

**Matter of Abdur-Rahim v Department of Hous.
Preserv. & Dev.**

2010 NY Slip Op 30264(U)

February 1, 2010

Supreme Court, New York County

Docket Number: 400537/2009

Judge: Paul G. Feinman

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

PRESENT. **HON. PAUL G. FENMAN**

PART B

Index Number : 400537/2009
ABDUR-RAHIM, ISHRIEL
vs.
RIVERBEND HOUSING CO.,
SEQUENCE NUMBER : # 001
ARTICLE 78

Justice

INDEX NO.

400537-09

MOTION DATE

MOTION SEQ. NO.

#001

MOTION CAL. NO.

ere read on this motion to/for

PAPERS NUMBERED

1
2,3,4,5

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 DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION/ORDER AND JUDGMENT.**

*Transfer to A.D. 1st Dept.
for substantial evidence
review.*

FILED

FEB 05 2010

NEW YORK
COUNTY CLERKS OFFICE

Dated:

2/1/10 8:30 pm.

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: CIVIL TERM: PART 12

-----X
In the Matter of the Application of
ISHRIEL ABDUR-RAHIM,
Petitioner,

Index Number 400537/2009
Motion Seq. Nos. 001, 002, &
003

- against -

DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT, RIVERBEND HOUSING CO. **DECISION & ORDER**
Respondents.

-----X
Petitioner:
Ishriel Abdur-Rahim, *pro se*
2333 5th Avenue, #3CC
New York, NY 10037
(347) 582-7182

Respondent Department of Housing Preservation and Development:
Michael A. Cardozo, Esq.
Corporation Counsel of the City of New York
By: Rachel K. Moston, Esq.
100 Church Street, Room 5-195
New York, NY 10007
(212) 788-0767

Respondent Riverbend Housing Company, Inc.:
Kagan Lunic Lepper Lewis Gold & Colbert LLP
By: Fran I. Lawless, Esq.
200 Madison Avenue, 24th Floor
New York, NY 10016-4001
(212) 252-0300

Papers considered in review of this petition to annul DHPD determination:

Papers	Numbered
Mot Seq. 001: Notice of Petition and annexed affidavit and exhibits	1
DHPD Verified Answer and annexed exhibits 1	2
DHPD Memo of Law	3
Riverbend Verified Answer	4
Riverbend Memo of Law	1
Mot. Seq. 002: Notice of Motion	2
Moston Aff. in Resp. dated 5/29/2009	3
Owens Aff.	1
Mot. Seq. 003: Notice of Motion and annexed exhibits	2
Moston Aff. in Opp. dated 6/8/2009	3
Lawless Aff. in Opp.	4
Petitioner's Memo of Law	

FILED
FEB 05 2010
NEW YORK
COUNTY CLERK'S OFFICE

PAUL G. FEINMAN, J.:

Motions bearing sequence numbers 001, 002, and 003 are joined for decision.

Petitioner commenced this CPLR Article 78 proceeding to reverse respondent

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Department of Housing Preservation and Development's ("DHPD") determination to issue a Certificate of Eviction, and to compel DHPD and respondent Riverbend Housing Company, Inc. ("Riverbend") to issue a Stock Certificate and occupancy agreement in petitioner's name (motion bearing sequence number 001). Petitioner also moves to amend the verified petition and notice of petition to add Mikial Abdur-Rahim as a petitioner (motion bearing sequence number 002), and to add a fifth cause of action (motion bearing sequence number 003). For the reasons set forth below, motion bearing sequence number 003 is denied, motion bearing sequence number 002 is granted to the extent that Mikial Abdur-Rahim is added as a petitioner, and the petition (motion bearing sequence number 001) is transferred to the Supreme Court, Appellate Division, First Department, pursuant to CPLR 7804 (g).

Background

Respondent Riverbend is a limited-profit housing company under 28 RCNY § 3-01, promulgated by DHPD pursuant to the Limited-Profit Housing Companies Law, commonly known as the Mitchell-Lama Law (*see* Private Housing Finance Law, art II). On October 28, 1998, Mikial Abdur-Rahim and Riverbend executed an occupancy agreement for 2333 5th Avenue, Apartment 3CC, New York County (Mot. Seq. 001: Ver. Ans., Ex. A). That same day, Mikial Abdur-Rahim executed an application for the Mitchell-Lama program which listed petitioner Ishriel Abdur-Rahim, his son, as a resident (Mot. Seq. 001: Ver. Ans., Ex. B). In 2001 and 2002, Mikial asked Riverbend to "assign [his] total shares, interest and ownership" to petitioner, which, apparently, was never effectuated (Mot. Seq. 001: Ver. Ans., Exs. E, F).

