SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. **PART** 40

Justice

Index Number : 401019/2012
SMITH, AUDREY
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
OTHER RELIEFS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 5 **, were read on this motion to/for** a default judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1-2

Answering Affidavits — Exhibits _____ **No(s).** 3

Replying Affidavits _____ **No(s).** 4-5

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

The court denies plaintiff's motion for a default judgment, grants defendant's motion to serve a late answer, and conditionally denies defendant's motion to dismiss the complaint, pursuant to the accompanying decision. C.P.L.R. §§ 3012(d), 3211(a)(1) and (7), 3215.

FILED

JAN 07 2014

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 12/20/13

Lucy Billings
LUCY BILLINGS J.S.C. , 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**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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AUDREY SMITH,

Plaintiff

- against -

NEW YORK CITY HOUSING AUTHORITY,

Defendant

----------x

Index No. 401019/2012

DECISION AND ORDER

APPEARANCES:

For Plaintiff
Audrey Smith, Pro Se

For Defendant
Elena Madelina Andrei Esq.
New York City Housing Authority
250 Broadway, New York, NY 10007

LUCY BILLINGS, J.S.C.:

Plaintiff Audrey Smith, maintaining that defendant New York City Housing Authority (NYCHA) has failed to answer timely, moves for a default judgment against defendant. C.P.L.R. § 3215. Defendant cross-moves for acceptance of defendant's answer, C.P.L.R. § 3012(d), and dismissal of the complaint based on documentary evidence and failure to state a claim. C.P.L.R. § 3211(a)(1) and (7).

Plaintiff claims defendant violated her rights, as a resident of defendant's housing, to opportunities for employment by defendant or its contractors under 12 U.S.C. § 1701u, because defendant informed its Department of Resident Economic Empowerment and Sustainability (REES), which administers

defendant's resident employment program, of her rent arrears. This program under 12 U.S.C. § 1701u, Section 3 of the federal Housing and Urban Development Act of 1968, is referred to as the Section 3 program. Plaintiff seeks lost wages for the claimed violation of her federal rights and unspecified damages for harassment by defendant's employees who attempted to peer into her apartment without her consent. Plaintiff filed her complaint May 7, 2012, but defendant maintains that she did not serve the summons and complaint on defendant until September 12, 2012, after the 120 days for service expired. C.P.L.R. § 306-b.

I. SERVICE OF PLAINTIFF'S SUMMONS AND COMPLAINT AND ACCEPTANCE OF DEFENDANT'S ANSWER

Before September 12, 2012, plaintiff served her summons only on defendant's employees, a manager and a building representative at one of its residential buildings. These employees were unauthorized to accept service for defendant itself. Defendant has designated it General Counsel at 250 Broadway, 9th floor, New York County, as defendant's agent for service. C.P.L.R. § 318.

Since defendant seeks only acceptance of defendant's answer as timely and not dismissal of the complaint based on its late service, C.P.L.R. § 306-b, the court accepts the answer served on plaintiff with defendant's cross-motion November 16, 2012, which was a timely response to plaintiff's motion for a default judgment. C.P.L.R. § 3012(d). Even if the answer itself was 45 days late, delay alone, without any demonstrated prejudice to plaintiff from the delay, is not a basis to preclude the answer. See Gazes v. Bennett, 70 A.D.3d 579 (1st Dep't 2010); Cirillo v.

Macy's, Inc., 61 A.D.3d 538, 540 (1st Dep't 2009); Jones v. 414 Equities LLC, 57 A.D.3d 65, 81 (1st Dep't 2008).

II. THE UNDISPUTED DOCUMENTARY EVIDENCE AND PLAINTIFF'S FACTUAL ALLEGATIONS

Plaintiff applied for defendant's resident employment program on September 6, 2011, and again on April 5, 2012. Between plaintiff's two applications, in early 2012, defendant commenced a proceeding against plaintiff claiming her nonpayment of rent. The parties settled the proceeding March 28, 2012, through a stipulation that provided for plaintiff's payment of $152 to defendant and its credit of $123 to plaintiff. At this point, defendant implicitly concedes it would have been inaccurate to convey that plaintiff's rent was in arrears. In fact plaintiff's exhibits to her complaint show that on March 30, 2012, defendant's employee at plaintiff's housing development notified REES in writing that the nonpayment proceeding was discontinued, and plaintiff was "at zero balance as a result of a credit due to the account, along with a payment in court." The outcome of the nonpayment proceeding further suggests, as plaintiff insists, that her rent was not in arrears previously either, or, if it was, the amount was negligible, as well as disputed.

In contrast to defendant's documentary evidence, the complaint alleges, however, that a REES representative notified plaintiff that in June 2011 her application for a job opportunity was "discontinued . . . due to rent arrears." V. Compl. ¶ 4. The complaint then alleges that between June 2011 and March 2012

she repeatedly attempted to resolve defendant's efforts to collect rent arrears from her that she did not owe. Based on the complaint's exhibits, the dispute only was resolved through the stipulation dated March 28, 2012, in the nonpayment proceeding.

In sum, plaintiff's allegations regarding the REES representative's notification to plaintiff in June 2011 raise an inference that defendant conveyed to REES that plaintiff's rent was in arrears at a point when she disputed such a fact. The March 2012 stipulation resolving this dispute further reflects that the true facts may not have sustained defendant's claim.

Plaintiff does not specifically allege, and defendant's documentary evidence does not indicate, however, that, as of June 2011, she had applied, let alone entered any contract with defendant, for a job opportunity in defendant's resident employment program. Nor does she specifically allege that at any point after September 2011, when she undisputedly applied, defendant then discontinued or denied her application due to rent arrears.

This lack of specificity undermines the substantive merits of plaintiff's motion for a default judgment, but does not defeat her action altogether. For purposes of defendant's motion to dismiss her action, her allegations that she completed REES' orientation and in June 2011 was "placed on the list for construction" and "custodial maintenance . . . to be the next for hire" may be construed as her completed application for or her enrollment in defendant's resident employment program in June

2011. V. Compl ¶ 3. This interpretation allows the further inference that the notice of discontinuance due to rent arrears followed the June 2011 application or enrollment.

III. WHETHER PLAINTIFF ALLEGES A CLAIM UNDER FEDERAL LAW

A. Violation of 12 U.S.C. § 1701u(c)(1) or 24 C.F.R. § 135.30(b)(1) or 135.32(c)

Assuming defendant discontinued plaintiff's application for or enrollment in defendant's resident employment program in June 2011 for an unfounded reason, the issue becomes whether defendant owed plaintiff any duty to retain her in the program to the extent of hiring her or assisting her in securing employment. 12 U.S.C. § 1701u(c)(1)(A) requires defendant, its contractors, and their subcontractors to "make their best efforts . . . to give low-income and very low-income persons the training and employment opportunities generated" by specified federal funding. These efforts must be prioritized to give those opportunities first to residents of defendant's housing developments where the funding is spent and second to residents of defendant's other housing developments. 12 U.S.C. § 1701u(c)(1)(B); 24 C.F.R. § 135.34(a)(1). Although the record does not indicate whether, since June 2011, defendant has spent federal funding subject to § 1701u(c)(1)'s requirements at the housing development where plaintiff resides, plaintiff is a member of at least one of the two priority groups. Defendant's "responsibility to comply" with 12 U.S.C. § 1701u(c)(1) "in its own operations" includes: "Facilitating the training and employment" of its residents. 24 C.F.R. § 135.32(c).

Defendant may meet the statutory "best efforts" requirement through the employment of defendant's residents as 30% of employees hired by defendant, its contractors, or their subcontractors. 24 C.F.R. § 135.30(b)(1)(iii). Thus, even if defendant discontinued training and employment opportunities to plaintiff based on information that was false or that unfairly disparaged her, defendant would not have violated the "best efforts" requirement as long as defendant met this standard. Plaintiff has not alleged that defendant failed to meet this standard.

Nevertheless, defendant's additional "responsibility" was to facilitate the training and employment of its residents, such as plaintiff. 24 C.F.R. § 135.32(c). Viewing the complaint and evidence in her favor, defendant discontinued her application for or enrollment in its resident employment program from June 2011 until either September 2011, when defendant shows she subsequently applied, or April 2012, when defendant shows she reapplied and it had notified REES that her rent was not in arrears. This outright discontinuance hardly may be considered facilitating residents' employment. Id.

B. HUD's Administrative Remedies Do Not Address Plaintiff's Injury.

Assuming defendant failed to meet the 30% standard or, by discontinuing plaintiff's application or enrollment, failed to afford the statutory priority or meet defendant's responsibility to facilitate a resident's training and employment between June 2011 and April 2012, 12 U.S.C. § 1701u provides an administrative

remedy. Marcel v. Donovan, 2012 WL 868977, at *5 (E.D.N.Y. Mar. 14, 2012); Williams v. United States Dept. of Hous. & Urban Dev., 2006 WL 2546536, at *9 (E.D.N.Y. Sept. 1, 2006). Plaintiff may complain to the Assistant Secretary for Equal Opportunity of the United States Department of Housing and Urban Development (HUD). 24 C.F.R. § 135.76(a)(1). HUD administers the federal funds to which defendant's resident training and employment obligations are tied. Although plaintiff might "obtain a voluntary and just resolution" from defendant through the HUD process, 24 C.F.R. § 135.76(f)(2), the relief HUD imposes on a public housing authority involuntarily, such as termination, suspension, or limitation of the housing authority's federal funds, would not provide redress to plaintiff. 24 C.F.R. § 135.76(g). E.g., Gonzaga Univ. v. Doe, 536 U.S. 273, 287-88 (2002); Alexander v. Sandoval, 532 U.S. 275, 289 (2001); Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 28-29 (1981); Williams v. United States Dept. of Hous. & Urban Dev., 2006 WL 2546536, at *9. See Rhodes v. Herz, 84 A.D.3d 1, 8 (1st Dep't 2011); Delgado v. New York City Hous. Auth., 66 A.D.3d 607, 608 (1st Dep't 2009). She seeks employment based on defendant's very receipt of federal funds, which if reduced or limited would curtail defendant's provision of the employment opportunities she seeks.

HUD's complaint process under 24 C.F.R. § 135.76 does not preclude plaintiff from seeking otherwise available redress through the judicial process, 24 C.F.R. § 135.76(j), and thus does not foreclose enforcement of 12 U.S.C. § 1701u(c)(1) or a

regulation under the statute, if it creates rights enforceable by private individuals. Alexander v. Sandoval, 532 U.S. at 290; Wilder v. Virginia Hosp. Assn., 496 U.S. 498, 508 & n.9 (1990); Williams v. United States Dept. of Hous. & Urban Dev., 2006 WL 2546536, at *9. Plaintiff must demonstrate a remediable injury, however, for which redress is available.

C. Plaintiff's Injury

Although plaintiff has not alleged that defendant failed to meet the 30% standard, such an allegation likely is impossible without disclosure. C.P.L.R. § 3211(d); Amsellem v. Host Marriott Corp., 280 A.D.2d 357, 359 (1st Dep't 2001); Cerchia v. V.A. Mesa, 191 A.D.2d 377, 378 (1st Dep't 1993); Putter v. North Shore Univ. Hosp, 25 A.D.3d 539, 540 (2d Dep't 2006); Bordan v. North Shore Univ. Hosp., 275 A.D.2d 335, 336 (2d Dep't 2000). See Vasquez v. Heidelberg Harris, 265 A.D.2d 225 (1st Dep't 1999). In any event, she does allege that defendant removed her from the priority group, 12 U.S.C. § 1701u(c)(1)(B), and failed to meet its "responsibility" to facilitate the training and employment of its residents. 24 C.F.R. § 135.32(c). To demonstrate an injury from any such failure, she must show that, had she not been discontinued from the resident employment program in June 2011, further training or jobs would have been available to her between then and April 2012, after which defendant had corrected any misinformation about her rent arrears, she reapplied, and she alleges no subsequent discontinuance.

Plaintiff alleges that she completed a resident employment program orientation and was "on the list" for construction and custodial maintenance "to be the next for hire." V. Compl ¶ 3. Regarding whether any further training or any jobs in those capacities would have been available to her between June 2011 and April 2012, in opposition to defendant's motion, plaintiff presents an unsworn statement signed by Christine M. Greene, CHST, Professional Safety Consultant, Licensed Site Safety Manager, and Authorized OSHA Trainer, of Sudden Safety Consultants. Greene's address is on Fifth Avenue near 140th Street in the northern section of the Harlem neighborhood in New York County, approximately 20 blocks from plaintiff's residence near Tenth Avenue on 125th Street in the southwestern section of Harlem. The letterhead identifies Sudden Safety Consultants as a subsidiary of New Millennium Builders, LLC, offering "OSHA and Scaffold Training" and "NYC Dept of Buildings Courses." Referring to plaintiff, Greene states:

> Ms. Smith approached me regarding a job and seemed eager to learn more about construction. Ms. Smith seemed to have an excellent work ethic, as well as a good attitude so I was ecstatic to have found placement for her in our construction company, New Millennium builders, LLC. . . . .
>
> . . . .
>
> . . . As a participant in the Section 3 - Resident Employment Services Program for individuals living in NYCHA buildings, a placement had been found for Ms. Smith on one of our local projects in June 2011. Ms. Smith lost her standing in the program, however, and therefore could not be placed.

Plaintiff, in opposing defendant's motion to dismiss the complaint, unlike defendant supporting the motion, may supplement

her pleading with admissible evidence. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Cron v. Hargro Fabrics, 91 N.Y.2d 362, 366 & n. (1998); Ray v. Ray, 108 A.D.3d 449, 452 (1st Dep't 2013); Thomas v. Thomas, 70 A.D.3d 588, 591 (1st Dep't 2010). If sworn, Greene's statement would show that "a participant in the Section 3 - Resident Employment Services Program for individuals living in NYCHA buildings" had a job for plaintiff on a local construction project in June 2011, but, even though she met "the qualifications of the position to be filled," did not place her in it solely because defendant had discontinued her eligibility. 24 C.F.R. § 135.34(c).

Although defendant insists that nothing prevented an employer from hiring plaintiff, which well may have been true outside defendant's construction projects and in private employment, the statement from Sudden Safety Consultants directly contradicts this contention regarding a contractor in defendant's Resident Employment Services Program. Defendant's Assistant Director of Job Generation for REES attests, nonetheless, that its records do not disclose New Millennium Builders or Sudden Safety Consultants as such a contractor. Even if this account of defendant's records without producing them or laying a foundation for their admissibility, e.g., C.P.L.R. § 4518(a), were not inadmissible hearsay, defendant's affidavit contradicting plaintiff's claims may not be considered to support a motion to dismiss claims under C.P.L.R. § 3211(a)(1) or (7). Lawrence v. Graubard Miller, 11 N.Y.3d 588, 595 (2008); Correa v. Orient-

Express Hotels, Inc., 84 A.D.3d 651 (1st Dep't 2011); Tsimerman v. Janoff, 40 A.D.3d 242 (1st Dep't 2007); Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc., 10 A.D.3d 267, 271 (1st Dep't 2004). See Miglino v. Bally Total Fitness of Greater N.Y., Inc., 20 N.Y.3d 342, 352 (2013); Regini v. Board of Mgrs. of Loft Space Condominium, 107 A.D.3d 496, 497 (1st Dep't 2013); Flowers v. 73rd Townhouse LLC, 99 A.D.3d 431 (1st Dep't 2012); Solomons v. Douglas Elliman LLC, 94 A.D.3d 468, 469 (1st Dep't 2012).

Defendant also questions whether New Millennium Builders or Sudden Safety Consultants actually offered plaintiff employment. As defendant concedes, however, upon its motion to dismiss the complaint pursuant to C.P.L.R. § 3211(a)(7), the court must accept plaintiff's allegations as true, liberally construe them, and draw all reasonable inferences in her favor. Walton v. New York State Dept. of Correctional Servs., 13 N.Y.3d 475, 484 (2009); Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Wadiak v. Pond Mgt., LLC, 101 A.D.3d 474, 475 (1st Dep't 2012). Upon defendant's motion pursuant to C.P.L.R. § 3211(a)(1), the court may rely on facts raised by defendant to defeat plaintiff's claims only if established by evidence in admissible documentary form, demonstrating the absence of any material dispute regarding those facts, and completely negating her allegations against defendant. Lawrence v. Graubard Miller, 11 N.Y.3d at 595; Goshen v. Mutual Life Ins. Co. of N.Y., 98

N.Y.2d at 326; Leon v. Martinez, 84 N.Y.2d 83, 87-88 (1994); Greenapple v. Capital One, N.A., 92 A.D.3d 548, 550 (1st Dep't 2012). The affidavit and questions raised by defendant fall far short of these standards.

Finally, defendant questions whether it referred plaintiff to the contractor or knew of the prospective placement, when both these facts would be within defendant's knowledge. The latter fact, at minimum, is inferable from the statement by Sudden Safety Consultants that it learned of plaintiff's lost standing in the employment program: information it must have learned from defendant. Nor does defendant cite to any requirement that defendant must refer a prospective employee to a contractor and be informed of the prospective placement before the employee is hired.

D. Judicial Remedy

Were plaintiff to present a sworn statement from Greene or comparable statement from Sudden Safety Consultants or New Millennium Builders in admissible form, the viability of plaintiff's claimed violation of 12 U.S.C. § 1701u(c)(1) or 24 C.F.R. § 135.30(b)(1)(iii) or 135.32(c) boils down to whether redress is available through the judicial process pursuant to 42 U.S.C. § 1983. See 24 C.F.R. § 135.76(j). 12 U.S.C. § 1701u(c)(1), a provision for federal funding of defendant's resident training and employment program, is enforceable via 42 U.S.C. § 1983 only if the federal laws implementing the program manifest "an 'unambiguous' intent to confer individual rights."

Gonzaga Univ. v. Doe, 536 U.S. at 280 (quoting Pennhurst State School & Hosp. v. Halderman, 451 U.S. at 17). To be enforceable by plaintiff, 12 U.S.C. § 1701u(c)(1) or 24 C.F.R. § 135.30(b)(1)(iii) or 135.32(c) must confer an unambiguous mandatory benefit focussed on individual low-income residents of defendant's housing developments. Gonzaga Univ. v. Doe, 536 U.S. at 280; Wilder v. Virginia Hosp. Assn., 496 U.S. at 511; Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. 418, 430 (1987).

24 C.F.R. § 135.30(b)(1)'s 30% standard, by its terms, does not focus on providing a benefit to individual residents of defendant's housing.

> Far from creating an individual entitlement to services, the standard is simply a yardstick for the Secretary to measure the systemwide performance . . . . Thus, the Secretary must look to the aggregate services provided . . . , not to whether the needs of any particular person have been satisfied.

Blessing v. Freestone, 520 U.S. 329, 343 (1997). See Price v. Housing Auth. of New Orleans, 2010 WL 1930076, at *4 (E.D. La. May 10, 2010).

The inquiry then turns to (1) 12 U.S.C. § 1701u(c)(1)'s "best efforts" requirement, still applicable if defendant has not met the 30% standard; (2) the statute's priorities, echoed by 24 C.F.R. § 135.34(a)(1); and (3) 24 C.F.R. § 135.32(c)'s "responsibility" to facilitate the training and employment of defendant's residents. 12 U.S.C. § 1701u(c)(1) and its implementing regulations unquestionably are intended to benefit persons like plaintiff. Gonzaga Univ. v. Doe, 536 U.S. at 282, 284; Blessing v. Freestone, 520 U.S. at 340; Wilder v. Virginia

Hosp. Assn., 496 U.S. at 509; Cannon v. University of Chicago, 441 U.S. 677, 690-91 & n.13 (1979); Nails Constr. Co. v. City of St. Paul, 2007 WL 423187, at *4 (D. Minn. Feb. 6, 2007). These laws also impose mandatory, not hortatory, obligations on local housing authorities like defendant, requiring them to make their best efforts to provide training and employment opportunities, and giving then the responsibility to facilitate training and employment. Gonzaga Univ. v. Doe, 536 U.S. at 282; Blessing v. Freestone, 520 U.S. at 341; Wilder v. Virginia Hosp. Assn., 496 U.S. at 509-510, 512; Williams v. United States Dept. of Hous. & Urban Dev., 2006 WL 2546536, at *8.

To provide plaintiff a judicial remedy, however, these obligations also must confer entitlements "sufficiently specific and definite to qualify as enforceable rights." Gonzaga Univ. v. Doe, 536 U.S. at 280; Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. at 432. See Wilder v. Virginia Hosp. Assn., 496 U.S. at 511-12, 522. This specificity requirement would bar enforcement of a claim by 12 U.S.C. § 1701u(c)(1)'s beneficiaries, such as plaintiff, simply that defendant has not made its "best efforts . . . to give low-income and very low-income persons the training and employment opportunities generated" by defendant's federal funding, without pointing to any particular indicator of wholesale noncompliance. 12 U.S.C. § 1701u(c)(1)(A); Nails Constr. Co. v. City of St. Paul, 2007 WL 423187, at *4 n.3. See Gonzaga Univ. v. Doe, 536 U.S. at 281; Suter v. Artist M., 503 U.S. 347, 357-58, 363 (1992); Price v. Housing Auth. of New

Orleans, 2010 WL 1930076, at *4-5; Nails Constr. Co. v. City of St. Paul, 2007 WL 423187, at *4. The bar likewise might apply to a claim that defendant had not made its "best efforts" and violated 12 U.S.C. § 1701u(c)(1)(A) because defendant had not provided plaintiff employment, since "best efforts" does not necessarily equate to providing a job to each eligible resident, and such a remedy depends on the availability of positions. See Marcel v. Donovan, 2012 WL 868977, at *5; Williams v. United States Dept. of Hous. & Urban Dev., 2006 WL 2546536, at *9; Nails Constr. Co. v. City of St. Paul, 2007 WL 423187, at *4.

Although these obligations may be insufficiently specific to enforce when a plaintiff is claiming a housing authority's programwide failure to make its best efforts or a failure to provide employment to a specific individual among all the eligible residents, plaintiff's claim here is different. Marcel v. Donovan, 2012 WL 868977, at *5; Williams v. United States Dept. of Hous. & Urban Dev., 2006 WL 2546536, at *9; Price v. Housing Auth. of New Orleans, 2010 WL 1930076, at *4-5; Nails Constr. Co. v. City of St. Paul, 2007 WL 423187, at *4. See Gonzaga Univ. v. Doe, 536 U.S. at 282, 284; Blessing v. Freestone, 520 U.S. at 340-41. Plaintiff claims an isolated and specifically delineated violation of federal law: defendant excluded her altogether from eligibility for training and employment opportunities on the false ground that her rent arrears were not fully paid. Cannon v. University of Chicago, 441 U.S. at 705. While a range of defendant's omissions in its

efforts and facilitation may be permissible, surely not every affirmative obstruction of opportunity is permissible under 12 U.S.C. § 1701u(c)(1) and 24 C.F.R. § 135.32(c). Wilder v. Virginia Hosp. Assn., 496 U.S. at 519-20 & n.17.

Defendant maintains that plaintiff may not sue to enforce (1) 12 U.S.C. § 1701u(c)(1)(A)'s "best efforts" requirement, even to challenge that specific, affirmative act by defendant, or (2) a right conferred by a federal regulation when the governing federal statute does not confer that right, Alexander v. Sandoval, 532 U.S. at 285-86, because "rights of action to enforce federal law must be created by Congress." Id. at 286. This latter principle applies only to bar the enforceability of a federal regulation without reinforcement by an enforceable federal statute, independent of 42 U.S.C. § 1983. Alexander v. Sandoval, 532 U.S. at 284, 286; Wilder v. Virginia Hosp. Assn., 496 U.S. at 508 n.9. See Alexander v. Sandoval, 532 U.S. at 292. 42 U.S.C. § 1983, however, provides an alternative Congressional authorization for a right of action to enforce federal law. Wilder v. Virginia Hosp. Assn., 496 U.S. at 508 n.9; Middlesex Cnty. Sewerage Auth. v. National Sea Clammers Assn., 453 U.S. 1, 19 (1981).

The applicable federal statute here, 12 U.S.C. § 1701u(c)(1), grants HUD the power to adopt regulations with the force of law that may require more of local housing authorities than the statute requires, as integral parts of the remedial scheme to promote, effectuate, and realize the statutory goals:

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to transform the statute's aspiration into reality. Congress has empowered HUD to evaluate local circumstances, to determine whether they warrant stronger measures, and delegated to HUD the determination of how HUD's grantees of federal funding must alter their practices. See Wilder v. Virginia Hosp. Assn., 496 U.S. at 511; Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. at 420. The statute and the regulations, including 24 C.F.R. § 135.32(c), set out the requirements local housing authorities must meet. Wilder v. Virginia Hosp. Assn., 496 U.S. at 519; Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. at 431-32; Shakhnes v. Berlin, 689 F.3d 244, 251 (2d Cir. 2012). In authoritatively construing the statute, HUD has determined that local housing authorities must facilitate the training and employment of their residents, not that local housing authorities make their best efforts to facilitate that training and employment. See Wilder v. Virginia Hosp. Assn., 496 U.S. at 507; Shakhnes v. Berlin, 689 F.3d at 251. This regulatory requirement carries the force of law. Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. at 431.

Moreover, 12 U.S.C. § 1701u(c)(1)(B) separately requires that defendant housing authority give priority to defendant's residents, not that defendant try its best to afford that priority. Wilder v. Virginia Hosp. Assn., 496 U.S. at 512-13 n.11; Marcel v. Donovan, 2012 WL 868977, at *3; Williams v. United States Dept. of Hous. & Urban Dev., 2006 WL 2546536, at *8. Neither HUD, the agency charged with administering, interpreting, and implementing 12 U.S.C. § 1701u(c)(1), nor

defendant, the local authority, nor any judicial authority has found this construction of the statute or of 24 C.F.R. § 135.32(c), as a means of ensuring that prioritization, to be unreasonable. Marcel v. Donovan, 2012 WL 868977, at *3; Williams v. United States Dept. of Hous. & Urban Dev., 2006 WL 2546536, at *8. See Shakhnes v. Berlin, 689 F.3d at 252-53. Neither the statute nor the regulation limits this priority to residents whose rent arrears are fully paid.

Thus, even if 12 U.S.C. § 1701u(c)(1)(A) does not confer a specific right on plaintiff, § 1701u(c)(1)(B) and 24 C.F.R. § 135.32(c)'s requirement to implement that prioritization by facilitating training and employment for priority group members do confer specific rights. Shakhnes v. Berlin, 689 F.3d at 251-52. Eligibility for the training and employment opportunities and protection against a discontinuance of eligibility on false grounds are unambiguous mandatory benefits, focussed on individual low-income residents of defendant's housing, conferred by 12 U.S.C. § 1701u(c)(1)(B); by the regulation that echoes this statutory mandate, 24 C.F.R. § 135.34(a)(1); and the companion regulatory mandate, 24 C.F.R. § 135.32(c). Williams v. United States Dept. of Hous. & Urban Dev., 2006 WL 2546536, at *8. See Gonzaga Univ. v. Doe, 536 U.S. at 280; Wilder v. Virginia Hosp. Assn., 496 U.S. at 511; Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. at 430; Cannon v. University of Chicago, 441 U.S. at 705.

