

**Matter of Sanders v New York City Hous. Auth.**

2012 NY Slip Op 31800(U)

July 2, 2012

Sup Ct, New York County

Docket Number: 400667/12

Judge: Arlene P. Bluth

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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: NOEL ARI FINE P. BLUTH  
Justice

PART 4

Index Number : 400667/2012  
SANDERS, JOANN  
vs.  
NYC HOUSING AUHTORITY  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 3, were read on this motion to/for Article 78

Notice of <sup>petition</sup> Motion/Order to Show Cause — Affidavits — Exhibits	No(s). <u>1</u>
<del>Answering Affidavits</del> — Exhibits <sup>Cross Motion to Dismiss</sup>	No(s). <u>2</u>
Replying Affidavits <sup>Opp. to cross-motion</sup>	No(s). <u>3</u>

Upon the foregoing papers, it is ordered that this motion <sup>petition + cross-</sup> ~~is~~ are

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER

### UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 7/2/12

[Signature], J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

SUPREME COURT OF THE STATE OF NY  
COUNTY OF NEW YORK: PART 4

Index No.: 400667/12

In the Matter of the Application of  
Joann Sanders,

*Petitioner,*  
  
*-against-*

DECISION, ORDER  
AND JUDGMENT

New York City Housing Authority,  
  
*Respondents.*

Present: HON. ARLENE P. BLUTH

Petitioner, who is self-represented, commenced this Article 78 proceeding to vacate her second default in appearing for a hearing on her remaining family member grievance. NYCHA cross-moves to dismiss this proceeding on the grounds that petitioner has failed to state a cause of action because (1) she failed to exhaust her administrative remedies by not making an application to vacate that default, and (2) she has failed to pay use and occupancy which is a prerequisite to pursuing a remaining family member grievance. For the reasons set forth below, NYCHA's cross-motion is granted and the proceeding is dismissed.

Petitioner seeks to succeed to the tenancy of her mother, Elizabeth Sanders, who vacated the subject apartment, 10F at 1970 Amsterdam Avenue, a public housing development owned and operated by NYCHA, on January 15, 2009.

Petitioner's First Grievance and First Article 78 Proceeding

After her mother vacated the apartment, petitioner filed a grievance seeking remaining

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family member status. Both the Property Manager and the Borough Manager denied petitioner's grievance because management never granted petitioner permission to join her mother's household. The Property Manager also noted that petitioner, who is not a senior citizen, was not eligible to receive a lease in the subject seniors-only building.

By District Grievance Summary dated March 20, 2009, the Borough Manager checked the box on the District Summary Grievance stating that the grievance was dismissed on the grounds that petitioner failed to make any showing to substantiate her claim (exh F). As such, petitioner had no further right of appeal to a hearing officer, and she was so informed. Nevertheless, petitioner commenced an Article 78 proceeding challenging NYCHA's refusal to grant her a hearing, which was resolved by an August 7, 2009 stipulation of discontinuance wherein NYCHA agreed to provide petitioner with a new remaining family member grievance provided she remain current in the payment of use and occupancy (exh G).

#### Petitioner's Second Grievance and Second Article 78 Proceeding

Less than one month after the stipulation was signed, the property manager notified petitioner that she must submit a request to initiate her second remaining family member grievance within 14 days; the Borough Manager offered petitioner an opportunity to submit additional documentation and/or request a meeting within 10 business days. Despite these notifications, petitioner took no action. By District Grievance Summary dated April 29, 2010, the Borough Manager denied her grievance. The form told petitioner how to request a hearing if she

was dissatisfied with this disposition.

Petitioner requested a hearing which was duly noticed for July 15, 2010. On that date, the parties signed a stipulation which adjourned the hearing until August 14, 2010 and expressly provided that if petitioner “does not appear on the adjourned date, the grievance may be dismissed and...she may be evicted as a result”.

Petitioner failed to appear on August 14, 2010 and the hearing officer dismissed her grievance. Instead of submitting an application to open her default, petitioner commenced another Article 78 proceeding challenging the dismissal of her grievance on default; that proceeding was dismissed as premature.

#### This, Petitioner's Third Article 78 Proceeding

After her second Article 78 proceeding was dismissed, petitioner submitted an application to open her default, which was granted, and petitioner was given a new hearing date—November 16, 2011. However, she failed to appear on this date, and once again the hearing officer dismissed her grievance on default. On December 7, 2011, NYCHA's Board approved the hearing officer's dismissal.

Petitioner has not applied to open her second default; instead she commenced this third Article 78 proceeding, claiming that NYCHA did not notify her of this hearing date in a timely manner.

Moreover, NYCCHA submits its rent ledger which shows that petitioner (1) has not paid any use and occupancy for over two years, since October 2009, and (2) is in arrears and owes \$8,541.72.

#### Standard of Review

The “[j]udicial review of an administrative determination is confined to the ‘facts and record adduced before the agency.’” (*Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000], quoting *Matter of Fanelli v New York City Conciliation & Appeals Board*, 90 AD2d 756 [1st Dept 1982]).

In *Sumner v Hogan*, 73 AD3d 618, 619, 901 NYS2d 236, 238 (1st Dept 2010), the court quoted what has long been the law: unless the act is challenged as unconstitutional, “one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law” (citing *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57, 412 NYS2d 821 [1978]). Where a petitioner has not demonstrated that she/he exhausted all administrative remedies, an Article 78 proceeding must be dismissed as premature. See *Gonzalez v New York City Hous. Auth.*, 82 AD3d 511, 512, 918 NYS2d 344 (1<sup>st</sup> Dept 2011) (lower court properly dismissed proceeding as premature where “petitioner did not file any grievance and petitioner rendered no determination relating to those claims”).

Here, it is undisputed that petitioner failed to apply to open her November 16, 2011 default. As such, she has failed to exhaust her administrative remedies, and this proceeding, like

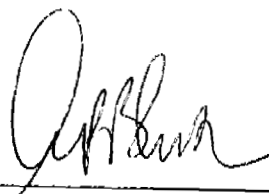
her second Article 78 proceeding, is premature. Additionally, the record amply demonstrates that petitioner did not comply with NYCHA's Grievance Procedures, para. 9, "Hearing Prerequisites" (exh D) which requires that a grievant be current with use and occupancy as a prerequisite to a hearing on the merits for a remaining family member grievance claim.

Accordingly, it is ORDERED and ADJUDGED that NYCHA's cross-motion to dismiss this proceeding is granted, and the proceeding is dismissed. All stays are vacated.

This is the Decision, Order and Judgment of the Court.

Dated: July 2, 2012

New York, New York



HON. ARLENE P. BLUTH, JSC

**HON. ARLENE P. BLUTH**

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