In April 2008, Riverbend served Mikial and petitioner with a Notice of Eviction alleging, among other things, that Mikial "never took occupancy of the Apartment, but rather continued to

live elsewhere” in violation of the Lease (Mot. Seq. 001: Ver. Ans., Ex. G). Riverbend then sent a Notice of Hearing to Mikial and petitioner (Mot. Seq. 001: Ver. Ans., Ex. H). Hearings were held over the course of two dates in October 2008 and January 2009, at which time documentary evidence was submitted and testimony was heard (Mot. Seq. 001: Ver. Ans., Exs. I, J, L). In February 2009, a Hearing Decision was rendered and a Certificate of Eviction was issued (Mot. Seq. 001: Ver. Ans., Ex. M).

In February 2009, petitioner commenced this proceeding, pursuant to CPLR Article 78, seeking administrative relief—to reverse respondent DHPD’s determination to issue a Certificate of Eviction and compel respondents to issue a Stock Certificate and occupancy agreement in his name—and asserting four plenary causes of action—(1) breach of fiduciary duty, (2) tortious interference of contractual rights, (3) unlawful discriminatory practices, and (4) fraud. Then, in May 2009, petitioner and Mikial also commenced an plenary action before Supreme Court (Rakower, J.) in which they alleged these same four causes of action (Mot. Seq. 001: Ver. Ans., Ex. N). Accordingly, in December 2009, Supreme Court (Rakower, J.) dismissed the complaint because it “contain[ed] identical allegations and s[ought] identical relief” to the Article 78 petition (Order, dated 12/23/2009, Ind. No. 106238/2009).

Petitioner then moved to amend the petition to add Mikial as a petitioner, and subsequently moved to amend the petition to add a cause of action.

The respondents contend that the determination is supported by substantial evidence and, accordingly, seek to have this proceeding transferred to the Appellate Division, First Department.

Analysis

I. Motion Sequence Number 002 (Add Party)

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Petitioner moves to amend the verified petition and notice of petition to add Mikial Abdur-Rahim as a petitioner. In the context of a special proceeding, motion practice often requires leave of court, “lest the proceeding lose its ‘summary’ character” (Siegel, NY Prac § 577, at 997 [4th ed]). “After a proceeding is commenced, no party shall be joined . . . except by leave of court” (CPLR 401; see *Matter of Barrett v Dutchess County Legislature*, 38 AD3d 651, 653 [2d Dept 2007]). While this determination “is committed to the court’s discretion” (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; see *Murray v City of New York*, 43 NY2d 400, 404-405 [1977]), “[p]ersons who ought to be parties if complete relief is to be accorded . . . shall be made plaintiffs or defendants” (CPLR 1001). Thus, even in the context of a summary proceeding, this court may add such a party “at any stage of the action” (CPLR 1003; see CPLR 402 [“The court may permit such other pleadings as are authorized in an action”]; see e.g. *Matter of Ferrando v New York City Bd. of Stds. & Appeals*, 12 AD3d 287, 288 [1st Dept 2004]; *Matter of McGuinn v City of New York*, 219 AD2d 489, 490 [1st Dept 1995], *app denied and dismissed* 87 NY2d 966 [1996]).

While this court is not empowered to address the underlying merits of relief sought because it involves the issue of substantial evidence (see Point II, *infra*), it must, nevertheless, assure that the proposed amendment does not utterly lack merit (see *Curiale v Weicholz & Co.*, 192 AD2d 339, 339 [1st Dept 1993]; Siegel, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR C3025:11). Here, the crux of petitioner’s claims involve the entitlement to occupancy of the subject premises. Because the resolution of this issue is necessarily contingent upon the status of succession rights held by petitioner’s father Mikial Abdur-Rahim (see 28 RCNY § 3-02), this court finds such an amendment necessary for the parties to be granted

complete relief. Therefore, petitioner's motion to amend the verified petition and notice of petition to add a party is granted.

