

**Matter of 115 W. 128 Corp. v Department of Hous.  
Preserv. & Dev. of the City of N.Y.**

2011 NY Slip Op 31949(U)

June 10, 2011

Sup Ct, NY County

Docket Number: 113973/10

Judge: Barbara Jaffe

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

BARBARA JAFFE  
J.S.C.

DECENT-

PART 5

Index Number : 113973/2010

115 WEST 182 CORP.

vs

NYC DEPARTMENT OF HOUSING

Sequence Number : 001

ARTICLE 78

INDEX NO. 113973/10

MOTION DATE 3/29/11

MOTION SEQ. NO. 001

MOTION CAL. NO. 128

CAL # 128

The following papers, numbered 1 to 4 were read on this motion to/for Judgment of mandamus pursuant to Article 78.

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

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

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

PAPERS NUMBERED
<u>1, 2</u>
<u>3</u>
<u>4</u>

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 6/10/11

BARBARA JAFFE J.S.C.  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

JUN 10 2011

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK : PART 5

-----X  
 In the Matter of the Application of  
 115 WEST 128 CORP.  
 Amended to 1211 SOUTHERN BOULEVARD LLC,  
  
 Petitioner,

Index No. 113973/10  
 Motion Date: 3/29/11  
 Motion Seq. No.: 001  
 Motion Cal. No.: 128

**DECISION & JUDGMENT**

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

-against-

**UNFILED JUDGMENT**  
 This judgment has not been entered by the County Clerk  
 and notice of entry cannot be served based hereon. To  
 obtain entry, counsel or authorized representative must  
 appear in person at the Judgment Clerk's Desk (Room  
 141B).

DEPARTMENT OF HOUSING PRESERVATION AND  
 DEVELOPMENT OF THE CITY OF NEW YORK

-----X  
 BARBARA JAFFE, J.:

**For petitioner:**  
 David I. Paul, Esq.  
 Rappaport, Hertz, Cherson & Rosenthal, P.C.  
 118-35 Queens Boulevard, 9<sup>th</sup> Floor  
 Forest Hills, NY 11375  
 718-261-7700

**For respondent:**  
 Lata Nott, ACC  
 Michael A. Cardozo  
 Corporation Counsel  
 100 Church Street  
 New York, NY 10007  
 212-788-0986

By notice of petition dated October 20, 2010 and amended notice of petition dated February 4, 2011, petitioner brings this Article 78 proceeding seeking a judgment of mandamus requiring respondent to determine whether petitioner is entitled to reinstatement of its section 8 subsidy, and if it is determined that petitioner is entitled to such subsidy, that respondent pay petitioner such subsidy for the months due. By notice of cross-motion dated January 21, 2011, respondent moves for an order dismissing the petition. Petitioner opposes.

I. BACKGROUND

The New York City Department of Housing Preservation and Development (HPD) administers the section 8 Housing Choice Voucher Program, a federally funded program that

provides rent subsidies to low-income families. (42 USC § 1437f[a]). Once a participant chooses an apartment, it must submit to HPD “a request for lease approval and a copy of the proposed lease.” (24 CFR 982.302). In determining whether to approve the request, HPD must, *inter alia*, inspect the apartment to ensure that it meets federal Housing Quality Standards (HQS). (24 CFR 982.405). If HPD approves the apartment and the lease, a Housing Assistance Payment (HAP) contract is executed whereby HPD agrees to subsidize the participant’s rent by paying the landlord a portion of his monthly rent. (24 CFR 982.305).

During a participant’s tenancy, HPD must periodically inspect the apartment to ensure continued compliance with the HQS (24 CFR 982.405), and if it discovers an “emergency failure,” such as “[m]issing or defective window guards where there are children living in the residence 10 years old and under,” it must be corrected within 24 hours (Affidavit of Jose Ali in Opposition, dated Feb. 1, 2011 [Ali Affid. in Opp.], Exh. 2). HPD “must not make any housing assistance payments . . . unless the owner corrects the defect within the period specified . . .” (24 CFR 982.404[a][3]).

