[*1] SCANNED ON 6/26/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PETER H. MOULTON SUPREME COURT JUSTICE
Justice

PART 40B

Index Number : 102867/2012
731 GERARD/WALTON LLC
vs.
RHEA, JOHN B.
SEQUENCE NUMBER : 001
ARTICLE 78

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

☑ CROSS MOTION

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 Petition and cross motion are decided per attached

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).

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

Dated: 6/20/13

HON. PETER H. MOULTON J.S.C.
SUPREME COURT JUSTICE

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 40 B

- -X

In the Matter of the Application of 731 GERARD WATSON, LLC,

Index No. 102867/12

Petitioner,

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

-against-

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

Respondents.

MELBA DISLA

Co-Respondent

- -X

PETER H. MOULTON, J.S.C.:

Petitioner, a landlord, brings this Article 78 proceeding to reverse the decision of respondent New York City Housing Authority ("NYCHA") to terminate a section 8 subsidy after Melba Disla's apartment failed to meet federal housing quality standards ("HQS"). Petitioner seeks to recoup $3,445.39 for rental payments for the period October 1, 2011 through April, 2012.

Respondent cross moves to dismiss the petition (1) as time barred (2) based on the documentary evidence, and (3) based on failure to state a claim. Respondent maintains that petitioner should have commenced this action within four months of October 1, 2011, when respondent maintains petitioner knew or should have

known that the subsidy was suspended. Thus, respondent asserts that this proceeding, which was commenced nearly eight months after the subsidy suspension, should have been commenced four months earlier.

Respondent attaches a copy of a letter addressed to petitioner, dated August 10, 2011, notifying petitioner that Disla's kitchen floor and halls/staircase ceiling needed repair. The notice also provided that the repairs must be made and verified by respondent, or respondent would take action to terminate the subsidy on September 9, 2011. Respondent does not attach proof of mailing of this letter, which is referred to as an NE-1 notice.

The notice provides in relevant part:

> [W]e will take action to suspend subsidy on 09/09/2011, unless we are properly notified (see below) that appropriate repairs have been made and we verify these corrective measures. If the above violations are not corrected, the Authority will offer the family a voucher to enable them to seek other housing and we will terminate the HAP Contract without further notice if the family is approved for a Section 8 transfer.
>
> It further provided:
>
> FAILURE TO COMPLETE REPAIRS AND HAVE THE AUTHORITY VERIFY THAT THE REPAIRS ARE DONE **WITHIN 30 DAYS AFTER THE INSPECTION** SHALL RESULT IN SUSPENSION OF SUBSIDY. REINSTATEMENT OF SUBSIDY WILL NOT BE CONSIDERED UNTIL WE RECEIVE AND ACCEPT THE CERTIFICATION, OR UNTIL WE RECEIVE NOTIFICATION OF COMPLETED REPAIRS FROM YOU AND WE REINSPECT THE APARTMENT TO DETERMINE THAT THE UNIT AGAIN COMPLIES WITH HQS.

In opposition to the cross motion, petitioner contends that the agency never sent petitioner a final determination, because the "sole notice received by the Petitioner was notice pertaining to HQS violations in question having been discovered at the subject premises." Petitioner asserts that NE-1 notice is ambiguous and misleading. Petitioner points to language in the notice which refers to the action that respondent "will" take, if the violations are not certified as corrected. This language, petitioner maintains, is not language of a final determination. Rather, it is merely notice of what might happen in the future, if the matter is not corrected. Petitioner cites *Rodriguez v New York City Hous. Auth* (127 Misc 2d 1052 [Sup Ct., New York County 1985]), which held that the agency was estopped from interposing the defense of a time bar based on a letter stating that the tenant was ineligible for housing, but indicating that if the tenant had "information that will shed new light on the finding of ineligibility, feel free to present it to the Applications Administration Office." Petitioner also cites to dicta in *Matter of BRG 3715 LLC v New York City Hous. Auth.* (2012 NY Slip Op 30656 [U] [Sup Ct, New York County 2012]).[1]

[1]Petitioner does not argue that the NE-1 notice should inform petitioner of the right to commence an Article 78 proceeding.

Additionally, petitioner contends that because respondent issues only one check to it each month, which combines all the landlord's section 8 tenants, the landlord could not know that a particular subsidy was terminated. Petitioner also faults respondent for derogation of its own obligation to send an inspector to certify the repairs, after receiving notice from petitioner that the repairs were made.

To demonstrate respondent's failure, petitioner submits the affidavit of Arthur Green, the agent for petitioner who has "personal knowledge from the books and records kept by Petitioner's office, unless otherwise noted." Green states that he became aware that sometime on August 10, 2011, a HQS inspection uncovered violations. He maintains that "immediately thereafter, the Landlord performed extensive work in the apartment to correct the discovered HQS violations." He further states that "[w]ithin twenty days of the afore-said inspection and discovery of HQS violations" he "contacted NYCHA via telephone and informed them that the previously discovered HQS violations have been duly corrected and requested that NYCHA inspectors appear and re-inspect." On a later unspecified date, because no inspector came, Green states he called again. On a third unspecified date, because no inspector came, some undisclosed person called respondent.

For the first time in reply, respondent attaches the affidavit of Qi Zhang, Assistant Director of the Accounting and Fiscal Services Department. Zhang attaches a copy of respondent's check and statement to petitioner for the month of October, 2011. The check, which bears petitioner's name care of the name and address petitioner's managing agent, indicates payment of $12,068.06. The attached statement indicates the names of the tenants for whom payment is made; Melba Disla is not listed.[2]

Respondent reiterates that the NE-1 notice is a final and binding notice because it left no doubt as to the agency's position, even if the issue could be mutually resolved at a later date. In any event, respondent argues that petitioner knew the monthly amount that it received, admittedly knew of the violations, and was a sophisticated landlord who should know that attempts at informal resolution would not toll the statute of limitations, estop the agency, or trump federal regulations which condition payment on certification that violations are corrected. Moreover, any purported failure by respondent to reinspect when it should have, would not excuse petitioner's own failures.

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[2]The court disregards the affidavit and check/statement for October 2011 as it was submitted for the first time in reply. Respondent should have included these documents in support of its cross motion to support its argument that petitioner knew or should have known that the subsidy was suspended.

Discussion

Federal law prohibits respondent from making any payment to a landlord for a HQS violation which was not certified as repaired (*see* 24 CFR § 982.404 (a) (3) ["[t]he 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])."

CPLR article 78 proceedings against a public "body or officer must be commenced within four months after the determination to be reviewed becomes final and binding" (CPLR 217 [1]). An agency determination is final when the petitioner is aggrieved by the determination (*see Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]). A petitioner is aggrieved once the agency has issued an unambiguously final decision that puts the petitioner on notice that all administrative appeals have been exhausted; any ambiguity created by the agency as to whether the decision is final and binding is resolved against the agency (*see Matter of Carter v State of N.Y., Exec. Dept., Div. of Parole*, 95 NY2d 267 [2000]).

Petitioner's attorney concedes that petitioner received the NE-1 notice. The NE-1 notice is not ambiguous, and is a final and binding notice for the following reasons. Although the notice refers to the action that respondent "will" take if the violations are not certified as corrected, petitioner fails to cite the

language that states that failure to complete repairs and have the authority certify completion within 30 days after the inspection "shall" result in suspension of subsidy. It is not credible that petitioner, who has hired a managing agent and presumably has access to legal counsel, misunderstood the NE-1 letter. Nor has petitioner submitted an affidavit which claims such a misunderstanding. Moreover, it is unreasonable for petitioner to expect to be relieved from the terms of the NE-1 notice, even if respondent failed to send an inspector, as it could have merely brought this proceeding earlier than it did. The NE-1 notice sent to landlords stands on very different footing than tenant notices.[3]

Even if petitioner did not receive the NE-1 notice, petitioner's agent, Arthur Green, admits that sometime on August 10, 2011, he learned of the HQS inspection and the violations, which prompted Green to contact respondent. Petitioner further admits that respondent did not certify that the conditions were repaired (although petitioner's defense is the offense that respondent neglected to reinspect after being notified that repairs were complete). At some point before the expiration of the statute of limitations, petitioner also knew or should have

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[3]Tenants are entitled to certain due process protections before they can lose their apartments and 24 CFR § 982.404 (a) (3) does not apply to them. Accordingly, *Rodriguez v New York City Hous. Auth* (127 Misc 2d 1052, *supra*) does not apply here. The Court declines to follow the dicta in *Matter of BRG 3715 LLC v New York City Hous. Auth.*, 2012 NY Slip Op 30656 (U), *supra*.

known that the October 2011 check was not for the same amount as the previous month. These facts taken together establish that petitioner either knew or should have known that it was aggrieved at some point before the expiration of the statute of limitations in February, 2011 (*see Matter of Baloy v Kelly*, 92 AD3d 521 [1st Dept 2012] [letter denying application for gun license was final and binding for the purposes of the four month statute of limitations because petitioner knew or should have known that he was aggrieved by it]). Petitioner has not established that federal requirements can be ignored, purportedly because respondent failed to timely inspect, when petitioner failed to take timely action.

Accordingly, it is

ADJUDGED that cross motion to dismiss the petition as time barred is granted, without costs and disbursements; and it is further

ADJUDGED that the petition is denied as untimely and the proceeding is dismissed.

This Constitutes the Decision and Judgment of the Court.

Dated: June 20, 2013

ENTER:

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).

J.S.C.
PETER H. MOULTON
J.S.C.