

**Matter of MRC-754 E. 161st St. Hous. Dev. Fund  
Corp. v New York City Hous. Auth.**

2011 NY Slip Op 30620(U)

March 15, 2011

Supreme Court, New York County

Docket Number: 105552/2010

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

*Justice*

Index Number : 105552/2010  
**MRC-754 EAST 161ST ST.**  
 VS.  
**NYC HOUSING AUTHORITY**  
 SEQUENCE NUMBER : 001  
 ARTICLE 78

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. 001  
 MOTION CAL. NO. \_\_\_\_\_

n 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

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

**MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.**

*Conference scheduled for May 5, 2011 in Post 10 @ 9:30 am*

**FILED**

MAR 16 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: MAR 15 2011

  
 HON. JUDITH J. GISCHE *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
 Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10

-----X  
In the Matter of the Application of  
MRC-754 EAST 161<sup>ST</sup> STREET HOUSING  
DEVELOPMENT FUND CORPORATION,

DECISION AND ORDER  
Index No.: 105552/10  
Seq No.: 001

Petitioner,

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

**FILED**

-against-

**MAR 16 2011**

NEW YORK CITY HOUSING AUTHORITY,

NEW YORK  
COUNTY CLERK'S OFFICE

Respondent.

-----X  
Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these)  
motion(s):

<b>Papers</b>	<b>Numbered</b>
Notice of Pet and Ver Pet w/exhs .....	1
Defs' x/m (3211 and 7804 [f]) w/JEB affirm, VK affid, exhs .....	2
Pet opp and in reply w/PNG affirm .....	3
Defs' reply .....	4

-----X  
*Upon the foregoing papers, the decision and order of the court is as follows:*

**Gische, J.**

In this article 78 proceeding, petitioner MRC-754 East 161<sup>st</sup> Street Housing Development Fund Corporation seeks a judgment compelling respondent New York City Housing Authority (NYCHA) to process petitioner's request to restore or reinstate the Section 8 Housing Assistance Program and payment of the rent subsidy to petitioner for apartment 3A located at 1500 Longfellow Avenue, Bronx, New York (the Premises). Petitioner is the landlord and owner of the building and Fredricka Adams (Adams) is petitioner's tenant occupying apartment 3A.

NYCHA cross-moves for an order, pursuant to CPLR 3211, dismissing the petition.

Through the federal Section 8 program, the United States Department of Housing and Urban Development (HUD) provides rent subsidies to qualifying lower-income families to enable them to afford decent, safe and sanitary rental housing in the private housing market. *See* 42 USC §§ 1437 (a) (1) (A), 1437f (a). The Section 8 program requirements are set forth in regulations promulgated by HUD at 24 CFR Part 982. NYCHA, a public benefit corporation that operates and maintains low-income housing in New York City, is one of the agencies that administers the city's Section 8 program. NYCHA explains that all landlords who agree to lease residential units to tenants participating in the Section 8 program are required to enter into a Housing Assistance Payments Contract with the administrator of the program, which, in this case, is NYCHA.

On or around August 12, 2004, petitioner and NYCHA entered into a Housing Assistance Payments Contract (the Contract), pursuant to which NYCHA agreed to provide monthly rental subsidies on behalf of the rent-stabilized tenant of record at the Premises. The lease term set forth in the Contract is March 1, 2004 through February 28, 2006. Petitioner asserts that NYCHA suspended Section 8 subsidies to Adams based upon a condition at the Premises. Petitioner contends that, although it repaired the condition, Adams acknowledged the repair, and proof thereof was submitted to NYCHA, NYCHA, in contravention of a duty enjoined upon it by law, has nonetheless failed to reinstate Section 8 voucher subsidy payments to petitioner.

NYCHA explains that federal regulations require it to inspect an apartment prior to the initial term of a Section 8 lease, at least annually during the subsidized tenancy, and at other times as needed, to ensure that the apartment meets the minimum housing quality standards (HQS) established by HUD. NYCHA inspected the Premises on November 3, 2004 and found

two HQS violations. In a November 4, 2004 letter, known as an NE-1 Notice, NYCHA notified petitioner of the HQS violations, and explained that if the first, and more serious, of the violations was not corrected within 30 days after the inspection, NYCHA would suspend its monthly subsidy payments as of December 3, 2004. Petitioner did not inform NYCHA, within 30 days, that the HQS violations had been repaired and NYCHA suspended its monthly subsidy payments. The last subsidy payment to petitioner for the Premises was on December 1, 2004, and payments were suspended thereafter.

The November 4, 2004 NE-1 Notice also stated that “[i]f subsidy is suspended for 180 consecutive days, the HAP Contract automatically terminates and the tenant’s voucher for the subject apartment also terminates.” The Contract similarly provides, at section 4 (b) (4), that it “terminates automatically 180 calendar days after the last housing assistance payment to the owner.” *See also* 24 CFR § 982.455. NYCHA notes that the Contract thus terminated on or about July 1, 2005.

