

Matter of OSI LLC v New York State Div. of Hous. & Community Renewal

2021 NY Slip Op 32717(U)

December 17, 2021

Supreme Court, New York County

Docket Number: 154224/2021

Judge: Laurence L. Love

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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. LAURENCE LOVE **PART** **63M**

Justice

-----X

IN THE MATTER OF THE APPLICATION OF OSI LLC

Petitioner,

- v -

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL,

Respondent.

-----X

INDEX NO. 154224/2021

MOTION DATE 09/10/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51

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

Upon the foregoing documents, the Decision and Order on Petitioner's Petition and Respondent's cross-motion seeking dismissal of the Petition is as follows:

Petitioner, OSI, LLC commenced the instant Petition by e-filing on April 30, 2021, seeking an order pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"), directing Respondent New York State Division of Housing and Community Renewal ("DHCR" or the "Agency") to modify the order bearing DHCR Docket No. ZE-430002-B ("DHCR Order"), or reopen the Rent Administrator's proceeding that resulted in the issuance of the DHCR Order. Respondent, The New York State Division of Housing and Community Renewal ("DHCR") cross-moves to dismiss same.

Petitioner is the owner of the building known as and located at 454 West 47th Street, New York, New York 10036 (the "Premises"). On or about May 2, 2011, Freddie Katz, the tenant of record for apartment 2-R of the premises filed an Application For A Rent Reduction Based Upon Decreased Building-Wide Service(s) (the "DHCR Complaint") with DHCR, asserting that various

alleged conditions in the Building's common areas constituted a reduction in "required services," as such term is defined pursuant to RSC § 2520.6(r), and, as such, warranted a reduction in rent. Said application included a hand-written list of seven other names as additional signatories to the complaint. The name associated to Apartment 5-E was "Jamie MacKenzie," who was neither registered as a tenant on the DHCR registrations for that apartment, nor named on any lease for the apartment. The Court notes that Jamie MacKenzie was an occupant of the apartment who signed an Occupancy Rider together with Erich Sturm, the tenant of record for Apartment 5-E on January 18, 2007. On October 6, 2011 DHCR Rent Administrator Luke S. O'Brien issued the DHCR Order finding that several of the alleged conditions warranted a reduction in rent for the apartments that were listed in the DHCR Complaint.


Over nine years after the issuance of said DHCR Order, on February 23, 2021 Petitioner's counsel wrote to DHCR requesting that the Agency issue an amended order, removing Apartment 5-E from the "List Of Tenant(s)" as Ms. MacKenzie was never a "tenant," as such term is defined in RSC § 2520.6, and as such lacked standing to file a "services complaint." On March 29, 2021, however, Petitioner's attorneys received a letter from DHCR Rent Administrator Margaret Ramroop denying said request as the DHCR Order was never appealed and is final. Petitioner attempts to circumvent this denial by arguing that pursuant to DHCR Policy Statement 91-5, "[r]equests for reconsideration of orders, issued by rent administrators or the Commissioner, based on fraud or illegality are not time limited" and that as Ms. MacKenzie lacked standing to file a services complaint that same is a product of fraud. Fraud, as defined by Policy Statement 91-5, is "[f]alse or misleading information which was known by a party to be false or misleading and which was relied upon as fact by the DHCR and affected the Rent Administrator's or Commissioner's order."

Petitioner fundamentally misidentifies which party to this action appears to be attempting to perpetrate a fraud upon this Court by seeking to convert a standing issue into a fraud issue. That Petitioner incompetently failed to note that Ms. MacKenzie lacked standing to join six other (theoretically) proper signatories to the DHCR complaint cannot now affect the validity of a nine plus year old DHCR Order. Petitioner utterly fails to allege that the complained of reduction in services did not exist and that the Order was procured by fraud. This is especially blatant where, as here, Petitioner failed to file a Petition for Administrative Review of the Order. The Court further notes that on May 30, 2016, Petitioner filed its initial Application to Restore the Rent, which was assigned DHCR Docket No. EQ 430144 OR. Said application was denied on January 9, 2017. Subsequently, on October 10, 2017, Petitioner filed a second Application to Restore the Rent, which was assigned DHCR Docket No. FV 430038 OR. Said application was denied on May 22, 2018. On May 31, 2018, the Owner filed a third Application to Restore the Rent. A DHCR inspection was conducted on December 11, 2018, and on January 31, 2019 an Order Restoring the Rent for Rent Stabilized Tenants was issued pursuant to DHCR Docket No, GQ 430111 OR. On October 17, 2017, Brian Moore, the current tenant of apartment #5-E (who commenced occupancy on August 1, 2012), commenced a Supreme Court action (Index No. 158854/17) claiming an overcharge. On September 14, 2018 Petitioner herein commenced a nonpayment proceeding (Index No. 72841/18) against Mr. Moore and Mr. Moore counterclaimed for overcharge. On August 7, 2019 Mr. Moore's Supreme Court matter was marked "off calendar" "pending the outcome of the non-payment proceeding. Only after all of the above issues, did Petitioner file the instant Petition.

As Petitioner is utterly unable to establish fraud, its failure to file a timely Petition for Administrative Review is fatal to the instant Petition. As discussed in *Dowling v. Holland*, 245

AD2d 167 (1st Dept. 1997) the untimely filing of a PAR constitutes a failure to exhaust administrative remedies and justifies dismissal of a subsequent Article 78 proceeding. See also *Lipes v. DHCR*, 174 AD2d 571 (2nd Dept.1991), *Kaplan v. DHCR*, 131 AD2d 483 (2nd Dept. 1987).

ORDERED that Respondent’s cross-motion is GRANTED in its entirety and Petitioner’s Petition is DENIED and DISMISSED.

12/17/2021			
DATE		LAURENCE LOVE, J.S.C.	
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE