Martin v La Rocca
2022 NY Slip Op 31510(U)
May 10, 2022
Supreme Court, New York County
Docket Number: Index No. 155421/2021
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD **PART** 35

Justice

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INDEX NO. 155421/2021

DEBORAH MARTIN, ED HAMILTON, GRETCHEN CARLSON, PHILIP TAAFFE, DREW STRAUB, MARTINE BARRAT, JONATHAN BERG, SUSAN BERG

Petitioner,

MOTION DATE 10/27/2021, 10/27/2021, 10/27/2021, 10/27/2021

- v -

MOTION SEQ. NO. 001 002 003 004

MELANIE LA ROCCA AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF BUILDINGS, NEW YORK CITY DEPARTMENT OF BUILDINGS, RUTHANNE VISNAUSKAS AS COMMISSIONER OF THE NEW YORK STATE DIVISION OF HOMES AND COMMUNITY RENEWAL, NEW YORK STATE DIVISION OF HOMES AND COMMUNITY RENEWAL, CHELSEA HOTEL OWNER LLC,

Respondent.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 15, 20, 21, 80, 84

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

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 81, 85, 88, 89, 90, 92

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 82, 86, 91

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 83, 87, 93, 94, 95, 96

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

ORDERED AND ADJUDGED that the verified petition/complaint, submitted by order to show cause, of petitioners Deborah Martin, Ed Hamilton, Gretchen Carlson, Philip Taaffe, Drew

B. Straub, Martine Barrat, Jonathan Berg, and Susan Berg (motion sequence number 001) is denied; and it is further

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 3211, of respondents Ruthanne Visnauskas, as Commissioner of the New York State Division of Homes and Community Renewal, and the New York State Division of Homes and Community Renewal (motion sequence number 002) is granted, and this proceeding is dismissed as against said respondents; and it is further

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 3211, of respondents Melanie La Rocca, as Commissioner of the New York City Department of Buildings, and the New York City Department of Buildings (motion sequence number 003) is granted, and this proceeding is dismissed as against said respondents; and it is further

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 3211, of respondent Chelsea Hotel Owner, LLC (motion sequence number 004) is granted, and this proceeding is dismissed as against said respondent; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondents Ruthanne Visnauskas, as Commissioner of the New York State Division of Homes and Community Renewal, and the New York State Division of Homes and Community Renewal shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

In this hybrid Article 78 proceeding/action, petitioners Deborah Martin, Ed Hamilton, Gretchen Carlson, Philip Taaffe, Drew B. Straub, Martine Barrat, Jonathan Berg, and Susan Berg (petitioners) move by order to show cause for various types of statutory and injunctive relief (motion sequence number 001), while the co-respondents New York State Division of Homes and Community Renewal (DHCR),[1] New York City Department of Buildings (DOB)[2] and Chelsea Hotel Owner, LLC (CHO) each move separately to dismiss the petition and complaint (motion sequence numbers 002, 003 & 004, respectively). For the following reasons, the order to show cause is denied, the three motions are granted, and this proceeding is dismissed.

BACKGROUND

Petitioners are all rent stabilized tenants in a mixed-use hotel/residential apartment building known as the "Chelsea Hotel," which is located at 222 West 23rd Street in the County, City and State of New York. *See* verified petition/complaint, ¶ 11. Respondent CHO has owned the Chelsea Hotel since 2016 and is currently the petitioners' landlord. *Id.*, ¶ 14. The co-respondent DHCR is the state agency charged with overseeing all properties located inside New York City that are subject to the Rent Stabilization Law and Code (RSL and RSC). *Id.*, ¶ 13. The co-respondent DOB is the city agency charged with overseeing compliance with such regulations as, e.g., the Building Code (BC), the Multiple Dwelling Law (MDL) and the Zoning Resolution (ZR). *Id.*, ¶ 12.

Between 2006 and 2007, a number of the Chelsea Hotel's "apartment tenants" (i.e., tenants residing in the building's apartment units rather than its hotel room units) commenced

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[1] The DHCR's Commissioner, Ruthanne Visnauskas (Commissioner Visnauskas) is also named as a co-respondent in her official capacity.

[2] The DOB's Commissioner, Melanie La Rocca (Commissioner La Rocca) is also named as a co-respondent in her official capacity.

administrative proceedings at the DHCR to assert claims for rent overcharges and loss of hotel services. DHCR rent administrators (RAs) eventually issued decisions that found in favor of the tenants with respect to both claims (RA's decisions). Petitioners have produced copies of three such RA's decisions, all dated January 4, 2017 and all containing substantially identical findings.[3] *See* verified petition/complaint, ¶ 15; exhibit A. The DHCR findings that gave rise to the instant litigation are evidently derived from the following language that appears, with slight variations, in all of the RA's decisions:

> "**Hotel Services**
> "Pursuant to Section 2521.3 of the Rent Stabilization Code, in order for an owner to retain or continue the building's classification as a hotel, he or she must provide all four of the following services:
>
> "1. Maid service, consisting of general house cleaning at a frequency of at least once a week;
> "2. Linen service, consisting of providing clean linens at a frequency of at least once a week;
> "3. Furniture and furnishings, including at a minimum a bed, lamps, storage facilities for clothing, chair and mirror in a bedroom; such furniture to be maintained by the hotel owner in reasonable condition; and
> "4. Lobby staffed 24 hours a day, seven days a week at least one employee.
>
> "The tenants have alleged, and the owner has not disputed, that maid and linen service is not provided in addition to furniture and furnishings not being provided. The failure of the owner to provide any or all of these services to the tenants, whose housing accommodations were rented to them as hotel housing, entitles the tenants to rent reductions for those services not received. It is the responsibility of DHCR to place a monetary value on each of the services not being provided and from this determine the appropriate rent reduction.
>
> * * *
>
> "Beginning January 1, 2014, the subject building was reclassified from a hotel to apartment building status because the owner was not providing the above hotel services to 51% of the permanent tenants. . . .
>
> * * *
>
> "Since the subject units are now subject to rent stabilization, the owner is further directed to offer the tenants a renewal lease for one or two years, at the tenants' option, in accordance with the Rent Stabilization Law and Code. The tenants shall be afforded sixty days to accept such offer and elect their option."

[3] One of these decisions involved claims asserted by named petitioner/plaintiff Drew B. Straub, the other two involved claims by apartment tenants who are not parties to this hybrid proceeding. *See* verified petition/complaint, exhibit A.

See verified petition/complaint, exhibit A. The court notes that petitioners have *not* produced a copy of a building-wide rent stabilization reclassification order.

On April 14, 2021, without having undertaken any prior action, petitioners' counsel sent a letter to DHCR Commissioner Visnauskas requesting the following relief:

> "Pursuant to Rent Stabilization Code secs. 2527.2 and 2526.2 (a), the Tenants respectfully request that DHCR institute an enforcement proceeding and issue an order enforcing the building wide reclassification ruling contained in the Orders, as follows:
>
> "(a) in conformity with DHCR's Status Definitions [Exh. "C"], and to enforce RSL sec. 26-506(b) and RSC sec. 2521.3 (b), ordering the Owner of the Chelsea to amend its Building Registration at DHCR to correctly identify the Chelsea's 'Building Status' as 'Multiple Dwelling A';
>
> "(b) in order to enforce the reclassification ruling, and the RSL and RSC, requiring the Owner to cease operation of the Chelsea as a hotel for transient use, and permitting use of the Chelsea solely as an apartment building for permanent residents; and
>
> "(c) confirming the reclassification ruling in the Orders to be a final determination."

See verified petition/complaint, exhibit E. On April 27, 2021, DHCR Property Management Bureau Chief Anthony Tatano (Tatano) responded on behalf of the agency in a letter that stated as follows:

> "I have reviewed the entire record in this matter and must decline your request. Under various docket numbers, the building was reclassified from a hotel to apartment building status as the owner was not providing the required hotel services as defined under Section 2521.3 of the Rent Stabilization Code. Such reclassification was effective January 1, 2014, granted rent reductions to the permanent tenants for lack of hotel services and further directed the owner to offer rent stabilized leases. Such orders have the effect of making the permanent tenants subject to the Rent Stabilization Law and Code and not Hotel Stabilization guidelines. These orders did not change the building status from 'Multiple Dwelling B' to 'Multiple Dwelling A' as such designation is governed under the Multiple Dwelling Law.
>
> "Accordingly, we cannot order the owner to change the building registration with this agency to list the building as a 'Multiple Dwelling A' as we did not direct such change. In addition, if the owner is not operating the building as indicated in the buildings Certificate of Occupancy, such complaint should be raised with the NYC Department of Buildings for enforcement. Lastly, our records show that various orders were issued that reclassified the building. While the orders that you cite were not appealed by the owner, the owner did appeal an order that was issued prior to the orders you cite and such appeal is still pending."

Id., exhibit F (the Tatano letter).

Previously, on January 24, 2019, petitioner/plaintiffs Deborah Martin, Ed Hamilton, Drew B. Straub, Jonathan Berg and Susan Berg had commenced an action in this court (Index Number 150594/19) against the DOB, CHO and several other parties seeking certain injunctive relief including orders to vacate building permits and requiring CHO to file an amended certificate of occupancy (C of O) for the Chelsea Hotel with the DOB (the prior action). *See* notice of motion (motion sequence number 003), Rizzuti affirmation, ¶ 4; exhibit A. This court (Kotler, J.) granted summary judgment dismissing the prior action in a decision dated May 14, 2020. *Id.*, ¶ 5; exhibit B. The Appellate Division, First Department, upheld Judge Kotler's dismissal in a decision dated February 16, 2021 that found, in pertinent part, as follows:

> "The court correctly found that the cause of action for an order requiring defendant owners of the subject building to have the building's certificate of occupancy modified to conform to a purported reclassification order should, in the first instance, be raised before the appropriate agency. Moreover, even if plaintiffs could seek the requested injunctive relief without first having exhausted their administrative remedies, they would not be entitled to summary judgment on this record, which does not contain a final reclassification order and does not show that the reclassification orders on which plaintiffs rely applied to the entire building."

Id., ¶ 6; exhibit C; *see Martin v Chelsea Hotel Owner, LLC*, 191 AD3d 534, 534 (1st Dept 2021).

On March 9, 2021, without having taken any prior action, petitioners' counsel sent a letter to DOB Commissioner La Rocca requesting that CHO be required to submit an application to the agency to amend the Chelsea Hotel's C of O to reclassify it as an apartment building rather than a hotel. *See* notice of motion (motion sequence number 003), Rizzuti affirmation, ¶ 8; exhibit E. DOB Deputy Borough Commissioner Lisa Amoia (Amoia) responded on behalf of the agency in a letter dated May 17, 2021 that stated, in pertinent part, as follows:

> "In general, certificates of occupancy (CO) issued by the Department of Buildings (Department or DOB) reflect the classification of a building or portion thereof pursuant to the laws within DOB's jurisdiction, including the New York State Multiple Dwelling Law (MDL), the New York City Construction Codes, and the New York City Zoning Resolution (ZR), as well as certain other information, such as a building's height. The Chelsea Hotel's current CO, no. 101899171, issued October 29, 2004, indicates that the

> building complies with section 67 of the Multiple Dwelling Law, applicable to certain buildings erected prior to 1929, and has a mix of apartments and hotel rooms (as defined by the laws referenced above). Job no. 120853754, a currently pending Alteration type 1 application that would result in a new CO, is consistent with that information . . ..
>
> "Based the information provided by you, the Department will not take any action with respect to CO no. 101899171 . . .. To the Department's knowledge, the information contained on CO no. 101899171 is accurate, including with respect to the laws within DOB's jurisdiction . . .. Furthermore, the Department is not aware of any authority holding that a building's status (or change in status) pursuant to the Rent Stabilization Code requires an amendment to an existing CO. Finally, if a change of occupancy or use is made to a building inconsistent with its current CO, that is a matter of enforcement (primarily, the issuance of summonses adjudicated at the NYC Office of Administrative Tribunals and Hearings), not a basis for revocation of a CO by DOB."

Id., ¶ 10; exhibit F (the Amoia letter).

Petitioners thereafter commenced this hybrid action/special proceeding on June 9, 2021 by serving a verified petition/complaint that sets forth causes of action for: 1) review pursuant to CPLR 7803 (3) (against DHCR); 2) mandamus pursuant to CPLR 7801 (1) and 7803 (3) (against DHCR); 3) prohibition pursuant to CPLR 7803 (2) & (3) (against DHCR); 4) review pursuant to CPLR 7803 (3) (against DOB); 5) mandamus pursuant to CPLR 7801 (1) and 7803 (3) (against DOB); 6) prohibition pursuant to CPLR 7803 (2) & (3) (against DOB); and 7) a permanent injunction (against CHO). *See* verified petition/complaint, ¶¶ 91-137. Rather than submit answers, the co-respondents filed separate motions to dismiss on August 5, 2021 (DHCR) and August 6, 2021 (DOB and CHO), respectively. *See* notice of motion (motion sequence number 002); notice of motion (motion sequence number 003) and notice of motion (motion sequence number 004). With the filing of the parties' opposition and reply papers, this matter is now fully submitted (motion sequence numbers 001, 002, 003 & 004).

DISCUSSION

Petitioners' first six claims against the DHCR and DOB concern the letters that they received from those co-respondent agencies. The court will review each claim in turn.

1. <u>DHCR</u>

Petitioners' first three causes of action are directed at the April 27, 2021 letter from DHCR Property Management Bureau Chief Tatano, which they seek to challenge under three provisions of CPLR 7801 et seq.

Petitioners first assert that the "DHCR erred as a matter of law, . . . , when, through [the Tatano letter], it refused to enforce its hotel reclassification orders" that were referred to in the 2017 RA's decisions. *See* verified petition/complaint, ¶ 92. Petitioners invoke CPLR 7803 (3) as the basis for their claim. The statute establishing the standards of legal review applicable in Article 78 proceedings provides as follows:

> "The only questions that may be raised in a proceeding under this article are:
>
> * * *
>
> 3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; . . ."

