

**Matter of 1130-1146 Colgate Ave. Assoc. v New York  
City Hous. Auth.**

2012 NY Slip Op 30469(U)

February 24, 2012

Sup Ct, NY County

Docket Number: 110896/2011

Judge: Carol R. Edmead

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: HON. CAROL EDMEAD  
Justice

PART 35

1130 - 1146 COLGATE AVE

INDEX NO. 110896/2011

MOTION DATE 2.23.2012

MOTION SEQ. NO. 001

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

- v -

NYC HOUSING Authority

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

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

**FILED**

FEB 29 2012

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 001 is decided in accordance with the annexed Memorandum Decision. It is hereby

NEW YORK  
COUNTY CLERK'S OFFICE

ORDERED that the application of Petitioner herein 1130-1146 Colgate Avenue Associates for an order, pursuant to CPLR Article 78, (1) directing and adjudging that respondent New York City Housing Authority reinstate the Section 8 Rent Subsidy for apartment 3A at 1132 Colgate Avenue, Bronx, New York 10472 effective June 1, 2011; and (2) ordering, directing and adjudging that respondent forthwith pay petitioner the monthly Section 8 Rent Subsidy for the subject apartment, and that said payments be inclusive of the time period from June 1, 2011, to and including the date on which this Article 78 Proceeding is determined by this court is hereby denied; and it is further

ORDERED that the cross motion of Respondent for an order (1) dismissing the Petition because petitioner did not comply with the notice and pleading provisions set forth in New York Public Housing Law section 157; and (2) dismissing the Petition for failure to state a cause of action pursuant to CPLR § 3211(a)(7) is hereby granted and the instant Petition is hereby dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for respondent shall serve a copy of this Order with notice of entry within twenty (20) days of entry on counsel for petitioner.

Dated: 2.24.2012

[Signature]

J.S.C.

HON. CAROL EDMEAD

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 35

\_\_\_\_\_  
In the Matter of the Application of  
1130-1146 COLGATE AVENUE ASSOCIATES,

Index No. 110896/2011

Petitioner,

**DECISION/ORDER**

For a Judgment Pursuant to Article 78 of the CPLR

-against-

NEW YORK CITY HOUSING AUTHORITY,

**FILED**

Respondent.

FEB 29 2012

RE: APARTMENT 3A  
At: 1132 COLGATE AVENUE  
BRONX, NEW YORK 10472

NEW YORK  
COUNTY CLERK'S OFFICE

\_\_\_\_\_  
EDMEAD, J.S.C.

**MEMORANDUM DECISION**

Petitioner herein 1130-1146 Colgate Avenue Associates (petitioner) moves for an order, pursuant to CPLR Article 78, (1) directing and adjudging that respondent New York City Housing Authority (respondent) reinstate the Section 8 Rent Subsidy for apartment 3A at 1132 Colgate Avenue, Bronx, New York 10472 (the subject apartment) effective June 1, 2011; and (2) ordering, directing and adjudging that respondent forthwith pay petitioner the monthly Section 8 Rent Subsidy for the subject apartment, and that said payments be inclusive of the time period from June 1, 2011, to and including the date on which this Article 78 Proceeding is determined by this court.

Respondent cross moves for an order (1) dismissing the Petition because petitioner did not comply with the notice and pleading provisions set forth in New York Public Housing Law section 157; and (2) dismissing the Petition for failure to state a cause of action pursuant to

CPLR § 3211(a)(7).

*Petitioner's Contentions*

The building located at 1132 Colgate Avenue, Bronx, New York, 10472 (the subject building) is a Multiple Dwelling which contains, among other apartments, the subject apartment, occupied by and rented to tenant named Debra Wright-Henderson (the tenant). The tenant was accepted into the Section 8 Program, and pursuant to Housing Assistance Payment (HAP) contract, respondent paid monthly sums of money to the petitioner, said monies representing the share of monthly rent which respondent agreed to pay as being its liability share of monthly rent.

Petitioner received HAPs for the subject apartment up to and including May, 2011; however, in June 2011, petitioner ceased receiving said payments for the subject apartment and has received no HAPs for the subject apartment since that time.

Petitioner received no documents from respondent regarding suspension of payments and received no notice of HQS violations as to the subject apartment or notice of opportunity to correct any such violations in the subject apartment prior to the cessation or suspension of HAPs. It was only upon inquiring of respondent that petitioner was informed of the existence of violations in the subject premises; however, to this date, petitioner has not been afforded written notice of any such violations or given any opportunity to correct any violations which exist at the subject apartment.

The suspension or cessation of Section 8 HAPs for the subject apartment without petitioner's having received any notice regarding the basis for the suspension or cessation of the payments is arbitrary and capricious and without any basis in law or in fact. Had petitioner received notice of any violations in the subject apartment and opportunity to correct same,

petitioner would have promptly made all diligent efforts to correct said violations; however, without notice, petitioner was unaware of such necessity and therefore unable to rectify the situation.

*Respondent's Contentions*

Respondent may only make HAPs to the landlord for apartments that meet housing quality standards (HQS), as established by the United States Department of Housing and Urban Development (HUD). Respondent may not make any payments for a dwelling unit that fails to meet HQS, unless the owner corrects the defect within the period specified by respondent and respondent verifies the correction. All subsidized apartments must be inspected and must meet HQS prior to the initial lease term and at least annually thereafter. In addition the HAP contract terminates automatically 180 calendar days after the last HAP to the owner. Thus, if payments remain suspended for 180 as a result of HQS violations, the HAP contract terminates.

