

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX,
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428 BRONX LLC,

Index No.:803279/2021E
Motion Sequence No(s). 13
Motion Date: 6/21/21

Petitioner,

-against-

NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT,

DECISION/ ORDER

Present:

Hon. Wilma Guzman

Justice of the Supreme Court

Respondent.
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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion and cross motion:

Papers

Numbered

Notice of Petition, Petition and Exhibits Annexed Thereto.....	1
Memorandum of Law in Support.....	2
Answer in Special Proceeding and Exhibits Annexed Thereto.....	3
Memorandum of Law in Opposition.....	4
Affirmation in Reply.....	5

Petition decided as follows: Upon deliberation of the application duly made by Petitioner, 428 BRONX LLC (hereinafter "Petitioner"), herein by **NOTICE OF PETITION** and all the papers in connection therewith for an Order (1) finding that New York City Department of Housing Preservation and Development's (hereinafter "HPD") Final Determination dated December 31, 2020 deeming the Petitioner's 421-a application as untimely was made in violation of lawful procedure, affected by errors of law and arbitrary and capricious and an abuse of HPD's discretion and (2) reversing and annulling HPD's Final Determination and (3) ordering HPD to accept Petitioner's 421-a application and review it on the merits and (4) ordering HPD to refund Petitioner's \$72,000 421-a filing fee if the 421-a application is found to be untimely and (5) granting Petitioner such other and further relief as this Court may deem just and proper is hereby granted in part and denied in part.

This action was commenced by Petitioner by an Article 78 Petition on March 9, 2021. Petitioner is the owner of the subject property located at 428 East 148th Street, Bronx and designated on the Tax map of the City of New York as Block 2292, Lot 1102 (f/p/o Lot 26) (hereinafter the “Subject Premises”). Petitioner filed an application for tax benefits pursuant to Real Property Tax Law § 421-a(16) and Chapter 51 of Title 28 of the Rules of New York City (hereinafter the “421-a application”) with Defendant HPD on November 2, 2020 which was denied in December 31, 2020.

Petitioner argues in sum and substance that Defendant HPD’s denial of his application was in error, arbitrary and capricious. Petitioner further argues that Defendant HPD improperly denied his application when HPD determined that he failed to meet the statutory deadline set by RPTL §421-a(16)(a)(xxii). Petitioner alleges that he benefited from a deadline extension due to Governor Cuomo’s Executive Order No. 202.8 and the policy considerations of Mayor De Blasio’s Emergency Executive Order No. 107. Petitioner further alleges that even if the Petitioner’s 421-a application was late, it should still be valid and eligible for review by Defendant HPD under the Excusable Neglect Equitable concept and on the merits. Alternatively, Petitioner seeks the return of Petitioner’s \$72,000 421-a application fee.

Defendant HPD filed opposition papers, arguing in sum and substance that Defendant HPD’s determination to deny Petitioner’s application was not arbitrary and capricious nor an error of law and was rational and reasonable. Defendant HPD argues that Petitioner failed to meet the statutory deadline set by RPTL §421-a(16)(a)(xxii). Defendant HPD also argues that neither Governor Cuomo’s nor Mayor de Blasio’s Executive Orders extend the statutory deadline to file a 421-a application. Defendant HPD further argues that the Excusable Neglect doctrine is inapplicable in this article 78 Proceeding. Defendant HPD lastly argues that Petitioner is not entitled to a refund of the 421-a application fee. Pursuant to Article 78 of the CPLR and RPTL §421-a(16)(o)(i), Defendant seeks to deny the Verification Petition and dismiss the instant Article 78 proceeding in its entirety¹.

Petitioner purchased the Subject premises on December 30, 2019 from the original developer. A Temporary Certificate of Occupancy was issued for the Subject Premises on

¹ It should be noted that HPD requests that the proceedings be dismissed in Respondent’s Memorandum of Law in Support of its Verified Answer and in Opposition to the Verified Petition, but they did not cross-move for dismissal. For the reasons stated herein, this Court will not address HPD’s request.

September 26, 2019. A Permanent Certificate of Occupancy was issued for the Subject Premises on December 4, 2019. Petitioner submitted his 421-a application to Defendant HPD on November 2, 2020.

NY CLS RPTL §421-a(16)(o)(i) states, in pertinent part, that: “The application with respect to any eligible multiple dwelling shall be filed with the agency not later than one year after the completion date of such eligible multiple dwelling”. Further, the Completion date is defined at NY CLS RPTL §421-a(16)(a)(xxii) as: “the date upon which the local department of buildings issues the first temporary or permanent certificate of occupancy covering all residential areas of an eligible multiple dwelling.” Failing to submit a 421-a application within one year after the completion date amounts to a rational basis and is not arbitrary nor capricious. Matter of Montgomery Realty NY, LLC v New York City Dept. of Hous. Preserv. & Dev., 187 A.D.3d 443 (1st Dept, 2020).

Here, Petitioner received a Temporary Certificate of Occupancy on September 26, 2019. NY CLS RPTL §421-a(16)(a)(xxii) starts the Completion date at the time of the first Certificate received, either Temporary or Permanent. This Court finds that the first Certificate of Occupancy was the September 26, 2019 Temporary Certificate of Occupancy, and therefore September 26, 2019 was the start of the Completion date, from which the one-year statutory deadline starts to run.

The judicial review of an Article 78 is restricted to an analysis of whether the governmental agency decision was arbitrary of capricious or affected by an error of law. Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 N.Y.2d 753 (1991). A capricious and arbitrary decision is a decision without sound basis in reason or regard to the facts. Matter of Stahl York Ave. Co., LLC v City of New York, 162 A.D.3d 103 (1st Dept. 2018). Here, Defendant HPD is the governmental agency in charge of the review of the 421-a applications. The Court limits itself to the review of whether Defendant HPD’s denial has sound basis.

Petitioner argues that, due to Governor Andrew Cuomo’s Executive Order No. 202.8 and the policy considerations of Mayor De Blasio’s Emergency Executive Order No. 107, the 421-a application benefited a deadline extension. On March 20, 2020, Governor Cuomo issued Executive Order No. 202.8 stating, in pertinent part:

In accordance with the directive of the Chief Judge of the State to limit court operations to essential matters during the pendency of the COVID-19 health crisis, any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding, as prescribed by the procedural laws of the state, including but not limited to the criminal procedure law, the family court act, the civil practice law and rules, the court of claims act, the surrogate's court procedure act, and the uniform court acts, *or by any other statute, local law, ordinance, order, rule, or regulation, or part thereof*, is hereby tolled from the date of this executive order until April 19, 2020 (emphasis added).

Subsequent Executive Orders issued by Governor Cuomo extended the tolling period until Executive Order No. 202.72 ended the tolling period effective on November 4, 2020.

On April 14, 2020, Mayor Bill De Blasio issued Emergency Executive Order No. 107 stating, in pertinent part, "WHEREAS, measures taken to combat the spread of COVID-19 may prevent individuals, businesses and other entities from meeting legally imposed deadlines for the filing of certain documents or for the completion of other required actions." The Mayor's Emergency Executive Order further states in §6: "*This Order incorporates any and all relevant provisions of Governor Executive Order No. 202 and subsequent orders issued by the Governor of New York State to address the State of Emergency declared in that Order pursuant to his powers under section 29-a of the Executive Law* (emphasis added)."

Petitioner's interpretation of the two Executive Orders as they apply to HPD deserves analysis. The purpose of the Emergency Executive Orders was addressed by Mayor DeBlasio in Emergency Executive Order No. 107 in discussing the impact of the COVID-19 virus and how the virus "may prevent individuals, businesses and other entities from meeting legally imposed deadlines for the filing of certain documents or for the completion of other required actions." The purpose of tolling certain deadlines reflects the impact that the virus has had on the people of the State and City of New York. Many City and State agencies slowed down or stopped operations, therefore hindering many processes, and making some deadlines impossible to meet due to lack of personnel and resources.

This Court's analysis of the purpose of the Orders indicates that discretion should be given by the Courts in determining whether or not the time should be tolled in the interests of justice as they relate to certain deadlines. The Completion date was on September 26, 2019, less

than six months before the COVID-19 pandemic began its relentless assault on the people of New York. As the city began to feel the effects of the planet-wide pandemic, which was outside of the control of any human being, our Governor and the Mayor of the City of New York made a determination that as business and agency operations ground to a standstill, so too should the timetable of certain administrative processes.

This Court thereby finds that Governor Andrew Cuomo's tolling of "any other statute, local law, ordinance, order, rule, or regulation, or part thereof" pursuant to Executive Order No. 202.8, which begins tolling on March 7, 2020 and ends tolling on November 4, 2020, should apply to the Petitioner's HPD 421-a application submission. This Court finds that the language of Mayor Bill DeBlasio's Emergency Executive Order No. 107 should be read broadly when it makes clear that "measures taken to combat the spread of COVID-19 may prevent individuals, businesses and other entities from meeting legally imposed deadlines for the filing of certain documents or for the completion of other required actions." The measures taken by many of the City's agencies in response to the pandemic made "business as usual" anything but, and forced prolonged closures and delays, making agency operations difficult, if not impossible.

Therefore, this Court finds that the Petitioner's 421-a application submission was not untimely when applying the tolling of deadlines pursuant to Governor Cuomo's Executive Order No. 202.8 and Mayor De Blasio's Emergency Executive Order No. 107. The date between the Completion date of September 26, 2019 and Petitioner's 421-a application submission on November 2, 2020, which occurred within the tolling period, was timely. As such, the Petition for an Order finding that HPD's final determination upon Petitioner's application filed with HPD on November 2, 2020 dated December 31, 2020 was untimely is hereby reversed and annulled. This Court further orders HPD to accept Petitioner's 421-a application and orders that HPD review said application on its merits.

As such, Petitioner's request for an Order finding that HPD's final determination dated December 31, 2020 deeming the Petitioner's 421-a application as untimely was made in violation of lawful procedure, affected by errors of law, arbitrary, capricious and an abuse of HPD's discretion is granted. Further, Petitioner's request for an order refunding petitioner's \$72,000 application filing fee is reserved upon the final acceptance and review on its merits of Petitioner's 421-a application by HPD.

Accordingly, it is,

ORDERED and ADJUDGED that the Petition made by 428 BRONX LLC, for an Order reversing and annulling Respondent New York City Department of Housing Preservation and Development's 421-a application decision dated December 31, 2020 is granted. It is further,

ORDERED AND ADJUDGED that Respondent New York City Department of Housing Preservation and Development is hereby directed to accept as timely Petitioner's 421-a application and review it on the merits. It is further,

ORDERED and ADJUDGED that Petitioner, 428 BRONX LLC, shall serve a copy of this Order with Notice of Entry upon all parties within thirty (30) days of entry of this Order.

This constitutes the Decision and Order of this Court.

Dated:

10/11/21



HON. WILMA GUZMAN, J.S.C.