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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JESSICA RIVERA,

Plaintiff,

- v -

RUTHANNE VISNAUSKAS, NEW YORK STATE HOMES AND COMMUNITY RENEWAL

Defendant.

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INDEX NO. 159854/2018

MOTION DATE 11/24/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, it is

ORDERED that the motion, by order to show cause, of petitioner Jessica Rivera (motion sequence number 001) which seeks leave to serve and file an amended verified petition pursuant to CPLR 3025 (b) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of respondents Ruthanne Visnauskas, as Commissioner of the New York State Division of Homes and Community Renewal, and the New York State Division of Homes and Community Renewal (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 respondents shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

In this Article 78 proceeding, petitioner Jessica Rivera (Rivera) moves by order to show cause for leave to serve and file an amended verified petition *nunc pro tunc*, while the respondent New York State Division of Homes and Community Renewal (DHCR) cross-moves for an order to deny the order to show cause and dismiss the petition (together, motion sequence number 001). For the following reasons, the order to show cause is denied and the cross motion is granted.

FACTS

Rivera resides in apartment 18B in a building situated in the "Co-op City" housing complex which is located at 120 Alcott Place in the County of the Bronx, City and State of New York. *See* verified petition, ¶ 2. Co-op City is operated pursuant to the Private Housing Finance Law (PHFL) as a "Mitchell-Lama Co-op" development by its non-party landlord, Riverbay Corporation (Riverbay). *Id.*, ¶ 8. Under the PHFL, the DHCR is the "supervising agency" charged with oversight of Mitchell-Lama Co-ops. *Id.*, ¶¶ 1-9.

Rivera's ex-husband, non-party Ruben Torres (Torres), became apartment 18B's official shareholder/tenant of record on March 17, 2006 when he executed a proprietary lease for the unit with Riverbay. *See* verified petition, ¶ 15. The couple divorced on November 12, 2015 pursuant to a judgment issued by Bronx County Supreme Court. *Id.*, ¶ 18. Rivera thereafter submitted a succession rights application for apartment 18B to Riverbay. *See* notice of cross motion, Sanders affirmation, ¶ 3. Riverbay denied her application in a letter decision dated September 25, 2017. *Id.*, ¶ 4. Rivera then appealed Riverbay's denial of her succession rights claim to the DHCR on October 11, 2017; however, on June 8, 2018, the DHCR issued a decision that denied her appeal. *Id.*, ¶¶ 5-6; verified petition, exhibit A.

Rivera's counsel avers that he purchased an index number and filed an Article 78 petition to challenge the DHCR's denial on October 9, 2018. *See* order to show cause, Taylor affirmation, ¶ 4. He presents an affidavit of service showing that the petition and notice of petition were delivered to the DHCR by hand on October 24, 2018. *See* notice of cross motion, Sanders affirmation, exhibit 1. However, he acknowledges that the notice of petition omitted an index number and a return date, and that it was not accompanied by a request for judicial intervention (RJI). *Id.*; order to show cause, Taylor affirmation, ¶ 5. For this reason, Rivera's counsel included a letter to the DHCR along with the petition and notice of petition that stated as follows:

> "In an abundance of caution I am serving the Petition on you pending issuance of an index number. I will be amending and re-serving shortly. Feel free to reach out to me if there are any questions in the meantime."

Id., notice of cross motion, Sanders affirmation, exhibit 2. Rivera's counsel states that he was subsequently contacted by counsel for the DHCR and that they agreed to "table the matter" of service "pending involvement by an attorney from the Attorney General's [AG's] office." *See* order to show cause, Taylor affirmation, ¶ 7. Rivera's counsel avers that the AG's office never contacted him, and that he subsequently submitted the instant order to show cause on January 28, 2020 seeking leave to serve and file an amended verified petition. *Id.*, ¶¶ 8-9. However, counsel for both the AG's office and the DHCR deny having made any arrangement with Rivera's counsel to extend Rivera's time to serve a new, non-defective petition and notice of petition. *See* notice of cross motion, Sanders affirmation, ¶¶ 8, 13; Walters affirmation, ¶¶ 3-4. Counsel for the AG's office stresses that Rivera's counsel "failed to take any action to bring this proceeding before this court either in 2018, 2019, or 2020 until the present application." *Id.*, Sanders affirmation, ¶ 8.

The court signed Rivera's order to show cause on February 5, 2020. *See* order to show cause. It notes that the order to show cause does not contain an explanation for the 15-month period that elapsed after the October 24, 2018 service of Rivera's original defective petition and notice of petition. *Id.* Shortly thereafter, the Covid-19 national pandemic caused the court to suspend most of its operations indefinitely. Respondents nevertheless sought an extension of their time to respond, and eventually filed a cross motion on June 26, 2020 seeking to deny the order to show cause and dismiss this Article 78 proceeding. *See* notice of cross motion. The matter is now fully submitted (together, motion sequence number 001).

