

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA PART 17

-----X

**In the Matter of the Application of
ALBIN LOBAINA,**

Petitioner,

Index Number: 4505/09

Motion Date: 6/3/09

Motion Cal. Number: 35

-against-

**HUMAN RESOURCES ADMINISTRATION, OFFICE
OF CHILD SUPPORT ENFORCEMENT,**

Respondents,

-----X

The following papers numbered 1 to 11 read on this petition pursuant to Article 78 of the CPLR to, *inter alia*, review and reverse the determination made by the Respondent, **HUMAN RESOURCES ADMINISTRATION, OFFICE OF CHILD SUPPORT ENFORCEMENT**, (“hereinafter, OCSE”) and preclude OCSE from collecting any money on the grounds that such determination was improper; and cross-motion by Respondent to dismiss the petition pursuant to CPLR 3211 (a) (1), (5), (7), & (8), it is barred by collateral estoppel, and the failure to join a necessary party.

	<u>Papers Numbered</u>
Notice of Petition-Petition-Exhibits.....	1- 4
Notice of Cross-Motion-Affirmation-Exhibits.....	5-8
Reply Affidavit-Exhibits.....	9-11

Upon the foregoing papers it is ordered that the petition pursuant to Article 78 of the CPLR to review and reverse the determination made by the Respondent and preclude the OCSE from seeking payment to satisfy child support arrears owed by Petitioner on the grounds that he does not owe arrears and that he can demonstrate he has paid his arrears is denied; and the cross-motion by Respondent to dismiss the petition pursuant to CPLR 3211 (a) (1), (5), (7), & (8), it is barred by collateral estoppel, and the failure to join a necessary party, is granted, for the following reasons:

This petition stems from an Order made on September 15, 1985, by the Honorable Joseph L. Torres, which entered a modified order of support (hereinafter, “Order”) reinstating a prior support order requiring Petitioner to pay \$25.00 per week to the Commissioner of Social Services (“CSS”) for the support of his child, Michael Fernandez a/k/a Cristian

Lobaina, born on May 24, 1984. Thereafter, on June 3, 1998, OCSE received correspondence from petitioner challenging the referral made by the Office of Temporary and Disability Assistance (“OTDA”) of his Child Support Management System (“CSMS”) account #NA01319G1 to the New York State Department of Taxation and Finance (the “DTF”). Petitioner’s claimed that the arrears stated on the notice was incorrect, and he and his son’s mother, Zunilda Fernandez (“Ms. Fernandez”), reconciled and petitioner was supporting his son. On June 23, 1998, petitioner’s DTF challenge was denied based on the fact that petitioner owed more than four months in child support. Petitioner was told to file a petition with the Family Court to receive credit for any payments made directly Ms. Fernandez. On August 22, 1998, petitioner’s DTF challenge decision was reviewed and the denial upheld. Petitioner was again advised he must file a petition in Family Court to address the arrears. On September 25, 1998, OCSE received an affidavit of service from Petitioner that he filed an objection to the denial of his DTF challenge with the New York State Office of Administrative Hearings. On April 6, 1999, OCSE received notification from the New York State Office of Administrative Hearings that OTDA’s decision to refer Petitioner’s CSMS account to DTF was affirmed by an administrative law judge. On November 18, 2005, petitioner contacted OCSE to contest the amount of arrears owed on his CSMS account. Petitioner was told was if he is disputing his child support arrears, he must file a petition with the Family Court. On February 27, 2006, Petitioner informed OCSE that he stopped paying child support because his son was living with him. OCSE informed petitioner the court order obligated him to pay support, even though his son lived with him at the time. Petitioner was told that if he and Ms. Fernandez are on good speaking terms, he should ask her to submit a letter to the Family Court in order to receive credit for direct payments made, or have her close the CSMS case. On May 1, 2006, Petitioner again informed OCSE that his son was living with him for most of his life and that the son’s school records and other documents were proof of that fact. Petitioner was told to file a petition, with his supporting documents, with the Family Court. On October 4, 2006, Ms. Fernandez appeared before Support Magistrate Lewis A. Borofsky (“S.M. Borofsky”) of the Queens County Family Court, on a petition filed by petitioner to terminate the child support order. S.M. Borofsky terminated the Order, dated September 18, 1985, effective *nunc pro tunc* to May 24, 2005 for Michael Fernandez a/k/a Cristian Lobaina. The Order was terminated without prejudice to arrears owed if any.

On November 8, 2006, Petitioner contacted OCSE and informed it, that his child support obligation was terminated and he does not owe any arrears. Petitioner was told that the October 2006 Order terminating his child support was without prejudice to arrears and if

he wanted to have the arrears adjusted, he would have to file a petition with the Family Court. On November 16, 2006, Petitioner filed a modification petition with the Family Court. On February 27, 2007, Ms. Fernandez appeared before S.M. Borofsky. After examination and inquiry into the facts of the case, S.M. Borofsky determined that both parties reside in Florida and New York had no continuing exclusive jurisdiction. S.M. Borofsky dismissed the petition due to lack of jurisdiction. On April 23, 2007, Petitioner filed a motion with the Queens County Family Court to vacate the dismissal of his modification petition and restore it to the calendar. On April 30, 2007, Petitioner appeared before S.M. Borofsky. S.M. Borofsky again determined that neither Petitioner nor Ms. Fernandez resides in New York and New York no longer had continuing exclusive jurisdiction and denied Petitioner's motion.

On November 1, 2007, in response to an incomplete filing to domesticate a foreign judgment under chapter 55 Florida Statutes, made by Petitioner with the 11th Judicial Circuit Court Family Division in Dade County Florida. Circuit Judge Judith Kreeger issued an Order to Show Cause giving Petitioner twenty (20) days to file documents to invoke the court's jurisdiction. On January 2, 2008, the Hon. Kreeger dismissed the petition due to Petitioner's failure to comply with the Order to Show Cause. On or about November 1, 2007, OCSE received Petitioner's tax offset challenge in a written Request for an Administrative Review pursuant to SSL 111-b(15). Petitioner claimed the amount of arrears due was incorrect because his account was not credited with payments he made and he submitted a copy of the April 2007 Order to substantiate his claim. Petitioner's tax offset challenge was denied because OCSE determined that the amount due on his account was correct. On or about October 20, 2008, OCSE received petitioner's tax offset challenge in a written Request for an Administrative Review pursuant to SSL 111-b(15). Petitioner claimed his child support order was dismissed in Florida and attached the April 2007 Order and the January 2, 2008 Order of Dismissal to his challenge. On October 28, 2008, Petitioner's request was denied because OCSE determined that the amount due on his account was correct and a final determination notice was mailed to petitioner. OCSE mailed its final determination to petitioner. On December 18, 2008, OCSE referred petitioner's account to the DTF for collection as he owed arrears on his CSMS account and currently is in arrears. Petitioner now seeks review of the 1985 Order and the Final Determination of OCSE pursuant to Article 78 petition and in response, OCSE filed the instant cross-motion.

Initially, OSCE is an entity that cannot be sued separately from the City of New York. In as much as OSCE is a unit and subdivision of an agency of the City of New York, in accordance with New York City Charter Ch. 17 §396, OSCE cannot be sued as a separate legal entity. The New York City Charter provides as follows:

§ 396. Actions and Proceedings for Recovery of Penalties.

All actions and proceedings for the recovery of penalties for the violation of any law shall be brought in the name of the City of New York and not in that of any agency, except where otherwise provided by law.

Accordingly, as a matter of law, petitioner's motion must be denied because OSCE lacks independent legal existence.

Furthermore, Petitioner seeks a review of OCSE's Final Determination arguing that it was made arbitrarily and capriciously pursuant to CPLR § 7803 (3). This Court's scope of review in an Article 78 proceeding is narrow. As the Court of Appeals held in the seminal case of Pell v. Board of Education, 34 N.Y.2d 222, 230-31 (1974), the scope of judicial review of administrative actions is limited to finding whether there was a rational basis for the challenged action. "Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard." *Id.* at 231. It is not the function of judicial review in an article 78 proceeding to weigh the facts and merits de novo and substitute its judgment for that of the body reviewed, but only to determine if the action sought to be reviewed can be supported on any reasonable basis. *Id.* at 378.

Here, based on the submitted evidence, the Court finds that petitioner has not shown that OCSE's Final Determination was arbitrary and capricious. On October 28, 2008, upon a final determination that Petitioner was in arrears for the payment of his child support obligation in excess of four months, OCSE properly determined that petitioner be warned that his failure to pay this support would result in referral to the DTF for collection. When he failed to pay, OCSE properly sent such notice to DTF on or about December 18, 2008. There is nothing to suggest that the review and audit of petitioner's account and the referral of the account was not done with discretion and proper in all respects. It cannot be said that OCSE's actions were arbitrary and capricious, an abuse of discretion, or not supported by the evidence.

Petitioner also seeks to prohibit OCSE from collecting arrears alleging OCSE has been biased against him and it has refused to dismiss the arrears despite orders issued in the New York and Florida courts. The October 2006 Order did not terminate arrears owed to Ms. Fernandez that accrued prior to the corresponding effective dates in the Order. The New York and Florida court orders petitioner refers to were Orders of Dismissal and did not address the matter of arrears. Thus, it was proper for OCSE to refer petitioner's account to DTF because petitioner is currently obligated to pay the child support arrears. Moreover, OCSE merely acts as a fiduciary in collecting child support payments on behalf of Ms. Fernandez and CSS. Any

child support or arrears that are owed are payable to both Ms. Fernandez, on behalf of their child, and CSS. As a result, OCSE cannot waive the arrears owed to Ms. Fernandez, on whose behalf the money is to be paid, without her consent or further court order. *See* SSL §111-h (4)

Accordingly, as the arrears in this case are primarily owed to Ms. Fernandez, the Court cannot extinguish the arrears to Ms. Fernandez for the benefit of her child without either Ms. Fernandez or the subject child being heard. In this matter, S.M. Borofsky terminated the Order without prejudice to arrears owed is any and OCSE has determined that Ms. Fernandez is due child support arrears in excess of \$19,000. Therefore, Petitioner's Article 78 petition is wholly without merit and must be dismissed.

Furthermore, petitioner seeks to preclude OCSE from collecting arrears he owes on his CSMS account as he alleges OCSE's course of action runs afoul of the October 2006 Order. Petitioner incorrectly asserts that the Order eliminates his arrears. Moreover, petitioner has failed to join Ms. Fernandez as a necessary party in the instant matter and the relief he seeks cannot be granted by this Court because the annulment of any arrears without the presence of a necessary party would be improper. Thus, the branch of the cross-motion seeking to dismiss the Verified Petition pursuant to CPLR §3211(a)(10), is granted.

Additionally, the petitioner has failed to state any cause of action against OCSE upon which relief can be granted under CPLR Article 78 since he seeks an order terminating and annulling the 1985 Order. The relief petitioner seeks herein cannot be granted by this Court because the termination of the Order is not a ground for relief under CPLR Article 78. In the October 2006 Order S.M. Borofsky terminated the September 18, 1985 Order. Therefore, Petitioner's claim regarding the 1985 Order's validity is moot; there is no cognizable claim against OCSE. Thus, the branch of the cross-motion seeking to dismiss the Verified Petition pursuant to CPLR §3211(a)(7), is granted.

Furthermore, OCSE has submitted a copy of the October 2006 Order and the A&R Statement. OCSE also relies on a copy of its own document, the Final Determination which is also provided by Petitioner in the Verified Petition. All of these documents show that OCSE correctly accounted for all past child support payments due and all payments made by Petitioner on his CSMS Account. Based upon this accounting, OCSE examined Petitioner's account and determined Petitioner owed \$19,965.22 in child support arrears, in excess of four months of his child support obligation, which qualified him for numerous enforcement processes, including the 2008 Tax Offset, which is currently being utilized by OCSE. Thus, the branch of the cross-motion seeking to dismiss the Verified Petition pursuant to CPLR

§3211(a)(1), is granted.

In sum, for the reasons set forth above, the Petition pursuant to Article 78 of the CPLR is denied; and the cross-motion by Respondent to dismiss the petition pursuant to CPLR 3211 (a) (1), (5), (7), & (8), is granted.

Dated: June 4, 2009

.....

ORIN R. KITZES, J.S.C.