

**London Terrace Gardens, L.P. v New York State Div.  
of Hous. & Community Renewal**

2020 NY Slip Op 31908(U)

June 10, 2020

Supreme Court, New York County

Docket Number: 161256/2019

Judge: Arthur F. Engoron

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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

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

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INDEX NO. 161256/2019

LONDON TERRACE GARDENS, L.P.,

MOTION DATE 11/19/2019

Plaintiff,

MOTION SEQ. NO. 001

- v -

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 12, 13, 14, 15, 16

were read on this motion for CPLR ARTICLE 78 RELIEF.

Upon the foregoing documents, the instant petition and cross-motion are granted solely to the extent of remitting the instant matter to DHCR for a decision on the merits of petitioner’s subject MBR applications as described more fully hereinbelow.

The Players

Petitioner, London Terrace Gardens, L.P., owns the “London Terrace Gardens” ten-building residential apartment complex (the “Complex”) located in Manhattan’s Chelsea neighborhood between West 23rd and West 24th Streets and 9th and 10th Avenues. Thirty-five apartments in the Complex are subject to the “City Rent and Rehabilitation Law” (the “Rent Control Law”). Respondent, New York State Department of Housing and Community Renewal (“DHCR”), is the agency that administers the Rent Control Law and other rent regulations.

Summary of the Instant Proceeding

In the instant CPLR Article 78 special proceeding, petitioner seeks to establish that the Petition for Administrative Review (“PAR”) Orders by which the Deputy Commissioner affirmed DHCR’s denial of petitioner’s Maximum Base Rent (“MBR”) applications were arbitrary and capricious and violated applicable law, as DHCR failed to [1] provide sufficient “default notices;” [2] dispute petitioner’s evidence that it had tendered checks to pay such fees; and [3] consider petitioner’s record of responding to DHCR’s “MBR” fee notices, as DHCR’s precedent and applicable law requires.

Background

According to the petition, in September 2017 petitioner filed ten MBR applications for the Complex (each of which apparently contained the required “Violation Certification” and “Operation and Maintenance and Essential Services Certification”), seeking permission to

increase the rent for every one of the rent-controlled apartments in the Complex for the “2018-2019 MBR cycle.”

Also in September 2017, petitioner received at least ten (one for each MBR application) fee payment notices from DHCR, which directed petitioner to pay \$30.00 for each rent-controlled apartments at the Complex by December 8, 2017. Petitioner asserts that on November 30, 2017, it tendered said fees by mailing checks to respondent. Petitioner also asserts that DHCR failed to cash any of said ten checks. According to the petition, the postal service did not return said checks to petitioner as “undeliverable” nor did DHCR send petitioner any “notices of delinquency” or “final notices.”

On March 21 and 28, 2019, DHCR’s MBR Unit issued ten orders (the “Denial Orders”) denying petitioner’s subject MBR applications on the ground that petitioner “Failed to Respond to Final MBR Billing.”

On June 2, 2019, petitioner filed MBR Challenges, asserting that (1) petitioner tendered said fees by mailing the aforementioned checks; (2) the postal service failed to return the envelopes in which petitioner mailed said checks; and (3) contrary to the DHCR MBR Unit’s arguments, petitioner did not receive any notices of delinquency or final orders from DHCR. Petitioner also asserts that DHCR violated its own requirement to mail two fee payment notices to an apartment owner prior to denying said owner’s MBR application, and that petitioner received only one such notice.

In July 2019, DHCR issued MBR Challenge Orders (one for each of petitioner’s MBR Challenges), affirming its Denial Orders, as it allegedly found:

As per Agency records, the fee payment notices were served on the owner on 9/27/2017, 12/27/2017, and 4/27/2018. The owner failed to submit a canceled check showing proof of payment. Payment confirmation was not received from the bank showing the MBR fee was paid.

NYSCEF Doc. No. 1.

On or about August 5, 2019, petitioner filed FOIL Requests (one for each building at the Complex) (Exhibit B; NYSCEF Doc. No. 4), requesting that DHCR provide copies of the subject fee payment notices that DHCR claims to have served on the 27<sup>th</sup> of September 2017, December 2017, and April 2018.

On August 16 and 19, 2019, petitioner challenged the Affirmation Orders by filing PARs in which petitioner (1) reiterated its grounds for its MBR Challenges on the application fees issues; (2) provided DHCR with copies of the affidavits that it had submitted with the subject MBR Challenges; and (3) identified the FOIL Requests that it had filed.

On August 23, 2019, DHCR responded (Exhibit C; NYSCEF Doc. No. 5) to petitioner’s FOIL Request for Building # 6 (petitioner asserts that DHCR failed to respond to the FOIL Requests for the nine other buildings at the Complex). Along with this response, DHCR submitted: (1) a

copy of a fee payment notice dated September 20, 2017 (rather than September 27, 2017 as DHCR had pleaded); (2) a copy of a fee payment notice dated December 20, 2017 (rather than December 27, 2017 as DHCR had pleaded); and (3) a statement that DHCR was unable to produce a copy of a fee payment notice dated April 2018 but enclosed a “case status” computer printout that asserted that DHCR served a fee payment notice on April 26, 2018 (rather than April 27, 2018 as DHCR had pleaded).

In September and October of 2019, DHCR issued PAR Orders that denied petitioner’s PARs.

