

**Matter of Flosar Realty LLC v New York City Hous.
Auth.**

2013 NY Slip Op 30691(U)

April 5, 2013

Sup Ct, New York County

Docket Number: 102799/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: _____
Justice

PART 55

FLOSAR REALTY LLC, et. al.

INDEX NO. 102799/12

-v-

MOTION DATE _____

NEW YORK CITY HOUSING AUTH.

MOTION SEQ. NO. 01

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

is decided in accordance with the annexed decision.

FILED

APR 09 2013

NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED

APR - 9 2013

IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

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

Dated: 4/5/13

PK, 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
COUNTY OF NEW YORK: Part 55

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

FLOSAR REALTY LLC, 155 REALTY LLC, 210
REALTY LLC, 243 HART REALTY LLC, 273
REALTY LLC, 316 REALTY LLC, 321 REALTY LLC,
362 REALTY LLC, 520 REALTY LLC, 1010 REALTY
LLC, 1441 DEKALB REALTIES LLC, 1451 REALTY
LLC, 1653 REALTY LLC, 1710 REALTY LLC, 2114
REALTY LLC, S & W REALTY LLC, 2204 REALTY
LLC, 2812 CHURCH AVENUE CORP. and 5200
REALTY CO., LLC,

Index No. 102799/12

DECISION/ORDER

Petitioners,

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

-against-

FILED

APR 09 2013

THE NEW YORK CITY HOUSING AUTHORITY
and JOHN B. RHEA,

**NEW YORK
COUNTY CLERK'S OFFICE**

Respondents.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	_____ 1 _____
Answering Affidavits.....	_____ 2 _____
Cross-Motion and Affidavits Annexed.....	_____ 3 _____
Answering Affidavits to Cross-Motion.....	_____ 4 _____
Replying Affidavits.....	_____ 5 _____
Exhibits.....	_____ 6 _____

Petitioners commenced the instant proceeding pursuant to Article 78 of the Civil Practice

Law and Rules (“CPLR”) seeking, among other things, mandamus to compel respondent New York City Housing Authority (“NYCHA”) to process 148 lease renewal rent increases for Section 8 tenants residing in petitioners’ buildings at various locations in Brooklyn, New York. NYCHA cross-moves for an Order pursuant to CPLR §§ 3211(a)(5) and (a)(7) dismissing the petition. For the reasons set forth below, NYCHA’s cross-motion to dismiss the petition is granted and the petition is denied.

The relevant facts are as follows. Petitioners are eighteen landlords participating in the federally-funded Section 8 rent subsidy program and own various buildings throughout Brooklyn, New York. They seek mandamus compelling NYCHA to process 148 lease renewal rent increases for Section 8 tenants residing in petitioners’ buildings and retroactive reinstatement of Section 8 subsidies for 28 apartments which were suspended for failing NYCHA’s Housing Quality Standards (“HQS”) inspections. In the alternative, petitioners allege that NYCHA’s failure to process the lease renewals and rent increases and reinstate the subsidies is a breach of the Housing Assistance Payments (“HAP”) contracts entered into between petitioners and NYCHA for each apartment.

The court first turns to NYCHA’s cross-motion to dismiss the petition. In the instant action, NYCHA’s cross-motion to dismiss the petition on the ground that petitioners have failed to comply with Notice of Claim requirements pursuant to Public Housing Law § 157(1) must be denied. Pursuant to Public Housing Law § 157(1),

In every action or special proceeding, for any cause whatsoever, prosecuted or maintained against an authority, other than a claim arising out of a condemnation proceeding, the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand, claim or claims upon which such notice or

special proceeding is founded were presented to the authority for adjustment and that it has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment.

It is undisputed that petitioners have failed to serve Notices of Claim on NYCHA and have not alleged in their petition that they have done so. Compliance with the notice and pleading requirements of PHL § 157(1) is a condition precedent to filing a lawsuit against NYCHA.

However, “when the relief sought is in the nature of mandamus...courts have held that a notice of claim is not a condition precedent to bringing suit.” *WWC Corp. v. New York City Hous. Auth.*, 2012 WL 3638861 (Sup. Ct. N.Y. Co. August 10, 2012) (Justice Joan B. Lobis); *see also In re Sharpe v. Sturm*, 28 A.D.3d 777 (2d Dept 2006). Thus, the fact that petitioners failed to serve Notices of Claim on NYCHA is not fatal to the instant petition.

However, NYCHA’s cross-motion to dismiss the petition on the ground that petitioners are not entitled to mandamus relief is granted. Mandamus to compel performance is granted only when a petitioner demonstrates a clear legal right to the relief sought. *Scherbyn v. Wayne-Finger Lakes Bd.*, 77 N.Y.2d 753 (1991). Moreover, “[i]t is hornbook law that 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.” *Anonymous v. Comm’r of Health*, 21 A.D.3d 841, 841 (1st Dept 2005).

Here, the petition must be dismissed as petitioners have not demonstrated a clear legal right to the relief sought. As an initial matter, lease renewal rent increases are not purely ministerial acts but matters entrusted to NYCHA’s discretion. Federal regulations set forth various scenarios where “the rent to owner for a unit must not be increased.” 24 C.F.R. § 982.519(b)(4). Indeed, federal regulations dictate that NYCHA cannot evaluate whether an

owner is entitled to a rent increase unless the owner requests the increase at least 60 days before the next annual lease term. *See* 24 C.F.R. § 982.519 (b)(4). Thus, as lease renewal rent increases cannot be granted automatically under the regulations, and their issuance depends, at least in part, on the owner's compliance with the time restrictions prescribed by the federal regulations for the lease renewal process, such increases cannot be considered "purely ministerial." Further, NYCHA's discretion is inherent in its processing lease renewal increases as an owner cannot receive a rent increase unless NYCHA first determines whether the rent requested is "reasonable." *See* 24 C.F.R. § 982.507(a)(2)(i). The determination of whether rent is "reasonable" depends on a number of discretionary factors including the location, quality, size, unit, type and age of the contract unit and any amenities, housing services, maintenance and utilities to be provided by the owner under the lease. *See* 24 C.F.R. § 982.507(b). Additionally, pursuant to the regulations, the decision of whether Section 8 subsidies should be reinstated after HQS violations have allegedly been cured is also discretionary. Thus, as the determinations to approve a lease renewal rent increase and as to whether Section 8 subsidies should be reinstated after HQS violations have allegedly been cured are discretionary, not ministerial, petitioners do not have a "clear legal right" to the relief requested and thus, they are not entitled to mandamus relief.

Finally, to the extent petitioners request in the alternative that this matter be set down for plenary adjudication on the basis of a breach of contract claim against NYCHA, such request is denied. Petitioners' claim that NYCHA improperly suspended Section 8 subsidy payments or wrongfully failed to implement requested rent increases is not a breach of contract action but rather a challenge to NYCHA's administrative determinations, or failure to make determinations.