DISCUSSION

Normally, the court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1st Dept 1996). A determination will only be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of the . . . facts . . .." *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell*, 34 NY2d at 231. On the other hand, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell*, 34 NY2d at 231-232. In this case, however, the court must address Rivera's order to show cause before it can perform the standard "arbitrary and capricious" analysis of her proposed amended verified Article 78 petition.

Rivera's February 5, 2020 order to show cause sought leave to file an amended petition and to deem it served on respondents *nunc pro tunc*. *See* order to show cause. Pursuant to

CPLR 3025 (b), "[a] party may amend his or her pleading . . . at any time by leave of court . . ., " such "[l]eave shall be freely given upon such terms as may be just . . .," and "[a]ny motion to amend . . . pleadings shall be accompanied by the proposed amended . . . pleading clearly showing the changes or additions to be made to the pleading." The Appellate Division, First Department, has long held that "leave to amend a pleading shall be freely granted absent prejudice or surprise resulting from the delay," unless "the proposed pleading fails to state a cause of action . . . or is palpably insufficient as a matter of law." *Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 (1st Dept 2001) (internal citation omitted. As was mentioned, Rivera's counsel averred that "law office error has unfortunately delayed the initiation of these proceedings," but argued that there was no prejudice to the DHCR because "the litigation is in its earliest phase, prior to the submission of an answer." *See* order to show cause, Taylor affirmation, ¶¶ 13-14. The DHCR responds that the court should deny Rivera's amendment request because her proposed amended petition is "palpably insufficient as a matter of law" for two reasons; specifically that: 1) it is time-barred by the four-month statute of limitations; and 2) it failed to name a necessary party; i.e., Riverbay. *See* notice of cross motion, Sanders affirmation, ¶¶ 9-20. The court will address each of these arguments.

With respect to timeliness, CPLR 217 (1) provides that Article 78 proceedings "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner . . .." *See e.g.*, *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 (2005). The DHCR argues that "[t]he four month statute of limitations period to challenge the June 8, 2018 DHCR order denying the appeal expired on October 6, 2018," but "[n]o service of papers to commence the proceeding . . . [has] ever occurred . . . to date." *See* notice of cross motion, Sanders affirmation, ¶ 15. In reply,

Rivera cites the rule in General Construction Law (GCL) § 25 (a) that "[w]hen any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day . . .." *See* Taylor reply affirmation, ¶ 8. She then argues that this rule defeats the DHCR's timeliness argument, because "[e]ven if the statute of limitations had been due to expire on October 6, 2018, as respondents claim, then filing on October 9, 2018 would be timely under § 25 (a), as October 6, 2018 was a Saturday, October 7, 2018 was a Sunday, and October 8, 2018 was Columbus Day." *Id.*, ¶ 11. The court notes that the First Department routinely applies the GCL § 25 (a) rule in the context of Article 78 proceedings. *See e.g.*, *Matter of Ross v DHCR*, 125 AD3d 434, 434 (1st Dept 2015); *Matter of Fantauzzi v New York State Div. of Human Rights*, 113 AD3d 518, 519 (1st Dept 2014). The court has also examined the 2018 calendar and finds that Rivera's date computations were correct. Thus, because GCL § 25 (a) afforded her three additional days' grace to commence tyhis Article 78 proceeding, the court finds that her claim had not expired when she purchased the index number and filed the original petition on October 9, 2018. That does not end the inquiry, however.

> CPLR 306-b provides, in pertinent part, as follows:
>
> "Service of the . . . petition with a notice of petition or order to show cause shall be made . . ., where the applicable statute of limitations is four months or less, . . . *not later than fifteen days after the date on which the applicable statute of limitations expires*. If service is not made upon a defendant within the time provided in this section, the court, upon motion, *shall dismiss the action without prejudice as to that defendant*, or upon good cause shown or in the interest of justice, extend the time for service (emphasis added)."

