

**Matter of Sanders v New York City Dept. of Hous.  
Preserv. & Dev.**

2014 NY Slip Op 30100(U)

January 14, 2014

Sup Ct, New York County

Docket Number: 104145/12

Judge: Doris Ling-Cohan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY  
PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36

In the Matter of the Application of

RENA SUSAN SANDERS

Petitioner,

INDEX NO. 104145/12

MOTION SEQ. NO. 001

-against-

NEW YORK CITY DEPT. OF HOUSING  
PRESERVATION AND DEVELOPMENT, NEW  
YORK CITY DEPT. OF CITYWIDE  
ADMINISTRATIVE SERVICES/DIVISION OF  
CITYWIDE PERSONNEL SERVICES, and THE  
CITY OF NEW YORK,

Respondents

**FILED**

JAN 16 2014

NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1-7 were considered on this Article 78 proceeding and cross-motion to dismiss:

| <u>PAPERS</u>  | <u>NUMBERED</u>      |
|--|----------------------|
| Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____  | <u>1, 2, 3, 4, 5</u> |
| Answering Affidavits — Exhibits _____  | <u>8</u>             |
| Replying Affidavits _____  | <u>9</u>             |
| Cross-Motion: <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No                    (memo of law) | <u>6, 7</u>          |

Upon the foregoing papers, it is ordered that these motions are decided as indicated below.

Petitioner Rena Susan Sanders commenced this Article 78 proceeding, *pro se*, to: (1) reverse the respondent New York City Department of Housing Preservation and Development's (HPD) decision, dated December 21, 2007, discharging petitioner from her employment; and (2) reinstate petitioner in her former position.

BACKGROUND

Petitioner was employed, by respondent HPD, as a Civil Engineer I, from March 2004

until December 21, 2007, whereupon her employment was terminated. In October 2006, petitioner was placed on a temporary involuntary leave of absence due to various incidents and complaints regarding petitioner's behavior. Respondent HPD directed petitioner to report to Dr. Azariah Eshkenazi (Dr. Eshkenazi), to determine petitioner's mental fitness to perform the duties of her position. On November 3, 2006, Dr. Eshkenazi conducted a psychiatric evaluation of petitioner and deemed her not mentally fit to perform the duties of her position. Dr. Eshkenazi recommended psychiatric treatment, and opined that, with mood medication, petitioner would likely be able to resume her position. By letter dated November 15, 2006, respondent HPD notified petitioner that she was being placed on a leave of absence pursuant to Civil Service Law § 72(1), effective October 30, 2006. Petitioner initially objected to such leave of absence, but later withdrew her objection.

Petitioner requested reinstatement by letter, dated May 31, 2007, to Thomas Croce, Director of New York City Department of Citywide Administrative Services (DCAS) Medical Appeals & Reinstatements. Respondent DCAS requested additional information to process such reinstatement, including a letter from petitioner's psychiatrist stating that she was fit to perform the duties of her position. Petitioner responded to such request by stating that she could not provide such letter, as she did not have a psychiatrist, or a mental illness, and that such record of mental illness was fabricated by respondent HPD.

Respondent HPD notified petitioner, by letter dated November 28, 2007, that she had been continuously absent from her position for over one year from a non-work related disability and that her employment would be terminated effective December 21, 2007, pursuant to Civil Service Law § 73, if she was unable to return to her position. Petitioner, by letter dated

December 6, 2007, denied that she had any disability or mental illness, and stated she was fit for her position. By letter dated December 21, 2007, respondent HPD terminated petitioner's employment, effective December 21, 2007.

Petitioner filed a complaint against respondents HPD and DCAS, alleging gender/sex and age discrimination under, *inter alia*, Title VII of the Civil Rights Act of 1964 (Federal Action). Summary judgment was granted against petitioner in the Federal Action, in July 2010. By order dated October 18, 2012, the District Court denied petitioner's motion for reconsideration. Petitioner appealed such decision, which was subsequently affirmed by the United States Court of Appeals for the Second Circuit in a summary order, issued April 30, 2012. Thereafter, petitioner commenced this Article 78 proceeding. Respondents now jointly cross-move to dismiss on the grounds that the petition is time-barred, *res judicata*, and collateral estoppel.

#### DISCUSSION

Preliminarily, this court must determine whether this Article 78 proceeding was timely filed. Pursuant to CPLR §217, "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner". In support of the cross-motion to dismiss, respondents argues that the four month period to commence an Article 78 proceeding began to run on December 21, 2007, the date petitioner's employment was terminated, and, thus, respondent HPD's decision became final and binding.

Here, a final determination, dated December 21, 2007, was made. In fact, petitioner concedes that she received respondent HPD's letter terminating her employment as of December 21, 2007. Thus, this proceeding, to reverse respondent HPD's decision, dated December 21, 2007, to terminate petitioner and to reinstate petitioner to her position, which was not

commenced until November 5, 2012 (almost five [5] years later), is time-barred.

Petitioner's argument that this proceeding is timely, as it was commenced within 6 months of the decision by the Second Circuit, affirming the District Court's decision to grant summary judgment against petitioner, issued April 30, 2012, is misplaced. CPLR §205(a) states that "[i]f an action is timely commenced and is terminated in any other manner than by a . . . final judgment on the merits, the plaintiff . . . may commence a new action upon the same transaction or occurrence . . . within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action". It is undisputed that petitioner's Federal Action was terminated on April 30, 2012 by the issuance of the Second Circuit summary order. As this Article 78 proceeding was not commenced until November 5, 2012, petitioner failed to commence this proceeding within six (6) months of the termination of her Federal Action. Moreover, pursuant to CPLR §205(a), this Article 78 proceeding is only timely if it would have been timely when petitioner commenced the Federal Action. Petitioner concedes that the Federal Action was commenced on April 24, 2009 in District Court. As respondents' final determination became final and binding on the date of her termination, December 21, 2007, this Article 78 proceeding would have been time-barred on April 24, 2009, and, thus, would not have been timely commenced at the time of the filing of the Federal Action. Petitioner further argues that, while the Federal Action was commenced in District Court on April 24, 2009, she filed a complaint with the Equal Employment Opportunity Commission (EEOC) on June 9, 2008. Even if this court were to consider petitioner's EEOC complaint as the "prior action", pursuant to CPLR §205(a), this proceeding would still be untimely, as June 9, 2008 is over four (4) months from the final determination dated December 21, 2007. As such, this proceeding is time-barred.

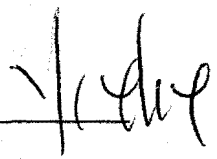
Accordingly, it is

ORDERED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that respondents' cross-motion to dismiss is granted; and it is further

ORDERED that within 30 days of entry of this order, respondent New York City

Department of Housing Preservation and Development shall serve a copy upon all parties with notice of entry.

Dated: \_\_\_\_\_ 

\_\_\_\_\_   
DORIS LING-COHAN, J.S.C.

Check one:  FINAL DISPOSITION       NON-FINAL DISPOSITION  
Check if Appropriate:  DO NOT POST

J:\Article 78\Sanders v HPD - time barred, no tolls, SOL.wpd

**FILED**  
JAN 16 2014  
NEW YORK  
COUNTY CLERK'S OFFICE