SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Margaret A. Chan
Justice

PART 52
INDEX 450677-2013

MOTION DATE 05/13/2013
MOTION SEQ. 001

ALYCE SAPP, LESLIE BROWN, SAHEM ABDALLA, SHANIQUA STOKLEY, DORETHA DILLAHUNT, on behalf of themselves and all others similarly situated,

Plaintiffs,

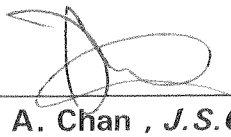
- v. -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, and SETH DIAMOND, as Commissioner of the New York City Department of Homeless Services,

Defendants.

The decision and order is made in accordance with the annexed memorandum decision.

Dated: May 15, 2013



Margaret A. Chan , *J.S.C.*

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The following papers, numbered 1 to 5, were read on this motion

	PAPERS NUMBERED
Moving Papers	1
Opposition Papers	2
Affirmation in Further Support	3
Memoranda of Law	4, 5

Upon the foregoing papers and after oral argument the court finds as follows:

Plaintiffs are individuals displaced by Superstorm/Hurricane Sandy and placed by the New York City's Hotel and Interim Placement Program (Hotel Program or Program) at various hotels throughout New York City. Defendants, the City of New York, The New York City Department of Homeless Services and its Commissioner, Seth Diamond, determined that the Hotel Program would come to a close on April 30, 2013, and for certain qualified households the termination date was extended to May 31, 2013. The named plaintiffs, on behalf of themselves and all others similarly situated, sought a temporary restraining order (TRO) against defendants on the eve before the closing

date of April 30, 2013. This court issued a TRO holding off the termination of the Hotel Program, and defendants extended the Hotel Program termination date to May 15, 2013. The hearing for the preliminary injunction motion was adjourned to May 13, 2013 to afford defendants an opportunity to submit opposition and respond to plaintiffs' motion. On May 13, 2013, defendants extended the termination date for all Program evacuees to May 31, 2013.

Facts

Superstorm or Hurricane Sandy walloped New York City and surrounding cities and states on October 29, 2012. Sandy was a unique devastating storm that wreaked massive destruction and rendered thousands of New York City residents homeless. By all accounts, it may be the worst natural disaster ever to hit this City. The City of New York responded to this unprecedented crisis with all due speed. On November 5, 2012, in an effort to develop plans to speedily provide longer term and permanent housing when the evacuation centers closed, the Mayor's Office of Housing Recovery Operations (HRO) contracted with fifty hotels to provide short-term sheltering. Significant to the instant case is the New York City Department of Homeless Services' (DHS) establishment of the Hotel Program. Seth Diamond, DHS' Commissioner, explained in his affidavit, that the Hotel Program was developed to avoid severe strain on the shelter system. Since its development, the Hotel Program has sheltered 1,260 households representing 3,132 individuals at a cost of $45 million, which has climbed up to $47 million at the time of this writing. All those sheltered in the Hotel Program were assigned a case manager and given housing, medical and financial resources, which included short-, medium- and long-term housing solutions (*see* Pltf's Aff, Exh 2 *"The End of the City Hotel Program and Permanent Housing Solutions for Sandy Evacuees" before The City Council Oversight Hearing, General Welfare Committee on Apr. 26, 2013* [Statement of Seth Diamond, Commissioner of Department of Housing Services]).

The solutions involved other programs such as the City's Restoration Centers, of which there were nine that were set up post-Sandy as a "one-stop-shops" for Sandy victims to access city, state and federal resources; the City's Housing Recovery Portal that started service on December 12, 2012 to register evacuees and provide referral to low and moderate income housing; the Section 8 Housing Choice Voucher Pilot Program, which set aside 151 Section 8 vouchers exclusively for the evacuees in the Hotel Program; and NYCHA, which set aside 470 apartments for Sandy evacuees, inclusive of those in the Hotel Program, among other programs.

As of April 27, 2013, the Hotel Program gave 119 households written notice of termination effective April 30, 2013, later extended to May 15, and just recently to May 31. At present, 14 of the 119 households have leases and 13 households have left on their own accord. Of the remaining 92 households, 70 of them do not qualify for Section 8 or NYCHA; 21 households are registered with Housing Recovery Portal; 1 household did not register with Housing Recovery Portal. As of May 13, 2013, there were 395 households remaining in the Hotel Program; 239 of those households were linked to a housing program and/or have transition plans. This leaves 156 households with no transition plans and no link to a housing program.

