Landlords' Article 78 Against NYCHA Upheld

By Ben Bedell
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Landlords subject to one of New York City's largest rent subsidy programs won a favorable ruling Tuesday from the Appellate Division, First Department.

A unanimous court ruled in *In re Flosar Realty v. New York City Housing Authority*, 102799/12, that landlords complaining of debilitating delays in their applications for rent increases could maintain an Article 78 proceeding.

Defendant New York City Housing Authority (NYCHA) administers federal subsidies paid to about 30,000 city landlords who have tenants covered by the "Section 8" program.

A group of 19 landlords brought an Article 78 mandamus proceeding against the housing authority claiming it arbitrarily delayed, or refused to even acknowledge receipt of, routine requests for rent increases available under the program.

"The petition states a claim for mandamus relief to the extent it seeks to compel NYCHA to make a determination, because NYCHA does not have the discretion to not process petitioners' requests," said Justice Rosalyn Richter, writing for the court.

The decision overruled the dismissal of the claims by Manhattan Supreme Court Justice Cynthia Kern two years ago.

Kern had held that the agency's management of Section 8 rent increases was a discretionary act and thus not subject to mandamus.

"Although the eventual determination of reasonable rent will be the product of NYCHA's judgment," Richter said, "the agency does not enjoy similar discretion to not make a decision at all on the rent increase requests."

"We had rent increase applications going back to 2008 where NYCHA didn't even respond," said David Berger, a partner at Tenenbaum Berger & Shivers who represented the landlords.

The landlords claimed damages of $350,000 for 175 Section 8 apartments over the four-year period preceding the filing of the suit in 2012.

They also claimed that NYCHA withheld rents for failing to make repairs long after the repairs had been completed. "In the case of the repair claims, the landlord gets zero rent until NYCHA gets around to sending an inspector out, which can take many months," Berger said.

The landlords will now request Kern to set a 30-day deadline for NYCHA determinations of rent increases and repair reinstatements, Berger said.

NYCHA reports that there are approximately 90,000 Section 8 units in the city. Under a New York City ordinance, landlords cannot refuse to accept prospective tenants merely because they receive Section 8 subsidies.

The program typically pays 70 percent of the rent of low income tenants. A family of four must have an income below $41,500 a year to qualify, but the city closed its wait list for the program in 2007, citing cutbacks in federal funds.

The appellate panel rejected NYCHA's claim that the landlord's petition was time-barred because the Article 78's four-month statute of limitations had run out.

"Because there was no clear and explicit refusal of petitioners' demands, the statute of limitations has not yet begun to run," Richter said.

The panel, however, found that Kern had properly dismissed the landlords' claims that NYCHA should be bound by determinations made by New York City's Rent Guidelines Board for rent-regulated units when setting Section 8 rents.

"The determination of rent reasonableness is governed by the Section 8 regulations," Richter said, "which make no mention of the RGB percentage increases."

Richter was joined in the opinion by Justices David Friedman, Dianne Renwick, Karla Moskowitz and Sallie Manzanet-Daniels.

NYCHA was represented by in-house attorneys Gil Nahmias, Nancy Harnett and Matthew Dineen.