

**Matter of Blaise v State Div. of Hous. & Community
Renewal**

2009 NY Slip Op 32079(U)

September 8, 2009

Supreme Court, New York County

Docket Number: 110757/07

Judge: Emily Jane Goodman

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

PRESENT. **EMILY JANE GOODMAN**

PART 17

Index Number : 110757/2007

BLAISE, J. J. EMANUEL

vs

STATE OF NEW YORK D.H.C.R.

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *and cross motion*
are decided for granted

FILED
SEP 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

REFERENCE

Dated: 9/8/09

EMILY JANE GOODMAN ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK I.A.S. PART 17

-----X
In the Matter of the Application of
JAMES LEE EMANUEL BLAISE,

Petitioner,

Index No. 110757/07

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

John M. Decker

-against-

STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL, CITY OF NEW
YORK DEPARTMENT OF HOUSING PRESERVATION
DEVELOPMENT, PACIFIC VILLAGE LLC and
ELH MANAGMENT, LLC.

Respondents.

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NEW YORK

-----X
EMILY JANE GOODMAN, J.S.C.:

In this hybrid proceeding/action, Petitioner seeks to annul a determination made by Respondent State Division of Housing and Community Renewal (DHCR), dated June 4, 2007, which denied Petitioner's overcharge claim on the basis that it did not have jurisdiction over the issue. Petitioner also seeks to compel Respondent City of New York Department of Housing Preservation and Development (HPD), Pacific Village, LLC (the Owner) and ELH Management, LLC (the Managing Agent) to recalculate Petitioner's rent and declare him eligible for a low income tax credit apartment in connection with HPD's Neighborhood Entrepreneur Program (NEP).¹ Petitioner also seeks attorneys fees

¹The Neighborhood Entrepreneurs Program is administered by HPD's Division of Alternative Management Programs ("DAMP") with the goal of facilitating the return of

under CPLR §8600 et seq. Petitioner's claim against HPD is in the nature of mandamus. Petitioner's claim against the Owner and Managing Agent is asserted in the nature of a declaratory judgment.

This dispute arose in connection with Petitioner's application for a low income tax credit apartment located at 1272 Pacific Street, Brooklyn. Petitioner's eligibility, considering his household size, turned on whether his income was paid semi-monthly (totaling 24 pay periods) or bi-weekly (totaling 26 pay periods). Petitioner contends that he earned \$32,121.36 for the year, while the Managing Agent calculated that he earned

qualifying City-owned multiple-dwellings to the private sector while maintaining rents at affordable levels (see Okilic v Paikoff, 589 F Supp2d 204, 208 [EDNY]). Under NEP, City-owned buildings in need of extensive renovation are redeveloped by a neighborhood-based property manager and developer, known as a Neighborhood Entrepreneur (id.). The building is net leased to the Neighborhood Partnership Housing Development Fund Company, Inc. ("NPHDFC"), a not-for-profit corporation which holds the lease while the Neighborhood Entrepreneur manages and renovates the building under a management and development agreement with NPHDFC (id.). Both HPD and NPHDFC provide the Neighborhood Entrepreneurs with aid in technical matters and assistance in financing for rehabilitation and ownership (id.). Once rehabilitation is complete, if the Neighborhood Entrepreneur has responsibly managed the building, ownership is conveyed to the Neighborhood Entrepreneur, subject to conditions designed to maintain affordable rents (id.). Accordingly to HPD, the building also receives unspecified federal funds, which, according to the regulatory agreement, are connected with the federal Low-Income Housing Credit Program, which allocates a federal tax credit, reducing federal tax liability for eligible owners who develop qualified low income housing projects (see Holly Ridge Ltd., Partnership v Pritchett, 936 So2d 694 [Fla Ct of App, 5th Dist. 2006]).

\$33,900-- only \$900.00 over the income limit of \$30,000.

DHCR cross moves to dismiss the proceeding as time barred and based on failure to state a cause of action, because it lacked jurisdiction. HPD moves to dismiss the proceeding based on failure to state a cause of action. Despite entering into a regulatory agreement with the Owner for the building, and having “oversight” authority to ensure compliance with NEP, HPD maintains that it is the Owner that makes the eligibility determinations, and, HPD can only “suggest” that the Owner recalculate Petitioner’s income. Further, although acknowledging that, based on information submitted, Petitioner was apparently income eligible,² HPD maintains that Petitioner’s complaints are untimely. This argument is based on the assumption that Petitioner was advised by the Owner or Managing Agent of a five day right to appeal the Owner’s ineligibility determination. Further, HPD points out that after being rejected for a low income tax credit apartment, Petitioner signed a lease for a high-rate rental apartment in the building.

The Owner and Managing Agent submit an Answer claiming that the action (1) is time barred because Petitioner failed to serve them with the Notice of Petition and Petition within 60 days from the date of DHCR’s determination, (2) fails to state a cause of action, (3) should be dismissed based on waiver/estoppel and failure to mitigate damages, because Petitioner failed to challenge the ineligibility determination within five

²Contradicting this acknowledgment, HPD speculates that Petitioner may have had other sources of undisclosed income, and therefore, might not have been eligible for apartment.

[* 5]

days of notification of the right to appeal, and, because Petitioner accepted a market rate lease.

In response to a Court directive for further information, the Director of Leasing submitted an affidavit stating that “it is my understanding that our office informed Mr. Blaise that he had five days to appeal the determination by submitting proof of his gross income” and that “[o]ur office has established the five day appeal procedure as a means of ensuring that prospective tenants are able to challenge our office’s determinations as to eligibility for Low Income Tax Credits units.” Apparently, this procedure is oral, as contrasted with the Owner’s initial contact, by letter, regarding the processing interview.³ The affidavit does not explain what the procedure entails (i.e., what applicants are advised, with regard to the right to appeal).

Additionally, in response to the Court’s directive, HPD submitted a letter advising the Court that “HPD does not take part in the appeals process if an applicant is deemed to be ineligible for a vacant tax credit unit, although it requires that the landlord have such a procedure.”⁴

The cross motion by DJICR to dismiss is granted, based on failure to statute a cause of action. Petitioner has cited no authority for DHCR’s jurisdiction over this issue

³Given the potential for disputes about whether or not proper notice is given, written notification is obviously preferable.

⁴Neither the Owner nor HPD address whether an applicant is advised of any further rights to appeal (i.e., to HPD or to the Court), where the Owner upholds the initial ineligibility determination.

and merely attaches DHCR's Capital Programs Manual, citing to one page involving the State Low Income Housing Credit Program. Apart from the fact that it is not clear that the building receives funds in connection with that program (the building apparently receives funds from the federal tax credit program), Petitioner does not dispute that HPD sets the initial rents for the building. Accordingly, DHCR is without authority to review the rent (see Matter of Ahmed v DHCR, 15 AD3d 216 [1st Dept 2005] [Article 78 proceeding against DHCR dismissed based on failure to state a cause of action because HPD set the initial rents following renovations financed with an IIPD loan, and, the proper course would have been to proceed against HPD, not DHCR]). Accordingly, DHCR's cross motion to dismiss is granted.

HPD's cross motion is held in abeyance pending a decision by a Special Referee because a triable issue of fact is raised as to whether Petitioner was advised of a five day right to appeal the Owner's determination of ineligibility (see CPLR 7804 [h]).⁵ HPD concedes that it requires that an Owner have an appeal procedure, but relies on the Owner and Managing Agent's statement they have such a procedure, and notified Petitioner of it.⁶

⁵Ironically, Petitioner's attorney faults Respondents for not submitting proper proof that Petitioner was notified of this right to appeal, yet only Petitioner's attorney states that Petitioner was not advised of his right. As Respondent's contention, that Petitioner was properly notified, was also not based on personal knowledge, and, as the determination of this issue is central, a hearing is required.

⁶In addition to HPD's own requirement that an Owner have an appeals procedure, because HPD may be sufficiently intertwined with the building, constitutional due

Therefore, the Court refers the issue of whether the Owner or Managing Agent notified Petitioner that he had five days to appeal the Owner's ineligibility determination to a Special Referee to hear and report.

It is hereby

ORDERED that the Petition and HPD's cross motion are held in abeyance pending a decision of the Special Referee and a motion to confirm or reject the decision; and it is further


ORDERED that the issue of whether the Owner and/or Managing Agent notified Petitioner of a five day right to appeal the Owner's determination that Petitioner was ineligible for a low rent tax credit apartment and what, specifically, Petitioner was advised, is referred to a Special Referee to hear and report; and it is further

ORDERED that DHCR's cross motion to dismiss the Petition against it is granted.

This constitutes the Interim Decision and Order of the Court.

Dated: September 8, 2009

ENTER:


 J.S.C.
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process notice protections may be triggered (see e.g., 512 East 11th Street HDFC, 181 AD2d 488 [1st Dept 1992] [City of New York was sufficiently intertwined with a building managed under the Tenants Interim Lease Program so as to trigger due process protections requiring notice of the reasons for eviction]).