Presently the named plaintiffs, Sapp, Dillahunt and Stokley, are being processed for Section 8 or NYCHA housing. Abdalla was not eligible for NYCHA housing because a member of her household, her 24 year-old son, has a criminal record. However, at oral arguments, it was learned that plaintiff Abdalla's NYCHA application was not approved because of her rent history in the past three years. Abdalla's application, plaintiffs argue, can be resolved in Abdalla's favor, but time is needed to present the proper information to NYCHA. Plaintiff Brown also did not qualify for NYCHA housing. Brown, who was a victim of a crime, was put up in a motel in Island Park by the District Attorney's Office prior to Sandy. However, the District Attorney declined to continue

paying for her boarding since Sandy. For both the Abdalla and Brown households, no Section 8 vouchers are available since the vouchers were given out on a first-come, first-served basis.

Citing budgetary concerns, defendants determined that the Hotel Program would be terminated initially on April 30, 2013, and currently, on May 31, 2013. Commissioner Diamond noted that three sets of written notices or letters of termination of the Hotel Program were sent out to the Program's evacuees, on or about February 27, March 26 and April 27, 2013. The notices advised the evacuees of the Program termination date and directed them to speak to their case manager.

Plaintiffs assert that the termination notices were inadequate. According to plaintiffs Sapp and Stokley, their case workers told them or gave them the impression that they could stay in the Hotel Program until they found permanent housing. Plaintiff Stokley only learned of the April 30th Hotel Program termination date in the beginning of April at a meeting where Brad Gair, Director of HRO, and Commissioner Diamond, among others, spoke to the Sandy evacuees. All the named plaintiffs claim that their caseworkers were not helpful or ineffective. Plaintiffs argue that the April 30th and May 31st deadlines are arbitrary and contrary to what Sandy evacuees were led to believe. They also argue that defendants' notices of the Hotel Program termination did not afford Sandy evacuees any meaningful opportunity for review, and thus deprived them of property interests without due process of law. Plaintiffs further claim that the termination letter failed to apprise them of their rights against illegal eviction pursuant to NYC Admin. Code § 26-251.

Discussion

I. Preliminary Injunction

Plaintiffs seek a preliminary injunction prohibiting the City from terminating the Hotel Program until all its evacuees find permanent housing. To prevail on this branch of their motion

seeking such an extraordinary remedy, plaintiffs must show that they would likely succeed on the merits, that they would be irreparably harmed if the injunction is not granted, and that a balance of equities in their favor (*see* CPLR 6301, *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839, 840 [2005]). In determining this issue, plaintiffs' due process claims must be addressed before determining whether granting a preliminary injunction is warranted.

II. Due Process

The discussion on due process begins with the Due Process Clause, which "forbids the State to deprive individuals of life, liberty, or property without due process of law" (USCA Const.Amend. 14; McKinney's Const. Art. 1, § 6; *DeShaney v Winnebago County Dep't of Social Services*, 489 US 189, 194-196 [1989]). But, first, "there must be a property interest to trigger the requirements of procedural due process" (*Cadman Plaza North, Inc. v New York City Dept. of Housing Preservation and Development*, 290 AD2d 344 [1st Dept 2002] *citing Matter of Daxor Corp. v State of New York Department of Health*, 90 NY2d 89, 98 [1997] *cert. denied* 523 US 1074). "[Property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits" (*Daxor Corp. v State Dept of Health*, 90 NY2d at 98 *quoting Board of Regents v Roth*, 408 US 564, 577). "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . ." (*id.*).

Plaintiffs assert that as the Hotel Program evacuees, they possess a constitutionally protected property interest in the Hotel Program benefits because defendants' words and actions created a reasonable expectation and led them to an understanding that the hotel payments would continue until they found permanent housing. Fueling this understanding was defendants' continuation to

make hotel payments under the Hotel Program for months after Superstorm Sandy despite defendants' characterization that the Hotel Program was temporary.

Defendants counter that no property interest was created by alleged statements, which, according to plaintiffs, were made by caseworkers to two plaintiffs, Sapp and Stokley. Nor could there be an understanding that the continued payments under the Hotel Program would go on forever. They argue that plaintiffs failed to meet their burden to show that they possess a property interest which was derived from a mutual understanding. The most plaintiffs have shown, according to defendants, is that they have an unilateral expectation of continued benefits.