II. Motion Sequence Number 001 (Petition)

CPLR Article 78 proceedings serve three primary functions: (1) to compel an administrative act (mandamus), (2) to prohibit an administrative act (prohibition), and (3) to review an administrative act (certiorari or mandamus to review) (*see* CPLR 7801; *Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757 [1991]; *Capers v Giuliani*, 253 AD2d 630, 633 [1st Dept 1998], *lv dismissed and denied* 93 NY2d 868 [1999]). The range of issues that may be addressed by CPLR Article 78 proceedings are limited and the scope of judicial review thereof is narrow (*see* CPLR 7803; *Matter of Poster v Strough*, 299 AD2d 127, 142 [2d Dept 2002]). Generally, if other relief is sought, it should be sought by commencing a plenary action (*see Eidlisz v New York Univ.*, 61 AD3d 473, 475 [1st Dept 2009]).

Here, the petition prays for two forms of administrative relief: (1) to reverse DHPD's determination to issue a Certificate of Eviction, and (2) to compel DHPD and Riverbend to issue a Stock Certificate and occupancy agreement in his name. In addition to that relief, petitioner asserts the following causes of action: (1) breach of fiduciary duty, (2) tortious interference of contractual rights, (3) unlawful discriminatory practices, and (4) fraud.

First, the four causes of action which are "plenary" in nature, and do not seek Article 78 relief, must be dismissed. Dismissal of the plenary causes of action is warranted here because they would be "better resolved in a plenary action, where discovery is readily available and where full legal and equitable relief is available under the traditional rules of contract law and the sections of the [Civil] Rights Law" (*Goldman v White Plains Ctr. for Nursing Care, LLC*, 9 Misc 3d 977, 981 [Sup Ct, NY County 2005]). The fact that the petition, unlike the complaint, does not demand monetary relief, which demand would likely warrant dismissal if it were made in the

context of an Article 78 proceeding, is of no import (*see Matter of City of New York v Wing*, 12 AD3d 180, 180 [1st Dept 2004], *lv denied* 4 NY3d 705 [2005]). The causes of action are improper in the context of this Article 78 proceeding (*see LaDuke v Lyons*, 250 AD2d 969, 971 [3d Dept 1998]; *Schussel v New York City Tr. Auth.*, 70 AD2d 527, 528 [1st Dept 1979], *aff'd* 52 NY2d 729 [1980]). The court also declines to convert this Article 78 proceeding into a plenary action under CPLR 103 (c). Doing so would not be in the interest of justice, even in light of the prior plenary action's dismissal, because the administrative relief sought may only be granted through an Article 78 proceeding. Thus, this court must dismiss that portion of the petition which alleges the four plenary causes of action.¹

Turning to that portion of the petition seeking administrative relief, this court cannot reach the merits thereof. Generally speaking, Supreme Court is the proper venue for commencing CPLR Article 78 proceedings to challenge an administrative determination (*see* CPLR 7801; *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009]), but if such a determination is made after a mandatory evidentiary hearing is held, the standard of judicial review is substantial evidence (*see* CPLR 7803 [4]; Siegel, NY Prac § 560, at 964-965). CPLR 7804 (g) provides, “[w]here the substantial evidence issue . . . is raised, the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and *res judicata*, without reaching the substantial evidence issue.” “The mere presence of the substantial evidence question . . . will trigger this

¹ Motion sequence 003 also seeks, among other things, summary judgment on these causes of action (*see* Point III, *infra*). Because this court disposes of Article 78 proceedings in the same manner it would a motion for summary judgment (*see* CPLR 409 [b]), that branch of the motion “is unnecessary” and nevertheless denied for the reasons discussed above (*Matter of 1300 Franklin Ave. Members, LLC v Board of Trustees of Inc. Vil. of Garden City*, 62 AD3d 1004, 1006 [2d Dept 2009]; *see* *Matter of White v Scrofani*, 161 AD2d 398, 400 [1st Dept 1990]).

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transfer requirement if some other objection does not terminate the proceeding” (Siegel, NY Prac § 568, at 981 [4th ed]). These objections must be “threshold objections that are capable of disposing of the case without reaching the merits” (*id.*).

