

**Matter of 751 Walton/Gerard, LLC v New York City
DHPD**

2013 NY Slip Op 31106(U)

May 17, 2013

Sup Ct, New York County

Docket Number: 104171/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 104171/2012
751 WALTON/GERARD, LLC.
vs.
NYC DEPARTMENT OF HOUSING
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

RECEIVED
MAY 21 2013
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

FILED
MAY 21 2013
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/17/13

CK, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
In the Matter of the Application of

751 WALTON/GERARD, LLC,

Petitioner,

Index No. 104171/12

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT,

Respondent.

JACQUELINE HERNANDEZ,

Co-Respondent.

FILED

MAY 21 2013

COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

| Papers | Numbered |
|--|----------|
| Notice of Motion and Affidavits Annexed..... | <u>1</u> |
| Answering Affidavits..... | <u>2</u> |
| Replying Affidavits..... | <u>3</u> |
| Exhibits..... | <u>4</u> |

Petitioner 751 Walton/Gerard, LLC ("751") brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking a writ of mandamus to compel respondent New York City Department of Housing Preservation and Development ("HPD") to pay, retroactively, the Section 8 subsidy due and owing for the dwelling unit of Jacqueline Hernandez ("Ms. Hernandez") to the date when HPD suspended/terminated payment of Housing

Assistance Payments (“HAP”). Respondent cross-moves to dismiss the petition. For the reasons set forth below, the cross-motion to dismiss the petition is granted and the petition is dismissed.

The relevant facts are as follows. Petitioner is the owner of the premises located at 751 Walton Avenue, Bronx, New York (the “building”). Co-respondent is the tenant of record in the building in apartment B-42 (the “subject apartment”) and is a participant in the New York City Housing Authority (“NYCHA”) Section 8 voucher program in which subsidies are linked to the individual tenant. By letter dated January 30, 2012, HPD informed Ms. Hernandez that her apartment failed a Housing Quality Standards (“HQS”) inspection on January 24, 2012. The letter further informed Ms. Hernandez that if she did not make the necessary repairs within 25 days from the date of the letter, her Section 8 subsidy would be terminated. Simultaneously, by letter dated January 30, 2012, HPD informed petitioner of the HQS failure of the subject premises. The letter stated, in pertinent part,

All non-emergency failure items must be corrected within 25 days, by 2/17/2012...Repairs to these conditions must be made by the landlord and corrected by the next inspection date, with the exception of those items listed as “Tenant Responsibility - Failure Items.” Failure to correct these conditions by the re-inspection date will result in the abatement of HPD’s Housing Assistance Payments.

On February 17, 2012, HPD conducted a re-inspection of the subject apartment but determined that certain defects had not been cured as petitioner had failed to cure the wall condition in the dining room which consisted of “excessive chipping on riser, riser peeling paint.” By HQS Unit - Transmittal Form dated February 22, 2012, the HQS Unit requested that Ms. Hernandez’s Section 8 subsidy be suspended due to the failure to cure the defects found in the subject apartment. On February 23, 2012, HPD mailed petitioner a Notice of Abatement

informing petitioner that because the subject premises failed the HQS re-inspection, the Abatement period for the subject premises would begin on March 1, 2012. The Notice further stated that during the Abatement period, "HPD will not pay its share of the contract rent" and that in order to reinstate payments, petitioner "must submit a work order, signed and dated by the tenant, once the corrections have been made." On that same date, HPD also sent a Notice of Abatement to Ms. Hernandez advising her that the HAP for the subject premises was abated, effective March 1, 2012, due to the failed HQS re-inspection.

On July 26, 2012, petitioner informed HPD that it had corrected the HQS violations and requested another inspection. By e-mail dated July 27, 2012, HPD informed petitioner that an HQS inspection was scheduled for August 13, 2012. On August 13, 2012, the subject premises passed the HQS inspection and thereafter, HPD reinstated the subsidy for the subject apartment, effective July 26, 2012. In September 2012, HPD made a retroactive HAP payment to petitioner in the amount of \$1,432.26 for July 26, 2012 through August 2012, which petitioner cashed. In October 2012, HPD made a \$1,200.00 HAP payment to petitioner for September 2012, which petitioner cashed.

