SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **05RCP**

Justice

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TEDFORD'S TENANCY, LLC,

Plaintiff,

- v -

CITY OF NEW YORK, RUTHANNE VISNAUSKAS, NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, ROHIT T. AGGARWALA, NEW YORK CITY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW YORK STATE, ADOLFO CARRION, NEW YORK CITY HOUSING PRESERVATION DEPARTMENT, MELANIE E. LA ROCCA, NEW YORK CITY DEPARTMENT OF BUILDINGS, PRESTON NIBLACK, NEW YORK CITY DEPARTMENT OF FINANCE,

Defendants.

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INDEX NO. 154082/2022

MOTION DATE 04/18/2023

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 46, 47, 48, 49, 50, 51, 52, 55, 56, 61, 63, 64

were read on this motion for INJUNCTION/RESTRAINING ORDER.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 53, 54, 57, 58, 59, 60, 62, 65, 66, 67

were read on this motion for DISMISSAL.

For the reasons set forth below, defendants' motions to dismiss this action are granted.

FACTUAL BACKGROUND

In 2006, Lynette Ciner inherited 294 Third Avenue, New York, New York, a multifamily mixed-use building in Gramercy Park, Manhattan, with six rent-stabilized residential apartments and one commercial unit (the "Building"). She subsequently transferred ownership of the Building to plaintiff herein, Tedford's Tenancy, LLC, in which she and her husband are members.

From 1978 until the middle of 2020, the Building was operated by a ground lessee. After the expiration of the ground lease, plaintiff learned that the rents were far below market value and that the fixed expenses for the Building far exceeded the rent roll. Plaintiff also asserts that a "full rehabilitation" of the Building is necessary and calculates that this rehabilitation will cost upwards of $1,000,000.00.

Plaintiff commenced this action on May 11, 2022, asserting that New York's Rent Stabilization Law ("RSL"), as applied to its ownership of the Building, violates the Just Compensation, or "Takings" Clause of the Fifth Amendment of the United States Constitution, insofar as it requires plaintiff to keep rents at a level far below its costs in maintaining and repairing the Building, thereby undermining plaintiff's reasonable, investment-backed expectations for the Building. Plaintiff seeks a judgment declaring the RSL unconstitutional as applied to the Building or, alternatively, a judgment in the amount of $5,000,000.00, with interest. Plaintiff also seeks a permanent injunction enjoining defendants from collecting real property taxes, water and sewer taxes from the Building or issuing violations at the Building "for the period of time during which there has been a taking." Finally, plaintiff seeks an injunction directing the New York City Housing Preservation and Development ("HPD") to perform necessary repairs at the Building without cost to plaintiff.

After commencing this action, plaintiff moved, by order to show cause, for a temporary restraining order and preliminary injunction seeking substantially the same injunctive relief set forth above. The Court signed the order to show cause but declined to grant the temporary restraining order (NYSCEF Doc. No. 22).

Defendants the City of New York, DEP and DEP Commissioner Rohit T. Aggarwala, the New York City Housing Preservation and Development ("HPD") and HPD Commissioner Adolfo

Carrion Jr., the New York City Department of Buildings ("DOB") and DOB Commissioner Melanie E. La Rocca, the New York City Department of Finance ("DOF"), and DOF Commissioner Preston Niblack (collectively the "City") oppose plaintiff's motion and cross-move to dismiss this action, arguing that this action is not ripe for adjudication given plaintiff's failure to apply for the hardship exemptions permitting an increase in rents beyond the limits of the RSL, created by Administrative Code §§26-511(c)(6)–(6-a). The City further argues that even if this action was not premature, the complaint fails to state a claim for a regulatory taking because its allegations of economic harm are speculative and, in any event, do not establish that the effect of the RSL is tantamount to a direct appropriation of the Building or ouster of plaintiff.

In motion sequence 002, defendants New York State Division of Housing and Community Renewal ("DHCR") and RuthAnne Visnauskas, in her capacity as Commissioner of DHCR, move to dismiss this action on substantially the same grounds raised by defendants in their opposition to motion sequence 001.

In opposition to defendants' motions to dismiss, plaintiff maintains that it is barred from applying for a hardship exemption but that even if it could do so, the application process is "daunting and burdensome"—it includes a twenty-six page application—and it is unlikely a hardship exemption would be granted. Finally, plaintiff adds that even if a hardship exemption was granted, it would have only a minimal impact on the Building's finances.

