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

In the Matter of the Application of

AGHAJUN HOLDINGS, LLC.,

Petitioner,

For a Judgment pursuant to Article 78 of the Civil Practice Laws and Rules,

-against-

RuthAnne Visnauskas, as Commissioner of the New York State Division of Housing and Community Renewal, NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondent.

Index No.: 150726/2020

DECISION and ORDER

Motion Seq. No.: 001

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

Papers	Numbered
Petition and Affidavits/Affirmations/ Memos of Law annexed	1-18
Cross Motion and Affidavits/Affirmations/Memos of Law annexed	21-24
Opposition to Cross Motion/Affidavits/Affirmations/ Memos of Law annexed	27-29
Reply Memo	30

ERIKA M. EDWARDS, J.S.C.:

In this Article 78 proceeding, Respondent RuthAnne Visnauskas, as Commissioner of the New York State Division of Housing and Community Renewal, New York State Division of Housing and Community Renewal ("DHCR") (collectively referred to as "Respondent") cross moves to dismiss Petitioner Aghajun Holdings, LLC's ("Petitioner") petition challenging DCHR's Deputy Commissioner's order, dated November 27, 2019, which granted the tenant's Petition for Administrative Review ("PAR"). For the reasons set forth herein, the court grants Respondent's cross motion to dismiss the petition and dismisses Petitioner's petition without prejudice to file a new Article 78 proceeding once Petitioner has exhausted all administrative remedies.

The PAR order reversed an order issued by a Rent Administrator on September 5, 2018 which denied the tenant's overcharge complaint and found that the subject premises was no longer subject to rent stabilization since it had a rent that was over $2000 when the apartment was vacant in 2011. The PAR order reversed this decision and found that the RA's order was improperly based on a 2016 civil court decision after trial in a summary holdover proceeding because the civil court came to the opposite conclusion and found that the owner had not proven that it was entitled to deregulate the premises in 2011. Therefore, the PAR order held that the apartment is subject to rent regulation since it could not modify or overturn the civil court's determination. The PAR order also noted that the civil court found that even if the owner's alleged individual apartment improvements ("IAIs") had been performed on qualifying improvements, then the legal rent would be less than the $2000 threshold necessary for deregulation. Without determining whether such improvements were made and whether they were qualifying expenses, the civil court had found that the maximum rent would only be $1,913.05. Therefore, the PAR order remanded the matter for further processing for the Rent Administrator to determine the allowable costs attributable to the alleged IAIs, the resulting legal rent, and the overcharges and penalties, if any.

In its petition Petitioner alleged that the PAR order was made in error and in violation of law, not in accordance with the facts and evidence presented, and that the court should reverse, annul, and set aside the order pursuant to CPLR 7803(3) because it was arbitrary, capricious, and an abuse of discretion.

Prior to answering, Respondent filed a cross motion to dismiss the petition based on CPLR 3211(a)(2), (a)(7), 7804(a) and (f), and, argues in substance that the civil court's order in 2016 was inconsistent with another order in 2018, which denied tenant's motion to vacate a default judgment in a summary holdover proceeding and held that the tenant failed to allege a meritorious defense that the premises was subject to rent stabilization. Respondent further argues that this court lacks subject matter jurisdiction and Petitioner fails to state a cause of action because the PAR was not a final determination subject to judicial review since it remanded the matter for further proceedings. As such, Respondent argues that the petition was premature as Petitioner failed to exhaust its administrative remedies.

In its Opposition to Respondent's cross motion Petitioner argues in substance that the PAR was a final determination despite the remand because the PAR rendered a substantive final determination that the subject premises is subject to rent regulation which was the disputed issue in the proceeding and the scope of the remand is limited to determining the costs attributable to the alleged IAIs, the resulting legal rent and the overcharges and penalties, if any. Additionally, Respondent sent an instruction sheet attached to the PAR order which advised Respondent in substance that it must file an Article 78 proceeding if it wished to appeal the PAR order. Therefore, Petitioner argues that Respondent intended for the PAR order to be a final determination on the merits.

A determination subject to review under Article 78 exists when, first, the agency "reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be significantly ameliorated by further administrative action or by steps available to the complaining party" (*Walton v. New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194 [2007]). There can be no judicial review of an agency's determination pursuant

to Article 78 unless the petitioner has exhausted administrative remedies (*Pascale v New York State Div. of Hous. & Community Renewal*, 157 AD3d 625, 625-26 [1st Dept 2018]).

Courts have found that an agency's order of remand for a local rent administrator to determine the maximum legal rent was not a final determination of the rights of the parties and whether the premises were subject to rent control cannot be reviewed until the maximum rent has been fixed (*Fiesta Realty Corp. v McGoldrick*, 308 NY 869, 870 [1955]). Even when there has been a determination that the premises were subject to rent control and the matter was remanded for the Rent Administrator to establish the maximum rent, courts have dismissed petitions as being premature and found that the order to remand the matter was not a final determination of the rights of the parties as the issue of whether the premises are rent controlled cannot be determined until a maximum rent has been fixed (*e.g. Love Sec. Corp. v Berman*, 295 NYS2d 512, 513 [1st Dept 1968], citing *Fiesta Realty Corp.*, 308 NY 869; *see Hawco v State Div. of Hous. & Community Renewal*, 225 AD2d 469, 470 [1st Dept 1996]).

Review of an agency's non-final order should be limited to situations when it is necessary to avoid irreparable harm without prompt judicial intervention (*Martin v Ambach*, 85 AD2d 869, 871 [3d Dept 1981]). The doctrine of exhaustion of administrative remedies requires that "if further administrative avenues or remedies are available to obtain the result, they must be pursued and completed unless such further pursuit reasonably appears to be futile" (*id.* at 870).

As in *Fiesta Realty Corp.*, the order is non-final because it did not grant any relief until further proceedings are conducted on remand and a final order is issued. Even though the PAR order determined that the premises were not deregulated, which was unfavorable to Petitioner, the decision is not final. Additionally, it would not be futile for Respondent to participate in the remanded proceedings and continue to argue that the legal rent was above the threshold. It is conceivable that based upon the evidence presented, the Rent Administrator could fix the rent over the $2000 threshold and alter the final determination in this matter, or that Respondent could file a new PAR which could result in a different final determination. Either way, the current PAR order is non-final and no actual or concrete injury has been inflicted upon Respondent, despite its determination that the subject premises is subject to rent regulation and its remand for further processing.

As such, the court finds that Petitioner failed to exhaust its administrative remedies as the proceedings on remand must first be resolved and there must be a final determination made in this matter. Therefore, the court grants Respondent's cross motion to dismiss, denies Petitioner's petition and dismisses this proceeding.

As such, it is hereby

ORDERED that the court grants Respondent RuthAnne Visnauskas, as Commissioner of the New York State Division of Housing and Community Renewal, New York State Division of Housing and Community Renewal's cross motion to dismiss Petitioner's CPLR Article 78 petition; and it is further

ORDERED that Petitioner's CPLR Article 78 Petition is denied and the petition is dismissed, without costs or disbursements, and without prejudice for Petitioner to file a new Article 78 proceeding once Petitioner has exhausted all available administrative remedies, and the clerk is directed to enter judgment in favor of Respondents against Petitioner.

Date: February 18, 2021

HON. ERIKA M. EDWARDS

HON. ERIKA M. EDWARDS
J.S.C.