CPLR 7803. Before a reviewing court reaches any of those questions, however, it must consider the rule set forth in CPLR 7801 (1) that "[e]xcept where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination . . . which is not final . . .." here, the DHCR argues that the Tatano letter is *not* a "final determination," that petitioners have *not* pursued any of the available administrative procedures to secure a "final determination," and that review of the Tatano letter under CPLR 7803 (3) is therefore unavailable, as a matter of law. *See* notice of motion (motion sequence number 002), Kelly affirmation, ¶¶ 18-27. Petitioners respond that the "DHCR cherry-picks and misinterprets the statutes, in conflict with the actual language of the statutes." *See* Behar affirmation in opposition (motion sequence number 002), ¶¶ 36-56. After reviewing the case law interpreting those statutes, however, the court finds that the DHCR's argument is meritorious.

The Appellate Division, First Department squarely holds that in any challenge to a DHCR determination that is brought under CPLR 7801 (1), the administrative determination "must be final and binding upon the petitioner," and that "[a] 'final and binding' determination is one where the agency reached a definitive position on the issue that inflicts actual, concrete injury, and the injury may not be significantly ameliorated by further administrative action or by steps available to the complaining party." *Matter of 333 E. 49th Partnership, LP v New York State Div. of Hous. & Community Renewal*, 165 AD3d 93, 100 (1st Dept 2018) (internal citations and quotations marks omitted). The regulation set forth in Section 2530.1 (a/k/a 9 NYCRR § 2530.1, "commencement of proceeding") of Part 2530 the RSC ("judicial review") also provides that an Article 78 proceeding may only be commenced to challenge a "final order of the DHCR," and further defines that term as either: 1) an agency determination that a landlord harassed a tenant (RSC 2262.2 [c] [2] a/k/a 9 NYCRR § 2262.2 [c] [2]); 2) a determination by the DHCR Commissioner on the merits of a petition for administrative review ("PAR;" RSC 2529.8 a/k/a 9 NYCRR § 2529.8); or 3) a "deemed denial" of a PAR caused by the DHCR Commissioner's failure to issue a ruling on it within the proscribed time period (RSC 2529.11 a/k/a 9 NYCRR § 2529.11). Here, it is plain that the Tatano letter does not meet the RSC's definition of a "final order of the DHCR" since it did not involve either a harassment complaint or a PAR.

Instead, of an "agency determination," it appears that that that letter was merely a letter. Tatano plainly sent it in response to petitioners' counsel's April 14, 2021 request that the DHCR commence a sua sponte enforcement proceeding. Such communications are authorized by the

discretionary authority[4] accorded to the DHCR by RSC 2527.11 (a/k/a 9 NYCRR § 2527.11; "advisory opinions and operational bulletins"), which provides that:

> "(a) The DHCR *may render advisory opinions as to the DHCR's interpretation of the RSL, this Code or procedures*, on the DHCR's own initiative or *at the request of a party*.
> (b) In addition to the advisory opinion issued under subdivision (a) of this section, the DHCR *may take such other required and appropriate action as it deems necessary for the timely implementation of the RSL and this Code, and for the preservation of regulated rental housing* in accordance with section 2520.3 of this Title. . . ."

RSC 2527.11 (a/k/a 9 NYCRR § 2527.11) (emphasis added). It appears that petitioners' April 14, 2021 letter constituted an informal "request of a party" that the agency take "other required and appropriate action . . . necessary for the timely implementation of the RSL and [RSC]." It further appears that Tatano's April 27, 2021 response constituted an "an advisory opinion" that the DHCR did not "deem [such] action necessary." It is a longstanding principle of administrative law that advisory opinions are not subject to challenge under CPLR Article 78 because they are not "final agency determinations." *See e.g.*, *Matter of Boyle v NYS Dept. of Motor Vehs.*, 200 AD3d 1375 (3d Dept 2021) (the DMV's email response to a petitioner's inquiry about filing a license application was not a judicially reviewable final determination); *State Farm Mut. Auto. Ins. Co. v Farescal*, 23 Misc 3d 1125(A), 2009 NY Slip Op. 50937(U), *2 (Sup Ct, Queens County 2009), citing *Joint Queensview Housing Enterprise, Inc. v Grayson*, 179 AD2d 434 (1st Dept 1992) (advisory opinion letters did not constitute final determinations of tax liability by city for purposes of article 78 proceeding). As a result, the court concludes that petitioners may not seek review of the Tatano letter under CPLR 7803 (3) because their request does not comport with CPLR 7801 (1).

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[4] The regulation's language is permissive ("may issue," "may deem necessary") rather than mandatory ("shall issue," "must take action"), which indicates that the DHCR is accorded discretion over how it proceeds with respect to advisory functions. *See* also RSC 2527.2 (9 NYCRR § 2527.2) ("The DHCR *may* institute a proceeding on its own initiative *whenever the DHCR deems it necessary or appropriate* pursuant to the RSL or this Code" [emphasis added]).

The DHCR further notes that, although there exists an administrative process to challenge the Chelsea Hotel's registration, in the form of "a proceeding pursuant to RSL 26-517(e) and RSC Section 2528.4(a)," petitioners have never commenced such a proceeding. *See* notice of motion (motion sequence number 002), Kelly affirmation, ¶ 24. The DHCR therefore argues that petitioners' first cause of action is improper because they failed to exhaust all available administrative remedies before they asserted that claim. *Id.*, ¶¶ 20-22. Petitioners respond by repeating their contention that the Tatano letter constituted a "final administrative determination" denying them the relief that they sought, and by asserting that it would therefore be futile to attempt to pursue any other administrative remedies. *See* Behar combined affirmation in opposition, ¶¶ 12-16. However, the court has already found that the Tatano letter was *not* a "final administrative determination." Therefore, the court rejects petitioners' "futility" argument. The doctrine of administrative exhaustion is another bedrock principle of administrative law. *See e.g., Matter of Funches v Vance*, 182 AD3d 516, 516 (1st Dept 2020), citing *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 (1978). Because petitioners have evidently not exhausted all of the available administrative remedies regarding the Chelsea Hotel's registration, the court finds that the doctrine affords another ground on which to find their first cause of action improper.

For the two foregoing reasons, the court concludes that so much of the DHCR's motion as seeks dismissal of plaintiffs' first cause of action should be granted.

Plaintiffs' second cause of action seeks an order in the nature of mandamus, pursuant to CPLR 7801(1) and 7803(3), to "compel enforcement of [the] DHCR's [2014] reclassification orders." *See* verified petition/complaint, ¶¶ 97-100. The DHCR argues that this remedy is unavailable, as a matter of law, because the decision whether or not to commence an

enforcement proceeding is a discretionary act, not a ministerial one. *See* notice of motion (motion sequence number 002), Kelly affirmation, ¶¶ 28-35. The DHCR's legal position is well grounded. The First Department summarizes the law applicable to mandamus claims thus:

> "Article 78 is the codification of the common-law writs, including a writ of mandamus to compel (CPLR 7801, 7803[1]). Mandamus to compel is a judicial command to an officer or body to perform a specified ministerial act that is required by law to be performed. It does not lie to enforce a duty that is discretionary (*Matter of Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY 2d 88, 96 [1981]). The availability of mandamus to compel the performance of a duty does not depend on the applicant's substantive entitlement to prevail, but on the nature of the duty sought to be commanded - i.e., mandatory, non-discretionary action (*id.* at 97). A ministerial act is best described as one that is mandated by some rule, law or other standard and typically involves a compulsory result (*New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 [2005). Discretionary acts, on the other hand, are not mandated and involve the exercise of reasoned judgment, which could typically produce different acceptable results (*id.*). Mandamus is not available to compel an officer or body to reach a particular outcome with respect to a decision that turns on the exercise of discretion or judgment. In other words, mandamus will lie to compel a body to perform a mandated duty, not how that duty shall be performed (*Klostermann v Cuomo*, 61 NY2d 525, 539–540 [1984]). It lies 'only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law' (*New York Civ. Liberties Union*, 4 NY3d at 184)
>
> "Mandamus is generally not available to compel government officials to enforce laws and rules or regulatory schemes that plaintiffs claim are not being adequately pursued (*see e.g. Jones v Beame*, 45 NY2d 402, 409 [1978], citing *People ex rel. Clapp v Listman*, 40 Misc 372 [Sup Ct, Special Term, Onondaga County 1903] [mandamus does not lie to compel enforcement of Sunday 'blue' laws]; *Matter of Walsh v LaGuardia*, 269 NY 437 [1936] [no right to compel Mayor and Police Commissioner to prohibit operators of nonfranchised bus routes]; *Matter of Perazzo v Lindsay*, 30 AD2d 179 [1st Dept 1968], affd 23 NY2d 764 [1968] [no right to compel enforcement of laws governing operation hours of coffee houses]; *Matter of Morrison v Hynes*, 82 AD3d 772 [2d Dept 2011] [cannot compel the initiation of a prosecution]; *Matter of Bullion v Safir*, 249 AD2d 386 [2d Dept 1998] [no mandamus to compel police to make arrests]). This reflects the long-standing public policy prohibiting the courts from instructing public officials on how to act under circumstances in which judgment and discretion are necessarily required in the fair administration of their duties."

Alliance to End Chickens as Kaporos v New York City Police Dept., 152 AD3d 113, 117-118 (1st Dept 2017). With regard to petitioners' claim, section 2527.2 of the RSC (a/k/a 9 NYCRR § 2527.2) provides that "[t]he DHCR *may* institute a proceeding on its own initiative whenever the DHCR *deems it necessary or appropriate* pursuant to the RSL or this Code (emphasis added)."

The highlighted regulatory language is permissive ("may institute," "deem necessary") rather than mandatory (e.g., "shall commence"), which indicates that the DHCR has discretion over its exercise of its enforcement function, and thus exempts that function from mandamus requests. *See e.g.*, *Committee for Maintenance & Privatization Fair Play at Rivercross v Jones (*a/k/a *Vink v New York State Div. of Hous. & Community Renewal)*, 285 AD2d 203 (1st Dept 2001). In view of the governing law and the clear regulatory language discussed above, the court finds that the remedy of mandamus is *not* available to compel the relief that petitioners sought in their April 14, 2021 letter. Petitioners' opposition papers nevertheless raise the semantic argument that "while the decision to initiate administrative proceedings may very well be discretionary, the enforcement of an order that was already issued at the culmination of an administrative proceeding is not discretionary." *See* petitioners' combined affirmation in opposition, ¶¶ 123-126. There is no support for this purported distinction in either the case law or the regulatory text. The court therefore rejects petitioners' argument and concludes that so much of the DHCR's motion as seeks dismissal of plaintiffs' second cause of action should be granted.

Plaintiffs' third cause of action seeks an order in the nature of prohibition, pursuant to CPLR 7803 (2) and 7803 (3), to invalidate the DHCR's "refusal to enforce [the 2014] reclassification orders, and thereby permit units in the Chelsea [Hotel] to become exempt or deregulated from the RSL when in transient use." *See* verified petition/complaint, ¶¶ 101-106. The DHCR argues that it would be improper for the court to make such an order because none of the three conditions necessary for the issuance of a writ of prohibition are met in this case. *See* notice of motion (motion sequence number 002), Kelly affirmation, ¶¶ 36-39. Appellate caselaw holds that:

> "A writ of prohibition will issue where there is a clear legal right and the body or officer 'acts or threatens to act without jurisdiction in a matter over which it has no power

> over the subject matter or where it exceeds its authorized powers in a proceeding over which it has jurisdiction' . . . and, in the court's discretion, the remedy is warranted."

Matter of Power v New York State Div. of Hous. & Community Renewal, 61 AD3d 544, 544 (1st Dept 2009) (internal citations omitted). Here, as discussed, RSC 2527.2 (a/k/a 9 NYCRR § 2527.2) plainly grants the DHCR the authority to commence sua sponte enforcement proceedings, and the discretion to determine whether or not it is appropriate to do so. Thus, even though the DHCR is a "legal body" acting in a "judicial or quasi-judicial capacity," it is plain that the decision not to commence an enforcement action in connection with the 2014 orders is not an act taken "without jurisdiction" or "in excess of" its jurisdication. *See e.g., Matter of Patouhas v Murphy*, 164 AD3d 797, 798 (2d Dept 2018), quoting *Matter of Allen B. v Sproat*, 23 NY3d 364, 375 (2014). Thus, the court concludes that two of the three requirements for the issuance of a writ of prohibition have not been met in this case, and thus finds that it would be improper to grant petitioners the order that they seek. Petitioners nonetheless respond that the DHCR's refusal to commence an enforcement proceeding places the agency "in conflict with the ETPA [i.e., the Emergency Tenant Protection Act of 1974] [and/]or RSL." *See* petitioners' combined affirmation in opposition, ¶¶ 127-129. This argument lacks merit. Certainly, RSL § 26-506 (b) requires the DHCR to determine whether or not a building is providing hotel services and, if not, to subject the building to the RSL. However, petitioners' allegation of a "conflict" is belied by the First Department's finding that there was no evidence that "that the reclassification orders on which plaintiffs rely applied to the entire building." *Martin v Chelsea Hotel Owner, LLC*, 191 AD3d at 534. Here, too, petitioners have provided no documentary evidence of a purportedly building-wide "reclassification order." Instead, they have only presented copies of the three 2017 RA's decisions that refer to plural "reclassification orders." *See* verified petition/complaint, exhibit A. Therefore, the court rejects petitioners' argument as unsupported.

As a result, the court concludes that so much of the DHCR's motion as seeks dismissal of plaintiffs' third cause of action should be granted.

2. DOB

Petitioners assert the same three causes of action against the DOB as they did against the DHCR, but direct them to the May 17, 2021 Amoi letter instead.

Petitioners' fourth cause of action asserts that the DOB "erred as a matter of law. . ., when it failed to require CHO to amend the Chelsea's CO in conformity with the [2014] hotel reclassification orders." *See* verified petition/complaint, ¶ 108. Petitioners again invoke CPLR 7803 (3) as the basis for their claim. *Id.*, ¶¶ 107-111. The DOB argues that petitioners have no standing to challenge its decision not to take any action against CHO with respect to the Chelsea Hotel's C of O. *See* defendants' mem of law (motion sequence number 003), at 12-13. Petitioners respond that the DOB's argument is flawed because they have established the existence of a "justiciable controversy." *See* petitioners' combined affirmation in opposition, ¶¶ 135. Although such an argument is pertinent in the context of a declaratory judgment claim (*see e.g.*, *Belli v New York City Dept. of Transp.*, 200 AD3d 402 [1st Dept 2021]), no such claim is raised in this case. Petitioners' argument does not address the DOB's allegation that petitioners lack standing. The DOB points out that New York City Charter § 645 (b) (3) (e) vests the agency with the exclusive discretionary authority to both issue certificates of occupancy and to submit applications (to either the Board of Standards and Appeals or to a court of competent jurisdiction) for permission to amend them. The First Department recognizes the DOB's exclusive discretionary authority over both of those functions. *See e.g.*, *Matter of Kusyk v New York City Dept. of Bldgs.*, 130 AD3d 509 (1st Dept 2015). Since there is no private right of action with regard to the issuance or amendment of a C of O, the court agrees that petitioners

lack standing to assert a direct challenge to the Chelsea Hotel's C of O. That does not end the present inquiry, however, since petitioners' fourth cause of action does not assert a direct claim regarding the Chelsea Hotel's C of O, but rather seeks review a DOB decision regarding that C of O. The court nevertheless finds that petitioners' claim fails.

The scant caselaw interpreting New York City Charter § 645 (b) (3) (e) noted that a party seeking to challenge a C of O may file a complaint with the DOB under Section 28-103.18 of the New York City Administrative Code. *See Matter of Arcamone-Makinano v New York City Dept. of Bldgs.*, 39 Misc 3d 1209(A), 2013 NY Slip Op. 50549(U) (Sup Ct, Queens County 2013). Here, however, petitioners filed no such complaint, and instead merely submitted a letter to DOB La Rocca on March 9, 2021. *See* notice of motion (motion sequence number 003), exhibit E. The May 17, 2021 Amoia letter therefore cannot be deemed to be an official DOB determination of a duly filed complaint, but is rather a simple, informal agency response. As such, it is not subject to challenge under CPLR 7801 (1). Further, petitioners' failure to file an administrative complaint with the DOB before commencing this hybrid proceeding constitutes a failure to exhaust administrative remedies which also bars review under CPLR 7801 (1). *See e.g.*, *Matter of Contest Promotions-NY LLC v New York City Dept. of Bldgs.*, 93 AD3d 436 (1st Dept 2012); *see also Matter of Karakash v Del Valle*, 194 AD3d 54 (1st Dept 2021). Petitioners' opposition papers assert that the "definitive position" expressed in the Amoia letter created an exception to the rule of administrative finality; however, they do not explain why or cite any relevant precedent. *See* petitioners' combined affirmation in opposition, ¶¶ 136-139. As a result, the court rejects petitioners' argument and concludes that so much of the DOB's motion as seeks dismissal of plaintiffs' fourth cause of action should be granted.

Petitioners' fifth cause of action seeks an order in the nature of mandamus, pursuant to CPLR 7801(1) and 7803(3), to "to compel enforcement by DOB of DHCR reclassification orders by requiring amendment to CO." *See* verified petition/complaint, ¶¶ 112-116. As was previously noted, a request for "mandamus to compel" "does not lie to enforce a duty that is discretionary." *Alliance to End Chickens as Kaporos v New York City Police Dept.*, 152 AD3d at 117, citing *Matter of Hamptons Hosp. & Med. Ctr. v Moore*, 52 NY 2d at 96. Caselaw recognizes that "the issuance of a temporary or final Certificate of Occupancy is not a ministerial act." *Matter of Arcamone-Makinano v New York City Dept. of Bldgs.*, 39 Misc 3d 1209(A), 2013 NY Slip Op. 50549(U), *5. Petitioners' opposition papers raise no argument to the contrary. *See* petitioners' combined affirmation in opposition ¶¶ 140-143. As a result, the court rejects petitioners' argument and concludes that so much of the DOB's motion as seeks dismissal of plaintiffs' fifth cause of action should be granted.

Petitioners' sixth cause of action seeks an order in the nature of prohibition, pursuant to CPLR 7803 (2) and 7803 (3), to negate the DOB "refusal to require amendment to CO, and instead enabling units in the Chelsea [Hotel] to become exempt or deregulated from the RSL when in transient use, in conflict with reclassification orders and ETPA and RSL sec. 26-506 (b)." *See* verified petition/complaint, ¶¶ 117-125. As was previously noted, "'[t]he extraordinary remedy of prohibition is available only where a judicial or quasi-judicial body acts or threatens to act without or in excess of its jurisdiction and then only when the clear legal right to relief appears and, in the court's discretion, the remedy is warranted.'" *Matter of Patouhas v Murphy*, 164 AD3d at 798, quoting *Matter of Allen B. v Sproat*, 23 NY3d at 375. While the DOB plainly acts as a "quasi-judicial body" regarding the issuance of certificates of occupancy, City Charter § 645 (b) (3) (e) makes it clear that the DOB has exclusive discretionary authority

over that function (*Matter of Arcamone-Makinano v New York City Dept. of Bldgs.*, 39 Misc 3d 1209(A), 2013 NY Slip Op. 50549(U), *5), and it therefore follows that the DOB cannot be deemed to be acting "without or in excess of its jurisdiction" where that function is concerned. As a result, the remedy of prohibition is unavailable, as a matter of law, where the DOB's determinations regarding the Chelsea Hotel's C of O are concerned. Petitioners' opposition argument refers to the EPTA and RSL, laws over which the DOB has no jurisdiction. *See* petitioners' combined affirmation in opposition, ¶¶ 144-150. As a result, the court rejects petitioners' argument and concludes that so much of the DOB's motion as seeks dismissal of plaintiffs' sixth cause of action should be granted.

3. CHO

Petitioners' seventh cause of action seeks an injunction requiring CHO to "to apply to DOB for an amended CO conforming to the hotel reclassification orders . . ., and indicating that the Chelsea [Hotel] is not a hotel," and to "file at DHCR a corrected building registration, identifying the Building Status of the Chelsea as 'Multiple Dwelling A,' for use as an apartment building and for occupancy only by permanent residents." *See* verified petition/complaint, ¶¶ 126-137. "To plead a cause of action for a permanent injunction, a plaintiff must allege, inter alia, 'a violation of a right presently occurring, or threatened and imminent.'" *Lemle v Lemle*, 92 AD3d 494, 500 (1st Dept 2012), quoting *Elow v Svenningsen*, 58 AD3d 674, 675 (2d Dept 2009). Here, the court has already determined that petitioners have failed to establish that they have any rights to the various actions which they request the co-respondent agencies to perform. Therefore, petitioners' claim for permanent injunctive relief against CHO must a fortiori fail as well. Petitioners' opposition papers gloss over the "cognizable right" requirement, and instead concentrate on the secondary allegation that they have no adequate remedies at law. *See*

petitioners' combined affirmation in opposition, ¶¶ 96-97. However, as the court noted earlier, petitioners do have such remedies; i.e., the administrative procedures before the DHCR and DOB that they failed to exhaust before they commenced this hybrid matter. As a result, the court rejects petitioners' argument and concludes that CHO's motion to dismiss plaintiffs' seventh cause of action should be granted.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED AND ADJUDGED that the verified petition/complaint, submitted by order to show cause, of petitioners Deborah Martin, Ed Hamilton, Gretchen Carlson, Philip Taaffe, Drew B. Straub, Martine Barrat, Jonathan Berg, and Susan Berg (motion sequence number 001) is denied; and it is further

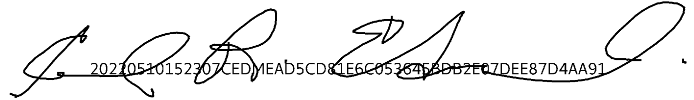
ORDERED AND ADJUDGED that the motion, pursuant to CPLR 3211, of respondents Ruthanne Visnauskas, as Commissioner of the New York State Division of Homes and Community Renewal, and the New York State Division of Homes and Community Renewal (motion sequence number 002) is granted, and this proceeding is dismissed as against said respondents; and it is further

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 3211, of respondents Melanie La Rocca, as Commissioner of the New York City Department of Buildings, and the New York City Department of Buildings (motion sequence number 003) is granted, and this proceeding is dismissed as against said respondents; and it is further

ORDERED AND ADJUDGED that the motion, pursuant to CPLR 3211, of respondent Chelsea Hotel Owner, LLC (motion sequence number 004) is granted, and this proceeding is dismissed as against said respondent; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondents Ruthanne Visnauskas, as Commissioner of the New York State Division of Homes and Community Renewal, and the New York State Division of Homes and Community Renewal shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.



5/10/2022		CAROL EDMEAD, J.S.C.
DATE		

CHECK ONE:	X	CASE DISPOSED				NON-FINAL DISPOSITION
		GRANTED		DENIED		GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT		REFERENCE