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

PRESENT: ALEXANDER W. HUNTER, JR. PART 33

Justice

2807/2809 CLAFLIN REALTY, LLC

INDEX NO. 103628/12

MOTION DATE

- v -

JOHN B. RHEA, ETAL

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-11
Answering Affidavits — Exhibits	12-19
Replying Affidavits	20-23

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

See memorandum decision & judgment annexed hereto

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).

Dated: 12/15/12

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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103628/12

In the Matter of the Application of
2807/2809 Claflin Realty, LLC

Index No. ~~401511~~12

Petitioner,

Decision and Judgment

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

-against-

John B. Rhea, as Chair of the New York City
Housing Authority, and the New York City
Housing Authority,

Respondents.

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HON. ALEXANDER W. HUNTER, JR.

The application by petitioner for an order pursuant to Article 78 of the C.P.L.R. for an order compelling respondents to restore subsidy payments made to petitioner, retroactive to the date on which the subsidy payments should have been reinstated, and to issue retroactive and ongoing subsidy payments for the tenant Carmen Diaz, is denied. Respondent's cross-motion to dismiss with prejudice, pursuant to C.P.L.R. § 3211 (5), is granted.

Petitioner commenced this Article 78 proceeding on August 20, 2012, by filing a verified petition. Respondent cross-moved to dismiss with prejudice, pursuant to C.P.L.R. § 3211. Petitioner is the owner and landlord of the premises known or located at 2807/2809 Claflin Avenue, Bronx, New York 10468. Carmen Diaz ("Diaz") is the tenant of record of apartment 6 at 2807 Claflin Avenue, Bronx, New York 10468 (the "apartment") and receives a Section 8 subsidy from New York City Housing Authority ("NYCHA").

The Secretary of Housing and Urban Development ("HUD") provides subsidies through public housing agencies ("PHA"), such as NYCHA. The PHA certifies eligible families for participation in the program and enters into Housing Assistance Payment ("HAP") contracts with the owners of agency approved rental housing units, for direct payment of a portion of the tenant's monthly rent. **See, 42 U.S.C. § 1437 et. seq.** Owners must maintain the unit in accordance with HUD promulgated Housing Quality Standards ("HQS"). "The PHA must not make any housing assistance payments for a dwelling unit that fails to meet the HQS, unless the owner corrects the defect within the period specified by the PHA and the PHA verifies the correction." **24 C.F.R. § 982.404.** NYCHA specifies a time frame for correcting the HQS defect in its NE-1 notice. The PHA is obligated to inspect the subsidized unit at least annually to determine whether it meets HQS and must notify the owner of any defects shown by the inspection. **24 C.F.R. § 982.405.**

NYCHA inspected Diaz's apartment was on April 5, 2010, and found two serious HQS violations and three additional conditions. NYCHA sent an NE-1 notice, dated April 14, 2011, to notify petitioner of the HQS violations found during the April 5, 2010 inspection. Diaz signed a certification of completed repairs form on July 7, 2011, and the executed form was returned via facsimile to NYCHA on July 11, 2011. NYCHA suspended Diaz's subsidy due to the HQS violation from June 1, 2011 to August 31, 2011. NYCHA resumed making subsidy payments after verifying the HQS violations were corrected, effective September 1, 2011.

NYCHA then sent petitioner a second NE-1 notice, dated January 10, 2012, which also referenced the April 5, 2010 inspection and the same HQS violations previously certified as corrected. Petitioner sent an executed certification of completed repairs form on February 1, 2012, via facsimile to NYCHA .

NYCHA reinspected the premises on April 4, 2012, and found two new HQS violations. NYCHA did not find the previous HQS violations. Petitioner was notified with a 3-L form and sent the executed 3-L certification of completed repairs on June 19, 2012, via facsimile to NYCHA. Diaz's subsidy was not suspended again and remains current to date.

Petitioner argues that Diaz's subsidy should be retroactively restored for the period June 1, 2011 through August 31, 2011. Petitioner brings suit under a theory of mandamus to compel, and in the alternative, under a theory of certiorari.

Respondent cross-moved to dismiss on the grounds that petitioner's mandamus claim is time-barred by the doctrine of laches because petitioner did not make a timely demand. As a preliminary matter, petitioner argues that respondent's cross motion to dismiss should be denied as untimely. It is within this court's discretion to permit an untimely answer, especially when there is no prejudice to petitioner. **See, Matter of Castell v. City of Saratoga Springs, 3 AD3d 774, 2004 NY Slip Op 00308 (3d Dept 2004); Matter of Marseilles Leasing Co. v. New York State Div. of Hous. & Community Renewal, 140 AD2d 345 (2d Dept 1988).** While respondent served answering papers several days late, petitioner secured an extension to answer the cross-motion and was not prejudiced.

Mandamus to compel is a judicial command to an officer or body to perform a specified ministerial act that is required by law to be performed. **See, Matter of Hamptons Hosp. & Med. Ctr. v. Moore, 52 NY2d 88 (1981).** The petitioner must show a "clear legal right" to the requested relief to succeed in mandamus and the petition must be denied if the right to performance is clouded by "reasonable doubt or controversy." **Matter of Assn. of Surrogates & Supreme Ct. Reporters within City of N.Y. v. Bartlett, 40 NY2d 571, 574 (1976).** Mandamus cannot be used to compel an officer or tribunal to reach a particular outcome with respect to a decision that turns on the exercise of discretion or judgment. **Klosterman v. Cuomo, 61 NY2d 525 (1984).**

In a proceeding for mandamus relief, the four month statute of limitations does not begin to run until the date petitioner's demand for action is refused. **Donoghue v. New York City Dept. of Educ., 80 AD3d 535, 2011 NY Slip Op 00425 (1st Dept 2011).** However, petitioner

will be found guilty of laches and its proceeding barred if it fails to make a demand for relief within a reasonable time after the right to make the demand occurs. **See, e.g., Matter of Civil Serv. Empls. Assn. v. Board of Educ., Patchogue-Medford Union Free School Dist., 239 AD2d 415 (2d Dept 1997)** (nine month delay); **Matter of McKenzie v. Comptroller of State of N.Y., 268 AD2d 828 (3d Dept 2000)** (thirteen month delay). Petitioner's right to make a demand arose when the subsidy was suspended in June 2011, however it did not make a demand until June 2012 (twelve month delay). While petitioner interprets respondent's argument as raising a statute of limitations issue as to the date of commencement of the proceeding, the rationale is rather a laches issue as to the date the demand was made. Laches is applicable in the instant proceeding because petitioner waited a year to make a demand.

In the alternative, petitioner argues that NYCHA's failure to retroactively restore the subsidy is arbitrary and capricious under a theory of certiorari. Respondent cross-moved to dismiss on the grounds that the mandamus to review claim is barred by the four month statute of limitations.

The writ of certiorari, also known as mandamus to review, is sought where petitioner seeks judicial review of the final determination of an agency. **Matter of Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs., 77 NY2d 753 (1991).** The standard used in mandamus to review is whether a determination was arbitrary and capricious. **Matter of Marburg v. Cole, 286 NY 202 (1941).** There are two requirements for a final and binding decision: (1) "the agency must have reached a definitive position on the issue that inflicts actual, concrete injury," and (2) "the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party." **Matter of Best Payphones, Inc. v. Dept. of Info. Tech. & Telecom. of City of N.Y., 5 NY3d 30, 40 (2005).**

"Petitioner cannot be said to be aggrieved by the mere issuance of a determination when the agency itself has created an ambiguity as to whether or not the determination was intended to be final." **Matter of Biondo v. New York State Bd. of Parole, 60 NY2d 832, 470 (1983).** NYCHA creates an ambiguity when it sends an NE-1 notice indicating that as long as an owner provided the certification to NYCHA, it would either deny the certification or reinspect the unit, but instead remains silent. **Matter of BRG 3715 LLC v. New York City Hous. Auth., 2012 NY Slip Op 30656(U) (Sup Ct, NY County 2012).** When NYCHA does reinspect the unit or provide petitioner with subsequent written notices there is no ambiguity, thus NYCHA's act of suspending the subsidy constitutes a final and binding determination. **See, e.g., Id.; Chillum Place v. Rhea, Index No. 101565/12 (Sup Ct, NY County 2012); Royal Charter Properties, Inc. v. New York City Hous. Auth., Index No. 100189/10 (Sup Ct, NY County 2010); Weilders v. New York City Hous. Auth., Index No. 1127872/11 (Sup Ct, NY County 2011).**

A party must commence a special proceeding under Article 78 of the C.P.L.R. by filing a petition within four months after the administrative determination to be reviewed becomes final and binding on the aggrieved party. **See, C.P.L.R. § 217 (1) & 304; Best Payphones, Inc. v. Dept. of Info. Tech. & Telecomms., 5 NY3d 30 (2005), 2005 NY Slip Op 04616.** The four

month limitation period is construed strictly, particularly against Article 78 petitioners seeking to challenge NYCHA determinations, and the court does not have the discretion to extend the statute of limitations in the interest of justice. **See De Milio v. Borhard, 55 NY2d 216 (1982); Saunders v. Rhea, 92 AD3d 602 (1st Dept 2012).**

Here, unlike **Matter of BRG**, there is no ambiguity that NYCHA made a final determination because it reinspected the premises. The first nonpayment of a disputed subsidy constituted a final and binding determination and put petitioner on notice of NYCHA's adverse determination. The four month statute of limitations began to run in June 2011 and this action was not commenced until more than a year later in August 2012. Petitioner's mandamus to review claim is time-barred.

Accordingly, it is hereby,

ADJUDGED, that the petition is denied and the proceeding is dismissed with prejudice, without costs and disbursements to either party.

Dated: December 15, 2012

ENTER:

J.S.C.
ALEXANDER W. HUNTER, JR.