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

PRESENT: Marilyn Shafer Justice PART 8

Ozdiba, M

INDEX NO. 110566/08

MOTION DATE

- v -

MOTION SEQ. NO. 001

Chelsea Landmark

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this ~~motion~~ petition is dismissed in accord with the annexed memorandum.

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 141B).

Dated: 3/25/09

MARILYN SHAFER
J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

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In the Matter of the Application of

MARK OZDOBA,

Petitioner,

For a Judgment under Article 78 of the Civil Practice Law and Rules,

Index: 110566/08

-against-

CHELSEA LANDMARK LIC, LLC, ROSE ASSOCIATES INC., MARINE ESTATES, LLC, NEW YORK STATE HOUSING FINANCE AGENCY, and NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

Respondents.

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Marilyn Shafer, J.

In this Article 78 proceeding, petitioner Mark Ozdoba seeks a judgment reversing the determination of respondents, Chelsea Landmark, LIC, LLC, Rose Associates, Inc., Marine Estates, LLC, New York State Housing Finance Agency, and New York City Department of Housing Preservation and Development (respondents) that petitioner did not meet the income eligibility requirements for an affordable apartment at a building located at 55 West 25th Street in Manhattan, New York, (building). Petitioner requests that his income at the time of his application be deemed eligible for the income requirements of the apartment, that he be granted an affordable studio or one bedroom apartment in the building, or

in the case that no such apartment is available in the building within a year, he be granted an affordable apartment in another building. Respondents filed a cross-motion seeking to have the petition dismissed.

BACKGROUND AND FACTUAL ALLEGATIONS

Petitioner is an applicant for a low income apartment unit located at 55 West 25th Street, Manhattan, New York.[1] Settlement Housing Fund, Inc (SHF) is a non-profit housing development corporation. SHF was engaged by the owner of 55 West 25th Street, which is a recently-constructed building, to prepare a marketing plan and to rent the affordable (i.e. low income) units in the building. The building was designated as an 80/20 building, that means that, in order to receive the benefits of the low income tax credits under the applicable Federal and State provisions, at least 20% of the units in the building are required to be set aside for low-income residents. Individuals and families are eligible whose income does not exceed either 40% (for 15% of the affordable apartments) or 50% (for 85% of the affordable apartments) of median area income, as calculated in accordance with the various federal, state and city agencies involved in such programs. Petition, Exhibit D.

At the time of his application, petitioner set forth his

[1]In his original application for the apartment, along with letters to the manager, petitioner states that he is disabled, but does not provide any supporting documents in the court papers.

total gross income as $17,576.00, which would put him in the 40% median income category for a studio or one bedroom in the single person household category.[2] Out of the building's 406 apartments, 83 apartments were designated as low-income. Marine Estates, LLC is the owner of the building, and it appears that Rose Associates, Inc. and/or Chelsea Landmark, LIC, LLC, is the manager of the building (collectively, respondents).

SHF was hired because Marine Estates, LLC, had been required to submit a marketing plan in compliance with New York State Financing Agency's (HFA) affirmative fair housing marketing guidelines. The marketing plan for the building specifically set forth the criteria for rejection, some of which include:

> Inconsistent or unverifiable information regarding residence, household composition or income,
> Failure to submit information/documentation within the requested time frame,
> Less than two years of self-employment in the same field of work, documented by I.R.S. transcripts.

Respondents, Exhibit A.

Petitioner applied for an apartment on behalf of himself in December 2006. On February 8, 2007, he was mailed a letter which scheduled an interview for him later that month (the interview was later scheduled to March 6, 2007 at the petitioner's request). The letter advised all applicants invited for an interview to bring with them multiple documents which would

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[2]The 40% of the area median income is $14,967-$19,840 for a studio and $15,967-19,840 for a one bedroom.

support income eligibility. In pertinent part, petitioner was advised to bring copies of W-2s, 1099s, tax returns (federal and state) including all schedules for 2003, 2004, 2005 and if available 2006, and copies of schedule C's and corporate tax returns, as appropriate, if he was self employed, or had his own business. The letter also stated that petitioner should bring six to eight most recent consecutive pay stubs.

When petitioner was mailed an application, a cover letter was enclosed which he and the other six thousand plus applicants received. Among other things, the letter advises that, "[a]n applicant's eligibility will be based on the applicant's circumstances at the time the applicant's log number is called up, not circumstances which later change." Respondents, Exhibit K.

Petitioner appeared for his interview and brought with him nine consecutive pay stubs. These pay stubs reflected 1099-misc, or self-employment, income. The mean average of the pay stubs was $345.00 per week, projecting a yearly total gross income of $17,940.00. However, on March 19, 2007, petitioner was sent a letter from the manager denying his application on the basis of two reasons: his gross income was below the program minimum and the manager was unable to calculate the income with the information provided.

The March 19, 2007 letter also stated that petitioner could

appeal the determination within fourteen days from the date of the letter. Respondents allege that without the required prior years' tax returns and schedules, as well as IRS documentation that would verify such self employment, they were unable to process petitioner's application.

On March 24, 2007, Petitioner sent a letter to the manager, in which he asserted that, if his employer had classified his income as employment income (i.e. W-2 income), instead of self employed, he would have been eligible for the apartment. He continues that during his two years of employment he was mis-classified and paid as self-employed, and not an employee, and this mistake on the part of his employers should not prevent him from being able to rent an apartment.

On April 2, 2007, petitioner submitted a package to the manager, which included his form 1040 income tax filings for 2006, which he filed on March 27, 2007, which reported a gross income of $16,064.00.

On April 9, 2007, the manager sent petitioner a letter in which he denied the appeal and advised petitioner as follows:

> This program applies uniform policies and procedures to all applicants. One such policy is that an applicant must be eligible at the time they are being considered.
> Self employed applicants must have a consecutive two years work history, in the same field, as evidenced by IRS transcripts (2004 and 2005). You do not meet this requirement.
> You are not eligible for this program.

Respondents, Exhibit G.

It appears that shortly after receipt of this letter, petitioner contacted the IRS to have his status classified as an employee who should receive a W-2 from his employer, and not as a self-employed person. Petitioner received a letter from the IRS in September 2007 notifying him that his employer had agreed to change his status to employee, not self-employee, for the 2005-2006 tax years. Petitioner received the amended tax forms for 2006, and filed them on November 16, 2007. He also received a letter from his employer that he would be classified as an "employee" for 2007.

Petitioner wrote to the manager around November 1, 2007 where he explained how he had been mis-classified by his employer, and that, in fact, he was actually an employee at the time of his initial application in March 2007. In their papers, respondents indicate that they learned of various letters that petitioner wrote to other agencies including the HFA, and politicians, in which he explains his situation with both the apartment and his employer.

In a letter dated November 20, 2007, the manager indicated to petitioner that his appeal was denied. The letter states among other things, that "an applicant must be eligible at the time they are being considered...[t]his program does not consider amended taxes after an ineligibility determination." Respondents, Exhibit J.

Petitioner received a letter from HFA dated April 4, 2008 which stated that, "HFA has determined that the Project owners/managers have acted on your application in accordance with the Regulatory Agreement and Affirmative Fair Marketing Plan/Tenant Selection Plan." Petition, Exhibit C. As previously mentioned, the marketing plan for the building specifically sets forth eligibility criteria.

On or about August 4, 2008, petitioner commenced this Article 78 proceeding.

Petitioner essentially argues that respondents' request for back-up data is inconsistent with the U.S. Department of Housing and Urban Development (HUD) guidelines, thereby the determination of his ineligibility would be arbitrary and capricious.

Respondents argue that their determination was not inconsistent with either HUD or any other agency, but was fully consistent with policies and procedures applicable to the consideration of applications for affordable apartments by individuals whose income is designated as 1099 or self-employment income.

DISCUSSION

HPD and HFA are not parties in this proceeding

The New York City Department of Housing Preservation and Development (HPD) moved by a cross motion, pursuant to CPLR 3211 (a) (7), for an order dismissing the proceeding against HPD.

HPD contends that petitioner did not make allegations against HPD sufficient to set forth a valid cause of action, and that it had no involvement in the eligibility proceeding. HPD argues that petitioner wrongly believes that HPD administered the 80/20 affordable housing project in the subject building. HPD claims that an 80/20 affordable housing program is either administered by HPD, HFA, or the New York City Housing Development Corporation, and for this particular building, HFA administered the program.

Accordingly, the court finds that the petition fails to state a cause of action against HPD, and the petition against HPD is dismissed.

HFA argues that the current proceeding against it should be dismissed since it had no role in denying petitioner's application to rent an apartment nor did it have the ability to furnish petitioner with an alternative apartment. In order for the building to receive the HFA-issued tax-exempt bonds, the building had to prepare a proper marketing plan, which it did. After that, HFA played no part in determining tenant's eligibility, and could not direct the owner to accept a certain tenant. The owner had complete control over the process and the selection of tenants.

Although petitioner wrote and contacted HFA, it explained to him that "HFA has determined that the Project owners/managers

have acted on your application in accordance with the Regulatory Agreement and Affirmative Fair Marketing Plan/Tenant Selection Plan." Petition, Exhibit C. As such, the court finds that the petition fails to state a cause of action against HFA, and the petition against HFA is dismissed.

Dismissal of the Current Article 78 Proceeding

Petitioner brings this instant proceeding pursuant to Article 78 as a mandamus to compel the defendant to provide an apartment to him. *See* CPLR 7801 (3). In the context of an Article 78 proceeding it is well settled that "a reviewing court is not entitled to interfere in the exercise of discretion by an administrative agency unless there is no rational basis for the exercise, or the action complained of is arbitrary and capricious." *In the Matter of Soho Alliance v NY State Liquor Authority*, 32 AD3d 363, 363 (1st Dept 2006), citing to *Matter of Pell v Board of Ed. Of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 (1974).

Petitioner alleges that given his steady and weekly income, the demand for past tax information to calculate his current income was against HUD guidelines, and was arbitrary and without a rational basis. Petitioner states that his income should have been calculated using the pay stubs which he brought to the interview. He quotes the HUD handbook as stating, "[g]enerally the owner must use current circumstances to anticipate income.

The owner calculates projected annual income by annualizing current income." HUD Guidelines 4350.3, at 5-5.

In their argument, respondents state there is nothing in the HUD guidelines which would prohibit an owner from adopting additional requirements and criteria as long as they are uniformly applied and consistent with fair housing laws. Petitioner only refers to a fraction of what the guidelines document, and neglects to mention that it is also written that, "[o]wners must determine the amount of a family's income before the family is allowed to move into the assisted housing." HUD Guidelines 4350.3, at 5-1.

Petitioner was not treated differently than any other applicant. All applicants were required to bring to the office interview three years' prior tax returns, including schedules, and where self-employment is indicated, proof of two years in the same field was required. The requirement for self-employed applicants is explained as documenting the stability and reliability of self-employment income, as well as an accurate income pattern projection. Respondents can not treat petitioner differently because he disagreed with the methodology chosen to determine his income eligibility. In the letter which petitioner received as part of his application, respondents clearly state, "[t]o qualify for the program, the household must meet all requirements established by law, regulation and the owner."

Respondents, Exhibit K.

In the context of an Article 78 proceeding, "an agency's determination, acting pursuant to legal authority and within its area of expertise, is entitled to deference." *Tockwotten Associates, LLC. v NY State Div. of Housing and Comm. Renewal*, 7 AD3d 453, 454 (1st Dept 2004). SHF has been operating for more than 35 years, and has marketed over 12,000 units for private and non-profit developers. Respondents' eligibility and rejection criteria, which were adopted from SHF, are designed to ensure that affordable housing is given to those with a documented and continuing need for the subsidy. Without a doubt, SHF is an expert in the field and the court will not substitute its judgment for that of the agency.

Petitioner claims that the manager's refusal to consider evidence of his eligibility after the fourteen-day period to appeal is arbitrary and capricious. Petitioner, like all the other applicants, was sent a cover letter which clearly explained that an applicant's eligibility is based on the time of the application, not on circumstances which later change. "The extraordinary remedy of mandamus will lie only to compel the performance of a ministerial act and only when there exists a clear legal right to the relief sought." *Levitov v Cowhey*, 270 AD2d 269 (2d Dept 2000). Respondents received six thousand applications for 83 apartments. It is not irrational that they

would have to follow the same protocol for each application. They can not make special accommodations for one applicant due to alleged errors in his employment record. Petitioner does not have a legal right to an apartment in this building. Even if petitioner became eligible eight months later, it is not arbitrary and capricious for respondents not to consider his application at that time.

Petitioner relies on the recently decided case of *Noman v Management, West 31st Street Apartments* (52 AD3d 209 [1st Dept 2008]), as a basis for why the calculation method by his developer was not rationally based and is arbitrary and capricious. In *Noman*, the petitioner was an applicant to a similar apartment in a 80/20 building which was also marketed and rented by SHF. He asserted that calculating his income based on his current pay stubs was flawed, and that respondents should have used his tax returns or historical income as a way to accurate determine his eligibility. The lower court denied respondents' motion to dismiss the proceeding in its entirety and respondents were ordered to recalculate petitioner's income. The appellate court reversed the decision and stated that the way respondents calculated the applicant's income (based on the last eight pay stubs) was rational.

In *Noman*, petitioner did not want his current income annualized and wanted to base his eligibility on past tax

returns. In the present case, petitioner takes the opposite position. Petitioner contends that providing tax records from 2004 has no rational connection to projecting his current annual income. However, as respondents describe, neither the petitioner nor *Noman* is correct. The affordable housing units are intended for families or individuals who are low income and require housing assistance. Both current circumstances and prior history are necessary to accurately reflect a household's income. Respondents give the example of a household who only gives prior tax returns but currently earns $100,000.00 annually, and a household that, due to current setbacks, meets the income criteria, but has the history and potential to earn more than the maximum allowed. Both of these households would be above the income eligibility requirement.

Additionally, respondents indicate that under HUD rules, self-employment income is net income. HUD Occupancy Handbook, 4350.3, at 5-10. Petitioner provided pay stubs which reflected gross income. Respondents could not accurately calculate petitioner's income without the required previous years tax returns, schedules and IRS transcripts.

Accordingly, the court finds that respondents were given certain liberties in adopting procedures by which to determine income eligibility and these guidelines are clearly rationally based and are not arbitrary and capricious.

While it is unfortunate that petitioner was not considered eligible for this apartment, it is not respondents' fault that petitioner or his employer incorrectly reported his income. Furthermore, respondents indicate that upon receipt of the current petition, they realized upon review that petitioner never filed his tax returns for 2005. Had this been known to respondents during the interview, petitioner would have been immediately rejected for not submitting the required tax returns. Now that his income is accurately reflected, petitioner is encouraged to apply for other affordable housing units which may be available.

The court has reviewed petitioner's other contentions and finds they are without merit.

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: 3/25/09

MARYN SHAFER

J.S.C.