

<b>Brown v Melrose Ctr. 40</b>
2011 NY Slip Op 31011(U)
April 20, 2011
Supreme Court, New York County
Docket Number: 400114/011
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_

PART 10

*Justice*

Index Number : 400114/2011

**BROWN, JOHN**

vs.

**MELROSE CENTER 40**

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

**FILED**

Upon the foregoing papers, It is ordered that this motion

APR 19 2011

NEW YORK  
COUNTY CLERK'S OFFICE

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

*and hearing scheduled  
for June 9, 2011 @ 9:30am*

Dated: 4/14/11

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

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

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

-----X  
John Brown,

Petitioner,  
-against-

Melrose Center 40,

Respondent.

**DECISION/ORDER**

Index No.: 400114/011  
Seq. No.: 001

**PRESENT:**

Hon. Judith J. Gische  
J.S.C.

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

**FILED**

<b>Papers</b>	<b>Numbered</b>
JB petition w/ exhs and proof of service .....	1

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

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This is the verified petition of John Brown, a recipient of public assistance benefits from the City of New York, Office of Human Resources ("HRA"). Mr. Brown is self represented and the relief he is seeking is somewhat unclear. Apparently he is seeking a writ of mandamus pursuant to Article 78 of the CPLR, directing HRA to take certain action that the State of New York, Office of Temporary and Disability Assistance ("OTDA") directed HRA to take following a Fair Hearing held on October 18, 2010 [Case No. 00002640470H].

In its decision dated November 15, 2010, OTDA directed the local HRA office to recompute Mr. Brown's public assistance budget from May 1, 2010 to the present "immediately, taking into account [Mr. Brown's] contention that his benefits were insufficient for his household." HRA was also directed by OTDA to notify Mr. Brown of its computations in writing and to restore any lost public assistance benefits retroactive to May 1, 2010.

In a notice dated December 7, 2010, HR notified Mr. Brown of its decision to issue him the sum of \$97.20 "as a nonrecurring or retroactive Cash Assistance grant for 05/01/10 -

06/30/10." The benefit would be "available to [Mr. Brown] on or before 12/10/10. HR decided, however, that his "cash assistance benefits [remained] unchanged." The notice goes on to state that this was due to Mr. Brown's failure to respond to "our letter" and that HR "[could not] complete any compliance action until you come in and/or supply the requested information. If you come in and/or bring the information to your Center within ten (10) days from the date of this notice, we will consider the information in accordance with the Fair Hearing decision..." The notice also contains these additional comments: "Your current budget is correct. Budget is \$682.01 S/M [semi-monthly] rent \$401.51 S/M your household cash is 280.50 S/M \$42.35 S/M sent for utility payment why you receiving \$238.15 S/M."

Mr. Brown states that he is not appealing the OTDA's decision after a hearing, but that the HR center is not doing what they are supposed to which is (among other things) to pay his family's Con Edison bill. He also states that HR has recouped money improperly and that he is owed retroactive monies.

Although there is due proof of service of this petition on the HR center (Center number 40) located at 260 East 161<sup>st</sup> Street, Bronx, New York no one has appeared in connection with this petition. It is unclear whether this is a valid way to serve a City agency. The petition is before the court unopposed.

### **Discussion**

Pursuant to CPLR 7801, the court can examine whether an administrative agency has failed to perform a duty enjoined upon it by law. The function of the writ of mandamus is to compel the performance of a duty. The duty, however, must be ministerial in nature, meaning no judgment or discretion is needed and no reasonable doubt or controversy is present. Where, however, the petitioner has failed to exhaust his duties, the petition should be denied as premature (Meyermac Elmhurst, Inc. v. Esnard, 111 A.D.2d 789 [2<sup>nd</sup>

Dept., 1985]).

It is difficult to understand exactly what the situation facing petitioner is and, since he is self-represented, some of his arguments are un- or under-developed. It is surprising that respondent has not answered the petition or appeared in this action because City agencies usually appear to defend or settle these types of actions. Although petitioner served the local HR center and the manager accepted service, there is no way know whether the papers made their way to the New York City Law Department. Mr. Brown did not serve the New York Law Department although the Law Department represents most City agencies in legal proceedings against them. It is also unclear whether Mr. Brown submitted a "Compliance Complaint" with OTDA. On its website, OTDA instructs any aggrieved recipient of public assistance benefits who believes a local HR has not complied with an OTDA order to file such a complaint to obtain compliance with the Fair Hearing determination (<http://otda.ny.gov/oah/FHComp.asp>). Whether this is a mandatory step is unclear.

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]).

Given the circumstances of this case, the serious nature of the relief sought, and the non-appearance of the respondent/agency, this petition cannot be decided without further facts and information. Therefore, the court will hold a hearing and directs that Mr. Brown serve: 1) a copy of his petition and supporting papers and 2) a copy of this decision and

order upon the New York City Law Department, 100 Church Street, New York, NY 10007.

These papers may either be served in person or by regular, first class mail and they must be served **no later than May 10, 2011.**

The hearing will be held on **June 9, 2011** at 9:30 a.m. p.m. in Part 10, 60 Centre Street, Room 232. Mr. Brown must bring **proof of service** with him on that day.

Any relief requested but not addressed is hereby denied.

This constitutes the decision and order of the court.

Dated;           New York, New York  
                  April 14, 2011.

So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC

**FILED**

**APR 19 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**