

**Matter of Nappi v New York City Dept. of Homeless
Servs.**

2020 NY Slip Op 33812(U)

November 10, 2020

Supreme Court, New York County

Docket Number: 100453/2020

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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INDEX NO. 100453/2020

In the Matter of

MOTION DATE 10/14/2020

MICHELLE NAPPI

MOTION SEQ. NO. 001

Petitioner,

- v -

**DECISION, ORDER, AND
JUDGMENT**

NEW YORK CITY DEPARTMENT OF HOMELESS
SERVICES,

Respondent.

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The following e-filed documents, listed by NYSCEF document number 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, as well as the unnumbered order to show cause, emergency affidavit in support of order to show cause, emergency request for stay, petition/complaint, and petitioner's exhibits (Motion 001)

were read on this motion to/for CPLR ART 78/CROSS-MOTION TO DISMISS.

In this hybrid CPLR article 78 proceeding and action for declaratory relief, the petitioner/plaintiff (hereinafter the petitioner) seeks judicial review of an undated notice issued by Best Western Motels. That notice purportedly informed the petitioner that she temporarily would be transferred from her current shelter residence, known as Pam's Place, and located at 40-03 29th Street, Long Island City, New York, to a Best Western Motel, located at 1025 Beach 21st Street, Far Rockaway, New York. In her petition/complaint, the petitioner also seeks a judgment declaring that the New York City Department of Homeless Services (DHS) deprived her of her Fourteenth Amendment due process rights, violated the Americans With Disability Act, and permanently must maintain her residence at Pam's Place. She further alleges that, if the DHS temporarily relocates her, the temporary location must be no farther from the offices of her psychiatrist, primary care physician, or proctologist than Pam's Place is located. The

petitioner also seeks a permanent injunction barring the DHS from attempting to move her out of Pam's Place, as well as an award of attorneys' fees. By order to show cause dated June 11, 2020, this court temporarily restrained the DHS from taking any steps to remove the petitioner from Pam's Place, pending hearing of the petition.

The DHS cross-moves pursuant to CPLR 7804(f) and 3211(a)(7) to dismiss the petition/complaint for failure to state a cause of action. The cross motion is granted, the petition/complaint is dismissed, except for the claim set forth in paragraph 19 of the first cause of action and, as to that claim, it is declared that the petitioner has no established rights to the unit that she presently occupies at 40-03 29th Street, Long Island City, New York.

The petitioner resides at Pam's Place in Long Island City. Pam's Place is a private social services agency that contracts with the City to provide shelter for homeless persons. The City provides Pam's Place with funds that it, in turn, allocates to leasing residential units from a private building owner in order to shelter homeless persons who qualify, as well as to provide associated social services. As part of the City's plan to stem or minimize the spread of COVID-19 in congregate shelters such as Pam's Place, it encouraged such shelter operators to transfer some of their residents to motels and hotels to reduce population density. In or about early June 2020, Best Western Motels issued an undated, unaddressed notice to the petitioner, suggesting that she was one of the persons designated for temporary relocation to a Best Western Motel in Far Rockaway.

Subsequent to the issuance of the notice, the petitioner did not submit a request for reasonable accommodation form to the DHS, as it makes available on its website, nor did she speak with her case manager or on-site shelter staff. Neither did the petitioner seek a "fair hearing" before the appropriate forum. This proceeding and action ensued. During the pendency of this proceeding and action, on-site shelter staff met with the petitioner, and advised her of her right to apply for a reasonable accommodation to the extent she deemed necessary, but she declined to accept or fill out the forms provided to her in that regard.

The DHS correctly argues that the petition fails to state a cause of action against it because it did not issue the challenged notice (*see Matter of Armacida v Reitz*, 141 AD3d 713 [2d Dept 2016]; *Matter of TAC Peek Equities, Ltd. v Town of Putnam Val. Zoning Bd. of Appeals*, 127 AD3d 1216 [2d Dept 2015]). As explained by in-house counsel for in the Homeless Litigation and Program Counseling Unit of the Office of Legal Affairs of the New York City Department of Social Services, of which the DHS is a component agency, not only was the DHS not responsible for issuing the relocation notice in dispute, it has no records whatsoever indicating that it determined to relocate the petitioner, and it has no current plans to relocate her. Hence, inasmuch as the DHS has rendered no determination that has any present impact upon the petitioner, the petitioner has not shown that she is aggrieved, and her request for relief pursuant to CPLR article 78 must be dismissed on that ground (*see Matter of Greco v Board of Educ. of Patchogue-Medford Union Free Sch. Dist.*, 98 AD2d 721, 722 [2d Dept 1983]).

