration of the Statute of Limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of a plaintiff's request for the extension of time, and prejudice to defendant" (*id.* at 105-106). A showing of prejudice requires the demonstration of an impairment of a party's ability to defend on the merits as a result of late service (*see Busler v Corbett*, 259 AD2d 13 [4th Dept 1999]). Extensions are heavily favored where in absence of the extension, the claim would be time-barred (*see LoPresti v Florio*, 71 AD3d 574 [1st Dept 2010]).

DHCR's explanation of prejudice is without merit. Accordingly, petitioner's cross motion is granted in light of the fact that (1) the claim would be time-barred if the cross motion was not granted, (2) the absence of any prejudice to DHCR, (3) the promptness of counsel's request for an extension, and (4) the very short delay in service.

It is hereby

ORDERED that petitioner's cross motion for an order pursuant to CPLR § 306-b retroactively extending petitioner's time to serve respondent to February 8, 2012, and for an order deeming such service timely made, nunc pro tunc, is granted; and it is further

ORDERED that petitioner's papers are deemed timely served; and it is further

ORDERED that respondent's cross motion is denied as to dismissal of the proceeding but is granted as to permission to submit an answer; and it is further

ORDERED that respondent may submit an answer on or before October 19, 2012; and it is further

ORDERED that the parties may submit further briefs, if any, on or before October 26, 2012; and it is further

ORDERED that the petition is held in abeyance pending the above submissions.

This Constitutes the Decision and Order of the Court.

Dated: September 28, 2012

ENTER:

J.S.C.

PETER H. MOULTON

FILED
OCT 03 2012
COUNTY CLERK'S OFFICE
NEW YORK