Motion sequences 001 and 002 are consolidated for disposition.

DISCUSSION

Defendants' motions are granted and this action is dismissed as not ripe for disposition. Ripeness is "a judicially-created doctrine designed to avoid premature review or adjudication of administrative actions" which, as pertinent here, mandates that "judicial review of an

administrative determination may not be sought until the decision maker has come to 'a definitive position' which has caused 'actual, concrete injury'" (Harmon v Markus, 08 CIV. 5511 (BSJ), 2010 WL 11530596, at *2 [SDNY Mar. 1, 2010], affd, 412 Fed Appx 420 [2d Cir 2011] quoting Dozier v New York City, 130 A.D.2d 128, 133 [2d Dept 1987]). Accordingly, a takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue" and "the landowner has availed itself of the state's procedures for obtaining just compensation" (Harmon v Markus, 08 CIV. 5511 (BSJ), 2010 WL 11530596, at *2 [SDNY Mar. 1, 2010], affd, 412 Fed Appx 420 [2d Cir 2011] quoting Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 US 172, 195 [1985]).

No final decision regarding the application of the RSL to the Building has been reached. The RSL provides a mechanism for property owners like plaintiff to apply to DHCR for a comparative hardship exemption permitting an increase of rent stabilized rents beyond that set by the Rent Guideline Board where, inter alia, "the gross rental income is insufficient to yield to the owner an average annual net income … for the three-year period ending on or within six months of the date of the filing of the owner's application, equal to the annual average net income of the property for … the period 1968-1970 or … the first three years of operation, if the building was completed after 1968 …" (See 9 NYCRR §2522.4[b]). The RSL also provides an "alternative hardship" exemption where "guideline increases are not sufficient to enable the owner to maintain an annual gross rent income for such building which exceeds the annual operating expenses of such building by a sum equal to at least five percent of such gross rent" (See 9 NYCRR §§2522.4[c]). However, plaintiff has failed to apply for such a hardship exemption under either category. In light of this failure, no final determination has been made, rendering this action not

ripe for disposition (See Harmon v Markus, 08 CIV. 5511 (BSJ), 2010 WL 11530596, at *3 [SDNY Mar. 1, 2010], affd, 412 Fed Appx 420 [2d Cir 2011]; see also 74 Pinehurst LLC v New York, 59 F4th 557, 567 [2d Cir 2023]).

Plaintiff's arguments in opposition are unavailing. It first argues that this action is ripe because it may not apply for a comparative hardship exemption because it does not maintain records for the Building from 1968-1970, the Building was completed before 1968, there has not been an arm's length sale of the Building since the 1940s, and there are current pending tax proceedings beyond the tax year. Even crediting these claims, however, they do not establish that plaintiff cannot apply for an alternative hardship exemption.

Plaintiff's other principal argument, that any efforts to seek a hardship exemption are futile, are similarly unsuccessful. As an initial matter, the "time and expense to wade through a complex process is a consequence of being in a regulated industry" and does not excuse plaintiff from the obligation of seeking a hardship exemption as a predicate to the commencement of this action (Harmon v Markus, 08 CIV. 5511 (BSJ), 2010 WL 11530596, at *5 [SDNY Mar. 1, 2010], affd, 412 Fed Appx 420 [2d Cir 2011]). Neither does the fact that plaintiff "may not ultimately obtain any relief by proceeding through the proscribed administrative process … render the requirement that they apply 'futile'" (335-7 LLC v City of New York, 21-823, 2023 WL 2291511, at *2-4 [2d Cir Mar. 1, 2023] citing Harmon v Markus, 08 CIV. 5511 (BSJ), 2010 WL 11530596, at *5 [SDNY Mar. 1, 2010], affd, 412 Fed Appx 420 [2d Cir 2011]). Finally, plaintiff's argument that any exemption granted would still be far less than the Building's costs is also "not sufficient to avoid the finality requirement" (Id, at *2-4). Accordingly, defendants' motion to dismiss this action is granted.

