

**Matter of Jones v New York City Hous, Preserv. &  
Dev.**

2012 NY Slip Op 31561(U)

June 12, 2012

Supreme Court, Queens County

Docket Number: 27822/2011

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

In the Matter of the Application of Index No.: 27822/2011
FREDERICK JONES, Motion Date: 04/05/12
Petitioner, Motion No.: 18
- against - Motion Seq.: 1

NEW YORK CITY HOUSING PRESERVATION and
DEVELOPMENT, NYC HPD CODE ENFORCEMENT
DIVISION,
Respondent.

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The following papers numbered 1 to 18 were read on this petition
pursuant to CPLR Article 78 to compel NYCHPD to enforce the New
York State Multiple Dwelling Laws, New York Housing Maintenance
Codes and reinstate petitioner as the building superintendent at
107-05 Sutphin Boulevard, Jamaica, New York:

Papers Numbered

Amended Notice of Petition-Affidavits-Exhibits.....1 - 5
Respondent's Cross-Motion to Dismiss the Petition....6 - 9
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This is an Article 78 proceeding in which the petitioner,
Frederick Jones, Pro Se, seeks a mandatory injunction directing
the respondents NYCHPD and NYC HPD Code Enforcement Division to
administer the Neighborhood Redevelopment Program and directing
the NYCHPD Code Enforcement Division to enforce NYS Multiple
Dwelling Law, NYC Housing Maintenance Codes and make all repairs
to remedy the code violations and restore the heat and hot water

permanently at the premises located at 107-05 Sutphin Boulevard, Apartment 2D, Jamaica, New York.

Petitioner, who is a tenant at 107-05 Sutphin Boulevard, Jamaica, New York, states that the premises are now under the jurisdiction of the Neighborhood Redevelopment Program. Petitioner states that he is not being provided with heat, hot water and maintenance services, and seeks an order directing NYCHPD to correct the outstanding violations. Petitioner argues that the NYCHPD has the ability to oversee the enforcement of the provisions of the Multiple Dwelling Law and other regulations which relate to the maintenance, use, occupancy, safety or sanitary conditions of any building occupied as a home, residence or dwelling place. Petitioner contends that the NYCHPD's duty to enforce the Housing Maintenance Code is mandatory (citing New York City Coalition to End Lead Poisoning v Koch, 138 Misc. 2d 18 [Sup. Ct. N.Y. Co. 1987]).

The respondents, represented by NYC Assistant Corporation Counsel, Jasmine M. Gerges, Esq., cross-move for an order pursuant to CPLR 3211(a)(7) and 7804(f) dismissing the proceeding on the ground that the petition fails to state a cause of action for mandamus relief against the respondents HPD and HPD's Code Enforcement Division (collectively "HPD").

The following history of the subject building and code violations is taken from the Ms. Gerges affirmation annexed to the respondent's cross-motion. In 2001 the subject building located at 107-04 150<sup>th</sup> Street was placed in HPD's Neighborhood Redevelopment Program (NRP) as one of several properties to be conveyed to a developer for rehabilitation and development as affordable rental housing. When a building enters NRP, HPD and the developer temporarily relocate existing tenants while the construction proceeds. The original tenants are entitled to return to renovated apartments within their building after construction has been completed. The tenants of the subject building were notified in October 2000 of the building's expected sale to Allen AME Neighborhood Preservation and Development Corp(AME) for rehabilitation. In November 2001, the tenants were notified that the subject building would be transferred to NRP and sold to AME for renovations. In 2006 the building was actually sold to Allen Affordable Housing development Fund Corp. (Allen Affordable) and Allen took over as the developer for the subject building. Since that time, according to the respondents, all of the tenants have been relocated with the exception of the petitioner who has refused to consider moving to any one of three separate temporary apartments until completion of renovations at the subject premises.

In support of the cross-motion to dismiss, the respondents submit the affidavit of Mario Ferrigno, HPD Assistant Commissioner for Code Enforcement, in which he details how HPD has responded to numerous complaints made by the petitioner regarding violations in the subject building. Mr. Ferrigno states that HPD is authorized to enforce the HMC, Administrative Code, NYS Multiple Dwelling Law and other laws addressed to the maintenance of proper housing standards. HPD receives tenant complaints and is authorized to place violations and issue notices of violation to the building owner. If the violations are not corrected HPD is authorized to commence litigation in Housing Court against the building owner and to obtain an order directing code compliance and an award of civil penalties. HPD is also authorized to perform emergency repairs where the conditions are dangerous to life, health, and safety.

With respect to the subject building, Mr. Ferrigno states that HPD has acted properly in responding to the violations which were reported. He states that HPD has issued many violations against the owner, Allen Affordable, for inadequate heat and hot water and other violations. Where violations were not corrected HPD attempted to correct the violations themselves or filed petitions in Queens Civil Court to enforce the Multiple Dwelling Law. Actions were commenced against Allen Affordable in December 2007, April 2009 and December 2010.

Respondent claims that the petition must be dismissed as mandamus does not lie to compel the exercise of discretionary enforcement authority. Counsel claims that mandamus is an extraordinary remedy used to compel the performance by an administrative body of a duty positively required by law and where the body has refused to perform such duty (citing Brusco v Braun, 84 NY2d 674[1994]). Respondent contends that the manner in which HPD exercises its authority to enforce the Multiple Dwelling Law is discretionary and HPD has discretion to determine the course of action it will take when a tenant complains of an owners failure to provide necessary services such as adequate heat and hot water. Here, respondent asserts that based upon Mr. Ferrigno's affidavit, it has demonstrated that HPD has responded to numerous complaints by petitioner, has had frequent contacts with the owner of the building, has issued violations for inadequate heat and hot water, has attempted to make the necessary emergency repairs and has filed petitions in Queens Civil Court against the owner of the subject building to enforce the Multiple Dwelling Law and the HMC. Counsel submits that, as such, HPD's actions in response to petitioner's complaints have been appropriate and proper pursuant to its discretionary authority.

With respect to the petitioner's request that HPD administer the NRP, counsel asserts that all of the tenants have been temporarily relocated with the exception of this petitioner who has refused to consider the options to relocate proffered by the respondents.

In opposition to the cross-motion, the petitioner notes that on January 20, 2012, a vacate order was placed on the subject property by the City Department of Buildings due to unsafe conditions. The respondents state that as recently as February 1, 2012, during a hearing in Civil Court, the owner of the building offered petitioner temporary relocation in three separate buildings pending the renovation of the subject premises in accordance with the requirements of Uniform relocation Assistance Act and petitioner refused to consider any of those options.

Upon review and consideration of the petition herein, respondent's affirmation in opposition and cross-motion to dismiss, petitioner's affirmation in opposition to the cross-motion and respondent's reply thereto, this Court finds as follows:

"The action or inaction of an administrative agency may be challenged by an Article 78 proceeding seeking mandamus to compel" (N. Y. Civil Liberties Union v State of N. Y., 4 NY3d 175 [2005]; Matter of Ozdoba v Chelsea Landmark LIC, LLC, 74 AD3d 555 [1st Dept 2010]). "Mandamus will only lie when it is established that some person has a clear legal right which he is entitled to enforce, and that a ministerial officer, whose duty it is to enforce the right or otherwise to act in furtherance thereof, has refused to perform his duty" Lisa v Board of Elections, 83 AD2d 949 [2d Dept. 1981]; also see Schachter v. Quinones, 140 AD2d 505 [2d Dept. 1988]).. It is used to enforce an administrative act positively required to be done by provision of law (Matter of Ahern v Board of Supervisors of County of Suffolk, 7 AD2d 538 542 [2d Dept. 1959] affd 6 NY2d 376 [1959]; Matter of Chessin v New York City Conciliation & Appeals Bd., 100 AD2d 297 [1st Dept. 1984]). "While mandamus is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which the officer may exercise discretion or judgment (see Lauer v City of New York, 95 NY2d 95, 107[2000]; Klostermann v Cuomo, 61 NY2d 525 [1984]; Tango v. Tulevech, 61 NY2d 34[1983]).

Here, mandamus is not an available remedy. Although the HPD is empowered by Title 27 of the New York City Administrative Code to enforce the Housing Maintenance Code, the Code provides that the HPD may institute actions in appropriate courts against

owners to correct violations, may issue violations, and may cause repairs to be done where emergency conditions exist. The acts which the petitioner seeks to compel the respondent to perform in this case are not duties enjoined upon the respondent by law. Rather, the manner in which the HPD decides to enforce the HMC and how its decides to proceed against building owners is within its discretion based upon its determination of the nature of the particular violation (see CPLR 7803[1]; Schachter v Quinones, 140 AD2d 505 [2d Dept. 1988]; Matter of Turdo v Rubin, 77 AD2d 608 [2d Dept. 1980]). Here, the HPD has demonstrated that until the building was ordered vacated, it had undertaken appropriate and proper enforcement actions against the building owners and attempted to correct violations in the building and in the petitioner's apartment. With respect to the administration of the NRP, there is no dispute that all of the tenants in the building were relocated during the renovation process. The petitioner has failed to explain why he has not accepted the owner's offer of a comparable residence at a comparable rent with advisory services.

With respect to the cause of action for reinstatement as superintendent, the petitioner has failed to provide any factual allegations with respect to his wrongful termination and how the respondents were involved in his discharge.

Therefore, for all of the above-stated reasons, this Court finds that the petitioner has failed to establish a legal right to mandamus in this matter.

Accordingly, it is hereby

ADJUDGED and ORDERED, that the petition is denied, and it is further,

ADJUDGED and ORDERED, that respondent's cross-motion is granted and the petition is dismissed.

Dated: June 12, 2012  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**