Here, the DHCR objects that Rivera did not complete service of the original petition and notice of petition in compliance with CPLR § 306-b "whether by October 21, 2018, the fifteen days after the expiration of the statute of limitations period, or to date." *See* notice of cross motion,

Sanders affirmation, ¶¶ 14-15. Rivera's counsel does not mention CPLR § 306-b in either the affirmation accompanying the order to show cause or in the affirmation in reply to the cross motion.[1] However, long standing appellate precedent recognizes that a petitioner's failure to comply with the 15-day service requirement in CPLR § 306-b results in the automatic dismissal of an Article 78 petition. *See e.g.*, *Matter of Genting N.Y., LLC v New York City Envtl. Control Bd.*, 158 AD3d 684, 685 (2d Dept 2018); *Matter of Kelly v New York City Police Dept.*, 286 AD2d 581, 581 (1st Dept 2001); *Matter of Hicks v City of New York*, 247 AD2d 342, 342 (1st Dept 1998). Thus, the court finds that, even though the claim Rivera asserts in her proposed amended Article 78 petition was timely pursuant to CPLR 217 (1) and GCL § 25 (a), her right to assert it is time-barred by her failure to comply with CPLR 306-b.[2] As a result, the court concludes that it would be an improvident exercise of discretion under CPLR 3025 (b) to permit Rivera leave to serve and file a time-barred amended Article 78 petition, and, therefore, grants so much of the DHCR's motion as requests the denial of Rivera's order to show cause and the dismissal of her petition.

Notwithstanding the finality of the foregoing determination, the court also makes the two following findings.

In addition to its timeliness argument, the DHCR also contends that Rivera's request for leave to amend should be denied, and the Article 78 petition should be dismissed, for failure to

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[1] As mentioned, the former document merely contains an oblique reference to "law office error." *See* order to show cause, Taylor affirmation, ¶ 14.

[2] The court notes that appellate case law interpreting CPLR 306-b recognizes that a trial court may extend the statute's 15-day deadline for service "upon good cause shown or in the interest of justice." *See e.g.*, *Matter of State of New York v Robert C.*, 113 AD3d 937, 938 (3d Dept 2014), citing *Matter of Frederick v Goord*, 20 AD3d 652, 653 (3d Dept 2005) (other citation omitted); *see also Matter of Nicklin-McKay v Town of Marlborough Planning Bd.*, 14 AD3d 858, 860 (3d Dept 2005). However, Rivera's order to show cause is devoid of argument on either of these points. The court declines to grant her an extension on either ground *sua sponte*.

join Riverbay as a necessary party to this proceeding. *See* notice of cross motion, Sanders affirmation, ¶¶ 17-20. CPLR 1001, which governs joinder, provide as follows:

> "(a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. . . .
>
> "(b) When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. . . ."

The DHCR asserts that Riverbay is a "party who should be joined," and argues that Rivera's failure to do so renders her proposed amended petition legally deficient and subject to dismissal. *See* notice of cross motion, Sanders affirmation, ¶¶ 17-20. Rivera first replies that Riverbay is not a "party who should be joined," because Rivera's proposed amended Article 78 petition is "challenging [the] DHCR's determination, not Riverbay's," and because "Riverbay must implement the ultimate resolution of this matter" whatever it may be. *See* Taylor reply affirmation, ¶ 16. Rivera cites the First Department's holding in *Matter of Feliz v Wing* (285 AD2d 426, 426 [1st Dept 2001]) that the New York City Human Resources Administration (HRA) was not a "necessary party" to an Article 78 petition commenced by two public assistance recipients to challenge HRA's decision to terminate their benefits payments. The First Department reasoned that, because "HRA must comply with the ultimate resolution of this matter by the State respondents in the aftermath of the" court-ordered remand in the Article 78 proceeding, its joinder in the proceeding "is unnecessary to afford complete relief." 285 AD2d at 426, citing *Matter of Thomasel v Perales*, 78 NY2d 561, 570 (1991). Rivera urges that Riverbay is similarly bound by whatever outcome the court directs in this proceeding. *See* Taylor reply affirmation, ¶ 16.

However, the court does not find the analogy to the HRA in *Matter of Feliz v Wing* persuasive. More compelling is the First Department's ruling in *Matter of Solid Waste Servs.*,

Inc. v New York City Dept. of Envtl. Protection (29 AD3d 318 [1st Dept 2006]) that CPLR 1001 requires that, "[i]n a CPLR article 78 proceeding, the governmental agency that performed the challenged action *must be a named party*." 29 AD3d at 319 (emphasis added), citing *Matter of McNeill v Town Bd. of Town of Ithaca*, 260 AD2d 829, 830 (3d Dept 1999). Here, Riverbay itself is not a "governmental agency." However, it is charged by the PFHL to apply the DHCR's succession rights regulations to Co-op City's Mitchell-Lama apartments as if it were a governmental agency. There is also no question that Riverbay "performed the challenged action" herein by denying Rivera's succession rights application for apartment 18B in its September 25, 2017 decision. Its role in performing that function indicates that Riverbay is a "party that should be joined" in this Article 78 proceeding, pursuant to the holding of *Matter of McNeill.*

