

**Matter of 81 Warren St. Realty Corp. v New York
State Div. of Hous. & Community Renewal**

2008 NY Slip Op 31030(U)

March 31, 2008

Supreme Court, New York County

Docket Number: 0115546/2007

Judge: Eileen A. Rakower

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

PRESENT: **EILEEN A. RAKOWER**
J.S.C.
Justice

PART 5

81 Warren St.

INDEX NO. 115546107

- v -

MOTION DATE _____

NYSDHCR

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

FILED
APR 09 2008
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 3/31/08



EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X

In the Matter of the Application of
81 WARREN STREET REALTY CORP.,

Index No.
115546/07

Petitioner,
for a Judgment pursuant to Article 78 of the
Civil Practice Law and Rules

DECISION
and ORDER

-against-
NEW YORK STATE DIVISION of HOUSING and
COMMUNITY RENEWAL,

Respondent.

FILED

APR 09 2008

Mot. Seq. 001

-----X
HON. EILEEN A. RAKOWER:

**COUNTY CLERK'S OFFICE
NEW YORK**

Petitioner is the owner of the building (the building) located at 81 Warren Street, New York, New York. Respondent New York State Division of Housing and Community Renewal (DHCR) is the administrative agency responsible for the administration of rent laws in New York.

On September 8, 2006, petitioner filed an application with DHCR seeking approval to evict three tenants who live at 81 Warren Street based on its intent to demolish the building and build a new structure in its place.

On September 19, 2006, respondent acknowledged petitioner's application and requested additional information and documentation in support of the application. On November 7, 2006, petitioner provided respondent with the requested information.

DHCR sent an additional request for information in February, 2007, which petitioner responded to on March 9, 2007. On July 25, 2007, petitioner wrote to DHCR requesting information regarding the status of its application and inquiring as to when a determination would be rendered. DHCR never responded to the letter. In November, 2007, petitioner filed this Article 78 petition seeking an order from the court either compelling DHCR to issue an order granting its application to refuse renewal leases to its tenants and proceed to eviction or, in the alternative, directing DHCR to issue a decision on petitioner's application by a date certain. The petition was randomly reassigned to this court on March 14, 2008.

A petitioner seeking mandamus to compel “must have a clear legal right to the relief demanded and there must exist a corresponding non-discretionary duty on the part of the administrative agency to grant that relief.” (*Scherbyn v. Wayne-Finger Lakes Bd. Of Coop Ed. Serv.*, 77 N.Y.2d 753, 757 [1991]). “The availability under Article 78 of mandamus to compel performance of a duty of an administrative agency depends not on the applicant’s substantive entitlement to prevail, but on the nature of the duty sought to be commanded -i.e. mandatory, non-discretionary action.” (*Hamptons Hospital and Medical Center, Inc. v. Moore*, 52 NY2d 88 [1981]).

DHCR argues that petitioner has failed to demonstrate either the necessity or propriety for a mandamus order. It argues that its determination regarding petitioner’s application is discretionary, judgmental and non-ministerial. Therefore, petitioner does not have the required “clear legal right” to the relief it seeks. DHCR states that the processing of an application such as petitioner’s is a complex matter which requires thorough review and sometimes an evidentiary hearing before a determination may be made. It states that it is constrained both by the regulatory requirements for such an application and regard for the due process rights of the tenants that petitioner seeks to evict which are mandated by the Rent Stabilization Law and Code. DHCR urges the court to deny the “extraordinary remedy of mandamus” to impose a time limit on its process as that would grant petitioner “an unwarranted preference over other earlier filed matters of equal or greater importance to other applicants.”

Petitioner argues that it has met all of DHCR’s requirements in order for DHCR to grant its application. It argues that “absent the commencement of this proceeding, it is unlikely that DHCR would have taken any steps to perform a duty enjoined upon it by law.” It argues that a hearing will not be necessary in this matter as DHCR can make a determination based on the relevant law and its submissions. Petitioner argues that it has complied with all of DHCR’s requirements and “the act of arriving at *some* decision is ministerial in nature.” (Emphasis in the original.) Petitioner argues that it has no objection to DHCR processing its application in a diligent manner but, to date, DHCR has failed to do so. Therefore, it states, it is entitled to a mandamus order.

