

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

2014 NY Slip Op 31748(U)

July 3, 2014

Sup Ct, New York County

Docket Number: 101310/13

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 21

FRED L. PASTERNAK,

Petitioner,

- against -

NEW YORK CITY DEPARTMENT OF HOUSING  
PRESERVATION & DEVELOPMENT,

Respondent.

INDEX NO. 101310/13

MOTION DATE 4/17/14

MOTION SEQ. NO. 001

The following papers, numbered 1 to 4, were read on this Article 78 Petition

Notice of Petition — Verified Petition — Exhibits A-T

No(s). 1-2

Notice of Cross Motion — Affirmation in Support of Cross Motion — Exhibits A-C

No(s). 3-4

Upon the foregoing papers, this petition is decided in accordance with the annexed memorandum decision, order and judgment.

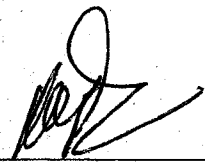
*Copies to both sides by mail.*

**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).

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

Dated: 7/3/14  
New York, New York

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

- 1. Check one:.....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. Check if appropriate:..... PETITION 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: IAS PART 21**

-----X  
FRED L. PASTERNAK,

Petitioner,

- against -

Index No. 101310/13

NEW YORK CITY DEPARTMENT OF HOUSING  
PRESERVATION & DEVELOPMENT,

Respondent.

**Decision, Order and  
Judgment**

-----X  
**HON. MICHAEL D. STALLMAN, J.:**

Petitioner Fred L. Pasternack brings this Article 78 proceeding to reverse the determination of respondent New York City Department of Housing Preservation & Development (HPD) that petitioner's 2011 registration for the building located at 29 East 63<sup>rd</sup> Street in Manhattan, also defined as lot 26 on block 1378 in Manhattan (Building) was not valid.

Petitioner seeks an order:

- (1) directing respondent HPD either to correct its records that reflect that petitioner's 2011 property registration was not valid or to provide an official letter reflecting that petitioner's 2011 property registration should have been determined to be valid but that it was by virtue of respondent's mistake that it was not; and
- (2) awarding petitioner the costs of pursuing this action to include the obtaining of certified property registration forms.

Respondent HPD cross moves to dismiss the petition on the ground that the petition is time-barred.

### BACKGROUND

In September 1993, Frebar Development Corporation (Frebar), a corporation incorporated in New York of which petitioner was the president and sole shareholder, purchased the Building. (Verified Petition ¶ 5.) The Building consists of three residential units and a doctor's office. (*Id.* Ex. A.) Petitioner resides in one of the residential units, conducts his medical practice in the doctor's office, and rents the two remaining units. (*Id.* ¶ 6.) Each year, the building is registered with HPD.

In December 2007, Frebar entered into a residential lease to rent one of the apartments. (*Id.* ¶ 7.) The tenant allegedly did not move into the apartment and Frebar and petitioner instituted a legal action against the tenant for unpaid rent, *Frebar Dev. Corp. v Posner*, Index No. 103525/2010, which was assigned to Justice Wooten. (*Id.*) On December 7, 2010, Justice Wooten granted petitioner and Frebar summary judgment in their favor as to liability against the tenant, and referred the issue of damages to a Special Referee to hear and report to the court. (*Id.* Ex. B.)

Before the hearing began, Frebar conveyed title to petitioner individually. (*Id.* Ex. C.) On October 4, 2011, the Special Referee

rendered her report, which was subsequently rejected by Justice Wooten.

(*Id.* ¶ 9.)

On September 11, 2012, the Special Referee conducted a second hearing. (*Id.*) During this hearing, the tenant raised the issue that

petitioner had not complied with section 325 of New York's Multiple

Dwelling Law for the period encompassing the hearing, in that no valid

property registration was on file with HPD at that time. (*Id.* ¶ 10.)

Petitioner alleges that this is the first time he was made aware of this issue

as he claims to have filed an annual property registration with HPD every

year, and that 2011 was the only year for which HPD deemed the

registration not valid. (*Id.* ¶ 10, Ex. D.)

On October 16, 2012, as a consequence of HPD's determination that

petitioner did not have a valid 2011 property registration on file, the Special

Referee denied without prejudice petitioner's request to collect any rent

owed. (*Id.* Ex. E.) By decision dated August 2, 2013, Judge Wooten

confirmed the Special Referee's report. (*Id.* Ex. F.)