The court has reviewed certain older First Department decisions that found that landlords were not "necessary parties" to their tenants' Article 78 proceedings. *See e.g.*, *Tindell v Koch*, 164 AD2d 689 (1st Dept 1991); *Joanne S. v Carey*, 115 AD2d 4 (1st Dept 1986). In those decisions, the court focused on the lack of evidence that the landlords would be "inequitably affected" by non-joinder in those proceedings. Rivera makes that assertion here about Riverbay. *See* Taylor reply affirmation, ¶ 16. However, the court believes that Rivera is mistaken to do so. It is clear that Riverbay is "inequitably affected" by being obliged to continue to allocate one of the finite number of Co-op City's Mitchell-Lama units to Rivera (as it has done since 2018) rather than sell the unit's shares to a new tenant of record. It is also clear that Riverbay has an interest in in any appeal of the occupancy decisions that it renders.[3] The PHFL places it in a

[3] The First Department has cited with approval Professor Siegel's observation about CPLR 1001 (a) that "[t]he possibility that a judgment rendered without [the omitted party] could have an adverse practical effect [on that party] is enough to indicate joinder." *Matter of 27th St. Block*

unique dual role as both a party to a succession rights dispute and as the initial judge of such a succession rights dispute. However, the court does not believe that the quasi-judicial responsibility inherent in the latter role cancels out the litigant's interest that is inherent in the former role. Instead, the court believes Riverbay should enjoy the same right to participate in the appeal of (or challenge to) a succession rights dispute as any other party. Therefore, the court rejects Rivera's "joinder" argument, and instead finds that, in this case, Riverbay is a "necessary party" to Rivera's challenge to the DHCR's decision denying her succession rights claim. Her failure to include Riverbay as such on her proposed amended petition is another reason to find that that pleading is deficient, as a matter of law. This, in turn, further supports the court's determination that it would be an improvident exercise of discretion under CPLR 3025 (b) to grant Rivera leave to file and serve her defective proposed petition.

Finally, although it need not undertake the analysis, the court finds that Rivera's proposed amended Article 78 petition lacks merit because it clearly fails to establish that the DHCR's June 8, 2018 decision was an arbitrary and capricious ruling. The proposed amended petition asserts that the DHCR based its denial of her succession rights claim on the erroneous finding that, as Torres's ex-wife, she was not a "family member," as that term is defined in 9 NYCRR § 1700.2 (a) (7). *See* order to show cause, exhibit A (proposed amended petition), ¶¶ 24-29. However, this assertion is plainly contradicted by the text of the DHCR's decision, which instead found that Rivera had failed to meet her burden to establish any of the alternative grounds for succession rights which apply to non-family members, such as ex-spouses. *Id.*, exhibit B.

Assn. v Dormitory Auth. of State of N.Y., 302 AD2d 155, 160 (1st Dept 2002), quoting *Hitchcock v Boyack*, 256 AD2d 842, 844 (3d Dept 1998), quoting Siegel, N.Y. Prac. § 132, at 199 (2d ed.).

The proposed amended petition also asserts that the DHCR's decision improperly imposed on her the legal obligation to prove the location of Torres's primary residence. *Id.*, exhibit A, ¶¶ 30-32. However, this assertion contradicts 9 NYCRR § 1727-8.2, which *does*, in fact, place the burden on Rivera to establish a two-year co-residency period in apartment 18B by both herself and Torres prior to Torres's permanent departure from the unit. The court finds that there was a "rational basis" in the administrative record before the DHCR to support its conclusion that Rivera had failed to meet her burden of proof; i.e., the absence of any such proof in the record due to her failure to respond to requests that she produce it. As a result, the court concludes that Rivera's proposed amended Article 78 petition is meritless because it plainly fails to show that the DHCR's June 8, 2018 decision was arbitrary and capricious. This finding affords yet another justification for the court's determination that it would be an improvident exercise of discretion under CPLR 3025 (b) to grant Rivera leave to file and serve that petition.

For the foregoing reasons, the court denies Rivera's order to show cause and grants the DHCR's cross motion to the extent of dismissing the Article 78 petition.

DECISION

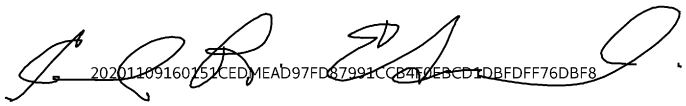
ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion, by order to show cause, of petitioner Jessica Rivera (motion sequence number 001) which seeks leave to serve and file an amended verified petition pursuant to CPLR 3025 (b) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of respondents Ruthanne Visnauskas, as Commissioner of the New York State Division of Homes and Community Renewal, and the New York State Division of Homes and Community Renewal (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 respondents shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



11/9/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	x	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	x	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE