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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR PART 33

Justice

Index Number : 102858/2012
2961-65 MARION LLC
vs.
RHEA, JOHN B.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 35, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-3

Answering Affidavits — Exhibits _____ | No(s). 4-14, 24-34

Replying Affidavits _____ | No(s). 15-23

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

Motion is decided in accordance with memorandum decision & judgment annexed hereto

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: 12/26/12

ALEXANDER W. HUNTER JR , J.S.C.

1. CHECK ONE: ..... [X] CASE DISPOSED [ ] NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: [ ] GRANTED [X] 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
2961-65 Marion, LLC.,

Petitioner,

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

John B. Rhea, as Chairperson of the
New York City Housing Authority, and
the New York City Housing Authority,

Respondents.

Nelsa & Xiomara Montalvo

Co-respondents

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102857/12

Index No. ~~401611~~/12

Decision and Judgment

UNFILED JUDGMENT

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HON. ALEXANDER W. HUNTER, JR.

The application by petitioner for an order pursuant to Article 78 of the C.P.L.R. for an order compelling respondents to restore subsidy payments made to petitioner, retroactive to the date on which the subsidy payments should have been reinstated, and to issue retroactive and ongoing subsidy payments for the tenants Nelsa & Xiomara Montalvo, is denied. Respondents' cross-motion to dismiss with prejudice, pursuant to C.P.L.R. § 3211, is granted.

Petitioner commenced this Article 78 proceeding on June 1, 2012, by filing a verified petition. Respondents cross-moved to dismiss with prejudice, pursuant to C.P.L.R. § 3211. Petitioner is the owner in fee of the premises known as or located at 2961-65 Marion Ave., Bronx, New York 10458 ("subject premises"). Co-respondents are the tenants of record in apartment 4-K at the subject premises (the "apartment") and are participants in the New York City Housing Authority ("NYCHA") Section 8 voucher program in which subsidies are linked to the individual tenant.

The Secretary of Housing and Urban Development ("HUD") provides subsidies through public housing agencies ("PHA"), such as NYCHA. The PHA certifies eligible families for participation in the program and enters into Housing Assistance Payment ("HAP") contracts with owners of agency approved rental housing units, for direct payment of a portion of the tenants' monthly rent. **See, 42 U.S.C. § 1437 et. seq.** Owners must maintain the unit in accordance with HUD promulgated Housing Quality Standards ("HQS"). "The PHA must not make any housing assistance payments for a

dwelling unit that fails to meet the HQS, unless the owner corrects the defect within the period specified by the PHA and the PHA verifies the correction." **24 C.F.R. § 982.404**. NYCHA specifies a time frame for correcting the HQS defect in its NE-1 notice. The PHA is obligated to inspect the subsidized unit at least once annually to determine whether it meets the HQS and must notify the owner of any defects shown by the inspection. **24 C.F.R. § 982.405**. NYCHA's policy is to send the owner of a subsidized unit a NE-1 notice when HQS violations are discovered in an inspection.

In support of respondents' cross-motion to dismiss, NYCHA attaches three NE-1 notices for the below referenced HQS violations and copies of the inspection list and invoices list. On September 10, 2010, NYCHA inspected the apartment and found that the fire escape was blocked by the tenant, which is a serious HQS violation. NYCHA suspended subsidy payments effective November 1, 2010. On January 3, 2011, NYCHA re-inspected the apartment and did not find the previous HQS violation, but found that the window would not close in bedroom one, which is a serious HQS violation. The apartment was re-inspected on January 24, 2011, and the subsidy was reinstated for February 2011.

On May 9, 2011, NYCHA re-inspected the apartment and did not find the previous two HQS violations but found that the window guard was missing in the living room, which is a serious HQS violation. NYCHA suspended subsidy payments effective June 1, 2011. The apartment was re-inspected on June 20, 2011, and the subsidy was reinstated for July 2011.

Petitioner avers that the NYCHA should be made to pay the subsidy to petitioner retroactive to the date when the payments were suspended or terminated because petitioner timely corrected the HQS violations. Petitioner alleges at one point that NYCHA never sent any NE-1 notices to give it notice of the HQS violations. Elsewhere, petitioner alleges that it received a "HQS notice" at the subject premises, but that this is contrary to NYCHA's policy. Petitioner alleges that it promptly corrected the HQS violations and sent a certification of completed repairs to NYCHA. Petitioner alleges that NYCHA suspended or terminated subsidy payments without conducting subsequent inspections to ensure compliance. Petitioner seeks $4,831.43 in rent subsidies for the months of November 2010, December 2010, January 2011, June 2011, and October 2011, as well as continually accruing monthly subsidy payments.

First, petitioner argues that NYCHA's failure to re-inspect the apartment following the owner's certification of completed repairs is a ministerial act required by HUD and NYCHA regulations, and the HAP contract. Petitioner also argues that it never received notice of NYCHA's final determination to terminate the subsidy. Second, petitioner argues that NYCHA's suspension or termination of the subsidy without further inspection of the apartment or further hearing regarding the matter is a violation of due process.

Respondents cross-moved to dismiss on the grounds that petitioner's claims are barred by the statute of limitations, the petition fails to state a cause of action, and at least part of petitioner's claim is moot.

First, respondents argue that the proceeding should be dismissed as barred by the statute of limitations because petitioner did not commence the proceeding within four months of November 2010, or June 2011, when NYCHA suspended payments to petitioner. Second, respondents argue the remedy of mandamus is not available because the issuance of subsidy payments is not a purely ministerial act to which a clear legal right exists. Third, respondents argue that the availability of Article 78 relief to review NYCHA's administrative determination provides petitioner with due process. Finally, respondents argue that petitioner's claims for the October 2011 subsidy and the accruing claims are moot because the October 2011 subsidy was reinstated and there are no accruing claims as NYCHA has paid subsidies on the apartment from July 11, 2011, through August 1, 2012.

Mandamus to compel is a judicial command to an officer or body to perform a specified ministerial act that is required by law to be performed. **See, Matter of Hamptons Hosp. & Med. Ctr. v. Moore, 52 NY2d 88 (1981)**. The petitioner must show a "clear legal right" to the requested relief to succeed in mandamus and the petition must be denied if the right to performance is clouded by "reasonable doubt or controversy." **Matter of Assn. of Surrogates & Supreme Ct. Reporters within City of N.Y. v. Bartlett, 40 NY2d 571, 574 (1976)**. Mandamus cannot be used to compel an officer or tribunal to reach a particular outcome with respect to a decision that turns on the exercise of discretion or judgment. **Klosterman v. Cuomo, 61 NY2d 525 (1984)**.

In a proceeding for mandamus relief, the four month statute of limitations does not begin to run until the date petitioner's demand for action is refused. **Donoghue v. New York City Dept. of Educ., 80 AD3d 535, 2011 NY Slip Op 00425 (1st Dept 2011)**. However, petitioner will be found guilty of laches and its proceeding barred if it fails to make a demand for relief within a reasonable time after the right to make the demand occurs. **See, e.g., Matter of Civil Serv. Empls. Assn. v. Board of Educ., Patchogue-Medford Union Free School Dist., 239 AD2d 415 (2d Dept 1997)** (nine month delay); **Matter of McKenzie v. Comptroller of State of N.Y., 268 AD2d 828 (3d Dept 2000)** (thirteen month delay). In the context of Section 8 subsidies, the right to make a demand arises upon nonpayment of the first disputed subsidy. **See, e.g., 193 Realty, LLC v. Rhea, John B. & N.Y.C. Hous. Auth., Sup Ct, NY County, July 17, 2012, Lobis, J., Index No. 101109/12; 2011 Newkirk LLC v. New York City Housing Authority, Sup Ct, NY County, Dec. 5, 2011, Mendez, J., Index No. 109666/11; BNS Buildings, LLC v. Rhea, Sup Ct, Queens County, Nov. 16, 2010, Strauss, J., Index No. 3778/10; Royal Charter Properties, Inc. v. NYCHA, Sup Ct, NY County, July 23, 2010, Rakower, J., Index No. 100189/10.**

Petitioner's right to make a demand arose when the subsidy was suspended in November 2010 or June 2011, however it did not make a demand until June 2012 (more than a twelve month delay). While on one hand petitioner alleges that it did not receive any NE-1 notices, on the other hand, petitioner impliedly admits that it did receive such notices by alleging that it promptly cured any HQS violations and timely submitted certifications of completed repairs within the period specified on the NE-1 notice. Even assuming petitioner did not receive a NE-1 notice, petitioner learned of the subsidy

suspension once it ceased to receive subsidy payments. Petitioner's claims are time-barred because petitioner is guilty of laches for waiting over a year to make a demand.

