Matter of Goldfeder v New York State Div. of Hous. & Community Renewal
2019 NY Slip Op 32841(U)
September 25, 2019
Supreme Court, New York County
Docket Number: 153205/19
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

JERRY H. GOLDFEDER and ALICE YAKER,
Petitioners,

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

Index No.: 153205/19
DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING & COMMUNITY RENEWAL,
Respondent,

-and-

CENPARK REALTY LLC,
Respondent-Intervenor.

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HON. CAROL R. EDMEAD, JSC:

In this Article 78 proceeding, petitioners Jerry H. Goldfeder and Alice Yaker (petitioners) seek a judgment to overturn an order of the respondent New York State Division of Housing & Community Renewal (DHCR) as arbitrary and capricious, and the DHCR and respondent-intervenor Cenpark Realty, LLC (Cenpark) each cross-move separately to dismiss the petition (together, motion sequence number 001). All of the parties' applications are disposed of in accordance with the following decision.

FACTS

Petitioners are the occupants of rent stabilized apartment 16F in a building (the building) located at 360 Central Park West, NY NY 10025 in the County, City and State of New York. *See* verified petition, ¶ 1. Cenpark is the building's owner. *See* notice of cross motion

(Cenpark), Billet affirmation, ¶ 3. The DHCR is the administrative agency charged with overseeing all rent stabilized apartments located inside the City of New York. *See* verified petition, ¶ 2.

Petitioners first took possession of apartment 16F pursuant to a non-rent stabilized, market rate lease that ran from April 1, 2009 through March 31, 2011, with a monthly rent of $5,000.00. *See* return, exhibit A-8. Petitioners state that apartment 16F was rent controlled during the occupancy of the unit's prior tenant, who vacated it on July 31, 2008. *See* verified petition, ¶ 7, fn 3. They take the position that apartment 16F became "deregulated" upon that prior tenant's vacatur. *Id.* Cenpark acknowledges that the building received "J-51" real estate tax abatement benefits from 1999 through June 30, 2010, but avers that apartment 16F became rent stabilized by operation of law when the prior tenant vacated (regardless of the building's receipt of J-51 benefits). *See* notice of cross motion (Cenpark), Billet affirmation, ¶¶ 3, 21-23. Both parties agree that apartment 16F is currently rent stabilized. *See* verified petition, ¶ 1; notice of cross motion (Cenpark), Billet affirmation, ¶ 4. However, petitioners contend that the apartment acquired rent stabilized status *solely* as a result of the building's participation in the J-51 tax abatement program, while Cenpark asserts that the unit became rent stabilized upon its prior tenant's vacatur, and that it thereafter retained that status upon the building's exit from the J-51 program in 2010. *See* verified petition, ¶ 7; notice of cross motion (Cenpark), Billet affirmation, ¶ 22. The bulk of petitioners' and Cenpark's submissions in connection with the instant motions are devoted to arguments over this dispute.

On June 26, 2015 Cenpark submitted an application to the DHCR to end apartment 16F's rent stabilized status pursuant to the "high income rent deregulation" provisions of the Rent

Stabilization Code (RSC). *See* return, exhibit A-1. Petitioners filed responsive papers, and, on July 22, 2016, a DHCR Rent Administrator issued an order that denied Cenpark's application (the RA's order). *Id.*, exhibit A-9. Cenpark thereupon filed a Petition for Administrative Review (PAR) with the DHCR Commissioner's office to contest the RA's order, and petitioners again filed responsive papers. *Id.*, exhibits B-1, B-2. On January 30, 2019, the DHCR Commissioner issued an order that granted Cenpark's PAR and remanded its deregulation application to the RA for further proceedings (the PAR order). *Id.*, exhibit B-5. The relevant portion of the PAR order found as follows:

> "A review of public records establishes that the applicable J-51 tax benefits received for the subject premises expired in 2010 and so were no longer in effect at the relevant time in this proceeding. DHCR records further establish that the apartment was subject to rent regulation prior to the receipt of these J-51 tax benefits. Specifically, as previously noted, DHCR records reveal that the subject apartment was originally rent-controlled and subsequently ceased to be rent-controlled and became rent-stabilized when the rent-controlled tenant vacated the apartment and the current tenants moved in during the period of time the J-51 tax benefits were being received, and so was otherwise subject to rent regulation apart from the receipt of those J-51 benefits. Therefore, the apartment was originally subject to rent regulation for reasons other than the receipt of the J-51 benefits and it became rent-stabilized after the vacancy of the rent-controlled tenant. As a result, pursuant to the controlling laws applicable to rent stabilized apartments, the high income rent deregulation provisions were applicable after the expiration of the J-51 benefits and the subject apartment is eligible for luxury decontrol. The tenants'' assertion that the subject apartment was rent stabilized solely due to the receipt of J-51 benefits is without merit and, pursuant to the controlling law and notwithstanding any prior DHCR PAR determinations, the high income rent deregulation provisions were applicable after the expiration of the J-51 tax benefits, and the subject apartment is eligible for luxury decontrol. Moreover, *Matter of 73 Warren Street, LLC v DHCR* [96 AD3d 524 (1st Dept 2012)], *supra.*, which the tenants cite in their response to the owner's PAR, is inapposite because that case involved a housing accommodation that was not rent regulated prior to receiving J-51 tax benefits, which is not the same status as the subject premises that is the subject of this administrative appeal. The tenants' assertion that the Supreme Court found that the apartment is currently rent stabilized also does not preclude the relief sought in the owner's petition.

> "Finally, the Commissioner also notes that high income rent deregulation is not dependent on or contingent upon a J-51 lease notice rider being contained in the relevant leases. The Commissioner notes that, pursuant to Section 26-504 (c) of the RSL [i.e., Rent Stabilization Law], the specified lease notice requirements referred to in the [Rent] Administrator's order pertaining to the automatic deregulation of an apartment upon the expiration of the J-51 tax benefits are not applicable to the subject apartment, as they only apply to apartments, unlike the subject apartment, which became subject to rent stabilization solely as a result of the receipt of J-51 benefits. Therefore, since the subject apartment was rent regulated prior to the receipt of the J-51 tax benefits, it is not relevant whether or not the tenants were provided with the specified lease notices concerning the expiration of the J-51 benefits, and so, even if the tenants had not, in fact, been provided with such lease notices, it does not preclude the subject apartment from qualifying for luxury deregulation once the J-51 tax benefits have expired. Therefore, a determination on the merits as to whether the subject apartment qualified for high income rent deregulation should have been made in the proceeding below.
>
> "Accordingly, the [Rent] Administrator's order denying the owner's petition for deregulation is revoked and the proceeding is remanded for such further processing as may be necessary so that a determination can be made on the merits as to whether the subject apartment qualifies for high income rent deregulation."

Id. Petitioners disagreed with this result, and thereafter commenced this Article 78 proceeding to challenge the PAR order on March 27, 2019. *See* verified petition. Rather than answer, Cenpark and the DHCR each filed separate cross motions to dismiss the petition on July 24, 2019. *See* notice of cross motion (Cenpark); notice of cross motion (DHCR). All applications are now fully submitted and before the court (together, motion sequence number 001).

DISCUSSION

As was mentioned, the instant petition and Cenpark's cross motion are devoted to contesting the merits of the various arguments as to whether or not the RSC's "high income rent deregulation" procedures are applicable to apartment 16F. However, the DHCR's cross motion raises the more fundamental issue of whether or not the instant Article 78 proceeding is barred by

the doctrine of exhaustion of administrative remedies.

The DHCR specifically argues that this proceeding should be dismissed because the PAR order is a "non-final order," and New York law requires that petitioners must exhaust their administrative remedies by participating in the further proceedings before the RA which that order specifies, and by thereafter commencing a new PAR if they are unsatisfied with the results of those proceedings, before they may seek relief in this court pursuant to CPLR Article 7801, et seq. *See* notice of cross motion (DHCR), Kuttner affirmation, ¶¶ 7-31. The Appellate Division, First Department, has long recognized that a DHCR Commissioner's PAR order which remands an administrative application to an RA for further consideration of the application's merits is a "non-final order," and that an Article 78 proceeding commenced to challenge such a PAR order must be dismissed on the ground that the petitioner has failed to exhaust all available administrative remedies. *See e.g.*, *Matter of Hawco v State of N.Y. Div. of Hous. & Community Renewal*, 225 AD2d 469 (1st Dept 1996). The First Department also recognizes that the DHCR "has jurisdiction to adjudicate luxury deregulation petitions," and has rejected tenants' attempts to procedurally foreclose the agency from conducting such adjudication. *See e.g.*, *Matter of Power v New York State Div. of Hous. & Community Renewal*, 61 AD3d 544 (1st Dept 2009). The PAR order that is the subject of this proceeding did *not* rule on the merits of Cenpark's luxury deregulation application for apartment 16F. *See* return, exhibit B-5. Instead, it plainly sets forth the DHCR Commissioner's order remanding that application to the RA for his ruling on the merits of the application. *Id.* Because it clearly contemplates the issuance of a second RA's decision which will, itself, be subject to challenge in a second PAR, the DHCR Commissioner's current PAR order must be regarded as "non-final." As such, neither petitioners

