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Citadel Estates, LLC v. New York City Housing Authority
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Supreme Court, Kings County, New York. January 30, 2013 39 Misc.3d 880 960 N.Y.S.2d 598 2013 N.Y. Slip Op. 23029 (Approx. 19 pages)
39 Misc.3d 880
Supreme Court, Kings County, New York.

CITADEL ESTATES, LLC, et al., Plaintiffs,

v.

NEW YORK CITY HOUSING AUTHORITY, Defendants.

Jan. 30, 2013.

Synopsis

Background: Landlords filed breach of contract action against New York City Housing Authority, as administrator of federally funded Section 8 rent subsidy program, seeking to recover increased rent subsidies allegedly unpaid for tenants whose increase in rent was approved by Rent Guidelines Board, pursuant to New York State Rent Stabilization Law. Authority moved to dismiss.

Holdings: The Supreme Court, Kings County, David Schmidt, J., held that:
1 contract action was converted to Article 78 proceeding;
2 Authority did not issue final determination required to start running of statute of limitations;
3 landlords' claims were not time barred by laches;
4 landlords had standing;
5 lack of notice barred claims regarding two tenants;
6 mandamus compelling Authority to increase subsidy was appropriate;
7 claims were moot as to only one tenant; and
8 termination of housing assistance payment (HAP) contract did not excuse nonpayment.

Motion granted in part and denied in part.

West Headnotes (25)

Change View

1 **Public Contracts** Breach of contract by government entity, rights on
Where damages allegedly have been sustained due to a breach of contract by a public official or governmental body, the claim must be resolved through the application of traditional rules of contract law.

1 Case that cites this headnote

2 **United States** Housing subsidies and rent supplements
Landlords' challenge to New York City Housing Authority's failure to pay increased monthly rent subsidies for tenants participating in Section 8 program was required to be reviewed in Article 78 proceeding, rather than in breach of contract action, since landlords were not seeking to enforce housing assistance payment (HAP) contract requiring rent increases to be reasonable and determined in accordance with requirements of Department of Housing and Urban Development (HUD), as any rent determination by Authority was thus governed by HUD regulations rather than HAP contract. United States Housing Act of 1937, §§ 2(a)(1)(A), 8(a), 42 U.S.C.A. §§ 1437(a)(1)(A), 1437f(a); 24 C.F.R. §§ 982.305(c, e), 982.451; McKinney's CPLR 7801 et seq.

1 Case that cites this headnote

3 **Action** Change of character or form
Courts are empowered and indeed directed to convert a civil judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal, making whatever order is necessary for its proper prosecution. McKinney's CPLR 103(c).

4 **Limitation of Actions** Limitation as affected by nature or form of remedy in general
A party may not change the nature of a proceeding, thereby lengthening the statute of limitations, simply by denominating it as something other than it is.

5 **Administrative Law and Procedure** Time for Proceedings
An article 78 proceeding must be brought within four months after the determination to be reviewed becomes final and binding upon the petitioner. McKinney's CPLR 217(1); McKinney's CPLR 7801 et seq.

6 **Administrative Law and Procedure** Finality; ripeness
An agency action becomes "final" and binding upon a petitioner when two factors are present: (1) where the agency reached a definitive position on the issue that inflicts actual, concrete injury, and (2) where the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.

7 **Limitation of Actions** Action for breach of official duty
Before commencing a proceeding in the nature of mandamus, it is necessary to make a demand and await a refusal by the administrative agency, and the statute of limitations begins to run on the date of the refusal and expires four months thereafter.

8 **Limitation of Actions** Time for making demand
The reasonable time requirement for a prompt demand on an administrative agency should be measured by the four-month statute of limitations for an Article 78 proceeding, and thus a demand should be made no more than four months after the right to make the demand arises. McKinney's CPLR 7801 et seq.

9 **Mandamus** Laches
If the allegedly aggrieved party commencing a proceeding in the nature of mandamus does not proceed promptly and make a formal demand, he or she may be charged with laches.

10 **Administrative Law and Procedure** Time for Proceedings
Where a continuing duty is imposed upon an administrative agency, the statute of limitations is not a defense to claims based on breaches of a continuing duty which occurred within the limitations period and the defense of laches should not be applied to any of the repeated violations occurring within the limitations period, since each new violation gives rise to a corresponding new right to demand compliance with the statute.

11 **Municipal Corporations** Actions for injuries

Since the Public Housing Law requires that 30 days must elapse after service of a notice of claim before an action may be commenced, the statute of limitations is tolled during that 30–day period. McKinney's Public Housing Law § 157(1); McKinney's CPLR 204(a).

12 **United States** Housing subsidies and rent supplements
Housing authority failed to issue final determination that Section 8 rent subsidies for tenants whose rent increased would not be granted, as required to commence running of statute of limitations for landlords' Article 78 proceeding seeking review of any determinations by Authority that increased subsidies would not be paid, even though Authority notified landlords that some subsidized apartments did not comply with required inspections. McKinney's CPLR 217(1); McKinney's CPLR 7801 et seq.

13 **United States** Housing subsidies and rent supplements
Landlords' claims seeking to recover from New York City Housing Authority allegedly unpaid Section 8 subsidies for tenants' rent increases were not barred by laches, since Authority had continuing regulatory duty to pay increased subsidies based on increase in rent, and each new violation by nonpayment gave rise to landlords' corresponding new right to demand compliance with federal regulations. 24 C.F.R. § 982.519(a), (b)(5)(ii).

14 **Action** Persons entitled to sue
Standing requires an actual legal stake in the outcome of the proceeding/action or, in other words, an injury in fact worthy and capable of judicial resolution.

15 **United States** Housing subsidies and rent supplements
Landlords seeking to enforce New York City Housing Authority's obligation to pay full amount of rent subsidy for each tenant participating in Section 8 program had standing, where landlords were not challenging Authority's decision to continue or to terminate tenant's participation in program for failure to comply with program's requirements. United States Housing Act of 1937, §§ 2(a)(1)(A), 8(a), 42 U.S.C.A. §§ 1437(a)(1)(A), 1437f(a); 24 C.F.R. §§ 982.551, 982.552.

16 **United States** Housing subsidies and rent supplements
Dismissal of the action seeking to recover payment under Section 8 rent subsidy program from a housing authority is not required based on the failure to comply with Public Housing Law, by alleging in the complaint that 30 days have elapsed since the subject claim was presented, since the defect is not a jurisdictional one, and the complaint can be deemed amended to plead the requisite presentment and refusal to make payment. McKinney's Public Housing Law § 157(1).

17 **United States** Housing subsidies and rent supplements
Landlords' claims to recover from New York City Housing Authority allegedly unpaid Section 8 subsidies for increased rent were barred with respect to two tenants, under Public Housing Law's notice requirements, where landlords failed to file notices of claims regarding those two tenants. McKinney's Public Housing Law § 157(1).

18 **Landlord and Tenant** Adjustment of regulated rents in general
Since landlords are obligated to accept the rent increases set by the Rent Guidelines Board as reasonable, under the Rent Stabilization Code, the New York City Housing Authority is similarly obligated.

19 **Mandamus** Ministerial acts in general
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.

20 **Mandamus** Nature and existence of rights to be protected or enforced
The petitioner for a writ of mandamus must show a clear legal right to the requested relief to succeed, but the petition must be denied if the right to performance is clouded by reasonable doubt or controversy.

21 **Mandamus** Matters of discretion
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.

22 **Mandamus** Payment of Debts and Claims
United States Housing subsidies and rent supplements
New York City Housing Authority's adjustment of rent paid to landlords that complied with requirements of Section 8 subsidy program was mandatory, rather than discretionary, as required to issue writ of mandamus compelling Authority to pay rent increases for tenants participating in Section 8 program, where Authority could not refuse to increase subsidy payment to landlords based on increased rent approved by Rent Guidelines Board. 24 C.F.R. § 982.519(a).

23 **Administrative Law and Procedure** Scope of Review in General
In an article 78 proceeding, an administrative action can be set aside if it was affected by an error of law, was made in violation of lawful procedure, or was arbitrary, capricious, or an abuse of discretion. McKinney's CPLR 7803.

24 **United States** Housing subsidies and rent supplements
Landlords' claims to recover from New York City Housing Authority allegedly unpaid Section 8 subsidies for increased rent were rendered moot only as to one tenant, where Authority annexed proof of retroactive subsidy payments only for one tenant.

25 **United States** Housing subsidies and rent supplements
New York City Housing Authority's non-payment of Section 8 subsidies for tenants whose rent was increased was not excused by termination of housing assistance payment (HAP) contract 180 days after last payment was made to landlords, where Authority failed to notify landlords that last Section 8 payment had been made.

1 Case that cites this headnote

Attorneys and Law Firms

***601** Stern & Stern, Esqs., Brooklyn, for Plaintiff.

Sonya Kaloyanides, Esq., New York, for Defendant.

Opinion

***602** DAVID SCHMIDT, J.

*881 Defendant New York City Housing Authority (the Housing Authority) moves for an order: (1) pursuant to *882 CPLR 3211(a)(5) and (a)(7), dismissing the complaint of plaintiffs Citadel Estates, L.L.C.; Fortress Crotona, L.L.C.; Fortress 31, L.L.C.; and M.Z. Partners, L.L.C. (hereinafter collectively referred to as the landlords), in its entirety because plaintiffs failed to challenge the Housing Authority's determination in an Article 78 proceeding; (2) even if plaintiffs had brought an Article 78 proceeding, their claims are time barred; (3) the complaint fails to state a cause of action; and (4) with respect to some claims, plaintiffs did not comply with the notice and pleading requirements set forth in Public Housing Law § 157, plaintiffs lack standing to challenge the Housing Authority's determination to terminate tenants from the Section 8 program and plaintiffs' claims are moot because the Housing Authority is voluntarily providing all the relief to which they are entitled.

Facts and Procedural Background

Plaintiffs, four landlords who participate in the federally funded Section 8 rent subsidy program (the Section 8 Program), commenced this breach of contract action on December 30, 2011 seeking to recover increased rent subsidies that were allegedly unpaid for apartments located in several buildings in the Bronx, which are occupied or were previously occupied by tenants now or previously participating in the Section 8 Program administered by the Housing Authority. For 26 tenants, the landlords claim that the Housing Authority has refused to pay rent increases which have been authorized under the New York State Rent Stabilization Law, as approved by the Rent Guidelines Board. For three tenants, the landlords claim that the Housing Authority suspended rent subsidy payments based upon "failed" Housing Quality Standards (HQS) inspections. For three tenants, the landlords claim that the Housing Authority stopped making subsidy payments after finding that the tenant was no longer entitled to participate in the Section 8 Program. The landlords assert that they were never given notice of the Housing Authority's determinations to refuse to pay, to suspend or to terminate the housing assistance payments.

The Section 8 Program

Through the Section 8 Program, the United States Department of Housing and Urban Development (HUD) provides rent subsidies to landlords of apartments occupied by qualifying low income families to enable them to afford decent, safe and sanitary housing (*see* 42 USC §§ 1437 [a][1][A] and 1437f[a]). The requirements for the Section 8 Program are set forth in the *883 regulations promulgated by HUD (*see* 24 CFR, Part 982). The Section 8 Program involves four distinct legal relationships that are addressed in the federal regulations: (1) the relationship between the Housing Authority and HUD, through which HUD finances the Section 8 Program pursuant to an Annual Contributions Contract with the Housing Authority; (2) the relationship between the Housing Authority and the tenant, created by the issuance of a voucher; (3) the relationship between the Housing Authority and the landlord, which is governed by a Housing Assistance Payment (HAP) Contract, under which the Housing Authority pays the Section 8 landlord monthly rent subsidy payments, known as housing assistance payments, from funds allocated by HUD, which comprise the difference between the total rent due for an apartment leased by the landlord to a qualifying tenant and the amount of rent due from the tenant pursuant to the controlling federal regulations (*see* 24 CFR §§ 982.305[c] and [e]; 24 CFR § 982.451); **603 and (4) the relationship between the tenant and the landlord, which is governed by a lease.

