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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN Justice

PART 12

Index Number : 112206/2011
193 REALTY, LLC
vs.
RHEA, JOHN B.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 112206/11

MOTION DATE _____

MOTION SEQ. NO. 001

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

and cross motion are

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION, ORDER AND JUDGMENT.

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).

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

Dated: SEP 24 2012

_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED Cross Motion ☒ DENIED Petition ☐ 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: CIVIL TERM: PART 12
----------X
In the Matter of the Application of

193 REALTY, LLC,

Petitioner,

for a Judgment pursuant to Article 78 of the Civil Practice Laws and Rules,

-against-

JOHN B. RHEA, as Chairman of the New York City Housing Authority, and the NEW YORK CITY HOUSING AUTHORITY,

Respondents.
----------X

Index Number: 112206/2011
Mot. Seq. No.: 001

DECISION, ORDER AND JUDGMENT

For the Petitioner
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Papers considered in review of this petition:	**Papers Numbered:**
Notice of petition, verified petition and annexed exhibits A - D	1, 2
Verified answer and exhibits 1 - 2	3
Transcript of oral argument	4

PAUL G. FEINMAN, J.:

Petitioner, 193 Realty, LLC, brings this CPLR article 78 proceeding to compel respondents, John B. Rhea, as Chairman of the New York City Housing Authority, and the New York City Housing Authority ("NYCHA"), to pay petitioner $10,630.95 representing the Section 8 rent subsidy allegedly due to petitioner for the period of December 1, 2010, through October 31, 2011. Petitioner claims that NYCHA, in suspending payments during this time period,

"acted arbitrarily and capriciously in having failed, neglected and refused to perform the duties and obligations imposed upon them by law and by contract" (Doc. 2, Notice of petition). In NYCHA's answer to the petition, it claims that this proceeding is barred by the applicable four-month statute of limitations, that NYCHA has made retroactive payments for the months of July, August, September and October of 2011 so that petitioner's claims for any period after July 1, 2011, have been rendered moot, and petitioner is not entitled to receive retroactive payments for the period of December 1, 2010, through July 1, 2011, because the subject apartment failed the required inspections performed by NYCHA's staff on October 18, 2010, and again on April 11, 2011. For the reasons set forth below, the petition is denied and the proceeding is dismissed.

BACKGROUND

Petitioner is the landlord and owner of apartment C-51 at 25 East 193rd Street, Bronx, New York. Petitioner participates in the federal Section 8 program, a federally-funded program in which the United States Department of Housing and Urban Development ("HUD") provides rent subsidies to qualifying low-income families. NYCHA, a public benefit corporation, is one of the agencies that administers the Section 8 program in New York City, subject to the regulations promulgated by HUD at 24 CFR Part 982 (*see Matter of MRC-754 E. 161st St. Hous. Dev. Fund Corp. v N.Y. City Hous. Auth.*, 2011 NY Slip Op 30620 [U] [Sup Ct, NY County 2011]). Owners participating in the Section 8 program must enter into a Housing Assistance Payments ("HAP") Contract. Here, petitioner attaches an HAP contract for apartment C-51 executed September 10, 2003, pursuant to which NYCHA would make a monthly housing assistance payment on the tenant's behalf to petitioner in the amount of $851.00 (Doc. 2, ex. A, HAP contract). The tenant was responsible for the remainder of the rent, which, according to the

HAP, was $218.00 a month. However, petitioner alleges, contrary to what appears on the HAP that it submits, that NYCHA had agreed to make monthly payments on the tenant's behalf in the amount of $966.45, and the tenant was required to pay $356.00 per month (Doc. 2, Petition at ¶¶ 13-14). No documentation supporting these amounts has been provided.

The governing federal regulations and the HAP contract forbid NYCHA from making a monthly Section 8 payment to the owner of an apartment unless the owner has complied with the minimum housing quality standards ("HQS") established by federal law. To ensure compliance with the minimum HQS, NYCHA's periodically inspect the apartments. During one such inspection of apartment C-51 on October 18, 2010, NYCHA identified four "serious" HQS violations: (1) the living room window did not stay up; (2) large holes were found in the kitchen wall; (3) the handle of the kitchen faucet was either nonfunctioning or missing; and (4) severe mildew/mold was found in the bathroom on the wall and trim (Doc. 2, ex. B, Certification of Completed Repairs). NYCHA further identified the following conditions: (1) in the kitchen, "intercom OOO"; (2) in the bathroom, floor tiles were either loose or missing; (3) mildew was present on caulking around the basin in the bathroom; (4) the shower head needed to be repaired or replaced; and (5) the closet door knob in the entrance hall was either missing or broken (*id.*). Upon receiving notice of the failed inspection, petitioner alleges that it took prompt action to correct the conditions and on November 1, 2011, it faxed to NYCHA a copy of the Certification of Completed Repairs in which one of its representatives certified that the "life threatening and/or other serious HQS violations" and "additional conditions" were corrected on October 29, 2010. The "Tenant Certifications" section is left blank, and a note attached to the Certification indicates that the "work is done [but the] tenant refuses to sign" (*id.*). At the top of the

Certification, a "reinspection date" is listed as November 12, 2010.

NYCHA suspended its Section 8 payments to petitioner for apartment C-51 as of November 30, 2010. When petitioner's personnel inquired as to why the subsidy had not been reinstated even though it had completed the Certification of Completed Repairs, NYCHA allegedly responded that the subsidy would only be reinstated upon a satisfactory inspection of the apartment. However, according to petitioner, NYCHA did not reinspect apartment C-51 until April 11, 2011 (Doc. 2, Petition at ¶ 33). Petitioner provides no record of any communications between petitioner and NYCHA between December 2010 and April of 2011. At the April 11, 2011 inspection, NYCHA staff identified several "serious" HQS violations: (1) severe mildew/mold on the bathroom wall and trim; (2) the bathroom window did not stay up; (3) window guards were missing in a household with a child under the age of 11; and (4) bedroom carbon monoxide detector was missing/broken (Doc. 2, ex. C, Certification of Repairs, dated July 1, 2011). In addition, NYCHA identified the following conditions: (1) in the bathroom, the basin was coming loose from the wall; (2) also in the bathroom, floor tiles were loose/missing; and (3) the refrigerator was leaking in the kitchen (*id.*). Petitioner contends that it is implicit in the report of the April 2011 inspection that three of the four conditions identified by the October 2010 inspection had been corrected, and claims that the fourth condition, mildew, had been "corrected in October of 2010, but had recurred in the intervening months" (Doc. 2, Petition at ¶¶ 36-37).

Petitioner also alleges that it did not receive notice of the results of the April 2011 inspection until June 15, 2011. It attaches a letter from Carl Chaims, petitioner's manager, to "Inspections," dated July 5, 2011, in which Chaims claims that petitioner was not aware that any

repairs had to be done until petitioner received the Section 8 check for June and noticed that payments were suspended (Doc. 2, ex. C, Chaims letter). He further says that petitioner requested that the violation notice be faxed to its office, which it was on June 15, 2011. In the letter, Chaims advises "Inspections" that it notified tenant by certified mail that it should call the office immediately to schedule access dates, and once access was granted on July 1, 2011, petitioner completed the necessary repairs. The letter refers to certain attachments which have not been submitted to the court. The only attachment to the July 5, 2011 letter found in the record is a copy of the Certification of Completed Repairs executed by Chaims. The "Tenant Certifications" section is left blank, and a note is included indicating that the work had been completed by the tenant "refuses to sign" (*id.*). The court notes that the Certification of Completed Repairs is made up of two pages, which are marked as pages three and four of four. The first two pages have not been submitted.

Petitioner filed a notice of claim with NYCHA on or around September 13, 2011, alleging that NYCHA has "repeatedly failed, neglected or refused to perform its duties and obligations" by not paying "the subsidy to the landlord for any of the ten months of December 2010, through and including September, 2011, and [NYCHA] is indebted to [petitioner] in the amount of $9,664.50" (Doc. 2, ex. D, Notice of claim).

The instant Article 78 proceeding was commenced October 27, 2011. In NYCHA's answer, it claimed that petitioner was paid a regular monthly subsidy of $1,224.45 on November 1, 2011, and also made retroactive payments for the months of July through October 2011. Attached to the answer is a document NYCHA describes as a record of these payments to petitioner, which consists of a spreadsheet titled "all invoices" (Doc. 3, ex. 2, Spreadsheet). The

spreadsheet shows four separate invoices. The amount listed as NYCHA's share for two of these invoices is $1,224.45, and $2,448.90 is listed for the other two invoices. Thus, it appears to show NYCHA's total share of the four invoices as $7,346.70. No explanation is provided as to what exactly it is that this spreadsheet is supposed to convey.

What remains in dispute in this proceeding is petitioner's claim that it is entitled to retroactive payments for the period of December 2010 through June of 2011.

ANALYSIS

As an initial matter, NYCHA contends that this proceeding was not commenced within the time period provided by the applicable statute of limitations. A proceeding under CPLR article 78 against a public "body or officer must be commenced within four months after the determination to be reviewed becomes final and binding" (CPLR 217 [1]). "An agency determine is final - triggering the statute of limitations - when the petitioner is aggrieved by the determination" (*Matter of Carter v State of N.Y., Exec. Dept., Div. of Parole*, 95 NY2d 267, 270 [2000]). A "petitioner is aggrieved once the agency has issued an unambiguously final decision that puts the petitioner on notice that all administrative appeals have been exhausted," and "[i]f an agency has created ambiguity or uncertainty as to whether a final and binding decision has been issued, the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his [or her] day in court" (*id.*; quoting *Mundy v Nassau County Civ. Serv. Commn.*, 44 NY2d 352, 358 [1978]; quoting *Matter of Castaways Motel v Schuyler*, 24 NY2d 120, 126-127 [1969]).

A key document has been omitted from the papers submitted by petitioner. The document, known as an "NE-1" or the notice of failed inspection, advises a landlord how much

time it has to correct violations identified during an inspection, the consequence of failing to timely make the corrections and the manner in which the landlord may go about advising NYCHA that the required repairs had been made. Nonetheless, it appears that there is no dispute between the parties as to the information provided to petitioner in the NE-1 notice. Petitioner concedes having received the NE-1 notice pertaining to the failed October 2010 inspection. According to NYCHA, the NE-1 advised petitioner that Section 8 payments would be suspended unless NYCHA was given sufficient proof of repairs. If both petitioner and the tenant certified that the repairs had been made within 20 days, then payments would not be suspended. However, if petitioner certified that repairs had been made but the tenant did not, then NYCHA would have to reinspect the apartment. Because the tenant did not sign the certification and NYCHA had not yet reinspected the apartment, petitioner's payments were suspended as of December 1, 2010.

NYCHA argues that the statute of limitations began to run on that date -- December 1, 2010. In support they cite two cases where the court held that NYCHA's determination to suspend Section 8 subsidy payments became final and binding for statute of limitations purposes when petitioner stopped receiving the payments (Doc. 3, Answer at ¶ 63; citing *Royal Charter Properties, Inc. v N.Y. City Hous. Auth.*, Sup Ct, NY County, July 23, 2010, index no. 100189/2010; also citing *BNS Buildings, LLC v Rhea*, Sup Ct, Queens County, Nov. 14, 2010, index no. 3778/2010). It claims that petitioner had been advised in the NE-1 that payments would be suspended if certain conditions had not been met by certain dates, so that the actual suspension of benefits was sufficient to put petitioner on notice that it had failed to comply with the NE-1 requirements as of the date of suspension. At oral argument, petitioner's attorney

claimed that petitioner could not assume that NYCHA's December 1, 2010 suspension of Section 8 benefits was the result "of a conscious, intelligent, administrative determination" (Doc. 4, Transcript at 8). He argued that petitioner received a notice in October of 2010 that there were "some violations, [petitioner] ha[d] to correct them, and [NYCHA] will reinspect on November 12th. [Petitioner] certified and corrected on November 1st. And then, for some reason, [in] December [petitioner received] no money" (*id.* at 9). He concludes that petitioner had "no way of knowing if this [was] the result of the determination" (*id.*). Petitioner's attorney argued that petitioner had requested that NYCHA do something and it should "be given a reasonable time to respond to requests before the statute of limitations starts to run" (*id.* at 13). He adds that the October 2010 NE-1 indicated that NYCHA would reinspect on November 12, 2010, but "they didn't show up until the following April" (*id.*). Petitioner cites to no legal authority in support of its arguments on the statute of limitations issue.

The court's own research has revealed that at least one court has seemed to adopt NYCHA's position that a landlord is "aggrieved" when it has knowledge that Section 8 payments have been suspended after it has received an NE-1 notice warning that Section 8 payments would be suspended on a specific date unless certain requirements were satisfied (*see Matter of Bramble Weilders, Inc. v N.Y. City Hous. Auth.*, 2012 NY Slip Op 32181 [Sup Ct, NY County 2012]; citing *Matter of Baloy v Kelly*, 92 AD3d 521 [1st Dept 2012] [letter denying application for gun license was final and binding for statute of limitations purposes because petitioner knew or should have known that he was aggrieved by it]). Another court has found that NYCHA's failure to notify a landlord that it had denied its certification of repairs or that it would not reinspect the unit created an ambiguity as to whether a final determination had been made (*see*

Matter of BRG 3715 LLC v N. Y. City Hous. Auth., 2012 NY Slip Op 30656 [U] [Sup Ct, NY County 2012]). Unlike here, in *Matter of BRG 3715 LLC*, at the time of oral argument, NYCHA had not yet reinspected the subject property (*id.* at *7-8 [distinguishing *Royal Charter Properties, Inc.* and *BNS Buildings, LLC*. Treating the branch of the petition requesting NYCHA's reinspection of the apartment as seeking relief sounding in mandamus, the court held that the petition was not untimely because it was commenced within a reasonable time after petitioner's filing of the Certification of Repairs (*id.* at *9).

The statute of limitations began to run, as NYCHA contends, on December 1, 2010, when NYCHA suspended petitioner's Section 8 payments just as petitioner had been warned would happen by the NE-1 notice. Petitioner was "aggrieved" by the suspension of payment at that time. To the extent there was any ambiguity in this action, such ambiguity was eliminated when petitioner was advised in December 2010 that the subsidy had not been reinstated because the apartment had not yet been reinspected (*see* Doc. 2, Petition at ¶ 31). However, petitioner did not commence the instant proceeding within four months of December of 2010. Therefore, the proceeding is untimely and barred by the statute of limitations (CPLR 217 [1]).

Contrary to petitioner's attorney's suggestion at oral argument, the relevant question is not whether the proceeding was commenced within a reasonable time after petitioner made an inquiry to NYCHA as to why the subsidy had been suspended (Doc. 4, Transcript at 12-13). That standard may be appropriate where a petition sounds in mandamus to compel, where the petitioner seeks "to enforce a clear legal right where the public official has failed to perform a duty enjoined by law" (*N. Y. Civil Liberties Union v State of N.Y.*, 4 NY 3d 175, 184 [2005]; citing CPLR 7803 [1]). An Article 78 "proceeding seeking mandamus to compel accrues even in

absence of a final determination. Hence, the statute of limitations for such a proceeding runs not from the final determination but from the date upon which the agency refuses to act" (*Ruskin Assocs., LLC v State of N.Y. Div. of Hous. and Community Renewal*, 77 AD3d 401, 403 [1st Dept 2010]). Here, however, the notice of petition indicates that petitioner's claim is that NYCHA has acted arbitrarily and capriciously in suspending Section 8 payments to petitioner, and does not explicitly seek to compel the performance of a specific, nondiscretionary duty by NYCHA.

Even assuming that the petition could be viewed as timely, it encounters additional difficulties on the merits. If the court allowed petitioner to avoid the statute of limitations issue by construing the petition as one sounding in mandamus, petitioner would not be entitled to the ultimate relief requested -- payment of $10,630.95. The decision to reinstate retroactive or prospective subsidy payments involves a discretionary determination (*see Matter of MRC-754 E. 161st St. Hous. Dev. Fund Corp. v N.Y. City Hous. Auth.*, 2011 NY Slip Op 30620 [U] [Sup Ct, NY County 2011] [holding that the "decision as to whether to resume subsidy payments involves judgment that could 'produce different acceptable results'"]; citing *N. Y. Civil Liberties Union*, 4 NY 3d at 184). Because mandamus to compel "does not lie to enforce the performance of a duty that is discretionary, as opposed to ministerial," (*N. Y. Civil Liberties Union*, 4 NY 3d at 184), petitioner is not entitled to the relief requested in the petition under that theory.

To the extent the petition seeks relief under CPLR 7803 (3), it is well established that "[i]n an article 78 proceeding, an administrative action can be set aside if it was affected by an error of law, was made in violation of lawful procedure, or was arbitrary, capricious or an abuse of discretion" (*Matter of Metro. Movers Assoc., Inc. v Liu*, 95 AD3d 596, 598 [1st Dept 2012]; citing CPLR 7803). An administrative action is "arbitrary" if it "is without basis in reason and is

generally taken without regard to the facts" (*id.*; quoting *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). A court should defer to an administrative agency's interpretation of a statute when it involves specialized "knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom," unless the agency's interpretation is "irrational or unreasonable" (*KSLM-Columbus Apts. v N.Y. State Div. of Hous. and Community Renewal*, 5 NY3d 303, 312 [2005]; quoting *Kurcsics v Merchants Mut. Ins. Co.*, 49 NY2d 451, 459 [1980]). The court is not permitted to "substitute its own judgment for that of the agency, particularly with respect to matters within its expertise" (*Flacke v Onondaga Landfill Sys.*, 69 NY2d 355, 363 [1987]).

