

<b>Gross v Department of Hous. Preserv. &amp; Dev. (HPD)</b>
2020 NY Slip Op 31741(U)
May 8, 2020
Supreme Court, New York County
Docket Number: 101960/2019
Judge: John J. Kelley
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. JOHN J. KELLEY PART IAS MOTION 56EFM**

*Justice*

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ABRAHAM GROSS and NETTY GROSS,  
Petitioners/Plaintiffs,

- v -

DEPARTMENT OF HOUSING PRESERVATION AND  
DEVELOPMENT (HPD), SHATARA PELL, VICTOR  
HERNANDEZ, LOUISE CARROLL, BREAKING GROUND  
(BG), BRENDA ROSEN, VANESAA CUCURULLO,  
TERESA PALMIERI, TRAVIS FONG, and  
STEPHANIE LABARTA,

Defendants/Respondent.

INDEX NO. 101960/2019

MOTION DATE 05/02/2020

MOTION SEQ. NO. 001, 003

**DECISION, ORDER, AND  
JUDGMENT and ORDER OF  
TRANSFER**

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The following e-filed documents, listed by NYSCEF document number 1 (Motion 001) and 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, and 98 (Motion 003)

were read on these respective motions to/for CPLR ART 78 and DISMISSAL.

This is a hybrid action to recover damages and for related relief, alleging violation of civil and constitutional rights under color of state law pursuant to 42 USC § 1983, negligence, breach of contract, and breach of fiduciary duty, and proceeding pursuant to CPLR article 78 to review a December 5, 2019 HPD determination allegedly denying, in part, the plaintiff/petitioner’s request for agency records pursuant to the Freedom of Information Law (Public Officers Law § 84, *et seq.*; hereinafter FOIL). By order to show cause dated December 31, 2019 (Friedman, J.), the plaintiff/petitioner requested the court to grant the CPLR article 78 petition seeking relief under FOIL and, inter alia, stay the defendants/respondents from, among other things, leasing out certain apartments at the Waterline Square apartment complex in Manhattan that had been the subject of an HPD affordable housing lottery (MOT SEQ 001).

The defendants/respondents HPD, Shatara Pell, Victor Hernandez, and Louise Carroll (collectively the HPD defendants) move pursuant to CPLR 3211(a)(7) to dismiss the amended complaint insofar as asserted against them (MOT SEQ 003). The defendants/respondents Breaking Ground, Brenda Rosen, Vanesaa Cucurullo, Teresa Palmieri, Travis Fong, and Stephanie Labarta (collectively the Breaking Ground defendants) separately move under the same motion sequence to dismiss the complaint insofar as asserted against them.

The motion for a stay is denied, so much of the complaint/petition as seeks review of HPD's FOIL determination pursuant to CPLR article 78 is denied, and the portion of this matter constituting a CPLR article 78 proceeding is dismissed. The remaining causes of action are severed, those causes of action together are deemed to constitute a severed action, and the severed action and pending motions to dismiss the complaint in the severed action are transferred to a City Part of this court for disposition.

This dispute arises from the HPD's July 9, 2019 determination that the plaintiff/petitioner's income was insufficient to qualify him for a subsidized apartment at the Waterline Square apartment complex in Manhattan that were the subject of an apartment lottery. By decision, order, and judgment dated August 16, 2019, this court denied the plaintiff/petitioner's CPLR article 78 proceeding challenging that determination, concluding that the HPD's determination had a rational basis that was supported by the administrative record. The plaintiff/petitioner appealed that decision, order, and judgment to the Appellate Division, First Department. The appeal remains pending.

While his appeal was pending, the plaintiff/petitioner made several applications to this court to revisit its decision, order, and judgment, and to reinstitute a limited stay that prohibited HPD, as well as the owners of the Waterline complex and Breaking Ground, as marketing agent, from leasing out certain apartments pending hearing of the CPLR article 78 proceeding. This court denied all of those applications. On October 2, 2019, a justice of the Appellate Division granted a temporary restraining order that prohibited Waterline's owners and Breaking

Ground from leasing out one particular studio apartment and one particular one-bedroom apartment in Waterline Plaza to persons who had a less favorable apartment lottery status than the plaintiff/petitioner, pending that Court's determination of his motion for a preliminary injunction pending appeal. By Decision and Order dated December 5, 2019, a panel of the Appellate Division denied the plaintiff/petitioner's motion for a preliminary injunction pending appeal, and dissolved the limited October 2, 2019 temporary restraining order. This court thereafter declined to entertain his subsequent requests to reinstate any type of stay.

On December 24, 2019, the plaintiff/petitioner commenced the instant hybrid action and proceeding. On or about February 9, 2020, the petitioner served and filed an amended petition/complaint and motion. The amended petition/complaint asserts seven causes of action. The first through third and fifth causes of action seek to recover damages pursuant to 42 USC § 1983 for alleged deprivation of due process and other violations of constitutional rights. The fourth cause of action seeks to recover damages for negligence and pursuant to 42 USC § 1983 for additional alleged violations of constitutional rights. The sixth cause of action seeks to recover damages for breach of contract. The seventh cause of action seeks to recover damages for breach of fiduciary. Although none of the causes of action specifically seeks a review of the HPD's FOIL determination, the plaintiff/petitioner requests such relief in the body of the petition/complaint.