The Housing Authority is a public benefit corporation created under Public Housing Law § 401 to operate and to maintain low income housing in New York City. The Housing Authority is one of the agencies that administers the Section 8 Program.

As is also relevant to the instant dispute, controlling regulations provide that the Housing Authority may only make housing assistance payments for apartments that meet housing quality standards as established by HUD (24 CFR §§ 982.401 and 982.404[a]). All apartments subsidized with Section 8 funds must be inspected and must meet HQS prior to the initial lease term and at least annually thereafter (24 CFR § 982.405). The HAP Contract terminates automatically 180 calendar days after the last housing assistance payment is made to the owner (24 CFR § 982.455). Further, a Section 8 tenant must regularly furnish the Housing Authority with information

establishing total household income and composition (24 CFR § 982.551[b]). The Housing Authority may terminate a Section 8 subsidy if a participant fails to comply with the program requirements (24 CFR §§ 982.551 and 982.552).

The regulations further provide that a landlord may request an adjustment of the contract rent upon a renewal of a Section 8 lease (24 CFR § 982.519 [a]). The landlord must request the adjustment by giving the Housing Authority 60 days notice and by complying with all requirements under the HAP contract (24 CFR §§ 982.519[b][4], [5] and [6]). The Housing Authority must then ***884*** determine whether the rent requested by the owner is reasonable in comparison to rent for other comparable, unassisted units (24 CFR §§ 982.507[a] and [b]). The adjustments will take effect commencing at least 60 days after the Housing Authority receives a landlord's request for a rent increase (24 CFR § 982.519[b][5]).

The Housing Authority's Claim that the Landlords Cannot Challenge Its Determinations In a Contract Action

The Parties' Contentions

The Housing Authority first argues that the instant action must be dismissed because the landlords can only challenge determinations that it makes in an Article 78 proceeding. More specifically, the Housing Authority contends that because the landlords are seeking relief in the nature of certiorari to review its decision to suspend housing assistance payments or to refuse to implement lease renewal increases, or mandamus to compel it to act upon the landlords' requests for lease renewal increases, the claims must be interposed in an Article 78 proceeding.

In opposition, the landlords argue that they could not commence an Article 78 proceeding to review the Housing Authority's determinations because no determinations were issued. The landlords also note that Fortress 31 sent a letter dated March 2, 2011 to the Housing Authority requesting written confirmation of what transpired with regard to Debra Ramsey's Section 8 subsidy. Although the Housing Authority sent a notice to Ms. Ramsey, dated June 30, 2010, advising her of its intention to terminate her Section 8 participation, no response was ever sent to Fortress 31. The landlords also aver that it is well established that in a dispute regarding a government contract, an Article 78 proceeding is neither the exclusive nor the appropriate remedy.

Discussion

1 "It is well settled that where damages allegedly have been sustained due to a breach of contract by a public official or governmental body, the claim must be resolved ****604*** through the application of traditional rules of contract law" (*Steve's Star Serv. v. County of Rockland,* 278 A.D.2d 498, 499, 718 N.Y.S.2d 72 [2000], quoting *Abiele Contr. v. New York City School Constr. Auth.,* 91 N.Y.2d 1, 8, 666 N.Y.S.2d 970, 689 N.E.2d 864 [1997]). Thus, for example, in a dispute concerning the sum due under a contract to transport handicapped children to school, it was held that mandamus to compel payment of the outstanding invoice did not lie and that the dispute was properly ***885*** resolved in a breach of contract action (*Steve's Star Serv.,* 278 A.D.2d at 500, 718 N.Y.S.2d 72). Similarly, an action alleging that a village failed to compensate a plaintiff is properly brought as a contract action (*see e.g. Garrigan v. Incorporated Vill. of Malverne,* 12 A.D.3d 400, 786 N.Y.S.2d 525 [2004]).

2 Nonetheless, the court finds that the claims raised by the landlords herein must be adjudicated in an Article 78 proceeding. In this regard, the court first rejects the landlords' contention that the Housing Authority's assertion that an Article 78 proceeding must be commenced to challenge its determinations is limited to cases in which the Housing Authority, for example, suspends a Section 8 subsidy because an apartment failed the HQS review (*see e.g. Alpha Dynamics v. NYCHA,* Civ. Ct., Bronx County, September 25, 2007, Alessandro, J., Index No. 22594/05), or removed a tenant from the Section 8 program because the tenant failed to provide income certifications (*see e.g. 3015 Brighton Realty v. Housing Auth.,* Civ. Ct., Kings County, February 15, 2011, Baynes, J., Index No. 26484/11). After reviewing the language of the HAP Contract, the court finds that the landlords are not seeking to enforce a provision set forth

therein, since the language provides that the rent and any increase in rent for a unit must be reasonable and must be determined in accordance with HUD requirements.[1] Thus, any determination by the Housing Authority is not governed by the terms of the HAP Contract, but is instead controlled by a determination made by the Housing Authority in accordance with the regulations promulgated by HUD. The court therefore concludes that the determination of whether the ***886*** landlords are entitled to an increase in the monthly rent subsidies payable to them must be reviewed in an Article 78 proceeding. Moreover, the Housing Authority cites numerous cases so holding and the landlords fail to offer any rationale that would compel the finding that these cases were erroneously decided (*see e.g. 1440 G. Pacific Realty v. Housing Auth.,* Civ. Ct., Kings County, June 16, 2010, Wade, J., Index No. 46636/10; *116 Lenox Realty v. Housing Auth.,* Civ. Ct., Kings County, Toussaint, J., Index No. CV–020000–08/K1; *PHA Assocs. IX v. Housing Auth.,* Civ. Ct., Kings County, Freed, J., Index No. CV–088413–09; *G & S Assocs. v. Housing Auth.,* Civ. Ct., Richmond County, June 14, 2007, Dollard, J., Index No. 23251/06).

3 ***605*** That the landlords improperly commenced this action seeking to recover damages for breach of contract, instead of commencing an Article 78 proceeding seeking to review the determinations of the Housing Authority, does not require dismissal. "Under N.Y. C.P.L.R. 103(c), the courts are empowered and indeed directed to convert a civil judicial proceeding not brought in the proper form into one which would be in proper form, rather than to grant a dismissal, making whatever order is necessary for its proper prosecution" (*Cromwell Towers Redevelopment Co. v. Yonkers,* 41 N.Y.2d 1, 5, 390 N.Y.S.2d 822, 359 N.E.2d 333 [1976]; *see generally Matter of Agoglia v. Benepe,* 84 A.D.3d 1072, 1077–1078, 924 N.Y.S.2d 428 [2011] [an article 78 proceeding was converted to an action to abate and recover damages for a public nuisance]; *Matter of Sandhu v. Mercy Med. Ctr.,* 35 A.D.3d 479, 481, 828 N.Y.S.2d 91 [2006] [under circumstances where the subject dispute could not be resolved in a CPLR article 78 proceeding because the gravamen sounded in contract, the proceeding was converted into a civil action for a judgment declaring that all or part of the contract at issue was void, and the notice of petition and petition were treated as a summons and complaint]). Accordingly, this action is deemed converted to an Article 78 proceeding, the complaint shall be deemed to be a petition and the caption shall be deemed amended to refer to the landlords as petitioners and the Housing Authority as the respondent.

The Housing Authority's Claim that the Action is Time Barred

The Parties' Contentions

The Housing Authority then argues that conversion of the contract action to an Article 78 proceeding is without purpose, ***887*** since a party seeking review of an administrative determination must do so in a proceeding that is commenced within four months of the determination to be reviewed. The Authority explains that in the context of determinations related to Section 8 subsidies, the limitations period begins to run upon nonpayment of the first disputed subsidy. The Housing Authority reasons that the landlords, who are seeking mandamus to compel, must commence the proceeding within four months of its refusal to grant the relief demanded. Since the controlling regulations provide that the landlord is not entitled to an increase in a housing assistance payment until 60 days after the Housing Authority receives the request, and the regulations do not provide a date by which an increased subsidy payment must be paid, under circumstances where there has been no refusal to pay an increase, the refusal must be deemed to have occurred 60 days after the request was made. Thus, an Article 78 proceeding challenging the determination must be commenced within a reasonable time thereafter, which is also argued to be four months after the 60–day period ends.

The Housing Authority further argues that the landlords were properly notified of its determination to suspend housing assistance payments because the subject apartments failed to comply with HQS requirements.

In opposition, the landlords again assert that since no administrative determinations were issued by the Housing Authority, and they were not aware of any determinations made by the Authority

concerning their requests for rent increases, but for Ms. Ramsey's claim, the Statute of Limitations did not begin to run. More specifically, since 24 CFR § 982.519 provides that a rent subsidy increase must be paid at least 60 days after the Housing Authority receives the owner's ***606** request, the regulation does not provide any time frame within which the Housing Authority must act, so there is no final determination to be challenged herein. In so arguing, the landlords emphasize that the Housing Authority never advised them that they were not going to pay the renewal rent increase. Similarly, for the three tenants whose apartments failed the HSQ inspections, the Housing Authority did not advise the landlords that the subsidy would not be reinstated. The landlords also argue that if they were obligated to commence an Article 78 proceeding within a reasonable time after the Housing Authority failed to comply with their requests for a rent increase, the issue of what constitutes a reasonable time is an issue of fact, not an issue of law.

***888** The landlords further allege that the claim for each of the tenants for whom they are seeking a rent increase premised upon a renewal lease that provided for an increase in rent is for a small amount of money each month, perhaps $25, which sum continues to accrue over the months during which the Housing Authority refused to pay any increases. The cost of commencing a proceeding to collect four months' rent is not, therefore, economically prudent.

The Law

4 As at threshold issue, the court first notes that it has been held that "[a] party may not change the nature of a proceeding, thereby lengthening the Statute of Limitations, simply by denominating it as something other than it is" (*Blackman v. Housing Auth.*, 280 A.D.2d 324, 325, 720 N.Y.S.2d 141 [2001]).

5 As argued by the Housing Authority, it is well settled that "[a]n article 78 proceeding must be brought 'within four months after the determination to be reviewed becomes final and binding upon the petitioner' " (*Best Payphones v. Department of Info. Tech. & Telecomms.*, 5 N.Y.3d 30, 34, 799 N.Y.S.2d 182, 832 N.E.2d 38 [2005], citing CPLR 217[1]; *see generally Matter of Richardson v. Housing Auth.*, 89 A.D.3d 1091, 1092, 933 N.Y.S.2d 581 [2011]; *Matter of Delgado v. Housing Auth.*, 88 A.D.3d 521, 931 N.Y.S.2d 211 [2011]). "The reason for the short statute is the strong policy, vital to the conduct of certain kinds of governmental affairs, that the operation of government not be trammeled by stale litigation and stale determinations" (*Solnick v. Whalen*, 49 N.Y.2d 224, 232, 425 N.Y.S.2d 68, 401 N.E.2d 190 [1980], quoting *Mundy v. Nassau County Civ. Serv. Comm.*, 44 N.Y.2d 352, 359, 405 N.Y.S.2d 660, 376 N.E.2d 1305 [1978], Breitel, Ch. J., dissenting).

6 7 8 9 As is also relevant to the instant dispute:

> "An agency action becomes final and binding upon a petitioner when two factors are present: (1) where 'the agency ... reached a definitive position on the issue that inflicts actual, concrete injury' and (2), where 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*, 5 N.Y.3d at 34[, 799 N.Y.S.2d 182, 832 N.E.2d 38])."

(*Matter of Carter*, 98 A.D.3d 1113, 1114–1115, 951 N.Y.S.2d 210 [2012], *lv. denied* 20 N.Y.3d 856, 2013 N.Y. Slip Op. 60596, 2013 WL 105354 [2013]). The court has also explained that:

> ***889** "Before commencing a proceeding in the nature of mandamus, it is necessary to make a demand and await a refusal, and the Statute of Limitations begins to run on the date of the refusal and expires four months thereafter (*see*, ***607** *Austin v. Board of Higher Educ.*, 5 N.Y.2d 430, 442, 186 N.Y.S.2d 1, 158 N.E.2d 681; *Matter of Thompson v. City of Poughkeepsie School Dist.*, 99 A.D.2d 550, 471 N.Y.S.2d 637; *Matter of Kolson v. New York City Health & Hosps. Corp.*, 53 A.D.2d 827, 385 N.Y.S.2d 302). The aggrieved party cannot, by delay in making his or her demand, extend indefinitely the period during which he or she is required to take action. If the allegedly aggrieved party does not proceed promptly and make a formal demand, he

> or she may be charged with laches (*see, Austin v. Board of Higher Educ., supra*; *Matter of Kolson v. New York City Health & Hosps. Corp., supra*)."

(*Civil Serv. Emples. Assn. v. Board of Educ.*, 239 A.D.2d 415, 415–416, 657 N.Y.S.2d 439 [1997]; *accord Matter of Zupa v. Zoning Bd. of Appeals*, 64 A.D.3d 723, 725, 883 N.Y.S.2d 139 [2009]). "The reasonable time requirement for a prompt demand should be measured by the four-month Statute of Limitations of CPLR article 78, and thus a demand should be made no more than four months after the right to make the demand arises" (*Blue v. Commissioner of Soc. Servs.*, 306 A.D.2d 527, 528, 762 N.Y.S.2d 630 [2003], quoting *Matter of Densmore v. Altmar–Parish –Williamstown Cent. School Dist.*, 265 A.D.2d 838, 839, 695 N.Y.S.2d 828 [1999], *lv. denied* 94 N.Y.2d 758, 705 N.Y.S.2d 5, 726 N.E.2d 482 [2000]; *accord Matter of Zupa*, 64 A.D.3d at 725, 883 N.Y.S.2d 139).

10 The court also notes that the recent case of *New York State Psychiatric Association v. New York State Department of Health*, 71 A.D.3d 852, 855–856, 898 N.Y.S.2d 153 [2010], *rev. on other grounds* 19 N.Y.3d 17, 945 N.Y.S.2d 191, 968 N.E.2d 428 [2012] is relevant to determination of the issue of whether the landlords' commencement of this proceeding is time barred. Therein, the Appellate Division, Second Department, held that where a continuing duty is imposed upon an administrative agency, as, for example, the duty to provide reimbursement of the Medicare deductible and coinsurance fees for services rendered to and claims processed for individuals eligible for both Medicare and Medicaid coverage, the Statute of Limitations is not a defense to claims based on breaches of a continuing duty which occurred within the limitations period and the defense of laches should not be applied to any of the repeated violations occurring within the limitations period, since each ***890** new violation gives rise to a corresponding new right to demand compliance with the statute (*New York State Psychiatric Assn.*, 71 A.D.3d at 855–856, 898 N.Y.S.2d 153).

11 It must also be recognized that since the Public Housing Law § 157(1) requires that 30 days must elapse after service of a notice of claim before an action may be commenced, the Statute of Limitations is tolled during that 30–day period (*Graham v. City of New York*, 199 A.D.2d 304, 604 N.Y.S.2d 973 [1993], citing Public Housing Law § 157[1], CPLR 204[a]; *Serravillo v. New York City Tr. Auth.*, 51 A.D.2d 1027, 381 N.Y.S.2d 308 [1976], *affd.* 42 N.Y.2d 918, 397 N.Y.S.2d 1006, 366 N.E.2d 1360 [1976]; *accord Figueroa v. Housing Auth.*, 271 A.D.2d 238, 707 N.Y.S.2d 37 [2000]; *Gamble v. City of New York*, 195 A.D.2d 441, 601 N.Y.S.2d 813 [1993]).

Discussion

The court first finds that the landlords' attempt to characterize this action as one seeking damages for breach of contract, instead of one pursuant to Article 78 seeking to review an administrative determination, cannot serve to extend the applicable Statute of Limitations. Moreover, the landlords' assertion that the six-year Statute of Limitations that governs contract ****608** actions applies herein has been rendered moot by the court's holding that the landlords can only challenge the Housing Authority's determinations in an Article 78 proceeding.

The court also notes that while the Housing Authority did provide the landlords with notices that the apartments resided in by Brandy Williams, Linda Burroughs, Takesha Williams and Felicia Petway did not comply with HSQ inspections, there is no allegation or proof that the Agency thereafter notified the landlords that the suspensions would or would not be terminated. In addition, there is no allegation by the Housing Authority that the landlords were provided with any notification that the rent subsidies for tenants who had received a rent increase pursuant to the increases approved by the Rent Guidelines Board would not be granted.

12 Thus, under the circumstances of this case, the court finds that the Housing Authority did not issue a final determination that started the running of the Statute of Limitations. Significant in so holding is the fact that the controlling regulation, 24 CFR § 982.519(b)(5)(ii), provides that the rent to the owner will be increased "at least 60 days after the PHA receives the owner's request." The regulation does not provide, however, for a date by which a determination to increase a rent subsidy must be made. In addition, 24 CFR § 982.519(a) provides that "[a]t each anniversary date

of the HAP contract, the PHA *must* adjust the rent to the owner at the request of the ***891*** owner in accordance with this section" (emphasis added). This provision compels the conclusion that the Housing Authority cannot avoid its obligation to increase a rent subsidy by failing to act on an owner's request for an increase.

13 In so holding, the court inherently finds that inasmuch as the landlords have a continuing right to receive increased rent subsidizes for tenants who continue to reside in the their buildings based upon an increase in rent, the court adopts the holding in the *New York State Psychiatric Association* case and holds that the landlords' claims are not time barred by laches. The court also notes that in arguing that the applicable Statute of Limitations is four months, the Housing Authority's position fails to take into account the tolling of the Statute of Limitations by virtue of the need to file a notice of claim and to wait 30 days thereafter before a proceeding can be commenced (*Figueroa,* 271 A.D.2d 238, 707 N.Y.S.2d 37; *Graham,* 199 A.D.2d 304, 604 N.Y.S.2d 973; *Serravillo,* 51 A.D.2d 1027, 381 N.Y.S.2d 308; *Gamble,* 195 A.D.2d at 441–442, 601 N.Y.S.2d 813).

Finally, it must also be noted that during the pendency of this proceeding, the Housing Authority alleges that it has granted the landlords most of the relief to which they claim that they are entitled. More specifically, in a footnote in its reply affirmation, the Authority asserts that it has processed lease renewals and issued retroactive subsidies for 19 of the subject tenants. This action on the part of the Housing Authority further supports the conclusion that as of the date of the commencement of this action, it had not yet made a final determination with regard to the landlords' application for rent increases that was subject to review.

Accordingly, the petition will not be dismissed as time barred.

Standing

The Parties' Contentions

The Housing Authority then argues that the landlords lack standing to challenge the Agency's determination that an individual tenant was terminated from the ****609*** Section 8 program for failure to comply with the program's requirements.

In opposition, the landlords argue that the Housing Authority claims that Ms. Gaskin was terminated from the Section 8 Program on June 30, 2010, allegedly because she no longer resided in the subject premises. Her landlord asserts, however, that it continued to house Ms. Gaskin at the subject premises, without receiving any subsidy for her, because it did not receive any notice that her participation in the Section 8 Program had ***892*** been terminated. Similarly, the Housing Authority did not advise the landlord that Ms. Ramsey had been terminated from the Section 8 Program, despite the letter that Fortress 31 sent requesting confirmation of her status. The landlords thus conclude that they are not seeking to challenge the Housing Authority's determination to terminate a tenant from the Section 8 Program. Rather, they are challenging the Agency's failure to give them any notice of their determination to do so. The landlords concede that the claim with regard to Ms. Immacula Baptiste has been rendered moot.

The Law

14 "[S]tanding requires an actual legal stake in the outcome of the proceeding/action or, in other words, an injury in fact worthy and capable of judicial resolution" (*Matter of La Barbera v. Town of Woodstock,* 29 A.D.3d 1054, 1055, 814 N.Y.S.2d 376 [2006], *lv. dismissed* 7 N.Y.3d 844, 823 N.Y.S.2d 773, 857 N.E.2d 68 [2006]).

Discussion

15 Since the landlords herein are seeking to enforce the Housing Authority's obligation to pay them the full amount of the rent subsidy for each tenant for whom it is entitled to receive a housing assistance payment, and are not seeking a review of a determination to continue or to terminate the participation of a tenant in the Section 8 Program, the Housing Authority's claim that the landlords lack standing is rejected.

Notice of Claim

The Parties' Contentions

The Housing Authority contends that the landlords' failure to file notices of claim, as required pursuant to Public Housing Law § 157(1), compels dismissal of the action as it pertains to Felicia Petway and Ms. Ramsey.

In opposition, the landlords contend that notices of claim were served upon the Housing Authority; copies of the notices are annexed to the opposition papers and the landlords assert that copies were also annexed to their complaint.

The Law

Public Housing Law § 157(1) provides that:

> "In every action or special proceeding, for any cause whatsoever, prosecuted or maintained against an authority ... the complaint or necessary moving papers shall contain an allegation that at least thirty days have elapsed since the demand, claim or ***893** claims upon which such action or special proceeding is founded were presented to the authority for adjustment and that it has neglected or refused to make an adjustment or payment thereof for thirty days after such presentment."

16 It has been repeatedly held that the failure to serve a notice of claim in the manner and method prescribed by statute upon the person designated by law is a fatal defect (*see e.g. Kovachevich v. Housing Auth.*, 295 A.D.2d 255, 744 N.Y.S.2d 28 [2002]; *Leon v. Housing Auth.*, 214 A.D.2d 455, 625 N.Y.S.2d 212 [1995]; *Moore v. **610 Housing Auth.*, 35 A.D.2d 553, 313 N.Y.S.2d 176 [1970]). It has also been held, however, that dismissal of the action is not required based on the failure to comply with Public Housing Law § 157(1) by alleging in the complaint that 30 days have elapsed since the subject claim was presented, since the defect is not a jurisdictional one and the complaint can be deemed amended to plead the requisite presentment and refusal to make payment (*Mendell v. Salamanca Hous. Auth.*, 12 A.D.3d 1023, 1024, 784 N.Y.S.2d 453 [2004], *lv. denied* 15 A.D.3d 1016, 789 N.Y.S.2d 454 [2005], quoting *Snyder v. Board of Educ. of Ramapo Cent. School Dist. No. 2, Town of Ramapo, Rockland County*, 42 A.D.2d 912, 912, 347 N.Y.S.2d 727 [1973]).

