

**Matter of Haberman v New York City Dept. of  
Hous. Preserv. & Dev.**

2008 NY Slip Op 32459(U)

September 8, 2008

Supreme Court, New York County

Docket Number: 0115284/2007

Judge: Walter B. Tolub

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PRESENT: WALTER B. TOLUB

PART 15

Index Number : 115284/2007

HABERMAN, JACOB

INDEX NO. \_\_\_\_\_

vs

NEW YORK CITY DEPT. OF HPD

MOTION DATE \_\_\_\_\_

Sequence Number : 001

MOTION SEQ. NO. \_\_\_\_\_

ARTICLE 78

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**IS DECIDED**

**IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION**

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1140).

Dated: 9/8/08

WALTER B. TOLUB  
U.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

\* 2 ]  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
In the Matter of the Application of  
JACOB HABERMAN

Petitioner,

Index No. 115284/07  
Mtn Seq. 001, 002

For a Judgment Pursuant to Article 78 of  
the Civil Practice Law and Rules

-against-

NEW YORK CITY DEPARTMENT OF HOUSING  
PRESERVATION AND DEVELOPMENT and  
CELIA NORIEGA,

Respondents.

UNFILED JUDGMENT  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1415).

-----x  
WALTER B. TOLUB, J.:

Application sequence 001 and 002 are consolidated and  
resolved in the following memorandum decision.

By application sequence 001, petitioner seeks an order  
directing respondent, the New York City Department of Housing  
Preservation and Development (HPD) to remit \$33,919.72 in Section  
8 rent arrears due to petitioner on behalf of Celia Noriega (Ms.  
Noriega). By application sequence 002, petitioner seeks to  
consolidate this Article 78 proceeding with the underlying  
Article 78 proceeding captioned, Celia Noriega v. Shaun Donovan,  
as Commissioner of the City Department of Housing Preservation  
and Development (New York County Index No. 401315/2006).

[\*3]

Background

Petitioner is the owner of a residential apartment building located at 123-17 Maple Avenue in Flushing, New York ("the building"). Respondent Ms. Noriega, a senior citizen, was the tenant of record for Apartment C301 in petitioner's building from the 1980's through 2007. Beginning in 1985, Ms. Noriega received Housing Assistance Payments (HAP payments) under the Section 8 program operated by HPD. These HAP payments continued through 1999, at which time it appears that HPD, without the requisite notice, ceased making any HAP payments to petitioner on behalf of Ms. Noriega.<sup>1</sup>

In 2005, petitioner commenced a nonpayment proceeding (the 2005 proceeding) against Ms. Noriega in the amount of \$27,114 for the unpaid Section 8 arrears. This amount represented the total of the unpaid Section 8 payments owed to petitioner by HPD from 1999 through October, 2005 (Notice of Petition, Exhibit A). The petition in the 2005 proceeding was marked "off calendar" by stipulation dated December 14, 2005 so as to allow the parties to resolve the lingering issue of the nonpayment of the Section 8 subsidy (Notice of Petition, Exhibit B). By 2007, petitioner claims that the amount of unpaid amount of Section 8 payments had risen to \$33,919.72. The court notes that respondent HPD

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<sup>1</sup> The court notes that although HPD ceased making HAP payments on Ms. Noriega's behalf, Ms. Noriega continued to pay her share of the required monthly rent (See, Notice of Motion).

\* 4 ]  
disputes this calculation.

The Underlying Article 78 Action

In 2006, Ms. Noriega, seeking reinstatement to the Section 8 Program and for retroactive HAP payments, commenced the Article 78 special proceeding captioned, Celia Noriega v. Shaun Donovan, as Commissioner of the City Department of Housing Preservation and Development (New York County Index No. 401315/2006). By judgment dated May 7, 2007, Judge Karen Smith determined that Ms. Noriega's Section 8 benefits had been improperly terminated, and ordered the restoration of her benefits retroactively to June 1, 2000 (Reply Affidavit, Application Sequence 001, Exhibit A).

It appears that following the issuance of Judge Smith's judgment, the parties engaged in negotiations in an attempt to resolve this matter without further litigation. Initially, HPD offered petitioner the amount of \$16,412.24 (representing eighty-six months of unpaid HAP payments at \$190.84 per month), which it calculated as being the unpaid arrears under the May, 2007 order. Petitioner countered HPD's offer with his claim for \$33,919.72. This figure, according to petitioner, took into consideration the multiple Maximum Base Rent Orders of Eligibility (MBR Orders) applicable to Ms. Noriega's apartment, and issued by DHCR between 2000 and 2007 (Notice of Petition, Exhibit C). Following review of the DHCR MBR Orders, HPD made a new offer to petitioner in the amount of \$27,530.41. After a second impasse, this application

followed.

### Discussion

Actions in the nature of mandamus to compel are limited to compelling a body or officer to perform a duty enjoined upon it by law (Garrison Protective Services, Inc., 92 NY2d 732 [1999]) and require a demonstrated "clear legal right to the relief sought" (Harper v. Angiolillo, 89 NY2d 761, 765-68 [1997]). As such, given the May 2007 order of Judge Smith, there is no question that petitioner is entitled to receive the HAP monies due to them on behalf of Mrs. Noriega from June 1, 2000 through June 2007.

Furthermore, contrary to HPD's claims, liability for the HAP payment arrears can neither be escaped nor reduced based on the assertion that petitioner did not provide them with the requisite rent increase information. HPD terminated Mrs. Noriega's Section 8 benefits, without giving notice to petitioner, in 2000. Once those benefits were terminated, it is doubtful that any new information presented by petitioner concerning the DHCR MBR orders would have even been accepted by HPD.

Here, it is clear that HPD was directed to remit payments to petitioner from June 1, 2000 through June, 2007. It is admitted by the parties that during this time frame, there were multiple DHCR MBR Orders which acted to increase the calculation of the HAP Payments due. HPD is thus responsible for remitting the

properly calculated payments for this time frame, which appears to be, based this court's own cursory review of the payments claimed due and owing from June 1, 2000 through June 1, 2007, quite close to petitioner's requested amount of \$33,919.72 (see Reply Affidavit, Exhibit C). Petitioner's application in sequence 001 is therefore granted.

Petitioner's application for consolidation however (Application sequence 002) is denied. The 2006 application, commenced as an Article 78 action, was marked disposed when Judge Smith issued her May, 2007 decision. As such, there is no active action to consolidate. Accordingly, it is

ADJUDGED and DECLARED that in accordance with the decision of Judge Karen Smith dated May 7, 2007 in the Special Proceeding captioned, Celia Noriega v. Shaun Donovan, as Commissioner of the City Department of Housing Preservation and Development (New York County Index No. 401315/2006), HPD is to remit \$33,919.72 in Section 8 rent arrears due to petitioner on behalf of Celia Noriega, and it is further

ORDERED that said payments are to be made within 60 days of service of a copy of this order with notice of entry; and it is further

ORDERED that petitioner's request to consolidate this Article 78 proceeding with the Article 78 proceeding captioned, Celia Noriega v. Shaun Donovan, as Commissioner of the City

[7]  
Department of Housing Preservation and Development (New York  
County Index No. 401315/2006) is denied.

This memorandum opinion constitutes the decision and  
judgment of the Court.

Dated: 9/8/08

*W*

HON. WALTER B. TOLUB, J.S.C.

**UNENFORCED JUDGMENT**

This judgment has not been entered by the County Clerk  
and a writ of entry cannot be served based hereon. To  
perfect this judgment or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
2000).