On August 6, 2012, petitioner submitted a Notice of Claim to the Office of the Comptroller, naming HPD as the City agency involved and described the nature of the claim as follows:

Department of Housing Preservation and Development (DHPD) has failed to tender payment and/or restore the payments of monthly subsidy to the Claimant for Apt. B-42 located at 751 Walton Avenue, Bronx, NY 10451, due and owing pursuant to a HUD contract entered into between the Claimant and DHPD.

The claimed amount was \$5,977.00. By letter dated September 27, 2012, the Comptroller's

Office requested information from HPD regarding the Notice of Claim. By letter dated October 15, 2012, HPD advised the Comptroller's Office as follows:

In response to Notice of Claim #2012LW020095 regarding Breach of Contract in the amount of \$5,977.00 for failure to pay monthly rent subsidy on behalf of Jacqueline Hernandez, 751 Walton Avenue, Bronx New York, #B-42. Please be advised that an extensive search of our database confirms that the landlord did not get paid for the period 3/1/2012 through 7/24/2012; the reason the landlord was not paid was due to Housing Quality Standards (HQS) failure...

The landlord is not entitled to payment from 3/1/2012 through 7/24/2012 due to HQS abatement, the unit did however pass HQS inspection on 7/25/2012 and the HAP was reinstated. A manual adjustment was created in the amount of \$1,432.26 for the period 7/25/2012 (prorated \$232.26) and regular monthly HAP @ \$1,200.00 for August 2012, totaling \$1,432.26...

According to our records as of today HPD does not owe the landlord money on behalf of Jacqueline Hernandez, 751 Walton Avenue, #B42.

By Notice of Petition and Verified Petition dated November 30, 2012, petitioner commenced the instant proceeding seeking a writ of mandamus to compel respondent HPD to pay, retroactively, the Section 8 subsidy due and owing for the dwelling unit of Ms. Hernandez to the date when HPD suspended/terminated payment of HAP, or March 1, 2012.

HPD provides subsidies through public housing agencies ("PHAs") such as NYCHA. The PHAs certify eligible families for participation in the program and enters into HAP contracts with owners of agency-approved rental housing units, for direct payment of a portion of the tenants' monthly rent. *See* 42 U.S.C. § 1437. Owners must maintain the unit in accordance with HPD promulgated HQS. "The PHA must not make any housing assistant payments for a dwelling unit that fails to meet the HQS, unless the owner corrects the defect within the period

specified by the PHA and the PHA verifies the correction.” 24 C.F.R. § 982.404. Chapter 8 of HPD’s Administrative Plan authorizes HPD to abate HAP to an owner on behalf of a Section 8 participant for the failure to correct an HQS violation. Chapter 8 states, in pertinent part,

When an owner fails to correct an HQS violation within the allotted time frame, HPD will provide the owner with written notice that the HAP payment will be abated effective the first of the month following the correction period. A copy of the notice will also be sent to the tenant. No retroactive payments will be made to the owner for the period of time the rent was abated and the unit did not comply with HQS....

The abatement will continue until all HQS deficiencies have been corrected and until the date the unit passes re-inspection. It is the owner’s responsibility to notify HPD that deficiencies have been corrected so that a re-inspection can be scheduled...

Under New York law, “mandamus lies to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought.” *Matter of Legal Aid Society of Sullivan County v. Scheinman*, 53 N.Y.2d 12,16 (1981). Mandamus does not lie to compel acts that “are entrusted to the respondent official’s discretion. Mandamus is available only where the petitioner’s right to performance is so clear as to admit of no doubt or controversy.” *Coastal Oil New York Inc. v. Newton*, 231 A.D.2d 55, 57 (1st Dep’t 1997).

In the instant action, petitioner is not entitled to mandamus relief compelling HPD to pay, retroactively, the Section 8 subsidy due and owing for the subject apartment to the date when HPD suspended/terminated payment of HAP as petitioner has not shown a clear legal right to the relief sought. The subject apartment failed an HQS inspection on January 24, 2012 and failed a re-inspection on February 17, 2012. Thus, petitioner received a Notice of Abatement letter from HPD which stated that HAP for the subject apartment would be abated effective March 1, 2012.

