

Fitterman v Seward Park Hous. Corp.

2021 NY Slip Op 31777(U)

May 26, 2021

Supreme Court, New York County

Docket Number: 151381/2021

Judge: Carol R. Edmead

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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

-----X

GARY FITTERMAN

Plaintiff,

- v -

SEWARD PARK HOUSING CORPORATION,

Defendant.

-----X

INDEX NO. 151381/2021
MOTION DATE 4/16/2021
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 6, 8, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29

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 Gary Fitterman (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent Seward Park Housing Corporation 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 Gary Fitterman (Fitterman) seeks a judgment to overturn a decision by respondent Seward Park Housing Corporation (Seward Park) as arbitrary and capricious (motion sequence number 001). For the following reasons, this petition is denied and this proceeding is dismissed.

FACTS

Seward Park is a co-operative corporation which owns a residential apartment building located at 385 Grand Street in the City, County and State of New York (the building). *See* verified petition, ¶ 3. Fitterman is a shareholder of Seward Park who holds the proprietary lease to studio apartment L902 in the building. *Id.*, ¶ 8. This proceeding involves two applications that Fitterman submitted to Seward Park's board of directors (the board).

On March 10, 2020, Fitterman entered into a contract to purchase one-bedroom apartment unit L104 at the building from its shareholders, Kirsten Youngren and Christian Skelly, along with their corresponding 22.75 shares of Seward Park stock. *See* verified petition, ¶ 11. Fitterman's purchase was subject to board approval. *Id.*, ¶¶ 12-14. At its May 6, 2020 scheduled meeting the board voted not to approve the purchase. *Id.*, ¶ 15; exhibit A.

On July 3, 2020, Fitterman submitted a separate application to the board for permission to add his son, Joshua Fitterman, to both the stock certificate and the proprietary lease for unit L902. *See* verified petition, ¶ 20. Fitterman alleges that the board reviewed the application, sought additional documents, and conducted an interview with himself and his son. *Id.*, ¶¶ 21-23. Nevertheless, at its August 5, 2020 scheduled meeting, the board rejected Fitterman's application. *Id.*, ¶ 24; exhibit B. He states that he received a notice from the board dated August 13, 2020 which stated that it had "declined consent to the above referenced transfer." *Id.*, ¶ 26.

Fitterman states that he was advised by Seward Park's managing agent that he could appeal the board's denials of his two applications by submitting a written appeal request to the board's counsel. *See* verified petition, ¶¶ 28-31. Fitterman also states that he submitted an "appeal letter" to the board's counsel on August 20, 2020, but that counsel never responded to it. *Id.*; exhibit C.

As a result, Fitterman then commenced this Article 78 proceeding via order to show cause on February 16, 2021. *See* order to show cause. Seward Park filed an answer with affirmative defenses on March 29, 2021. *See* verified answer. This matter is now fully submitted (motion sequence number 001).

DISCUSSION

A trial court's usual role in an Article 78 proceeding is to determine whether, upon the facts before an administrative agency, a challenged agency determination had a rational basis in the record or was arbitrary and capricious. *See 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. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). Here, however, the court cannot perform the usual Article 78 analysis of Fitterman's petition.

As the Appellate Division, First Department, held in *Valyrakis v 346 W. 48th St. Hous. Dev. Fund Corp.* (161 AD3d 404 [1st Dept 2018]):

"A proceeding challenging an action taken by a cooperative corporation must be commenced within four months after the action is final. In circumstances where a party would expect to receive notification of a determination, but has not, the Statute of Limitations begins to run when the party knows, or should have known, that it was aggrieved by the determination."
161 AD3d at 405 (internal citations and quotation marks omitted). Here, it is clear that Fitterman did receive almost contemporaneous notice of both of the board's application denials. The

evidence shows that: 1) the board duly provided Fitterman and the building’s other residents with copies of the minutes of its regularly scheduled May 6, 2020 and August 5, 2020 meetings pursuant to the building’s by-laws; and 2) the board also provided Fitterman with a special notice dated August 13, 2020 that confirmed that it had “declined consent” to the second of his applications. See verified petition, exhibits A, B, C. Thus, the documentary evidence indicates that the statute of limitations began to run on Fitterman’s Article 78 claim on August 13, 2020, and that it would have expired four months later on December 13, 2020.

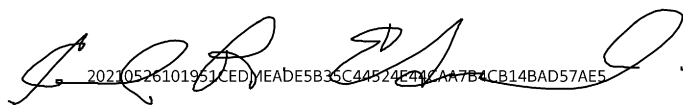
Even were the court to afford Fitterman the benefit of the doubt, and to deem the statute of limitations to have commenced at some point shortly after his counsel sent the August 20, 2020 appeal letter, the limitations period would still have expired by the end of 2020, at the latest. Because Fitterman did not commence this Article 78 proceeding until February 16, 2021, it is clearly untimely in violation of CPLR 217 (1). Accordingly, the court finds that this Article 78 petition must be denied for that reason, and that this proceeding must be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Gary Fitterman (motion sequence number 001) is denied, and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent Seward Park Housing Corporation shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.



5/26/2021
DATE

CAROL R. EDMOAD, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED
<input type="checkbox"/>	GRANTED
<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	REFERENCE
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT		

APPLICATION:

CHECK IF APPROPRIATE: