[* 1] 11-25-09

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

PRESENT: KAREN S. SMITH PART 62

Justice

DDEH 291 PLEASANT, LLC,

Plaintiff,

- v -

PAMELA REINERT and THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK,

Defendants.

INDEX NO. 111506/09

MOTION DATE 11/12/09

MOTION SEQ. NO. 001

MOTION CAL. NO.

The following papers, numbered 1 to 2 were read on this motion for/to Dismiss

	PAPERS NUMBERED
Notice of Motion — Affidavits – Exhibits	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ORDERED that this motion by defendant Department of Housing Preservation and Development of the City of New York, seeking an order dismissing plaintiff's complaint as against it, is granted for the reasons stated more fully below. The cross-motion by plaintiff, seeking a default judgment against defendant Pamela Reinert in the amount of $41,690.39 and for an order of ejectment against her, is denied for the reasons stated more fully below.

Plaintiff DDEH 291 Pleasant, LLC is the owner of a multi-dwelling building located at 291 Pleasant Avenue, New York, New York. Plaintiff entered into a Housing Assistance Payment contract with defendant Department of Housing Preservation and Development ("HPD") by which defendant Pamela Reinert would be leased apartment 1D in the subject building and her rent would be significantly subsidized by HPD pursuant to the federal Section 8 Housing Choice Voucher Program. According to the complaint, on or about March 22, 2007, plaintiff was notified by HPD that its Section 8 subsidy was being suspended due to the fact that Reinert's apartment had failed the Housing Quality Standards inspection(s). Plaintiff contends that HPD's suspension of payments was a violation of its Housing Assistance Payment ("HAP") contract and seeks damages accordingly.

HPD now moves, pre-answer, for an order dismissing plaintiff's complaint as against it pursuant to CPLR §§ 3211(a)(5) and (a)(7) and also § 7804(f), contending that plaintiff's action was commenced beyond the statute of limitations, the complaint fails to state a cause of action, and that the appropriate remedy to challenge HPD's determination would have been an Article 78 petition brought in a timely manner. Plaintiff opposes HPD's motion, asserting that its complaint sounds in breach of contract, which may be maintained as a plenary action and is not subject to the provisions of Article 78.

The Housing Choice Voucher Program ("Section 8") is a federal program administered by the United States Department of Housing and Urban Development, the regulations for which are set forth in Part 982 of Title 24 of the Code of Federal Regulations. The program is administered in New York City by defendant HPD, a public housing agency, pursuant to 24 CFR § 982.1. Part of administering the Section 8 program locally involves conducting Housing Quality Standard inspections of apartments participating in the program, (24 CFR § 982.405). HPD is empowered and required to enforce those standards under federal law:

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

...

> (2) If the owner fails to maintain the dwelling unit in accordance with [Housing Quality Standards or "HQS"], the [HPD] must take prompt and vigorous action to enforce the owner obligations. [HPD] remedies for such breach of the HQS include termination, suspension or reduction of housing assistance payments and termination of the HAP contract.
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> (3) The [HPD] must not make any housing assistance payments for a dwelling unit that fails to meet the HQS, unless the owner corrects the defect within the period specified by the [HPD] and the [HPD] verifies the correction. . . .

(24 CFR § 982.404; *see also* 24 CFR § 982.453). 24 CFR § 982.305 requires that HPD assure that the apartment receiving Section 8 subsidies pass an HQS inspection. In Chapter 8 of its Administrative Plan, which it is required to adopt pursuant to 24 CFR § 982.54, HPD describes its annual inspections in some detail, stating,

> If the unit does not pass inspection, the owner and tenant will be notified in writing of the defects and the 30-day requirement to make the repairs. The notice will inform the owner that HAP payments will be suspended the first of the month following the 30-day period if the defect has not been corrected.

The Plan further states that there will be "no retroactive payments" for the time period in which the unit did not comply with the HQS and payments will resume only after all defects are corrected and the unit passes reinspection.

The complaint alleges that plaintiff was unable to remedy the defects alleged by HPD because the tenant, Reinart, refused access to the owner's agents, and the HPD was made aware of this fact and still abated the HAP. Plaintiff alleges this action by HPD was "unreasonable, unjustified, and wrongful." In addition, plaintiff seeks a declaration that HPD violated the HAP contract and injunctive relief, directing HPD to pay plaintiff the Section 8 subsidy/HAP for the period March 2007 through August 2009.

According to HPD, an HQS inspection of Reinert's apartment was conducted on April 4, 2007, during which the inspector noted several defects, specifically that the gas powering the stove and oven had been turned off due to a leak, the metal casing beneath the kitchen sink was rusted, a wall socket in the kitchen was missing its face plate, the bathroom tub had a defective drain and the bathroom fan did not "generate suction." The apartment was reinspected, according to HPD, on April 23, 2007 and the inspector found that the same defects remained. HPD sent a notice to the entity listed in its records and on the HAP contract as the owner, 291 Pleasant Ave LLC,[1] in which HPD stated that subsidy payments would be abated as of May 1, 1007 and that such payments would only be reinstated after the defects were repaired and HPD verified same by re-inspection of the premises. According to HPD, plaintiff notified it that all repairs were complete on May 19, 2009 and the apartment subsequently passed re-inspection, leading to reinstatement of the payments as of July 2009. HPD, in its motion to dismiss, maintains that the decision to abate the subsidy payments was authorized by law and that, to challenge that determination, plaintiff was obliged to commence an Article 78 petition, subject to a four-month statute of limitations.

Plaintiff opposes HPD's motion to dismiss, contending that the allegations against HPD sound in breach of contract and, therefore, are not subject to the requirements of Article 78 of the CPLR. DDEH argues that HPD's motion papers, which claim that an Article 78 proceeding is the only proper vehicle for the instant dispute, constitutes nothing more than justification for the alleged breach of contract. Plaintiff cites to Ablele Contracting, Inc, v New York City School Construction Authority, (91 NY2d 1 [1997]), for the proposition that a party who contracts with an administrative agency is not precluded from bringing a

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[1] According to HPD, it did not receive all the requisite paperwork to change the listed owner from 291 Pleasant Ave LLC to DDEH 291 Pleasant, LLC, until December 26, 2008, although plaintiff held title to the property as early as March 2007.

plenary action for breach of contract when the agency terminates it. Plaintiff further argues that the mere existence of an administrative remedy or agency with oversight of the general subject area does not always preclude an action for breach of private contract.

While plaintiff is correct that, in some circumstances, a party who contracts with an administrative agency or body may maintain a plenary action for breach of contract, this is not such an action. Plaintiff's reliance on Ablele Contracting, Inc. v New York City School Construction Authority is misplaced, as the holding in that case actually supports defendant's contention that this challenge should have been in the form of an Article 78 proceeding. In Ablele, the New York City School Construction Authority terminated a contract to build a school and the private contractor sued the Authority for breach of contract. The Authority moved to dismiss the action, contending, as HPD does here, that the agency's actions could only be challenged through an Article 78 proceeding. There, the Court rejected the Authority's motion to dismiss and held plaintiff could maintain a plenary action for breach of contract, but specifically noted that its decision was based on the fact that "the municipal agency had neither statutory nor contractual authority to render a quasi-judicial determination" and, as such, "it was not empowered to issue a final and binding determination of default reviewable only in an article 78 proceeding." (91 NY2d 1, 5-6). In discussing the careful analysis in which the Court must engage to determine whether a plenary action or special proceeding is appropriate, the Ablele court stated,

> When the damage allegedly sustained arises from a breach of the contract by a public official or governmental body, then the claim must be resolved through the application of traditional rules of contract law. On the other hand, when a petitioner asserts that the determination of a governmental body or public official is '"in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" and seeks nullification of same, then an article 78 proceeding is the appropriate vehicle through which the claim may be addressed. (CPLR § 7803).
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> . . . [W]here the focus of the controversy is on an agency's breach of an express contractual right, or on the agency's violation of the implied obligations of good faith, fair dealing and cooperation, a contract action is the recommended remedy.

