

Matter of 400 Fort Washington Ave., LLC v Towns

2013 NY Slip Op 32702(U)

October 25, 2013

Supreme Court, New York County

Docket Number: 100944/13

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 100944/2013
400 FORT WASHINGTON AVENUE
vs
TOWNS, DARRYL C.
Sequence Number : 001
ARTICLE 78

PART _____

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.

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

FILED

OCT 30 2013

NEW YORK
COUNTY CLERKS OFFICE

RECEIVED
OCT 30 2013
13C MOTION SUPPORT OFFICE
13C SUP. AND COCOURT-CIVIL

Dated: 10/25/13

CRK, 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 NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
In the Matter of the Application of

400 FORT WASHINGTON AVENUE, LLC,

Petitioner,

Index No. 100944/13

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

DARRYL C. TOWNS, as Commissioner of the New York
State Division of Housing and Community Renewal, NEW
YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL and CARLETON COFFRIN,
as President of Tenant Association,

Respondents.

FILED

OCT 30 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

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
Notice of Cross Motion and Answering Affidavits.....	2
Affidavits in Opposition to Cross Motion.....	3
Exhibits.....	4

Petitioner 400 Fort Washington Avenue, LLC (“petitioner” or “Landlord”), the
Owner/Landlord of the rent-stabilized building located at 400 Fort Washington Avenue, New
York, New York (“the building”), brings the instant petition pursuant to Article 78 of the Civil
Practice Law and Rules (“CPLR”) challenging the Final Order issued on May 2, 2013 by
respondent New York State Division of Housing and Community Renewal (“DHCR”) which
revoked a Major Capital Improvement (“MCI”) rent increase granted by the Rent Administrator.

DHCR cross-moves for an Order remitting this proceeding to the DHCR for further proceedings and a new determination. For the reasons set forth below, the petition is denied and the cross-motion is granted.

The relevant facts are as follows. On or about December 8, 2006, petitioner applied to DHCR for an increase of \$97,531.13 in the regulated rent for MCIs made to the building (the "Application"). Specifically, petitioner alleges that such improvements included pointing the roof; performing sidewalk bridging; adding new doors throughout the building; repairing and performing work on the sewer line; and improving the intercom. In response to the Application, certain tenants of the building filed complaints objecting to any such increase on the ground that lead paint violations existed in the building.

On or about March 22, 2007, in response to the Application, the DHCR's Rent Administrator made a "Request for Additional Information/Evidence" and directed the petitioner to correct all class "C" violations on record with the Department of Housing Preservation & Development ("HPD"). In a response dated May 2, 2007, petitioner submitted an affidavit, sworn to on December 5, 2006, by an architect, who stated, in pertinent part:

Based on a personal, thorough inspection of the premises on 12/4, 2006, the following is certified to be true: All the 'B' and 'C' type violations not requiring tenant action or access to a tenant's apartment listed in the current Report of Search issued on 3/15, 2006 by the Division of Code Enforcement of the office of Rent and Housing Maintenance, have been physically removed and/or rectified by the Owner/Managing Agent. In the case of those B & C violations requiring tenant action or access to the tenant's apartment, the tenant has been notified by certified mail if it has not been possible to rectify the violation.

On May 21, 2007, DHCR informed petitioner that the architect's affidavit was inadequate on the ground that "[t]he majority of the 'C' violations listed with HPD required access [to the tenant's

apartment]” and requested that petitioner indicate what has been completed regarding the ‘C’ violation and provide lead-based paint test results.

By letter, petitioner then informed DHCR that repairs had been made to remove existing violations from HPD’s record and attached copies of the lead-based paint test results demonstrating “NO LEAD-BASED PAINT PRESENT” in a specific apartment in the building. Additionally, petitioner attached to the letter the records submitted to HPD “requesting an inspection of the building which would determine the effectiveness of the repairs made” and stated that “[s]hould HPD determine that repairs were made according to their standards all existing violations will be removed.”

On October 1, 2007, the Rent Administrator partially granted petitioner’s Application. Specifically, DHCR granted the application for an MCI rent increase in the amount of \$75,180.57 and authorized an increase in the amount of \$5.46 for each room, effective February 1, 2007, which was collectible as of November 1, 2007. The Rent Administrator declined to grant petitioner an increase to the full amount requested - \$97,531.13 - on the ground that repairs to the sewer line did not qualify for an increase as an MCI installation and the final number also discounted sales tax on the intercom.

On October 9, 2007, respondent Carlton Coffrin (“Mr. Coffrin”), the tenant of Apartment 6G in the building, filed a complaint with DHCR alleging certain items in the building which were in need of repair. On November 5, 2007, Mr. Coffrin also filed a Petition for Administrative Review (“PAR”) challenging the Rent Administrator’s October 1, 2007 determination. Specifically, the PAR alleged that the grant of a rent increase for the building pursuant to the alleged MCIs was in error as many “C” violations reported against the building still have not been

cured; several of these "C" violations pertained to lead-based paint hazards; and the evidence submitted by petitioner did not substantiate the curing of the lead-based paint hazards as it merely related to one apartment in the building.

DHCR alleges that on April 11, 2013, it checked HPD's website and found three class "C" violations that were on record since before the Rent Administrator's Order, two of which were based on the presence of lead paint. Thus, on May 2, 2013, almost six years after the PAR was filed, DHCR reversed the October 1, 2007 Order awarding petitioner an MCI rent increase on the ground that immediately hazardous conditions existed in the form of class "C" violations. In making his determination, DHCR's Commissioner relied on Rent Stabilization Code § 2522.4(a)(13) which states:

The DHCR shall not grant an owner's application for a rental adjustment pursuant to this subdivision, in whole or in part, if it is determined by the DHCR prior to the granting of approval to collect such adjustment that the owner is not maintaining all required services, or that there are current immediately hazardous violations of any municipal, county, State or Federal law which relate to the maintenance of such services.

Thus, DHCR's Commissioner held that

[F]or MCI purposes an architect's affidavit is acceptable for establishing that "C" violations have been corrected, except for lead paint violations which are of such a serious nature that they are required to be removed of record from the HPD database. Accordingly, as the lead paint Class "C" violations which were placed on record on or before the issuance date of the Administrator's order have not been cleared from HPD's list of pending violations as of April 11, 2013, the Commissioner finds that the owner's MCI rent-increase application should be denied, and that the Administrator's order herein under review should be revoked.

The Commissioner notes that the subject owner has had more than five years within which to have all of the relevant Class "C" violations removed from record, but has failed to do so.

Petitioner then commenced the instant proceeding seeking to set aside the Final Order and reaffirm the October 1, 2007 Order granting the rent increase.

The court first turns to DHCR's cross-motion for an Order remitting the instant proceeding to the DHCR for further proceedings and a new determination. "The Court of Appeals has confirmed DHCR's broad powers and authority to alter its prior determinations on remission." *Matter of Sherwood 34 Assoc. v. New York State Divis. of Hous. and Community Renewal*, 309 A.D.2d 529, 531 (1st Dept 2003). Further, it is well-settled that courts have the power to remit matters back to the DHCR when requested by said agency. *See id* (reversing the Supreme Court's denial of DHCR's cross-motion to remit the Article 78 proceeding to the agency for further proceedings and a new determination); *see also 47 Clinton Street Co. v. New York State Division of Housing and Community Renewal*, 161 A.D.2d 402, 403 (1st Dept 1990), citing *Matter of Wiener v. Joy*, 100 A.D.2d 800, 801 (1st Dept 1984) (remitting an Article 78 proceeding back to the DHCR "for the submission of a complete record, further fact finding, and a new determination" so that the DHCR may "function efficiently and render substantial justice to the parties concerned"); *see also Matter of Schoenstein v. McGoldrick*, 279 A.D. 395 (1st Dept 1952) (holding that a court, "at any stage of the proceedings, has the right to remit the same to the administrative agency...on the agency's request that it be permitted to correct some error of judgment or mistake in the record or take additional testimony" on the ground that "a certain degree of continuing jurisdiction for reconsideration and review and the taking of additional testimony is contemplated and indeed is necessary in order that the agency may function efficiently and render substantial justice to the parties concerned.")

In the instant action, DHCR's cross-motion to remit the proceeding to the DHCR for