Pursuant to a publication entitled “Changes to Housing Quality Standards (HQS) Inspection Procedures” (inspection publication), which describes HPD policy changes that became effective July 14, 2008, “[a] new *Certification of Completed Repairs* form can [ ] be used to certify corrections of all non-emergency HQS failures that are the landlord’s responsibility to fix.” (Ali Affid. in Opp., Exh. 2). The landlord receives this form when he receives notification of a HQS failure, and he must have this form signed by the tenant and return it to HPD via certified mail, facsimile, or email before the correction deadline to avoid subsidy abatement or interruption. (*Id.*). The inspection publication also provides that “failures in vacant units,

emergency failures, or failures identified as the tenant's responsibility to fix must be re-inspected by HPD HQS inspections staff," and that although automatic re-inspections will continue to be scheduled for these types of failures, they will not continue to be scheduled for regular failures that the landlord is responsible to fix. (*Id.*).

Petitioner owns 1211 Southern Boulevard, an apartment building located in the Bronx, New York. (Amend. Pet.). Shanika Harrel, a Housing Voucher Program participant, lives in apartment 602. (*Id.*). On June 24, 2009, a HPD inspector discovered that the window guards in her apartment were missing one-way screws, which he deemed an emergency failure to comply with the HQS which must be remedied within 24 hours. (*Id.*, Exhs. 1, 2). On June 26, 2009, the apartment was re-inspected. (*Id.*, Exh. 1). It was determined that the window guards had not been repaired or replaced. (*Id.*). Later that day, petitioner's contractor installed new window guards throughout the apartment, and Harrel signed a letter issued by Langsam Property Services Corporation, the building's managing agent, acknowledging the performance of these repairs. (*Id.*, Exhs. 3, 4, 5, 6).

By notice dated July 1, 2009, HPD informed petitioner that the section 8 subsidy for the apartment was being abated effective that day, as petitioner had failed to correct a HQS failure in a timely manner, and "federal regulations require that HPD abate Housing Assistance Payments when HQS violations are not [timely] corrected." (*Id.*, Exh. 2). The notice also provides that reinstatement of the subsidy may be expedited upon transmittal to HPD of a work order signed by the tenant demonstrating that the HQS failure was corrected. (*Id.*).

On July 23, 2009, Jose Ali, a Langsam employee, reported to HPD that the window guards were replaced and requested re-inspection. (Ali Affid. in Opp.). That same day,

Langsam's workmen had Harrel sign another work order, although no additional work was performed. (Amended Pet., Exh. 7). On July 24, 2009, Crystal Moronta, another Langsam employee, emailed HPD to report the window guard replacement, attaching the work order and letter Harrel had signed as proof thereof. (*Id.*).

By email dated March 2, 2010, a HPD employee informed Ali that HPD records reflected that the apartment had twice failed inspection, that the subsidy was abated as of July 1, 2009, and that "the unit never passed inspection again." (*Id.*, Exh. 9). The employee did not indicate that the apartment had been inspected after June 26, 2009. (*Id.*).

## II. CONTENTIONS

In seeking to compel HPD to determine whether the subsidy should be reinstated, petitioner complains that HPD never re-inspected the apartment after being notified that the window guards had been replaced and claims that it is entitled to retroactive reinstatement of the subsidy from July 2009 to the present, as it promptly corrected the HQS failure and notified HPD of it. (*Id.*).

In support of its cross-motion, and in opposition to the petition, respondent claims that the petition must be dismissed as time-barred, as HPD's July 1, 2009 notice of abatement was final and binding on petitioner, and petitioner failed to file the petition within four months of its issuance. (Affidavit of Lata Nott, dated Jan. 21, 2011).

In opposition to the cross-motion, and in further support of its petition, petitioner argues that respondent misapprehends the nature of its application. (Ali Affid. in Opp.). Rather than challenging HPD's decision to abate the subsidy effective July 1, 2009, petitioner is challenging HPD's alleged failure to re-inspect the apartment being informed that the window guards had

been replaced. (*Id.*). Thus, it seeks to compel HPD to re-inspect the apartment and determine whether the subsidy should be retroactively reinstated. (*Id.*). Petitioner also claims that the abatement notice was an interim notice, not a final determination, and thus that the statute of limitations did not begin to run at its issuance. (*Id.*). Additionally, petitioner claims that HPD did not comply with its own inspection publication, as it did not send petitioner a Certification of Completed Repairs form and did not re-inspect the apartment after receiving petitioner's notification calls and emails, as required, and that the rent subsidy would have been reinstated effective August 1, 2009 had HPD complied. (*Id.*).