Moreover, where, as here, a statute, ordinance, or regulation provides for further administrative remedies, and a party has an opportunity to pursue them, he or she must exhaust all of those administrative remedies before seeking judicial review (*see Matter of Carter v State of New York*, 95 NY2d 267 [2000]; *Matter of Carter v Annucci*, 166 AD3d 1189, 1190 [3d Dept 2018]). Judicial review of any initial administrative determination is thus foreclosed (*see Matter of Harrell v New York City Housing Auth.*, 300 AD2d 54 [1st Dept 2002]). Inasmuch as the petitioner failed to seek a reasonable accommodation for any disabilities from which she allegedly suffers and failed to request a fair hearing in connection with any denial of such a request, she has failed to exhaust her administrative remedies. The request for CPLR article 78 relief must be dismissed on that ground as well.

In any event, “[h]omeless persons do not have the right to choose their own temporary placements” (Admin. Directive 94 ADM-20[V][D][3] [N.Y.S. Office of Temporary and Disability Assistance Dec. 29, 1994]). Hence, even if the DHS were planning temporarily to relocate the

petitioner, she fails to state a cause of action pursuant to CPLR 7803(3) to challenge any such determination as arbitrary and capricious.

Although the petitioner purports to seek a judgment “declaring” that the DHS violated her Fourteenth Amendment rights and the Americans With Disabilities Act (42 USC § 12101 *et seq.*), as well as a declaration that she is entitled to permanent residency at Pam’s Place and that she may not be relocated to a shelter situated at a distance greater than Pam’s Place from her health-care providers, a CPLR article 78 proceeding is not a declaratory judgment action, and a declaratory judgment action does not lie here. A declaratory judgment action is not an appropriate procedural vehicle for challenging administrative determinations, and the matter is properly only prosecuted as a CPLR article 78 proceeding (*see Matter of Potter v Town Bd. of Town of Aurora*, 60 AD3d 1333, 1334 [4th Dept 2009]; *see also Matter of Legacy at Fairways, LLC v McAdoo*, 67 AD3d 1460, 1461 [4th Dept 2009]).

In light of the foregoing, the petitioner would be limited in this matter to seeking “mandamus to compel” the DHS to perform a ministerial duty to maintain her at Pam’s Place (*see* 7803[1]), or, if DHS had in fact issued an adverse relocation determination, seeking judicial review pursuant to CPLR 7803(3) on the grounds that the determination was arbitrary and capricious, affected by an error of law, including the denial of constitutional rights arising from the application of a rule or regulation (*see Latino Officers Assoc. v City of New York*, 253 F Supp 2d 771, 779-780 [SD NY 2003]), or made in the absence of proper procedure, sometimes collectively referred to as “mandamus to review” (*see Matter of Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 757-758 [1991]).

For the reasons described above, the petitioner failed, in the first instance, to state a cause of action for judicial review under CPLR 7803(3). In addition, no cause of action lies here to compel the DHS to perform any ministerial act. Relief in the nature of mandamus may be brought to compel an agency “to perform a duty enjoined upon it by law” (CPLR 7803 [1]). It is well-settled that mandamus to compel “applies only to acts that are ministerial in nature and not

those that involve the exercise of discretion” (*Matter of Maron v Silver*, 14 NY3d 230, 249 [2010]). Thus, “the petitioner must have a clear legal right to the relief demanded and there must exist a corresponding nondiscretionary duty on the part of the administrative agency to grant that relief” (*Matter of Anonymous v Commissioner of Health*, 21 AD3d 841, 842 [1st Dept 2005] [internal quotation marks omitted]). Stated another way, “[m]andamus is available . . . only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law” (*New York Civil Liberties Union v State of New York*, 4 NY3d 175, 185 [2005]; see *Matter of Flosar Realty LLC v New York City Hous. Auth.*, 127 AD3d 147, 152 [1st Dept 2015]). The petitioner has failed to establish her right to such relief.

Moreover, the issue of whether an action for a declaratory judgment lies at the present time is premature (see CPLR 3001; *New York Pub. Interest Research Group v Carey*, 42 NY2d 527 [1977]).

“It is fundamental that the ‘function of the courts is to determine controversies between litigants . . . They do not give advisory opinions. The giving of such opinions is not the exercise of the judicial function’ (*Matter of State Ind. Comm.*, 224 NY 13, 16 [Cardozo, J.]). This is not merely a question of judicial prudence or restraint; it is a constitutional command defining the proper role of the courts under a common-law system (*Matter of State Ind. Comm.*, *supra*).

“In a sense, of course, any decision a court may render is always advisory since it determines the legal rights and obligations of the parties. But the courts should not perform useless or futile acts and thus should not resolve disputed legal questions unless this would have an immediate practical effect on the conduct of the parties. The need for judicial intervention is obvious when, because of the actions of one of the parties, a dispute arises as to whether there has been a breach of duty or violation of the law. Then the courts can declare the rights and obligations of the parties, and if a breach is found, compel compliance, award damages or otherwise order appropriate action to be taken.

“But a request for a declaratory judgment is premature if the future event is beyond the control of the parties and may never occur (*Prashker v United States Guar. Co.*, 1 NY2d 584). Then any determination the court may make would be merely advisory since it can have no immediate effect and may never resolve anything (Borchard, *Declaratory Judgments*, pp 58-60). Thus it is settled that the ‘courts will not entertain a declaratory judgment action when any decree that the court might issue will become effective only upon the occurrence of a future

event that may or may not come to pass' (3 Weinstein-Korn-Miller, op. cit., par 3001.09b)"

(*New York Pub. Interest Research Group v Carey*, 42 NY2d at 529-530, 531; see *Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354-355 [1988]; *Bachety v Kinsella*, 146 AD2d 725, 726 [2d Dept 1989]). Most of the petitioner's requests for declaratory relief essentially ask the court to render an advisory opinion, as the event that the petitioner describes---compulsory relocation---may never occur. Consequently, the court grants those branches of the DHS's cross motion that seek to dismiss, for failure to state a cause of action, those requests for declaratory relief as are addressed to the petitioner's possible relocation, as set forth in paragraphs 16, 17, 18, and 20 of the first cause of action, along with the second cause of action (permanent injunction), and third cause of action (award of attorneys' fees).

To the extent that the petitioner, in paragraph 19 of the first cause of action, seeks a declaration that she is entitled permanently to occupy an apartment at Pam's Place, or that her occupancy has become, in effect, a personal leasehold interest, that cause of action must be decided in the DHS's favor as well. The Appellate Division, First Department, already has determined, in connection with a unit in a building leased to another private social services agency that she had previously occupied, under circumstances virtually identical to her current occupancy, that she "has no established rights to the subject apartment" (*Matter of Nappi v Community Access, Inc.*, 169 AD3d 535, 536 [1st Dept 2019], *app dismissed* 33 NY3d 996 [2019], *lv denied* 34 NY3d 910 [2020]). While, generally, a court may not summarily determine the merits of a properly pleaded declaratory judgment cause of action based on the pleadings alone (see *Matter of 24 Franklin Ave. R.E. Corp. v Heaship*, 74 AD3d 980, 980-981 [2d Dept 2010]), a court nonetheless may reach "the merits of a properly pleaded cause of action for a declaratory judgment upon a motion to dismiss for failure to state a cause of action where 'no questions of fact are presented [by the controversy]'" (*Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d

Dept 2011], quoting *Hoffman v City of Syracuse*, 2 NY2d 484, 487 [1957]; see *Minovici v Belkin BV*, 109 AD3d 520, 524 [2d Dept 2013]). Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action “should be taken as a motion for a declaration in the defendant’s favor and treated accordingly” (Siegel, NY Prac § 440 [5th ed]; see *Lanza v Wagner*, 11 NY2d 317, 334 [1962]; *Minovici v Belkin BV*, 109 AD3d at 524; *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d at 1150). Since there are no questions of fact presented by the instant controversy, the court treats that branch of the DHS’s cross motion accordingly, and declares that the petitioner has no established rights to the unit that she presently occupies at 40-03 29th Street, Long Island City, New York.

In light of the foregoing, it is,

ORDERED that those branches of respondent/defendant’s cross motion that seek to dismiss the petition and to dismiss the claims for relief set forth in paragraphs 16, 17, 18, and 20 of the first cause of action, the second cause of action, and the third cause of action are granted; and it is further,

ORDERED that the branch of the respondent/defendant’s cross motion that seeks to dismiss the claim for relief set forth in paragraph 19 of the first cause of action is deemed to be a branch of the cross motion that seeks a judgment declaring that the petitioner/plaintiff has no established rights to the unit that she presently occupies at 40-03 29th Street, Long Island City, New York, and that branch of the cross motion is granted; and it is,

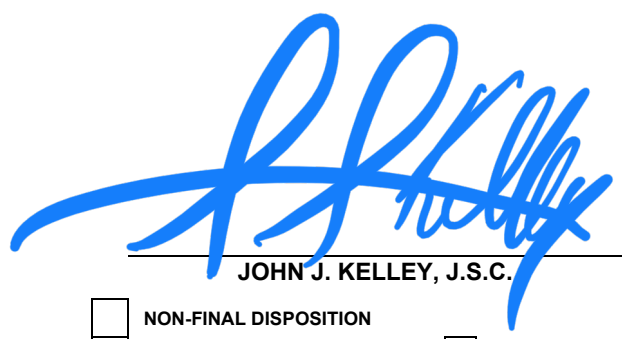
ADJUDGED that the petition is dismissed; and it is further,

ADJUDGED that the claims for relief set forth in paragraphs 16, 17, 18, and 20 of the first cause of action, the second cause of action, and the third cause of action are dismissed; and it is further,

ADJUDGED and DECLARED that the petitioner/plaintiff has no established rights to the unit that she presently occupies at 40-03 29th Street, Long Island City, New York.

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

11/10/2020
DATE



JOHN J. KELLEY, 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
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE