

<b>517-525 W. 45th LLC v New York City Dept. of Hous. Preserv. &amp; Dev.</b>
2021 NY Slip Op 31669(U)
May 18, 2021
Supreme Court, New York County
Docket Number: 160426/2020
Judge: Carol R. Edmead
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

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

*Justice*

-----X

517-525 WEST 45TH LLC,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF HOUSING  
PRESERVATION AND DEVELOPMENT,

Defendant.

-----X

INDEX NO. 160426/2020

MOTION DATE 12/09/2020,  
03/11/2021

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 25, 26, 29, 31, 32, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 70, 71, 72, 73, 74, 75, 76, 77

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 63, 66, 67, 68, 69

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE.

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner 517-525 West 45th LLC (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that the motion, pursuant to CPLR 7802, of proposed intervenor petitioner Douglas Ward Kelley (motion sequence number 002) is denied; and it is further

ORDERED that counsel for respondent New York City Department of Housing Preservation and Development shall serve a copy of this order along with notice of entry on all parties within ten (10) days.

In this Article 78 proceeding, petitioner 517-525 West 45th LLC (517-525) seeks an order in the nature of mandamus against the respondent New York City Department of Housing Preservation and Development (HPD; motion sequence number 001), and non-party Douglas Ward Kelley (Kelley) moves for leave to intervene (motion sequence number 002). For the following reasons, the petition and motion are both denied.

### FACTS

517-525 is the owner of a five-building complex located at 517-525 West 45th Street in the County, City and State of New York (the buildings). *See* verified petition, ¶ 1. The five structures, designated as buildings A, B, C, D, and E, are situated on a single zoning lot located in the “Special Clinton District.” *Id.* The buildings are themselves each designated as “interim multiple dwellings” (IMDs), and are all currently subject to the Loft Law (Multiple Dwelling Law [MDL] Article 7-C, et seq.), compliance with which is overseen by HPD. *Id.*, ¶¶ 1-2. Kelley is a resident of loft unit 2C. *See* notice of motion, Kelley aff, ¶1

517-525 seeks to “legalize” the buildings, i.e., to sufficiently renovate them so that the non-party New York City Department of Buildings (DOB) will issue “certificates of occupancy” (C’s of O) that designate the buildings as “multiple dwellings” and authorize residential tenants to live in them. *See* verified petition, ¶¶ 7-8. The New York City Zoning Resolution (ZR) places certain restrictions on what renovation work may be performed on buildings located in the “Special Clinton District.” *Id.* The portions of the Zoning Resolution that are relevant to this proceeding include the following:

“ZR § 96-108. Alterations of buildings.

“Prior to the issuance of an alteration permit by [DOB] for a material alteration of a multiple dwelling within the Preservation Area [i.e., the Special Clinton District], [HPD] shall certify to [DOB] that:

“(a) prior to evicting or otherwise terminating the occupancy of any tenant preparatory to alteration, the owner shall have notified the [DOB] Commissioner of his or her intention to alter the building; and

“(b) [HPD] has issued a certification of no harassment or that the owner has complied with paragraph (d) of Section 96-110

\* \* \*

“ZR § 96-110. Harassment and cure.

\* \* \*

“(b). Permit Process.

“(1) Unless [HPD] has issued a certification of no harassment pursuant to paragraph (c) of this Section or has certified compliance with the cure provisions of paragraph (d) of this Section, no permit may be issued by [DOB] pursuant to Sections 96-109 or 96-24, and no special permit may be granted by the City Planning Commission pursuant to Sections 96-107 or 96-108.

\* \* \*

“(3) Where [HPD] has denied a certification of no harassment with respect to a multiple dwelling, [DOB] shall not issue any permit with respect to any multiple dwelling or other building located on, or to be located on, the cure requirement lot except in accordance with paragraph (d) of this Section.

\* \* \*

“(c). Certification of No Harassment.

“(1) [HPD] shall determine and certify whether there has been harassment of the lawful occupants of a multiple dwelling during the inquiry period.

\* \* \*

“(3) [HPD] may promulgate rules regarding the implementation of this Section. Such rules may include, but shall not be limited to, provisions which: (i) establish the information to be required in an application for certification of no harassment, the form of such application, and the manner of filing of such application.

\* \* \*

“(4) [HPD] may refuse to accept, or to act upon, an application for a certification of no harassment where [HPD] finds that:

\* \* \*

“(ii) such multiple dwelling has been altered either without proper permits from [DOB] or in a way that conflicts with the [C of O] for such multiple dwelling (or, where there is no [C of O], any record of [HPD] indicating the lawful configuration of such multiple dwelling) and such unlawful alteration remains uncorrected; or

“(iii) [HPD] has previously denied an application for a certification of no harassment pursuant to this Section.

“(d). Certification of Cure for Harassment.

“(1) [HPD] shall not certify compliance with the cure provisions of this paragraph to [DOB] unless all parties in interest to the cure requirement lot and all

parties in interest to the cure compliance lot have entered into a restrictive declaration.

“(2) Any permit or certificate of occupancy issued by [DOB] with respect to any structure located on a cure requirement lot or a cure compliance lot shall be subject to the following conditions:

“(i) [DOB] shall not issue any permit, except a permit for an alteration which is not a material alteration, with respect to any structure located on the cure requirement lot unless the restrictive declaration has been recorded in the Office of the City Register and indexed against each tax lot within the cure requirement lot and each tax lot within the cure compliance lot.

“(ii) [DOB] shall not issue any temporary or permanent [C of O] for any new or existing structure or portion thereof on the cure requirement lot, other than any low income housing located on the cure requirement lot, until:

“(a) [HPD] certifies that the low income housing required by the restrictive declaration has been completed in compliance with the restrictive declaration; and

“(b) [DOB] has issued a temporary or permanent [C of O] for each unit of such low income housing.”

*See* ZR §§ 96-108, 96-110.

In 2008, the buildings’ prior owner applied for a “certification of no harassment” pursuant to ZR § 96-110 (c), however HPD denied that application on April 8, 2010. *See* verified petition, ¶¶ 9-10. 517-525 thereafter acquired the buildings on July 14, 2014, and applied for a “certification of cure” pursuant to ZR § 96-110 (d). *Id.*, ¶¶ 11-12; verified answer, exhibit A. On December 13, 2016, 517-525 executed a “cure agreement” with HPD (the cure agreement). *Id.*, verified petition, ¶ 13; exhibit A. The cure agreement designated apartment units 2A, 2C,<sup>1</sup> 2D and 5C as “low income units,” and provided, in part, as follows:

“5. Permits and Certificates of Occupancy.

\* \* \*

“b. Owner shall not apply for or accept any temporary or permanent [C of O] for any new or existing structure or portion thereof on the Zoning Lot, other than any Low Income Housing located on the Zoning Lot, until (i) HPD certifies that the Low Income Housing required by this Agreement has been completed in

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<sup>1</sup> Kelley is the occupant of unit 2C. *See* notice of motion, Kelley aff, ¶1.

compliance with this Agreement; and (ii) DOB has issued a permanent [C of O] for the Building.

\* \* \*

“f. Owner shall ensure that its construction plans for the Project are in full compliance with the design requirements of all applicable laws, and with all requirements to obtain approvals and/or waivers from DOB as set forth in the building plans submitted to HPD and DOB (‘Building Plans’) annexed hereto as Exhibit C and made a part hereof. Failure to comply with the Building Plans within thirty-six (36) months from the date of this Agreement shall constitute a default under this Agreement and in addition to the remedies set forth in Section 20 hereof shall constitute a basis for revocation of any permit, temporary or permanent [C of O] for any new or existing structure or portion thereof on the Zoning Lot (other than the Low Income Housing) and the Cure Certificate of Completion described in Section 11 hereof. Any schematic design changes made subsequent to the date of this Agreement as a result of determinations by DOB shall be submitted to HPD’s Division of Building & Land Development Services (‘BLDS’) with a written explanation, for further HPD review and approval.

\* \* \*

“11. Certifications.

“Upon the request of Owner following recordation of this Agreement against the Property, and provided that the Owner [sic] in compliance with this Agreement, the Plan, and the Program, and solely for the purpose of allowing DOB or City Planning Commission to issue the permit(s) or special permit(s) required for the Project, HPD will certify to DOB or City Planning Commission, as applicable, compliance with the cure provisions of Zoning Resolution §96-110(d) (‘Cure Certificate’), and in particular that the Plan has been submitted and approved in compliance with the Program and that the square footage of the Floor Area of the Low Income Units, when completed in accordance with the Plan and this Agreement, will satisfy the Cure Requirement.

“Following recordation of this Agreement against the Property and completion of the Low Income Units in accordance with the Plan and this Agreement, and for the purpose of allowing DOB to issue the permanent [C of O] required in connection with the Project for any new or existing structure, or portion thereof, on the Cure Requirement Lot, other than for the Low Income Housing on the Cure Requirement Lot, HPD shall issue a certificate of completion (‘Cure Completion Certificate’) certifying the Project’s compliance with the cure provisions of Zoning Resolution § 96-110 (d) within fourteen (14) business days after the last to occur of the following:

“(a) HPD’s receipt of the permanent [C of O] for each Low Income Unit containing the occupancy restrictions contained in this Agreement in accordance with Zoning Resolution §96-110 (d) (2); and

“(b) a site inspection which establishes to HPD’s satisfaction that the Low Income Units have been completed in accordance with this Agreement, the Building Plans, the Plan, the Program, HPD’s design guidelines and construction guidelines issued in conjunction with such design guidelines, and the building plans previously submitted to and approved by HPD; and

“(c) funding of the Special Reserve Fund, where applicable, in accordance with Section 17; and

“(d) Rent-Up of the Low Income Units satisfactory to HPD in accordance with Section 13; and

“(e) HPD’s receipt of certificates of insurance required by Section 14, together with satisfactory evidence that all premiums for the current year are fully paid; and

“(f) HPD’s receipt of (i) a true copy of Owner’s policy of fee title insurance dated on or after the date that the Owner acquired title to the Low Income Units, where such policy (A) has been issued by a title company in good standing licensed to issue title insurance in New York State and contains the Standard New York Endorsement (Owner’s Policy) in substantially the form that appears as Exhibit E annexed hereto and made a part hereof, and (B) evidences fee simple ownership in the Owner and the absence of liens and other encumbrances on the Zoning Lot other than those approved by HPD, (ii) written title continuation report(s) by the title company setting forth the state of title for the Zoning Lot from the date of the fee title policy to the date of submission of such title policy to HPD, and confirming the absence of liens and encumbrances thereon other than this Agreement and any other lien or encumbrance approved by HPD, and (iii) satisfactory proof of payment of all premiums and fees for the title policy and continuations; and

“(g) HPD’s receipt of an executed contract between the Applicant and Administering Agent and, if applicable, an executed contract of sale between Applicant and Administering Agent in accordance with Section 13 hereof; and

“(h) submission of proof of multiple dwelling registration of the Building that contains the Low Income Units, in accordance with the New York City Housing Maintenance Code and of registration of all such occupied Low income Units with the DHCR, and with written HPD approval, if the Low Income Units are not fully occupied, an affidavit stating that Owner shall register all remaining units as they become occupied and shall submit proof of such registration of all remaining units in a form approved by HPD upon the earlier to occur of: (A) the occupancy of the last remaining unit, or (B) one (1) year from receipt of a permanent certificate of occupancy for all the Low Income Units; and

“(i) Owner’s certification that the representations, covenants, warranties and statements made by Owner that are contained in this Agreement and all other documents executed in connection with this Agreement remain true and correct as of the date on which the foregoing conditions have been satisfied; and

“(j) submission of zoning calculations that show the Cure Requirement as approved by the DOB provided, however, that if such approved zoning calculations differ from those set forth in the Architect Schematic Drawings (as such term is defined below) submitted to HPD on November 30, 2016, HPD’s issuance of the Cure Completion shall be based upon such approved calculations;

...”

*Id.*, exhibit A.

517-525 duly filed the cure agreement with the City Register, after which HPD certified the agreement with DOB and the Loft Board advised DOB that it did not object to the issuance

of a temporary C of O for the buildings' low income units. *See* verified answer, ¶¶ 105-106; exhibits D, E (exhibits mislabeled). DOB thereafter issued 517-525 a temporary C of O for the buildings' low income units on August 29, 2019, and later issued another temporary C of O for the rest of the buildings' units on February 20, 2020. *See* verified petition, ¶ 16; exhibits D, G. Earlier, in October 2019, 517-525 sent HPD a written request to issue a "cure completion certificate." *See* verified answer, ¶ 107; exhibit F (exhibits mislabeled). HPD declined to issue such a certificate, however, and instead issued 517-525 several requests seeking information, documents and leave to inspect the buildings in order to ascertain whether 517-525 was indeed in compliance with the terms of the cure agreement. *Id.*, ¶¶ 108-114; exhibits F-J (exhibits mislabeled). HPD eventually determined that 517-525 had failed to comply with all of the requirements of the cure agreement, and thereafter issued 517-525 a notice of default on July 29, 2020 (the first default notice), the pertinent portion of which stated as follows:

"PLEASE TAKE NOTICE that [517-525] is in default of paragraph (5) (b) of the Agreement in that it has accepted a temporary certificate of occupancy for certain units located on the Zoning Lot, other than the Low Income Housing, prior to the issuance of a Cure Completion Certificate, as required under paragraph 11 of the Agreement and §96-110 (d) (2) (ii) of the Zoning Resolution.

PLEASE TAKE FURTHER NOTICE that [517-525] is in default of paragraph (5) (f) of the Agreement in that it has failed to complete the Project in compliance with the Building Plans submitted to HPD and DOB within thirty-six (36) months from the date of the Agreement.

PLEASE TAKE FURTHER NOTICE that [517-525] has failed to deliver a permanent certificate of occupancy for each of the Low Income Units located on the Zoning Lot, as required by paragraph 11 (a) of the Agreement. As a result, [517-525] has failed to meet the requirements necessary for issuance of a Cure Completion Notice under the Agreement.

PLEASE TAKE FURTHER NOTICE that [517-525] has failed to pass a site inspection by HPD for the Low Income Units located on the Zoning Lot that establishes to HPD's satisfaction that the Low Income Units have been completed in accordance with the Building Plans, HPD's design and construction guidelines, and the Inclusionary Housing Program, as required by paragraph 11 (b) of the Agreement. As a result, [517-525] has failed to meet the requirements necessary for issuance of a Cure Completion Notice under the Agreement.

PLEASE TAKE FURTHER NOTICE that [517-525] has failed to provide the Administering Agent with fully-executed leases for each of the Low Income Units located on the Zoning Lot. This failure has prevented the Administering Agent from providing HPD with the requisite sworn affidavit required in accordance with paragraphs 13 and 23 of the Agreement that the Low Income Units are or have been Rented-up in accordance with the Plan and all of the requirements of the Program, and that each household occupying a Low income Unit complied, at Initial Occupancy, with the annual income eligibility requirements of the Program. Accordingly, [517-525] has failed to achieve Rent-Up of the Low Income Units pursuant to paragraph 11 (d) of the Agreement. As a result, [517-525] has failed to meet the requirements necessary for issuance of a Cure Completion Notice under the Agreement.

PLEASE BE ADVISED that you have thirty (30) days to cure said defaults. Failure to timely cure same may result in the City exercising its rights and remedies under the Agreement.”

*Id.*, ¶ 115; exhibit K (exhibit mislabeled). 517-525 asserts that it “rebutted HPD's allegations” in the first default notice; however, HPD claims that 517-525 only partially complied with the notice. *See* verified petition, ¶ 44; verified answer, ¶¶ 119-120. As a result, HPD sent 517-525 another notice of default on October 20, 2020 (the second default notice), the pertinent portion of which stated as follows:

“HPD reaffirms that [517-525] remains in default under the Cure Agreement, as described in the Default Notice, and, as such, HPD will not be withdrawing the Default Notice. The following defaults under the Cure Agreement remain outstanding:

“1. **TCO of Market Rate Units prior to Cure Completion Certificate:** [517-525] applied for and accepted temporary certificates of occupancy (‘TCOs’) for units on the Cure Requirement Lot other than the Low Income Units (such units, the ‘Market Rate Units’) prior to the issuance of a Cure Completion Certificate by HPD, in violation of Section 5 (b) (i) the Cure Agreement and Section 96-110 (d) (2) (ii) (a) of the Zoning Resolution. On February 20, 2020, prior to HPD certifying the completion of the Low Income Units by issuing a Cure Completion Certificate under the Cure Agreement, [517-525] applied for and accepted a TCO for both the Low Income Units and the Market Rate Units on the Cure Requirement Lot. [517-525] subsequently applied for and accepted TCOs on May 12, 2020 and August 3, 2020, again for both the Market Rate Units and the Low Income Units - not solely the Low Income Units, as would have been permitted under the Cure Agreement. The application and acceptance of the TCOs for the Market Rate Units prior to receipt of a Cure Completion Certificate violates Section 5 (b) (i) of the Cure Agreement and Section 96-110 (d) (2) (ii) (a) of the Zoning Resolution.

“2. **Failure to complete Low Income Units in thirty-six months:** [517-525] failed to complete the substantial rehabilitation of the Low Income Units in compliance with the building plans submitted to HPD within thirty-six (36)

months of the date of the Cure Agreement (i.e., by December 13, 2019), in violation of Sections 5 (f) and 9 (c) of the Cure Agreement. Completion of the Low Income Units is to be evidenced by a Cure Completion Certificate, which HPD can issue after the satisfaction of the conditions set forth in Section 11 of the Cure Agreement, including, per Section 11 (b), a site inspection establishing to HPD's satisfaction that the Low Income Units have been completed in accordance with the Cure Agreement, HPD's design and construction guidelines, and the building plans submitted to and approved by HPD. As of the date of this letter, [517-525] has failed to obtain a site inspection that satisfies the requirements of Section 11 (b) of the Cure Agreement. On June 23, 2020, a representative of HPD's Building and Land Development Services (BLDS) Unit inspected the Building and found numerous deficiencies with the rehabilitation work. A list of those deficiencies is included in the Cure Compliance Site Assessment prepared by HPD BLDS, attached hereto as Exhibit A. After [517-525] has remedied the deficiencies set forth in the Cure Compliance Site Assessment, [517-525] may request a new site inspection by a representative of HPD BLDS.

“3. **Amendment to building plans without HPD approval:** [517-525] failed to submit design changes to the building plans for the Project made subsequent to the date of the Cure Agreement to HPD for review and approval, in violation of Section 5 (f) of the Cure Agreement. Prior to entry into the Cure Agreement, [517-525] submitted building plans for HPD's review and approval on December 8, 2016, which plans were approved by HPD BLDS on December 12, 2016. Subsequent to entering into the Cure Agreement and HPD's approval of such building plans, however, [517-525] modified the building plans on August 22, 2017, October, 18, 2017, November 8, 2017, March 16, 2019, December 17, 2019, April 17, 2019, and September 3, 2019, without submitting such modified plans to HPD for review or approval.

“HPD understands that COVID-19 restrictions may have created additional challenges for Owner in curing the defaults outlined in the Default Notice and this letter. As such, HPD is willing to provide [517-525] with an additional thirty (30) days to cure said defaults, prior to exercising its rights and remedies under the Cure Agreement, if [517-525] notifies HPD in writing, upon receipt of this letter, that [517-525] commits to curing the defaults outlined in the Default Notice and this letter within such thirty-day cure period.

“Said defaults can be cured by (A) submitting the modified building plans to HPD BLDS, for HPD's comment, review, and approval, and (B) satisfying the outstanding requirements for a Cure Completion Certificate from HPD. The outstanding requirements for a Cure Completion Certificate include: (1) completion of the rehabilitation of the Low Income Units, including rectifying the deficiencies identified by HPD BLDS set forth on Exhibit A and ensuring that the rehabilitation of the Low Income Units is in accordance with HPD-approved building plans, (2) requesting and passing a site inspection which establishes to HPD's satisfaction that the Low Income Units have been completed in accordance with the Cure Agreement, HPD's design and construction guidelines, and the building plans approved by HPD (per Section 11 (b) of the Cure Agreement), and (3) Rent-Up of each of the Low Income Units satisfactory to HPD (per Section 11 (d) of the Cure Agreement).

“If [517-525] fails to provide the written notice to HPD described above, [517-525] will not be entitled to such additional thirty-day cure period, and HPD and/or the City may seek all available legal remedies under the Cure Agreement and the Zoning Resolution.”

*Id.*, verified petition, exhibit L.

