

<b>Matter of 16-18 Charles St., L.L.C. v State Div. of Hous. &amp; Community Renewal</b>
2007 NY Slip Op 33537(U)
October 24, 2007
Supreme Court, New York County
Docket Number: 0100790/2006
Judge: Charles J. Tejada
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**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY**  
**PRESENT: Hon. Charles J. Tejada, Justice** **PART 50N**

In The Matter of the Application of \_\_\_\_\_  
16-18 CHARLES STREET, L.L.C., \_\_\_\_\_  
  
Petitioner, \_\_\_\_\_  
For a Judgment pursuant to Article 78 \_\_\_\_\_  
of the Civil Practice Law and Rules \_\_\_\_\_

INDEX NO. 100790/06  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

-against-

STATE DIVISION OF HOUSING AND \_\_\_\_\_  
COMMUNITY RENEWAL, \_\_\_\_\_  
  
Respondent. \_\_\_\_\_

**FILED**  
OCT 31 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause - Affidavits - Exhibits _____	_____
Answering Affidavits - Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this petition is denied as per the attached opinion, decision and order

Dated: October 24, 2007

ENTER: *any*  
J.S.C.

Check One:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 50N

-----X  
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-----X  
TEJADA, C.J., J.S.C.

:  
:  
: INDEX NO. 100790/06

:  
: OPINION, DECISION  
: AND ORDER

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Petitioner brings this Article 78 proceeding, to compel a determination by the respondent, New York State Division of Housing and Community Renewal (DHCR), with respect to Petitioner's application for an Order of Eviction (Docket No. TJ-420002-OE) and a related Tenant's Complaint of Harassment (Docket No. TK-410010-HL) and for such other and further relief as the Court may deem just and proper.

Specifically, petitioner seeks to compel the DHCR to determine the owner's application for an Order Granting Approval to Proceed with Eviction against one of its tenants.

In support of the petition, petitioner argues, in part, that it has been three (3) months since the filing of the application, which is necessary to remove a violation and that "it is being irreparably harmed by the existence of a violation issued by the New York City Department of Buildings"; because "failure to remove the extension expeditiously will cause additional violations to be issued, thereby causing Petitioner to be subject to a plethora of fines."

DHCR opposes petitioner's motion and contends that petitioner has not demonstrated that

it is entitled to the extraordinary relief of mandamus.

An Article 78 proceeding in the nature of mandamus does not lie unless the act sought to be compelled is ministerial, non-discriminatory and non-judgmental, and is premised upon specific statutory authority mandating performance in a specified manner. See, *Matter of Stutzman v. Fahey*, 62 AD2d 1070.

In a proceeding pursuant to Article 78 of the CPLR seeking mandamus to compel an agency or officer's performance of a ministerial act, the court examines whether the petitioner possesses a clear legal right to the relief sought and whether the agency or officer has a corresponding nondiscretionary duty to grant the relief requested (see, CPLR 7803 [1]; *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757; see also, *Matter of Armstrong v Centerville Fire Co.*, 83 NY2d 937, 939; *Matter of Legal Aid Socy. v Scheinman*, 53 NY2d 12, 16).

Rather than revealing that the matter before respondent is one that is ministerial, non-discriminatory or non judgmental, the record reveals that both parties filed opposing petitions in which they each seek relief which requires hearings to determine questions of fact, as well as investigation into the extraordinary relief sought by the petitioner. *Gimprich v. Board of Education*, 306 NY 401, 406 (citations omitted) ("mandamus . . . will not be awarded to compel an act in respect to which the officer may exercise judgment or discretion.")

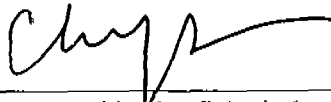
The petitioner has not met the heavy burden of demonstrating a clear legal right to the relief sought *and* whether the agency or officer has a corresponding nondiscretionary duty to grant the relief requested. See, *Matter of Hamptons Hosp. & Med. Center v Moore*, 52 NY2d 88 (1981); *Matter of Lisa v Board of Elections*, 83 AD2d 949 [2d Dept 1981] ("There must be a duty imposed by law"); *Matter of Morgenthau v Gold*, 126 Misc 2d 856 [Sup Ct, NY County

1985] The party seeking mandamus must show a clear right to the relief sought (*Matter of Brown v New York State Dept. of Social Servs.*, 106 AD2d 740 [3d Dept 1984]), and mandamus is inappropriate where the action is of a discretionary nature (*Matter of Chessin v New York City Conciliation & Appeals Bd.*, 100 AD2d 297 [1st Dept 1984]).

Consequently, this petition seeking mandamus relief must be denied.

This constitutes the opinion, decision and order of this Court.

Date: October 24, 2007  
New York, NY

  
\_\_\_\_\_  
Charles J. Tejada, J.S.C.

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