

**Yunfei Chen Weng v NYC Dept. of Hous. Preserv. & Dev.**

2024 NY Slip Op 30740(U)

March 8, 2024

Supreme Court, New York County

Docket Number: Index No. 154283/2022

Judge: Arlene P. Bluth

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

This opinion is uncorrected and not selected for official publication.

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

**PRESENT:** HON. ARLENE P. BLUTH **PART** **14**

*Justice*

-----X

YUNFEI CHEN WENG, MOU SIN CHEUNG, ZHI YANG  
HU, LIAN PING NAN

Petitioners,

- v -

NYC DEPARTMENT OF HOUSING PRESERVATION &  
DEVELOPMENT, THE NYC DEPARTMENT OF FINANCE,

Respondents.

-----X

**INDEX NO.** 154283/2022

**MOTION DATE** 03/04/2024<sup>1</sup>

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1- 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for ARTICLE 78.

The petition to annul the determination by respondent the NYC Department of Housing Preservation and Development (“HPD”)’s to revoke the tax benefits related to real property is denied.

**Background**

Petitioners own various properties in Queens. They contend that they received a tax abatement for the property under the 421-a program starting in 2007. Petitioners allege that in January 2022, they received a letter from HPD noting that HPD was going to retroactively revoke the tax benefits for these properties based on petitioners’ failure to submit a Final Certificate of Eligibility (“FCE”) (NYSCEF Doc. No. 21).

---

<sup>1</sup> The Court observes that this proceeding has been pending before different judges for more than a year. Although this proceeding was only recently assigned to this part, the Court apologizes for the lengthy delay in the resolution of this proceeding.

They contend that they did not receive due process as they did not receive proper notices from HPD. Petitioners point out that the Final Application Checklist (NYSCEF Doc. No. 15) for the tax exemption was sent by HPD to someone named Louis Pescatore, someone allegedly hired by the original builder decades ago. Petitioners argue that HPD has ready access to the tax bills maintained by the Department of Finance (“DOF”) and so HPD could have easily discovered the true owners of the property. Petitioners also claim that they never got a March 13, 2020 notice of impending revocation and so they did not have an opportunity to respond or comply.

In opposition, respondents contend that petitioners failed to obtain an FCE (a final certificate of eligibility). They claim that the DOF sent a notification on December 2, 2016 to each petitioner notifying them that they had to submit the FCE by January 5, 2018 in order to retain their tax benefits (Respondents claim in a footnote that they do not retain copies of this particular correspondence).

Respondents then sent a notice on August 2, 2017 titled “Important Notice: Act Now to Avoid Losing Your 421-a Benefits” to each of the petitioners (NYSCEF Doc. No. 26 [copies of these notices addressed to petitioners]). On August 9, 2019, respondents sent another notice, this one titled “Important Notice: Your Failure to Comply May Result In The Repayment of Your Property’s Tax Benefits” (NYSCEF Doc. No. 27) to the petitioners. They explain that these notices are called a pre notice of impending revocation.

Respondents observe that one of these letters was returned, but that each of these petitioners was also sent a copy of the same letter to a different address on file and none of these were returned. They contend they received no responses from these warnings.

On March 13, 2020, HPD sent a notice of impending revocation to each petitioner (NYSCEF Doc. No. 28) and respondents claim they received nothing in response. Respondents

then sent each petitioner a copy of the “Final Application Checklist” in December 2021 and noted that the deadline was December 28, 2021 (NYSCEF Doc. No. 29).

Respondents observe that after receiving no responses, they issued a determination dated January 18, 2022 that revoked the partial tax exemption for the subject premises.

In reply, petitioners contend that there were various governmental orders related to the COVID-19 pandemic that tolled their time to respond. They claim that the notices to petitioners were “sporadic arbitrary and defective.” Petitioners maintain that HPD failed to notify the legal representative on file for petitioners, Mr. Pescatore, and so the determination should be reversed.

### **Discussion**

In an Article 78 proceeding, “the issue is whether the action taken had a rational basis and was not arbitrary and capricious” (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*id.*). “If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable” (*id.*). “Arbitrary action is without sound basis in reason and is generally taken without regard to the facts” (*Matter of Pell v Board of Educ. of Union Free Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

The Court denies the petition. This record is replete with notices sent as early as 2016 informing petitioners that they had to comply with the requirement to send an FCE in order to maintain their tax benefits. Notice after notice was sent and petitioners ignored every single one of them before suddenly taking action after HPD issued its final determination. Nothing in this

record shows any arbitrary or capricious action by HPD; rather it shows that every deadline was extended again and again. Petitioners had ample opportunity to comply and simply did not.

The Court also observes that petitioners' arguments changed quite drastically from their moving papers to their reply. The petition implies that there was a lack of due process because a final application checklist was sent to Mr. Pescatore (NYSCEF Doc. No. 1, ¶ 33). Petitioners emphasized that Mr. Pescatore "was not engaged by the Petitioners who bought the Properties in 2004" (*id.*). Yet, in reply, petitioners argue that HPD did not send notices to Mr. Pescatore (NYSCEF Doc. No. 35 at 11). Petitioners cannot have it both ways.

Of course, underlying this entire proceeding is the fact that each of the properties received a "Preliminary Certificate of Eligibility" (NYSCEF Doc. No. 23) in 2004, which specifically states that "This Certificate is conditioned upon the filing and approval of a Final Application to be submitted to the Department of Housing Preservation" (*id.*). In other words, petitioners knew or should have known that filing a FCE was a requirement to ensure that they maintained their tax benefits. The plethora of notices were simply reminders of that ongoing obligation.

Petitioners' claim about a toll due to the pandemic-related executive orders is without merit. First, the executive orders purported to toll the "time limit for the commencement, filing or service of any legal action" (*see* Executive Order 202.8). And second, to the extent that the executive orders operated as a toll for HPD's deadline, they do not compel the Court to grant the petition. HPD's notice dated March 13, 2020 notice gave a deadline of June 11, 2020 to submit the FCE (NYSCEF Doc. No. 28). The executive orders implemented a toll from March 20, 2020 through November 3, 2020 (*Murphy v Harris*, 210 AD3d 410, 411, 177 NYS3d 559 [1st Dept 2022]). That means that, at best, petitioners' deadline to respond expired sometime in 2021.


Petitioners self-serving calculation of the toll in reply makes clear that it does not save this petition. Petitioners argue the toll should run from January 18, 2022, the date of the determination. They ignore the March 2020 notice and the December 2021 notice. Of course, the December 2021 notice, submitted well after the expiration of any tolling order, set a deadline of December 28, 2021.

**Summary**

The fact is that respondents sent numerous notices to the same addresses over the course of many years warning about the need to submit an FCE. Petitioners conveniently claim that they never received any notices, although they admit to receiving the final determination on which this proceeding is based even though those were sent to the same addresses as the previous notices (*see* NYSCEF Doc. No. 21). In other words, the Court finds that it was neither arbitrary nor capricious for respondents to revoke the instant tax benefits where they repeatedly extended deadlines and petitioners simply ignored their obligations under this tax abatement program.

Accordingly, it is hereby

ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements upon presentation of proper papers therefor.

<u>3/8/2024</u>							
DATE			ARLENE P. BLUTH, J.S.C.				
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION			
	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input 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