Here, petitioner does not deny that the October 2010 inspection revealed four "serious" violations and several additional conditions at apartment C-51 and that the tenant refused to execute the Certificate of Repairs. As such, NYCHA had a rational basis for suspending Section 8 payments for the apartment until a reinspection showed that the necessary corrections had been made. After all, under the federal regulations governing the Section 8 program, NYCHA is prohibited from making Section payments on behalf of an apartment that is not in compliance with the Housing Quality Standards (*see Matter of 1130-1146 Colgate Ave. Assoc. v N.Y. City Hous. Auth.*, 2012 NY Slip Op 30469 [U], at *6 [Sup Ct, NY County 2012]; citing 24 CFR § 982.401; *see also Matter of Mosholu Preservation Corp. v Dept. of Hous. Preservation & Dev. of City of N. Y.*, 2011 NY Slip Op 51380 [U], at *5 [Sup Ct, NY County 2011] [stating that the "governing federal regulations unequivocally bar HPD from making Section 8 payments on behalf of an apartment that is not in compliance with the Housing Quality Standards"]; citing 24

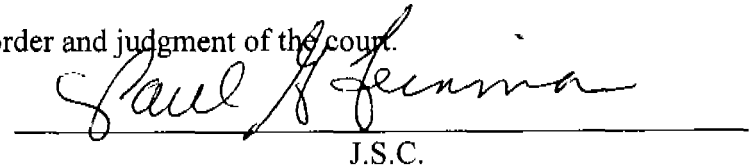
CFR § 982.401). Moreover, "the burden is on the owner to establish that the conditions have been corrected, just as the burden is on the owner ... to establish that [NYCHA's determination] was arbitrary and capricious ..." (*id.* at *5; *see also Matter of 1130-1146 Colgate Ave. Assoc.*, 2012 NY Slip Op 30469 [U], at *6). While petitioner seems to take issue with the amount of time that passed after it sent NYCHA the Certificate of Repairs and NYCHA's reinspection in April of 2011, it acknowledges that the April 2011 inspection revealed numerous HQS violations. At least one of these "serious" violations -- "severe" mildew and mold in the apartment's bathroom -- had previously been identified by NYCHA in its October 2010 inspection. Notwithstanding petitioner's claim that the mold/mildew problem had been corrected in October of 2010 after the first failed inspection, but had recurred at some unspecified time before the April 2011 inspection, it was not arbitrary, capricious or an abuse of NYCHA's discretion for it to conclude based upon the presence of serious HQS violations at both the October 2010 and April 2011 inspections and the tenant's refusal or failure to certify that required repairs had been made, that HQS violations were present in the apartment between December of 2010 and June of 2011. No evidence other than the Certificates of Repairs, which are not executed by the tenant, has been submitted to NYCHA or this court showing that the apartment was free of serious HQS violations during the applicable time period (*see Matter of Mosholu Preservation Corp*, 2011 NY Slip Op 51380 [U], at *5 [owner has the burden of establishing that conditions were corrected]). Nor is there any evidence of any attempt by petitioner to schedule a reinspection of the apartment or any communication from petitioner to NYCHA regarding suspension of the Section 8 payments after the alleged communication at an unspecified time in December of 2010 until at least June of 2011.

Thus, to the extent this proceeding is not barred by the four month statute of limitations, petitioner has not met its burden to establish that NYCHA's suspension of Section 8 payments to petitioner was arbitrary, capricious or an abuse of discretion, and petitioner is not entitled to payment in the amount of $10,630.95, representing "arrears" in monthly payments by NYCHA for the period of December 1, 2010, through October of 2011. Accordingly, it is:

ORDERED and ADJUDGED that the petitioner's application pursuant to CPLR article 78 seeking an annulment of respondent's December 1, 2010 determination to suspend Section 8 subsidy payments to petitioner is denied and the petition is hereby dismissed, together with costs and disbursements.

This constitutes the decision, order and judgment of the court.

Dated: September 24, 2012
New York, New York



J.S.C.

(2012 Pt 12 D&O_112206_2011_001_daz[art78_Landlordsec8])