SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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In the Matter of the application of
WEST 97TH STREET REALTY CORP., WESTWOOD HOUSE LLC, TOWN HOUSE WEST LLC, COLUMBUS MANOR, LLC,,

Petitioner,

For a judgment pursuant to Article 78 of the CPLR

Index No.
104007/07

- against -

NEW YORK STATE DIVISION OF HOUSING and COMMUNITY RENEWAL

Respondents.

Decision and Order

-and-

COLUMBUS MANOR TENANTS ASSOCIATION and HECTOR CARDONA, INDIVIDUALLY and as PRESIDENT, TOWN HOUSE WEST APARTMENTS TENANTS' ASSOCIAITON by NIKKI SPRINGER, PRESIDENT, WESTWOOD HOUSE TENANTS ASSOCIATION BY MICHAEL NEAL, PRESIDENT, and CENTRAL PARK GARDENS TENANTS' ASSOCIATION,

Intervenor- Respondent.

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HON. EILEEN A. RAKOWER

Petitioners, the owners of four apartment buildings, file this Article 78 petition against New York State Division of Housing and Community Renewal (DHCR) seeking an order from the Court directing DHCR to process their pending "unique or peculiar" application (U&P) within sixty days and to direct DHCR to determine that certain rental units must have their monthly rents increased so that they conform to those of "substantially similar housing accommodations." Formerly, the buildings' owners (or their predecessors) participated in the government's Mitchell-Lama program under which they received low interest loans that were funded by the

government and many years of tax subsidies in exchange for renting apartments to tenants at affordable rates. Petitioners chose to exit the Mitchell-Lama program and, pursuant to Rent Stabilization Law, the apartments in these buildings automatically became stabilized at their then existing rents. Petitioners no longer enjoy government tax subsidies and wish to have the rents in the buildings re-evaluated by DHCR. Petitioners state that the rents must be increased to what they believe are market rate rents for the subject location. Petitioners state that, on information and belief, DHCR is refusing to process their applications. They now seeks a writ of mandamus ordering DHCR to make their determination within 60 days. Additionally, they petition the to Court direct DHCR to issue the determination they state that they are entitled to as a matter of law increasing the tenants.

DHCR opposes Petitioners' applications arguing that the petition should be dismissed because the Court lacks subject matter jurisdiction to grant the relief requested and because Petitioners have failed to exhaust their administrative remedies. By stipulation dated June 5, 2007, Petitioner and DHCR agreed with the Intervenor-Respondents' Tenants' Associations (Tenants) that Tenants should be permitted to intervene in this matter. Tenants also oppose Petitioner's application on the two aforementioned grounds and myriad others.

Petitioners argue that they are entitled to the relief requested because they filed their U&P applications between February, 2005 and June, 2006, and as of the date of this petition, DHCR has made no determination and, to their knowledge, their applications are not even being processed. They state that they are entitled to rent increases as a matter of law pursuant to the Court of Appeals decision in *Matter of KSLM-Columbus Apartments, Inc. v. New York State Division of Housing and Community Renewal and Westgate Tenants Association et al.*, (5 N.Y.3d 303 [2005]), and Rent Stabilization Law § 26-513(a), the U&P provision. Petitioners state that DHCR refuses to process their U&P applications because it hopes that Petitioners will settle their rent disputes with tenants here, as the tenants in *KSLM, (supra),* did. Petitions, however, do acknowledge that in *KSLM* all DHCR administrative remedies were exhausted before the parties went to Court.

DHCR argues that Petitioners are attempting to preclude DHCR from exercising its exclusive jurisdiction to determine the owners' U&P applications. It argues that given the due process requirements of the Rent Stabilization Law and Code, it is impossible for the applications to be finally determined within sixty days.

DHCR argues that *KSLM, (supra)*, is not despositive in this case, but rather was limited to facts not present here. It states that this is a matter of first impression because it has never before had to rule on a U&P application by the owners of a former Mitchell-Lama building seeking building-wide rent increases. DHCR also argues that this proceeding should be dismissed because Petitioners failed to exhaust their administrative remedies before commencing this action. It argues that it has exclusive original jurisdiction in this matter which is inherently technical and within its area of expertise. DHCR also states that Mandamus does not lie here because in processing these applications, DHCR is performing a non-ministerial, discretionary and judgmental act.

The doctrine of primary jurisdiction "is intended to coordinate the relationship between courts and administrative agencies so that, among other things, the agency's views on factual and technical issues are made available where the matter before the court is within the agency's specialized field." (*Matter of Donato v. Board of Education of the Plainview-Old Bethpage Central School District et al.*, 286 A.D.2d 388 [2nd Dept. 2001] citations omitted.) DHCR has exclusive original jurisdiction in matters of this nature and the Court's power is limited to Article 78 review of its determination. (*Sohn v. Calderon*, 78 N.Y.2d 755 [1991]).

Additionally, it is generally held that "one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law." (*Lehigh Portland Cement Company v. New York State Department of Environmental Conservation*, 87 N.Y.2d 136, 140 [1995], *citing Watergate II Apartments v. Buffalo Sewer Authority*, 46 N.Y.2d 52 [1978]). The purpose of this rule is to relieve the courts of the burdens associated with deciding issues that have been entrusted to an agency and to permit agencies to establish a consistent scheme of regulation regarding its area of expertise. (See, *Watergate II Apartments v. Buffalo Sewer Authority, supra* at 57). Additionally, where a reviewing agency "did not issue any sort of determination or statement of policy on the issue in dispute," administrative review is not futile. (*Lehigh Portland Cement Company v. New York State Department of Environmental Conservation, supra* at 141-42).

Moreover, "[a] petitioner seeking mandamus to compel must have a clear legal right to the relief and the administrative agency must have a non-discretionary duty to grant the relief." (*Scherbyn v. Wayne-Finger Lakes Bd. Of Coop Ed. Serv.*, 77

N.Y.2d 753, 757 [1991]).

Here, Petitioners do not dispute that they have not exhausted all of their administrative remedies or that DHCR is charged with primary jurisdiction over Petitioners' U&P applications. DHCR "categorically" states that "it intends to issue determinations in each of these applications [but it] recognizes that it must formulate a coordinated, consistent and legally enforceable paradigm for these matters . . .." Rather DHCR must follow its procedures in adjudicating this discretionary, judgmental act. Accordingly, this petition must be dismissed. Wherefore, it is hereby

ORDERED that the petition seeking an order from the Court directing DHCR to process its pending "unique or peculiar" application within sixty days is denied; and it is further

ORDERED that the petition seeking an order from the Court directing DHCR to grant Petitioners' "unique or peculiar" application and directing rent increases is denied.

All other relief requested is denied.

This constitutes the decision and order of the Court

Dated: August 14, 2007

Eileen A. Rakower, J.S.C.