nor Cenpark may contest that order under CPLR Article 78 at this juncture. The court therefore concludes that petitioners' current Article 78 application is improper and should be dismissed for failure to exhaust administrative remedies. Petitioners nevertheless raise two arguments in reply.

First, petitioners assert that the doctrine of exhaustion of administrative remedies does not apply "where the relief sought is in the nature of mandamus to compel rather than mandamus to review or by way of prohibition," and that they are seeking the former type of mandamus. *See* Silagy reply affirmation, ¶ 9. However, the case that petitioners cite in support of this argument, *Matter of Ista Mgt. Co. v State Div. of Hous. & Community Renewal* (139 Misc 2d 1 [Sup Ct, NY County1988]), contained the following analysis of mandamus to compel vis a vis mandamus to review:

> "A matter submitted for determination, whether to an administrative agency or a court, imposes a clear duty to render a decision. The obligation to issue the determination is absolute and therefore ministerial. It is only the process by which the decision is reached which is judgmental. Therefore the failure to perform the duty to render a determination within a reasonable time is grounds for mandamus to compel. . . . By contrast where the decision itself is asserted to be defective, it must be a final determination by the agency and must be brought before the court by way of certiorari or mandamus to review. In the latter instance, relief is only available where the agency can be shown to have acted in an arbitrary and capricious manner in reaching its determination."

139 Misc 2d at 4 (internal citation omitted). Here, petitioners plainly seek to challenge a "judgmental" agency process; i.e., the manner in which the DHCR should analyze and apply the RSC's "high income luxury deregulation" procedures. As such, the instant petition must be interpreted to seek mandamus to review the DHCR's decision, and not mandamus to compel the DHCR to issue a specified order or discharge a specified function. Therefore, the court rejects petitioners' first reply argument.

Petitioners also argue that "the Housing Stability and Protection Act of 2109 . . . repeals [the RSC's high income luxury decontrol provisions]." *See* Silagy reply affirmation, ¶¶ 3-8. The DHCR responds that, "even assuming the validity of that argument it is the DHCR's responsibility to render that dismissal" in the proceedings before it. *See* Kuttner reply affirmation, ¶ 3. The court agrees for the same reasons as were just discussed; i.e., that any decision to dismiss Cenpark's luxury deregulation application pursuant to the RSC would constitute a decision on the merits which is committed to the agency in the first instance, which the court may only review afterwards pursuant to the "arbitrary and capricious" standard that governs Article 78 proceedings. The DHCR has not yet issued a final ruling on Cenpark's application. The court may not act until it does. Therefore, the court rejects petitioners' second reply argument.

In conclusion, the court finds that the instant Article 78 petition should be denied because petitioners failed to exhaust their administrative remedies before the DHCR before they filed that petition. Consequently, the court also finds that the DHCR's cross motion to dismiss the petition should be granted. Finally, the court finds that Cenpark's cross motion should be denied because, like the instant petition, it seeks relief based on the review of a non-final agency order.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioners Jerry H. Goldfeder and Alice Yaker (motion sequence number 001) is denied and the petition is dismissed; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondent New York

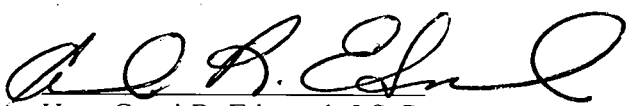
State Division of Housing & Community Renewal (motion sequence number 001) is granted, the petition is dismissed in its entirety, and the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of respondent-intervenor Cenpark Realty, LLC (motion sequence number 001) is denied; and it is further

ORDERED that counsel for Petitioner shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for Respondents.

Dated: New York, New York
September 25, 2019

ENTER:



Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.