Matter of 3569 Assoc., LLC v New York State Div. of Hous. & Community Renewal
2020 NY Slip Op 33795(U)
November 13, 2020
Supreme Court, New York County
Docket Number: 161383/2019
Judge: Melissa A. Crane
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: MELISSA A. CRANE PART 15
Justice

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In the Matter of the application of
3569 Associates, LLC,

Petitioner,

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

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUN ITY RENEWAL,

Respondent.

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Index Number: 161383/2019

Motion Sequence No. 001

Decision and Order

The following papers, numbered _ to _ were read on this motion to/for_____.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause — Affidavits — Exhibits …	
Answering Affidavits — Exhibits	
Replying Affidavits	

CROSS-MOTION: ☐ YES ☒ NO

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

Upon the foregoing papers, it is ordered that this motion is

Melissa Crane, J.:

Petitioner 3569 Associates, LLC is the owner (Owner) of the building located at 3569 Broadway, New York, New York (Building). Respondent is New York State Division of Housing and Community Renewal (DHCR), an administrative agency responsible for the administration of the rent-regulation laws of New York, including the Rent Stabilization Law of 1969 (RSL) and the Rent Stabilization Code (RSC). Pursuant to its notice of petition (NYSCEF Doc. No. 2), Owner seeks an order of this court compelling DHCR to accept its "request for an administrative determination" and to determine the "legal rent" of apartment 4D in the Building (Apartment), in light of the various improvements it made to the Apartment in or about March 2018. The improvements occurred before New York's enactment of the Housing Stability and

Tenant Protection Act of 2019 (HSTPA), that imposed restrictions upon an apartment building owner's right to rent increases based on the improvements completed in that owner's building.

Background

The following facts are from the allegations in the verified petition Owner filed with this court on November 21, 2019 (Petition; NYSCEF Doc. No. 1). In or about March 2018, while the Apartment was vacant, Owner made various improvements to the Apartment at a cost of $57,000 (Petition, ¶¶ 11-12). Based on the regulations governing rent increases at that time, commonly known as "IAI Increases," upon re-renting the Apartment, Owner would have been entitled to a $950 increase, in addition to any other permissible amount, representing 1/60 of the cost of the improvements (*id.*, ¶¶ 13-16, citing RSC section 2522.4 [a]). On June 14, 2019, the New York legislature enacted HSTPA. This statute "significantly curtailed [a] property owner's rights to IAI Increases and imposed draconian penalties for rent overcharges." (*id.*, ¶ 17). In relevant part, subsection K of the HSPTA amended the RSL to: (i) limit the amount of an apartment improvement upon which an IAI Increase may be based, to only $15,000, and (ii) provide the property owner no more than three separate IAI Increases within a 15-year period (*id.*, ¶ 18). Subsection K also limits the amount of an IAI Increase to 1/180 of the cost of the improvements for the apartments within the Building (*id.*, ¶ 19). At the time the HSTPA became effective, Owner had not yet re-rented the Apartment. As of the date of the Petition, the Apartment remained vacant (*id.*, ¶¶ 21-22).

Because improvements to the Apartment were complete prior to the effective date of the HSTPA, Owner believes the law previously in effect governs its right to an IAI Increase. Thus, on October 1, 2019, Owner filed with DHCR a request for an administrative determination (Administrative Application) as to the "legal rent" of the Apartment. Owner advised DHCR that the Apartment had been vacant since November 30, 2016; that the last tenant to occupy the

Apartment paid a monthly rent of $1,072.86; that it made improvements to the Apartment at a cost of $57,000 after it became vacant; and that, based upon the relevant provisions of the RSC, it would be entitled to re-rent the Apartment at an IAI Increase in the amount of 1/60 of the cost of improvements (*id.,* ¶¶ 25-26).

The Petition asserts that DHCR "never docketed" the Administrative Application. Instead, on October 11, 2019, DHCR issued a notice of rejection (Rejection Notice) because the Apartment was vacant at the time and there was no court proceeding where a tenant of the Apartment disputed the rent (*id.*, ¶ 27). The Rejection Notice also stated that Owner would be "responsible for charging a lawful rent" and for keeping all rent records in case a tenant seeks a determination regarding the legal rent of the Apartment (*id.*). Accordingly, Owner filed this Petition, pursuant to CPLR 7803, to compel DHCR "to perform an act which it is required by law to perform but which it has failed to perform" (*id.*, ¶ 28).

Discussion

In response to the Petition, by way of its counsel's affirmation in opposition (DHCR Opp.; NYSCEF Doc. No. 12), DHCR contends that the Rejection Notice reflected a proper exercise of discretion "because there was no rent amount in dispute between the owner and a tenant as the apartment was vacant and there was thus no court proceeding where a tenant disputed the rent for the apartment" (DCHR Opp., ¶ 5). DHCR also contends that the Administrative Application was not ripe for determination because a justiciable controversy between Owner and a tenant was required, and in the "absence of a controversy, any injury would be speculative" (*id.*, ¶¶ 6-8). Thus, DHCR also contends that Owner "lacks standing" to commence this proceeding (*id.*, ¶ 8).

In support of its opposition, DHCR cites to, among other cases, *Matter of Hamptons Hosp. & Med. Ctr. v Moore* (52 NY2d 88 [1981]), for the proposition of law that mandamus lies

only where the right to relief is clear and the duty involves "no exercise of discretion" (DCHR Opp., ¶ 11). DHCR points to section 2522.6 (a) of the RSC that provides, in relevant part: "Where the legal regulated rent . . . is in dispute between the owner and the tenant, or is in doubt, or is not known, the DHCR at any time upon written request of either party . . . ***may*** issue an order in accordance with the applicable provisions of this Code determining the facts, including the legal regulated rent . . . " (*id*., ¶ 13, quoting RSC section 2522.6 [a] [emphasis added]). Because acceptance and processing of the Administrative Application is "discretionary" under the statute, as the word "may" evidences, DHCR contends it has not failed to perform a required act. Accordingly, an order of mandamus to compel DHCR does not lie (*id*., ¶ 15).

In its reply (Owner Reply; NYSCEF Doc. No. 14), Owner argues that DHCR's reasoning for rejecting the Administrative Application is flawed because there is "no requirement" in the statute that there must be a tenant occupying an apartment in order for DHCR to determine the legal rent (Owner Reply, ¶ 20). Specifically, Owner argues that, while the statute provides for DHCR to determine the legal rent where there is a dispute between the owner and the tenant, it also provides for DHCR to determine the legal rent "if the legal rent is in doubt or is not known," and as such, the language of the statute requires that DHCR "must determine" the legal rent of the Apartment where "the rent in this case is clearly in doubt and not known, especially given the provisions of HSTPA" (*id.*, ¶¶ 21, 25-26).

Owner's argument is unavailing because it is clear that the governing statute provides DHCR with the discretion to determine the legal rent of an apartment where there is "a dispute between the owner and the tenant, or is in doubt, or is not known," and that DHCR "***may*** issue an order in accordance with the applicable provisions of this Code" (RSC section 2522.6 [a] [emphasis added]). It is also noteworthy that Owner completed improvements to the Apartment in March 2018, the HSTPA did not become effective until June 14, 2019, but Owner filed the

Administration Application with DHCR in October 2019. Thus, Owner had more than 12 months to re-rent the Apartment before the effective date of the HSTPA. Had it re-rented the apartment, its entitlement to an IAI Increase under section 2522.4 (a) of the RSC would not have been in question. Therefore, any prejudice to Owner is due to its own failure to re-rent the vacant Apartment.

Owner also argues that, because DHCR's obligation to issue a determination is "absolute and therefore ministerial," its failure to render a determination is "grounds for mandamus to compel" (Owner Reply, ¶ 13, citing, among other cases, *Matter of Gianelli v New York State Div. of Housing & Community Renewal,* 142 Misc2d 285 [Sup Ct, Queens County 1989]; *Matter of Ista Mgmt. Co. v New York State Div. of Housing & Community Renewal,* 139 Misc2d 1 [Sup Ct, NY County 1988]). However, these cases involved either a dispute between a landlord and a tenant where DHCR was asked to determine whether there was a rent overcharge (as in *Gianelli*), or involved a review of administrative orders to roll back rents and refund overcharges where DHCR was to render a decision within the 90-day period under the RSL but failed to do so (as in *Ista Management*).

In this proceeding, DHCR contends that there is no evidence for determining the Apartment's legal rent, because Owner's claim of "what the rent should be with improvements allegedly done before passage of HSTPA cannot necessarily be proven based solely on Owner's proof," and that a tenant "could have countervailing evidence that some or all of the claimed work was not done" (DHCR Opp., ¶ 30). Therefore, DHCR argues that the Administrative Application is not ripe, because the rent charged and paid "is an essential factor in determining the legal rent" (*id.*, citing *Waterways Dev. Corp. v Lavalle*, 28 AD3d 539, 540 [2d Dept 2006] [a justiciable controversy must involve a present rather than a hypothetical prejudice]). DHCR's

contention is persuasive, because, in the absence of an actual controversy with a tenant, any potential injury to Owner is speculative.

In the Petition, Owner points out that under RSC section 2527.11 (a), DCHR may render an advisory opinion regarding its interpretation of the RSL, RSC and regulatory procedures on its own initiative or at the request of a party (Petition, ¶ 41). According to Owner, there is "no doubt" that DHCR is "empowered to enforce the rent regulatory laws and specifically, to decide applications before it," and as such, DHCR "had a clear and official duty to decide the Administrative Application" (*id.*, ¶ 47).

Unlike a formal agency, an advisory opinion is "simply an opinion" that is "not binding on DHCR." Moreover, it is arguable that any order DHCR issued would not bind a future tenant, because that individual never had an opportunity to be heard (*see Kaufman v Eli Lilly & Co*., 65 NY2d 449 [1985]).

Owner also argues that DHCR's refusal to adjudicate the Administrative Application has placed Owner in the "prejudicial position of being forced to choose" whether to forego a portion of an IAI Increase or to implement the increase and risk "huge and unjust penalties, including potential damages" under the HSTPA (Owner Reply, ¶ 32). Again, Owner's failure to re-rent the Apartment before the HSTPA became effective obviates this argument.

As a last resort, Owner argues that, if this court "does not wish to direct DHCR to carry out its mandate and determine the Administrative Application," the court should then convert this proceeding to an action for declaratory judgment under CPLR 103 (c) (Owner Reply, ¶¶ 38-39). The statute states, in relevant part, that "a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution," and that the court "may convert a motion into a special proceeding or vice-versa," where it finds it is appropriate to do so "in the interest of

justice" or "upon such terms as may be just" (CPLR 103 [c]). This court declines to entertain Owner's belated request made in its reply (*Matter of Allstate Ins. Co. v Dawkins*, 52 AD3d 826, 827 [2d Dept 2008] [function of a reply is to address arguments made in opposition to the moving paper, not to permit the movant to introduce new argument or new ground for the requested relief. Moreover, it is unclear who the respondent would be in such a declaratory judgment proceeding, considering Owner does not have a tenant in the apartment.

Conclusion

For all of the foregoing reasons, it is hereby

ORDERED that the relief sought in the petition of 3569 Associates, LLC (motion sequence number 001) is denied in all respects and the proceeding is dismissed.

DATED: November 13, 2020

MELISSA A. CRANE, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: MOTION IS: GRANTED IN PART

Check if appropriate: DO NOT POST REFERENCE SETTLE ORDER SUBMIT ORDER FIDUCIARY APPOINTMENT