

West Fifth Ave. Realty L.P. v Visnauskas

2020 NY Slip Op 33962(U)

November 30, 2020

Supreme Court, New York County

Docket Number: 154504/2020

Judge: Carol R. Edmead

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. CAROL R. EDMEAD **PART** **IAS MOTION 35EFM**

Justice

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INDEX NO. 154504/2020

WEST FIFTH AVENUE REALTY L.P.,

MOTION DATE 01/19/2021

Plaintiff,

MOTION SEQ. NO. 001

- v -

RUTHANNE VISNAUSKAS, DIVISION OF HOUSING AND
COMMUNITY RENEWAL, BEVERLY MCGARRELL,

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner West Fifth Avenue Realty L.P. (motion sequence number 001) is denied; 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 1001, of petitioner West Fifth Avenue Realty L.P. (motion sequence number 001) is denied as moot; and it is further

ORDERED that counsel for respondent shall serve a copy of this order on all parties, along with notice of entry, within twenty (20) days.

In this Article 78 proceeding, petitioner West Fifth Avenue Realty L.P. (West Fifth) seeks a judgment to overturn an order of the respondent New York State Division of Housing and Community Renewal (DHCR) as arbitrary and capricious. The DHCR cross-moves to dismiss the petition, and West Fifth cross-moves separately for leave to implead a non-party pursuant to CPLR 1001 (together, motion sequence number 001). The petition and the cross motions are all disposed of in accordance with this decision.

FACTS

Co-respondent Beverly McGarrell (McGarrell) is the tenant of record of apartment 5C in a residential, rent-stabilized building (the building) located at 2 West 129th Street in the County, City and State of New York. *See* verified petition, ¶ 1. West Fifth is the building's owner and landlord. *Id.*, ¶ 4. The DHCR is the administrative agency that oversees rent-stabilized buildings located within New York City. *Id.*, ¶¶ 2-3.

On May 28, 2009, McGarrell filed an administrative complaint with the DHCR that alleged that West Fifth had improperly decreased certain services in the building. *See* verified petition, ¶ 5. After West Fifth failed to answer that complaint and twice failed to appear, the DHCR granted McGarrell's application on default, and issued an order, dated April 29, 2010, that reduced her rent to \$430.00 per month (the rent reduction order). *Id.*, ¶ 5; exhibit 1.

The DHCR states that West Fifth failed to file a timely administrative appeal of the rent reduction order via "Petition for Administrative Review" (PAR) in 2010. *See* notice of cross motion (DHCR), Schindelman affirmation, ¶ 26. It notes that McGarrell filed a DHCR rent overcharge complaint against West Fifth in 2019. *Id.*, 27. West Fifth states that it first became aware of the 2010 rent reduction order during the litigation of the 2019 DHCR rent overcharge proceeding, and that it finally filed a PAR to challenge the rent reduction order on April 2, 2020.

See verified petition, ¶ 6; exhibit 2. However, on May 21, 2020, the office of DHCR Commissioner Ruthanne Visnauskas (the Commissioner) issued a decision that dismissed West Fifth's PAR. *Id.*, ¶ 7; exhibit 3. The Commissioner's decision found that:

“The aforesaid [PAR] was not filed within 35 days after the issuance date of the order as required by the applicable regulations (Part 2529 of the Rent Stabilization Code [RSC], Part 2510 of the Tenant Protection Regulations, Part 2108 of the State Rent & Eviction Regulations, or Part 2208 of the City Rent & Eviction Regulations), which provides that a [PAR] must be filed within 35 days after the date such order is issued.

“There is no provision under said applicable regulations permitting an extension of time for the filing of a [PAR].

“The Commissioner finds that [West Fifth] has failed to comply with the requirements set forth above and that the [PAR] must therefore be dismissed.” *Id.*; exhibit 3. West Fifth thereafter commenced this Article 78 proceeding on June 19, 2020.

See verified petition. At that time, the Covid-19 national pandemic had caused the court to suspend most of its operations. The DHCR nevertheless filed a cross motion to dismiss the petition on October 15, 2020. See notice of cross motion (DHCR).

McGarrell apparently suffers from mental health issues, as a result of which non-party Selfhelp Community Services, Inc. (Selfhelp) was evidently appointed as her Article 81 guardian ad litem (GAL) at some point. See notice of motion (West Fifth), exhibit 1. McGarrell also apparently relocated herself from apartment 5C to apartment 5A in the building without permission some time prior to this litigation. *Id.* Nevertheless, McGarrell filed a pro-se answer to West Fifth's petition on October 19, 2020. See verified answer. On November 10, 2020, in another action (*Matter of Doar v McGarrell*, Index Number 401651/11), this court (T. James, J.) granted West Fifth's application for an order: 1) to relocate McGarrell back to apartment 5C from apartment 5A; and 2) directing West Fifth to seek leave to implead and join Selfhelp as a party in this proceeding. See notice of motion (West Fifth), exhibit 1. On November 17, 2020, West Fifth submitted a cross motion in this action to make that request. *Id.*, notice of cross

motion (West Fifth), Rothenberg affirmation, ¶¶ 1-11. The matter is now fully submitted (together, motion sequence number 001).

DISCUSSION

Pursuant to the RSC:

“A PAR against an order of a [DHCR] rent administrator must be filed in person, by mail, or otherwise as provided by operational bulletin, with the DHCR within 35 days after the date such order is issued.”

9 NYCRR § 2529.2. The failure to file a timely PAR constitutes a failure to exhaust all available administrative remedies which mandates the dismissal of a subsequent Article 78 proceeding.

See e.g., Matter of Ross v DHCR, 125 AD3d 434 (1st Dept 2015); *Matter of JP & Assoc. Corp. v New York State Div. of Hous. & Community Renewal*, 122 AD3d 739 (2d Dept 2014). Here, it is beyond question that West Fifth’s 2020 PAR was not a timely challenge to the DHCR’s 2010 rent reduction order. *See* verified petition, exhibits 1, 3.

West Fifth nevertheless asserts that the DHCR improperly served the 2010 rent reduction order on it at 5041 Broadway, New York, NY 10034, which address was “incorrect/incomplete as it does not include a unit or suite designation,” and therefore the “notifications were not received by the landlord which resulted in a default.” *See* verified petition, ¶¶ 9-11. The DHCR responds that the aforementioned address was the one which West Fifth had entered on the annual building registration statement that was on file with the agency in 2010. *See* notice of cross motion (DHCR), Schindelman affirmation, ¶ 89. It also presents copies of West Fifth’s subsequent registrations and of its own proofs of mailing. *Id.*; exhibits A, D, E, F. The agency correctly notes that well settled appellate precedent holds that evidence that the DHCR followed its routine mailing procedures gives rise to a presumption of receipt of those orders. *See e.g., Matter of Le Havre Tenants Assn., Inc. v New York State Div. of Hous. & Community Renewal*, 17 AD3d 368 (2d Dept 2005); *Matter of Nelson Mgt. Group v New York State Div. of Hous. &*

Community Renewal, 259 AD2d 411 (1st Dept 1999). West Fifth nevertheless replies that the DHCR “could have followed mailroom procedure, but that would not change the fact that the mailing address maintained by DHCR's records for Petitioner is incomplete/improper.” *See* notice of cross motion (West Fifth), Rothenberg affirmation, ¶¶ 44-46. However, the court rejects this argument because the evidence cited above clearly shows that “5041 Broadway, New York, NY 10034” was the address for service that West Fifth itself provided to the DHCR. The affidavit of West Fifth’s agent Donna Synmoie does not offer any explanation as to why West Fifth did so. *See* notice of cross motion (West Fifth), Synmoie aff, ¶¶ 1-11. Therefore, the court concludes that West Fifth has failed to present any evidence to overcome the presumption of receipt.

Accordingly, the court finds that West Fifth’s Article 78 petition should be denied as untimely, and that the DHCR’s cross motion to dismiss it should be granted. Because it so finds, the court also finds that West Fifth’s cross motion for leave to implead Selfhelp should be denied as moot.

CONCLUSION

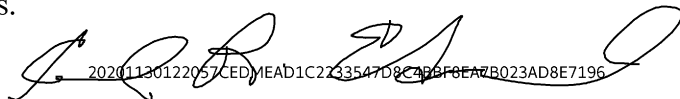
ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner West Fifth Avenue Realty L.P. (motion sequence number 001) is denied; 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

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ORDERED that counsel for respondent shall serve a copy of this order on all parties, along with notice of entry, within twenty (20) days.


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11/30/2020
DATE

CAROL R. EDMEAD, J.S.C.

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