Petitioner claims that after the Special Referee issued the report, he

spoke with the head of the property registration unit at HPD, Rick

Immediato. (*Id.* ¶ 11.) According to petitioner, Immediato told him that,

"because there was a change of title, any preprinted information supplied

on the registration application was deleted when the application was processed and, for that reason, the application was deemed invalid.” (*Id.*)

Petitioner claims he then told Immediato that, “there was nothing in the instructions for completing the registration application to that effect” and that “the fee for registration was negotiated by HPD.” (*Id.*) According to petitioner, Immediato responded explaining that, “the process was twofold, fee payment and providing information, and that the two issues were independent of each other.” (*Id.*)

By email dated September 21, 2012, petitioner contacted the Deputy Commissioner of HPD, Vito Mustaciuolo. (*Id.* Ex. H.) In the email, petitioner stated in pertinent part,

“I have an ongoing landlord-tenant issue in New York Supreme Court. On 11 September, I had a hearing before a special referee related to that matter. The issue deals with uncollected rent and charges related to the uncollected rent. At the time of that hearing, opposing counsel presented a print-out from HPD’s website that reflected no current registration for my property and also presented case law that established the fact that rent is uncollectable if a property is not registered with HPD.

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I reviewed my copy of the Form. I reviewed the instructions for completing the Form. According to the instructions, I believe I completed the Form properly. There was nothing in the instructions, both on the Form and in the separate instruction page, to indicate that all preprinted information had to be redone even if correct when there was a change in the ‘owner.’

The preprinted information on the Form reflected that the property was jointly owned by me and [Frebar]. That was incorrect. The

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property was owned and is owned by me individually. As instructed, I crossed out that erroneous information and inserted the correct information to reflect the individual ownership. Other preprinted information was unchanged and, consequently, according to the instructions, left intact.

When I raised this issue with Mr. Immediato, he told me that nothing could be done about correcting the situation. He told me that all I had to do was to register for the current year, and they system would reflect that I had a current registration. That is an inadequate solution to my situation.

I have always registered the property. For my legal purposes, I may have to obtain certified copies of my registration from 2007 to the present. I am now being told that my property was not registered for the period of October 2011 through September 2012 . . . [.]

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My position is that, ideally, I would like the system to be updated to reflect proper registration of the year in question. I do not know how your systems work and can accept the contention that it is not possible to correct the error. I do not totally believe that it is impossible but will accept that contention. Given the alleged impossibility, I have requested a letter from you or some other official on proper letterhead reflecting that through an error on the part of HPD my property, while not reflected in the computer records due to an impossibility to rectify those records, was indeed properly registered with HPD.”

(Id.)

By letter dated September 28, 2012, HPD Deputy Commissioner Mustaciuolo replied to petitioner’s September 21, 2012 email, stating in pertinent part,

“HPD has reviewed the registration history of the [Building] from the years 2007 to 2011. The [Building] was validly registered during that time except for the year 2011.

When the 2011 registration was deemed invalid, HPD's records show that the agency notified you of the fact. In addition, since you have certainly registered the [Building] correctly in the past, you were aware that you did not receive the receipt that HPD sends to owners to confirm valid registrations. While HPD appreciates that you have historically registered the [Building] in the past, the agency is not able to retroactively deem the [Building] validly registered for 2011."

(*Id.* Ex. I.) Petitioner sent multiple emails to HPD Deputy Commissioner Mustaciuolo seeking explanation as to why the 2011 registration was not valid, but alleges that he did not receive any explanation. (*Id.* Ex. J.) Petitioner then sent several emails to the Commissioner of HPD, Mathew Wambua seeking an explanation but alleges that he did not receive any response. (*Id.* Ex. K.)

By two separate emails dated September 27, 2012, petitioner contacted City Council Member Daniel Garodnick and then Public Advocate Bill de Blasio about his 2011 property registration issue, attaching the emails he sent to the Deputy Commissioner and Commissioner of HPD.

(*Id.* Ex. L.) Petitioner and Council Member Garodnick's staff communicated about petitioner's 2011 registration issue until approximately February 20, 2013. (*Id.*) Petitioner communicated with the Public Advocate's staff until approximately January 6, 2013. (*Id.*) Council Member Garodnick sent three letters to the Deputy Commissioner of HPD on petitioner's behalf. (*Id.* Ex. M.) According to petitioner, upon

information of belief, the then Public Advocate also sent letters to HPD on petitioner's behalf. (*Id.* ¶ 14.) Petitioner also filed multiple requests for an explanation on the non-validity of the 2011 property registration at the Mayor's website. (*Id.* Ex. N.) Petitioner alleges he never received a response other than acknowledgement that the requests were received. (*Id.* ¶ 15.)

