

**Matter of De La Cruz v City of N.Y. Dept. of Hous.
Preserv. & Dev.**

2022 NY Slip Op 30455(U)

January 27, 2022

Supreme Court, Kings County

Docket Number: Index No. 510162/2021

Judge: Larry Martin

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

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In the Matter of the Application of

YOSELIS DE LA CRUZ,

Petitioner,

- against -

Index No. 510162/2021

Justice Larry Martin

CITY OF NEW YORK DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT,

Respondents,

For a Judgment and Order Pursuant to Article 78 of the
Civil Practice Law and Rules.

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Petitioner commenced this Article 78 proceeding pursuant to CPLR §§7803.1 and 7803.3 seeking a declaratory and remedial relief, *inter alia*, finding that the Respondent, City of New York Department of Housing Preservation and Development (“HPD”) arbitrarily and capriciously violated its rules in calculating her income eligibility in connection with her application to purchase affordable housing from nonparty Nehemiah Spring Creek Homes.

History of the Program and Statutory Framework

The NYS legislature passed the Private Housing Finance Law (“PHFL”) to address the shortage of housing for low and middle income families by assisting private developers with long-term, low interest government mortgage loans and real estate tax exemptions. Pursuant to Article XI of the PHFL (the “Housing Development Fund Companies Law”), a housing development fund company (“HDFC”) may be incorporated pursuant to PHFL § 573 and organized to develop a housing project for persons of low and middle income. PHFL § 570.

In June 2016, the City and HPD entered into a Land Disposition Agreement (“LDA”) with Nehemiah Spring Creek Affordable Homeownership Housing Development Fund Company, Inc. (“Nehemiah HDFC”) conveying property in East New York to Nehemiah HDFC for the construction of affordable housing (the “Phase 4A Program”). The LDA set the terms and conditions for the development, and required Nehemiah HDFC to construct a specified number of one- and two-family homes to sell to purchasers who meet HPD’s income eligibility requirements.

The NYC Housing Development Corporation (“HDC”) and HPD publish a “Marketing Handbook,” which contains the policies, procedures and requirements for marketing and selection of residents for developments assisted by HPD and HDC, including developments by HDFCs. Section 5-5 of the HUD Handbook sets forth the methods for calculating and projecting annual income, including “annualizing current income” or, if information is available on changes expected to occur during the year, determining the “total anticipated income from all known sources during the year.”

Procedural History

In March 2018, Petitioner applied to Nehemiah HDFC for a single-family home in the Phase 4A Program for her family of four. Under HPD’s income eligibility guidelines, the annual income range for Petitioner’s family of four is from \$76,225 to \$125,070 at 110% of the area median income (“AMI”).

In June 2020, Nehemiah HDFC rejected Petitioner’s application on the basis of its finding that her household income fell below HPD’s foregoing income requirement (the “First Determination”). Petitioner contested that decision, and in December 2020, Nehemiah HDFC denied her appeal on the basis of its finding that her income *exceeded* HPD’s income requirement (the “Second Determination”). Petitioner filed an HPD appeal of Nehemiah HDFC’s Second

Determination, and in January 2021 it essentially agreed with the Second Determination and found “no reason to interfere.” Specifically, HPD agreed that Petitioner’s annual household income was \$126,504.88 and thus concurred with Nehemiah HDFC’s Second Determination that her income exceeded the \$125,070 maximum for a four-person unit by \$1,434.88.

Petitioner commenced this proceeding seeking an Order (1) finding that HPD’s determination was arbitrary and capricious and that HPD failed to perform a duty enjoined by law, (2) enjoining HPD from violating its regulations, (3) allowing Petitioner to purchase a unit in the Phase 4A Program or a succeeding program, and (4) awarding Petitioner’s attorney’s fees.

Respondent opposes arguing: i) that Nehemiah HDFC is a necessary party to this proceeding and the case should be dismissed for failure to name it as a co-respondent; ii) that HPD’s calculation of Petitioner’s household income was reasonable and consistent with applicable law; iii) that Petitioner has not established the requisite clear right to a writ of mandamus allowing Petitioner to purchase a home in the Phase 4A Program or a succeeding program; and iv) Petitioner has not demonstrated the degree of specificity required for an Order enjoining HPD and doing so would improperly entangle the Court in HPD operations.

Analysis

Failure to Name a Necessary Party

With respect to Respondent’s argument that the proceeding should be dismissed for failure to name Nehemiah HDFC is a necessary party, CPLR § 1001(a) provides that a necessary party is someone “who ought to be [joined] 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.” While Petitioner cites the Appellate Division Third Department’s decision in *Hudson River Sloop Clearwater, Inc. v. Town Board of the Town of Coeymans*, 144 AD3d 1274, 41 NYS3d 170 (3rd

Dept. 2016) for the proposition that a zoning change from residential to industrial use, does not require joinder of every affected property owner. Respondent in turn cites the NYC Civil Court case of *East 55th St. Joint Venture v. Litchman*, 122 Misc. 2d 81 (Civ. Ct., N.Y. Co. 1983), *aff'd*, 126 Misc. 2d 1049 (App. Term 1st Dep't 1984), *purportedly* for the proposition that the landlord therein was a necessary party to an Article 78 proceeding challenging the Conciliation and Appeals Board board's determination. Respondent, however, only cites the lower Court's decision, ostensibly referring to an unreported decision under this Court's Index No.: 26654/81, *in a different context*.

Based upon the parties' submissions thus far, Respondent has failed to establish that Nehemiah HDFC is a necessary party, and has only established that it is an "interested party," entitled to notice of this proceeding and an opportunity to intervene if they see fit.

Applicable Standard of Review

With respect to the underlying determinations, administrative agencies have broad discretionary power when rendering determinations, and in Article 78 proceedings reviewing those determinations, the Court's function is limited to confirming whether the agency's decision had a rational basis and is not arbitrary. See, e.g., Tall Trees Constr. Corp. v. Zoning Bd. of Appeals, 97 N.Y.2d 86 (2001); Pell v. Board of Educ., 34 N.Y.2d 222, 230-31 (1974). Here, the Marketing Handbook requires, in accordance with HUD guidelines, that loose paystubs be "annualized," *i.e.*, multiplying weekly wages by 52, bi-weekly wages by 26, and monthly wages by 12. Thus, to project Petitioner's annual income, Nehemiah HDFC and then HPD divided her paystubs totaling \$15,395 for the nine weeks covered, by nine, to estimate her weekly income as \$1,710.55, and then multiplied \$1,710.55 by 52 weeks to project an annual income of \$88,948.88. HPD next concluded that \$125,070 is the maximum income for a four-person unit at the specified 110%

AMI, and that taken together with the other household member's uncontested income, determined that Petitioner was not eligible to purchase a home in the Phase 4A, and there was thus no basis to intervene with Nehemiah HDFC's decision.

Said projections, however, were directly contradicted by Petitioner's employer, who submitted an uncontradicted July 30, 2020 letter stating that her annual salary was \$85,522.

Thus, while HPD's choice of methodologies for calculating and projecting income is entitled to deference, Howard v. Wyman, 28 N.Y.2d 434, 438 (1971), and while HUD's guidelines give owners discretion to employ whatever methodology they believe will yield *accurate* results in determining income eligibility, Respondent has offered no basis for whatever rational methodology of projecting income supplanting uncontracted documentary evidence of *actual* income. The use of a projection in lieu of an uncontested statement of income is particularly arbitrary where, as here, said underlying projections from the same documents led to multiple conclusions.¹

Petitioner's Request for Injunctive Relief

To the extent Petitioner's action seeks an Order directing HPD to allow Petitioner to purchase a home in the Phase 4A Program or a succeeding program, however, the inquiry in an Article 78 proceeding seeking mandamus relief is "whether the body or officer failed to perform a duty enjoined upon it by law." CPLR § 7803(1). Mandamus is an extraordinary remedy used to compel performance by an administrative body or officer of a duty positively required by law. See

¹ Nehemiah initially calculated Petitioner's income to be \$75,854.26 which is below the Income Range (\$76,225 - \$125,070) (Petition Exhibit I); using the same figures and proof of income, Nehemiah then calculated Petitioner's income to be \$132,325.75 which is above the Income Range (\$76,225 - \$125,070) (Petition Exhibit K); and using the same figures and proof of income used all along, HPD calculated Petitioner's income to be \$126,504.88 which is above the Income Range (\$76,225 - \$125,070) (Petition Exhibit I).

Hamptons Hosp. & Med. Ctr., Inc. v. Moore, 52 N.Y.2d 88 (1981). “The availability under Article 78 of mandamus to compel performance of a duty by an administrative agency depends not on the applicant’s substantive entitlement to prevail, but on the nature of the duty sought to be commanded - *i.e.*, mandatory, non-discretionary action.” In re Hamptons Hospital & Medical Center. v. Moore, 52 N.Y.2d 88, 97 (1981). “A judgment granting injunctive relief ‘must define specifically what the enjoined person must or must not do, in language so clear and explicit that a layman can understand what he is expected to do, or refrain from doing.’” Gimbel Bros., Inc. v. Brook Shopping Centers, Inc., 118 A.D.2d 532, 536 (2d Dep’t 1986). The requested relief should not entangle the Court in HPD affairs.

Respondent argues that it lacks the power to compel Nehemiah HDFC to allow Petitioner to purchase a home in the Phase 4A Program or a succeeding program. Thus, Respondent argues that even if Petitioner prevails in demonstrating that its actions were arbitrary, her only remedy should be being relegated to re-applying, and leaving it to lottery whether she is again selected. To the extent that both parties speculate that the Phase 4A program may have ended, Petitioner argues that her relief should be HPD granting her a preference to purchase a unit in a succeeding program subject to meeting income/eligibility requirements, *i.e.*, Petitioner’s right to submit an application should be automatic and not subject to the lottery.

Wherefore, it is ORDERED that Petitioner’s Motion on this Court’s Motion Seq. 1 is granted solely to the extent of:

finding that Nehemiah HDFC is an interested rather than necessary party, and is entitled to notice hereof; and directing Petitioner to serve Nehemiah HDFC with a copy of the underlying moving papers and a copy of this Court’s instant Order, by February 7th, 2022; and further

granting nonparty Nehemiah HDFC leave to interpose a notice of appearance, by February 14th, 2022; and further

granting all parties leave to submit, no later than February 28th, 2022, a further brief concisely citing material facts in the record and relevant caselaw as to Petitioner's appropriate remedy where, as here, the decision not to consider Petitioner's unrefuted documentary evidence of income was arbitrary. (16)

Dated: January 27th, 2022.



J.S.C.

**HON. LARRY MARTIN
JUSTICE OF THE SUPREME COURT**