Petitioner states that, in October 2005, Adams commenced an action against petitioner to correct violations at the Premises, but that she did not allow petitioner access to the Premises for approximately two years thereafter. Petitioner asserts that it completed the needed repairs in April 2007, after Adams finally allowed it access to the Premises. Petitioner maintains that it notified NYCHA of the completed repairs by submitting to NYCHA the work orders signed by both petitioner and Adams.

Petitioner submits a NYCHA document entitled “FYI: When an Apartment Fails Inspection,” which states that, even after an apartment has been suspended for failure to pass inspection and failure to repair violations within 30 days, “tenant certifications” that the violations have been corrected “will still be acceptable.” The same document states that one

way to certify is for both the owner and the tenant to sign work orders.

Petitioner alleges that, in October 2008, Lynne Foxon of NYCHA (Foxon) met with representatives of petitioner regarding the reinstatement of the subsidy. According to petitioner, although Foxon said that she would look into the matter, petitioner has heard nothing further from her or from NYCHA, despite several requests to have the voucher payments reinstated, including January 21, 2009 and July 13, 2009 letters to Foxon. Petitioner contends that NYCHA has not taken any action to deny, accept or otherwise respond to its requests to reinstate voucher payments. Petitioner maintains that, presently, arrears for Section 8 subsidies for the Premises are \$49,383.86.

NYCHA submits a March 31, 2006 letter from Adams to NYCHA, in which she requests reinstatement to the Section 8 subsidies. NYCHA explains that, when a Housing Assistance Payments Contract terminates because subsidies have been suspended for 180 consecutive days, a Section 8 participant is "moved off" the Section 8 program. NYCHA replied to Adams in a May 3, 2006 letter, informing her of the requirements to restore her to the program and resume payment of the subsidy, namely: (1) she had to submit a completed affidavit of income and proof of income for all members of her household within 10 working days from the date of the letter; (2) her apartment had to pass inspection or she had to request and complete a transfer; and (3) petitioner had to provide copies of a signed lease for the period from March 2006 through February 2008. NYCHA contends that because Adams and petitioner did not satisfy any of these requirements Adams was not entitled to be restored to the Section 8 program and petitioner was not entitled to reinstatement of the suspended Section 8 subsidies.

Petitioner argues that, pursuant to CPLR 7801 and 7803 (1), a mandamus proceeding may be brought when an administrative agency has failed to perform an act required of it by law,

including a ministerial act. Petitioner originally argued that reinstating the subsidies was a mandatory, non-discretionary ministerial act that did not involve reason or judgment. It asserted that, in compliance with HUD requirements, petitioner and Adams certified to NYCHA that the repairs were made to the Premises by signing work orders, such that the suspended subsidy payments should be continued or reinstated.

In its reply papers, however, petitioner modified its argument to instead provide that the ministerial act it seeks to compel is having its request processed. Petitioner now maintains that NYCHA is under a duty to respond to its request to reinstate voucher payments and has failed to do so. Petitioner argues that NYCHA's act of processing the request is a ministerial act because it involves the direct adherence to HUD regulations and is an act devoid of discretion. Petitioner asserts further that, although the actual determination as to whether to reinstate subsidy payments may involve discretion and judgment, the fact that a determination needs to be made is compulsory, not discretionary.

NYCHA cross-moves, pursuant to CPLR 3211, to dismiss the petition in its entirety on the grounds that: petitioner is not entitled to mandamus relief because a NYCHA determination to reinstate a Section 8 subsidy involves the judgment and discretion of the agency and is not a mere ministerial act; petitioner has not shown a clear legal entitlement to reinstatement of the subsidy; and, even if petitioner had made such a showing, it would be barred by the statute of limitations applicable to mandamus proceedings.<sup>1</sup> NYCHA argues that the court should grant its

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<sup>1</sup>In its reply papers, NYCHA noted that certain arguments it made in support of its cross motion became moot in light of petitioner's clarification that it is not seeking monetary damages or challenging NYCHA's determination to suspend the subsidies. Those arguments, now moot, involved required notice under section 157 (1) of the New York Public Housing Law and the statute of limitations for certiorari proceedings.

cross motion to dismiss the proceeding in its entirety, with prejudice, and grant NYCHA costs and disbursements incurred in defending against this proceeding. If the cross motion is denied, NYCHA reserves the right to answer the petition, pursuant to CPLR 7804 (f).

#### Discussion

Since an Article 78 proceeding is a special proceeding, it may be summarily determined upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised (CPLR § 409 [b]; CPLR §§ 7801, 7804 [h]). Thus, much like a motion for summary judgment, the court should decide the issues raised on the papers presented and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial (CPLR § 7804 [h]; York v. McGuire 1984, 99 A.D.2d 1023 *aff'd* 63 N.Y.2d 760 [1984]; Battaglia v. Schumer, 60 A.D.2d 759 [4<sup>th</sup> Dept 1977]).

Mandamus is available “only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law.” *New York Civ. Liberties Union v State of New York*, 4 NY3d 175, 184 (2005). Mandamus “is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion.” *Matter of Brusco v Braun*, 84 NY2d 674, 679 (1994). A discretionary act is one in which “the exercise of reasoned judgment ... could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result.” *New York Civ. Liberties Union v State on New York*, 4 NY3d at 184, quoting *Tango v Tulevech*, 61 NY2d 34, 41 (1983).

At this point in this proceeding, prior to NYCHA answering the petition, it appears that mandamus will likely be available to the petitioner, thus requiring NYCHA to process and respond to petitioner’s requests for a reinstatement of the payment of subsidies for the Premises.

Mandamus is not, however, available to require NYCHA to reinstate or resume the subsidy in this situation, because the decision as to whether to resume subsidy payments involves judgment that could “produce different acceptable results.” The subsidies were suspended as of the monthly payment scheduled for January 1, 2005. According to petitioner, the repairs at issue were not completed until April 2007, long after the Contract had terminated, on or around July 1, 2005. Whether, as of April 2007, Adams still qualified for the subsidy, and whether the Premises qualified for the Section 8 program, would have to be determined again, based on a number of factors, such that resumption of the subsidies is not simply a ministerial act.

Regarding the timeliness of the instant proceeding, petitioner maintains that it is timely, because in a mandamus proceeding, the four-month statute of limitations does not begin to run until the demand and refusal are made. According to petitioner, because there is no clear statement by NYCHA refusing to process the request, the statute of limitations was not triggered and has not begun to run. Although NYCHA contends that the mandamus claim is time-barred where, as here, a demand was made but the administrative agency did not respond, as petitioner alleges here, the claimant must still commence a mandamus proceeding within a reasonable time after it has made its demand. NYCHA states that petitioner alleges that it first demanded that NYCHA reinstate the subsidy in October 2008. Petitioner commenced this proceeding on April 28, 2010, more than 18 months later. According to NYCHA, by any standard, the delay in commencing the proceeding was unreasonable.

The court finds the instant proceeding to be timely. “Before commencing a proceeding in the nature of mandamus it is necessary to make a demand and await a refusal, and the Statute of Limitations does not run out until four months after the refusal.” *Matter of Fischer v Roche*, 81 AD2d 541, 542 (1<sup>st</sup> Dept), *affd* 54 NY2d 962 (1981); *see also Matter of Town of Harrison*

*Police Benevolent Assn., Inc. v Town of Harrison Police Dept.*, 69 AD3d 639, 640-41 (2d Dept 2010). There has been no refusal in the instant situation, such that the statute of limitations has not run.

Petitioner argued, in its initial papers, that NYCHA failed to give it the required notice under the federal consent judgment, *Williams v New York City Hous. Auth.*, (RJW), First Partial Consent Judgment, docketed October 17, 1984, (Exhibit 9 to Notice of Cross Motion to Dismiss), which sets forth comprehensive notice procedures that NYCHA must comply with before termination of a Section 8 subsidy may occur.

NYCHA explained, however, that *Williams* requires NYCHA to send notices to tenants before terminating their participation in the Section 8 program based on tenants' failure to meet their program requirements. NYCHA points out that *Williams* expressly states, at ¶ 28, that “[t]his agreement does not govern terminations of subsidies that result from a landlord’s breach of its obligations under the Section 8 program but do not affect the tenant’s eligibility for benefits, inasmuch as the court has ruled that this issue is not encompassed within the instant litigation.” The *Williams* consent decree, therefore, is irrelevant in the instant proceeding, where notice to a landlord for its failure to meet Section 8 program requirements is at issue, and where NYCHA provided petitioner with notice of the HQS violations and informed petitioner of the consequences of failure to correct them.

The court further notes that petitioner submits documents related to an earlier HQS violation and subsidy suspension at the Premises, from October 2003, which seem to have been resolved by January 2004. In any case, those documents, presumably related to an earlier Housing Assistance Payments Contract between petitioner and NYCHA, are not relevant to the issues in the instant proceeding.

NYCHA reserved its right to serve and file a verified answer to the petition if the court denied its motion to dismiss. CPLR 7804(f) authorizes the court to permit the respondent to answer the petition upon denial of a motion to dismiss within five days after service of the order with notice of entry.

Accordingly,

ORDERED that the cross motion to dismiss is denied; and it is further

ORDERED that respondent is directed to serve an answer to the petition within 5 days after service of a copy of this order with notice of entry; and it is further

ORDERED that an all purpose conference is scheduled for **May 5, 2011** in Part 10 at 9:30 a.m. at which time the petition will be scheduled for a hearing ; and it is further

ORDERED that petitioner shall serve a copy of this order on Fredicka Adams and bring proof of service to the conference; and it is further

ORDERED that this constitutes the decision and order of the court.

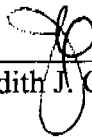
Dated: New York, New York  
March 15, 2011

ENTER:

**FILED**

**MAR 16 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

  
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Hon. Judith J. Gische, JSC