On January 10, 2013, petitioner filed a Freedom of Information Law (FOIL) request with HPD "requesting any and all records that would explain in what way [his] application was not completed in accordance with the instructions provided for completing the application and for what REASON the application was deemed not valid" (*Id.* Ex. O.) In response, petitioner received a copy of the 2011 registration application as filed but with redactions that included the preprinted information in box 10, but he alleges that HPD provided no explanation. (*Id.*)

By email dated, July 17, 2013, petitioner contacted the office of Robert Steel, Deputy Mayor, who oversees HPD. In his email, petitioner stated in pertinent part,

"It seems to me that I should be able to understand why my 2011 registration was not valid as opposed to simply receiving an administrative ukase. This would seem to be especially true given the legal implications of a failure to have a valid registration on file. It seems to me that if my fee for registration is received and negotiated, that should represent an acknowledgement of a valid registration. It

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seems to me that HPD should not stonewall efforts by the Public Advocate or a City Councilman to obtain a proper and complete answer to a valid request. It seems to me . . .

I appreciate any assistance you are able to provide including promoting greater accountability by government agencies.”

(*Id.* Ex. P.) On August 8, 2013, petitioner sent another email to Deputy Mayor Steel’s office. (*Id.*)

By letter dated August 27, 2013, HPD Deputy Commissioner Mustaciuolo provided petitioner with an explanation for the non-validity of the 2011 registration, stating in pertinent part,

“You have asked for the reason that the 2011 registration for the [Building] was deemed invalid. As has been explained to you, when a prior registration form is amended to indicate change of ownership, the information that is preprinted on the form is deleted. All appropriate fields must then be filled so that all information is complete.

The 2011 registration form that you submitted to HPD had the following errors: In Box 10, there was no emergency 24-hour phone number and area code in the New York City metropolitan area, and there was no person associated with such a number. These errors resulted in the registration being deemed invalid.

HPD sent a form known as the S1 to your address at 29 East 63<sup>rd</sup> Street, New York, indicating that the registration was invalid and needed to be corrected. That form was sent to you in mid-October 2011. . . . Since you did not submit a corrected registration form, the [Building] remained invalidly registered for the year 2011, and cannot be retroactively deemed valid for that time period.”

(*Id.* Ex. Q.) Petitioner responded to HPD Deputy Commissioner

Mustaciuolo by letter dated August 27, 2013. (*Id.* Ex. R.) By letter dated

August 29, 2013, HPD Deputy Commissioner Mustaciuolo sent a letter to petitioner stating, in pertinent part, “[t]his response is this agency’s final position on this matter.” (*Id.* Ex. S.) By email dated August 29, 2013, petitioner again contacted Deputy Mayor Steel’s office. (*Id.* Ex. T.) On September 3, 2013, Deputy Mayor Steel’s office called petitioner and informed him that “the Mayor’s office endorsed the determination by HPD and considered the matter closed.” (*Id.* ¶ 19.) On September 17, 2013, petitioner called Deputy Mayor Steel’s office, and the office advised him that “the Mayor’s office would not provide a letter and that the letter from HPD was sufficient to define the matter as closed.” (*Id.*)

On September 23, 2013, petitioner commenced this proceeding. On November 6, 2013, respondent HPD cross-moved to dismiss the petition as time-barred.

### DISCUSSION

“On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, *prima facie*, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff. Further, plaintiff’s submissions in response to the motion must be given their most favorable intendment.”

(*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011] [internal quotation marks omitted] [citations omitted].)

HPD argues that the limitations period began to run on September 28, 2012 when HPD Deputy Commissioner Mustaciuolo's sent petitioner a letter refusing petitioner's demand that HPD deem petitioner's 2011 property registration valid. In this letter, HPD Deputy Commissioner Mustaciuolo specifically stated, "[while] HPD appreciates that you have historically registered the [Building] in the past, the agency is not able to retroactively deem the [Building] validly registered for 2011." (Petition Ex. I.) HPD argues that the petition is time-barred because "petitioner had four months from HPD's September 28, 2012 refusal to commence an Article 78 proceeding, i.e., no later than January 28, 2013. However, petitioner did not commence the instant Article 78 proceeding until September 23, 2013, almost eight months after the statute of limitations expired." (Magsino Affirm. ¶ 21.) In opposition, petitioner argues that the petition is not time-barred because "[w]hether timed from the August 29, 2013, letter documenting that HPD's decision was final or from the conversation on September 3, 2013, with Deputy Mayor Steel's office, in which the finality of HPD's decision was endorsed . . . the filing of the [p]etition on September 23, 2013, was well within the statute of limitations . . ." (Petitioner Reply Memo. at 5.)

"An administrative determination becomes 'final and binding' when two requirements are met: completeness (finality) of the

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determination and exhaustion of administrative remedies. 'First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be ... significantly ameliorated by further administrative action or by steps available to the complaining party.'"

(*Walton v New York State Dept. of Correctional Servs.*, 8 NY3d 186, 194-195 [2007].) "An administrative determination becomes 'final and binding' when the petitioner seeking review has been aggrieved by it." (*Matter of Yarbough v Franco*, 95 NY2d 342, 346 [2000] [citations omitted].)

Based on the September 28, 2012 letter when HPD Deputy Commissioner Mustaciuolo refused to deem petitioner's 2011 registration valid (*Id.* Ex. I) and the October 16, 2012 report in which the Special Referee denied without prejudice petitioner's request to collect any rent owed in his landlord-tenant dispute, as a consequence of HPD's determination that petitioner did not have a valid 2011 property registration on file (*Id.* Ex. E), petitioner knew that his 2011 property registration was not valid and that HPD was not able to deem retroactively the Building validly registered for 2011. Petitioner alleges that he did not receive the initial notice of the invalid 2011 property registration from HPD, and that he first learned of the invalid 2011 property registration on September 11, 2012 during his landlord-tenant dispute. (*Id.* ¶¶ 10, 19, Ex. T). Petitioner does not deny that he knew that HPD considered the 2011 property

registration invalid as of September 2012 nor does he dispute that he received the September 28, 2012 letter. However, petitioner argues that the September 28, 2012 letter should not be considered “final and binding” upon petitioner because the September 28, 2012 letter “provided no explanation whatsoever of why [HPD]’s determination was made” and “[o]nly after the Mustaciu[o]’s August 29, 2013, letter and the subsequent conversation with [the Deputy Mayor’s office], was it clearly defined that the determination of HPD was ‘final’ and that the review by the Mayor’s Office was also ‘final.’” (Petitioner Reply Memo. at 2, 4.)

“In circumstances where a party would expect to receive notification of a determination, but has not, the Statute of Limitations begins to run when the party knows, or should have known, that it was aggrieved by the determination.” (*90-92 Wadsworth Avenue Tenants Association v City of New York Department of Housing Preservation & Development*, 227 AD2d 331 [1<sup>st</sup> Dept 1996].) The Court is constrained to dismiss the petition as time-barred because, under *90-92 Wadsworth*, petitioner knew he was aggrieved by HPD’s determination when he received HPD’s September 28, 2012 letter. Moreover, the Special Referee’s October 16, 2012 report concluded that petitioner could not collect unpaid rent in his landlord-tenant dispute due to the invalid 2011 registration. Petitioner reasonably

communicated with HPD and contacted his elected officials to attempt to resolve this dispute with HPD without resorting to litigation. Nevertheless, petitioner's only legal recourse would have been a timely Article 78 proceeding, as there were no other administrative remedies to exhaust. Contacting elected officials is not an administrative remedy. Moreover, an attempt to negotiate with an agency, after a final administrative determination, does not toll or extend the period of limitation. (See *Matter of Lubin v Board of Educ. Of City of N.Y.*, 60 NY2d 974, 976 [1983]; *Goonewardena v Hunter Coll.*, 40 AD3d 443, 443 [1st Dept 2007].) HPD's letter dated September 28, 2012 was final and binding upon petitioner upon his receipt of the letter, notwithstanding HPD's lack of explanation as to why the 2011 registration was deemed invalid. Thus, petitioner's commencement of this proceeding on September 23, 2013, was too late.

### CONCLUSION


Accordingly, it is hereby

ORDERED that respondent's cross motion to dismiss is granted; and  
it is further

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: July 3, 2014  
New York, New York

ENTER:

  
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J.S.C.

*[Faint, illegible text]*

**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).