

**Matter of East 77th Realty, LLC v New York State
Div. of Hous. & Community Renewal**

2011 NY Slip Op 32594(U)

October 4, 2011

Supreme Court, New York County

Docket Number: 103776/2011

Judge: Joan B. Lobis

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

PRESENT: Joan B. LoSis
Justice

PART 6

Index Number: 103776/2011
EAST 77TH REALTY, LLC
vs
NEW YORK STATE D.H.C.R.
SEQUENCE NUMBER: 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 8/10/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for _____

Palmer
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
1-7
8-11
12

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION
of Order

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/4/11

JBL
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

-----X
In the Matter of the Application of
East 77th Realty, LLC

Petitioner,

Index No. 103776/11

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

Decision, Order, and Judgment

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL,

Respondent.

UNFILED JUDGMENT
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-----X
JOAN B. LOBIS, J.S.C.:

Petitioner East 77th Realty, LLC (the "LLC") brings this proceeding under Article 78 of the C.P.L.R., seeking an order compelling respondent New York State Division of Housing and Community Renewal ("DHCR") to issue an order on a petition brought by the LLC in 2004 to deregulate a rent stabilized apartment due to the tenant's high income (the "DCHR Petition"). For the reasons set forth below, the petition is denied.

The LLC owns a building located at 500 East 77th Street in Manhattan; the apartments therein are subject to the Rent Stabilization Code. On May 4, 2004, the LLC commenced the DCHR Petition to deregulate apartment numbers 2017 and 2018 (collectively the "Apartment"), which are occupied as a single household by James A. Power, the tenant of record, and his roommate, Richard Hastings. The LLC alleged that in the two years prior to the commencement of the proceeding, Mr. Power and Mr. Hastings were earning annual incomes in excess of \$175,000, thereby making the Apartment no longer subject to rent regulation. Mr. Power responded to the DHCR Petition and admitted that Mr. Hastings was his roommate and occupied the Apartment as

a primary residence. In a subsequent submission, Mr. Power denied that Mr. Hastings occupied the Apartment as his primary residence in the two year period prior to the filing of the DHCR Petition. On November 9, 2004, the LLC requested that DHCR verify the incomes of Mr. Power and Mr. Hastings through the New York State Department of Taxation and Finance ("DTF"). On or about June 24, 2005, DHCR submitted only Mr. Power's name to the DTF. The DTF found that Mr. Power's income in 2002 did not exceed \$175,000.

By order dated July 28, 2005, a rent administrator for DHCR denied the DHCR Petition, finding that Mr. Hastings did not occupy the Apartment as his primary residence and that the verified income for Mr. Power did not exceed \$175,000 in 2002. The LLC filed a petition for administrative review ("PAR") to challenge the July 28, 2005 order. On March 1, 2006, the PAR was granted, with the Deputy Commissioner of DHCR finding that Mr. Hastings did occupy the Apartment as his primary residence in 2004 and therefore his income should have been considered in the evaluation of the DHCR Petition. The Deputy Commissioner remanded the DHCR Petition for the purpose of determining Mr. Hasting's income.

On or about March 6, 2006, the parties were notified that the DHCR Petition would be reopened and that "[u]nder separate cover, the tenant . . . will be requested to provide specific documents as to enable the (DTF) to verify the total annual income for 2002 and 2003." (Emphasis in original). Apparently, that request was never issued. In or about April 2006, Mr. Power and Mr. Hastings brought a special proceeding by order to show cause, returnable before the Hon. Charles J. Tejada of the New York Supreme Court, Civil Term, for a writ of prohibition to prevent DHCR from processing the DHCR Petition. By decision dated March 6, 2007, Justice Tejada denied the

petition on the grounds that DHCR had the authority to seek Mr. Power's and Mr. Hastings' tax statements. The decision was upheld by the Appellate Division, First Department. See In re Power v. New York State Div. of Hous. and Cmty. Renewal, 61 A.D.3d 544 (1st Dep't 2009). The Court of Appeals denied leave to appeal. See 13 N.Y.3d 716 (2010).

According to DHCR, on or about June 28, 2011, it requested for the second time that year that Mr. Hastings provide it with "information needed . . . to assist DTF in locating his tax information," including New York State tax records. Mr. Hastings has yet to respond to the request. According to a letter to DHCR sent by counsel for Mr. Power dated June 9, 2011, Mr. Hastings was not able to provide a "notarized statement" to DHCR as of the date of the letter due to his HIV positive status and attendant deteriorating health. It is not clear why Mr. Hastings needed a notarized statement. Counsel then requested a ninety day extension to provide the records. It is not clear if DHCR granted the request. DHCR acknowledges that it has "received allegations that [Mr. Hastings] is not medically disabled . . . and has been witnessed bringing in groceries, luggage, and other heavy objects onto the premises." The DHCR Petition has still not been adjudicated.

The LLC brings this proceeding for a writ of mandamus compelling the DHCR to issue an order on the DHCR Petition. "[A] mandamus to compel may not force the performance of a discretionary act, but rather only purely ministerial acts to which a clear legal right exists." In re Anonymous v. Comm'r of Health, 21 A.D.3d 841, 842 (1st Dep't 2005). In a mandamus action, the court may "compel acts that officials are duty-bound to perform, regardless of whether they may exercise their discretion in doing so." Klostermann v. Cuomo, 61 N.Y.2d 525, 540 (1984). An agency's failure to comply with statutory time lines warrants mandamus relief. See, e.g., In re Rhino

Assets, LLC v. New York City Dep't for Aging, 31 A.D.3d 292 (1st Dep't 2006); Mamaroneck Beach & Yacht Club, Inc. v. Frajoli, 24 A.D.3d 669 (2d Dep't 2005).

Under Rent Stabilization Code ("RSC") (9 N.Y.C.R.R.) § 2531.4, when an owner begins a proceeding to deregulate due to high income, "[w]ithin 20 days of filing such request . . . the DHCR shall notify the tenants . . . [that they] must provide the DHCR with such information as the DHCR and the DTF shall require to verify whether the total annual income exceeds . . . \$175,000 [in the two proceeding calendar years]." The tenants have sixty (60) days to respond to the notice. Id. On or before November 15 of the year that DHCR obtains the DTF's determination of the tenant's income, DHCR is required to notify the tenant and the owner of the DTF's determination. RSC § 2531.5. The tenant and the owner then have thirty (30) days "to comment on such verification results." Id. "Within 45 days after the expiration of the comment period, the DHCR shall, where appropriate, issue an order [deregulating the apartment]." Id. Where the tenant fails to provide his or her income information, "DHCR shall, on or before the next December 1st, issue an order providing that such housing accommodation is not [rent regulated]." RSC § 2531.6.

The LLC asks this court to issue an order compelling DHCR to decide the DHCR Petition on the grounds that DHCR was statutorily required to render a decision on the matter by December 2006, the year in which the matter was remanded to the rent administrator. The LLC asserts that it has been unfairly prejudiced by DHCR's inaction. DHCR answers and asserts that it has been actively processing the DHCR Petition. It blames the litigation brought by Mr. Power and Mr. Hastings for the delay. DHCR also seems to blame some delay on DTF even though there is no indication that DTF has become involved in the DHCR Petition. DHCR also asserts that the agency's

work load must be taken into account by the court, but there is no specific information on the nature of the work load. DHCR further maintains that Mr. Power's and Mr. Hastings' time to respond to the request for income information has not expired since the request was not sent until 2011. In reply, the LLC argues that respondent should decide the DHCR Petition immediately because Mr. Hastings has no intention of submitting the required information.

While DHCR should have requested income information from Mr. Hastings in 2006 (the year that the DHCR Petition was remanded), Mr. Power and Mr. Hastings should not be adversely affected with a default order of deregulation due to DHCR's inaction up until the year 2011, *no matter how unreasonable*. Under the present circumstances pursuant to the RSC, Mr. Power and Mr. Hastings had sixty days from June 28, 2011 (the date in which DHCR requested information regarding their income), to submit the required information. See RSC § 2531.4. Even if the information was not submitted by that point, DHCR is not required to issue an order of deregulation until December 1, 2011. See RSC § 2531.6. Although the LLC argues that Mr. Hastings is unwilling to submit the required information on his income, by the clear language of the statute, it is in DHCR's discretion to issue an order of deregulation prior to December 1, 2011. Id. Thus, the writ of mandamus does not lie. New York Civil Liberties Union v. State, 4 N.Y.3d 175, 184 (2005). Accordingly, it is hereby

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

Dated: Oct. 4, 2011

UNFILED JUDGMENT

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JOAN H. LOBIS, J.S.C.