In their motion, the HPD defendants submit documentation and a certification establishing that they fully responded to the subject FOIL request. HPD thus discharged its duty pursuant to FOIL and 22 NYCRR 1401.2(b)(7)(ii) by certifying that "the records of which the agency is a custodian cannot be found after diligent search" (*see Matter of Rattley v New York City Police Dept.*, 96 NY2d 873 [2001]; *Matter of Lopez v New York City Police Dept. Records Access Appeals Officer*, 126 AD3d 637 [1st Dept 2015]). Although the plaintiff/petitioner "must show by more than speculation that all responsive documents were not produced" (*Matter of Mitchell v Slade*, 173 AD2d 226, 227 [1st Dept 1991]; *see Matter of Morgan v Nassau County*

*Police Dept.*, 197 AD2d 579 [2d Dept 1993]; *Matter of Wood v Ellison*, 196 AD2d 933 [3d Dept 1993]), he has not done so here. Hence, so much of the complaint/petition as sought to annul the HPD defendants' determination with respect to the plaintiff/petitioner's request for documents must be denied (see *Matter of Taylor v New York City Police Dept. FOIL Unit*, 25 AD3d 347 [1st Dept 2006]; *Matter of Tellier v New York City Police Dept.*, 267 AD2d 9 [1st Dept 1999]).

The remaining causes of action all seek money damages from the HPD defendants and the Breaking Ground defendants. HPD is an agency of the City of New York and the HPD defendants are represented by the New York City Corporation Counsel. Thus, regardless of whether the remaining claims state a cause of action, are barred by the doctrine of res judicata, or cannot be pursued against the HPD defendants because the plaintiff/petitioner failed to serve a timely notice of claim, the proper course of action for this court to take is to sever those causes of action, deem them to constitute a severed action, and transfer both the action and pending motions to dismiss the complaint in the severed action to a City Part of this court for disposition.

That branch of the plaintiff/petitioner's motion seeking to reinstitute the dissolved stay must be denied, as the Appellate Division has already dissolved an even more limited stay, this court has no authority to second guess the Appellate Division, and the assertions made and evidence submitted by plaintiff/petitioner do not warrant the issuance of a new stay.

Accordingly, it is

ORDERED that so much of the complaint/petition as sought judicial review of the December 5, 2019 New York City Department of Housing Preservation and Development HPD determination allegedly denying, in part, the plaintiff/petitioner's request for agency records pursuant to the Freedom of Information Law is denied (SEQ 001); and it is

ADJUDGED that so much of the hybrid action and proceeding as constituted a CPLR article 78 proceeding to review the December 5, 2019 New York City Department of Housing

Preservation and Development HPD determination allegedly denying, in part, the plaintiff/petitioner's request for agency records pursuant to the Freedom of Information Law, is dismissed (SEQ 001); and it is further,

ORDERED that the first, second, third, fourth, fifth, sixth, and seventh causes of action in the amended complaint/petition are severed and together shall constitute a severed action; and it is further,

ORDERED that the County Clerk shall assign a new index number to the severed action, and the plaintiff/petitioner shall not be required to pay an additional index number fee or RJI fee; and it is further,

ORDERED that the severed action, as well as the pending motions to dismiss the amended complaint/petition in the action, are remitted to the Trial Support Clerk, who is directed to transfer the matter to a City Part of this court; and it is further,

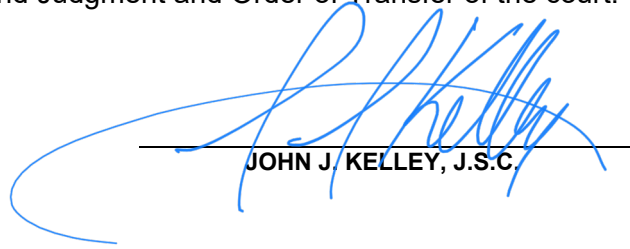
ORDERED that the defendants/respondents shall serve a copy of this order with notice of entry upon both the County Clerk and the Trial Support Clerk; and it is further,

ORDERED that the defendants/respondents shall serve the notice required by CPLR 8019(c) and a completed Form EF-22 upon the County Clerk and the Trial Support Clerk, and file the same with the County Clerk, and the Trial Support Clerk shall thereupon amend the court records accordingly; and it is further,

ORDERED that, upon the Clerk's issuance of a new index number to the severed action, the defendants/respondents shall file an RJI under that index number, without the need for the payment of any new RJI fee, and shall re-notice the motions to dismiss the amended complaint/petition in the severed action under that index number.

This constitutes the Decision, Order, and Judgment and Order of Transfer of the court.

5/8/20  
DATE

  
JOHN J. KELLEY, J.S.C.

CHECK ONE:SEQ 001

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

CHECK ONE:SEQ 003

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input checked="" type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: