

Matter of Samest Realty Corp. v Rhea

2013 NY Slip Op 31140(U)

May 21, 2013

Sup Ct, New York County

Docket Number: 102812/2012

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. KATHRYN FREED
PRESENT: JUSTICE OF SUPREME COURT
Justice

PART 5

Index Number : 102812/2012
SAMEST REALTY CORP.
vs.
RHEA, JOHN B.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

CAL #107

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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: 5-21-13
MAY 23 2013


_____, J.S.C.
MAY 21 2013
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT

- 1. CHECK ONE: CASE DISPOSED
- 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 5

-----X

In the Matter of the Application of
SAMEST REALTY CORP.,

Petitioner,

DECISION/ORDER

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

Index No.: 102812/2012

Seq. No.: 001

JOHN B. RHEA, as Chairperson of the
NEW YORK CITY HOUSING AUTHORITY
and the NEW YORK CITY HOUSING
AUTHORITY (NYCHA)

PRESENT:
Hon. Kathryn E. Freed
J.S.C.

Respondents,

HEIDI RODRIGUEZ,

Co-Respondent.

-----X

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF
THIS MOTION.

PAPERS	NUMBERED
NOTICE OF PETITION AND AFFIDAVITS ANNEXED.....1-2.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
AFFIRMATION IN OPPOSITION, X-MOTION.....4 -5.....
REPLYING AFFIDAVITS.....6-7.....
EXHIBITS.....8-31.....
OTHER.....(Memos of Law).....32-33.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Samest Realty Corp. (Samest) brings a petition to compel New York City Housing Authority (NYCHA) to pay retroactively the amount it claims is due for rental of an apartment under the Section 8 housing subsidy program. Respondents cross-move to dismiss the petition, pursuant to CPLR 217 as barred by the four-month statute of limitations, and pursuant to CPLR 3211 (a) (1) and

(7), based upon documentary evidence. For the reasons set forth below, the cross motion is granted and the petition is dismissed.

Parties and Underlying Facts

Petitioner is the owner of a building (the Building), located at 2234 Ryder Avenue, Bronx, New York (petition, ¶ 1). Heidi Rodriguez (Rodriguez) was a tenant of apartment 4-B (the Apartment) in the Building (*id.*, ¶ 6). NYCHA operates the Section 8 housing program and it paid a monthly subsidy of \$1094 under that program to petitioner for the Apartment on Rodriguez's behalf (*id.*, ¶¶ 4, 7).

Petitioner alleges that it is owed the sum of \$5470 for its unpaid Section 8 housing subsidy for the Apartment (*id.*, ¶ 5). It states that NYCHA inspected the Apartment and found violations, but that petitioner made the requisite repairs (*id.*, ¶¶ 22-23). It further states that NYCHA suspended the Section 8 housing benefit payments, that on March 13, 2012, petitioner filed a notice of claim and that, on May 30, 2012, it brought this petition seeking an order of mandamus to compel NYCHA to make retroactive payment of the Section 8 subsidy payment (*id.*, ¶ 9, 24).

Respondents seek dismissal of the petition as time-barred. They state that the Apartment was inspected on August 24, 2009 and that an NE-1 suspension notice (the Notice) was sent to petitioner on August 25, 2009 (Menegakis affirmation dated July 26, 2012, ¶ 10). By its terms, the Notice required the petitioner to present proof of the repairs and fill out a certificate of completed repairs and arrange for reinspection. They further state that the last Section 8 payment for the Apartment was made on September 1, 2009, that Rodriguez moved out of the Apartment and that, on February 1, 2010, they began making Section 8 housing subsidy payments on her behalf to her new landlord (*id.*, ¶ 11).

Respondents assert that Section 8 Housing benefits can only be paid to a landlord for a tenant residing in the apartment at issue and the Housing Assistance Program (HAP) contract terminates automatically 180 days after the last payment to the landlord. (*id.*, ¶¶ 18-19). They present evidence that an appropriate breakdown for each apartment in the Building under the Section 8 program was done (Zhang affidavit, ¶¶ 4-6), and that the Notice was sent on August 25, 2009 (Tesoriero affidavit, ¶¶ 5-7). They, therefore, contend that petitioner was fully aware, that as of October 1, 2009, there were no further Section 8 payments for the Apartment, that the four-month statute of limitations began to run at that point and that, consequently, the petition is untimely.

In reply, petitioner states that on August 25, 2009, it became aware that the Apartment had been inspected by NYCHA (Stein affidavit, ¶ 3). It alleges that oral notification was given to NYCHA of the repairs and asserts that unsuccessful attempts were made to schedule a reinspection of the Apartment (*id.*, ¶¶ 4-9). Petitioner does not present a copy of the certificate of completed repairs to demonstrate that repairs were made, nor does it deny receipt of the Notice on or about August 25, 2009. It does not deny awareness that the Section 8 housing subsidy payment was suspended as of October 1, 2009 and it does not present any reason for the failure to commence this proceeding until more than two and a half years later.

CPLR 217

“A CPLR article 78 proceeding against a public body or officer must be commenced within four months ‘after the determination to be reviewed becomes final and binding upon the petitioner’ ... [and] ‘[a]n administrative determination becomes ‘final and binding’ when the petitioner seeking review has been aggrieved by it’” (*Matter of Rocco v Kelly*, 20 AD3d 364, 365-366 [1st Dept 2005], quoting *Matter of Yarbough v Franco*, 95 NY2d 342, 346 [2000]).

“[W]hen the determination is unambiguous and its effect certain, the statutory period [of four months] commences as soon as the aggrieved party is notified” (*Matter of Edmead v McGuire*, 67 NY2d 714, 716 [1986]).

The short time frame is based on the “strong public policy [that] ... the operation of government agencies should not be unnecessarily clouded by potential litigation” (*Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]). To constitute notice “the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and ... the injury inflicted may not be prevented or significantly ameliorated by further administrative action” (*id.* at 34).

Mandamus

“While mandamus is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which the officer may exercise discretion or judgment” (*Matter of Ozdoba v Chelsea Landmark LIC, LLC*, 74 AD3d 555, 556-556 [1st Dept 2010], quoting *Klosterman v Cuomo*, 61 NY2d 525, 539 [1984]). Moreover, “before commencing a proceeding in the nature of mandamus, it is necessary to make a demand and await a refusal, and the Statute of Limitations begins to run on the date of the refusal” (*Matter of Civil Serv. Empls. Assn. v Board of Educ., Patchogue-Medford Union Free School Dist.*, 239 AD2d 415, 416 [2d Dept 1997]). However, “[i]f the allegedly aggrieved party does not proceed promptly and make a formal demand, he or she may be charged with laches” (*id.* at 416).

Discussion

It has been held that “a suspension of Section 8 payments triggers the running of the four month statute of limitations” (*Matter of the Application of 12th & 14th St. Inv., LLC v New York City*

Hous. Auth., Sup Ct NY County, 2013 WL 1562134 *3, 2013 NY Slip Op 30696[U], *3). Petitioner neither denies awareness of the suspension of payments, nor does it present proof that it supplied the certificate of completed repairs to NYCHA to demonstrate that the repairs were performed adequately. It does not deny that the HAP contract expired more than two years ago. It has not demonstrated that it proceeded “promptly” to make a formal demand and has, thus, shown laches (*Civil Serv. Empls. Assn.*, 239 AD2d at 416; *Matter of 2807/2809 Claflin Realty LLC v Rhea*, 38 Misc3d 1205[A], *2, 2012 NY Slip Op 52372[U] [Sup Ct NY County 2012]).

Also, petitioner has not shown a clear right to the “extraordinary remedy” of mandamus (*Klosterman*, 61 NY2d at 537). The adequacy of the repairs performed, to the extent that they were performed, could have involved the exercise of NYCHA’s judgment. Petitioner chose not seek review by submitting the completed certificate of repairs and challenging NYCHA’s subsequent determination.

In sum, the more than two and a half year period between the suspension of Section 8 payments on October 1, 2009 and the commencement of the action on May 30, 2012 goes far beyond any reasonable time frame for review of an agency’s administrative action, particularly when coupled with the absence of any reason given for such an egregious delay. Accordingly, respondents’ cross motion to dismiss the petition is granted.

Order and Judgment

Therefore in accordance with the foregoing, it is hereby

ORDERED that plaintiff’s petition for a judgment pursuant to an Article 78, to compel the retroactive payment of rent is denied; and it is further

ORDERED that defendant NYCHA’s Cross Motion to dismiss the petition is granted, and

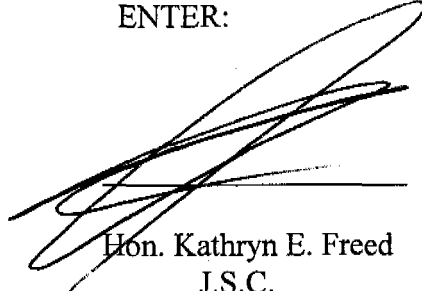
the proceeding is dismissed, it is further

ORDERED that defendant NYCHA shall serve a copy of this order on all other parties and the Trial Support Office at 60 Centre Street, Room 158; and it is further

ORDERED that this constitutes the decision and order of the Court.

DATED: May 21, 2013

ENTER:



MAY 21 2013

Hon. Kathryn E. Freed
J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT