Matter of Torres v Hernandez
2005 NY Slip Op 30537(U)
March 23, 2005
Supreme Court, New York County
Docket Number: 403847/04
Judge: Edward H. Lehner

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

In the Matter of the Application of
CALIXTO TORRES,

Petitioner,

For a Judgment Under Article 78 of the
Civil Practice Law and Rules,

Index No.
403847/04

-against-

TINO HERNANDEZ, as Chair of the
New York Housing Authority, and the
NEW YORK CITY HOUSING AUTHORITY
and 1202 REALTY ASSOCIATES, LLC.,

Respondents.

Lehner, Edward H. J.:

Petitioner brings this proceeding to set aside the determination of the New York City Housing Authority (the "Agency") to terminate him from the Housing Choice Voucher Section 8 program (the "Section 8 program"). This program is administered by the Agency and petitioner received benefits in connection with his residence at [redacted] Spofford Ave., Apartment [redacted] Bronx, New York for four years.

Tenants who receive Section 8 program benefits are sent documents by the Agency to certify their income and household composition on an annual basis (the "Recertification package"). The First Partial Consent Judgment in Williams v. New York City Housing Authority (the "Williams Judgment") provides, among other

things, a procedure for termination of Section 8 program benefits. After a preliminary determination that a basis for termination exists, a warning letter in Spanish and English is to be sent to the tenant by regular mail stating the basis for the proposed adverse action. If the conditions which led to the preliminary determination have not been remedied, a notice in Spanish and English (the "Notice of Default") must be sent by both certified and regular mail stating the proposed adverse action and its alleged basis. The tenant may then request a hearing by responding in writing within twenty days. If a hearing is requested, the proposed termination shall not be implemented until a final determination after the hearing. If the tenant does not respond, a notice of termination (the "Termination Notice") in Spanish and English is to be sent and this notice has the same effect as a determination after a hearing. The Termination Notice is to be sent to the tenant by regular and certified mail and the termination occurs on the forty-fifth calendar day following the date of mailing of the Termination Notice. "For the purposes of Section 217 and Article 78 ... the determination to terminate a subsidy shall, in all cases, become final and binding upon receipt of the Notice of Determination (the Termination Notice) ... or the Notice of Default ... except that where a default is reopened the statute of limitations shall begin to run upon receipt of the Notice of Determination following the completion of such reopened proceeding." [Williams Judgment ¶22(f)]. "For the purposes of this

paragraph, there is a rebuttable presumption of receipt of the requests or notices referred to herein on the fifth day following the date of mailing" [Id. at ¶22(g)]. Here the proceeding was never reopened by the Agency.

Petitioner alleges that: he received the annual Recertification package in February 2004; he went to the Social Security Administration to obtain documentation for his Supplemental Security Income ("SSI") to establish his income but was unable to do so due to computer problems; he spoke to an unidentified person in the housing assistant's office who told him he could submit the old SSI award letter; in mid-March 2004 he submitted the Recertification package with the old SSI award letter to the Agency by regular mail; he received the Notice of Default dated April 13, 2004; he spoke to an unidentified person in the housing assistant's office who told him to disregard it; he received the Termination Notice dated May 14, 2004 which stated that he had not supplied the affidavit of income and that his Section 8 subsidy would be terminated in forty-five days and that he could request a hearing. Petitioner alleges that he spoke to an unidentified person in the housing assistant's office who told him to disregard the Termination Notice and that he would be sent another Recertification package. Petitioner asserts that he did receive a second Recertification package but "was unable to re-submit" this Recertification package, and he was called on July 16, 2004 by the housing assistant to come into her office

that day but he did not do so. Petitioner asserts that he received on July 19, 2004 a letter from the housing assistant dated July 13, 2004 regarding an affidavit of income for his Recertification package, and he contends that he spoke to the housing assistant on that date but was informed that his Section 8 subsidy would be terminated effective July 31, 2004.

The Agency asserts that: it mailed the Recertification package to petitioner about March 1, 2004; when it did not receive the executed Recertification package it sent a final request letter and another Recertification package to petitioner on March 31, 2004; when this Recertification package was not received, it sent the Notice of Default dated April 13, 2004 by regular and certified mail; and when no response to this notice was received, it sent the Termination Notice dated May 14, 2004 by regular and certified mail on that day. The Termination Notice stated that the Section 8 subsidy would be terminated forty-five days after the date of the letter unless petitioner requested a hearing, and that if the case is not reopened a court proceeding must be commenced within 4 months of the date of the notice. The Agency asserts that petitioner did not request a hearing within forty-five days and the housing assistant mailed a letter to petitioner on July 13, 2004 advising him to come to the office and to bring his SSI award letter with him. She received a call from petitioner on July 19, 2004 stating he had just received the July 13, 2004 letter.

Petitioner did not come to the office and the Agency terminated his Section 8 subsidy on July 31, 2004. Petitioner instituted this proceeding on November 18, 2004.

Petitioner contends that his termination from the Section 8 program was arbitrary and capricious, that the Agency advised him that he would have an additional opportunity to complete the recertification package, and that he has timely brought this proceeding to challenge the Agency's determination. The Agency asserts that the proceeding is time-barred by CPLR 217, that it is not estopped from enforcing the income recertification requirements and that the termination of petitioner's Section 8 program rent subsidy was neither arbitrary nor capricious.

"An Article 78 proceeding must be commenced within four months after the administrative determination to be reviewed becomes 'final and binding upon the petitioner' (CPLR 217[1]; New York State Assn. of Counties v. Axelrod, 78 NY2d 158, 165). An administrative determination becomes 'final and binding' when the petitioner seeking review has been aggrieved by it" [Yarbough v. Franco, 95 NY2d 342, 346 (2000)]. Petitioner has not denied receipt of the Termination Notice dated May 14, 2004 nor has he denied that he did not request a hearing. This document states that the petitioner's tenancy is terminated in forty-five days unless a hearing is requested and the Williams Judgment states that "for the purposes of Section 217 and Article 78 ... the determination to terminate a subsidy shall, in all cases, become final

and binding upon receipt of the Notice of Determination" [¶22(f)]. "Where, as here, the determination is unambiguous and of certain consequence, the statutory period commences as soon as the aggrieved party is notified" [Kan v. New York City Environmental Control Board, 262 AD2d 135 (1st Dept. 1999)]. See also, Lewis v. New York City Housing Authority, 262 AD2d 16 (1st Dept. 1999). Since petitioner brought this proceeding on November 18, 2004 and the Termination Notice was sent on May 14, 2004 and the Williams Judgment provides in ¶22(g) that "there is a rebuttable presumption of receipt of the requests or notices referred to herein on the fifth day following the date of mailing," the time period for petitioner to challenge the termination began on May 19, 2004. This proceeding was commenced more than four months thereafter, and is therefore time-barred pursuant to CPLR 217.

Additionally, "(g)enerally, estoppel may not be invoked against a municipal Agency to prevent it from discharging its statutory duties" [Parkview Associates v. City of New York, 71 NY2d 274, 282 (1988)]. However, estoppel can be invoked against a governmental entity where it "acts or comports itself wrongfully or negligently, inducing reliance by a party who is entitled to rely and who changes his position to his detriment or prejudice" [Bender v. New York City Health and Hospitals Corp., 38 NY2d 662, 668 (1976)]. But, this doctrine "is to be invoked sparingly and only under exceptional circumstances" [Nowinski v. City of New York,

189 AD2d 674, 675 (1st Dept. 1993)]. See also, Lo Ciciro v. Metropolitan Transit Authority, 288 AD2d 353 (2nd Dept. 2001).

Petitioner has also failed to submit evidence that he has ever sent in a proper Recertification package for his Section 8 program benefits with proof of his current SSI award. Therefore, petitioner has not shown the exceptional circumstances necessary to warrant invoking estoppel against a governmental entity by claiming unidentified employees told him to ignore the Notice of Default and the Termination Notice.

Moreover, "if the acts of the administrative agency find support in the record, its determination is conclusive and the test of judicial review is to determine whether the agency acted arbitrarily or capriciously" [Matter of Sullivan County Harness Racing Association, Inc. v. Glasser, 30 NY2d 269, 278 (1972)]. "The arbitrary or capricious test chiefly 'relates to whether a particular action should be taken or is justified ... and whether the administrative action is without foundation in fact' .... Arbitrary action is without sound basis in reason and is generally taken without regard to the facts .... Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard" [Matter of Pell v. Board of Education of Union Free School District No. 1, 34 NY2d 222, 231 (1974)](internal citations omitted). Additionally, "(t)he judicial function is exhausted when there is

found to be a rational basis for the conclusions approved by the administrative body" [Howard v. Wyman, 28 NY2d 434, 438 (1971)] ,quoting Rochester Telephone Corp. v. United States, 307 U.S. 125, 146 (1939).

Applying these principles to this proceeding, the Agency had a rational basis to terminate petitioner's Section 8 program subsidy due to his failure to submit his 2004 Recertification package with a current SSI award letter since without proof of his income eligibility, petitioner could not establish his entitlement to Section 8 benefits. Therefore the petition is dismissed.

This decision constitutes the judgment of this court.

Dated: March 23, 2005

J.S.C.