The property interest at issue, as posited by plaintiffs, is one based on understandings. The query then is whether such understandings, which cannot be unilateral in order to find a possessory interest, can support plaintiffs' claim of entitlement to the benefit requiring a hearing. To address this issue, it must be recalled that the Hotel Program was borne out of necessity to alleviate the strain on the City's shelter system due to the havoc and destruction caused by Superstorm Sandy. Thus, the Hotel Program was created to grant emergency relief to City residents that were rendered homeless by Sandy. It stands to reason that the Program would see an end once that pressing need dissipates.

Plaintiff Sapp stated that her first caseworker made the representation that she could stay in the Hotel Program until she found permanent housing. Plaintiff Stokley's understanding of the same was derived from non-specific conversations she had with workers when she first entered the Hotel Program. However, the caseworkers' alleged representations do not address the termination of the Program as a whole. Thus, while plaintiffs argue that the representations led them to believe that they can stay in the Program until they find a permanent home, it cannot be said that it would lead them to believe that the Program itself would not have a termination date. In any event, an

employee's representation does not bind the government, otherwise, the government would be put at risk every time its employee, especially those who are not policy makers, misstates or fails to follow instructions (*see, Schweiker v Hansen*, 450 US 785 [1981]; *Goldberg v Weinberger*, 546 F2d 477 [2d Cir 1976]). Therefore, the workers' alleged representations to plaintiffs Sapp and Stokley do not establish a property interest in an unending Hotel Program.

As to plaintiff's point that defendants' conduct - making payments continually on their behalf once they entered the Program - which gave rise to a legitimate expectation of a continuation of benefits, this argument, on its face, does not show that a property interest was created by defendants' conduct. Generally, when a public benefits program has unfettered discretion as to the eligible member it helps, there is no property interest (*see Washington Legal Clinic for the Homeless v Barry*, 107 F3d 32, 37 [CA DC 1997] *citing Board of Regents v Roth*, 408 US 564, 577 [1972]). The Hotel Program did not have any rules or regulations to qualify an individual to receive program benefits. It served anyone who came for assistance without any requirements to prove they were residents of an evacuation zone, or that they were displaced as a result of Sandy. This is not a case where a specific criteria has to be met before a benefit is granted. In that situation, an applicant may rightfully expect to receive the benefit upon meeting the criteria, and thus would have a property interest in the benefit (*see Ridgely v Federal Emergency Management Agency*, 512 F3d 727, 736 [5th Cir 2008]; *Matter of Doe v Coughlin*, 71 NY2d 48, 55 [1987]). Absent any criteria for plaintiffs to meet, plaintiffs do not have a legitimate expectation that the Hotel Program is to continue paying for their hotel rooms because it did so the month before (*id.*).

On the other hand, the Hotel Program was created to automatically provide assistance to all Sandy evacuees. This creates a reasonable expectation of the benefit of housing assistance in these evacuees. But, does that reasonable expectation rise to the level of a constitutionally protected

property interest? The answer is yes, it does. Given the HRO's efforts in coordinating with other city and federal programs to accomplish its goal of getting evacuees "to long-term housing within a time-frame of 18 to 24 months," (Pltf's Aff, Exh 1, p3); its outreach efforts to gather evacuees; its compilation of data and statistics relevant to housing needs and costs; and its applications for funds from various sources are all demonstrative of its goal to help the evacuees find more permanent housing, a person who is an evacuee that was accepted into the Program has a legitimate expectation he/she will receive housing assistance for that time-frame. This expectation rises to the level of a property interest protectable under the Due Process Clause (*accord, McWaters v Federal Emergency Management Agency*, 436 FSupp2d 802, 818 [ED La 2006] the court found that the mandatory and non-discretionary policies under the Stafford Act and its implementing regulations requiring FEMA to automatically provide emergency disaster assistance to all applicants created reasonable expectations in these applicant and this expectation rose to a level of protectable property interest).

While there is no mandatory statutory language in the Hotel Program, as the Program was not promulgated by statute, HRO's solicitation of funds from FEMA, HUD and other sources creates an expectation that the funds are to be used in accordance to the regulations and mandates of the source agency. Indeed, HRO's strategies and plans for the utilization of the funds from these sources and the time it would take to obtain these funds may have been a consideration for Director Gair's estimation on the length of time it would take to accomplish the Hotel Program's goals.

Defendants argue that Director Gair's estimation of how long it would take to accomplish the goal of the Hotel Program or statements taken out of context regarding finding permanent homes do not create a legal obligation to continue the program. They point out that Director Gair's testimony was made to the City Council, not to Sandy evacuees, and therefore the Hotel Program evacuees cannot take Gair's testimony as attributing to an understanding in creating a property

interest. Defendants, however did not discuss whether the City Council was to keep this vital information a secret from their constituents, especially during times of crisis. Gair's testimony leads to an expectation that is shared not just by politicians, but by their constituents as well. Indeed, Gair's estimation to set the program to end beyond the initial six-months time frame finds support from the City Council Speaker and the Chair of the General Welfare Committee, who sent a letter to Commissioner Diamond requesting an extension of the Hotel Program to May 29, 2013, in anticipation of the Department of Housing Preservation and Development's Synthetic Voucher Program (Pltf's Aff, Exh 9). The letter noted that FEMA's Temporary Sheltering Assistance (TSA) hotel program was extended to May 29, 2013. Apparently, defendants have heeded the request as the Program is now extended to May 31, 2013. While the time frame is not set in stone, Director Gair, with all his experience as a Presidentially-appointed Federal Coordinating Officer at FEMA and the Federal Recovery Officer who had a budget of $8.8 billion for the aftermath of the 9/11 attacks, and who had worked in housing leadership positions after several major natural disasters like Hurricanes Floyd and Katrina, did not set a eighteen to twenty-four month time-frame for housing recovery without due consideration (Pltf's Aff, Exh 1, *City Council Oversight Hearing on Recovery: Managing the City's Housing Needs in the Wake of Hurricane Sandy Before the New York City Council Committee on Housing and Buildings on February 26, 2013* [Statement of Brad Gair, Director of the Mayor's Office of Housing Recovery Operations]).

Defendants next argue that plaintiffs would be "hard-pressed" to establish a property interest in the Hotel Program as the City lacks funding for the Program (*Kelly Kare, Ltd. v O'Rourke*, 930 F2d 170 [2d Cir 1991] *citing O'Bannon v Town Court Nursing Center*, 477 US 773[1980]). Plaintiffs counter this argument with an assertion that new federally funded housing programs will

be implemented in weeks[1]. Unfortunately, plaintiffs did not submit any substantiating or supporting documents except for the aforementioned letter from the City Council to Commissioner Diamond requesting an extension of the program to May 29 (Pltf's Aff, Exh 9). Nonetheless, defendants tacitly acknowledge that FEMA would or should be reimbursing defendants although such reimbursements have yet to be seen for the $47 million cost. Their application is still pending (Defts' Aff p24, ¶ 58; Defts' oral argument 5/13/13). Defendants added that the federal money would go toward other programs whose money was diverted to fund the Hotel Program. However, this assertion in no way suggests that no funds would be paid to the Hotel Program. Defendants have not presented evidence that the Hotel Program is unfunded and will not be reimbursed at this juncture.

Indeed, it was divulged during oral arguments that $9 million is immediately available for rental assistance. Additionally, there is a Community Development Block Grant (CDBG) which was just approved by Department of Housing and Urban Development (HUD) that would assist defendants achieve their post-Sandy housing goals. Back on February 26, 2013, Director Gair had estimated that the CDBG-funded programs would be available in early May (Pltf's Aff, Exh 1, p10). Therefore, it is evident that Director Gair intended the CDBG funded program would be part of HRO and Hotel Program's goal to transition evacuees to more permanent housing. Also on February 26, 2013, Director Gair announced that "$720 million of the first tranche of HUD funding" was dedicated to housing recovery" (*id.* at p8). Thus, given the additional financial aid for defendants' housing programs coming seven months after the Hotel Program's inception, as forecasted, it can be said that there is a mutual understanding that it would take more than seven months to accomplish the HRO goal through the Hotel Program. It would be contrary to HRO's mission of ending the

[1]The federal funds were to be disbursed within 45 days as per plaintiff's motion dated April 29, 2013.

