Matter of MHM Sponsors Co. v New York State Div. of Hous. and Community Renewal
2019 NY Slip Op 30283(U)
February 7, 2019
Supreme Court, New York County
Docket Number: 156513/2018
Judge: John J. Kelley
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. JOHN J. KELLEY **PART** IAS MOTION 56EFM

Justice

----------X

INDEX NO. 156513/2018

MOTION DATE 07/13/2018

In the Matter of

MHM SPONSORS CO.,

MOTION SEQ. NO. 001

Petitioner,

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, BONNIE ZUCKER, and CLYDE ZUCKER,

DECISION, JUDGMENT, and ORDER

Respondent.

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 5, 6, 7, 8, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42

were read on this proceeding to/for ARTICLE 78 (BODY OR OFFICER) and cross motion to dismiss the petition.

In this CPLR article 78 proceeding, building owner MHM Sponsors Co. seeks judicial review of a New York State Division of Housing and Community Renewal (DHCR) determination that denied its petition for administrative review (PAR) of the Rent Administrator's decision denying a request to deregulate a rent-stabilized apartment. The tenants who occupy the apartment, Bonnie Zucker and Clyde Zucker, answered the petition. The DHCR cross-moves pursuant to CPLR 7804(f) and 3211(a) to dismiss the petition for failure to state a cause of action and lack of subject matter jurisdiction. The cross motion is denied. The court reaches the merits of the petition and denies it.

Generally, a CPLR article 78 proceeding is summarily determined "upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised" (CPLR 409[b]; *see also* CPLR 7804[a], [f]). Here, the DHCR has not submitted an answer, but instead cross-moves to dismiss the petition.

"In considering a motion to dismiss a CPLR article 78 proceeding pursuant to CPLR 3211(a)(7) and 7804(f), all of the allegations in the petition are deemed to be true and are afforded the benefit of every favorable inference" (*Matter of Eastern Oaks Dev., LLC v Town of Clinton*, 76 AD3d 676, 678 [2d Dept 2010]; *see Leon v Martinez*, 84 NY2d 83 [1994]; *Matter of Gilbert v Planning Bd. of Town of Irondequoit,* 148 AD3d 1587 [4th Dept 2017]; *Matter of Schlemme v Planning Bd. of City of Poughkeepsie*, 118 AD3d 893 [2d Dept 2014]; *Matter of Ferran v City of Albany*, 116 AD3d 1194 [3d Dept 2014]; *Matter of Marlow v Tully*, 79 AD2d 546 [1st Dept 1980]). "In determining motions to dismiss in the context of [a CPLR] article 78 proceeding, a court may not look beyond the petition . . . where, as here, no answer or return has been filed" (*Matter of Scott v Commissioner of Correctional Servs.*, 194 AD2d 1042, 1043 [3d Dept 1993]; *see Matter of Ball v City of Syracuse*, 60 AD3d 1312 [4th Dept 2009]). "Whether a plaintiff [or petitioner] can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). Thus, if the petition alleges specific facts "giving rise to a fair inference" (*Matter of Vyas v City of New York*, 133 AD3d 505, 505 [1st Dept 2015]) that the DHCR's determination was arbitrary and capricious or affected by an error of law, dismissal for failure to state a cause of action is not warranted. Contrary to the DHCR's contention, the petition states a cause of action for judicial review of its May 16, 2018, PAR.

Nor is there any basis for the DHCR's contention that the court lacks subject matter jurisdiction over this proceeding. Even where, as here, the legislature confers exclusive original jurisdiction upon an agency in connection with the administration of a statutory regulatory program, the agency's determinations in that regard remain subject to judicial review pursuant to CPLR article 78 (*see Katz 737 Corp. v Cohen*, 104 AD3d 144 [1st Dept 2010]; *Parisi v Hines*, 131 Misc 2d 582 [Civ Ct, N.Y. County 1986], *affd* 134 Misc 2d 20 [App Term, 1st Dept 1986]).

While a respondent in a CPLR article 78 proceeding generally is required to answer the petition after its motion to dismiss is denied (*see Matter of Kickertz v New York Univ.*, 25 NY3d

942 [2015]), where "it is clear that no dispute as to the facts exists and no prejudice will result," a court, upon denial of the motion, may nonetheless decide the petition on the merits (*Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County,* 63 NY2d 100, 102 [1984]; *see Matter of Arash Real Estate & Mgt. Co. v New York City Dept. of Consumer Affairs*, 148 AD3d 1137 [2d Dept 2017]; *Chestnut Ridge Assoc, LLC v 30 Sephar Lane, Inc.*, 129 AD3d 885 [2d Dept. 2015]; *Matter of Applewhite v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 115 AD3d 427 [1st Dept 2014]; *Matter of Kuzma v City of Buffalo*, 45 AD3d 1308 [4th Dept 2007]). Under the circumstances presented here, there is no need for the DHCR to answer, as the facts have been fully presented in the parties' papers, no factual dispute remains, and the DHCR will not be prejudiced if it does not file an answer (*see Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County,* 63 NY2d 100 [1984]; *Matter of Applewhite v Board of Educ. of the City Sch. Dist. of the City of N.Y.*, 115 AD3d 427 [1st Dept 2014]; *Matter of Camacho v Kelly*, 57 AD3d 297 [1st Dept 2008]). Thus, upon denying the DHCR's cross motion, the court will consider the merits of the petition.

With respect to the merits, there is no dispute that the tenants entered a rent-stabilized lease for the subject apartment in the 1970s. Thereafter, the building was converted to a cooperative, but the tenants, who did not become tenant-shareholders, remained rent-stabilized and other entities became holders of the unsold shares referable to their apartment. In 2005, the building began to receive benefits under the J-51 real property tax abatement program (Admin. Code of City of N.Y. §§ 11-243-11-244). The owner sought to deregulate the apartment on three occasions, most recently in 2018, contending that the unit was subject to luxury deregulation. The DHCR denied the owner's most recent PAR on May 16, 2018.

Generally, luxury deregulation is triggered either when: (a) a unit becomes vacant and the legal regulated rent thereupon exceeds $2,000.00 per month ($2,500.00 after June 24, 2011; see L 2011, ch 97) (high rent vacancy deregulation), or (b) the legal regulated monthly rent of the unit exceeds $2,000.00 ($2,500.00 after June 24, 2011) and the tenants' annual

household income exceeds $175,000.00 for two consecutive years (high rent/high income deregulation) (*see* Admin. Code of City of NY §§ 26-403.1, 26-504.1).

With exceptions that are inapplicable here, §26-504.1(a) of the Rent Stabilization Law (Admin. Code of City of N.Y. §26-504.1[a]; hereinafter RSL) explicitly precludes the deregulation of "housing accommodations [that, sic.] became or become subject to this law by virtue of receiving tax benefits pursuant to Section 421-a or 489 of the real property tax law." The J-51 program, first enacted in 1960, created a municipal real property tax abatement benefit under RPTL 421-a to encourage the improvement and rehabilitation of substandard dwellings. Thus, an apartment in a building receiving J-51 abatements is subject to the regulated rents and limited renewal increases required by the RSL and Rent Stabilization Code (*see Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]; *Altschuler v Jobman 478/480, LLC*, 135 AD3d 439 [1st Dept 2016]; *72A Realty Assoc. v Lucas,* 101 AD3d 401 [1st Dept 2012]).

Crucially, during the time that a landlord receives J-51 abatements, it may not deregulate any apartment under the RSL's luxury decontrol provisions. Subsequent to receiving J-51 abatements, "the subject apartment must be returned to rent stabilization as of [the date] when the Owner first treated the apartment as exempt" (*Taylor v 72A Realty Assoc., L.P.*, 151 AD3d 95, 97 [1st Dept 2017]; *see Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270 [2009]; *Altschuler v Jobman 478/480, LLC*, 135 AD3d 439 [1st Dept 2016]; *72A Realty Assoc. v Lucas*, 101 AD3d 401 [1st Dept 2012]). These principles apply to the entire time that the building was enrolled in the J-51 program, including the present, if applicable (*see Gersten v 56 7th Ave., LLC*, 88 AD3d 189 [1st Dept 2011]).

Moreover, Admin. Code of City of N.Y. § 26-504(c) provides that "if such dwelling unit would have been subject to [the RSL even] . . . in the absence of [J-51 benefits], such dwelling unit shall, upon the expiration of [J-51] benefits, continue to be subject to [the RSL] . . . to the same extent and in the same manner as if [J-51 benefits] had never applied thereto." Hence, a tenant-occupied unit that had previously been rent-regulated may not be deregulated under the

luxury deregulation program while a J-51 abatement is in effect, even if the unit is in a cooperative building and even if its status as a rent-regulated unit was not initially a consequence of the landlord's receipt of J-51 benefits (*see Ram I LLC v New York State Div. of Hous. & Community Renewal*, 123 AD3d 102 [1st Dept 2014]).

The court rejects the owner's contention that General Business Law § 352-eeee is inapplicable to the instant dispute or is somehow inconsistent with the DHCR's determination. Although Admin. Code of City of N.Y. § 26-504.1(a)[1] previously excluded units in a residential cooperative from rent stabilization, that exclusion arose because, prior to 1982, General Business Law § 352-eeee required any rental building converting to cooperative ownership to effectuate an eviction plan that left no regular rental tenants in the building. "In 1982, the [General Business L]aw was broadened to permit the sponsoring of noneviction plans for cooperative conversion within the City of New York (L 1982, ch 555, § 2), and the provision subjecting dwelling units to continued governmental regulation was expanded to include "non-purchasing tenants'" (*10 W. 66th St. Corp. v. New York State Div. of Housing & Community Renewal*, 184 AD2d 143, 151 [1st Dept 1992]). General Business Law § 352-eeee(2)(c)(iii) now provides that "non-purchasing tenants who reside in dwelling units subject to government regulation as to rentals and continued occupancy prior to the conversion of the building or group of buildings or development to cooperative or condominium ownership shall continue to be subject thereto."