On April 22, 2011 the tenant's apartment failed an HQS inspection. Respondent issued an April 23, 2011 notice to petitioner advising it of the failed inspection. After petitioner did not certify that the necessary repairs had been made, respondent suspended payments to petitioner effective May 31, 2011. Respondent's last subsidy payment to petitioner on the tenant's behalf was on or about May 1, 2011.

Further, petitioner has failed to meet the statutorily mandated notice of claim and pleading requirements. Compliance with those requirements is a substantive element of a cause of action against respondent, the absence of which is fatal to petitioner's action.

Finally, based on the HQS failure for the subject apartment, and respondent's prohibition to make Section 8 payments for an apartment that does not meet HQS, petitioner fails to state a

cause of action.

*Petitioner's Opposition and Reply*

Respondent's papers contain an alleged notice of HQS violation dated April 23, 2011; however, said papers do not contain any proof that the petitioner received this notice, or even any proof that it was ever sent out. It is therefore petitioner's claim therein that it had absolutely no written notice of the violation, nor was petitioner given any time frame within which to cure the alleged violation.

Further, it should be noted that the HQS violation in question is extremely minor.

Finally, since this is a proceeding brought in equity and requires not the payment of monies, but rather affirmative action to be taken on the part of respondent, the requirement of a notice of claim does not apply in this situation.

And, petitioner states a claim in that the Section 8 payments should not have stopped in the first place.

*Respondent's Reply*

Petitioner asserts it is not required to comply with section 157(1) because "this is a proceeding brought in equity and requires not the payment of monies, but rather, affirmative action to be taken on the part of Respondent." The statute, however, has no such limitation and by its terms applies to "every action or special proceeding for any cause whatsoever, prosecuted or maintained against an authority, other than a claim arising out of a condemnation proceeding."

Contrary to petitioner's claim the violations were not "minor."

Finally, as the HAP contract between petitioner and respondent terminated automatically on or about November 1, 2011, 180 calendar days after the last housing assistance payment to the

owner on or about May 1, 2011, petitioner has no basis on which to seek subsidy payments for the months of November 2011 through present.

***Discussion***

The governing federal regulations unequivocally bar respondent from making Section 8 payments on behalf of an apartment that is not in compliance with the Housing Quality Standards. See 24 CFR § 982.401 *ff*. When an apartment fails the HQS inspection, the owner is given a specific number of calendar days to correct the conditions of disrepair. 24 CFR § 982.404(a). The burden is on the owner to establish that the conditions have been corrected, just as the burden is on the owner here to establish that it was arbitrary and capricious for respondent to terminate the Section 8 subsidy.

With respect to petitioner's argument that notice of claim is unwarranted herein, the court looks to the case of *Potter v Atarlen*, 13 Misc.3d 846 (Sup. Ct. Queens co. 2010) in which the court held that the failure to allege the presentment of a timely notice of claim to NYCHA as required by PHL section 157(1) renders a complaint legally insufficient and warrants its dismissal for failure to state a cause of action ( *Kovachevich v New York City Housing Authority*, 295 A.D.2d 255, 744 N.Y.S.2d 28 [1st Dept.2002] [tort and breach of contract]; *Leon v New York City Housing Authority*, 214 A.D.2d 455, 625 N.Y.S.2d 212 [1st Dept.1995] [constitutional claim]; *Reaves v City of New York*, 177 A.D.2d 437, 576 N.Y.S.2d 280 [1st Dept.1991] [tort]; *New York City Housing Authority v Roberts*, 2002 WL 759637, 2002 N.Y. Slip Op. 50144[U] [App. Term 1st Dept.2002] [breach of warranty of habitability]; *Trio Bronx Inc. v Hernandez*, 2009 WL 3612135, 2009 N.Y. Slip Op. 32506[U] [Sup. Ct. N.Y. County 2009] [breach of contract and tort].)

Petitioner provides no case law in support of its argument that since this is a proceeding brought in equity and requires not the payment of monies, but rather affirmative action to be taken on the part of respondent, the requirement of a notice of claim does not apply in this situation.

Finally, there is a judicial presumption that petitioner received notices sent by regular mail and that denial of receipt can not rebut that presumption. *Fowler v Marks*, 241 A.D.2d 928, 661 N.Y.S.2d 363 (4th Dept.1997) held that "The contention of petitioner that he did not receive the documents is insufficient to rebut the presumption that a proper mailing occurred." *American Savings & Loan Assoc. v Twin Eagles Bruce Inc.* 208 A.D.2d 446, 617 N.Y.S.2d 717 (1st Dept.1994) held that the service by mail can not be rebutted by a denial of receipt alone.

#### CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the application of Petitioner herein 1130-1146 Colgate Avenue Associates for an order, pursuant to CPLR Article 78, (1) directing and adjudging that respondent New York City Housing Authority reinstate the Section 8 Rent Subsidy for apartment 3A at 1132 Colgate Avenue, Bronx, New York 10472 effective June 1, 2011; and (2) ordering, directing and adjudging that respondent forthwith pay petitioner the monthly Section 8 Rent Subsidy for the subject apartment, and that said payments be inclusive of the time period from June 1, 2011, to and including the date on which this Article 78 Proceeding is determined by this court is hereby denied; and it is further

ORDERED that the cross motion of Respondent for an order (1) dismissing the Petition because petitioner did not comply with the notice and pleading provisions set forth in New York


[\* 8]

Public Housing Law section 157; and (2) dismissing the Petition for failure to state a cause of action pursuant to CPLR § 3211(a)(7) is hereby granted and the instant Petition is hereby dismissed; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly; and it is further

ORDERED that counsel for respondent shall serve a copy of this Order with notice of entry within twenty (20) days of entry on counsel for petitioner.

Dated: February 24, 2012



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMead**

**FILED**

**FEB 29 2012**

**NEW YORK  
COUNTY CLERK'S OFFICE**