[* 1]

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

PRESENT: Hon. DIANE A. LEBEDEFF PART 8
Justice

985 Fifth Avenue, LLC,

-v-

Earl Reiss.

INDEX NO. 112371/02
MOTION DATE 8/21/02
MOTION SEQ. NO. 001
MOTION CAL. NO. 132

The following papers, numbered 1 to _____ were read on this motion tolfor disc.

	PAPERS NUMBERED
Amended Notice of Motion/ se — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	2
Replying Affidavits	3

SCANNED JAN 27 2003

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: JAN 15 2003

J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8
----------X

985 FIFTH AVENUE LLC.,

Plaintiff,

-against-

Index No. 112371/02
Mot. Seq. No. 001

EARL REISS and NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendants.

----------X

DIANE A. LEBEDEFF, J.:

This declaratory judgment action centers upon the state rent regulatory agency's procedures regarding income certification in luxury decontrol proceedings.[1] Because the plaintiff has filed an administrative appeal, both the defendant-tenant and the Division of Housing and Community Renewal ("DHCR') move to dismiss (CPLR 3211) upon the ground that plaintiff cannot bring a proceeding to challenge an administrative determination which is not final or which "can be adequately reviewed by appeal to ... [a non-judicial] body or officer" (CPLR 7801[1]).

---

[1] The plaintiff-landlord challenges procedures utilized by the DHCR in relation to an owner seeking luxury decontrol of a rent stabilized apartment. After the verification information is received, "the owner and the tenants shall have thirty days within which to comment" and, thereafter, DHCR "shall, where appropriate, issue an order providing'' for luxury decontrol (RSL § 26-504.3[c][2]).

In this case, the tenant, upon being notified of the information received from the Department of Taxation and Finance, advised DHCR that he had filed an amended 2000 tax return. DHCR again sought verification from the Department of Taxation and Finance, which verified that the tenant's household income was below the threshold as a result of the amended tax return or returns.

Both motions assert plaintiffs Petition for Administrative Review ("PAR") raise the very same issues as are presented to the court in the amended complaint and urge that resort to the court is barred by the doctrine requiring exhaustion of administrative remedies (see, *Urban Associates v. Hettinger*, 177 A.D.2d 439 [1st Dept. 1991], applying exhaustion principles to a declaratory judgment action). The doctrine was explained in *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978), as follows:

> "It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law (e.g., *Young Men's Christian Assn. v. Rochester Pure Waters Dist.*, 37 N.Y.2d 371, 375). This doctrine furthers the salutory goals of relieving the courts of the burden of deciding questions entrusted to an agency (see 1 N.Y. Jur., Administrative Law, § 5, pp. 303-304), preventing premature judicial interference with the administrators' efforts to develop, even by some trial and error, a co-ordinated, consistent and legally enforceable scheme of regulation and affording the agency the opportunity, in advance of possible judicial review, to prepare a record reflective of its 'expertise and judgment' *(Matter of Fisher [Levine]*, 36 N.Y.2d 146, 150; see, also, 24 Carmody-Wait 2d, N.Y. Prac., § 145:346)."

There do exist exceptions to the exhaustion doctrine, which were summarized in *Grattan v. Department of Social Services of State of New York*, 131 A.D.2d 191, 193 (3rd Dept. 1987), in the following terms:

> "The Court of Appeals has held that exhaustion is not required where the agency's action is challenged as being either unconstitutional or wholly beyond its authority as a matter of law *(Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57; see, *Young Men's Christian Assn. v. Rochester Pure Waters Dist.*, 37 N.Y.2d 371, 375-376). Exceptions also exist where resort to an administrative remedy is futile or where its pursuit would cause irreparable injury *(Watergate II Apts. v. Buffalo Sewer Auth., supra*, 46 N.Y.2d at 57)."

The court finds that none of these exceptions are applicable at this point in time.

Futility of Administrative Review

As to the claim an administrative review would be futile *(Watergate II Apts. v. Buffalo Sewer Auth., supra,* 46 N.Y.2d at 57), plaintiff has the burden of advancing evidence on the issue of futility (see, *Lehigh Portland Cement Co. v. New York State Dept. of Environmental Conservation*, *87* N.Y.2d 136, 141 [1995], plaintiff demonstrated unwavering policy was in effect for many years; compare, no futility shown, *New York Inst. for the Educ. of the Blind v. United Fedn. of Teachers' Comm.*, 83 A.D.2d 390 [1st Dept. 1981], affd *57* N.Y.2d 982 [1982], agency had not issued determination nor statement of policy on the issue in dispute; *Matter of Kirk v. Bahou,* 73 A.D.2d 770 [3rd Dept. 1979], affd 51 N.Y.2d 867 [1980], only evidence was statement by a petitioner "I believe" the Commission has already decided this matter; *Matter of Grattan v. Department of Social Servs.*, 131 A.D.2d 191 [3rd Dept. 1987], lv. denied 70 N.Y.2d 616 [1988], finding no evidence of futility).

Plaintiff admits that DHCR's Operational Processing Bulletin 95-3, which addresses luxury decontrol, does not state such a policy and makes no evidentiary showing establishing a "policy." Accordingly, this argument is not sustainable by the papers submitted.

Agency Action Beyond Its Legal Authority

Plaintiff raises two different arguments in relation to whether the agency acted beyond its legal authority. First, it objects that the DHCR has failed to comply with the rule-making requirements of State Administrative Procedure Act § 102 (2)(a)(i). The type of rule subject to the State Administrative Procedure Act has a defined character, which has

been stated by the Court of Appeals to be as follows:

> "Section 102(2)(a)(i) of the State Administrative Procedure Act defines a 'rule' as 'the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency'. In *Matter of Cordero v. Corbisiero, 80* N.Y.2d 771, we adopted for purposes of determining what constitutes a 'rule' under the State Administrative Procedure Act the criterion for constitutional filing purposes articulated in *Matter of Roman Catholic Diocese v. New York State Dept. of Health,* 66 N.Y.2d 948, embracing 'a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers' *(id.,* at 951). Respondent's ... policy ... is a rigid, numerical policy invariably applied across-the-board to all claimants without regard to individualized circumstances or mitigating factors, and as such falls plainly within the definition of a 'rule' for State Administrative Procedure Act purposes. The policy cannot be characterized as concerning only the internal management of the agency ...." (*Schwartfigure v. Hartnett*, 83 N.Y.2d 296,301-302 [1994].)

An amplification of these general principles can be found in a dissenting opinion adopted by the Court of Appeals in *Roman Catholic Diocese of Albany v. New York State Dept. of Health, 66* N.Y.2d 948, 951 (1985), where the Court of Appeals reversed the decision reviewed; Justice Levine's Appellate Division dissent had stated in relevant part that:

> "Neither [precedent] nor the State Constitution'sregulation-filing requirement (N.Y. Const. art. IV, § 8) were intended to overturn the general principle of administrative law that an agency is free to evolve standards, if consistent with the statutory framework, on a case-by-case basis and to apply them to the individual proceeding at hand. 'And the choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency' *** New York case law, up to now, has not been inconsistent with these general principles of administrative law in ruling that an administrative agency does not violate the regulation-filing requirement by 'establishing a guideline for a case-by-case analysis of the facts'.
>
> "[Where a] rule [is] nothing more than a nonconclusive, nonbinding guideline to be weighed along with other factors on the public need issue in adjudicating individual cases, there was no need to file it as a regulation." *(Roman Catholic Diocese of Albany v. New York State Dept. of Health,* 109 A.D.2d 140, 148 [3rd Dept. 1985]).

Under these standards, the court finds that the DHCR's procedure of re-verifying income tax information, invoked on a case-by-case basis when there is information that an amended return has been filed, cannot be classified as a "rule" within the meaning of the Administrative Procedure Act (see, *Metropolitan Life Ins. Co. v. New York State Div. of Housing and Community Renewal,* 235 A.D.2d 354 [1st Dept. 19971, DHCR's major capital improvement application processing "does not amount to the promulgation of a new rule, 'invariably applied across- the-board to all claimants without regard to individualized circumstances or mitigating factors', in violation of the State Administrative Procedure Act").

Second, plaintiff urges the challenged administrative action of re-verification of amended tax returns is in violation of the Rent Stabilization Law. Case law does not support the argument that DHCR must "close the record" long before it issues a final decision. In *Matter of Dworman v. New York State Div. of Housing and Community Renewal,* 94 N.Y.2d 359 (1999), which also addressed the luxury-decontrol provisions of the Rent Stabilization Law, the landlord also objected to the receipt and consideration of responsive information after the time periods contained in the statute. There, the Court of Appeals concluded that the statement of a time period in the luxury decontrol provisions of the Rent Stabilization Law "does not divest the Division of authority to forgive a late filing or excusable default in the sound exercise of its discretion" (94 N.Y.2d at 372). The Court stated:

> "Significantly, the Rent Stabilization Code states that DHCR may, at 'any stage of a proceeding * * * for good cause shown, except where prohibited by the RSL, accept for filing any papers, even though not filed within the time required by this Code' (9 NYCRR 2527.5 [d]; see also, 9 NYCRR 2507.5 [d]; 9 NYCRR 2210.1 [unless it conflicts with the statute, the Rent Stabilization Code applies to all proceedings under the Rent

