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

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10

Index Number : 109121/2010

LONDON TERRACE GARDENS, L.P.

INDEX NO. _____

vs

CITY OF NEW YORK

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

ARTICLE 78

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
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 (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

MAY 06 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/5/11

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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In the matter fo the application of

London Terrace Gardens, L.P.,

Petitioner,

For a judgment Pursuant to CPLR Article 78

-against-

The City of New York and
New York City Department of
Housing Preservation and Development,

Respondents.

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Decision/Order

Index No.:109121/10
Seq. Nos.: 001,002,003

London Terrace Gardens, L.P.

Plaintiff,

-against-

The City of New York,
New York City Department of
Housing Preservation and Development, and
New York State Division of
Housing and Community Renewal,

Defendants.

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Index No.: 109122/10
Seq. Nos.: 001, 002, 003

Hon. Judith J. Gische:

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Index # 109121	
Seq. No. 001	
Notice of Petition, Petition, exhibits.....	1

Seq. No. 002
Notice of Motion, JMW affirm., exhibits.....2

Seq. No. 003
Notice of Motion, HF affirm., exhibits.....3
JMW affirm. in opp., exhibits.....4
HF reply affirm., exhibit.....5

Index # 109122

Seq. No. 001
Notice of Motion, JMW affirm., exhibits.....6

Seq. No. 002
Notice of Motion, JMW affirm., exhibits.....7

Seq. No. 003
Notice of Motion.....8
SDM affirm., exhibits.....9
SDM reply affirm., exhibits.....10

Upon the foregoing papers the decision and order of the court is as follows:

London Terrace Gardens, LP ("London Terrace") has brought two separate interrelated actions against the City of New York ("NYC") and New York City Department of Housing and Preservation Development ("DHPD")(collectively "the City"). This actions arise in connection with the impact and reach of the Court of Appeals decision in Roberts v. Tishman Speyer Properties, LP, 13 NY3d 270 (2009).

The first action ("Article 78") (index# 109121/10), which is brought pursuant to CPLR Article 78, primarily seeks a judgment rescinding London Terrace's J-51 "arrangement" with the City, nunc pro tunc, as of the date the J-51 arrangement was commenced. London Terrace sets out four claims respectively for: recision (first claim); declaratory judgment (second claim); agency misconduct (third claim) and a violation of

due process (fourth claim). The second action ("plenary action")(index # 109122/10), styled as a plenary action, seeks identical relief and sets out four identical claims. It also names the New York State Division of Housing and Community Renewal ("DHCR") as a defendant.

Multiple motions have been made in each of the two actions. The City has moved, pre-answer, to dismiss the Article 78 proceeding for failure to state a cause of action. CPLR 3211(a)(7) and 7804(f). London Terrace has separately moved to amend the petition to include the DHCR as a respondent. The City has moved, pre-answer, to dismiss the plenary action for failure to state a claim.[1] The DHCR has separately moved, pre-answer, to dismiss the plenary action. Since the actions are based on identical claims and the motions make identical and overlapping arguments, the court has consolidated ,for consideration in this single decision, all of the pending motions in both actions.

DISCUSSION

In the context of a motion to dismiss for failure to state a cause of action, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true, and provide the plaintiff with the benefit of every possible inference. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83 (1994); Morone v. Morone, 50 N.Y.2d 481 (1980); Beattie v. Brown & Wood,

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[1]The City has two pending motions to dismiss the plenary action (Seq. Nos. 001 and 002). They are identical except that Seq. No. 001 was made returnable before a Supreme Court Justice that has since retired. Seq. No. 001 has since been referred to this court. The later motion to dismiss was made returnable before this court as well. Other than who the motions were originally returnable before, there is no appreciable differences between the motions. The merits of both motions will be considered.

243 A.D.2d 395 (1st Dept. 1997). In deciding the present motions to dismiss, the court must determine whether the allegations support the causes of action asserted (Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 [1976]) and whether they fit within any cognizable legal theory without regard to ultimate success on the merits. Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 (2005); EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11(2005). On the other hand, allegations based solely upon legal conclusions are not entitled to the same favorable consideration, because issues of law are for the court to decide. EBC I, Inc. v. Goldman, Sachs & Co., *supra*. Moreover, the legal standard is the same whether the underlying action is an Article 78 proceeding or a plenary action. Green Harbour Homeowners' Ass'n, Inc. v. Town of Lake George Planning Board, 1 AD3d 744 (3rd Dept 2003).

