

Matter of 721-735 Walton/Gerard, LLC v Rhea

2013 NY Slip Op 30139(U)

January 23, 2013

Sup Ct, New York County

Docket Number: 102863/2012

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUAN B. LOBIS
Justice

PART 6

Index Number : 102863/2012
721-735 WALTON/GERARD LLC
vs.
RHEA, JOHN B.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 10/26/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to 21, were read on this motion to for Art 78 Petition.

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Petition No(s) 1-3

Answering Affidavits — Exhibits _____ No(s) X-mot: 4-9

Replying Affidavits _____ No(s) 10-14

X-mot reply: 15-21

Upon the foregoing papers, it is ordered that this motion is

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

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

JAN 25 2013

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/23/13

JUAN B. LOBIS, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X

In the Matter of the Application of
721-735 WALTON/GERARD, LLC,

Petitioner,

Index No. 102863/2012

-against-

Decision, Order, and Judgment

JOHN B. RHEA, as Chairperson of the
New York City Housing Authority, and the
NEW YORK CITY HOUSING AUTHORITY,

Respondents,

MARIAM FIGUEROA,

Co-Respondent.

-----X

JOAN B. LOBIS, J.S.C.:

FILED

JAN 25 2013

NEW YORK
COUNTY CLERK'S OFFICE

721-735 Walton/Gerard, LLC, petitions under Article 78 of the Civil Practice Law

and Rules for an order mandating the Respondents to retroactively pay the Petitioner for Section 8 rent subsidies to which it claims it is entitled. Prior to answering the petition, Respondents cross-move to dismiss under C.P.L.R. Rule 3211(a)(5) and (a)(7) on the grounds that the proceeding is barred by the statute of limitations and the petition fails to state a cause of action. For the following reasons, the cross-motion to dismiss is granted, and the petition to compel payment is dismissed.

The facts as related are derived from the record in this case and related in the light most favorable to Petitioner as the non-moving party to Respondents' cross-motion to dismiss. On August 29, 2011, Apt. E-12 at the premises of 735 Walton Avenue of Bronx, New York, failed inspection by the Respondent New York City Housing Authority (NYCHA). The inspection, which

was conducted pursuant to a Housing Assistance Payments Contract between Petitioner 721-735 Walton/Gerard, LLC and NYCHA, revealed several serious violations including windows that did not stay up, a missing bedroom door and a smoke detector that was out of order. In exchange for rental subsidies under the federal Section 8 program, which at the time of inspection were in the amount of \$1140.50 monthly, the Petitioner had agreed with NYCHA to maintain the contract unit and premises in accordance with the Section 8 Program's Housing Quality Standards (HQS). The violations noted were all considered serious HQS violations.

Petitioner promptly corrected these violations and notified NYCHA. The record is inconsistent whether Petitioner notified NYCHA by telephone, as the affidavit of the building manager, Arthur Green, attests, or whether Petitioner submitted written certifications by the Landlord and tenant, Respondent, Mariam Figueroa, as the verified petition relates. Either way, that notification prompted NYCHA to either reinspect the unit to verify compliance or assuming it received written certifications, to verify compliance through acceptance of those certifications. Petitioner had the burden of certifying and obtaining verification of repairs within 30 days after notification of the violations before rent subsidies would be suspended. NYCHA failed to act in response to Petitioner's attempts to avoid suspension of its subsidy and Petitioner's last subsidy from NYCHA for the unit was received on September 1, 2011.

On March 27, 2012, Petitioner made and served a notice of claim on Respondents. More than 30 days after that notice, on June 1, 2012, it filed the petition in this proceeding and is seeking over \$6,000 in subsidy payments. Respondents cross-moved pursuant to C.P.L.R. Rule

3211(a)(5) and (a)(7) to dismiss the petition as barred by the statute of limitations and for its failure to state a cause of action.

Section 217(1) of the Civil Practice Law and Rules provides in pertinent part that “a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner.” A determination is final and binding when petitioner has received notice of the determination and has been aggrieved by that determination. E.g., Cowan v. Kelly, 89 A.D.3d 572, 572 (1st Dep’t 2011). Petitioner contends that there has been no final and binding determination and therefore the statute of limitations has not run. In this case, however, Petitioner was aggrieved by the suspension of its subsidy on October 1, 2011, and the ultimate relief sought as noted in the Notice of Petition is an order from this Court directing Respondents “to pay, retroactively, the Section 8 subsidy, due and owing for the dwelling unit in question to the date when the NYCHA suspended/terminated payment.” Moreover, Petitioner’s claim that it did not know of the determination on October 1, 2011, is not supported by this record. Counsel for Petitioner states in his memorandum of law that the Petitioner only received a single check from NYCHA for multiple subsidies. That unsworn contention, however, is rebutted by NYCHA’s inclusion of the affidavit of its staff member attesting that recipients are provided both the check and printout of apartments for which payment is provided. Suspended payments are excluded from that list or indicated as suspended. The affidavit further includes a copy of Petitioner’s check for October 1, 2011, and corresponding printout, which does not list Apt. E-12 among the units for which payment is tendered. Accordingly, under this record it is uncontroverted that the determination was final and binding on October 1, 2011. Given that Petitioner took no

action relating to that determination until well after four months after that date, its petition is barred by the statute of limitations. Accordingly, it is

ORDERED that Respondents' cross-motion to dismiss the petition is granted; it is further

ORDERED that the proceeding is dismissed in its entirety, and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: January 23, 2013

ENTER:



JOAN B. LOBIS, J.S.C.

FILED
JAN 25 2013
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