On November 18, 2019, petitioner commenced the instant CPLR Article 78 special proceeding, requesting that this Court (1) reverse, annul, and set aside ten “final” orders that DHCR issued under the following ten docket numbers: HT-420006-RO, HT-420012-RO, HT-420009-RO, HT-420010-RO, HT0320015-RO, HT-420011-RO, HT-420008-RO, HT-420013-RO, HT-420014-RO, and HT-420016-RO, which affirmed DHCR’s Denial Orders; and (2) direct DHCR to grant the subject MBR applications (NYSCEF Doc. No. 2). Petitioner asserts that DHCR’s PAR Orders “must be annulled as lacking a rational basis, arbitrary and capricious and affected by errors of law” (NYSCEF Doc. No. 1).

On January 28, 2020, DHCR cross-moved, pursuant to CPLR 103(b), 105(b), 4004(a), 2215, 7804(a), and 7804(f), to remit the instant CPLR Article 78 special proceeding to the New York State Division of Housing and Community Renewal “for further consideration and the issuance of a new determination” (NYSCEF Doc. No. 13). DHCR asserts that it seeks to hold a formal evidentiary hearing “at which petitioner may present such testimony and evidence” that it mailed the subject checks (NYSCEF Doc. No. 15). DHCR requests that, if this Court denies its cross-motion to remit this matter, that the Court grant “a further period of not less than twenty (20) days from the service of the Order of the Court, together with notice of entry thereof, within which to answer the Verified Petition herein, and further reserves the right to have this matter proceed in accordance with the provisions of CPLR Article 7804(f)” (NYSCEF Doc. No. 13).

On February 13, 2020, petitioner opposed DHCR’s cross-motion to remit the instant CPLR Article 78 special proceeding, arguing that such a hearing would fail to address “whether DHCR served petitioner with the required number of fee payment notices, including final notices” and “would be biased against petitioner” (NYSCEF Doc. No. 16).

### Discussion

#### CPLR Article 78 Petition

This Court’s function in reviewing DHCR’s determinations is limited. “Where the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom, the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute. If its interpretation is not irrational or unreasonable, it will be upheld.” Ansonia Residents Ass’n v New York State Div. of Hous. & Cmty. Renewal, 75 NY2d 206, 213 (1989).

Petitioner asserts that an agency’s determination is arbitrary and capricious when the agency “neither adheres to its own prior precedent nor indicates its reason for reaching a different result

on essentially the same facts.” Matter of Lantry v State of New York, 6 NY 3d 49, 58, 810 NYS2d 729 (2005).

Petitioner thus argues that DHCR violated its own policy to mail at least two MBR fee payment notices prior to denying an MBR application. Petitioner asserts, “it is more than likely that the checks which petitioner in fact sent to DHCR in response to the September 2017 fee payment notices were simply not cashed” (NYSCEF Doc. No. 1).

Petitioner has sufficiently pleaded that it had tendered payments to DHCR by mailing checks (Exhibit B; NYSCEF Doc. No. 4). Furthermore, even DHCR “recognizes that the petitioner has submitted documentary evidence that it issued checks in payment of the required MBR fees and two affidavits attesting to the mailing of those checks” (NYSCEF Doc. No. 15).

Respondent has failed to rebut this prima facie case.

#### Cross-Motion to Remit

DHCR cites the Appellate Division, First Department’s decision to remit a proceeding despite the landlord’s objection, as:

Review of the record indicates that remission to respondent for the submission of a complete record, further fact finding, and a new determination is necessary in order for the Division to “function efficiently and render substantial justice to the parties concerned.” Matter of Wiener v Joy, 100 AD2d 800, 801.

47 Clinton St. Co. v New York State Div. of Hous. and Comm. Ren., 161 AD2d 402 (1<sup>st</sup> Dep’t 1990). NYSCEF Doc. No. 15. DHCR thus asserts that the petition and administrative record justify that DHCR commence “further review...the instant proceeding.”

DHCR also notes that the Appellate Division, First Department “has held that where the agency documents its reason for requesting a remit, it is proper for the Court to grant the requested remit.” Hakim v Division of Housing and Community Renewal, 273 AD2d 3 (1<sup>st</sup> Dep’t 2000).

However, petitioner emphasizes that, in its cross-motion, DHCR asserted that it wished only “to conduct a hearing ‘at which the petitioner may present...testimony and evidence.’” Petitioner opposes said “limited remit,” which would fail to try a pivotal issue of fact, namely whether DHCR served the required second/final set of fee payment notices, and, in particular, the final notices (NYSCEF Doc. No. 16).

Petitioner cites La Fontaine Properties, Inc. v McGoldrich, 200 Misc 518 (Sup Ct, Bronx Co 1951) (Levy, J.), in which the court held that a court may remit a proceeding to an administrative agency when the Administrator “admitted error,” which, here, DHCR failed to do in its affirmation supporting its cross-motion to remit.

This Court finds that, as petitioner has submitted evidence that it had tendered the subject fees to DHCR, it would be arbitrary and capricious to conclude that petitioner did not tender the fees.

Thus, the instant special proceeding should progress to a hearing on the merits of the MBR applications for DHCR.

Conclusion

Thus, the instant petition and cross-motion are granted solely to the extent of remitting the instant matter to respondent New York State Department of Housing and Community Renewal (“DHCR”) for a hearing, to be held as soon as possible (under the current unusual circumstances), on the merits of the subject MBR applications of petitioner London Terrace Gardens, L.P, said hearing conditional on petitioner’s tendering another check or checks covering the subject application fees, and the Clerk is hereby directed to enter judgment accordingly.

6/10/2020

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE