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

PRESENT: GISCHE Justice PART 10

ZHENG, T

- v -

CITY OF NY

INDEX NO. 400806/11

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

MAY - 2 2011

NEW YORK COUNTY CLERK'S OFFICE

pc set 5/17/11 @ 9:30 a.m.

Dated: 5/2/11

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Jasmine Zheng and A.T. on behalf of themselves and all others similarly situated,

Plaintiffs,

-against-

The City of New York, The New York City Department of Homeless Services, The New York City Human Resources Administration, Seth Diamond, as Commissioner of the New York City Department of Homeless Services and Robert Doar, as Commissioner of the New York City Human Resources Administration,

Defendants.

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DECISION/ ORDER

Index No.: 400806/11
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
OSC, SB affirm., Zheng affd., A.T. affd.,JS affd., LD affd., exhibits	1
SD 3/28/11 affd., exhibits	2
Notice of Cross-Motion, ER affirm., SD affd., exhibits	3

Upon the foregoing papers, the decision and order of the court is as follows:

Named plaintiffs, Jasmine Zheng and A.T. (Collectively "plaintiffs"), are participants in the Advantage II program (sometimes "Advantage" or "program") administered by defendant, the City of New York, through its agencies that provide

services for homeless New Yorkers (defendants are collectively referred to as "NYC")[1]. As more fully explained below, Advantage is a program that provides durational housing assistance payments to homeless individuals and families, in an effort to transition them to permanent housing. In response to notifications by NYC that it would be discontinuing Advantage, effective April 1, 2011, the named plaintiffs, on behalf of themselves and all others similarly situated, brought an action for: specific performance of contracts allegedly made by NYC to provide the payments required under the program (First Claim); a declaration that NYC is contractually bound to continue Advantage payments (Second Claim); an injunction prohibiting NYC from discontinuing Advantage payments to tenant-recipients that are currently participating in the program (Third Claim); and deprivation of property without due process of law (Fourth Claim).

Plaintiffs now move for a preliminary injunction preventing NYC from terminating the rent subsidy payments for existing program participants. The gravamen of their argument is that NYC is contractually bound to provide these payments, for either one or two years, to the current participants in the program. They also seek class certification of the 15,000 households, consisting of families and individuals, that are currently enrolled in Advantage.

At the outset, it needs to be made clear that the plaintiffs are not seeking to have NYC continue the program in the future. As of March 17, 2011, NYC stopped taking in new program participants. Plaintiffs do not contest in this action NYC's right to stop

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[1]The other named defendants are the New York City Department of Homeless Services ("DHS"), the New York City Human Resources Administration ("HRA"), Seth Diamond as Commissioner of DHS (sometimes "Diamond") and Robert Doar, as Commissioner of HRA ("Doar").

taking in new participants. Nor are plaintiffs seeking to require NYC to pay rent subsidies for existing program participants for an indefinite duration of time. Plaintiffs recognize that the right of the current program participants to receive rent subsidy payments cannot exceed two years from the time any particular participant initially began receiving such subsidies.

NYC not only opposes the motion, but cross-moves to dismiss the complaint for failure to state a cause of action. While it recognizes that Advantage has been a remarkably successful program in averting chronic homelessness[2], it argues that the program is just that, a program that exists without any contractual obligation on the part of NYC to continue it. NYC explains that it finds itself in an unenviable position of having to discontinue Advantage because New York State, after having renewed its authorization for the program in May 2010, has failed to fund its one third share of the program's cost. As a consequence, the program is ineligible for the one third funding previously provided by the Federal government. The withdrawal of the State and Federal funding, effective April 1, 2011, is described by NYC as a "devastating blow." NYC states that it is not in a position to fund the entire program without State and Federal financial assistance, which it projects as $97,000,000.00 for one year and $171,000,000.00 for two years. It understands that, under existing law, prior consent court decrees and that as a matter of public policy, it has ongoing obligations to homeless families. NYC explains, however, that it can fulfill its obligations with other,

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[2]Seth Diamond, the Commissioner of the New York city Department of Homeless Services, states in his affidavit that "by any critical measure, Advantage triumphed as a bridge to independent living."[¶3].

albeit less effective, programs, which are more cost effective to NYC, because the State is obligated to contribute funds to the alternative programs.

The Advantage Program

In general[3], the current Advantage program provides partial monthly rental subsidies for participants, that are paid directly to private landlords for an initial one year period, but for no more than two years. The goal of the program is to transition formerly homeless families into permanent housing, and to prevent them from returning to the shelter system.

Since 2004, there have been at least two prior programs that were designed in a similar manner to achieve similar goals. In 2004, the program was known as Housing Stability Plus ("HSP"). In order to rectify what were perceived problems with HSP, in 2007 the first Advantage program was approved. In 2009-2010, the Advantage program underwent further changes and in May 2010, the current Advantage program was approved by the New York State Office of Temporary and Disability Assistance ("State OTDA") .

All of the iterations of the program, which were considered research and demonstration programs, were designed with and required the approval the State OTDA. 18 NYCRR §300.11. Since the programs involved additional shelter supplements to public assistance recipients to reside in private housing, prior approval of the State OTDA was required. The State OTDA could authorize the supplement only

[3]For the purposes of this decision it is not necessary and the court does not discuss all the nuances of eligibility and benefits provided under Advantage. A full discussion of Advantage and its predecessor programs is set forth in the Diamond affidavit.

if it determined that there were sufficient funds available to provide such reimbursement. 18 NYCRR § 352.3(a)(3). Since the programs were demonstration projects, NYC was required to and did evaluate the success of such programs. According to NYC, the success rate was overwhelming. Of the 25,000 households that participated in the Advantage program since 2007, 90% of such households did not return to the shelter system after exiting the program (Diamond affd. ¶3).

The current Advantage program is described as follows: It is only open to eligible households. Eligibility requires that a family or individual had to reside in a shelter for at least 60 days, have an open and active public assistance ("PA") case and have a total household income that did not exceed 200% of federal poverty level. In general, eligible families had to have at least one household member working at least 20 hours per week, at minimum wage or above, and engaged in HRA approved activities for a total of 35 hours weekly. Additional adult members of the household had to meet separate eligibility requirements. If members of a household could not meet the employment requirement due to disability, they could still qualify for the program if the they received Social Security Income, Social Security Disability Income or other federal disability benefits, or were certified as "needed at home" to care for a disabled family member receiving such benefits.

The amount of rental assistance provided depended upon total gross household income and household size. No subsidy would be paid if the rent exceeded a maximum amount set by NYC.

If eligible, the participant had to find an apartment, which was subject to an approval process by NYC. The subsidy was for an initial one year period. Participants

were required to contribute 30% of their gross monthly income to their rent. If certain eligibility criteria were met, a participant could receive an additional year of rent subsidies. A participant household was required to pay 40% of gross income toward the monthly rent during the second year.

Under the current Advantage program (as well as under its earlier iterations) documents were generated by NYC to facilitate the program. The content of the documents has changed somewhat as the programs evolved, but the documents utilized can be generally categorized as:

[1] a certification of eligibility

[2] a participant statement of understanding

[3] a landlord statement of understanding and

[4] a lease rider

(collectively "program documents").

It is these program documents that are central to the parties' positions in this action. Plaintiffs claim that the documents, taken together, or in various combinations, are binding contracts that require NYC to continue the Advantage program as to the existing participants. They claim that the documents are contracts between NYC and the participants to provide at least one, and if otherwise eligible, up to two years of rent subsidies. They further claim that these documents are contracts between NYC and private landlords to guarantee payment of rent subsidies for at least one and, if the participants are otherwise eligible, up to two years. They argue that the tenant participants, as third party beneficiaries of the guarantee agreements with the private landlords, can bring an action to enforce the contracts.

NYC claims that these documents are not contracts, whether taken collectively or in various combinations, but only intended to provide information to participants and landlords about the underlying social service program known as Advantage.

In order to evaluate the parties' respective claims for the purposes of this decision, it is necessary to closely examine the relevant operative language of the program documents. While the program documents used for the current participants in the Advantage program are not completely uniform, they do have substantially the same characteristics.

Plaintiff Zheng has provided the court with her certification of eligibility and lease rider. Her certification of eligibility provides in relevant part:

> "Re: Advantage Program (Guaranteed Rent Not Tied to Public Assistance)...
>
> The City of New York has developed a new rental assistance program: Fixed Income Advantage. The Fixed Income Advantage program will provide eligible households with a rental subsidy to move out of shelter and the opportunity to apply for a priority Section 8 voucher. To be eligible , *(lists certain requirements)*...According to our records you may be eligible for this opportunity. ... Rental payments to your landlord will be guaranteed for up to one year...All apartments undergo a Section 8-type Housing Quality Standard inspection...A pro-rated share of the first month's rent, the next three months' rent, a one month security deposit and a broker's fee (if applicable) will be paid at lease signing....future monthly rent payments will be paid directly to the landlord and are not affected by your Public Assistance status."

Zheng's lease rider provides in relevant part:

> "¶2 The Program Tenant agrees that as a participant in the Children Advantage/Fixed Income Advantage Program, the Program Tenant authorizes the payment of the Program Tenant's rental assistance directly to the Landlord. Pursuant to the terms and conditions of the City of New York's ("CITY") Children Advantage/Fixed Income Advantage Program, the City shall pay the Program Tenant's rent directly to the Landlord ("Children Advantage/Fixed Income Advantage Program

Payment") until the Program Tenant's acceptance into the then existing New York City Housing Authority's ("NYCHA") section 8 Housing Program ("Section 8 Housing Program") but in no event no longer than one year from the commencement of the Lease. The city reserves the right in its sole discretion, to make Children Advantage/Fixed Income Advantage Program Rent Payments beyond the one year period....

¶3 The Landlord acknowledges that (1) the amount and duration of the Children Advantage/Fixed Income Advantage Program rent Payment is subject to all applicable rules and requirements of the Children Advantage/Fixed Income Advantage Program and (2) the Children Advantage/Fixed Income Advantage Program Rent Payment shall not be paid after the Program Tenant's acceptance into the Section 8 Housing Program or after the first anniversary date of the lease, whichever occurs first."

Plaintiff A.T. has provided the court with her certification of eligibility and participant statement of understanding.

A.T.'s certification of eligibility provides in relevant part:

" You are now eligible for the Advantage rental assistance program....The Advantage program guarantees that the subsidy portion of the rent will be paid directly to your landlord for one year. You may receive a second year of rental assistance under Advantage if you meet eligibility criteria for a second year."

A.T.'s participant statement of understanding provides in relevant part:

"Under the Advantage program, the City of New York ("City") will pay a portion of my monthly rent (over and above my family's monthly rent contribution) directly to my Landlord....¶2. I understand that I will sign a one-year lease with my Landlord and the City will pay the Advantage rent payment directly to my landlord on a monthly basis, for the first year of the Advantage program....¶3...If I am found eligible for a second year of Advantage, The City will pay a second year of Advantage Rent Payments to my Landlord on a monthly basis.

The moving papers also contain a blank form that typifies a landlord statement of understanding. It provides in relevant part:

"Under the Advantage program, the city of New York ("city') will pay

> directly to me, the Landlord, monthly rent in the amount of [*rental subsidy amount*] ("Advantage Rent Payment") for a period of one year, on behalf of the eligible Advantage client ("Program Tenant"). ..¶1. I understand that I will sign a one year Lease and rider....¶3 I understand that the Program Tenant is automatically entitled to a self executing renewal of the Lease for a second year at the same total monthly rent provided for in this rider, provided that (a) the Program Tenant has been found eligible by the city for a second year of the Advantage Program, or (b) the Program Tenant is able to pay his/her entire rent for a second year....¶6. I understand that if the Program Tenant leaves the apartment....I, the Landlord, will return any pre-paid Advantage rent payments to the City..."

NYC has provided blank forms that is uses in the Advantage program (exs Z through BB). These forms do not materially differ from the forms that have been provided by plaintiffs.

The certification of eligibility is provided to the tenant participant while the household is in the Shelter. It is used by the tenant to identify a qualifying apartment to rent. Once the apartment was identified and approved by NYC, the landlord and tenant would appear at DHS Office of Re-housing to sign the lease, the participant statement of understanding, the landlord statement of understanding and the lease rider. The documents were witnessed and acknowledged by a DHS representative.

Discussion

Legal Standard for a Preliminary Injunction

Plaintiffs' are seeking a preliminary injunction prohibiting the City from discontinuing the Advantage program to existing participants, until their eligibility runs out. In order to obtain a preliminary injunction, plaintiffs must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction, and a balance of equities in their favor. *See* CPLR § 6301; Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 N.Y.3d 839 (2005); Aetna Insurance Co., Inc. v. Capasso, 75

N.Y.2d 860 (1990); W.T. Grant Co. v. Srogi, 52 N.Y.2d 496 (1981). Although the party seeking a preliminary injunction does not have to provide conclusive proof of its right to the underlying relief, and a preliminary injunction can, in the court's discretion, be issued where there are disputed facts (Terrell v. Terrell, 279 A.D.2d 301 [1st Dept. 2001]), showing likely success on the merits is still a *bona fide* requirement before temporary relief can be granted. Post v. Killian, 73 AD3d 507 (1st Dept. 2010); Famo, Inc. v. Green 521 Fifth Ave., LLC, 51 AD3d 578 (1st Dept. 2008); O'Hara v. Corporate Audit Co., 161 A.D.2d 309 (1st Dept. 1990).

Legal Standard on a Motion to Dismiss

NYC has cross-moved to dismiss the complaint for failure to state a cause of action. CPLR §3211(a)(7). In the context of a motion to dismiss for failure to state a cause of action, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true, and provide the plaintiff with the benefit of every possible inference. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326 (2002); Leon v. Martinez, 84 N.Y.2d 83 (1994); Morone v. Morone, 50 N.Y.2d 481 (1980); Beattie v. Brown & Wood, 243 A.D.2d 395 (1st Dept. 1997). In deciding defendants' motion to dismiss, the court must determine whether the allegations support the causes of action asserted (Rovello v. Orofino Realty Co., 40 N.Y.2d 633, 634 [1976]) and whether they fit within any cognizable legal theory. Goldman v. Metropolitan Life Ins. Co., 5 N.Y.3d 561 (2005). Ultimate success is not part of the calculus. EBC I, Inc. v. Goldman, Sachs & Co., 5 N.Y.3d 11(2005).

NYC argues that it has "supplemented the materials submitted by plaintiff" (NYC Memorandum Of Law ["MOL"] p.9) which the court should consider on its motion to

dismiss. Where the parties submit affidavits and other evidentiary materials in support of their respective motions, the courts are free to consider the affidavits and documents submitted to remedy any defects in the pleading. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994). Extrinsic evidence may be freely relied upon to preserve in-artfully pleaded but potentially meritorious claims. Rovello v. Orofino Realty Co., *supra*. Such materials, however, are not considered to defeat a complaint, unless the motion to dismiss is based upon documentary evidence that definitively disposes of plaintiff's claims. Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 (1st Dept. 2006); Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st Dept. 1995).

The primary program documents on which plaintiffs are relying to prove the existence of a contract are already part of the moving papers. To the extent NYC has provided the same or similar documents, they are unnecessary for the court's consideration of the present motions. To the extent NYC has provided other documents, including collateral Advantage documents and documents relating to both earlier and other programs, they will not be considered in connection with the cross-motion to dismiss. They, however, can and will be considered in connection with plaintiffs' motion for a preliminary injunction.

The Existence of a Contract or Contracts

In this case, both the motion for a preliminary injunction and the cross-motion to dismiss the complaint turn on the court's analysis of whether the program documents constitute an enforceable contract or contracts. There is no serious dispute that the plaintiffs (and others similarly situated) will be irreparably harmed if the injunction is not granted. NYC admits that the end of the Advantage program will subject many of the

15,000 present program participants to eviction and that, while NYC will undertake measures to fulfill its obligations to the homeless, the measures will fall short of the success it claims the Advantage program has had in preventing formerly homeless families and individuals from re-entering the shelter system. Plaintiffs argue that this sudden influx of families back into the shelter system will simply overwhelm NYC's present homeless resources and will result in violations of Court Decrees requiring NYC to provide shelter to the homeless (see*: infra*). Likewise, although NYC pointed to the great financial burden of continuing the program, there is not much argument contesting plaintiffs' position that the balancing of the equities weighs in the plaintiffs' favor.

The existence or absence of a contractual relationship is crucial to the court's inquiry and the relief available to the parties in this action. Although the parties all recognize NYC is legally mandated to provide shelter to homeless families with children, and homeless single adult men and women, pursuant to the New York State Constitution (Article XVII §1); the New York State Social Services Laws (§§ 61(1); 77(3), the New York City Charter (§§ 610-614) and prior court judgment, orders and decrees (Boston v. City of New York [NY Co. index#402295/08]; Callahan v. Carey [NY Co. index #42582/79] and Eldredge v. Koch [NY Co. index # 41494/82] [collectively "Court Decrees"]), these mandates do not require the continuation of the Advantage program *per se* to fulfill those legal obligations.[4] Consequently, plaintiffs are required

[4]In this regard, the parties' collateral arguments about whether continuation of Advantage would cost NYC more or less than other services necessary to fulfill the laws and Court Decrees is not germane to these motions. NYC must make these policy decisions on how best to fulfill their obligations. Failure to fulfill the obligations,

to prove an enforceable contractual obligation as a predicate to all of their claims alleged in the complaint.

Plaintiffs argue that the program documents when read either collectively or in various combinations, constitute an enforceable contract between NYC and the tenant participant or a contract between NYC and the landlord participant. They argue that the tenant participants gave up their right to continue living in shelters and signed leases for rents that they could not afford in exchange for and reliance on NYC's promise that a substantial portion of the rent would be paid by NYC for a certain period of time. They also argue that the participants agreed to participate in surveys and to favorably publicize the program in exchange for the rental subsidy. Plaintiffs argue that continued payment of the subsidy is a contractual right owed directly to them. Alternatively, they claim that contracts were made with participating landlords to guarantee the rent subsidy for the duration of a one year lease and, as renewed, for up to two years. All of plaintiffs' claims set forth in the complaint are remedies for the anticipated breach of contract by NYC. Plaintiffs claim that they are entitled to remedies for non-performance of any contract directly with them or for which they are a third party beneficiary.

NYC denies that the program documents, when read either collectively or in various combinations, constitute an enforceable contract with either the tenant-participant or the private landlord. They argue that, as a matter of law, the program documents are not contracts, mandating dismissal of the action. Instead, they claim

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however, is subject to judicial oversight.

that the documents are part and parcel of a social services program, nothing more. They argue there is no consideration for the so-called contracts. The also argue that any obligations they had to either the participant tenant or the landlord were expressly limited to rules and regulations of the program, which has since been terminated.

A critical element of any cause of action for breach of contract is that a contract was formed in the first instance. Furia v. Furia, 116 AD2d 694 (1986). The requirements for the formation of a contract are: [1] at least two parties with legal capacity to contract; [2] a meeting of the minds or mutual assent ;and [3] consideration. 2 NY PJI3d 4:1, Comment, (2011) (and authorities cited therein). While a formally executed document is not always necessary for a contract to be proven, the proponent must still prove an intent of the parties to be bound. Kowalchuk v Stroup, 61 AD3d 118 (1st dept. 2009); Moore v. Microsoft, 293 AD2d 587 (2nd dept. 2002). As the Appellate Division of this department stated in the recent decision of Ruane v. Allen-Stevenson School (85 AD3d 615 [2011]):

> "In determining whether the parties entered into a contractual agreement and what its terms were, it is necessary to look to the objective manifestations of the intent of the parties, as evidenced by the totality of their expressed words and deeds. The Court must look to the attendant circumstances, the situation of the parties, and the objectives that they were striving to attain."

It is black letter law that in order to have a valid and binding contract, there must be consideration. Pershall v. Elliott, 249 NY 183 (1928); Consideration to support an agreement exists when there is a benefit to the promisor or a detriment to the promisee. Weiner v. Mcgraw-Hill, Inc, 57 NY2d 458 (1982); Hollander v. Lipman, 65 AD2d 1086

(2nd dept. 2009). It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him. Hamer v. Sidway, 124 NY 538 (1891). Generally, the slightest consideration may sufficiently support the most onerous contractual obligation and the value of the consideration is not crucial as long as it is acceptable to the parties. Daniel Goldreyer, Ltd. v. Van de Wetering, 217 AD2d 434 (1st dept. 1995). Nothing is consideration, however, that is not regarded by the parties as such at the time the alleged contract is made. Rose v. Elias, 177 AD2d 415 (1st dept. 1991).

Whether consideration is adequate is usually a question of fact that survives a pre-answer motion to dismiss. Daniel Goldreyer, Ltd. v. Van de Wetering, *supra.* Where, however, it is clear from the face of a pleading that a promise is gratuitous, the complaint will be dismissed. Startech, Inc. V. VSA Arts, 126 F. Supp.2nd 234 (SDNY 2000).

There is no dispute that Advantage is part of a social services program. That fact alone is not determinative about whether the program documents constitute an enforceable contract, because the Commissioner of the Department of Housing Services has the authority to enter into contracts in connection with fulfilling his duties. New York City Charter §612(1). On the other hand, the fact that the Commissioner can make contracts in connection with fulfilling his mandates, does not mean that he did so in these particular circumstances.

Commissioner Diamond explains that the intent of the program documents was to describe the program to its participants and that there was no intention to bind NYC

as a party to any contractual obligation. Advantage is described as "program" in the documents and NYC argues there is no language of binding obligation. The program is defined by eligibility requirements, which NYC argues is not bargained for consideration. NYC argues that even the use of common contractual terms like "guarantee" in the program documents were not intended to bind NYC, but rather to encourage landlords to participate in the program.[5] NYC claims that the tenant participants were required to participate in Advantage pursuant to 18 NYCRR 353.35(c)(3) and (f) which requires families in shelters to seek and not refuse any permanent housing, or risk sanctions. They claim that since the program was not voluntary for the tenant-participants, there can be no consideration.

Plaintiffs argue that there is consideration because the tenant participants gave up their right to stay in the shelter and, instead, entered into leases that they could not otherwise afford in order to participate in the program.[6] They also agreed to participate in surveys and publicity about the Advantage program. Plaintiffs further argue that NYC was advantaged by taking people out of the shelter system and having lower or fixed costs associated with fulfilling its responsibilities to house the homeless under the Court Decrees. These claims of consideration, however, can be equally consistent with a

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[5]NYC claims that landlords were reluctant to participate in prior programs because payment of the subsidy was contingent on the status of the PA case. The language of guarantee was added to inform landlords that they would be paid regardless of the status of the PA case.

[6]While the plaintiffs make factual arguments that they relied upon NYC's promises to pay rent to their personal detriment, they make no legal claims on such basis. In general, estoppel is not available against a governmental entity in the exercise of its governmental functions. Daleview Nursing Home v. Axelrod, 62 NY2d 30 (1984).

tenant participant decision to participate in a voluntary social services program. Whether, however, this constitutes consideration or is merely aspects and consequences of participating in the Advantage program, cannot be determined as a matter of law on these motions. Thus, NYC's argument that the complaint must be dismissed because there is no consideration, as a matter of law, is rejected.

The court also rejects NYC's contention that 18 NYCRR 353.35 requires tenant participants to take part in Advantage, and, consequently, there is no consideration as a matter of law. While the regulations do require homeless families and individuals in the shelter system to seek, cooperate and not refuse permanent housing, or risk sanctions, they need not accept permanent housing that is unaffordable. 18 NYCRR 352.35(c)(3). The Advantage subsidy is premised on participants accepting apartments that they otherwise could not afford, with a view toward increasing household income over time, so that participants could pay for their own housing costs at the time of exiting the program.

Notwithstanding that the plaintiffs' complaint can withstand a motion to dismiss, the court is not convinced that they have a likelihood of succeeding on their contract claims. They would need to prove that, at the time the program documents were signed, NYC and the tenant participant each had an actual intention to bound contractually. Most of the language in the program documents is consistent with NYC's claim that Advantage was simply a social services program. The actions taken by the tenant participants are consistent with having to meet eligibility requirements for a particular social services program.

Certain separate arguments are made in connection with whether the program

documents constituted contracts with the private landlords. These arguments are therefore addressed separately as follows:

Plaintiffs argue that they are entitled to enforce contracts made with landlords as third party beneficiaries thereof. NYC does not dispute that, if there were enforceable contracts with the landlords, the tenant-participants would be third party beneficiaries thereof. State of California Public Employees' Retirement System v. Sherman & Sterling, 95 NY2d 427, 435 (2000); Burns, Jackson, Miller, Summit and Spitzer v. Lindner, 59 NY2d 314 (1983).

None of the parties argue about the sufficiency of consideration in connection with the obligations made to the landlords. See: Michelin Mgt. Co., Inc. v. Mayaud, 307 AD2d 280 (2nd dept. 2003); 1374 Boston Road, LP v. Fountain House, 8 Misc3d 1020 (NY City Civ. Ct. 2005)(holding that a lease guarantee that induces a landlord to enter into a contract with a tenant is supported by consideration). General arguments, however, about whether the parties intended to be bound in contractual relationships, as opposed to becoming participants in a social services program, apply equally to the alleged contracts with tenant-participants as with landlords (see: decision, *supra*).

NYC additionally argues, that the program documents expressly provide that the amount and duration of the subsidy is still subject to all applicable rules and requirements of the Advantage program, and that the program has been terminated by the State's failure to fund the program.

Plaintiffs argue that the references to durational limits in the lease riders apply only to whether the tenant participant will be eligible for the program one or two years. The also deny that the State withdrew its authorization for the program by failing to fund

its portion of Advantage.

Plaintiff Zheng's lease rider provides:

> "The Landlord acknowledges that (1) the amount and duration of the Children Advantage/Fixed Income Advantage Program rent Payment is subject to all applicable rules and requirements of the Children Advantage/Fixed Income Advantage Program ..."

Substantially similar provisions are contained in the lease riders for all participants in the program. The court rejects plaintiffs' argument that the lease rider language is limited to whether the subsidy will be provided for either one or two years. The documents reveal that there are a variety of circumstances which could affect the duration of the subsidy paid to the landlord, including the participant tenant's eligibility for section 8 housing, [7] the tenant participant vacating the apartment and the tenant participants' expulsion from the program for failing to comply with continued requirements of eligibility. The language, which expressly speaks to "all" applicable rules and regulations, means what it plainly says, that duration of Advantage payments to landlords is subject to all program rules and regulations.

The collateral consideration is whether the State's actions have essentially terminated the program, thereby triggering the durational limitation in the lease riders.

NYC is a local social service district within the meaning of the Social Services Law. SSL §§ 61(1); 77(3). It acts, through its agencies, to fulfill the State Constitutional mandate to provide aid, care and support of the needy. NY State Constitution, Article

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[7]At the time many of these documents were signed, the moratorium on section 8 housing had not been put into effect. See: Richardson v. NYCHA, 8/31/10 NYLJ 31 (col.1).

XVII § 1. Advantage was promulgated as a public assistance program in accordance with 18 NYCRR 352.3(a)(3)(i-ii). Such regulation provides that a social services district may, with the prior approval of the State OTDA, provide an additional shelter supplement to PA recipients so that they can reside in private housing. The regulation expressly provides that the State OTDA "may authorize the supplement only if it determines that there are sufficient funds available to provide such reimbursement" (emphasis added).

Advantage was approved by the State OTDA in May 2010. Implicit in such approval is a finding by the State OTDA that there were sufficient funds to provide "reimbursement" at the time of approval. NYC argues that the reimbursement referred to in the regulation is from State and Federal funds available for public assistance programs. SSL §§153(1)(d); 158 (1)(a) and 358; 42 USC 603. NYC argues further that when the State failed to provide funds for Advantage in the most recently passed budget, it effectively terminated or withdrew its authorization for the program. Since the duration of payments under the lease rider is subordinate to the program rules and regulations, NYC argues that any contract to pay subsidies is likewise, terminated.

In opposition, plaintiffs rely on a March 18, 2011 letter from Elizabeth Berlin, executive Deputy Commissioner of the State OTDA, that informs NYC that it does not consider its failure to fund Advantage as the same thing as withdrawing its authorization to the program. (Diamond Affd. Ex. OO). Referring to the requirement of funds for reimbursement, Ms, Berlin states: "The provision does not limit or specify the source of the funds to be used to pay the rental supplements and, in fact, the supplements could be paid with funds other than State and Federal funds." Plaintiffs' argue that this court

should give deference to the interpretation given by an agency which promulgated and is responsible for its administration. See: Roberts v. Tishman Speyer Properties, LP, 13 NY3d 270 (2009). Plaintiffs argue further that there are no other rules and regulations of the Advantage program that would allow NYC to terminate the program in the middle of extant contracts.

In Roberts v. Tishman Speyer, *supra*, the Court of Appeals made it clear that deference to an agency interpretation of a statute or regulation applies only when "specialized knowledge and understanding of underlying operational practices or...an evaluation of factual data and inferences to be drawn therefrom is at stake." If the question is one of pure statutory interpretation, then there is little basis to rely on special competence or expertise of the administrative agency and its interpretive regulations. At bar, the State OTDA interpretation of 18 NYCRR 352.3, that its approval of Advantage, which is subject to funds available for "reimbursement," bears no relationship to the State funding, is contrary to the express language of the regulation and to the enabling legislation in the Social Services Law. Reimbursement and the need for State approval are clearly tied to the State obligations of "reimbursement" and apportionment of federal monies as specified in the Social Services Law. SSL §§153, 158, 358.

That having been said, once a program is approved by the State OTDA, the applicable regulation does not expressly speak to what occurs if funds later become unavailable. Nor has NYC cited to any express program rules or regulations that allow it to terminate the program if funds become unavailable. If Advantage were merely a social services program, as NYC argues, then they could terminate it at any time. In

fact, nobody contests NYC's actions in terminating the program for prospective tenant participants. If, however, Advantage is based upon created contractual relationships, then under the lease rider, the duration of the payments is governed by applicable program rules and regulations. There are no rules and regulations about what occurs when the State stops funding the program.

Under these circumstances the court cannot find, as urged by NYC, that as a matter of law, any "contracts" with landlords are now" inoperative" by their own terms. This analysis, however, still leaves open the question as to whether the program documents created a contract in the first place or whether they were just part of the delivery of a social service program.

Thus, the plaintiffs' claims that NYC had enforceable contracts with private landlords survives dismissal. A claim for a preliminary injunction on the basis of contracts with landlords, however, suffers from the same infirmities as plaintiffs' claim for a preliminary injunction on the basis of contracts with tenant participants. It is not likely to succeed on the merits because there little evidence that NYC and the landlords intended to be contractually bound at the time documents were signed.

Due Process

Plaintiffs' due process claims are based upon their contract claims. Since the court is not dismissing any of plaintiffs' contract claims, it is not dismissing the due process claim.

Class Certification

Plaintiffs seek class certification of the 15,000 households presently participating in the advantage program. NYC opposes the motion.

CPLR 901 lists five requirements which are prerequisites for certification of a class action: (1) that the class is so numerous that joinder of all of the members is impracticable; (2) that there are common questions of law or fact which predominate over any questions affecting only individual members; (3) that the claims or defenses of the representative parties are typical of those of the class; (4) that the representative parties will adequately protect the interests of the class; and (5) that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Although NYC does not address the requirements of CPLR 901, it objects to certification based on the government operations rule. The government operations rule provides that where "governmental operations are involved, and where subsequent petitioners will be adequately protected under the principles of *stare decisis* . . . class action relief is not necessary." Martin v. Lavine, 39 N.Y.2d 72 (1976) *quoting* Matter of Jones v Berman, 37 NY2d 42, 57 (1975). The governmental operations rule does not bar class certification. New York City Coalition to End Lead Poisoning v. Giuliani, 245 A.D.2d 49 (1997). Rather, the rule cautions against class certification where governmental operations are involved, since any relief granted to the named plaintiffs would adequately flow to and protect others similarly situated under principles of *stare decisis*. *See*, Martin v. Lavine, *supra* at 75; Matter of Jones v Berman, *supra* at 57.

As set forth in New York City Coalition to End Lead Poisoning v. Giuliani, *supra*, there are exceptions to this rule, such as where the governmental entity has repeatedly failed to comply with court orders affecting the proposed class, rendering it doubtful that

stare decisis will operate effectively (*see*, Matter of Lamboy v. Gross, 126 AD2d 265, 273-74; *see also*, Varshavsky v Perales, 202 AD2d 155, 156); where the entity fails to propose any form of relief that purports to protect the putative class members (*see*, Seittelman v Sabol, 217 AD2d 523, 526); where any particular person's ability to commence individual suits is highly compromised, due to indigency or otherwise (*see*, Tindell v Koch, 164 AD2d 689, 695; Matter of Lamboy v Gross, supra; Matter of Davis v Perales, 137 Misc 2d 649, 655 [Sup Ct, Kings County 1987]); or where the condition sought to be remedied poses some immediate threat that cannot await individual determinations (Matter of Lamboy v Gross, *supra*).

Here, it is undisputed that plaintiffs and all those similarly situated are indigent and that it would be "oppressively burdensome" for them to commence individual actions against NYC. *See* Tindell v. Koch, 164 A.D.2d 689 (1991). However, in light of the fact that at oral argument NYC agreed to treat all tenant-participants similarly situated in accordance with this court's rulings, even those made prior to reaching a final determination, the need for class certification is unnecessary at this time. While the tenant-participants may be indigent, they have no need to bring separate actions, since NYC has agreed to apply this court's determination equally to all similarly situated. To the extent that NYC fails to similarly treat all tenant-participants in accordance with this court's ruling, plaintiffs may renew their motion for class certification at that time.

Claim for legal fees

Although plaintiffs state no separate cause of action for legal fees in their

complaint, they seek them as part of their prayer for relief. In footnote 8 of its MOL (p.20) NYC argues that the request for legal fees should be dismissed.

In general, each party is required to pay its own legal fees, unless there is a statute or an agreement providing that the other party shall pay same. AG Ship Maintenance Corp. v. Lezak, 69 NY2d 1 (1986). Plaintiffs' demand is premised on 42 USC §1988, CPLR §§ 8601 and 909. Although the application of CPLR §8601 is completely unclear to the facts alleged in this case since the State is not a party (see: Crabtree v. New York State Division of Housing and Community Renewal, 294 AD2d 287 [1st de[t. 2002]; 2421 Realty Co. v. New York State Division of Housing and community Renewal, 193 AD2d 571 [1st dept. 1993]), the cause of action for violation of due process (Fourth Claim) is still part of this case which could trigger legal fees under 42 USC § 1988. In addition, although the court has at this time denied class certification, it was without prejudice to renew. Thus, for that reason as well, it would be premature to dismiss the claim for legal fees pursuant to CPLR §909 at this time.

Conclusion and Order

The court finds that although the plaintiffs' allegations survive a motion to dismiss, they have not shown the court that they have a likelihood of success on their claims that the program documents constitute enforceable contracts. Thus, the court denies any request for a preliminary injunction. The court however, continues the TRO it originally issued for an additional 10 days in order to allow plaintiffs time to seek a stay from the Appellate Division, if they so choose.

The court recognizes that in view of the fact that it has denied the preliminary

injunction, the underlying matter needs to be expedited, so that if the plaintiffs' are ultimately successful, the victory will be meaningful for current tenant participants in the Advantage program. NYC is, therefore, directed to interpose an answer within 10 days of the date of this decision. The parties are directed to appear for a preliminary conference on May 17, 2011 at 9:30 a.m., at which time an expedited discovery schedule and trial date will be set.

The motion for class certification is denied. The cross-motion to dismiss the complaint is denied.

In accordance herewith it is hereby:

ORDERED that plaintiffs' motion for a preliminary injunction is denied, and it is further

ORDERED that the temporary restraining order previously granted by the court in the March 28, 2011 Order to Show Cause shall otherwise remain in full force an effect for an additional ten (10) days for the plaintiffs to, if they choose, seek a further stay from the Appellate Division, and it is further

ORDERED that after such ten (10) day period, the aforesaid temporary restraining order is vacated, and it is further

ORDERED that plaintiffs' motion for class certification is denied, and it is further

ORDERED that defendants' cross-motion to dismiss the complaint is denied in its entirety , and it is further

ORDERED that defendants are directed to interpose an answer to the complaint

on or before May 12, 2011, and it is further

ORDERED that the parties are directed to appear for a preliminary conference on May 17, 2011 at 9:30 a.m. at which time the court will set an expedited discovery schedule and set a trial date, and it is further

ORDERED that any requested relief not otherwise expressly granted herein is denied it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY
May 2, 2011

So Ordered:

J.G. J.S.C.

HON. JUDITH J. GISCHE
J.S.C.