

**Behrend v Gramercy-Rutherford Townhouse Corp.**

2018 NY Slip Op 32172(U)

September 5, 2018

Supreme Court, New York County

Docket Number: 152520/2018

Judge: William Franc Perry

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT:** HON. W. FRANC PERRY

**PART** IAS MOTION 23EFM

*Justice*

-----X

**INDEX NO.** 152520/2018

MICHELLE BEHREND

**MOTION DATE** 07/26/2018

Petitioner,

**MOTION SEQ. NO.** 001

- v -

GRAMERCY-RUTHERFORD TOWNHOUSE CORP.,

Respondent.

**DECISION AND ORDER**

-----X

The following e-filed documents, listed by NYSCEF document number (Motion and Cross Motion 001) 10, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion and cross motion for ARTICLE 78 (BODY OR OFFICER)/CROSS MOTION TO DISMISS.

Petitioner brings this Article 78 proceeding against Respondent, seeking an order annulling and setting aside Respondent’s November 21, 2017, determination denying Petitioner possession and access to the roof directly above Petitioner’s apartment; compelling Respondent to restore Petitioner’s right of possession and access to the roof by delivering all keys, to Petitioner, necessary to access the roof; declaring that Petitioner has the right to improve the subject roof amenity by building decking, subject to all applicable laws and obligations under her proprietary lease and at law; and deeming Petitioner the prevailing party and directing a hearing in her favor for an award of attorney’s fees.

Respondent, in lieu of answering the Petition, has filed a cross motion seeking dismissal of the Petition, on the grounds that Petitioner lacks standing to commence this special proceeding as she failed to comply with the requirements of CPLR § 7803, and for failure to state a

cognizable cause of action upon which relief can be granted. Respondent also opposes Petitioner’s request for declaratory relief and the Petition in its entirety. The Petition and cross motion to dismiss are consolidated for disposition.

**FACTUAL BACKGROUND and CONTENTIONS**

Petitioner has been the proprietary lessee of apartment 222/#4 (the “Apartment”) at Respondent Gramercy-Rutherford Townhouses Corporation, the cooperative building located at 220-222 East 17th Street, New York, New York 10003, since July 11, 2007. The residential cooperative is comprised of two buildings, 220 East 17th Street (“Building 1”) and 222 East 17th Street (“Building 2”), New York, NY 10003. (Verified Petition ¶¶ 5 and 6, Ex. A). Petitioner alleges that she is the proprietary lessee of both her apartment and the roof directly above her apartment and that the description of “Demised Premises” and Paragraph 7 of the Lease, set forth her rights and obligations with respect to the roof appurtenant to her apartment. (Verified Petition ¶¶ 6 and 9).

Respondent contends that Petitioner lacks standing to pursue the instant action because Petitioner never served a demand on the board prior to the commencement of this action and thus has failed to fulfill the necessary preconditions to the commencement of an Article 78 proceeding. Respondent avers that Petitioner failed to make a demand on the board with respect to her roof rights and/or the right to build a structure on the roof, and thus Respondent argues that Petitioner failed to allow the board to render a determination with respect to the issue of the Petitioner’s roof rights. The only demand Petitioner made to Respondent, that falls within the applicable four-month statute of limitations, was to approve her request to sublet her apartment “beginning in either November 2017 or December 2017, subject to the Coop’s rules and regulations”. (Verified Petition, ¶16, and Ex. E).

In support of its motion to dismiss the Petition, Respondent has submitted the affidavit of Matthew Crowe, the Treasurer of the cooperative since 2008. (Crowe Affidavit, dated May 21, 2018). Crowe contends that based upon his review of the historical documents of the cooperative, the terms of the proprietary lease agreement signed by Petitioner do not give her the right of ingress and egress to/from the roof of Building 2 through the common space of the cooperative and that, prior to the roof repair in 2017, any resident in the building could have accessed the roof through the door Petitioner is demanding the keys for, as Petitioner did not have exclusive access to the roof because she did not sign the Roof Access Agreement. (Crowe Aff., ¶¶ 6 and 8, Ex. A). Respondent contends that the only historical agreement between the shareholder of the Apartment (currently Petitioner) relating to shareholder rights and obligations with respect to the roof of Building 2, is set forth in "Agreement Between Gramercy Rutherford Townhouse Corporation and the Owners of #4, 222 East 17th St. NY NY 10003 Regarding Roof Rights/Ownership", dated November 1997 (the "Roof Access Agreement"). (Crowe Aff., Ex. A).

Respondent admits that it was not able to secure a fully executed Roof Access Agreement between the cooperative and the prior shareholder of Petitioner's apartment, and that none exists as between Petitioner and Respondent, but argues that the terms of the Roof Access Agreement forms the basis of the cooperative board's understanding that the shareholder of the apartment is financially responsible for the roof in Building 2 and that the board received no compensation for allocation of the roof rights of Building 2, other than the shareholder's promise to bear such financial responsibility. (Crowe Aff., ¶¶ 8 and 9, Ex. A). Based on this understanding and the terms of the Roof Access Agreement and Petitioner's Proprietary Lease, Respondent contends that its request that Petitioner bear financial responsibility for the roof was made in good faith.

Petitioner alleges that going back to 2009, there is a history of leaks from the roof into her apartment. (Verified Petition, ¶10). On May 20, 2013, Petitioner sent an email to the members of the board indicating that she had noticed further evidence that the roof was leaking into her apartment and in that email, directs several questions to the board and seeks information relative to her apparent intention to purchase additional shares allocated to the roof in exchange for the board permitting her to do construction on the roof. Specifically, Petitioner states: “Regarding share allocation for roof building, would the co-op be open to me purchasing additional share units in exchange for the right to build? I understand this would be a process, but I believe the co-op has done a share sale to Craig Samuelson for his usage for the roof on the 220 side in the past few years, so procedure should be in place already.” (Verified Petition, Ex. B).

Petitioner claims that in 2014, the board “improperly attempting to shift all repair costs for the roof, structural and otherwise, to the two shareholders occupying the two (2) top floor apartments, respectively” and attaches “HOUSE RULES FOR GRAMERCY RUTHERFORD TOWNHOUSES CORPORATION” as an exhibit to the Petition. (Verified Petition, ¶11, Ex. G). In December 2016, Petitioner alleges that the cooperative’s board engaged an engineer who recommended a full replacement of the Building’s roof, and the board engaged a contractor to make the structural repairs for approximately \$84,00. (Verified Petition, ¶12).

On December 13, 2016, the board’s treasurer, Mr. Crowe, sent an email to Petitioner and the other shareholder whose apartment was directly below the roof, summarizing the costs of the roof repair and indicating the board’s preference “to proceed with the \$84,000 bid, which would result in a \$42,000 allocation to each of you.” (Verified Petition, Ex. C). Contrary to Petitioner’s allegations, there is no “demand” for payment expressed in the email, but rather a stated preference on how the board would like to proceed with the roof repairs. Indeed, at the

end of the email, Mr. Crowe invites any questions and offers to go over the bids for the roof repair in detail. (Verified Petition, Ex. C). On January 11, 2017, the other shareholder responded to Mr. Crowe indicating that he agreed with the board's preference. (Verified Petition, Ex. C). On July 6, 2017, Petitioner's counsel, notified the board of her objection to the \$42,000 chargeback for the roof replacement project, and asserted her rights under the Lease and the law. (Verified Petition, Ex. D).

Thereafter, in September, 2017 Petitioner advised the board that she wanted to sublet her Apartment beginning in either November 2017 or December 2017, subject to the Coop's rules and regulations. (Verified Petition, ¶16). On November 21, 2017 Respondent, through its attorney, approved Petitioner's request to sublet her apartment. (Verified Petition, Ex. E). In that same letter, Respondent indicating that the board would be restricting access to the roof and that the board reserves all rights pursuant to contract and at law and equity relating to the roof and access to same as well as to, in the board's sole discretion, limiting alterations to the building. (Id.). For the reasons that follow, Respondent's motion to dismiss is granted and the Petition is dismissed.

#### **STANDARD OF REVIEW and ANALYSIS**

An Article 78 proceeding may only be brought in certain circumstances, as prescribed by the statute. CPLR §7803. Specifically, here, Petitioner seeks to compel mandamus and direct the cooperative to restore Petitioner's right of possession and/or access to the roof by immediately delivering to her all keys necessary to access the roof space, and declare that Petitioner has the right to improve the subject roof amenity by building decking and/or installing other lawful materials on the portion of the roof directly above the Petitioner's apartment. (Verified Petition).

Mandamus to compel is "an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear legal right to the relief sought". *Matter of Curry v New York State Educ. Dept.*, 2018 N.Y. App. Div. LEXIS 5303, 2018 WL 3463127 (3d Dept. 2018); *Matter of Maron v Silver*, 14 NY3d 230 (2010); *Liggett v Pichler*, 142 AD2d 206, 210 (1<sup>st</sup> Dept. 1988). Accordingly, a writ of mandamus is not an appropriate remedy to compel performance of an act or duty for "which an officer may exercise judgment or discretion." *Liggett v. Pichler*, 142 A.D.2d 206, 210, 534 N.Y.S.2d 973 (1st Dept. 1988), quoting *Posner v. Levitt*, 37 A.D.2d 331, 332, 325 N.Y.S.2d 519 (3rd Dept. 1971). See also *Matter of Maron v. Silver*, 14 N.Y.3d 230, 925 N.E.2d 899, 899 N.Y.S.2d 97 (2010); *Gimprich v. Board of Education of the City of New York*, 306 N.Y. 401, 118 N.E.2d 578 (1954); *People ex rel. Hammond v. Leonard*, 74 N.Y. 443, 445 (1878). Thus, "the petitioner must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief" *Matter of Anonymous v Commissioner of Health*, 21 AD3d 841, 842, 801 NYS2d 302 [1st Dept 2005] [internal quotation marks omitted].

Because each of Petitioner's causes of action set forth CPLR Article 78 mandamus to compel claims, CPLR § 217(1)'s four-month statute of limitations applies. As such, before commencing this mandamus to compel proceeding, Petitioner was required to make a demand and await refusal. (*Hassig v. New York State Dept. of Health*, 5 AD3d 846, 773 N.Y.S.2d 158 [3d Dept. 2004]; *Letourneau v. Town of Berne*, 56 AD3d 880, 866 N.Y.S.2d 462 [3d Dept. 2008])

Here, Petitioner filed this Article 78 petition alleging that Respondent had failed to deliver keys to access the roof directly above Petitioner's apartment and to seek a declaration

that Petitioner has the right to improve the roof amenity. Petitioner, however, has put the proverbial cart before the horse in that she has never made a formal demand upon Respondent to improve the roof amenity, nor has she demonstrated that she has any legal right of ownership in the roof amenity that forms the basis of her Petition. In fact, the documents submitted in support of the Petition, demonstrate quite clearly that Petitioner does not have any legal right of ownership to the roof amenity because she has not signed the Roof Access Agreement. (Crowe Aff., Ex. A). Moreover, her own email correspondence with Mr. Crowe, makes very clear the fact that Petitioner knew she did not have ownership rights to the roof amenity because she clearly asks Mr. Crowe, "Regarding share allocation for roof building, would the co-op be open to me purchasing additional share units in exchange for the right to build? I understand this would be a process, but I believe the co-op has done a share sale to Craig Samuelson for his usage for the roof on the 220 side in the past few years, so procedure should be in place already." (Verified Petition, Ex. B).

Accordingly, Petitioner's own email demonstrates the fact that Petitioner does not have a clear legal right to the relief demanded, as she has not demonstrated that she has any ownership rights to the roof amenity she is seeking to compel Respondent to grant her access to. Neither Petitioner nor Respondent provided a signed copy of the Roof Access Agreement in support of this proceeding. Moreover, Petitioner has also failed to demonstrate that the act for which she seeks the court to compel Respondent to undertake, is a "mandatory" act, and not one subject to Respondent's discretion and judgment.

Paragraph 7 of Petitioner's proprietary lease provides in pertinent part: "If the apartment includes . . . a portion of the roof . . . The Lessee's use thereof shall be subject to such regulations as may from time to time, be prescribed by the Directors." (Verified Petition, Ex. A,



¶ 7). Accordingly, the plain language of the lease demonstrates that Respondent’s Directors retain the right to promulgate regulations, from time to time, relative to the use of the roof appurtenant to Petitioner’s apartment. As such, this Lease provision aptly demonstrates that Respondent retained discretion and judgment with respect to Petitioner’s use and enjoyment of the roof amenity that is the subject of this proceeding. As such, mandamus to compel does not lie. *Mullen v Axelrod*, 74 NY2d 580, 583 (1989) (While a mandamus is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which the officer may exercise judgment or discretion).

**CONCLUSION**

Here, it is clear from the Petition and the exhibits attached thereto that Petitioner has not met her burden to maintain this Article 78 proceeding. Petitioner has not established a clear legal right to access the roof directly above her apartment, nor has she established that the act she seeks to compel Respondent to perform is a ministerial duty, where the board cannot exercise judgment or discretion. Accordingly, it is,

ADJUDGED that the application is denied and the petition is dismissed, with costs and disbursements to respondent; and it is further

ADJUDGED that respondent’s cross motion to dismiss the petition is granted insofar as petitioner has not met her burden to maintain this Article 78 proceeding; and it is further

ADJUDGED that respondent, having an address at \_\_\_\_\_, do recover from petitioner, having an address at \_\_\_\_\_, costs and disbursements in the amount of \$ \_\_\_\_\_, as taxed by the Clerk, and that respondent have execution therefor.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court

9/05/2018  
DATE

*W.P.*  
W. FRANC PERRY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
				<input type="checkbox"/> REFERENCE