

**1214 Sheridan Realty LLC v New York City Hous.
Auth.**

2012 NY Slip Op 31919(U)

July 16, 2012

Supreme Court, New York County

Docket Number: 107427/2011

Judge: Saliann Scarpulla

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

SALIANN SCARPULLA

PRESENT: _____

PART 19

Index Number : 107427/2011
1214 SHERIDAN REALTY LLC.
 VS.
NYC HOUSING AUTHORITY
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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: 7/16/12

Saliann Scarpulla
SALIANN SCARPULLA

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: CIVIL TERM: PART 19

----- X
IN THE MATTER OF THE APPLICATION OF
1214 SHERIDAN REALTY LLC,

Petitioner,

Index No.: 107427/2011
Submission Date: 06/24/2011

- against-

NEW YORK CITY HOUSING AUTHORITY,

**DECISION, ORDER AND
JUDGMENT**

Respondent.

----- X
For Petitioner:
Bruce M. Scheiner
Cohen Hurkin Eherenfeld
Pomerantz & Tenenbaum, LLP
25 Chapel Street, Suite 705
Brooklyn, NY 11201

For Respondent:
Kelly D. MacNeal
Acting General Counsel
New York City Housing Authority
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UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon until the party obtains entry, counsel or authorized representative appear in person at the Judgment Clerk's Desk (Room 141B).

Papers considered in review of this petition:

Petitioner's Verified Petition	1
Supplemental Affirmation in Support of Petition	2
Respondent's Verified Answer	3
Supplemental Affirmation in Support of the Housing Authority's Verified Answer	4

HON. SALIANN SCARPULLA, J.:

Petitioner 1214 Sheridan Realty LLC ("Sheridan") brings this Article 78 proceeding challenging respondent New York City Housing Authority's ("NYCHA") March 1, 2011 suspension of Section 8 benefits for 1214 Sheridan Avenue, apartment number 5-B, Bronx, New York 10456 (the "apartment"). Sheridan alleges that the suspension is arbitrary and capricious, not supported by the record, and without a basis in

law or fact. Sheridan requests an order directing NYCHA to both reinstate the Section 8 rent subsidy for the apartment effective March 1, 2011, and to pay Sheridan the monthly Section 8 rent subsidy for the apartment from March 1, 2011, up to and including the date on which the Court makes a determination in this matter.

Sheridan, the apartment's owner and landlord, participates in the federal Section 8 rent subsidy program administered by NYCHA. The monthly subsidy is subject to the landlord's compliance with minimum housing quality standards ("HQS") as established by federal law. A landlord's failure to comply with the minimum HQS results in a suspension of subsidy payments.

On January 12, 2011, NYCHA staff inspected the apartment and found eight "serious" HQS violations. Among these violations were a leak and a hole in the ceiling of the living room, "buckling" and "bulging" of the ceiling in one of the bedrooms, and "chipping" and "peeling" on the window sill in the kitchen.

On January 13, 2011, NYCHA mailed Sheridan a written notice of failed inspection ("NE-1 form") ordering Sheridan to repair all HQS violations. The NE-1 form indicated that Sheridan's failure to correct the listed violations would result in a subsidy suspension effective February 11, 2011, unless Sheridan properly notified NYCHA that it had taken the appropriate corrective measures. The NE-1 form listed three available options for Sheridan to resolve the HQS violations within twenty days after the inspection date. Sheridan could (1) notify NYCHA's inspection unit by telephone that the repairs had been completed, (2) submit a Certification of Completed Repairs form ("CCR form") without the tenant's signature, whereby NYCHA would re-inspect the apartment on

February 7, 2011, or (3) submit a CCR form with both the landlord's and the tenant's signatures, whereby re-inspection would not be required and the subsidy would continue, or be reinstated if already suspended.

Sheridan submitted to NYCHA a CCR form signed by both Sheridan's managing agent and the tenant on January 26, 2011, indicating that all serious HQS violations had been rectified. However, NYCHA determined that re-inspection of the apartment was still necessary. NYCHA re-inspected the apartment on February 1, 2011, and determined that it again failed inspection. The NE-1 form dated February 7, 2011 indicates that, upon re-inspection, the hole in the bedroom ceiling and the "chipping" and "peeling" kitchen window sill had not been repaired. The NE-1 form alerted Sheridan that NYCHA would suspend its Section 8 subsidy payment on March 3, 2011 unless Sheridan notified NYCHA that the HQS violations were rectified.