The Article 78 and the plenary action are premised on the same set of alleged facts, which, briefly stated, are as follows:

London Terrace is the owner of a residential housing complex which contains approximately 1,000 rental units ("properties"). London Terrace performed various improvements, which preserved and upgraded its properties. As a result, it was able to apply for, and was eligible to receive, a partial real estate tax abatement benefit as part of the J-51 program.[2] RPTL §489; NYCAC §11-243. The DHPD, which administers the J-51 program, issued two J-51 certificates of eligibility and reasonable cost, both dated

[2]The J-51 program derives from RPTL §489, which authorizes municipalities to exempt from taxation, increases in the assessed value of real property arising from certain alterations or improvements. NYAC §11-243 is the local legislation that provides such tax exemptions in the City. The Rules of the City of New York ("RCNY") §§ 5-01 et seq. implement the local legislation.

January 29, 2003. The certificates granted tax abatements in the aggregate amount of $2,193,400, which were to commence with the 2003/4 tax year.

In general, London Terrace acknowledges that, buildings receiving J-51 benefits are subject to rent regulation for the period in which the benefits are received. 28 RCNY 5-03(f)(1).[3] Notwithstanding the general requirement, at the time that London Terrace applied for and received its J-51 benefits, London Terrace believed, and the DHCR permitted, participating landlords to have particular apartments decontrolled under the luxury de-control provisions of the rent regulation laws. NYCAC §§ 26-504.1 and 26-504.2.[4] In fact , issued Advisory Opinions and promulgated regulations consistent with this interpretation of the J-51 program.

At the time London Terrace applied for J-51 benefits, there were many residential apartments at the properties that had previously become luxury de-controlled. After the J-51 benefits were conferred, London Terrace continued to de-control particular apartments under the luxury decontrol provisions of the rent stabilization laws. The J-51 benefits permitted by the City were mathematically and proportionally reduced on account of the number of de-controlled residential apartments at the properties.

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[3]28 RCNY §5-03(f) provides that all dwelling units in building or structures recieivng J-51 benefits shall be subject to rent regulation pursuant to the City Rent and Rehabilitation Law (Rent Control); or the Rent Stabilization Law of 1969 or the Private Housing finance Law or any federal law providing for rent supervision or regulation by HUD or any other federal agency or the Emergency Tenant Protection Act of 1974.

[4]Since 1993 the Rent Stabilization laws have permitted landlords to deregulate apartments where the regulated monthly rent exceeded a certain amount or where the household income of the tenant exceeded a certain amount. Presently, landlords may charge market rent for previously regulated apartments where the regulated rent is equal to or greater than $2,000 per month and either the apartment is vacant or the combined income of the tenants exceeds $175,000 per annum. NYAC §26-504.

In 2009 the Court of Appeals decided the case of Roberts v. Tishman Speyer Properties, LP, 13 NY3d 270 (2009). In Roberts, *supra*, the Court of Appeals rejected, as a matter of law, that landlords could accept the benefits of the J-51 tax abatement program for a particular property where they were charging market rents for particular apartments that been decontrolled under the luxury decontrol provisions of the rent stabilization laws.

London Terrace alleges that it "would not have applied for J-51 benefits, nor accepted them, if the receipt of J-51 benefits would have required it to re-regulate that apartments that previously had been subject to luxury decontrol, or prevented London Terrace from applying luxury control to additional apartments thereafter." (Pet. ¶24; Complaint ¶24). London Terrace alleges that its financial benefit from participating in the J-51 program is substantially less than the financial detriment of re-regulating apartments that had previously been decontrolled. It argues that it would have been economically irrational for it to have participated in the J-51 program if it knew that it would be required to re-regulate the affected apartments.[5]

After the decision in Roberts v. Tishman Speyer Properties, LP, *supra*. London Terrace wrote to DHPD Commissioner Cestero, seeking to withdraw from the J-51 program *ab initio* and offering to return all of the tax benefits that had been received by it to that point. DHPD refused to permit London Terrace to withdraw from the J-51 program, stating that "[t]he J-51 Program has no provision for voluntary withdrawal."

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[5]There are two putative class actions brought on behalf of tenants and former tenants against London Terrace for rent overcharge as a result of the decision in of Roberts v. Tishman Speyer Properties, LP, *supra*. (Dugan v. London Terrace Gardens, LP [index # 603468/09]; Doerr v. London Terrace Gardens, LP [index# 603696/09]).

These actions ensued.

London Terrace seeks to rescind, nunc pro tunc, its participation in the J-51 program; a declaration that it is not a participant in the J-51 Program, *ab initio*; a determination that the City engaged in misconduct by denying its offer to rescind and denied it due process of law.

The City argues that both the complaint and the petition must be denied because rescission is not available where, as here, there is no underlying contract between the parties; and recision is likewise not available where there is, at most, unilateral mistake. Since rescission is not available, the City argues that the City's refusal to rescind cannot constitute agency misconduct. Finally, the City argues that because the Roberts decision could have been anticipated by London Terrace, there is no violation of any due process rights.

The DHCR separately moves to dismiss the plenary action against it arguing that the issues raised are not ripe, London Terrace has failed to exhaust its administrative remedies, London Terrace has no standing, there is no current case or controversy, there is another action pending, the action is barred by collateral estoppel and London Terrace has failed to name necessary parties.

London Terrace opposes all of the motions to dismiss. Since the City's arguments affect both proceedings and all claims asserted against all named defendants and/or respondents, the court addresses the City's arguments first.

The City first argues that because participation in the J-51 program does not confer any contractual rights, rescission, which is only a contractual remedy, is not available. It further argues that even if rescission were theoretically an available remedy,

it is not available in this case because there was only a unilateral mistake of law.

London Terrace argues that the J-51 Program creates a contract, but even if it does not, rescission is still an available remedy. It argues that there was a mutual, not unilateral mistake of law, making rescission an available remedy.

Notwithstanding London Terrace's arguments to the contrary, the court finds that the J-51 Program does not create any contractual rights between them and the City. The requirements for the formation of a contract are: [1] at least two parties with legal capacity to contract; [2] a meeting of the minds or mutual assent ;and [3] consideration. 2 NY PJI3d 4:1, Comment, (2011) (and authorities cited therein). While a formally executed document is not always necessary for a contract to be proven, the proponent must still prove an intent of the parties to be bound. Kowalchuk v Stroup, 61 AD3d 118 (1st dept. 2009); Moore v. Microsoft, 293 AD2d 587 (2nd dept. 2002). As the Appellate Division of this department stated in the recent decision of Ruane v. Allen-Stevenson School (85 AD3d 615 [2011]):

> "In determining whether the parties entered into a contractual agreement and what its terms were, it is necessary to look to the objective manifestations of the intent of the parties, as evidenced by the totality of their expressed words and deeds. The Court must look to the attendant circumstances, the situation of the parties, and the objectives that they were striving to attain."

In arguing that there is a contract, London Terrace relies on the United States Supreme Court case of State of Indiana ex. rel. Anderson v. Brand, (303 US 95 [1935]). In that case, the Supreme Court found that a legislative enactment regarding tenure of teachers constituted an enforceable contract. In so holding, the court stated:

> "The principle function of a legislative body is not to make contract but to make laws which declare the policy of the state and are subject to repeal when a subsequent Legislature shall determine to alter that policy. Nevertheless, it is established that a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions..."

Construing any legislative enactment as a contract, however, is only permissible when the rule making body evinces an intention to confer contractual rights. Mugavin v. Nyquist, 78 Misc2d 914 (NY Sup. Alb. Co. 1974). At bar, there is no statutory or regulatory language relied upon by London Terrace to demonstrate that when the J-51 Program was enacted, the City intended to create any contractual rights between itself and the participating landlords. There is no language in the State enabling legislation that supports a finding that the permitted tax exemption programs were intended to operate on a contractual basis. Nor has London Terrace referenced any legislative history indicating any such intention. The J-51 program is just that, a program, and no contractual rights are created as a result of a landlord's voluntary participation therein.

As to the remedy requested, rescission generally applies only where the parties have otherwise formed a contract. DaSilva v. Musso, 53 NY2d 543 (1981). The remedy is one of equity (Symphony Space, Inc. v. Pergola Properties, Inc., 88 NY2d 466 [1996]) that can be invoked where there is a mistake made at the same time the contract was made. Gould v. Board of Education, 81 NY2d 446 (1993). The mistake must be substantial and material, such that it goes to the foundation of the agreement. DaSilva v. Musso, *supra*. The mistake must be mutual, unless there is fraud on the part of the other party, in which case, it can be unilateral. Almap Holdings, Inc. v. Bank Leumi Trust Co. of New York, 196 AD2d 518 (2nd dept. 1993).

CPLR § 3005 provides that a remedy shall not be denied merely because the mistake is one of law rather than of fact. Nevertheless CPLR § 3005 does not require that all mistakes of law be equated with mistakes of fact. Instead, the provision removes technical objections in instances where recoveries can otherwise be justified by analogy with mistakes of fact. Symphony Space, Inc. v. Pergola Properties, Inc., *supra*. Where the parties' mistake amounts to nothing more that a misunderstanding of the applicable law, CPLR § 3005 does not direct any undoing of the underlying transaction. Symphony Space, Inc. v. Pergola Properties, Inc., *supra*.

London Terrace argues that rescission is available for non-contractual relationships. While none of the cases it relies upon expressly address the issue of whether rescission applies where there is no contract, each does permit a rescission like remedy in a non-contract setting. See: Gould v. Board of Education, *supra*; Maryland v. Ambach, 79 AD2d 48 (3rd dept. 1989) affd. 59 NY2d 711 (1983). The parties also disagree whether the mistake in this case was mutual or unilateral. Certainly, there is factual evidence to support a conclusion that the City and the DHCR labored under the same mistaken interpretation of the applicable law as did London Terrace. Therefore, the court cannot find at this time, that as a matter of law, the mistake was unilateral.

Even were rescission available in non-contract matters, and even were the mistake mutual, the court finds, however, that rescission is still not available under the facts alleged in these actions. The mistake here is only a misunderstanding of applicable law. In Roberts v. Tishman- Speyer, *supra*, the Court of Appeals expressly held that its interpretation of the applicable statutory language, precluding luxury decontrol to J-51 program participants, required no particular agency expertise, but

flowed from the "natural" reading of the statutory language. This type of mutual misunderstanding regarding the applicable law, according to Symphony Space, Inc. v. Pergola Properties, Inc., *supra*., does not support the "undoing of the [underlying] transaction." Indeed, there is authority that even had the parties agreed to retroactively rescind London Terrace's participation in the J-51 Program, it would have been of no force and effect. See: Independence Plaza North Tenant's Association v. Independence Plaza, 29 Misc3d 868 (NY Sup Ct. NY Co. 2010).

The court holds that London Terrace's claims for recession must fail. In this regard the due process claim also fails, because the Court of Appeals decision in Roberts v. Tishman Speyer Properties, LP, *supra*, was not a new law but instead an interpretation of existing law. See: Roberts v. Tishman Speyer Properties, LP , NY Sup Ct., NY Co. Index #100956/07, Order dated July 30, 2010. Consequently the decision was not tantamount to a governmental taking of London Terrace's property that requires due process

In view of the court's conclusion that London Terrace has failed to state a cause of action against any defendant and/or respondent in either action, the court need not reach the DHCR's collateral reasons to dismiss the case only as to it.

In view of the court's conclusion that London Terrace has failed to state a cause of action against any defendant and/or respondent, its motion, in the Article 78 proceeding, to amend the petition to include the DHCR as a party is denied,

Conclusion

In accordance herewith, it is hereby:

ORDERED that the Article 78 petition (mot seq no. 1, index # 109121/10) is

dismissed, and it is further

ORDERED that the City of New York and New York City Department of Housing Preservation and Development's motion to dismiss the Article 78 petition (mot seq no. 2, index # 109121/10) is granted, and it is further

ORDERED that petitioner, London Terrace Garden PC's motion to amend the petition (mot seq no. 3, index # 109121/10) is denied, and it is further

ORDERED that the City of New York and New York City Department of Housing Preservation and Development's motion to dismiss the plenary action (mot seq no. 1, index # 109122/10,) is granted and the action is hereby dismissed in its entirety and it is further

ORDERED that the City of New York and New York City Department of Housing Preservation and Development's second motion to dismiss the plenary action (mot seq no. 2, index # 109122/10) is denied as duplicative, and it is further

ORDERED that New York State Division of Housing and Community Renewal's motion to dismiss is denied as moot, and it is further

ORDERED that any requested relief not hereby expressly granted is denied, and that this constitutes the decision and order of the court.

Dated: New York, NY
May 5, 2011

SO ORDERED:

J.G. J.S.C