Petitioner seems to confuse mandamus to compel and mandamus to review, combining arguments that apply to the separate doctrines. Petitioner argues that the statute of limitations does not begin to run until a final determination is made. This argument is not applicable to a mandamus to compel theory, but rather a mandamus to review theory where petitioner seeks judicial review of the final determination of an agency. **See, Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753 (1991); Matter of Marburg v. Cole, 286 NY 202 (1941); Matter of Best Payphones, Inc. v. Dept. of Info. Tech. & Telecom. of City of N.Y., 5 NY3d 30 (2005).**

Even assuming that petitioner is also making an argument under the theory of mandamus to review, petitioner's claims are still barred by the statute of limitations. A party must commence a special proceeding under Article 78 of the C.P.L.R. by filing a petition within four months after the administrative determination to be reviewed becomes final and binding on the aggrieved party. **See, C.P.L.R. §§ 217 (1) & 304; Best Payphones, Inc. v. Dept. of Info. Tech. & Telecomms., 5 NY3d 30.** The four month limitation period is construed strictly, particularly against Article 78 petitioners seeking to challenge NYCHA determinations, and the court does not have the discretion to extend the statute of limitations in the interest of justice. **See, De Milio v. Borhard, 55 NY2d 216 (1982); Saunders v. Rhea, 92 AD3d 602 (1st Dept 2012).**

"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." **Matter of Biondo v. New York State Bd. of Parole, 60 NY2d 832, 470 (1983).** NYCHA creates an ambiguity when it sends a NE-1 notice indicating that as long as an owner provided the certification to NYCHA, it would either deny the certification or re-inspect the unit, but instead remains silent. **Matter of BRG 3715 LLC v. New York City Hous. Auth., 2012 NY Slip Op 30656(U) (Sup Ct, NY County 2012).** There is no ambiguity when NYCHA does re-inspect the unit or provide petitioner with subsequent written notices, thus NYCHA's act of suspending the subsidy constitutes a final and binding determination. **See, e.g., Id.; Chillum Place v. Rhea, Sup Ct, NY County, Aug. 24, 2012, Mendez, J., Index No. 101565/12; Weilders v. New York City Hous. Auth., Sup Ct, NY County, Aug. 13, 2012, Moulton, J., Index No. 1127872/11; Royal Charter Properties, Inc. v. NYCHA, Index No. 100189/10.**

Here, unlike **Matter of BRG**, there is no ambiguity that NYCHA made a final determination because, contrary to petitioner's unsupported assertion that NYCHA did not re-inspect the apartment, NYCHA did re-inspect the apartment and attaches records in support of this fact. The first nonpayment of a disputed subsidy constituted a final and binding determination and put petitioner on notice of NYCHA's adverse determination. The four month statute of limitations began to run in November 2010 and this action was not commenced until more than a year later in June 2012. A mandamus to review claim is time-barred in the instant proceeding.

Finally, petitioner was not deprived of due process. Contrary to petitioner's allegation that NYCHA did not re-inspect the apartment, NYCHA's records clearly demonstrate that the apartment was re-inspected. In addition, Article 78 provides petitioner with due process by giving petitioner the right to challenge NYCHA's administrative determination. **See, C.P.L.R. § 7803**. NYCHA is not required to give an owner or landlord a hearing before suspension or termination of the subsidy.

Accordingly, it is hereby,

ADJUDGED, that the petition is denied and the proceeding is dismissed with prejudice, with costs and disbursements to respondents.

Dated: December 26, 2012

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR

UNFILED JUDGMENT
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