

**Matter of Jewish Press, Inc. v New York City Dept. of  
Hous. Preserv. & Dev.**

2020 NY Slip Op 33414(U)

October 19, 2020

Supreme Court, New York County

Docket Number: 150695/2020

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

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INDEX NO. 150695/2020

IN RE APPLICATION OF THE JEWISH PRESS INC.,

MOTION DATE 10/23/2020

Plaintiff,

MOTION SEQ. NO. 001

- v -

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT,

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 16, 20, 21, 22, 23, 24, 25

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner Jewish Press Inc. (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211 (a), of the respondent New York City Department of Housing Preservation and Development (motion sequence number 001), is granted and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that counsel for respondent New York City Department of Housing Preservation and Development shall send a copy of this order, along with notice of entry, on all parties within twenty (20) days.

## MEMORANDUM DECISION

In this Article 78 proceeding, petitioner The Jewish Press, Inc. (TJP) seeks to compel respondent New York City Department of Housing Preservation and Development (HPD) to comply with a Freedom of Information Law (FOIL) request, while HPD cross-moves to dismiss the petition (together, motion sequence number 001). For the following reasons, the petition is denied, the cross motion is granted, and this proceeding is dismissed.

## BACKGROUND FACTS

TJP sent its initial FOIL request to HPD on April 7, 2019. *See* verified petition, ¶ 11; exhibit 2. HPD acknowledged TJP's request, assigned it # FOIL-2019-806-00635, and estimated that it would respond to the request by July 9, 2019, but it failed to do so. *Id.*, ¶ 11; exhibit 2. TJP deemed this failure to constitute a constructive denial of its FOIL request and submitted an appeal of said denial to HPD on July 25, 2019. *Id.*, ¶ 12; exhibit 3. On August 15, 2019, HPD sent TJP a quantity of documents in response to TJP's FOIL request. *Id.*, ¶ 15; exhibit 6. TJP deemed this to be an insufficient partial response that constituted a constructive denial of its FOIL request, and it submitted another appeal of said denial to HPD on August 22, 2019. *Id.*, ¶ 16; exhibit 7. HPD failed to respond to this appeal. *Id.*, ¶ 17.

TJP later commenced this Article 78 proceeding on January 20, 2020. *See* verified petition. Shortly thereafter, the COVID-19 national pandemic forced the court to indefinitely suspend most of its operations. Rather than file an answer, HPD ultimately submitted a cross motion to dismiss the petition on August 19, 2020. *See* notice of cross motion. The matter is now ready for disposition (motion sequence number 001).

## DISCUSSION

Article 78 proceedings are governed by a four-month statute of limitations which begins to run “after the determination to be reviewed becomes final and binding upon the petitioner . . . or after the respondent [agency’s] refusal, upon the demand of the petitioner . . . to perform its duty.” CPLR 217 (1); see also *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 (2005). In the case of FOIL requests, the Appellate Division, First Department, consistently holds that the four-month limitations period begins to run when an agency fails to respond to an appeal of a constructive denial within the 10-day period mandated by Public Officers Law § 89 (4) (a). See e.g. *Matter of Kohler-Hausmann v New York City Police Dept.*, 133 AD3d 437 (1<sup>st</sup> Dept 2015); *Matter of New York Times Co. v City of N.Y. Police Dept.*, 103 AD3d 405, 408 (1<sup>st</sup> Dept 2013), citing *Council of Regulated Adult Liq. Licensees v City of N.Y. Police Dept.*, 300 AD2d 17, 18-19 (1<sup>st</sup> Dept 2002); see also *Matter of Kelly v New York City Police Dept.*, 286 AD2d 581 (1<sup>st</sup> Dept 2001).

Here, TJP asserts that HPD’s August 15, 2019 partial document production was a constructive denial of TJP’s FOIL request and avers that it submitted an appeal of this constructive denial on August 22, 2019. See verified petition, ¶¶ 15-18; exhibit 7. HPD argues that Article 78 petition that TJP subsequently filed on January 20, 2020 was not timely, because more than four months had elapsed since the expiration of the 10-day period after TJP submitted its last appeal. See respondent’s mem of law at 3-4. HPD is correct. TJP submitted its appeal of HPD’s August 15, 2019 constructive denial on August 22, 2019. See verified petition, exhibit 7. The 10-day response period mandated by Public Officers Law § 89 (4) (a) therefore expired on September 1, 2019. Consequently, the four-month limitations period that governs Article 78 proceedings expired on January 1, 2020. However, TJP did not commence this proceeding until January 20, 2020. See verified petition. Therefore, it is plain that TJP’s petition is untimely.

TJP nevertheless argues that “the four month statute of limitation starts with a final and binding determination,” but that “lack of determination is not the same as a determination.” See petitioner’s mem in opposition at 3-7. TJP cites a quantity of appellate case law for the general propositions that “[a] administrative determination is considered ‘final and binding’ when an agency has ‘reached a definitive position on the issue that inflicts actual, concrete injury’ and administrative remedies have been exhausted,” and that “the statute of limitations to bring an Article 78 proceeding challenging an administrative determination begins to run when a petitioner is informed that their request has been denied,” but that where an agency’s order is ambiguous on this point, the courts should resolve the ambiguity against the agency. *Id.*; see e.g., *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30; *Matter of Kaufman v Town of New Castle, N.Y.*, 116 AD3d 1044 (2d Dept 2014); *Matter of Castaways Motel v Schuyler*, 24 NY2d 120 (1969). These propositions are correct; however, they are inapposite because this proceeding is governed by Public Officers Law § 89 (4) (a) and the case law which follows it. Therefore, the court rejects petitioner’s argument.

The court likewise rejects petitioner’s assertion that “HPD took the opposite position in another [TJP] FOIL matter.” See petitioner’s mem in opposition at 7-8. Proof of inconsistent agency determinations is relevant to analysis under the “arbitrary and capricious” standard. See e.g. *Matter of Lantry v State of New York*, 6 NY3d 49 (2005). However, the court cannot assess the merits of TJP’s Article 78 petition because it is time-barred.

Accordingly, the court determines that TJP’s petition should be denied, that HPD’s cross motion should be granted, and that this proceeding should be dismissed.

### CONCLUSION

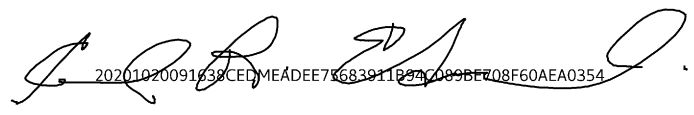
ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the petitioner Jewish Press Inc. (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211 (a), of the respondent New York City Department of Housing Preservation and Development (motion sequence number 001), is granted and this proceeding is dismissed; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

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10/19/2020  
DATE

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CAROL R. EDMEAD, J.S.C.

CHECK ONE:

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

APPLICATION:

CHECK IF APPROPRIATE: