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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART 4
Justice

Index Number : 102098/2012
HEIGHTS 324, LLC.
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to 4, were read on this motion to/for Art. 78

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1
Answering Affidavits — Exhibits (cross motion to dismiss, memo) | No(s). 2
Replying Affidavits (Opp to X-motion) | No(s). 3, 4

Upon the foregoing papers, it is ordered that this motion is (cross-to dismiss) denied in accordance with the attached decision and order. Respondent Housing Authority is directed to serve and file an answer to the petition pursuant to the CPLR.

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

Dated: 12.14.12

, 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 NY
COUNTY OF NEW YORK: PART 4

Index No.: 102098/12

In the Matter of the Application of
Heights 624 LLC,

Petitioner,

-against-

New York City Housing Authority,

Respondent.

DECISION and ORDER

Present: HON. ARLENE P. BLUTH

Petitioner, a landlord participating in the federally funded Section 8 program, which is administered by respondent New York City Housing Authority's ("NYCHA"), commenced this Article 78 proceeding against NYCHA on March 6, 2012. Petitioner seeks a judgment (1) directing NYCHA to reverse its prior decision to suspend/terminate the subsidy, and order NYCHA to reinstate the rent subsidy payments for Maria De Luna, its tenant, who resides at 624 West 176th Street, Apt.12A in Manhattan for the period October 2010 to date, (2) granting mandamus relief by directing NYCHA to fulfill its obligations under its charter, (3) for an award of damages for breach of contract, and (4) for an award of attorneys' fees pursuant to CPLR §8601(3).

NYCHA cross-moves to dismiss the petition on the following grounds: (1) petitioner's claim is barred by (a) the statute of limitations and (b) documentary evidence, (2) the petition fails to state a cause of action, and (3) petitioner is not entitled to attorneys' fees. For the reasons set forth below, NYCHA's cross-motion is granted only to the extent that the claim for attorneys' fees is dismissed; the balance of the cross-motion to dismiss is denied. NYCHA is directed to serve and file an answer to the petition pursuant to the CPLR.

Background

As set forth in the Verified Petition, petitioner is the owner and landlord of 624 West 176th Street in Manhattan. In October 2010, NYCHA stopped making subsidy payments for the subject apartment. Bronstein Properties, LLC ("Bronstein"), petitioner's managing agent for the building[1], repeatedly attempted to contact NYCHA in order to determine why it stopped making the subsidy payments, but was unsuccessful.

Finally, on May 9, 2011 petitioner received an unsigned form letter dated April 20, 2011 from NYCHA's Leased Housing Department stating that the subsidy for the subject apartment was terminated as of March 31, 2011 based on "long-term suspension" (see Petition, exh 2); that letter gave no indication of why there was a suspension in the first place. Petitioner thought this form letter was sent in error because it never received any prior notification from NYCHA that there were any Housing Quality Standard ("HQS") violations in the apartment (a common reason for suspensions). Petitioner followed the direction in the letter to telephone the Section 8 Customer Contact Center to inquire further but could not get through on the number given on any of the three times it called on May 9th and 11th.

Not being able to reach anyone by telephone, petitioner sent a letter dated May 12, 2011 stating that the telephone number supplied on the letter was out of service, and asked why the subsidy was terminated. This letter was apparently ignored. After hearing nothing from NYCHA in response, in August petitioner called the Customer Contact Center and spoke to "Joselle" who stated that the NYCHA computer system did not contain any record of a violation at the premises

[1]Because the actions of Bronstein were on behalf of petitioner, this decision does not distinguish between Bronstein's actions and petitioner's actions; both are referred to as petitioner.

and she could not ascertain why the subsidy had not been paid. Joselle further stated that petitioner would receive a follow-up response from NYCHA within two weeks.

After hearing nothing further from NYCHA, petitioner contacted the Section 8 Customer Contact Center once again, spoke to "Adam" who again confirmed that the NYCHA database had no record of any violations for the subject premises; Adam stated that petitioner would receive a call back within two weeks. Not surprisingly, petitioner never received a return phone call.

Justifiably frustrated, petitioner contacted its attorneys to try to get to the bottom of this – petitioner deserved an answer as to why NYCHA stopped paying the subsidy. On November 2, 2011 its attorneys sent a certified letter to various NYCHA officials (exh 2 to Petition) detailing the situation and asking for assistance in resolving the matter. Finally, NYCHA paid attention. A month later, Elliott Lauterstein, Housing Manager for the Leased Housing Correspondence Unit sent petitioner's attorneys a December 1, 2011 letter (exh 3 to petition) which stated in pertinent part:

> A review of Ms. De Luna's case reveals that her apartment failed the HQS inspection on August 12, 2010. A failing HQS will result in a suspension of subsidy, if not corrected within 30 days. On August 27, 2010, a letter was mailed to both the landlord and the tenant; the following were the violations that were found during the inspection:
>
> Living Room - Floor Condition- Floor -Weak/Rotted/Buckled

The letter further instructed petitioner how to correct the violations and "(i)f the inspection passes (sic), the process to restore Ms. De Luna's subsidy can begin and payments, if restored, would be paid prospectively."

In this proceeding, petitioner asserts, inter alia, that NYCHA's failure to pay the

subsidy for the period October 1, 2010 through February 2012 (when the proceeding was commenced) was arbitrary and capricious, and an abuse of discretion because NYCHA did not inform it why it stopped paying the subsidy until Mr. Lauterstein's letter (Petition, para.15).

Statute of limitations

In support of its cross-motion to dismiss, NYCHA submits only an attorney's affirmation. In paragraph 6, counsel states, without offering the basis for his knowledge, that NYCHA suspended the subsidy payments on the grounds that petitioner failed to timely correct HQS violations described in an August 27, 2010 notice of failed inspection. While the notice is annexed to his affirmation as exhibit A, there is no proof of service whatsoever in the cross-moving papers. Of course, this omission is stunning -- the whole point in the petition is that the petitioner had no notice as to why the payments stopped; even a paralegal would know that some proof is necessary to show that NYCHA actually sent a notice.

Counsel contends that this proceeding is barred by the four month statute of limitations applicable to Article 78 proceedings which starts running when a final agency determination becomes binding on petitioner (aff., para. 14). Without any proof whatsoever, and without any supporting affidavits, counsel suggests three scenarios as to when NYCHA may have issued a final, binding determination. First, counsel argues that the date that the statute of limitations starting running was October 1, 2010, when NYCHA stopped making payments. In the alternative, counsel asserts that petitioner knew of NYCHA's decision to terminate the subsidy by November 2, 2010, when it received a check with the payment breakdowns for November which showed payments for other tenants but no payment for the

subject apartment; petitioner's knowledge of the lack of payment is admitted because it marked the breakdown as follows: "12A? Why suspend" (exh C to cross-motion). Finally, counsel asserts that at the latest, petitioner knew as of May 9, 2011 that NYCHA had terminated the subsidy when petitioner concedes it received the April 20, 2011 letter of termination (exh D). Therefore, NYCHA claims that, assuming arguendo, that the applicable four month statue of limitations starting running on May 9, 2011 at the latest, this proceeding, commenced on March 6, 2012, is untimely.

In opposition to the motion, petitioner submits the affirmation of Leslie Rubel, a building manager of Bronstein Properties, petitioner's managing agent. She specifically denies that her office ever received an HQS violation for the subject premises (aff., para. 6). Rubel states in detail petitioner's unsuccessful efforts to determine why NYCHA stopped making monthly subsidy payments, including telephone calls to NYCHA's Section 8 Customer in August and September 2011 (at which time two different NYCHA representatives stated there were no violations showing in the computer database), and the certified letter petitioner's attorneys sent on November 2, 2011, which were set forth in the Petition. Ms. Rubel states that her office believed that NYCHA's failure to make the subsidy payments was due to NYCHA's oversight which would be corrected, as had happened in many other cases.

Significantly, Ms. Rubel further states it was not until December 1, 2011 that petitioner finally learned the reason for the suspension: it was when Elliot Lauterstein, NYCHA's Housing Manager, responded to the attorneys' November 2, 2011 letter. Until that letter, petitioner did not know why the payments had stopped, despite numerous efforts.

Ms. Rubel states that after receiving this letter, her office contacted the tenant who had repaired the floor, and submitted a certificate of repairs to NYCHA, along with the HAP contract and lease, and that "upon information and belief", NYCHA thereafter re-inspected the premises which then passed inspection.

In other words, Ms. Rubel explains in detail petitioner's attempt to find out why the subsidy was terminated and NYCHA's failure to respond. Whether that failure was due to NYCHA's incompetence or some other reason, it is clear that once petitioner finally learned about the violation, it absolutely did take prompt action.

In reply, NYCHA submits only its attorneys' affirmation, who cites to three unreported Supreme Court decisions. None of those decisions discuss situations where, as here, petitioner repeatedly sought to learn why the subsidy was terminated but was stonewalled by NYCHA. Respondent relies heavily on *Royal Charter Properties v NYCHA,* Index No. 100189/10 (Sup Ct, NY Co., 7/23/10, n.o.r.), and *BNS Buildings, LLC v Rhea,* Index No. 3778/10 (Sup Ct, Queens Co., 9/16/10, n.o.r.) (which relies heavily on *Royal).* In *BNS* the court specifically found that the NE-1 letter was mailed; of course, that is not the situation here. The court did not make reference to the issue of service/receipt of the NE-1 in *2011 Newkirk LLC v NYCHA,* Index No. 109666/11 (Sup Ct, NY Co., 12/5/11, n.o.r.); as such, it is distinguishable.

To the extent that the court in *Royal* indicated, in a two paragraph decision, that the statute of limitations starts to run when the payments stop, making the entire NE-1[2] irrelevant, this Court respectfully disagrees. Merely missing a payment, or even many payments,

[2]The NE-1 notifies the landlord of specific violation(s) found.

without communicating that the payments were purposely stopped and the reason therefor cannot be considered a final determination.

Additionally, NYCHA's attorney rejects petitioner's claim that Mr. Lauterstein's letter constitutes the final and binding determination which started the four month limitations period running. He claims that petitioner's attorneys' November 2, 2011 letter was a simply an untimely request for reconsideration, and that Lauterstein's letter was merely a restatement that a final determination had already been made. Counsel misses the point: the four month statute of limitations governing Article 78 proceedings which challenge an administrative determination begins to run on the date the determination becomes "final and binding" upon the petitioner, which is the date petitioner receives notice of the decision. *See* CPLR §217(1); *Matter of Metropolitan Museum Historic District Coalition v De Montebello*, 20AD3d 28, 796 NYS2d 64 (1st Dept 2005). The undisputed facts presented here show that the first time petitioner ever knew that there was an administrative determination (as opposed to another NYCHA mistake) was when it received Mr. Lauterstein's letter.

The Court notes that NYCHA's counsel did not, and could not, dispute any of the factual allegations set forth in Ms. Rubel's affidavit in opposition to the cross-motion. Because NYCHA did not submit the affidavit of any individual with personal knowledge to dispute anything in Ms. Rubel's affidavit, i.e. that it has employees named Joselle and Adam in the Customer Call Center, and that these individuals took calls from petitioner and affirmatively stated that there were no HQS violations for the subject premises in NYCHA's computers, these allegations are admitted.

Analysis

NYCHA does not provide any proof whatsoever that it mailed the August 27, 2010 NE-1 notice to petitioner, despite having had ample time to do so. NYCHA should have submitted it in its cross-motion, as the petition makes clear that petitioner's claim is that it never had notice. Having failed to submit it on the cross-motion, it could have submitted it in reply; here, too, NYCHA failed to provide any proof of mailing.

The Court notes that NYCHA's unauthorized submissions, purporting to be proof of mailing of the NE-1, offered without any explanation as to why these affidavits were not submitted as part of the reply, were not considered by the Court. These papers, sent to the court and petitioner's counsel after a telephone settlement conference, constitute an improper attempt to circumvent the rules of the court. This is especially true because further submissions were specifically prohibited and were in direct violation of the court's direction, as communicated to counsel by the court attorney's statement that the motion was fully submitted and no additional papers would be accepted by the Court.

As set forth above, the statute of limitations governing Article 78 proceedings begins to run on the date the petitioner receives notice of the decision. NYCHA did not dispute that the first time petitioner ever knew that there was an administrative determination (as opposed to another NYCHA mistake) was when it received Mr. Lauterstein's letter. Accordingly, this proceeding, brought within four months of receiving Mr. Lauterstein's letter, is timely.

Moreover, petitioner's attempts to find the reason why the payments stopped before incurring the expense of this proceeding, and its prompt action to challenge this determination once finally communicated via Mr. Lauterstein's letter, should not be used

against it. While petitioner does admit that on May 9, 2011 it received the April 20, 2011 letter advising that the rent subsidy had been terminated on March 31, 2011, petitioner had no reason to believe the letter was correct because it never received the NE-1 notice.

Additionally, this April 20, 2011 letter (exh D to cross-motion) is not signed by an individual, but "generated" by the "Leased Housing Department". It stated that the rent subsidy for the apartment "will be/has been terminated". Moreover, while it stated that "this action is being/has been taken for the following reason: Long-Term Suspension", ***the reason for the suspension was not identified even though there was ample space for this crucial information on the form***. Finally, this letter stated "If you have any questions, please contact the Customer Contact Center at (718) 707-7707". As Ms. Rubel explained in her affidavit, petitioner's attempts to get answers by calling the NYCHA center were futile.

NYCHA should not get an advantage when it never told the landlord about the violation, when it suspended payments but kept the reason a mystery, when it terminated the payments by sending an unsigned letter, inviting inquiries to a non-working phone number, announcing that payments were terminated but never disclosing why payments were suspended in the first place. As if that were not bad enough, there was a huge space on the form letter to explain why the benefits were initially suspended; if the anonymous author had only filled in "payments terminated due to uncured violation", then a whole lot of aggravation could have been avoided. Instead NYCHA's lawyers are trying to put the blame on the petitioner, the victim of NYCHA's inability to respond to petitioner's inquiries (until Mr. Lauterstein responded to the attorney's letter).

In *193 Realty, LLC v Rhea*, 37 Misc.3d 1203 (A), __ NYS2d __, 2012 WL 4477616,

the court (Feinman, J.), agreed with NYCHA's position that the statute of limitations began to run when NYCHA suspends Section 8 payments *just as petitioner had been warned* would happen by the NE-1 notice. In that case, petitioner conceded having received the NE-1 notice of the failed inspection. Here it is undisputed that petitioner did not receive such notice, and accordingly never knew about the violations and never had a date by which to correct such violations and was never warned of what would happen. It is also undisputed that petitioner timely brought this proceeding once it was finally told about the already-cured violation.

For all the foregoing reasons, that branch of NYCHA's cross-motion seeking to dismiss the petition as time-barred is denied.

Documentary evidence and failure to state a cause of action

In support of that branch of its motion seeking to dismiss the petition based on documentary evidence and failure to state a cause of action, NYCHA's counsel cites to 24 C.F.R. Section 982.404(a)(3) which states that NYCHA is not permitted to make subsidy payments for a unit that fails to meet the HQS unless the owner corrects the defect and NYCHA verifies the correction. This argument fails for several reasons. First, a federal regulation is not the type of documentary evidence contemplated by CPLR §3211(a)(1). Additionally, the petition clearly states a cause of action in that it seeks retroactive payment of Section 8 subsidies from NYCHA for a specified period for the subject apartment. Finally, the grounds presupposes that NYCHA served the appropriate NE-1 notice which, based on the papers presented, as this Court has already determined, it did not.

Breach of contract and Attorney's fees

The branch of the cross-motion seeking to dismiss petitioner's contract claim was not raised in the moving affirmation, only in the reply (paras. 27-28), and as such is denied.

The branch of the cross-motion seeking to dismiss petitioner's request for an award of attorneys' fees is granted. Assuming arguendo petitioner were to be the prevailing party, CPLR section 8601(b), 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 such as NYCHA. *See BRG 3715, LLC v New York City Hous. Auth.*, 2012 NY Slip Op. 30656[U] (Sup Ct, New York Co. 2012*) citing Hemandez v. Hammons,* 98 NY2d 735, 750 NYS2d 813 (2002). Therefore, NYCHA's motion to dismiss this claim is granted.

Accordingly, NYCHA's cross-motion is granted only to the extent that the claim for attorneys' fees is dismissed; the balance of the cross-motion to dismiss the petition is denied. NYCHA is directed to serve and file an answer to the petition pursuant to the CPLR.

This is the Decision and Order of the Court.

Dated: December 14, 2012
New York, New York

HON. ARLENE P. BLUTH, JSC