The Court of Appeals has explained that “CPLR 7804(g) authorizes the court in which the article 78 proceeding is commenced to decide any issues which would terminate the case if no issue of substantial evidence is raised. Otherwise, the section requires the court to transfer the case to the Appellate Division for disposition” (*Matter of Al Turi Landfill v New York State Dept. of Env'tl. Conservation*, 98 NY2d 758, 760 n [2002]). Each of the Appellate Divisions have followed suit (*see Matter of Moore v Alexander*, 53 AD3d 747, 748 n 2 [3d Dept 2008], *lv denied* 11 NY3d 710 [2008]; *Matter of Mair-Headley v County of Westchester*, 41 AD3d 600, 601 [2d Dept 2007]; *Matter of Hoch v New York State Dept. of Health*, 1 AD3d 994, 994 [4th Dept 2003] [“Because the petition herein raises a substantial evidence issue and the issue found determinative by the court was not an objection ‘that could have terminated the proceeding within the meaning of CPLR 7804(g) . . . Supreme Court should have transferred the entire proceeding to the Appellate Division’”]; *Matter of G & G Shops v New York City Loft Bd.*, 193 AD2d 405, 405 [1st Dept 1993] [“The points raised by petitioner that were disposed of by the IAS court are not objections that could have terminated the proceeding within the meaning of CPLR 7804(g), and thus we review the matter de novo”]).

Therefore, this matter must be transferred to the Supreme Court, Appellate Division, First Department to address the administrative relief sought.

III. Motion Sequence Number 003 (Add a Cause of Action)

The remainder of the relief requested is sought by motion sequence 003. Petitioner characterizes this as a “motion to amend[the] complaint [to add] a fifth cause of action (statute of limitations)” arguing that respondents were prohibited from commencing the administrative

proceedings because they were "time barred [by] CPLR [§] 213 [2] [and] UCC [§] 2-A-506" (Mot. Seq. 003: Not. of Mot.). Petitioner is actually attempting to assert an affirmative defense to the underlying dispute. The extent to which this defense is meritorious, if at all, falls squarely within the issue of whether respondents' determinations were supported by substantial evidence. Therefore, as discussed above, this is beyond the scope of this court's review and must be addressed before the Appellate Division (*see* Point II, *supra*). Thus, because there are no remaining issues before this court which would dispose of this proceeding, and inasmuch as the remaining issues concern the question of substantial evidence within the meaning of CPLR 7803 (4), this matter must be transferred to the Supreme Court, Appellate Division, First Department. Accordingly, it is therefore,

ORDERED that the plenary causes of action for (1) breach of fiduciary duty, (2) tortious interference of contractual rights, (3) unlawful discriminatory practices, and (4) fraud are dismissed and the Clerk of Court shall enter judgment accordingly; and it is further

ORDERED that the causes of action seeking relief pursuant to Article 78 are severed and continued under this index number; and it is further

ORDERED that petitioner's motion, bearing sequence 003 is denied; and it is further

ORDERED that petitioner's motion, bearing sequence number 002, to add Mikial Abdur-Rahim as a petitioner to the Article 78 petition is granted, and the caption shall be amended as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM

-----X
In the Matter of the Application of
ISHRIEL ABDUR-RAHIM and MIKIAL ABDUR-
RAHIM,

Index Number 400537/2009

Petitioners,

-against -

DEPARTMENT OF HOUSING PRESERVATION

AND DEVELOPMENT, RIVERBEND HOUSING CO.

Respondents.

-----X; and it is further

ORDERED that the petition seeking to reverse the determination of respondent Department of Housing Preservation and Development (motion bearing sequence 001) is respectfully transferred to the Appellate Division, First Department, for disposition pursuant to CPLR 7804 (g) because this proceeding involves the issue of whether the determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law, is, on the entire record, supported by substantial evidence (*see* CPLR 7803 [4]); and it is further

ORDERED that petitioners shall promptly serve a copy of this order with notice of its entry upon the respondents and the Clerk of the Court, 60 Centre Street, Basement, who shall transfer the file to the Appellate Division, First Department.

This constitutes the decision and order of this court.

Dated: February 1, 2010
New York, New York

8/30

[Signature]

J.S.C.

HON. PAUL G. FEINMAN

FILED
FEB 05 2010
NEW YORK
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