

**Matter of Duncan v New York City Dept. of Hous.
Preserv. & Dev.**

2013 NY Slip Op 32629(U)

October 23, 2013

Supreme Court, New York County

Docket Number: 401105/13

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 401105/2013

DUNCAN, PEARL

vs
NYC DEPARTMENT OF HOUSING

Sequence Number : 011

ARTICLE 78

FILED

OCT 24 2013

COUNTY CLERK'S OFFICE
NEW YORK

PART _____

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

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

RECEIVED
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IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT-CIVIL

Dated: 10/23/13

PK, 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 NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
In the Matter of the Application of

PEARL DUNCAN,

Petitioner,

Index No. 401105/13

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT,

Respondent.

FILED

OCT 24 2013

COUNTY CLERK'S OFFICE
NEW YORK

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>3</u>

Petitioner Pearl Duncan brought the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to challenge a determination made by respondent New York City Department of Housing Preservation and Development ("HPD") revoking Section 8 subsidies. HPD cross-moves to dismiss the petition on the ground that it is time-barred. For the reasons set forth below, the petition is denied and the cross-motion is granted.

The relevant facts are as follows. Petitioner is the tenant of the apartment located at 40 Harrison Street, Apt. 36H, New York, New York (the "subject apartment"), which is part of

Independence Plaza North (“Independence Plaza”), an Article II housing company organized under the Private Housing Finance Law (“PHFL”), also known as the Mitchell-Lama Law. On or about July 1, 2004, Independence Plaza opted out of the Mitchell-Lama Program and as part of the conversion process, its residents, including petitioner, were able to apply to the Section 8 program.

On March 17, 2004, petitioner submitted a Section 8 Existing Housing Program Application for Rental Assistance to HPD (the “Application”). On April 15, 2004, HPD requested additional information to process the Application, including a complete copy of petitioner’s 2003 tax return. By letter dated April 20, 2004, petitioner sent HPD the additional information and requested that she not be deemed eligible for a Section 8 subsidy. Specifically, petitioner stated, in pertinent part,

I do not want anything to happen to jeopardize the work and business I have labored so hard to build. Believe me, you must decline Section 8 for me. Receiving any such assistance will place me and the program at risk, for there is the possibility that the news could come out when a reporter is writing about, or preparing an interview, about my income.

In a letter dated May 10, 2004, HPD informed petitioner that she qualified for a Section 8 voucher based on the Application and supporting documentation.

However, in response to petitioner’s April 20, 2004 letter, on May 13, 2004, HPD sent petitioner an “Official Termination Letter” notifying her that HPD’s offer for the Section 8 voucher was revoked effective May 13, 2004. Specifically, the letter explained that the reason for the revocation was petitioner’s “Refused Offer.” By Notice of Petition and Verified Petition, dated September 24, 2012, petitioner commenced an Article 78 proceeding seeking reevaluation of the Application and for HPD to average her income from previous years to find her *ineligible*

for Section 8. HPD cross-moved to dismiss the petition on the ground that petitioner's claims were time-barred. On or about July 1, 2013, Justice Shlomo Hagler heard oral argument on the petition and cross-motion. During oral argument, petitioner made it clear that she was not merely challenging HPD's Official Termination Letter but that HPD did not correctly calculate whether petitioner should receive "middle income status," which would place her in the Landlord Assisted Program ("LAP") and allow her to obtain a LAP middle-income lease. Finally, petitioner asserted during oral argument that HPD violated its guidelines by not informing her of her right to an administrative hearing. Although Justice Hagler noted that the petition may very well be time-barred, by Decision and Order, dated July 1, 2013, Justice Hagler dismissed the petition without prejudice on the ground that "petitioner failed to attach or show proof that HPD was required to determine the middle income status of petitioner for a landlord sponsored program."

Petitioner then commenced the instant Article 78 proceeding by Notice of Petition and Verified Petition dated July 12, 2013 seeking to "review petitioner's financial documents, average petitioner's variable self-employed income, correct the evaluation error, and determine that petitioner is ineligible for section 8." To prove that HPD was required to determine the middle income status of petitioner, petitioner attaches to her petition an eight-page excerpt from a March 12, 2004 Agreement (the "Agreement") between Independence Plaza North Tenant Association, Inc. (the "Tenant Association"), Independence Plaza Associates, L.P. (the "Landlord") and Washington Plaza Towers, Inc. (the "Housing Company").

As an initial matter, the petition must be denied on the ground that it is time-barred. There is a four month statute of limitations to bring an Article 78 proceeding to challenge an

administrative determination that is measured from the date the determination becomes final and binding upon the petitioner. NY CPLR § 217. An administrative determination becomes final and binding when it has an impact upon an individual and that party is notified of the determination. *See Westbury v. Department of Transp.*, 75 N.Y.2d 62 (1989). In the instant action, HPD notified petitioner by Offer Termination Letter, dated May 13, 2004, that its offer for a Section 8 voucher was revoked, effective May 13, 2004, due to petitioner's "Refused Offer." The Offer Termination Letter advised petitioner to call HPD if she had any questions regarding the matter. Thus, in order for this proceeding to be timely, it had to be commenced on or before September 13, 2004, four months after petitioner received HPD's Offer Termination Letter and was aggrieved by the agency's determination. It is undisputed that petitioner received the termination letter in May 2004. However, petitioner did not commence the Article 78 proceeding before Justice Hagler until September 24, 2012, eight years after her time to do so had already expired. Moreover, this proceeding was not commenced until July 12, 2013. Thus, any challenge to HPD's decision is time-barred and must be dismissed.

To the extent petitioner asserts that the instant Article 78 petition is timely because she was never provided with the opportunity to have an administrative hearing or notified of her right to an appeal in an Article 78 proceeding, such assertion is unavailing. As an initial matter, respondent's determination denying petitioner Section 8 benefits was based solely on petitioner's own refusal of Section 8 benefits in her letter to HPD dated April 20, 2004 and petitioner has not demonstrated that respondent must offer her the option of challenging such decision.

Furthermore, the Offer Termination Letter stated that if petitioner had any questions regarding her Section 8 termination, she should contact HPD and a specific telephone number was given.

However, even if the petition was timely, it must still be dismissed. Petitioner's prior Article 78 proceeding was dismissed without prejudice to allow petitioner to provide the court with proof that HPD was required to determine the middle income status of petitioner for a landlord sponsored program such as LAP. However, in petitioner's second attempt to challenge HPD's decision, she still has not provided the court with such proof. Petitioner has attached to her petition eight pages of the Agreement between the Tenant Association, the Landlord and the Housing Company. Specifically, petitioner asserts that such proof lies in the relevant portion of such Agreement which states that "HPD will make a determination as to each Tenant's eligibility for Sticky Vouchers based upon his or her family income level and other relevant HPD/HUD standards." The Agreement explains that "Sticky Vouchers" are not conventional Section 8 vouchers but rather Section 8 enhanced vouchers. However, nowhere in the Agreement does it state that HPD must determine the middle income status of petitioner for the LAP but only whether petitioner is eligible for Sticky Voucher benefits. Additionally, petitioner does not allege that HPD was a party to the Agreement nor has she identified any statutory or regulatory authority requiring HPD to determine whether petitioner qualifies as a middle income tenant for a landlord-sponsored program.

Accordingly, the cross-motion to dismiss the petition is granted and the petition is dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 10/23/13

FILED

OCT 24 2013

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NEW YORK

OK

J.S.C.