Hotel Program just when the funds became available. Defendants cautioned that the CDBG program has eligibility requirements, and implementation of the program would likely occur in September. However, the only information regarding CDBG at this time is that the funds were approved and are immediately available. Considering the extensive efforts expended in obtaining these funds to assist defendants with their HRO and Hotel Program goals, the recipients of those benefits would have a property interest in a program to find a more permanent housing solution, which apparently, but not surprisingly, takes longer than seven months to accomplish. Absent funding for the Program, defendants are correct in asserting that plaintiffs would be "'hard-pressed' to establish a legitimate entitlement to that benefit" (*Kelly Kare, Ltd. v O'Rourke*, 930 F2d at 178 *citing O'Bannon, supra* at 786-88). But, this does not appear to be the case here.

Summarizing the foregoing analysis, the court finds that plaintiffs do not have a property interest in the Hotel Program to pay for their hotel stay indefinitely or until such time that they can find permanent housing whenever that may be. However, plaintiffs do have a property interest in receiving housing benefits from the Hotel Program for a period longer than seven months. While the finding is that the Program should last more than seven months, the finding is based on the fact that certain programs, such as the CDBG, were part of the strategy to help the HRO and the Hotel Program at the inception. To terminate the Hotel Program just when the CDBG funding became available does not seem reasonable. Keeping in mind that the initial 18 to 24 months time-frame is a well thought-out realistic guidepost, defendants' expertise in running the Hotel Program with the financial assistance they have just received should accomplish their goals without judicial intervention. In concluding that plaintiffs have a property interest in the Hotel Program to assist them with their housing needs in finding more permanent homes, plaintiffs are entitled to a notice and to be heard.

III. Adequacy of Notices

Defendants argue that even assuming that plaintiffs have a property interest, they received all the process that was due them. They add that the closing of the Hotel Program did not mean that the evacuees would be abandoned as there were other programs that would intercede.

In the seven months since the inception of the Hotel Program, all but 395 of the 1,260 households are in more permanent housing. This is quite an achievement and the efforts made to realize this accomplishment are laudable. However, plaintiffs complained that their caseworkers were ineffective and unavailable most of the time to assist them. In such a large scale effort, consistent excellent and comprehensive work in a disaster situation may see some failings. As of May 13, 2013, there are still 156 households, including two of the named plaintiffs, who are homeless were it not for the Hotel Program, and still not linked to any housing programs. The notices sent to them informed them that the Hotel Program was ending, and suggested that they contact their caseworkers. However, if the complaints are true, then the advise to contact their caseworker is no advice at all. The notices left the recipients unaware of what other steps may be taken once the Program is terminated. Considering that the Program was the source of the evacuee's housing needs, the termination of the Program should apprise them the reason for its termination and direct them to the alternative sources. Thus, as conceded by defendants during oral arguments, the notices were not adequate to the extent that it did not lead evacuees to other helpful information. The notices also did not indicate any reasons for the curtailment of the Program.

IV. Class Certification

Plaintiffs urge this court to grant class certification to the Sandy Evacuees. There are five prerequisites that must be met before class certification can be considered (CPLR § 901 [a]). They are (1) the class is so numerous that joinder of all the members would be impracticable; (2)

commonality of questions of law and fact which predominate over any questions affecting individual members; (3) typicality of claims and defenses; (4) representative parties will adequately protect the interests of the class; and (5) a class action is superior to other available method for the fair and efficient adjudication of the controversy (*id.; City of New York v Maul,* 14 NY3d 499 [2010]). Plaintiffs claim they meet all five criteria. However, as this case involves government operation, the issue of whether plaintiffs meet all five prerequisites is of secondary import. This is because *stare decisis* and the uniformity of governmental operations ensure that all similarly situated persons will receive the relief ordered by the court (*see Neama v Town of Babylon*, 18 AD3d 836 [2d Dept 2005]). Accordingly, the branch of plaintiffs' motion for class certification is denied.

V. Conclusion

The branch of plaintiffs' motion for a preliminary injunction is granted based on the finding that plaintiffs have a property interest in receiving housing assistance from the Hotel Program for a period to exceed seven months as the Hotel Program is currently funded. The branch of plaintiff's motion for class certification is denied.

This constitutes the decision and order of the court.

Dated: May 15, 2013

Margaret A. Chan , *J.S.C.*