Even were the Court to reach the merits of defendants' motion to dismiss, it would conclude that the complaint fails to not state a claim for regulatory taking. Governmental regulations which limit an owner's rights to possess, use or dispose of property may amount to a "taking" where "the regulation: (1) denies the owner all economically viable use of the property or (2) does not substantially advance a legitimate State interest" (Fed. Home Loan Mortg. Corp. v New York State Div. of Hous. and Community Renewal, 87 NY2d 325, 335 [1995] [internal citations omitted]; see also Manocherian v Lenox Hill Hosp., 84 NY2d 385, 392 [1994]). The complaint's allegations, taken as true, do not satisfy to this standard.

In determining whether a use restriction effects a taking, courts apply the balancing test set out in Penn Central Transp. Co. v City of New York, 438 US 104 (1978). This flexible, "ad hoc, factual inquir[y]" focuses on "several factors that have particular significance," i.e.: (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action" (Penn Central Transp. Co. v. City of New York, 438 US 104, 124 [1978]). All of these factors militate against plaintiff.

First, plaintiff has not plausibly alleged that the RSL has thwarted all economically viable use of the Building. While plaintiff asserts that the RSL prevents it from profiting from its ownership of the Building, it is well-settled that the owner of rent-regulated property "is not guaranteed [a] 'reasonable return' on investment" (See e.g., Bldg. and Realty Inst. of Westchester and Putnam Ctys., Inc. v New York, 19-CV-11285 (KMK), 2021 WL 4198332, at *23 [SDNY Sept. 14, 2021] [internal citations omitted]). Rather, "[t]he critical inquiry ... [is] whether the property use allowed by the regulation is sufficiently desirable to permit property owners to sell the property to someone for that use" (Id.) and plaintiff does not assert that no sale is possible but

argues that the RSL has decreased the Building's resale value. That plaintiff does not wish to sell the Building is not germane to this analysis. Finally, plaintiff's assertion, in opposition to defendants' motions, that a sale would be difficult absent a rezoning which is unlikely to be granted is unavailing as it is entirely contingent and speculative.

Second, the RSL does not interfere with plaintiff's investment-backed expectation. The New York State legislature has repeatedly revised the RSL since its initial enactment in 1969 and, therefore, when Lynette Ciner inherited the Building in 2006[1] and transferred her ownership to plaintiff, a reasonable property owner would have understood that the Building was subject to the RSL and expect that it would remain subject to same (See 335-7 LLC v City of New York, No. 21-823, 2023 WL 2291511, at *2-4 [2d Cir Mar. 1, 2023] citing 74 Pinehurst LLC v New York, 59 F4th 557, 567, at *5 [2d Cir. 2023]).

Third, and finally, the character of the RSL does not support a regulatory taking claim. In analyzing the character of the governmental action, courts focus on the extent to which a regulation was "enacted solely for the benefit of private parties" as opposed to a legislative desire to serve "important public interests" (74 Pinehurst LLC v New York, 59 F4th 557, 568 [2d Cir 2023] quoting Keystone Bituminous Coal Ass'n v DeBenedictis, 480 US 470, 485–86 [1987]). Here, the legislature has determined that the RSL is necessary to prevent "serious threats to the public health, safety, and general welfare" (See Administrative Code §26-501), which cannot seriously be gainsaid, and weighs against a takings claim (74 Pinehurst LLC v New York, 59 F4th 557, 568 [2d Cir 2023]; see also 335-7 LLC v City of New York, No. 21-823, 2023 WL 2291511 at *2-4 [2d Cir, 2023]).

[1] The fact that Lynette Ciner's family owned the Building before enactment of the RSL is not germane to this analysis—what matters is the time when plaintiff acquired the Building (See 74 Pinehurst LLC v New York, 59 F4th 557, 567 [2d Cir 2023] ["the critical time for considering investment-backed expectations is the time a property is acquired"]).

Accordingly, it is

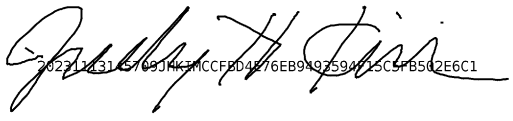
ORDERED that defendants' motions to dismiss this action are granted and this action is hereby dismissed; and it is further

ORDERED that plaintiff's motion for a preliminary injunction is denied as moot; and it is further

ORDERED that, within ten days from the date of this decision and order, counsel for the City of New York shall serve a copy of this decision and order, with notice of entry, on plaintiff as well as the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to enter judgment; accordingly, and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



11/13/2023
DATE

HON. JUDY H. KIM, J.S.C.

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