(91 NY2d 1, 7-8).

In this case, HPD was authorized by both statute and the contract to abate its subsidy payments. 24 CFR § 982.404(a)(2) states explicitly that if the owner fails to maintain the premises in accordance with the HQS, HPD "must take prompt and vigorous action to enforce the owner obligations." (Emphasis added). HPD's remedies under the statute include termination, suspension or reduction of the HAP, or termination of the HAP contract. Likewise, Part B, Section 5, subsection d of the parties' contract specifically parrots this language, but adds that HPD may exercise its remedies even where the tenant is responsible and the HQS violation(s) is not caused by the owner.

In its affirmation in support of its cross-motion and in opposition to HPD's motion, counsel acknowledges that HPD "had a choice to reduce housing assistance payments rather than terminate the contract even if they did deem that there was a violation of HQS," citing to the federal statute that authorizes such discretion. With this statement, plaintiff acknowledges it is actually alleging that HPD abused its discretion when it decided to suspend subsidy payments, rather than utilizing its other remedies. Plaintiff cannot allege that HPD breached "an express contractual right," as discussed by the Ablele court, particularly since the contract itself authorized the actions taken by HPD, and there is no allegation that HPD violated the implied obligations of good faith, fair dealing and cooperation. Thus, the proper vehicle by which to challenge HPD's alleged abuse of discretion is an Article 78 proceeding. However, as HPD rightly points out, pursuant to CPLR § 217, such proceeding must be commenced within four months of the final determination. Plaintiff, in its complaint, states that it received HPD's notice of abatement on or about March 22, 2007, although the actual notice is dated April 24, 2007. This action was commenced by filing of a summons and complaint on August 12, 2009, far beyond the four month statute of limitations.

Plaintiff also cross-moves for default judgment pursuant to CPLR § 3215 against defendant Pamela

Reinart, and seeks an order of ejectment against her, and judgment in the amount of $41,690.39 on the first cause of action for breach of the lease contract and in the amount of $25,000 on the fourth cause of action for attorney's fees.

CPLR § 3215 provides that a default judgment may be sought against any party who fails to appear or plead in the time provided by law. Plaintiff submits an affidavit of service indicating Reinart was personally served with the summons and complaint on August 20, 2009. Pursuant to CPLR § 3012, Reinart was required to interpose an answer within 30 days. On October 5, 2009, plaintiff served this cross-motion seeking default judgment against Reinart for her failure to answer. There has been no opposition to the motion or other papers filed by Reinart.

Although it is unopposed, plaintiff's cross-motion must nonetheless be denied on several grounds. As an initial matter, the cross-motion is improper. CPLR § 2215 provides for a cross-motion to be made against the moving party; here, plaintiff made its cross-motion in response to a motion by defendant HPD, not a motion by Reinart. This is significant, considering that the time to respond to a cross-motion is severely limited, when compared to the time to respond to a notice of motion. Further, pursuant to recent changes in CPLR § 2215, if the cross-motion had been properly made against Reinart, it would still be untimely. The original motion was made upon Reinart by priority mailing on September 15, 2009 with a return date of October 8, 2009, and it noted that answering affidavits were required to be served at least seven days prior to that date. The purported cross-motion was served upon HPD and Reinart by first class mailing on October 5, 2009, just three days prior to the return date. While CPLR § 2215 provides for service of cross-motion three days prior to the return date as a minimum, it also states that where seven days is demanded in the notice of motion pursuant to CPLR § 2214, as is the case here, the cross-motion may not be served less than seven days prior to the return date. Additionally, where such papers are served by mailing, as they were here, CPLR § 2215 provides that an additional three days is required. As such, any proper cross-motion was required to be served by regular mail no later than September 29, 2009.

Even had the purported cross-motion been properly made, it appears that plaintiff has failed to comply with the requirements of CPLR § 3215(3)(i), which requires that any time default judgment is sought against a natural person for alleged non-payment of a contractual obligation, such as here where plaintiff alleges that Reinart failed to pay rent in violation of the terms of her lease, the movant must submit an affidavit,

> that additional notice has been given by or on behalf of the plaintiff at least twenty days before the entry of such judgment, by mailing a copy of the summons by first-class mail to the defendant at [her] place of residence in an envelope bearing the legend "personal and confidential" and not indicating on the outside of the envelope that the communication is from an attorney or concerns an alleged debt.[2]

In addition, plaintiff has failed to submit sufficient proof of the facts constituting the claim. (CPLR § 3215[f]). Plaintiff submits an unexecuted lease, annexed to which is the HAP contract, which is executed by all parties. According to that contract, of the monthly contract rent of $601.00, HPD was responsible for $524.82, leaving Reinart to pay only $76.18 each month. While plaintiff seeks judgment against Reinart in the amount of $41,690.39 for breach of the lease contract and $25,000 for attorney's fees, plaintiff has failed to articulate how it calculates either of those amounts. Reinart cannot be held liable for the unpaid HAP portion of the contract rent, so an accounting of what plaintiff alleges Reinart owes is important. (See, Prospect Place HDFC v Galldon, 6 Misc3d 135(A) [1st Dept 2005] [explicitly rejecting the notion that after subsidy termination and in absence of new agreement, tenant is liable for subsidy portion of rent]).

Further, there is absolutely no evidence regarding the demand for attorney's fees. While Michael Kessner, a representative of plaintiff, states in his affidavit in support, and plaintiff's counsel asserts in his

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[2] This action does not fall under the provisions of CPLR § 3215(3)(iii), which exempts only cases in small claims court, summary proceedings to recover possession of real property, and actions affecting title to real property from serving additional notice prior to moving for default judgment.

affirmation, that the lease agreement annexed as Exhibit C explicitly provides that Reinart is liable to plaintiff for legal fees in the prosecution of this action, plaintiff fails to identify which provision it claims imposes such liability. The Court can find no such provision either in the unexecuted lease agreement or in the HAP contract.[3]

Accordingly, it is

ORDERED that this motion by defendant Department of Housing Preservation and Development of the City of New York, seeking an order dismissing plaintiff's complaint as against it only, is granted; it is further

ORDERED that the action is severed and will continue as to plaintiff's claims against defendant Pamela Reinert; it is further

ORDERED that the moving defendant serve a copy of this decision and order with notice of entry upon all parties, and upon the Clerk of the Court (60 Centre Street); it is further

ORDERED that the cross-motion by plaintiff for an order of default judgment against defendant Pamela Reinart is denied in its entirety; it is further

ORDERED that upon service of a copy of this decision and order with notice of entry, the Clerk is directed to mark his records accordingly.

This constitutes the decision and order of the Court. The Court is mailing a copy of this decision and order to each of the parties. The parties are on notice that, as this decision and order dismissed all claims against the municipal defendant, the action will be transferred to the Trial Support Office for reassignment to a non-City Part under separate cover.

Dated: November 20, 2009

Hon. Karen S. Smith, *J.S.C.*

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**

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[3] The only provision that appears relevant to plaintiff's claim for attorney's fees is found in Section 15(h) of the Lease Addendum. That provision prohibits any lease from requiring the tenant, here Reinert, to agree to pay the costs of any legal actions regardless of the outcome. While 15(h) would not bar an agreement that the tenant pay such costs where she loses a legal action, the parties have no such provision in the lease agreement submitted to the Court.