

Matter of Gross v Affordability Oversight Program of the Dept. of Hous. Preserv. & Dev. (HPD)
2020 NY Slip Op 30035(U)
January 7, 2020
Supreme Court, New York County
Docket Number: 101081/2019
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM

Justice

-----X

In the Matter of
ABRAHAM GROSS,

Petitioner,

INDEX NO. 101081/2019

MOTION DATE 12/04/2019

MOTION SEQ. NO. 006

- v -

AFFORDABILITY OVERSIGHT PROGRAM OF THE
DEPARTMENT OF HOUSING PRESERVATION AND
DEVELOPMENT (HPD), BREAKING GROUND, RCB1
RESIDENTIAL FOR SALE LLC, RCB3 RESIDENTIAL FOR
SALE LLC, RCB4 RESIDENTIAL FOR SALE LLC

**DECISION + ORDER ON
MOTION**

Respondents.

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The following e-filed documents, listed by NYSCEF document number (Motion 006) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 61, 62

were read on this motion to/for RENEWAL

In this CPLR article 78 proceeding, the petitioner sought judicial review of a July 9, 2019 New York City Department of Housing Preservation and Development (HPD) determination that his income was insufficient to qualify him for a subsidized apartment at the Waterline Square apartment complex in Manhattan. By order dated July 18, 2019, the court temporarily stayed the respondents from leasing out certain apartments at Waterline Square pending hearing of the petition. By order and judgment dated August 16, 2019, and entered August 23, 2019, this court denied the petition on the merits and dismissed the proceeding, concluding that HPD's determination that the petitioner's income was insufficient was not arbitrary and capricious. It also rejected the petitioner's contention that he was denied due process. The stay was thereupon dissolved. By order dated November 20, 2019, as amended, this court denied the petitioner's motion for leave to reargue. It also declined to sign several proposed orders to

show cause, pursuant to which the petitioner sought leave to reinstitute the stay that had been dissolved when the petition was denied.

The petitioner now moves for leave renew the petition, contending that newly discovered evidence requires the court to vacate the order and judgment and thereupon grant the petition. Specifically, he asserts that certain correspondence and a generic housing applications report should have been included in the administrative record, but were not, and that, had the court considered those documents, it would have been compelled to conclude that the HPD's determination was arbitrary and capricious or denied him due process. The respondents oppose the motion, contending that these documents were not properly part of the administrative record but that, even if they were, consideration of their contents would not compel a different outcome. The motion is deemed to include a request to amend or correct the administrative record and is granted to the extent that the administrative record is amended and corrected so as to include copies of email correspondence annexed as Exhibits B2 and B3 to the petitioner's affidavit in support of the motion. The motion is otherwise denied.

Renewal is only warranted where the movant presents "new facts not offered on the prior motion that would change the prior determination," or demonstrates that "there has been a change in the law that would change the prior determination" (CPLR 2221[e][2]; see *Foley v Roche*, 68 AD2d 558, 567 [1st Dept. 1979]). A movant must also present "a reasonable justification for the failure to present" any such new facts on the prior motion (CPLR 2221[e][3]). "A motion for leave to renew is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Joseph v Simmons*, 114 AD3d 644, 644 [2d Dept 2014], quoting *Elder v Elder*, 21 AD3d 1055, 1055 [2d Dept 2005]).

Renewal is not warranted here since, even if the documents identified by the petitioner were actually part of the administrative record, and the petitioner had a reasonable excuse for failing to submit or refer to them in connection with the initial petition, the court's consideration of those documents would not have changed the outcome of the proceeding.

In the first instance, “[d]isposition of the proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered” (*Matter of Fanelli v New York City Conciliation & App. Bd.*, 90 AD2d 756, 757 [1st Dept 1982], *affd* 58 NY2d 952 [1983]; *see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000] [court may not “consider evidentiary submissions as to circumstances after the [agency] made its determination”]; *Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Quinones v New York City Hous. Auth.*, 99 AD3d 473, 474 [1st Dept 2012] [“petitioners’ arguments and documentation submitted in support of their CPLR article 78 petition are not reviewable as they were not part of the administrative record”]; *Matter of Regional Action Group for the Environment v Zagata*, 245 AD2d 798, 801 [3d Dept 1997]; *Matter of Raqiyyb v Coughlin*, 214 AD2d 788, 789 n [3d Dept 1995]; *Matter of For-Med Med. Group v New York State Ins. Fund*, 207 AD2d 300, 301 [1st Dept 1994] [“proof outside the administrative record should not be considered”]; *Matter of Tilles v Williams*, 119 AD2d 233, 241 [2d Dept 1986] [same]; *Matter of Celestial Food Corp. v New York State Liquor Auth.*, 99 AD2d 25, 26-27 [2d Dept 1984]).

The evidence that the petitioner characterizes as “newly discovered” consists of various emails and letters from HPD to the petitioner and emails from HPD to marketing agent Breaking Ground discussing the status of the petitioner’s application, as well as a building-wide “Applications Report” for Waterline Square that lists applicants’ names, unit, log number, dates that applications were received, and dates applications were “proceeded.” The petitioner asserts that these documents should have been included in the administrative record filed with the court but were not; he further contends that, had they been included, the court would have been constrained to grant the petition and annul HPD’s determination.

Where material should have been included in the administrative record but was not, the “proper remedy is a motion in Supreme Court to amend or correct the record” (*Matter of Raqiyyb v Coughlin*, 214 AD2d at 799 n, citing 10 Carmody-Wait 2d, NY Prac § 70:199, at 204; *see Matter of Regional Action Group for the Environment v Zagata*, 245 AD2d at 801 [affirming

denial of motion to amend the administrative record]). Prior to the instant motion, the petitioner did not avail himself of this remedy. Nonetheless, the court deems the petitioner's instant motion to include a request to amend the administrative record to add copies of the documents annexed as Exhibits B2, B3, B4, B5, B6, B7, B8, C5, and C6 to his affidavit in support of the motion to renew.

It is not clear from the petitioner's submissions when he first learned of the existence of the documents that he now identifies; certainly, he knew and was in possession of the email and letter correspondence between the respondents and himself prior to the oral argument on the initial petition. He had the opportunity to review the administrative record filed by the HPD with the court prior to oral argument. He also had the opportunity to object that the record was not complete and request the court to amend or correct the administrative record at that time to add the correspondence that he possessed. His failure to do so renders untimely any present request to add, to the administrative record, emails and letters between the respondents and him. The petitioner does not provide a reasonable excuse as to why he did not earlier move to amend or correct the administrative record with documents that he claims are relevant and were in his possession as of July 9, 2019. Hence, the documents annexed as Exhibits B4, B5, B6, B7, and B8 to the petitioner's affidavit will not be added to the administrative record.

Since two of the emails between HPD and Breaking Ground were or could have been generated prior to the final determination, and the petitioner might not have known of their existence prior to oral argument on the petition, the court grants the petitioner's request to amend and correct the administrative record so as to add copies of the emails annexed as Exhibits B2 and B3 to his affidavit. The court notes that an appeal from the order and judgment dated August 16, 2019 is pending. The petitioner is referred to the Clerk of the Appellate Division, First Department, for the rules applicable to the filing a supplement record on appeal with that Court.

In any event, even if the petitioner could show that he only learned of any of this correspondence after oral argument on the petition was conducted, it supports neither his claim of bad faith nor his contention that, had the court reviewed them, it would have concluded that HPD's determination was arbitrary and capricious or deprived him of due process.

There is no merit to the petitioner's argument that the emails proved that HPD only reviewed his application for a maximum of three hours on July 9, 2019 before it issued its adverse determination later that day, and that Breaking Ground lied to him about when his application was forwarded to HPD. As Breaking Ground correctly notes, Exhibit B3 to the petitioner's affidavit confirms that HPD had been reviewing petitioner's file at least as of July 5, 2019. On that date, a Senior Policy Analyst for HPD had reviewed his file and observed that the initial ineligibility letter was not included in the file sent to HPD by Breaking Ground.

Breaking Ground also correctly notes that, to the extent that the email annexed as Exhibit B2 to the petitioner's motion even referred to the petitioner's file (the copy annexed to the petitioner's affidavit has the applicant's name redacted), it merely expresses the frustration of the HPD Deputy Director that the file that was the subject of the email was not organized properly. The rhetorical question asking, "does Breaking Ground review the files they send to us" refers to the observation that the file itself was "out of order with skewed documents," and not to an error in Breaking Ground's factual review.

Even if the court included Exhibits B4 to B8 in the administrative record, the outcome of the proceeding would not be affected. The June 28, 2019 email from Breaking Ground to the petitioner, attached as Exhibit B4 to the petitioner's motion papers, simply states that "your file is currently under review by the outside regulatory agency," which is consistent with the fact that the petitioner had complained to HPD on June 21, 2019. Although the June 28, 2019 email did not indicate when the file was made available to HPD it did not preclude concurrent review of the digital or paper files by both Breaking Ground and HPD, nor did it establish that HPD only conducted a cursory review of the petitioner's file on July 9, 2019. Exhibit B5 to the petitioner's

affidavit includes correspondence returning the money order that the petitioner had remitted to pay for a background check, following Breaking Ground's rejection letter. It appears that the letter was prepared on June 27, 2019, and then held back when the petitioner continued to appeal. That it misstates the log number and was mailed later than the date stated on the letter is irrelevant and immaterial to this proceeding. The series of emails sent to the petitioner from "HPD Compliance" on July 9, 2019 (annexed as Exhibits B6 to B8 to the petitioner's affidavit), first indicating that his application had not been reached, and then that it had been reached, are clearly in the nature of automated responses, and do not establish that HPD engaged only in a cursory review of the petitioner's file.

The Applications Report identified by the petitioner, annexed as Exhibits C5 and C6 to his affidavit, was irrelevant to the review of the petitioner's application for an apartment, the evaluation of his income, or to any due process concerns that he raised in connection with the review of his application. It thus does not constitute evidence that was required to be included in the administrative record. Nor does it support the petitioner's motion for leave to renew. To the extent that the petitioner contends that the report establishes that Breaking Ground violated the intent of this court's July 18, 2019 temporary restraining order by continuing to review applications in the underlying housing lottery involving more than 70,000 applicants, that contention is irrelevant to whether HPD's income determination was arbitrary and capricious, as it post-dated the determination. In any event, the court notes that the order restrained only the leasing of any relevant apartment, but not the review of applicant eligibility.

To the extent that the petitioner seeks review of an adverse determination of his request for agency records from HPD under the Freedom of Information Law, that request is not properly before the court on this motion.

Accordingly, it is,

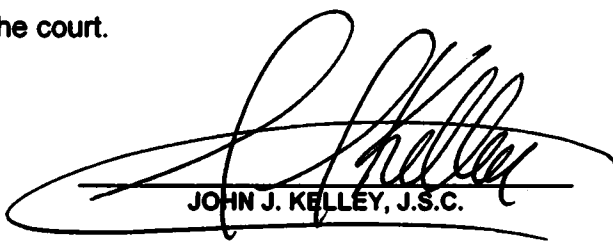
ORDERED that the petitioner's motion for leave to renew the petition is deemed to include a request to amend or correct the administrative record filed with the court by the New

York City Department of Housing Preservation and Development, so as to add copies of documents annexed to the petitioner's affidavit in support of the motion as Exhibits B2, B3, B4, B5, B6, B7, B8, C5, and C6; and it is further,

ORDERED that the motion is granted to the extent that the administrative record is amended and corrected by adding thereto the documents annexed to the petitioner's affidavit in support of the motion as Exhibits B2 and B3, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

1/7/2020
DATE


JOHN J. KELLEY, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	