Surely the laws do not permit a local housing authority to

exclude from the priority group residents whose rent arrears the housing authority falsely claims are not fully paid. Surely these laws are sufficiently specific, at minimum, both to prohibit defendant from excluding residents whose rent arrears defendant falsely claims are not fully paid and to allow a remedy for such a practice. Wilder v. Virginia Hosp. Assn., 496 U.S. at 509-510; Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. at 431-32. See Gonzaga Univ. v. Doe, 536 U.S. at 282; Blessing v. Freestone, 520 U.S. at 340-41. Were defendant permitted to exclude low-income residents from training and employment based on a false claim or even for an unauthorized reason, there would be little point in requiring housing authorities to provide those opportunities to those residents. Wilder v. Virginia Hosp. Assn., 496 U.S. at 516.

E. Defendant's Failure to Meet Its Burden

Defendant bears the burden to show the legislative intent to foreclose a private individual from enforcing a federal right, through Congress' express preclusion of a judicial remedy pursuant to 42 U.S.C. § 1983, or through its creation of a comprehensive remedial scheme that demonstrates that preclusion. Wilder v. Virginia Hosp. Assn., 496 U.S. at 521-522; Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. at 423; Middlesex Cnty. Sewerage Auth. v. National Sea Clammers Assn., 453 U.S. at 20. As set forth above, HUD's enforcement mechanisms expressly do not preclude the remedy plaintiff seeks for defendant's discontinuance of her eligibility for employment and affirmative

obstruction of an employment opportunity with defendant's contractor or its subcontractor. 24 C.F.R. § 135.76(g). See Wilder v. Virginia Hosp. Assn., 496 U.S. at 521. Nor would that remedy thwart HUD's enforcement mechanisms. See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curren, 456 U.S. 353, 374-75 (1982). Mechanisms to ensure that federal funds are used for their intended purposes of providing training and employment opportunities to housing authority residents, by withholding or limiting the funds until a housing authority demonstrates that it will use them for those purposes, do not preclude a right of action to achieve a coordinate objective. 24 C.F.R. § 135.76(g). See Wilder v. Virginia Hosp. Assn., 496 U.S. at 512, 514, 521-22; Wright v. Roanoke Redev. & Hous. Auth., 479 U.S. at 428; Cannon v. University of Chicago, 441 U.S. at 705-706. Providing a housing authority resident a means to protect against a discontinuance of her eligibility for those opportunities on false grounds is fully consistent with Congress' statutory purposes and HUD's enforcement objectives.

Finally, although defendant points out that plaintiff has not filed a notice of claim against defendant, insofar as plaintiff pleads an enforceable federal right, she need not file a notice of claim. Felder v. Casey, 487 U.S. 131, 151-52 (1988); Chenkin v. City of New York, 103 A.D.3d 556, 557 (1st Dep't 2013); Wanczowski v. City of New York, 186 A.D.2d 397 (1st Dep't 1992). Such a requirement may apply to claims for damages based on state law, but, as set forth below, plaintiff's only

potentially viable claim is based on 12 U.S.C. § 1701u(c)(1), its implementing regulations 24 C.F.R. §§ 135.32(c) and 135.34(a)(1), and 42 U.S.C. § 1983.

IV. WHETHER PLAINTIFF ALLEGES A CLAIM UNDER STATE LAW

A. Breach of Contract

To establish breach of a contract, plaintiff must show a contract, that plaintiff performed and defendant breached the contract, and that defendant's breach caused plaintiff to sustain damages. Harris v. Seward Park Hous. Corp., 79 A.D.3d 425, 426 (1st Dep't 2010). See Tutora v. Siegel, 40 A.D.3d 227, 228 (1st Dep't 2007). Plaintiff must plead the specific terms of the agreement that defendant breached. Marino v. Vunk, 39 A.D.3d 339, 340 (1st Dep't 2007); Giant Group v. Arthur Andersen LLP, 2 A.D.3d 189, 190 (1st Dep't 2003); Kraus v. Visa Intl. Serv. Assn., 304 A.D.2d 408 (1st Dep't 2003); Trump on the Ocean v. State of New York, 79 A.D.3d 1325, 1326 (3d Dep't 2010). The absence of an agreement on a material term of the contract renders it unenforceable even if the parties intended to be bound by it. Zheng v. City of New York, 93 A.D.3d 510, 512 (1st Dep't 2012); Gessin Elec. Contrs., Inc. v. 95 Wall Assoc., LLC, 74 A.D.3d 516, 519 (1st Dep't 2010).

Plaintiff's applications for defendant's resident employment program did not create any contractual rights or obligations, nor require defendant to provide plaintiff further training, hire her, or secure her employment by another employer under 12 U.S.C. § 1701u. Nor does plaintiff allege any oral contract with

defendant promising to train her, hire her, or secure her employment or promising any other terms necessary to form a contract. Schutty v. Speiser Krause P.C., 86 A.D.3d 484, 485 (1st Dep't 2011); John Anthony Rubino & Co., CPA, P.C. v. Swartz, 84 A.D.3d 599 (1st Dep't 2011); Tringle v. Tringle, 40 A.D.3d 353 (1st Dep't 2007). Plaintiff thus fails to demonstrate an enforceable contract obligating defendant to provide her any specific employment opportunity. Schutty v. Speiser Krause P.C., 86 A.D.3d at 485; Jamaica Pub. Serv. Co. v. Compagnie Transcontinentale De Reassurance, 282 A.D.2d 227 (1st Dep't 2001). See Red Oak Fund, L.P. v. MacKenzie Partners, Inc., 90 A.D.3d 527, 528 (1st Dep't 2011); Edge Mgt. Corp. v. Crossborder Exch. Corp., 304 A.D.2d 422, 423 (1st Dep't 2003).

B. Harassment

Finally, plaintiff claims defendant engaged in harassment through defendant's employees who attempted to peer into her apartment without her consent. Harassment is not a cognizable civil claim, Jerulee Co. v. Sanchez, 43 A.D.3d 328, 329 (1st Dep't 2007); Hartman v. 536/540 E. 5th St. Equities, Inc., 19 A.D.3d 240 (1st Dep't 2005), except under specific statutory and regulatory provisions that plaintiff does not rely on and do not apply here. Jerulee Co. v. Sanchez, 43 A.D.3d at 329.

V. CONCLUSION

In sum, plaintiff's allegations and the documentary evidence indicate that defendant imparted information to REES about plaintiff's delinquency in paying rent when such information may

have been an inaccurate or unfair representation of the true facts. Her allegations and supporting evidence indicate that this inaccurate information caused REES to remove her from the priority group eligible for employment opportunities, to discontinue providing any employment opportunities to her, and thus to discontinue facilitating her employment training and employment, in violation of 12 U.S.C. § 1701u(c)(1)(B) and 24 C.F.R. §§ 135.32(c) and 135.34(a)(1). Plaintiff further shows that, had REES not removed her from the priority group eligible for employment opportunities and, instead, continued providing her employment opportunities by facilitating her training and employment, in accordance with 12 U.S.C. § 1701u(c)(1)(B) and 24 C.F.R. §§ 135.32(c) and 135.34(a)(1), she would have secured employment through one of defendant's contractors or its subcontractor.

This latter showing, however, through the correspondence from Sudden Safety Consultants, is neither in the complaint, nor sworn, nor otherwise in admissible form. Without this latter showing, plaintiff fails to show that, had REES not removed her from the priority group and affirmatively obstructed her employment opportunities, she would have obtained a benefit from REES's continued facilitation, and therefore she was injured by its adverse action.

In contrast, plaintiff fails to make any showing, in her complaint or in any supplementary evidence, admissible or not, that defendant broke any contractual promise to provide her

training or employment. Therefore she fails to allege a legal claim for breach of a contract or any other cognizable claim under state law. The alleged conduct of defendant's employees attempting to peer into plaintiff's apartment without her consent, which plaintiff describes as harassment, fails to allege either any injury or any legal claim for relief.

For the reasons set forth at the outset, the court grants defendant's cross-motion to serve a late answer, C.P.L.R. § 3012(d), and therefore denies plaintiff's motion for a default judgment. C.P.L.R. § 3215. For the reasons just summarized, the court grants defendant's cross-motion to dismiss plaintiff's claims other than her claims for violation of 12 U.S.C. § 1701u(c)(1) and 24 C.F.R. §§ 135.32(c) and 135.34(a)(1) pursuant to 42 U.S.C. § 1983. C.P.L.R. § 3211(a)(1) and (7).

The court also grants defendant's cross-motion to dismiss plaintiff's claims for violation of 12 U.S.C. § 1701u(c)(1) and its implementing regulations unless, within 30 days after service of this order with notice of entry, plaintiff complies with the following condition. She shall serve on defendant an amended complaint or an affidavit by a person with first hand knowledge from Sudden Safety Consultants or New Millennium Builders, alleging that a participant in defendant's Section 3 resident employment program had a job for plaintiff between June 2011 and March 2012, but did not place her in it because defendant had discontinued her eligibility.

Any dismissal of plaintiff's claims is without prejudice to

a future timely and adequately pleaded action or an administrative complaint to HUD based on similar claims. This decision constitutes the court's order.

DATED: December 20, 2013

LUCY BILLINGS, J.S.C.