> Stabilization Law]). Since Administrative Code § 26-504.3 does not prohibit DHCR from accepting late filings, it may exercise its discretion under the Code to accept late filings when good cause is established. Further, Code sections 2507.5 (d) and 2527.5 (d) permit DHCR to accept late filings for good cause shown at 'any stage of a proceeding' -- that is, at any point before the Commissioner *** has entered a final order dismissing the PAR (see, *Matter of Magnone v. Halperin*, 238 A.D.2d 207 ['a final decision was not rendered until the resolution of the tenant's petition for administrative review']; see also, 9 NYCRR 2529.8 et seq. [regulations governing '(f)inal determination' by the Commissioner])." (94 N.Y.2d at 373-374; brackets in original.)

See also, *Elkin v. Roldan*, 94 N.Y.2d 853 (1999), similarly rejecting an argument that the time period formed a statutory constraint prohibiting consideration of subsequently submitted information.

Here, no statutory time bar constrains the DHCR's processing of **a** luxury decontrol application after it receives comments on the information received from the Division of Taxation and Finance. Accordingly, consistent with established law as set forth above, there is no valid argument that DHCR is prohibited by the the Rent Stabilization Law from seeking re-verification of income after it learns an amended tax return has been filed.

Unconstitutional Administrative Action

The landlord also urges that re-verification is a violation of the Landlord's equal protection rights. No argument is advanced which explains this legal contention.

The relief requested suggests that plaintiff seeks to have the court prospectively mandate the way in which DHCR internally processes this luxury decontrol application.[2]

---

[2] The plaintiff asks the court to "examine whether the 'policy' provides": (a) that DHCR be advised if the amendment is "a result of an audit or an amended return"; (b) DHCR be advised if the amendment "affect[s] any other tax years"; (c) that DHCR "re-opens any other years ... affected in other" luxury-decontrol applications; (d) that DHCR

Specifically, because such processing was committed to the DHCR by the legislature, this court lacks jurisdiction to grant such relief. The applicable bar was explored by the Court of Appeals when a New York City landlord – among other items of relief – sought approval to demolish his building, to evict his rent-control tenants and to refrain from offering renewal leases to rent-stabilization tenants; the Court of Appeals held:

> "[T]he constitutionally protected jurisdiction of the Supreme Court does not prohibit the Legislature from conferring exclusive original jurisdiction upon an agency in connection with the administration of a statutory regulatory program. In situations where the Legislature has made that choice, the Supreme Court's power is limited to article 78 review, except where the applicability or constitutionality of the regulatory statute, or other like questions, are in issue.
>
> " .... [Here, the] provisions of the rent-control and rent-stabilization laws demonstrate that the Legislature intended DHCR and HPD to be the exclusive initial arbiters of whether an owner has, in fact, met these regulatory conditions. ... [T]he many references to the need to establish the necessary facts to the agency's satisfaction and the other references to determinations and findings by the agency ... evinces a legislative intent to have issues arising in the latter class of cases determined, in the first instance, by the agency. * * *
>
> "Since concurrent Supreme Court jurisdiction was not contemplated in this situation and the Constitution does not require it, Supreme Court erred in entertaining plaintiff's claims on the merits. Furthermore, Supreme Court's consideration of the delays that purportedly typify the administrative adjudicative process was inappropriate, since that factor, to the extent it might ever be relevant at all, would apply only in the application of the doctrine of 'primaryjurisdiction.' * * * While the rule is certainly not without exceptions, no such exception is possible where, as here, the agency's original jurisdiction is exclusive." (*Sohn v. Calderon*, 78 N.Y.2d 755, 767 [19911; citations omitted.)

Accordingly, while the court has reviewing authority over an administrative determination of DHCR, it has no jurisdiction to engage in the refinement of DHCR procedures on the

---

hold a hearing to "determine if income shifting occurred for the purpose of defeating" the owner's application; and, (e) if "other safeguards ... insure the integrity of the deregulation process" (amended complaint, para. 41).

abstract bask advanced in this portion of the petition.

Conclusion

In closing, it is noted that the tenant argues that the two additional claims are premature or inapplicable to the facts. The fourth cause of action seeks damages for the claimed delay of a luxury decontrol ruling, which is speculative absent determination of entitlement to luxury decontrol. The fifth cause of action asserts entitlement to legal fees under the lease and is similarly premature. Accordingly, these causes of action must fall.

Based upon the foregoing, the complaint is dismissed. No sooner than five days after service of a copy of this order with notice of entry and a proposed judgment upon plaintiff, the clerk shall enter judgment accordingly upon the presentation of appropriate papers.

This decision constitutes the order of the court.

Dated: January 15 ,2003

J.S.C.