Matter of Grand 73 LLC v New York City Hous. Preserv. & Dev.

2018 NY Slip Op 30461(U)

March 19, 2018

Supreme Court, New York County

Docket Number: 153157/2017

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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In the Matter of the Application of

THE GRAND 73 LLC,

Petitioner,

-against-

NEW YORK CITY HOUSING PRESERVATION AND DEVELOPMENT and THE NEW YORK CITY DEPARTMENT OF FINANCE,

Respondents.

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

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Index No. 153157/2017
Motion Seq: 001

DECISION, ORDER & JUDGMENT

HON. ARLENE P. BLUTH

The petition to annul a determination notice issued by respondent the New York City Department of Housing and Preservation Development ("HPD"), which found that petitioner was in violation of a tax exemption program is granted.

Background

This proceeding arises out of the construction of a residential property located at 73 and 75 Grand Street in Brooklyn, New York. In 2006, petitioner filed an application under the 421-a Partial Tax Exemption Program– a program which incentivizes housing development in New York City. In June 2010, HPD approved petitioner's Preliminary Certificate of Eligibility application and issued a Preliminary Certificate of Eligibility for the properties as a condominium project.

The condo project was completed in October 2010 and on November 29, 2010, petitioner submitted an application for Final Certificate of Eligibility for 421-a benefits. HPD claims that it sent numerous notices to petitioner's representative (Unger Realty Services, Inc.) that the application was incomplete.

In 2015, HPD contends that the New York State Attorney General ("AG") began investigating properties that had applied for 421-a tax benefits as condominiums but were instead operating as rentals without complying with the rental unit requirements under the 421-a regulations. Properties who seek 421-a benefits and operate rental buildings must register these units with the Department of Housing and Community Renewal ("DHCR"). The AG's investigation identified petitioner's buildings (at 73 and 75 Grand Avenue) as properties that had initially sought tax benefits as condominiums but were improperly operating rental buildings.

The AG informed HPD about its findings and, on January 26, 2016, HPD mailed petitioner a Notice of Impending Revocation. The notice told petitioner that it might lose its tax benefits because it had failed to register rental units with DHCR.

In February 2016, Alan Kucker (of Kucker and Bruh, LLP) confirmed to HPD that petitioner had received the January 2016 notice and believed it was erroneous. Mr. Kucker sent other correspondence, including a letter dated April 11, 2016 in which he asked HPD to withdraw the impending revocation notice. HPD responded on April 18, 2016 by sending a Final Application Checklist to Mr. Kucker stating that petitioner's Final Certificate of Eligibility application was incomplete.

HPD sent another Final Application Checklist on May 3, 2016 to Mr. Kucker that highlighted HPD's conclusion that petitioner had abandoned the condo plan and requested that

petitioner send in the documents required for a rental project. HPD claims that it did not receive a response to this May 3, 2016 checklist and so it issued a Determination Notice on July 22, 2016.

The Determination Notice told petitioner that it had violated the requirements under the 421-a Tax Exemption Program because the premises were operating as rentals and these units were not registered with DHCR. The Determination Notice also included an August 21, 2016 deadline to cure the violation. HPD claims that it mailed the Determination Notice to petitioner and it received no response– HPD subsequently told respondent the New York City Department of Finance ("DOF") to revoke the tax exemption benefits for these properties. In November 2016, DOF issued revised tax assessments for the units at petitioner's properties– this increased the taxable assessment from about $200,000 to over $2 million retroactively for the tax years 2011 through 2016. In December 2016, HPD admits it forwarded a copy of the Determination Notice to Mr. Kucker– who claims that this was the first time he knew about this notice.

Petitioner commenced the instant proceeding to annul the July 2016 Determination Notice, HPD's instruction to DOF to revoke petitioner's tax benefits and DOF's revised tax assessments on the ground that HPD's actions violated due process. Petitioner argues that even though HPD knew that it was represented by Mr. Kucker, HPD mailed the Determination Notice to only petitioner. Petitioner's members also deny that they ever received the Determination Notice. Petitioner demands that the revocation of its tax benefits be vacated and that it be afforded the opportunity to cure the violation identified in the July 2016 Determination Notice.

Respondents claim that petitioner was provided with multiple opportunities to comply with the 421-a Tax Exemption Program before the benefits were revoked. Respondents insist that

HPD provided adequate notice to petitioner. Respondents observe that HPD's rules do not require service on an attorney.

Discussion

"In reviewing an administrative agency determination, courts must ascertain whether there is a rational basis for the action in question or whether it is arbitrary or capricious. Arbitrary action is without sound basis in reason and is generally taken without regard to facts. Moreover, courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise" (*Aponte v Olatoye*, – NE3d –, 2018 WL 889540, *1 [2018] [internal quotations and citations omitted]).

Here, the only issue for this Court to decide is whether it was rational for HPD to fail to send the Determination Notice to petitioner's attorney. The Court finds that this failure was arbitrary and capricious and justifies vacating the Determination Notice as well as the subsequent revocation of petitioner's tax benefits.

"[O]nce a party chooses to be represented by counsel in an action or proceeding, whether administrative or judicial, the attorney is deemed to act as his agent in all respects relevant to the proceeding. Thus any documents, particularly those purporting to have legal effect on the proceeding, should be served on the attorney the party has chosen to handle the matter on his behalf. This is not simply a matter of courtesy and fairness; it is the traditional and accepted practice which has been all but universally codified" (*Matter of Bianca v Frank*, 43 NY2d 168, 173, 401 NYS2d 29 [1977] [finding that the statute of limitations did not begin to run because the attorney for petitioner at the underlying administrative disciplinary hearing was not served

with the final determination even though petitioner was served]).

Although respondents attempt to confine the *Bianca* ruling to the statute of limitations context, the ruling has broader application. And the facts of this case demonstrate the unfairness inherent in respondents' position. Petitioner's attorney sent a letter to HPD on February 4, 2016 in which he stated that he was representing petitioner in connection with the Notice of Impending Revocation (NYSCEF Doc. No. 35). HPD admits that it received that letter (NYSCEF Doc. No. 25, ¶ 99 [Respondents' Answer]). HPD also admits receiving another letter from plaintiff's attorney dated April 11, 2016 (*id.* ¶ 101) This letter stated that "this office represents The Grand 73 LLC . . . Please address all further communication concerning this matter to this office" (NYSCEF Doc. No. 37).

HPD acknowledges that it sent a Final Application Checklist dated April 18, 2016 *to petitioner's attorney* (NYSCEF Doc. No. 25, ¶ 102). A copy of that document contains a handwritten notation crossing out petitioner's previous representative (Unger Realty) and includes the words "Kucker & Bruh, LLP, Attn: Alan D. Kucker" (NYSCEF Doc. No. 38). And the Final Application Checklist dated May 3, 2016 is addressed to "Kucker & Bruh, LLP, 747 Third Avenue, New York, NY 10017, Attn: Alan D. Kucker" (NYSCEF Doc. No. 40).

By July, HPD had already received multiple letters and sent numerous communications to petitioner's attorney. It makes absolutely no sense why HPD would send the Determination Notice to only petitioner. HPD clearly knew that Mr. Kucker was representing petitioner on this issue and, for some unknown reason, did not send him a copy of a critical document– a decision that gave petitioner a short time period to cure the purported violation. It does not matter that HPD's rules may not require HPD to serve petitioner's attorney because HPD's own conduct

evidences that it should have sent it to petitioner's attorney.

To be clear, the Court is not insinuating that HPD failed to send it to petitioner's attorney as part of some litigation strategy. But the Court does not want to create an incentive for government agencies to use this tactic to gain an advantage. Here, petitioner communicated with petitioner's attorney for months only to send the penultimate determination, which included a one-month cure period, to only petitioner. Not informing a party's attorney creates the possibility that an important notice will be missed and that actions will be rendered on default. That type of outcome is contrary to principles of fairness and due process where an attorney has been hired to handle a matter. Hiring an attorney in this situation demonstrated that petitioner took this issue seriously– clearly, DOF's subsequent actions shows that a lot of money was at stake because petitioner's tax assessment was increased nearly $2 million.

The Court recognizes that the claims by petitioner's members (Mr. Rabkin and Mr. Gorodetsky) that they never received the Determination Notice strain all credulity. The fact is that the Impending Notice of Revocation dated January 26, 2016, which petitioner admits to receiving, was sent *exactly the same way* that the Determination Notice was sent (compare NYSCEF Doc. No. 34 with 41). Although Mr. Gorodetsky and Mr. Rabkin claim that they never received the Determination Notice, they both conveniently leave out of their affidavits whether or not they received the Impending Notice of Revocation. But this issue is not dispositive because HPD had already established a course of conduct to communicate with petitioner through its attorney, who told HPD he was representing petitioner.

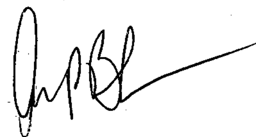
Summary

Because the Court finds that the failure to send the Determination Notice to petitioner's attorney was arbitrary and capricious, the Determination Notice and the subsequent revocation of petitioner's tax benefits by DOF must also be vacated. Petitioner must be afforded another opportunity to cure the purported violation. However, HPD is free to serve another Determination Notice at its earliest convenience, as long as Kucker and Bruh LLP is served. This opinion only analyzes due process considerations and the Court makes no finding about the merits of the potential revocation of petitioner's tax benefits.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is granted and HPD's instruction to DOF to revoke petitioner's 421-a tax benefits retroactively is vacated, the revised tax assessments issued by DOF dated November 3, 2016 (based upon that now-vacated instruction) are revoked, all without prejudice to respondent re-issuing a Determination Notice, giving all rights to cure, etc., and serving petitioner's attorney therewith. The clerk is directed to enter judgment accordingly.

This is the Decision, Order and Judgment of the Court.



Dated: March 19, 2018
New York, New York

ARLENE P. BLUTH, JSC
HON. ARLENE P. BLUTH