NYCHA inspected the apartment again on February 25, 2011, and found that Sheridan had not corrected the violations relating to the bedroom ceiling and the kitchen window sill. NYCHA mailed another NE-1 form to Sheridan on March 16, 2011, indicating that the HQS violations in the apartment continued, and that it would suspend the Section 8 subsidy on March 27, 2011 if Sheridan did not notify NYCHA that the repairs were complete.

NYCHA suspended Sheridan's Section 8 subsidy for the apartment effective February 11, 2011 because it asserts that it never received confirmation from Sheridan that the repairs had been made.

Sheridan commenced this Article 78 proceeding on or about June 22, 2011, by filing a verified petition seeking a reversal of NYCHA's suspension of the Section 8 subsidy for the apartment because the decision was arbitrary and capricious.

In its answer, NYCHA denies all of the material allegations contained in the verified petition and asserts that Sheridan's Section 8 subsidy suspension was justified by both federal law and the Housing Assistance Payments Contract between NYCHA and Sheridan. Additionally, NYCHA asserts that the Court should dismiss Sheridan's petition because it fails to allege a cause of action pursuant to Public Housing Law ("PHL") § 157(1).

At oral argument on May 9, 2012, petitioner asserted that it had not received the NE-1 forms dated February 7, 2011 and March 16, 2011. The Court adjourned the proceeding until May 30, 2012 and allowed the parties to submit additional documentation. Therefore, Sheridan submitted a supplemental affirmation in support of its petition, along with an affidavit by its managing agent, Eli Abbott ("Abbott"). Abbott states that he never received the February 7, 2011 and March 16, 2011 NE-1 forms.

Sheridan further asserts that the CCR form it faxed to NYCHA on January 26, 2011 satisfies the notice requirement of PHL § 157(1) with regard to presentation of the demand or claim to NYCHA. Sheridan maintains that this form put NYCHA on notice that Sheridan was in compliance with its obligations and entitled to the continuation of subsidy payments. Sheridan also argues that it alleged compliance with the notice requirement in paragraph 7 of its verified petition.

NYCHA contends in its supplemental affirmation in support of its verified answer that Sheridan's failure to properly serve a notice of claim on NYCHA's designated recipient of service is fatal to its cause of action. NYCHA also asserts that the February 7, 2011 and March 16, 2011 NE-1 forms were properly mailed to Sheridan. In support, NYCHA provided the affidavit of Joseph LaMarca ("LaMarca"), NYCHA's Deputy Director of the General Services Department, who attests that NYCHA's regular business practice was to deliver to the United States Postal Service all batch-printed letters generated by NYCHA, such as the NE-1 forms sent to Sheridan, within three business days of being printed.

Additionally, NYCHA asserts that it is barred by federal law from making Section 8 subsidy payments from February 1, 2011 through August 15, 2011 because the apartment was not in compliance with the federal HQS during that period. It should be noted, however, that the subsidy was reinstated effective October 1, 2011, following a passed inspection on August 15, 2011. As of May 25, 2012, NYCHA was to retroactively apply a credit for the apartment for the period between August 15, 2011 and October 1, 2011, effective June 1, 2012.

Discussion

A failure to allege compliance with the notice of claim requirement of PHL § 157(1) in a verified petition mandates dismissal of that petition. *Leon v. New York City Hous. Auth.*, 214 A.D.2d 455, 455 (1st Dep't 1995). While generally not required in an Article 78 proceeding, pursuant to PHL § 157(1), a notice of claim is required in every proceeding against NYCHA, including those for equitable relief or money damages.

Matter of BRG 3715 v. New York City Hous. Auth., 2012 N.Y. Slip Op 30656U, at *7-8 (Sup. Ct. N.Y. Co. Mar. 15, 2012). PHL § 157(1) requires a notice that “at least thirty days have elapsed since the demand . . . upon which such action . . . is founded were presented to the authority for adjustment or payment thereof for thirty days after such presentment.”

Here, Sheridan’s failure to comply with the notice and pleading requirement of PHL § 157(1) mandates dismissal of its verified petition. *Kovachevich v. N.Y. City Hous. Auth.*, 295 A.D.2d 255, 255 (1st Dep’t 2002); *Leon*, 214 A.D.2d 455 at 455. Sheridan argues that it alleged compliance with PHL § 157(1)’s notice requirement in Paragraph 7 of its verified petition.¹ However, this paragraph refers solely to NYCHA’s suspension of Section 8 subsidy payments for the apartment on March 1, 2011 after receiving Sheridan’s completed CCR form. Such a statement does not amount to an allegation of timeliness and presentment of Sheridan’s claims. As this form does not constitute notice to NYCHA, the petition must be dismissed. *See Kovachevich*, 295 A.D.2d at 255 (action dismissed because plaintiff failed to comply with the notice and pleading requirements in PHL § 157).

“[T]he purpose of the notice of claim [requirement] is to give a municipal authority the opportunity to investigate” the claim against it. *Goodwin v. New York City Hous. Auth.*, 42 A.D.3d 63, 68 (1st Dep’t 2007) (internal citations omitted). Sheridan’s

¹ Paragraph 7 states only “[d]espite the timely submission of Exhibit ‘B’ [the completed CCR form], the Section 8 subsidy Housing Assistance Payments for this apartment was [*sic*] suspended as of March 1, 2011, and continued to be suspended to date.”

CCR form does not reference any submittal of a complaint against NYCHA, nor does it put NYCHA on notice of any claim or demand upon which Sheridan's action could be founded. The CCR form does not give NYCHA the opportunity to investigate the claim against it as the CCR form neither requests, nor does it offer reasons for, reinstatement of the Section 8 subsidy and retroactive payments of the subsidy from the date it was suspended. Furthermore, routine correspondence similar to Sheridan's CCR forms has been found to be insufficient to constitute a notice of claim. *See Rosenbaum v. City of New York*, 8 N.Y.3d 1, 11-12 (2006) (holding that a letter from a plaintiff or an attorney to a city agency that "suggest[s] that unmet demands might lead to litigation" does not constitute notice of claim); *Solomon Burke Corp. v. New York City Hous. Auth.*, 2010 NY Slip Op 33366U at *6 (Sup. Ct. N.Y. Co. Dec. 8, 2010) (holding that a letter from plaintiff to NYCHA addressing concerns regarding NYCHA's Section 8 payments does not constitute notice of claim).

Furthermore, Sheridan did not serve the completed CCR form on NYCHA's General Counsel, its authorized recipient of service. Therefore, even were the CCR form sufficient to constitute notice, the verified petition would be dismissed for a failure to serve a notice of claim on NYCHA. *Trio Bronx, Inc.*, 2009 N.Y. Slip Op 32506U, at *6 (Sup. Ct. N.Y. Co. Oct. 29, 2009).

Additionally, LaMarca's affidavit establishes a presumption that the February 7, 2011 and March 16, 2011 NE-1 forms were properly mailed by NYCHA and received by Sheridan. *See Burr v. Eveready Ins. Co.*, 253 A.D.2d 650, 651 (1st Dep't 1998) ("Testimony as to an office practice or procedure in the regular course of business is

sufficient to establish a presumption of mailing and receipt.”). To rebut this presumption, Sheridan “must go beyond mere denial of receipt and actually demonstrate that . . . routine office practice was *not* followed, or was ‘so careless that it would be unreasonable to assume that the notice was mailed.’” *Id.* (quoting *Nassau Ins. Co. v. Murray*, 46 N.Y.2d 828, 830 (1978)) (emphasis in original). Here, Sheridan has put forth no evidence that NYCHA’s regular business practice of mailing out NE-1 forms was not followed, or that this practice was careless in any way. Consequently, Abbott’s affidavit asserting that these forms were never received is insufficient to rebut the presumption established by LaMarca’s affidavit that the February 7, 2011 and March 16, 2011 NE-1 forms were properly mailed and received.

In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that the petition of 1214 Sheridan Realty LLC to direct respondent New York City Housing Authority to reinstate and retroactively pay Sheridan the monthly Section 8 subsidy for 1214 Sheridan Avenue, apartment 5-B, Bronx, New York 10456 as of March 1, 2011, is denied. The petition is dismissed and the Clerk of the Court is directed to enter judgment accordingly.

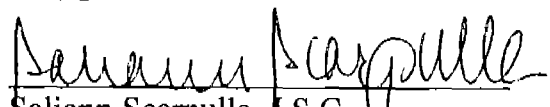
This constitutes the decision, order and judgment of the Court.

Dated: New York, New York
July 16 2012

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).

ENTER:


Saliann Scarpulla, J.S.C.