Rent Stabilization Law §26-511 c.9(a) states, in pertinent part

c. A code shall not be adopted hereunder unless it appears to the division of housing and community renewal that such code

(9) provides that an owner shall not refuse to renew lease except

(a) where he or she intends in good faith to demolish the building and has obtained a permit therefor from the department of buildings . . .

Rent Stabilization Law § 2524.5(a)(2) states, in pertinent part

(a) The owner shall not be required to offer a renewal lease to a tenant . . . and shall file on the prescribed form an application with the DHCR for authorization to commence an action or proceeding to recover possession in a court of competent jurisdiction after the expiration of the existing lease term, upon any one of the following grounds . . .

(2) Demolition. (i)The owner seeks to demolish the building. Until the owner has submitted proof of it's (sic) financial ability to complete such undertaking to the DHCR, and plans for the undertaking have been approved by the appropriate city agency, an order approving such application shall not be approved.

In its September 18, 2006 request for additional information, DHCR asked petitioner to provide, among other things, the architectural plan approved by the appropriate governmental agencie(s). Petitioner's "Notice to Tenant" in his original application states that it intends on doing a partial demolition "above the ground floor commercial space, and construct a 'mixed use' building in its place." Pursuant to DHCR's "Notice to Tenant," tenants are permitted to respond to petitioner's application within twenty (20) days. Both the owner and the tenants here requested and received extensions of their time to file responses to DHCR.

DHCR avers that this matter has been further complicated by the interaction of the Loft Law with Rent Stabilization Law and DHCR's rules. DHCR notes that other similarly situated tenants state that the legislative history of the Loft Law shows that apartments such as these were not made legal residential units to permit owners to convert units back to commercial use. It states that the question which must be resolved is, what degree of demolition by the owner would satisfy the requirements of the Rent Stabilization statute. By their attorney, tenants respond that the New York City Conciliation and Appeals Board Order and Opinion No. 15,680 states that demolition means " the substantial demolition which occurs in the total gutting of a building's interior, or, as the test is sometimes characterized, being able to stand in the cellar and look up at the sky." Accordingly, they have requested that petitioner's

application to refuse them renewal leases be denied by DHCR.

DHCR states that there are two appeals from Supreme Court decisions presently pending before the Appellate Division, First Department, which pose precisely the question of how much demolition is enough demolition to meet the requirements of Rent Stabilization Law. This court has ascertained that those appeals were argued on February 15, 2008, are fully submitted and a final decision is forthcoming.

This court is mindful of petitioner's frustration occasioned by the delay in processing his application. DHCR does not explain why it ignored petitioner's letter of July, 2007 which simply requested information regarding the status of its application. It is apparent that, having begun this process in September, 2006, petitioner sought a decision from DHCR long before any of the current tenants' leases expire in May, 2008. However, the legislature which empowers DHCR has not imposed any time limitations on its decision making process. As our appellate courts repeatedly remind us, an administrative agency is entitled to great deference in matters within its authority and area of expertise. (*Academic Health Professionals Insurance Association v. M.Q. of New York, Inc.*, 30 AD3d 165 [1st Dept. 2006]).

This is not a case where the administrative agency has failed to take any action on petitioner's application. (See, *Hamptons Hospital and Medical Center, Inc. v. Moore, supra*). Once petitioner's application was received, DHCR made a request for further information and documentation. As required by law, DHCR contacted the tenants that petitioner seeks to evict for input on its application. Further exchanges continued through March, 2007.

Here, DHCR's decision regarding whether or not to grant petitioner's application to terminate the tenancy of its tenants so petitioner may proceed with the demolition/renovation of its building is a discretionary matter. Further, it is not unreasonable for DHCR to await a determination from the appellate court in a situation which involves the complex interaction of conflicting laws, rules and policy concerns. It is not for this court to interject itself into DHCR's deliberations and direct it to reach a particular conclusion with respect to petitioner's application. Nor, in the absence of any information regarding the many matters pending before it, will this court direct DHCR to render a decision on the instant matter within a specified period of time. While DHCR is not proceeding with the processing of petitioner's application as expeditiously as petitioner expects, it is clear that DHCR is fulfilling

its duty and processing the application. Therefore, petitioner's application must be denied.

ORDERED that this petition is denied and the proceeding is dismissed.

All other relief requested is denied.

This constitutes the decision and order of the court.

Dated: March 31, 2008



EILEEN A. RAKOWER, J.S.C.

FILED

APR 09 2008

**COUNTY CLERK'S OFFICE
NEW YORK**