517-525 asserts that it either addressed the items listed in the second default notice, or that HPD’s demands are improper. *See* verified petition, ¶¶ 61-76. HPD responds that 517-525 did not address any of the items in the second notice, despite having been granted extra time in which to do so. *See* verified answer, ¶¶ 123-124. 517-525 also asserts that “[u]pon information and belief, on or about October 20, 2020, HPD issued ‘the DOB Notice,’ instructing DOB to refuse to renew the Project’s TCO for non-Affordable Units, notwithstanding the completion of the Affordable and non-Affordable Units.” *See* verified petition, ¶¶ 77-78. However, 517-525 has not produced a copy of any such “DOB notice.” HPD avers that the purported “DOB notice” was actually its 2016 letter to the DOB acknowledging that it had executed the cure agreement with 517-525. *See* verified answer, ¶ 125. *See* verified answer, ¶¶ 105, 125; exhibit D (exhibit mislabeled).

In his motion for leave to intervene, Kelley attests that 517-525 has not performed the bulk of the renovation work in unit 2C that it claimed to have completed in its DOB submissions, and that it has twice attempted to evict him instead. *See* notice of motion, Kelley aff, ¶¶ 1-21.

In any event, 517-525 commenced this Article 78 proceeding on December 4, 2020, and its petition seeks an order in the nature of mandamus “directing HPD to revoke the [second] default and DOB notices and to issue a Cure Completion Certificate.” *See* verified petition, ¶¶ 79-83. As mentioned, Kelley submitted a motion for leave to intervene in this proceeding on March 8, 2021. *See* notice of motion. HPD submitted its answer with affirmative defenses on March 12, 2020, shortly before the Covid-19 national pandemic obliged the court to suspend

most of its operations indefinitely. *See* verified answer. The parties have all submitted replies, and this matter is ready for disposition (motion sequence numbers 001 & 002).

#### DISCUSSION

Pursuant to CPLR 7803 (1), among “[t]he only questions that may be raised in a proceeding under this article are: . . . whether the body or officer failed to perform a duty enjoined upon it by law.” The Appellate Division, First Department, recognizes that a party seeking an order in the nature of mandamus to compel an official act must demonstrate that it has a “clear legal right” to such relief. *See e.g., Matter of New York City Yacht Club v New York City Dept. of Bldgs.*, 172 AD3d 606, 606-607 (1<sup>st</sup> Dept 2019). The First Department also recognizes that the remedy of mandamus is only available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion. *See e.g., Matter of Yohay v City of New York*, 181 AD3d 408, 409 (1<sup>st</sup> Dept 2020), citing *New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 (2005).

Here, 517-525 asserts that it “is entitled to an order compelling HPD to revoke its DOB Notice,” and “an order compelling HPD to issue a Cure Completion Certificate” because it is “in full compliance with the Cure Agreement.” *See* petitioner’s mem of law at 5. HPD responds that “the challenged determinations are not subject to relief in the nature of mandamus.” *See* respondent’s mem of law at 6-7. A review of the governing case law shows that HPD is correct.

In *Alliance to End Chickens as Kaporos v New York City Police Dept.* (32 NY3d 1091 [2018]), the Court of Appeals defined discretionary acts, which may *not* be compelled via mandamus, as those which “involve the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a

governing rule or standard with a compulsory result.” 32 NY3d at 1093, citing *New York Civ. Liberties Union v State of New York*, 4 NY3d at 184, quoting *Tango v Tulevech*, 61 NY2d 34, 41 (1983). The Court also observed that “mandamus may only issue to compel a public officer to execute a legal duty; it may not ‘direct how [the officer] shall perform that duty.’” 32 NY3d at 1093, citing *Klostermann v Cuomo*, 61 NY2d 525, 540 (1984), quoting *People ex rel. Schau v McWilliams*, 185 NY 92, 100 (1906). The court finds that the two acts which 517-525 seeks to compel in this proceeding are clearly “discretionary,” when measured against the Court’s criteria.

Regarding the “DOB notice,”<sup>2</sup> ZR § 96-110 (d) (2) (ii) provides that DOB “shall not issue any temporary or permanent [C of O] . . . , until . . . [HPD] certifies that the low income housing required by the [cure agreement] has been completed in compliance with the [cure agreement].” Determining whether or not 517-525 has renovated the buildings’ low income apartment units in conformity with the terms of the cure agreement plainly requires an “exercise of reasoned judgment which could typically produce different acceptable results;” i.e., a determination that 517-525 either did or did not comply with the terms of the cure agreement. Such a determination must therefore be characterized as a “discretionary,” as opposed to a “ministerial,” act, and

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<sup>2</sup> The court here notes that 517-525's characterization of this document as a “DOB notice” is inaccurate. 517-525 stated that “[u]pon information and belief, on or about October 20, 2020, HPD issued a notice “instructing DOB to refuse to renew the Project's TCO for non-Affordable Units, notwithstanding the completion of the Affordable and non-Affordable Units.” See verified petition, ¶¶ 77-78. However, the only notice which HPD sent to DOB was the 2016 letter that acknowledged that the parties had executed the cure agreement. See verified answer, ¶¶ 105, 125; exhibit D (exhibit mislabeled). That letter did not instruct DOB to take any action with respect to a cure certificate. *Id.* Further, 517-525 has not produced a 2020 communication from HPD that contained such an instruction. Thus, the court concludes that 517-525's allegations regarding a “DOB notice” are disingenuous..

CPLR 7803 would consequently not make it subject to enforcement via mandamus.<sup>3</sup> As a result, to the extent that the petition's "DOB notice" claim implicates HPD's certification that 517-525 complied with the cure agreement, the court finds that the petition must be denied because such a certification is a discretionary act which may not be compelled. *Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d at 1093.

Regarding issuance of a "cure completion certificate," the parties' cure agreement provides that "HPD shall issue a certificate of completion" "[f]ollowing recordation of this Agreement . . . and completion of the Low Income Units in accordance with the Plan and this Agreement" within 14 days after the occurrence of 10 specified actions, including:

"(b) a site inspection which establishes to HPD's satisfaction that the Low Income Units have been completed in accordance with this Agreement, the Building Plans, the Plan, the Program, HPD's design guidelines and construction guidelines issued in conjunction with such design guidelines, and the building plans previously submitted to and approved by HPD; . . ."

See verified petition, exhibit A [emphasis added]. This portion of the cure agreement clearly contemplates two "discretionary" acts by HPD: 1) a determination as to whether 517-525 "completed renovations on the low income apartment units in accordance with the agreement"; and 2) an assessment of the results of a site inspection that leads to a determination based on "HPD's satisfaction." *Id.* Both such determinations plainly require the "exercise of reasoned judgment which could typically produce different acceptable results;" i.e., a finding that 517-525 either did or did not renovate the low income apartment units in conformity with the terms of the cure agreement. As a result, the court finds that the portion of the cure agreement that governs the issuance of "cure completion certificates" contemplates "discretionary acts" that are not

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<sup>3</sup> The court also notes here that mandamus is not available to compel HPD to make a finding that a landlord did or did not comply with the terms of a cure agreement. *Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d at 1093, citing *Klostermann v Cuomo*, 61 NY2d at 540.

subject to mandamus.<sup>4</sup> *Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d at 1093. Accordingly, the court concludes that the portion of the instant petition that requests an order for HPD to issue a “cure completion certificate” must also be denied because that act involves discretionary determinations that may not be compelled.

The fact that HPD has established that mandamus is unavailable for the relief that 517-525 seeks in this Article 78 proceeding is a sufficient ground to dismiss the petition. Nevertheless, the court also makes the additional two following findings.

HPD argued in the alternative that “the court lacks subject matter jurisdiction to hear petitioner’s claims,” because 517-525 failed to exhaust the available administrative remedies regarding the second default notice that it challenged in its Article 78 petition. *See* respondent’s mem of law at 4-6. It is well settled that an Article 78 petition will be dismissed where, at the time of its commencement, the petitioner’s application to the subject agency has not yet been denied, and it has not yet rendered a final administrative determination. CPLR 7804 (f); *see e.g.*, *Concourse Rehabilitation & Nursing Ctr., Inc. v Shah*, 161 AD3d 669 (1<sup>st</sup> Dept 2018); *Matter of Cross v Russo*, 132 AD3d 454 (1<sup>st</sup> Dept 2015). Here, the second default notice plainly did *not* deny 517-525’s request for a “cure completion certificate.” *See* verified petition, exhibit L. Instead, it reiterated HPD’s determination that 517-525 was in default of certain obligations under the cure agreement, it specified ways in which 517-525 could cure that default, and it afforded 517-525 a 30-day cure period. *Id.* HPD evidently never issued a final denial of 517-525’s application for a “cure completion certificate.” Had it done so, then it would have been

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<sup>4</sup> Neither may mandamus be used to compel HPD to make the finding that 517-525 did (or did not) renovate the buildings’ low income apartment units in conformity with the terms of the cure agreement. *Alliance to End Chickens as Kaporos v New York City Police Dept.*, 32 NY3d at 1093, citing *Klostermann v Cuomo*, 61 NY2d at 540.

incumbent on 517-525 to file an administrative appeal of that denial before it commenced an Article 78 proceeding. However, 517-525 chose to ignore the administrative route and instead simply commenced a proceeding in this court. That was improper pursuant to CPLR 7804 (f). The court is aware that, under some circumstances, an agency determination may be “deemed denied,” and treated as “final,” by virtue of inaction and the passage of time. *See e.g., Matter of Gardner v Division of Hous. & Community Renewal of State of N.Y.*, 166 Misc 2d 290 (Sup Ct, Bronx County 1995). However, 517-525 did not argue that such circumstances exist in this case. Accordingly, because there is no legal argument on the issue of “finality” before the court, this decision will not consider it. Indeed, the court notes that 517-525's papers are completely devoid of legal argument or case citations, apart from one which concerns the appropriate standard of review to apply herein. *See* petitioner's mem of law at 4-5. In any event, the court agrees that the fact that the second default notice is not a “final” agency determination supports HPD's contention that this petition should be denied as a result of 517-525's failure to exhaust administrative remedies.<sup>5</sup>

HPD also raised the alternative argument that its “determination to issue a notice of default was rational, reasonable, and within its discretion.” *See* respondent's mem of law at 8-10. That argument would apply in the event that the court deemed it proper to review the second default notice under the “arbitrary and capricious” standard that generally applies in Article 78 proceedings. *See e.g., Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A.*

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<sup>5</sup> With respect to the “DOB notice,” the court has already observed that it does not appear to exist, at least insofar as 517-525 has failed to produce an HPD document dated on or about October 20, 2020 which contained an order directing DOB not to renew the buildings' temporary C of O. *See* fn 2. As a result, this purported document certainly cannot constitute a “final” agency determination.

*Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1<sup>st</sup> Dept 1996). Well settled appellate case law holds that, if there is a “rational basis” in the administrative record that supports an agency’s determination, there can be no judicial interference with it. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232; see also *Matter of Pickholz v New York City Dept. of Hous. Preserv. & Dev.*, 173 AD3d 444 (1<sup>st</sup> Dept 2019). Here, the court agrees that there appears to be sufficient support in the administrative record for HPD’s determination, since that notice refers to specific documents, including: (a) the report of HPD’s on-site inspection of the buildings’ low income apartment units, and (b) 517-525’s improperly submitted C of O applications and DOB plans. See verified petition, exhibit L. The court notes that HPD’s determination is further supported by Kelley’s assertion that 517-525 did not perform the renovation work to apartment 2C which it alleged in its cure certificate application. See notice of motion, Kelley aff, ¶¶ 1-21. As a result, the court agrees that there do not appear to be grounds to vacate the second default notice pursuant to the “arbitrary and capricious” standard.

Accordingly, for all of the foregoing reasons, the court concludes that 517-525’s petition should be denied as meritless. The court consequently also concludes that Kelley’s motion should be denied as moot.

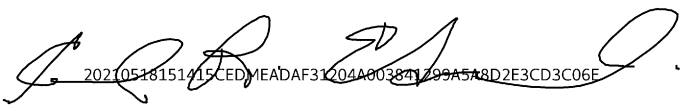
#### DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner 517-525 West 45th LLC (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that the motion, pursuant to CPLR 7802, of proposed intervenor petitioner Douglas Ward Kelley (motion sequence number 002) is denied; and it is further

ORDERED that counsel for respondent New York City Department of Housing Preservation and Development shall serve a copy of this order along with notice of entry on all parties within ten (10) days.



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5/18/2021  
DATE

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CAROL R. EDMEAD, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED
<input type="checkbox"/>	GRANTED
<input checked="" type="checkbox"/>	DENIED

<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	OTHER

APPLICATION:

<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>	REFERENCE

CHECK IF APPROPRIATE: