

Matter of Gjushi Realty, LLC v Cestero
2010 NY Slip Op 30770(U)
March 30, 2010
Supreme Court, New York County
Docket Number: 117360/09
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. EILEEN A. RAKOWER**
Justice

PART 15

Index Number : 117360/2009
GJUSHI REALTY, LLC
VS.
CESTERO, RAFAEL E.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

1
2, 3
4

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 motion

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

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

FILED
APR 06 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/30/10


HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X
In the Matter of the Application of
GJUSHI REALTY, LLC,

-against-

Petitioner,

RAFAEL E. CESTERO, as Commissioner of the New York City Department of Housing Preservation and Development, and NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Respondents.
-----X

FILED

APR 06 2010

NEW YORK
COUNTY CLERK'S OFFICE

Index No.
117360/09

DECISION
and ORDER

Mot. Seq.
001

HON. EILEEN A. RAKOWER:

Petitioner Gjushi Realty, LLC ("Petitioner") brings this Article 78 proceeding for an Order annulling the August 12, 2009 determination of the New York City Department of Housing Preservation and Development ("HPD") regarding Petitioner's application for a tax abatement under the J-51 program.

The J-51 program is authorized by Real Property Tax Law §489 and New York City Administrative Code ("NYC Admin. Code.") §11-243, and is designed to encourage the rehabilitation of residential properties by granting partial real property tax exemption and/or abatement benefits for eligible items of work, such as major capital improvements, repairs, and conversions of commercial buildings to residential use. The J-51 program is administered by HPD, which promulgates regulations which are codified in Chapter 5 of Title 28 of the Rules of the City of New York ("RCNY").

Petitioner is the landlord and owner of 2245 Webster Avenue in the Bronx ("the premises"). Petitioner states that it caused renovations and improvements to be made to the premises which resulted in the rehabilitation and/or creation of thirteen Class A dwelling units. Petitioner states it expended \$498,850.00 in construction costs pertaining to this construction work. Of these expenditures, Petitioner states that \$390,120.00 were eligible for the J-51 program. According to

the affidavit of architect Errol McIntosh, annexed to the petition as an exhibit, Petitioner obtained the necessary DOB permit (#200662336) to perform the subject work on April 11, 2001¹. The McIntosh affidavit states that demolition work commenced on April 17, 2001, construction work began on June 26, 2001, and that the work was completed on or before March 20, 2003.

On or around June 15, 2005, Petitioner filed its application for tax abatement and exemption under the J-51 program. In or around June 2009, HPD issued an initial Certificate of Eligibility which stated that the certified reasonable cost of eligible construction to the premises totaled \$9,448.00. Petitioner subsequently contested this figure. HPD responded that Petitioner's application was untimely because it was not filed within 48 months of the commencement of construction work. On August 12, 2009, HPD issued a final Certificate of Eligibility, which found that the certified reasonable cost of eligible construction work to the premises totaled \$27,514.00.²

Petitioner commenced this Article 78 proceeding by filing a verified petition. Petitioner claims that HPD's final Certificate of Eligibility is arbitrary and capricious due to HPD's failure to account for the actual date of commencement of construction. Petitioner asserts that the actual commencement of construction, rather than the commencement of demolition work or the issuance of a DOB permit, constitutes the proper start date for the relevant 48-month period within which a J-51 application must be made.

HPD submits a verified answer and a memorandum of law in support of its answer. HPD claims that it properly found that Petitioner's J-51 application was untimely (inasmuch as the application sought a tax exemption and abatement for

¹The McIntosh affidavit states that the DOB permit was issued on March 27, 2001. However, HPD states that April 11, 2001 is the correct date, and notes that Petitioner lists April 11, 2001 as the permit date on Petitioner's Form J-3, which was part of its J-51 application. Petitioner apparently concedes this point in its reply memorandum.

²As noted below, HPD takes the position that, for purposes of ascertaining J-51 eligibility, the operative date for commencement of work which requires a DOB permit is the date that the permit was issued. The \$27,513 figure reflects work which did not require a DOB permit. 28 RCNY §5-02 states that the commencement date for work not requiring a DOB permit is "the date any physical operation has commenced solely for the purpose of making eligible alterations or improvements." This figure is not disputed by Petitioner.

work requiring a DOB permit), since Petitioner filed its J-51 application more than 48 months after a DOB permit was issued to perform the subject work.

Petitioner submits a memorandum of law in response.

It is well settled that the “[j]udicial review of an administrative determination is confined to the ‘facts and record adduced before the agency’.” (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency’s determination but must decide if the agency’s decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency’s determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency’s determination “arbitrary and capricious” if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

28 RCNY §5-03(d)(3) requires that a J-51 application must be filed with HPD “not later than forty-eight months following the commencement of the construction....” 28 RCNY §5-02 provides, in pertinent part:

Commencement of construction. (a) For work requiring a permit, "commencement of construction" means:

- (1) the date of issuance of a permit by the Department of Buildings....

The Court finds that HPD’s determination, reflected in its Certificate of Eligibility, must be upheld. As noted above, the relevant permit was issued by DOB on April 11, 2001, and Petitioner submitted its J-51 application on June 15, 2005 - just over 50 months after the commencement of construction, as that term is defined by the RCNY. Accordingly, HPD’s determination that Petitioner’s J-51 application was untimely was not arbitrary and capricious.


Wherefore it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied

Dated: March 30, 2010



EILEEN A. RAKOWER, J.S.C.

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