Sapp v City of New York
2013 NY Slip Op 32325(U)
September 27, 2013
Sup Ct, New York County
Docket Number: 450677-2013
Judge: Margaret A. Chan
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EXPEDITE

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

PRESENT: HON. MARGARET A. CHAN, *Justice* PART 52

ALYCE SAPP

- v -

CITY OF NY

INDEX NO. 450677/13

MOTION DATE

MOTION SEQ. NO. 002

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for renew

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

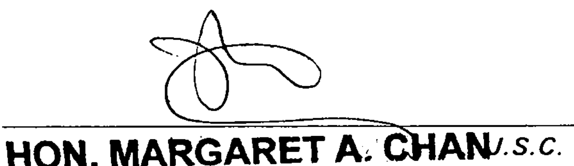
Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION DETERMINED PURSUANT TO ANNEXED DECISION AND ORDER

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

Dated: 9/27/13



HON. MARGARET A. CHAN 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
NEW YORK COUNTY

PRESENT: **Hon. Margaret A. Chan**
Justice

PART 52
***INDEX* 450677-2013**

ALYCE SAPP, LESLIE BROWN, SAHEM ABDALLA, SHANIQUA STOKLEY, DORETHA DILLAHUNT, on behalf of themselves and all others similarly situated,

Petitioner,

- v. -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, and SETH DIAMOND, as Commissioner of the New York City Department of Homeless Services,

Defendants.

Decision and Order

Last October 29, 2012, Hurricane Sandy destroyed property and homes of thousands of New York City residents. Many households had to evacuate from their homes. To accommodate the multitude of people that were rendered homeless, defendant New York City Department of Homeless Services (DHS) initiated the New York City's Hotel and Interim Placement Program (Hotel Program) as the New York City shelter system was insufficient to house the burgeoning number of evacuees. Plaintiffs are the remaining evacuees in the Hotel Program, which is set to terminate on September 30, 2013. Defendants initially had sought to terminate the Hotel Program by May 31, 2013. By order dated May 15, 2013, this court granted plaintiffs' motion for a preliminary injunction barring defendants from terminating the Hotel Program on May 31, 2013. Defendants now move by Order to Show Cause to renew this court's decision of May 15, 2013 and vacate the preliminary injunction, which plaintiffs oppose.

Facts

In May 2013, there were 395 households remaining in the Hotel Program of which 239 were linked to housing programs and 156 with no transition plans. The current facts, as of September 19, 2013, the date this order to show cause was filed, 179 households remain in the Hotel Program[1], of which 76 have been linked to a permanent housing program; 5 are waiting for repairs on their own homes; 94 are in the Temporary Disaster Assistance Program (TDAP) application or appeals process; and 4 no longer receive DHS payments.

In May 2013, plaintiff's main claim for a preliminary injunction was that the Hotel Program termination notices sent out in April and May 2013 were inadequate and deprived them of a property interest without due process of law. Defendants contended that no property interest was created by the Hotel Program because plaintiffs' expectation of continued benefits was unilateral.

In addressing plaintiff's due process claim, the May 15, 2013 order first addressed The Due Process Clause, which, "forbids the State to deprive individuals of life, liberty, or property without due process of law" (USCA Const. Amend. 14; McKinney's Const. Art. 1, § 6; *DeShaney v Winnebago County Dep't of Social Services*, 489 US 189, 194-196 [1989]), and examined whether there plaintiffs had a property interest because "there must be a property interest to trigger the requirements of procedural due process" (*Cadman Plaza North, Inc. v New York City Dept. of Housing Preservation and Development*, 290 AD2d 344 [1st Dept 2002] *citing Matter of Daxor Corp. v State of New York Department of Health*, 90 NY2d 89, 98 [1997] *cert. denied* 523 US 1074). "[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits" (*Daxor Corp. v State Dept of Health*, 90 NY2d at 98 *quoting Board of Regents v Roth*, 408 US 564, 577). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must

[1] As of September 24, 2013, the date of oral arguments for the motion to renew, the parties informed that there were 166 household remaining in the Hotel Program with 15 households set to move to permanent housing by September 30, 2013.

have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . . ." (*id.*).

The May 15, 2013 decision found that plaintiffs had a property interest in receiving housing assistance from the Hotel Program based on the following reasoning: "Given the HRO's[2] efforts in coordinating with other city and federal programs to accomplish its goal of getting evacuees 'to long-term housing within a time-frame of 18 to 24 months,' [cite omitted]; its outreach efforts to gather evacuees; its compilation of data and statistics relevant to housing needs and costs; and its applications for funds from various sources are all demonstrative of its goal to help the evacuees find more permanent housing, a person who is an evacuee that was accepted into the Program has a legitimate expectation he/she will receive housing assistance for that time-frame. This expectation rises to the level of a property interest protectable under the Due Process Clause (*accord, McWaters v Federal Emergency Management Agency*, 436 FSupp2d 802, 818 [ED La 2006] the court found that the mandatory and non-discretionary policies under the Stafford Act and its implementing regulations requiring FEMA to automatically provide emergency disaster assistance to all applicants created reasonable expectations in these applicant and this expectation rose to a level of protectable property interest)" (*Sapp v City of New York*, Index 450677/2013 [Sup Ct, NY Cty, May 15, 2013]). Further, while the Hotel Program was not promulgated by statute, the Hotel Program's solicitation of funds, through the Mayor's Office of Housing Recovery Operations (HRO), from Federal Emergency Management Agency (FEMA) and Department of Housing and Urban Development (HUD) created an expectation that the funds from these sources would be used in accordance to their mandates (*id.*).

In support of their opposition to plaintiffs' motion for a preliminary injunction, defendants argued that plaintiffs would be "hard pressed" to establish a property interest when there is no funding for the program. However, defendants had divulged then that $9 million was immediately available for rental assistance. Defendants also acknowledged that they have applied for FEMA

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[2]The Mayor's Office of Housing Recovery Operations (HRO).

reimbursement, which payment was pending, and HUD had approved a Community Development Block Grant (CDBG) to fund the HRO, which includes the Hotel Program. Therefore, the federal financial assistance was approved and in the process of being disbursed. This court found that with available funds at hand and the federal grant being approved for the intended purpose of assisting evacuees with their housing needs, there was a mutual understanding that plaintiffs would be receiving those benefits, thereby creating a possessory interest triggering due process requirements.

Discussion

Defendants now bring the instant motion to renew the May 15, 2013 order. A motion to renew pursuant to CPLR § 2221 (e) "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" (CPLR § 2221 (e)(2)). The new fact proffered by defendants is the cessation date of FEMA assistance to fund the Hotel Program - that date is September 30, 2013. Defendants submitted an affidavit of HRO Director, Brad Gair, who averred that the implementation of the Hotel Program was based on FEMA's representation that it would reimburse the New York State Office of Emergency Management (State OEM) and that New York City does not have a budget to support the Hotel Program. The cost of the Hotel Program, which, to date, had provided temporary shelter to 1,313 households, was over $70.5 million (*see* Gair Aff). As per the agreement entered into between State OEM and FEMA, the funding ends on September 30, 2013 (*see* Gair Aff, Exh A). An affidavit by Michele M. Ovesey, the current Commissioner and General Counsel of DHS, added that the average cost to maintain each household in the Hotel Program at present was $16,355.00 per month (*see* Supplemental Aff of Michele Ovesey). While plaintiffs claim that the average hotel room cost is about $252.00 per night per household, Ovesey stated that plaintiffs' figure does not account for the monthly cost of the hotel room, the case management services, program management, security, food, transportation and data systems. Ovesey added that the cost of the hotel rooms have risen due to supply and demand to an average of $266.00 per night (*id.*).

[* 6]

In their opposition, plaintiffs argue that defendants' motion to renew should be denied as there are no new material facts to vacate the preliminary injunction. They claim that defendants' opposition in the preliminary injunction motion was that the Hotel Program had to end by May 31, 2013 due to budgetary concerns. Plaintiffs point out that in May, defendants argued they had no assurance that FEMA would come through with the reimbursement. Also at that time, defendants received approval of the CDBG grant for housing recovery. Thus, plaintiffs posit that the preliminary injunction was granted despite the lack of FEMA funding because the CDBG grant was available. Plaintiffs reasoned that the unexpected FEMA reimbursement for the Hotel Program is a windfall for defendants, and the cessation of FEMA funds should not interfere with defendants' obligation to continue the Hotel Program.

Plaintiffs' argument appears to exclude FEMA reimbursements from the Hotel Program as the CDBG grant was in place when the May 15, 2013 order was issued. However, while the decision granting the preliminary injunction gave weight to the availability of the CDBG grant in determining not to curtail the Hotel Program[3], it also noted that at that time, the only known facts about the CDBG was that it was approved and the funds were immediately available, and that Director Brad Gair had intended the CDBG grant to have a part in HRO and the Hotel Program's housing goals. Indeed, while defendants had cautioned that the CDBG program had eligibility requirements (unlike the Hotel Program) and implementation of the program would be in September, the information on the CDBG program was scant. What is now known is that the CDBG grant was used to fund TDAP, a short-term rental assistance program that is overseen by New York City Housing Preservation and Development (*see* Michele Ovesey Aff., p3, fn2), and is to continue post September 30, 2013. The May 15, 2013 order also agreed with defendants that absent funding for the Hotel Program, "plaintiffs would 'hard-pressed' to establish a legitimate entitlement to that benefit" (*Kelly Kare, Ltd v O'Rourke*, 930 F2d 170, 179 [2d Cir 1991] *citing O'Bannon v Town Court Nursing Center*, 477

[3]In the May 15, 2013 order, this court stated that "to terminate the Hotel Program just when the CDBG funding became available does not seem reasonable".

US 773 [1980]). However, back in May, there was evidence that funding was at hand, the CDBG grant was approved, and the FEMA reimbursement was forthcoming. Therefore, the May 15, 2013 decision did not excise FEMA reimbursement as superfluous or inconsequential.

Moreover, the May 15, 2013 decision also made clear that "plaintiffs do not have a property interest in the Hotel Program to pay for their hotel stay indefinitely or until such time that they can find permanent housing whenever that might be". The new information showed that FEMA had awarded a grant to the State OEM as reimbursement for Hotel Essential Sheltering Program (HESP). Under Section 2 of the Addendum to the Grant Agreement,

> "... FEMA shall reimburse the State for the following allowable costs as emergency sheltering under Section 403 of the Stafford Act:
> (1) The full costs incurred by the City in connection with HESP for all hotel, motel, and hostel rooms contracted with and paid for from October 29, 2012 through March 31, 2013 as supported by the documentation provided by the City; and
> (2) The costs incurred by the City for HESP-occupied rooms from April 1, 2013 through September 30, 2013, where those rooms were occupied by individuals who were/are:
>> a. Registered with FEMA prior to FEMA's application deadline of April 13, 2013;
>> b. Checked in to a HESP-contracted room prior to April 1, 2013, which constitutes the end of the cold-weather emergency threat as previously agreed by FEMA and the City;
>>
>> . . . .
>
> (3) FEMA will not reimburse the State for any costs incurred by the City after September 30, 2013, in connection with HESP.

(*see* Gair Aff, Exh A).

The Addendum was signed on or about September 12, 2013 (*id.*).

As this new information was not available at the time the May 15, 2013 decision was rendered, defendants' motion to renew is granted. Upon renewal, the facts show that the CDBG funds were used toward housing recovery, as intended, but the program implemented to this end is TDAP, which remain available to plaintiffs after September 30, 2013. The facts also show that FEMA reimbursements for the Hotel Program will end on September 30, 2013. When the funding ends, so does plaintiffs' property interest in the Hotel Program benefits.

Plaintiffs also argue that with the decrease in the number of households that remain in the

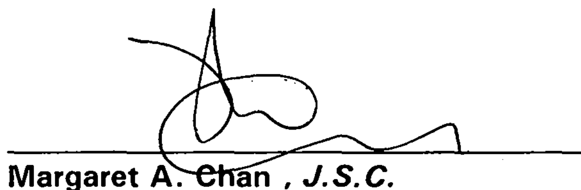
Hotel Program, the cost to defendants is likewise reduced. Moreover, considering that 76 households are linked to a housing program and 5 households are waiting to move back into their own homes, it made no sense to again put these evacuees out of their temporary homes in the Hotel Program. However, defendants respond that there is no given time as to when these households will be moving out. Further, defendants state that the remaining households can turn to the shelter system which now has available space, and that TDAP will continue to work with the remaining households to attain longer-term housing. Defendants remind that the Hotel Program was implemented because the shelter system could not handle the influx of people rendered homeless because of Hurricane Sandy; it was not to remain a permanent program.

It is true that plaintiffs have suffered much, and can do without another upheaval of moving into the shelter system. However, the point of this upheaval is the lack of further funding from FEMA and there is no showing or even argued that FEMA can be estopped from declining to fund the Hotel Program. To continue the Hotel Program would transfer the financial burden onto the City, which "does not have a budgeted source of funds to operate the Hotel Program" (Gair Aff).

Accordingly, defendants' motion for leave to renew is granted; and upon renewal, the preliminary injunction is vacated.

This constitutes the decision and order of the court.

Dated: **September 27, 2013**



Margaret A. Chan , *J.S.C.*