### III. ANALYSIS

#### A. Statute of limitations

Pursuant to CPLR 217(1), an Article 78 proceeding must be commenced within four months after the challenged determination becomes final and binding on petitioner. However, an Article 78 "proceeding seeking mandamus to compel accrues even in the absence of a final determination. Hence, the statute of limitations for such a proceeding runs not from the final determination but from the date upon which the agency refuses to act." (*Ruskin Assocs., LLC v State of N.Y. Div. of Hous. and Community Renewal*, 77 AD3d 401, 403 [1<sup>st</sup> Dept 2010]; see also *Academy St. Assocs., Inc. v Spitzer*, 44 AD3d 592, 593 [1<sup>st</sup> Dept 2007]). "The refusal must be clear and explicit, and any ambiguity created by a public body should be resolved against it." (*Matter of Fischer v Roche*, 81 AD2d 541, 542 [1<sup>st</sup> Dept 1981]; see also *Matter of Harrison Police Benevolent Assn., Inc. v Town of Harrison Police Dept.*, 69 AD3d 639, 640-41 [2d Dept 2010]).

Here, petitioner is not challenging the July 1, 2009 abatement but rather HPD's alleged

refusal to re-inspect the apartment and reinstate the subsidy. Thus, the statute of limitations did not begin running when the abatement notice was issued but rather when, if ever, HPD refused to re-inspect and/or reinstate. As there is no evidence that HPD clearly and explicitly refused to do so, the statute of limitations has not begun to run. (See *Matter of MRC -754 E. 161<sup>st</sup> Street Hous. Dev. Fund. Corp. v N.Y. City Hous. Auth.*, 2011 NY Slip Op 30620[U], \*8-9 [Sup Ct, New York County 2011] [statute of limitations had not begun to run on Article 78 proceeding for mandamus to compel reinstatement of section 8 subsidy as New York City Housing Authority had not expressly refused petitioner's demand for reinstatement]).

#### B. Mandamus

The action or inaction of an administrative agency may be challenged by an Article 78 proceeding seeking mandamus to compel. (*N.Y. Civil Liberties Union v State of N.Y.*, 4 NY3d 175, 183 [2005]; *Matter of Ozdoba v Chelsea Landmark LIC, LLC*, 74 AD3d 555, 556 [1<sup>st</sup> Dept 2010]). Mandamus is available only to enforce a clear legal right where an administrative agency “has failed to perform a duty enjoined by law.” (CPLR 7803[1]). Thus, mandamus lies only to enforce a ministerial act, which “envisions direct adherence to a governing rule or standard with a compulsory result,” and not a discretionary act, which “involve[s] the exercise of reasoned judgment which could typically produce different acceptable results.” (*Id.*; *Lauer v City of New York*, 95 NY2d 95, 107 [2000]; *Tango v Tulevich*, 61 NY2d 34, 41 [1983]).

Here, petitioner claims that HPD's inspection publication requires that it provide petitioner with a Certification of Completed Repairs form and re-inspect the apartment upon receiving notification that the window guards were replaced. However, HPD was required to do neither, as the defective window guards constituted an emergency failure, and the provisions on

the Certification of Completed Repairs form, including that permitting submission of the form via e-mail, and on reinspection upon notification of correction address non-emergency repairs only. Additionally, the notice of abatement provides only that reinstatement may be expedited by reporting a correction.

In accordance with the inspection publication, HPD automatically re-inspected the apartment on June 26, 2009 to determine whether petitioner had repaired or replaced the window guards within the 24-hour time frame for correction of emergency failures and, determining that it had not, abated the subsidy. As the inspection publication neither mandates that HPD re-inspect the apartment a second time after receiving notification of correction nor that it reinstate a subsidy upon determining that a failure has been corrected after the correction deadline, and as petitioner has failed to cite other authority supporting the proposition that HPD is required to do so, petitioner has failed to demonstrate a deprivation of a clear legal right as the result of HPD's failure to perform a ministerial act.

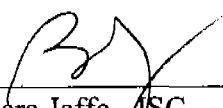
#### IV. CONCLUSION

Accordingly, it is hereby

ADJUDGED and ORDERED, that the petition is denied, and it is further

ADJUDGED and ORDERED, that the proceeding is dismissed.

ENTER:

  
Barbara Jaffe, JSC

**BARBARA JAFFE**  
J.S.C.

DATED: June 10, 2011  
New York, New York

JUN 10 2011

#### UNFILED JUDGMENT

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