Admin. Code of City of N.Y. §§ 26-504.1(a) (generally defining which units are subject to rent stabilization) and (c) (requiring units in buildings receiving J-51 benefits to remain stabilized) were thus amended in 1982 to harmonize the RSL with the amended General Business Law. From 1982 forward, the exclusion of cooperatives from both rent stabilization and the consequences of receipt of J-51 benefits were expressly made subject to General

[1] Former Admin. Code of City of N.Y. § YY51-3.0.

Business Law § 352-eeee, as amended, thus creating an "exception to the exception." In other words, units in residential cooperative buildings are now excluded from rent stabilization and the continuing regulatory protection provided to units in buildings receiving J-51 benefits, except where, as here, the unit is a rental unit in a residential cooperative that was established under a non-eviction plan.

Where an administrative determination is made, and a trial-type hearing is not mandated by law, that determination must be confirmed unless it is arbitrary and capricious, affected by an error of law, or made in violation of lawful procedure (*see* CPLR 7803[3]; *Matter of Lemma v Nassau County Police Officer Indem. Bd.*, 31 NY3d 523 [2018]; *Matter of McClave v Port Auth. of N.Y. & N.J.*, 134 AD3d 435, 435 [1st Dept 2015]). A determination is arbitrary and capricious where is not rationally based, or has no support in the record (*see Matter of Gorelik v New York City Dept. of Bldgs.*, 128 AD3d 624 [1st Dept 2015]), or where the decision-making agency fails to consider all of the factors it is required by statute to consider and weigh (*see Matter of Kaufman v Incorporated Vil. of Kings Point*, 52 AD3d 604 [2d Dept 2008]). Stated another way, a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

"While agency interpretations of their own regulations are generally afforded considerable deference, courts must scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case" (*Matter of Murphy v. New York State Div. of Hous. & Community Renewal*, 21 NY3d 649, 654-655 [2013] [citations and internal quotation marks omitted]; *see Kuppersmith v Dowling*, 93 NY2d 90, 96 [1999]; *Matter of Dworman v New York State Div. of Hous. & Community Renewal*, 94 NY2d 359 [1999]; *Matter of Gaines v New York State Div. of Hous. & Community Renewal,* 90 NY2d 545, 548-549 [1997]). "While as a general rule courts will not defer to administrative agencies in matters of

pure statutory interpretation, deference is appropriate where the question is one of specific application of a broad statutory term (*Matter of O'Brien v Spitzer*, 7 NY3d 239, 242 [2006] [citations and internal quotation marks omitted]; *see Matter of KSLM-Columbus Apts., Inc. v New York State Div. of Hous. & Community Renewal*, 5 NY3d 303, 312 [2005]; *Matter of American Tel. & Tel. Co. v State Tax Comm.*, 61 NY2d 393, 400 [1984]). Irrespective of whether the DHCR is entitled to deference in its interpretation of the RSC, RSL, or the General Business Law, the court agrees with the DHCR's interpretation is this matter. A consideration of the interplay of those regulations and statutes warrants the conclusion that the subject apartment remains subject to rent stabilization unless and until the J-51 benefits expire, or the building withdraws from the J-51 program. Hence, the rent may not be increased to market rates even if the permissible annual increase causes the rent to exceed $2,500.00 per month. Moreover, the annual or biennial increase in rent must be limited to that permitted by the RSL.

Thus, the court concludes that DHCR's May 16, 2018, determination is rationally based and is not affected by an error of law.

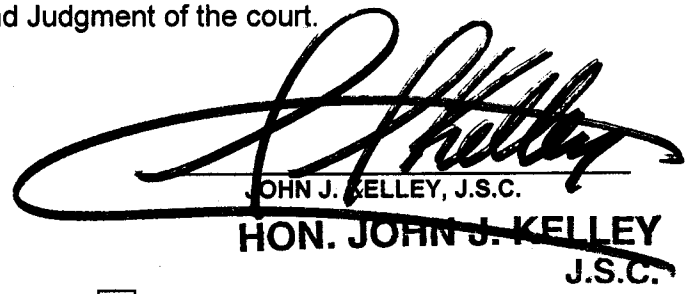
Accordingly, it is

ORDERED that the cross motion to dismiss the petition is denied; and it is further,

ORDERED that the petition is denied; and it is,

ADJUDGED that the proceeding is dismissed.

This constitutes the Decision, Order, and Judgment of the court.



2/7/2019
DATE

JOHN J. KELLEY, J.S.C.
HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE