

Matter of 2131 Clinton Ave. Hous. Dev. Fund Corp. v Wambua
2012 NY Slip Op 30007(U)
January 3, 2012
Supreme Court, New York County
Docket Number: 101034/11
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

ALICE SCHLESINGER

PART **IA** PART 16

PRESENT:

Index Number : 101034/2011

2131 CLINTON AVENUE HOUSING

vs

CESTERO, RAFAEL E.

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 petition is denied and the proceeding is dismissed in accordance with the accompanying memorandum decision. **FILED**

JAN 05 2012

NEW YORK COUNTY CLERK'S OFFICE

JAN 03 2012

Dated: January 3, 2012

Alice Schlesinger
ALICE SCHLESINGER *v.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
COUNTY OF NEW YORK

-----X
In the Matter of the Application of

Index No. 101034/11
Motion Seq. No. 001

2131 Clinton Avenue Housing Development Fund Corporation, Eduardo Gonzalez, Jr., Audrey A. Warren, Julia Picart, Marisol Ortiz, Parker Coleman, Thomas Molyneaux, Marcia Brown, Rosetta Glover, Rosalyn McMullin Fred Coleman, Michelle Bell, Helena Hilton, Lynette Dixon, Carmen Martinez, Ramon Quinones & Doreth Jackson,

Petitioners,

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

-against-

Matthew Wambua, as Commissioner of New York City Department of Housing Preservation and Development,

Respondent.
-----X

FILED

JAN 05 2012

NEW YORK
COUNTY CLERK'S OFFICE

SCHLESINGER, J.:

At issue in this Article 78 proceeding is an individual determination dated September 28, 2010 and an amendment to the Rules of the City of New York of the same general substance effective the following month on October 23, 2010. Both bar a cooperative corporation formed by a Housing Development Fund Corporation (HDFC) from applying for the Third Party Transfer program sponsored by the City's Department of Housing Preservation and Development (HPD) if the property is the subject of an *in rem* foreclosure proceeding based on unpaid taxes. Petitioners challenge the determination and the amendment as arbitrary and capricious and violative of various rules and regulations. HPD counters that the disputed amendment is rationally based on the need to transfer tax delinquent buildings in poor condition from irresponsible property owners to responsible third parties so as to maintain the properties and avoid

the displacement of low-income families. HPD further insists that the new rule conforms to all procedural and substantive requirements of law.

Background Facts

Petitioner 2131 Clinton Avenue Housing Development Fund Corporation is a low-income housing cooperative corporation that owns the subject building located at 2129-2131 Clinton Avenue, Bronx, NY. The cooperative was formed in June of 1991 after the rental tenants in possession at that time successfully participated in HPD's Tenant Interim Lease (TIL) program, a program that enabled tenants in distressed City-owned buildings to become the owners of their building. The building consists of 31 units, only 18 of which are occupied. Of those 18, 17 are occupied by shareholders, including the individual petitioners here, and one is occupied by a rental tenant.

The subject dispute involves the Third-Party Transfer Program (TPT), which the City created in 1997. Under the TPT Program, HPD works with the New York City Department of Finance to transfer tax-delinquent buildings in poor condition from irresponsible owners to new owners who will repair the building and provide safe, affordable apartments to current and new tenants. The eligible buildings are identified based on *in rem* foreclosure actions, which allow the City to obtain a judgment against the owner based on unpaid taxes pursuant to Chapter 4, Title 11, of the Administrative Code. A judgment in such a foreclosure action authorizes the transfer of the property to either a third party or the City.

Section 11-412.1 of Title 11 gives HPD broad authority to establish specific criteria for the selection of suitable third parties who may become owners under the TPT Program. Included in the section are general criteria that shall be included, such as

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residential management experience, financial ability, rehabilitation experience, ability to work with government and community organizations, neighborhood ties, and evidence that the third party is "a responsible legal tenant, not-for-profit organization or neighborhood-based-for-profit individual or organization."

Pursuant to that grant of authority, HPD promulgated RCNY §8-03, which sets forth the qualifications for future owners under the TPT Program. As particularly relevant here, subdivision (c)(2) of that section indicates generally that an entity that owes taxes or other governmental charges, or is the subject of a lien foreclosure proceeding, is not eligible to assume ownership under the TPT Program. Subdivision (d)(9)(iii) of that same section — in effect before the disputed amendment was promulgated — contains no such prohibition, simply authorizing tenant-based applications for third party ownership where:

- (A) the foreclosed property contains at least 10 residential units,
- (B) such property is at least 50 percent occupied; and
- (C) the application is signed by 60% of the Tenant households of such property.

On July 30, 2010, HPD published in the City Record various proposed amendments to the above-stated rule that sets eligibility requirements for tenant-based applications. Those amendments were adopted effective October 23, 2010 after a public hearing that no one attended. They increased from 60% to 80% the percentage of existing tenants who must consent to the transfer of the building. As significant here, the amendment added a bar precluding tax-delinquent tenant-shareholders of a cooperative-based HDFC in foreclosure from submitting tenant-based applications, stating:

Such application [i.e., tenant-based applications] shall only be considered where ... such property was not owned by a cooperative corporation formed by a Housing Development Fund Corporation when the foreclosure proceeding commenced.

This amendment was similar to subdivision (c)(2) discussed above that states generally that an entity that is the subject of a tax lien foreclosure proceeding is not eligible for the TPT program. The disputed amendment simply applied this general rule directly and specifically to HDFC owners like the petitioner herein.

When the petitioners here sought to apply for the TPT program in the Fall of 2010, their record was a poor one. When the cooperative corporation was formed in 1991, the tenants purchased the shares allocable to their respective apartments for the nominal sum of \$250. Within a year, the cooperative failed to fully pay property taxes and water and sewer charges. A pattern of partial payment or nonpayment continued throughout the years, resulting in an accumulated debt to the City of \$1,303,948 by 2011. Even worse, the cooperative failed to maintain the property; as of May 2011, the building had ten open immediately hazardous Class C violations, forty-two hazardous Class B violations, and three non-hazardous Class A violations.

Due to the substantial tax arrears, the City notified petitioners on November 2, 2007 that it intended to foreclose on the property if the situation was not rectified. The petitioners did not enter into a payment plan or otherwise act. Thus, the City commenced an *in rem* foreclosure action in January of 2008. In August 2010, the City notified the petitioners that it was seeking a judgment of foreclosure. The court issued the judgment the following month, on September 28, 2010. By letter dated October 19, 2010, the City notified petitioners that the judgment had been entered and that the building would be conveyed to a third party if the arrears were not addressed by a payment plan or otherwise within four months.

Shortly before sending that October letter regarding the judgment, HPD sent petitioners the letter at issue herein. In that letter, dated September 28, 2010, HPD provided additional details about the TPT program. As particularly relevant here, the letter also indicated that occupants of an HDFC cooperative may not apply if the building was the subject of an *in rem* proceeding.

Despite this information, petitioners partnered with the Urban Homesteading Assistance Board (UHAB) and submitted a tenant-based application on or about January 24, 2011 and simultaneously commenced this Article 78 proceeding. By letter dated February 16, 2011, HPD notified UHAB that it would not consider the application because the building was owned by a cooperative corporation formed by an HDFC when the foreclosure proceeding commenced. Soon thereafter, on or about March 15, 2011, HPD proposed to the City Council that the building be transferred to Neighborhood Restore, a third party of its choice. While the Council did not oppose the proposed transfer, it was not completed due to the automatic stay resulting from the bankruptcy filing of Neighborhood Restore.

Discussion

Petitioners claim that HPD's decision and the related amendment are arbitrary and capricious in that they deprive a particular category of tenants of the right to participate in the TPT program without any sound basis in public policy and without allowing consideration of any mitigating circumstances that may apply to a particular group of tenants. For example, petitioners claim that they should be given the opportunity to demonstrate that it was the prior Board, rather than the current one, that allowed the cooperative to accumulate such serious arrears.

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The claim is unavailing. As respondents assert, the rule is wholly consistent with the public policy of preserving safe housing for low-income residents by limiting ownership to responsible parties. Those who allow substantial debt to accumulate over a period of years, despite repeated offers and opportunities to address the problem, are appropriately considered irresponsible. Further, residents will not be penalized by the policy as they will be allowed to remain in their apartments as rent-stabilized tenants with affordable rents.

Here, the building has been in financial distress for a period of about twenty years. The City notified the cooperative of its intent to foreclose based on unpaid taxes as early as 2007, some four years ago, and of an opportunity to take steps to avoid that action. No action having been taken, the City commenced foreclosure proceedings in January 2008. The cooperative was well aware of the continuing proceedings, including the entry of a judgment in 2010, yet did not act to resolve the financial problems. These facts undeniably support a finding that the HDFC is an irresponsible owner, even if the individual petitioners were not themselves in control of the Board for the entire time.

Similarly unavailing is petitioners' claim that HPD deprived them of due process of law by depriving them of a property interest in their homes as tenant-shareholders. A public benefit or entitlement does not constitute a protectable property interest under federal or state law if the benefit is discretionary. *See, e.g., Town of Castle Rock v Gonzales*, 545 U.S. 748 (2005); *Alliance of American Insurers v Chu*, 77 NY2d 573 (1991). The TPT program does not create a property interest, as HPD has broad discretion to select responsible third parties to assume ownership of distressed buildings pursuant to the criteria set forth in Administrative Code § 11-412.1 quoted

above. Further, as previously discussed, RCNY §8-03 in effect before the disputed decision and amendment expressly states in general terms that an entity that is the subject of a lien foreclosure proceeding is not eligible for the TPT program.

Nor can it be said that the amendment deprives petitioners of equal protection based on the alleged disproportionate impact on people of color. Clearly, the amendment does not target a particular group based on race. It applies to all similarly situated individuals residing in tax-delinquent buildings, regardless of race.

Regarding petitioners' contention that HPD failed to comply with the requirements of the City Administrative Procedure Act, the Uniform Land Use Review Procedure, and other governing rules and regulations. HPD has demonstrated substantial compliance, and petitioners have failed to produce evidence to rebut that showing.

Petitioners' last claim seeking damages based on their purported detrimental reliance on a false representation made by HPD cannot proceed due to petitioners' failure to file a notice of claim. Petitioners do not suggest otherwise.

In sum, HPD's decision to deny petitioners' application to participate in the Third Party Transfer program was reasonable and rational, and the petition fails to raise any meritorious claim.

Accordingly, it is hereby

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

Dated: January 3, 2012

FILED

JAN 03 2012

JAN 05 2012

NEW YORK
COUNTY CLERK'S OFFICE



J.S.C.

ALICE SCHLESINGER