Matter of Stellar Sedgwick LLC v Rhea
2013 NY Slip Op 32130(U)
September 9, 2013
Supreme Court, New York County
Docket Number: 100196/13
Judge: Cynthia Kern
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[* 1] SCANNED ON 9/11/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____ **PART** _____

Justice

Index Number : 100196/2013
STELLAR SEDGWICK LLC.
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
ARTICLE 78

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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

is decided in accordance with the annexed decision.

FILED
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COUNTY CLERK'S OFFICE

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

Dated: 9/9/13

BOK
_____, J.S.C.

1. CHECK ONE: ..... [X] 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 55

----------x

In the Matter of the Application of

STELLAR SEDGWICK LLC,

Petitioner,

Index No.: 100196/13

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

DECISION/ORDER

-against-

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

Respondents.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	
Cross-Motion and Affidavits Annexed.....	2
Answering Affidavits to Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	5

Petitioner Stellar Sedgwick LLC commenced the instant proceeding pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to compel respondent New York City Housing Authority ("NYCHA") to (1) act upon, approve and implement monthly increases in the Section 8 subsidy share of the rent for twelve tenants who reside at petitioner's premises; and (2) pay the increases retroactively from the beginning of the twelve renewed tenants' leases to the

present. Respondents cross-move for an Order pursuant to CPLR §§ 3211(a)(5) and (a)(7) dismissing the petition. For the reasons set forth below, respondents' cross-motion to dismiss the petition is granted and the petition is denied.

The relevant facts are as follows. Petitioner is a landlord who participates in the federally-funded Section 8 rent subsidy program and owns the building located at 1889 Sedgwick Avenue, Bronx, New York (the "subject premises"). In connection with each of the twelve residential tenants involved, each tenant has an expired Housing Assistance Payment ("HAP") contract and/or lease. Petitioner alleges that prior to and subsequent to the expiration of the last fully executed HAP contract, it forward to NYCHA the appropriate lease renewals with requests for increases due to Major Capital Improvement ("MCI") charges made to each apartment. However, petitioner alleges that NYCHA has failed to make payment in connection with the lease renewals and MCI charges and that NYCHA has failed to accept or reject the lease renewals and MCI charges. Petitioner then commenced the instant action seeking mandamus to compel NYCHA to adjust the subsidies for the twelve tenants accordingly.

The court first turns to NYCHA's cross-motion to dismiss the petition. In the instant action, NYCHA's cross-motion to dismiss the petition on the ground that petitioners have failed to comply with Notice of Claim requirements pursuant to Public Housing Law § 157(1) must be denied. Pursuant to Public Housing Law § 157(1),

> In every action or special proceeding, for any cause whatsoever, prosecuted or maintained against an authority, other than a claim arising out of a condemnation proceeding, the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims upon which such notice or special proceeding is founded were presented to the authority for adjustment and that it has neglected or refused to make an adjustment

or payment thereof for thirty days after such presentment.

It is undisputed that petitioner has failed to serve a Notice of Claim on NYCHA. The fact that petitioner served a Notice of Claim upon the Comptroller of the City of New York is insufficient as the City of New York is an entirely separate and distinct entity from NYCHA and is not authorized to accept service on NYCHA's behalf. Although compliance with the notice and pleading requirements of PHL § 157(1) is a condition precedent to filing a lawsuit against NYCHA, "when the relief sought is in the nature of mandamus...courts have held that a notice of claim is not a condition precedent to bringing suit." *WWC Corp. v. New York City Hous. Auth.*, 2012 WL 3638861 (Sup. Ct. N.Y. Co. August 10, 2012) (Justice Joan B. Lobis); *see also In re Sharpe v. Sturm*, 28 A.D.3d 777 (2d Dept 2006). Thus, the fact that petitioners failed to serve a Notice of Claim on NYCHA is not fatal to the instant petition.

However, NYCHA's cross-motion to dismiss the petition on the ground that petitioner is not entitled to mandamus relief is granted. Mandamus to compel performance is granted only when a petitioner demonstrates a clear legal right to the relief sought. *Scherbyn v. Wayne-Finger Lakes Bd.*, 77 N.Y.2d 753 (1991). Moreover, "[i]t is hornbook law that a mandamus to compel may not force the performance of a discretionary act, but rather only purely ministerial acts to which a clear legal right exists." *Anonymous v. Comm'r of Health*, 21 A.D.3d 841, 841 (1st Dept 2005).

Here, the petition must be dismissed as petitioner has not demonstrated a clear legal right to the relief sought. As an initial matter, lease renewal rent increases are not purely ministerial acts but matters entrusted to NYCHA's discretion. Federal regulations set forth various scenarios where "the rent to owner for a unit must not be increased." 24 C.F.R. § 982.519(b)(4).

Indeed, federal regulations dictate that NYCHA cannot evaluate whether an owner is entitled to a rent increase unless the owner requests the increase at least 60 days before the next annual lease term. *See* 24 C.F.R. § 982.519 (b)(4). Thus, as lease renewal rent increases cannot be granted automatically under the regulations, and their issuance depends, at least in part, on the owner's compliance with the time restrictions prescribed by the federal regulations for the lease renewal process, such increases cannot be considered "purely ministerial." Further, NYCHA's discretion is inherent in its processing lease renewal increases as an owner cannot receive a rent increase unless NYCHA first determines whether the rent requested is "reasonable." *See* 24 C.F.R. § 982.507(a)(2)(i). The determination of whether rent is "reasonable" depends on a number of discretionary factors including the location, quality, size, unit, type and age of the contract unit and any amenities, housing services, maintenance and utilities to be provided by the owner under the lease. *See* 24 C.F.R. § 982.507(b). Thus, as the determination to approve a lease renewal rent increase is discretionary, not ministerial, petitioner does not have a "clear legal right" to the relief requested and thus, it is not entitled to mandamus relief.

Even if mandamus to compel NYCHA to approve and pay subsidy increases for the twelve apartments did lie, which it does not, petitioner's claims are time-barred. After an agency's initial determination, a petitioner seeking mandamus to compel must first make a formal demand for relief, and then, if the demand has been refused, petitioner may commence a special proceeding within four months of the refusal of a body or officer to grant a demand for relief requested. *See* CPLR § 217(1); *see also Cravatts v. Klozo Fastener Corp.*, 282 A.D. 1014 (1st Dept 1951)("...a proceeding in the nature of mandamus must be instituted within four months after the refusal of the respondent upon the demand of the petitioner to perform the duty."); *see*

also Civil Service Employees Assoc., Inc. v. Board of Education, 239 A.D.2d 415 (2d Dept 1997)("Before commencing a proceeding in the nature of mandamus, it is necessary to make a demand and await a refusal, and the Statute of Limitations begins to run on the date of the refusal and expires four months thereafter.") If petitioner makes a formal demand of the agency but there is no formal refusal, "[t]he refusal to comply with the demand must be deemed to have occurred within a reasonable time." *Cravatts*, 282 A.D. at 1015. A reasonable time is deemed to have passed "when the petitioner acquired a knowledge that his rights were adversely affected." *Amsterdam City Hosp. v. Hoffman*, 278 A.D. 292, 297 (3d Dept 1951).

In the instant action, the petition must be dismissed as untimely. Petitioner asserts that it made timely applications to NYCHA for lease renewals and MCI increases for all twelve leases before the renewed leases commenced. The time that passed between petitioner's alleged applications for increased subsidies and the start of the renewed leases, without increases having been granted, provided a reasonable time after which petitioner knew, or should have known, that NYCHA had not granted its applications. *See Barry v. Mulrain*, 4 A.D.2d 268 (1st Dept 1957). Thus, when the renewed leases commenced in November 2011, without the requested increased subsidies, petitioner's cause of action accrued. *See Highbridge House Ogden, LLC v. Rhea*, Index No. 106730/11 (Mills, J.)(Sup. Ct. N.Y. Cty. April 25, 2012)(holding that the four month statute of limitations period accrued, with respect to each lease, on the date that the renewed lease commenced and the old lease expired due to petitioner's knowledge from the expired leases that NYCHA had not granted its requested subsidy increases). Petitioner therefore had four months from November 2011 to commence an Article 78 action against NYCHA. However, petitioner did not commence this special proceeding until January 2013, ten months after its time

to do so expired.

Accordingly, respondents' cross-motion to dismiss the petition is granted and the petition is denied. The petition is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 9/9/13

Enter: _____
J.S.C.

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