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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR Justice

PART 33

Index Number : 103416/2012
AMSTERDAM APARTMENTS LLC
vs.
RHEA, JOHN B.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

The following papers, numbered 1 to 40, were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits — No(s). 1-11

Answering Affidavits — Exhibits — No(s). 12-20, 39-40

Replying Affidavits — No(s). 21-38

Upon the foregoing papers, it is ordered that this motion is decided in accordance with memorandum decision and judgment annexed hereto

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).

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

Dated: 2/4/13

ALEXANDER W. HUNTER JR, 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

COUNTY OF NEW YORK: PART 33

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In the Matter of the Application of Amsterdam Apartments LLC and FY Melrose LLC, AP-Amsterdam Melrose LLC,

Petitioners,

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

-against-

John B. Rhea, as Chairman of the New York City Housing Authority, and the New York City Housing Authority,

Respondents.

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Index No. 103416/12

Decision and Judgment

HON. ALEXANDER W. HUNTER, JR.

The application by petitioners for an order, pursuant to Article 78 of the CPLR, directing respondents to pay petitioners arrears in rent subsidies in the total amount of $20,114.72 for the tenancy of Ebonie Shelley and further directing respondents to thereafter continue paying petitioners a monthly subsidy as provided by the HAP contract among the parties and said tenant, or to make a final determination regarding such suspension, is denied. Respondents' cross-motion to dismiss with prejudice, pursuant to CPLR 3211 (a) (5) & 7804 (4), is granted.

Petitioners commenced this Article 78 proceeding on August 1, 2012, by filing a verified petition. Petitioners are the co-owners and landlord of the multiple dwelling situated at and known as 681 Melrose Avenue, Bronx, New York ("subject premises"). Ebonie Shelley ("Shelley") is the tenant of record of apartment 4 in the subject premises (the "apartment") and receives Section 8 subsidy voucher number 0468576 ("subsidy") from New York City Housing Authority ("NYCHA"). Petitioners, respondents, and Shelley are parties to a Section 8 Tenant-Based Assistance Housing Choice Voucher Program Housing Assistance Payments ("HAP") contract.

The Secretary of Housing and Urban Development ("HUD") provides subsidies through public housing agencies ("PHA"), such as NYCHA. The PHA certifies eligible families for participation in the program and enters into HAP contracts with the owners of agency approved rental housing units, for direct payment of a portion of the tenant's monthly rent. **See, 42 USC § 1437 et. seq.** Owners must maintain the unit in accordance with HUD promulgated Housing Quality Standards ("HQS"). "The PHA must not make any housing assistance payments for a dwelling unit that fails to meet the HQS, unless the owner corrects the defect within the period specified by the PHA and the PHA verifies the correction." **24 CFR § 982.404**. NYCHA specifies a time frame for correcting the HQS defect in its NE-1 notice. The PHA is obligated to

inspect the subsidized unit at least once annually to determine whether it meets the HQS and must notify the owner of any defects shown by the inspection. **24 CFR § 982.405.**

NYCHA inspected Shelley's apartment on October 5, 2010, and found 10 HQS violations and 4 additional conditions. NYCHA sent petitioners an NE-1 notice, dated October 6, 2010, to notify petitioners of the HQS violations found during the inspection. A letter sent by NYCHA to petitioners, also dated October 6, 2010, stated that the October 5, 2010 inspection was performed pursuant to a request by petitioners for NYCHA to confirm that the HQS violations previously found in the apartment were repaired. The letter explicitly stated that payment cannot be reinstated until the apartment once again meets the HQS.

Shelley did not grant access to her apartment until petitioners initiated a holdover action against her. Petitioners sent NYCHA an executed certification of completed repairs form, dated November 19, 2010. NYCHA suspended the subsidy due to the HQS violations, effective December 1, 2010. The NE-1 notice states that NYCHA may reimburse the subsidy suspension if the owner can establish that it was delayed in completing repairs of HQS violations because the tenant failed to provide access. It should be noted that this is a discretionary decision and NYCHA is not bound to reinstate the subsidy due to lack of tenant cooperation.

NYCHA reinspected the premises on May 20, 2011, and found four new HQS violations, one preexisting HQS violation, and eight additional conditions. NYCHA sent petitioners an NE-1 notice, dated May 20, 2011, to notify petitioners of the HQS violations found during the inspection. Petitioners sent NYCHA an executed certification of completed repairs form, dated July 14, 2011. Despite efforts by petitioners to have the apartment reinspected, to date NYCHA has not reinspected the apartment and the subsidy remains suspended.

Petitioners seek to have NYCHA retroactively reinstate the subsidy and to continue paying the subsidy, or to make a final determination regarding the suspension. Petitioners' second claim is moot as NYCHA's act of suspending the subsidy constituted a final and binding determination. **See e.g. Matter of 193 Realty LLC v. Rhea, 37 Misc 3d 1203(A), 2012 NY Slip Op 51865(U); Chillum Place v. Rhea, Sup Ct, NY County, Aug. 24, 2012, Mendez, J., Index No. 101565/12; Weilders v. New York City Hous. Auth., Sup Ct, NY County, Aug. 13, 2012, Moulton, J., Index No. 1127872/11; Royal Charter Properties, Inc. v. NYCHA, Index No. 100189/10.** NYCHA explicitly told petitioners in the October 6, 2010 letter that the subsidy would not be reinstated until all HQS violations were cured.

Petitioners do not directly address NYCHA's failure to reinspect the apartment after the May 20, 2011 inspection. While petitioners would have a more persuasive argument if they were seeking to have NYCHA reinspect the apartment, nearly a year has passed since petitioners sent NYCHA an executed certification of completed repairs form, dated July 14, 2011.

Petitioners' first claim for retroactive payment of the subsidy is time barred. As a preliminary matter, this court finds that respondents are not estopped from arguing the statute of limitations. Petitioners misconstrue **Walker v. New York City Health & Hosps. Corp., 36 AD3d 509, 2007 NY Slip Op 00395 (1st Dept 2007)**, which holds in full that:

> The extraordinary remedy of equitable estoppel may be invoked to bar the affirmative defense of the statute of limitations only where the defendant's affirmative wrongdoing contributed to the delay between accrual of the cause of action and commencement of the legal proceeding [citation omitted]. Furthermore, the plaintiff must demonstrate reasonable reliance on the defendant's misrepresentations, and plaintiff's due diligence in ascertaining the facts and commencing the action. **Walker at 510.**

NYCHA's affirmative wrongdoing is not a well settled fact. Petitioners are sophisticated business entities and they cannot be said to have reasonably relied on representations made by unnamed NYCHA employees that the matter was being reviewed. While NYCHA has failed to reinspect the apartment to date, this does not explain petitioners' delay and untimely commencement of the instant proceeding.

A party must commence a special proceeding under Article 78 of the CPLR by filing a petition within four months after the administrative determination to be reviewed becomes final and binding on the aggrieved party. **See CPLR 217 (1) & 304; Best Payphones, Inc. v. Dept. of Info. Tech. & Telecomms., 5 NY3d 30 (2005), 2005 NY Slip Op 04616 (2005).** The four month limitation period is construed strictly, particularly against Article 78 petitioners seeking to challenge NYCHA determinations, and the court does not have the discretion to extend the statute of limitations in the interest of justice. **See De Milio v. Borhard, 55 NY2d 216 (1982); Saunders v. Rhea, 92 AD3d 602 (1st Dept 2012).**

The first nonpayment of the subsidy constituted a final and binding determination that put petitioners on notice of NYCHA's adverse determination and started running the four month statute of limitations. In addition, petitioners received a letter from NYCHA that explicitly stated that the subsidy would be suspended. The four month statute of limitations began running in December 2010, but this action was not commenced until over a year and a half later in August 2012. This court cannot reach the issue of whether NYCHA wrongly suspended the subsidy where Shelley's lack of cooperation delayed the repairs because petitioners' claim is time barred by the four month statute of limitations.

Petitioners' claim is also barred by laches. A petitioner will be found guilty of laches and its proceeding barred if it fails to make a demand for relief within a reasonable time after the right to make the demand occurs. **See e.g. Matter of Civil Serv. Empls. Assn. v. Board of Educ., Patchogue-Medford Union Free School Dist., 239 AD2d 415 (2d Dept 1997)** (nine month delay); **Matter of McKenzie v. Comptroller of State of N.Y., 268 AD2d 828 (3d Dept 2000)** (thirteen month delay). In the context of Section 8 subsidies, the right to make a demand arises upon nonpayment of the first disputed subsidy. **See e.g. 193 Realty, LLC v. Rhea, John B. & N.Y.C. Hous. Auth., Sup Ct, NY County, July 17, 2012, Lobis, J., Index No. 101109/12; 2011 Newkirk LLC v. New York City Housing Authority, Sup Ct, NY County, Dec. 5, 2011, Mendez, J., Index No. 109666/11; BNS Buildings, LLC v. Rhea, Sup Ct, Queens County, Nov. 16, 2010, Strauss, J., Index No. 3778/10; Royal Charter Properties, Inc. v. NYCHA, Sup Ct, NY County, July 23, 2010, Rakower, J., Index No. 100189/10.** In the instant proceeding, petitioners are guilty of laches because their right to make a demand arose

when the subsidy was suspended in December 2010, but they did not make a demand until over a year and a half later in August 2012.

Accordingly, it is hereby,

ADJUDGED, that the petition, for an order directing respondents to retroactively reinstate the subsidy, or to make a final determination regarding the subsidy, is denied and the proceeding is dismissed with prejudice, and respondents' cross motion to dismiss with prejudice is granted, with costs and disbursements to respondents.

Dated: February 4, 2013

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR

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).