Discussion

17 As the above discussion reveals, a failure to file a notice of entry is fatal to a petitioner's claim. A review of the notices of claim filed by the landlords reveals that no claims were filed for Ms. Petway and Ms. Ramsey. Accordingly, the proceeding is dismissed as to them.

Mandamus

The Parties' Contentions

In support of its assertion that mandamus does not lie to compel it to implement rent increases, the Housing Authority argues that mandamus is a drastic remedy that is available only when a petitioner demonstrates a clear legal right to the relief sought; mandamus to compel cannot force the performance of a discretionary act, but only a purely ministerial one. The Housing Authority then argues that any decision to increase a housing assistance payment is discretionary, since a request for an increase must be processed in accordance with governing federal regulations. Thus, for example, an increase cannot be granted unless the Housing Authority first determines that the lease renewal was timely submitted. Further, it must be determined that the rent requested is reasonable, which determination *894 depends upon the location, quality, size, type, age and amenities of subject unit (*see* CFR § 982.507[b]). In addition, the HAP Contract states that "[t]he rent paid to [the landlord] may at no time exceed the reasonable rent for the [unit] as most recently determined ... by the [Housing Authority] in accordance with HUD requirements" (HAP Contract, para. 6.a) and that "[t]he amount of the housing assistance payment to the [landlord] shall be determined by the [Housing Authority] in accordance with HUD requirements" (HAP Contract, para. 7.c[1]).

In opposition to this contention, the landlords aver that the substantial majority of the claims set forth by them allege that the Housing Authority failed to pay appropriate rent increases. They explain that every apartment in which the named tenants resided is subject to the rent stabilization laws of the state, so that the rent increases that the landlords can charge is limited to the rent increases approved by the Rent Guidelines Board. Further, the landlords cannot opt out of the Section 8 Program, because the tenants' status as a Section 8 recipient becomes part of the tenants' "bundle of rights" under the Rent Stabilization Code. Thus, they conclude that the determination of the Rent Guidelines Board with regard to an appropriate rent increase controls a determination of whether a rent is reasonable.

Reasonableness of the Rent Increases

It has been held that there is a "presumption that Congress did not intend to preempt the States' power to regulate matters of local concern" (*Holtzman v. Oliensis,* 91 N.Y.2d 488, 494, 673 N.Y.S.2d 23, 695 N.E.2d 1104 [1998], citing *Medtronic* *****611*** *v. Lohr,* 518 U.S. 470, 484–485, 116 S.Ct. 2240, 135 L.Ed.2d 700 [1996]; *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.,* 514 U.S. 645, 654–655, 115 S.Ct. 1671, 131 L.Ed.2d 695 [1995]; *California v. ARC Am. Corp.,* 490 U.S. 93, 101, 109 S.Ct. 1661, 104 L.Ed.2d 86 [1989]). Further, New York courts have found that state laws imposing stricter requirements than federal law are not necessarily preempted (*see e.g. City of New York v. Job–Lot Pushcart,* 88 N.Y.2d 163, 643 N.Y.S.2d 944, 666 N.E.2d 537 [1996], *cert. denied sub nom. JA–RU v. City of New York,* 519 U.S. 871, 117 S.Ct. 186, 136 L.Ed.2d 124 [1996]). More specifically, it has been held that as a general proposition, courts in New York have held that the federal Section 8 legislative scheme does not preempt state tenant protection laws (*Rosario v. Diagonal Realty,* 8 N.Y.3d 755, 840 N.Y.S.2d 748, 872 N.E.2d 860 [2007]; *see also Matter of Mott v. New York State Div. of Hous. & Community Renewal,* 211 A.D.2d 147, 628 N.Y.S.2d 712 [1995], *appeal dismissed* 86 N.Y.2d 836, 634 N.Y.S.2d 444, 658 N.E.2d 222 [1995]). In addition, it is beyond dispute that the rent regulatory scheme as enacted by the State of New York in the Rent ****895*** Stabilization Code is binding on the landlords herein, and that a landlord is not free to opt out of the Program (*Rosario, id.* at 764, 840 N.Y.S.2d 748, 872 N.E.2d 860).

18 From this is follows that the landlords are obligated to accept the rent increases approved by the Rent Guidelines Board and are not free to seek to collect market rent. The court finds that since the landlords are obligated to accept the rent increases as set by the Rent Guidelines Board as "reasonable," the Housing Authority is similarly obligated. In so holding, the court also notes that although the Housing Authority argues that is obligated to determine if a rent increase is reasonable, even after an increase is approved by the Rent Guidelines Board, it cites no case law precedent or regulatory authority that would allow it to issue a determination with regard to what constitutes a reasonable rent that is different than that adopted by the Rent Stabilization Board.

Mandamus

19 20 21 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 e.g. Matter of Hamptons Hosp. & Med. Ctr. v. Moore,* 52 N.Y.2d 88, 436 N.Y.S.2d 239, 417 N.E.2d 533 [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" (*see e.g. Matter of Assn. of Surrogates & Supreme Ct. Reporters within City of N.Y. v. Bartlett,* 40 N.Y.2d 571, 574, 388 N.Y.S.2d 882, 357 N.E.2d 353 [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 (*see e.g. Klostermann v. Cuomo,* 61 N.Y.2d 525, 475 N.Y.S.2d 247, 463 N.E.2d 588 [1984]).

22 A reading of CFR § 982.519(a) compels the conclusion that if a Section 8 landlord complies with the requirements of the provision, the Housing Authority "*must* adjust the rent to owner at the request of the owner" in accordance with the requirements set forth in that regulation (emphasis added). Thus, this regulatory direction belies the Authority's contention that the determination of whether a rent subsidy will be increased is discretionary. Accordingly, there is no authority that

would allow the Housing Authority to **612 refuse to increase the housing assistance payment paid to a landlord based upon *896 an increased rent approved by the Rent Guidelines Board.[2] The court accordingly concludes that mandamus to compel the Housing Authority to increase the rent subsidy paid to the landlords is appropriate under circumstances where it is established that the requirements of CFR § 982.519 are met.[3]

23 Moreover, even if the court did not so hold, the landlords' proceeding can be deemed to be one seeking to review of the Housing Authority's determinations under CPLR 7803(3). It is well established that "[i]n an article 78 proceeding, an administrative action can be set aside if it was affected by an error of law, was made in violation of lawful procedure, or was arbitrary, capricious or an abuse of discretion" (*Matter of Metro. Movers Assoc. v. Liu*, 95 A.D.3d 596, 598, 944 N.Y.S.2d 529 [2012]; citing CPLR 7803). Thus, regardless of whether the proceeding is characterized as one seeking mandamus or a review of the Housing Authority's determinations, the court can direct the Housing Authority to issue a determination increasing the rent subsidies, as demanded by the landlords, in the absence of any claim by the Housing Authority that the requests are properly denied for a failure to meet the requirements of CFR §§ 982.19.

The Housing Authority's Claim that the Complaint is Moot

The Parties' Contentions

The Housing Authority argues that the action should be *897 dismissed as moot with regard to those tenants who have provided it with the documentation necessary to renew their leases and, as a result, the Housing Authority will implement lease renewal increases in accordance with federal regulations. As noted above, in footnote 1 of its reply affirmation, the Housing Authority also asserts that it has provided the landlords with the relief sought "by processing lease renewals and issuing retroactive subsidy payments, where appropriate, on behalf" of 19 tenants.

The landlords concede that the proceeding has been rendered moot with regard to only Ms. Baptiste.

Discussion

24 Inasmuch as the Housing Authority fails to annex any proof to establish that the landlords' claims were rendered moot, and the assertion is not conceded by the landlords, the petition is dismissed with **613 regard to only Ms. Baptiste on this ground.

The Landlords Cannot Seek Payments After the HAP Contract Terminated

The Parties' Contentions

In support of this demand for dismissal, the Housing Authority argues that since the HAP Contract terminates 180 calendar days after the last housing assistance payment is given to the owner, the Agency is relieved of any obligation to pay a rent subsidy after a lease terminates. Accordingly, Fortress Crotona has no basis for its claim for payment from February 2011 for Ms. Burroughs and from June 1, 2011 for Ms. Petway, or 180 days after the last payment was made for each of these tenants.

The landlords do not address this contention.

Discussion

25 As was the case in arguing that the claims with regard to 19 tenants have been rendered moot, the Housing Authority fails to annex any evidence to support its claim that no subsidies were paid to the landlords on behalf of Ms. Burroughs and Ms. Petway for 180 days. Moreover, the gravamen of the landlords' claims is that no subsidies were increased after their requests were made and no determination with regard to any denial of the claims were sent to them. Accordingly, even if no payments were made to Ms. Burroughs and Ms. Petway for 180 days, the Housing Authority fails to establish that petitioners were so advised or that they are not entitled to receive a subsidy for the *898 period during which these tenants continued to reside in the subject units without being notified that the last housing assistance payment had been made.

Conclusion

For the above stated reasons, the motion by the Housing Authority is granted to the extent of converting the contract action commenced by the landlords into an Article 78 proceeding. As such, the complaint shall be deemed to be a petition and the caption shall be deemed amended to refer to the landlords as petitioners and the Housing Authority as respondent. Those branches of the Housing Authority's motion to dismiss the petition is granted only to the extent of dismissing the proceeding as brought by Ms. Petway and Ms. Ramsey, since no notice of claim was filed on their behalf as is required pursuant to Public Housing Law § 157, and dismissing the claim of Ms. Baptiste as moot.

All other relief requested is denied. The Housing Authority is directed to serve an answer addressing the merits of the proceeding within 30 days of service upon it of a copy of this order and decision with notice of entry.

The foregoing constitutes the order and decision of this court.

Parallel Citations

39 Misc.3d 880, 960 N.Y.S.2d 598, 2013 N.Y. Slip Op. 23029

Footnotes

1 For example, the HAP Contract provides that:

> "Rent to Owner: Reasonable Rent
>
> "The PHA must redetermine the reasonable rent when required in accordance with HUD requirements. The PHA may redetermine the reasonable rent at any time."
>
> (HAP contract, para. 6[c]).
>
> "Amount of PHA payment to owner
>
> "The amount of the PHA housing assistance payment to the owner shall be determined by the PHA in accordance with HUD requirements for a tenancy under the voucher program.
>
> "The amount of the PHA housing assistance payment is subject to change during the HAP contract term in accordance with HUD requirements. The PHA must notify the family and the owner of any changes in the amount of the housing assistance payment."
>
> (HAP contract, para. 7[c][1] and [2]).

2 The Housing Authority's assertion that it has the discretion and/or obligation to determine whether a rent increase, as approved by the Rent Guidelines Board, is reasonable, has been discussed above and rejected.

3 24 CFR § 982.519 provides, in pertinent part, that:

> "(b) Amount of annual adjustment. (1) The adjusted rent to owner equals the lesser of ...
>
> "(ii) The reasonable rent (as most recently determined or redetermined by the PHA in accordance with § 982.503); or
>
> "(iii) The amount requested by the owner....
>
> "(4) The rent to owner for a unit must not be increased at the annual anniversary date unless:

"(i) The owner requests the adjustment by giving notice to the PHA; and

"(ii) During the year before the annual anniversary date, the owner has complied with all requirements of the HAP contract, including compliance with the HQS.

"(5) The rent to owner will only be increased for housing assistance payments covering months commencing on the later of:

"(i) The first day of the first month commencing on or after the contract anniversary date; or

"(ii) At least sixty days after the PHA receives the owner's request."

(Emphasis added).

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