

Matter of Pinet v Donovan

2007 NY Slip Op 30170(U)

March 9, 2007

Supreme Court, New York County

Docket Number: 0403243

Judge: Kibbie F. Payne

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

PRESENT: KIBBIE F. PAYNE
Justice

PART 4

In the Matter of the Application of

CILED A OSORIO PINET,

INDEX NO. 403243/06

Petitioner,

MOTION DATE 1/10/07

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

- against -

MOTION SEQ. NO. 001

SHAWN DONOVAN, as Commissioner of the Department
of Housing Preservation and Development, the DEPARTMENT
OF HOUSING PRESERVATION AND DEVELOPMENT, and
LA PUERTA DE VITALIDAD ASSOCIATES, L.P.,

MOTION CAL. NO. _____

Respondent.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that the cross-motion to dismls this proceeding is granted as indicated in the attached memorandum.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
41B).

Dated: March 9, 2007


J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 4

In the Matter of the Application of
CILED A OSORIO PINET,

Index No. 403243/06

Petitioner,

Motion Seq. 001

JUDGMENT

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

-against-

SHAUN DONOVAN, as Commissioner of the
Department of Housing Preservation and
Development; THE DEPARTMENT OF HOUSING
PRESERVATION and DEVELOPMENT,
PUERTA DE VITALIDAD ASSOCIATES

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Respondents.

KIBBIE F. PAYNE, J.:

Petitioner commenced this CPLR article 78 proceeding,
challenging the determination of respondent the Department of
Housing Preservation and Development (HPD), which terminated her
Section 8 housing subsidy.¹ Petitioner seeks relief both in the
form of a judgment annulling such determination and in the nature
of mandamus compelling HPD to reinstate her subsidy. HPD and
respondent Shaun Donovan, as Commissioner of HPD, cross-move to
dismiss the proceeding on the ground that it is barred by the
statute of limitations and, in the alternative, that petitioner

¹ The Section 8 program provides subsidies to low income
families in order that they may obtain adequate housing in the
private sector (see 42 USC § 1437f).

fails to state a cause of action (see CPLR 217 [1]; see also CPLR 3211 [a] [5], [a] [7]). Respondent La Puerta de Vitalidad Associates, L.P. (La Puerta) appears, taking "no position on the cross-motion." La Puerta, however, counterclaims for a judgment against petitioner in the amount of \$22,395.18 for unpaid rent and in the additional amount of \$5,000.00 for reasonable legal fees.

Petitioner lived in an apartment on Bainbridge Avenue in the Bronx (Bainbridge apartment) for which HPD made housing assistance payments (HAP) pursuant to her Section 8 voucher. In 2002, she moved out of that apartment into another on Third Avenue in the Bronx (Third Avenue apartment). Petitioner, however, failed to notify HPD of her move. HPD had no opportunity to approve petitioner's new lease or to enter a HAP contract with La Puerta, the landlord of the Third Avenue apartment. Unaware of petitioner's change in residence, HPD continued to make payments on the Bainbridge apartment until July 2003. That month, the landlord of the Bainbridge apartment informed HPD of petitioner's move. HPD recouped payment for July 2003, and terminated petitioner's voucher.² HPD never made any payments to La Puerta on petitioner's behalf.

Petitioner alleges that, in 2002, she attended an HPD

² HPD is currently attempting to recoup HAP made for the Bainbridge apartment from May 2002, when petitioner moved out, to July 2003.

meeting concerning recertification of Section 8 vouchers in the lobby of the Third Avenue apartment building. However, petitioner submits no proof of applying for a subsidy at that time. Instead, she submits a copy of a recertification application dated May 11, 2004. A notation on that application indicated that it would be approved once petitioner's apartment was "inspected." Having still received no subsidy, on December 13, 2004, petitioner returned to HPD for an update on her section 8 status. She received no further indication that an inspection was pending or that her subsidy would be reinstated. HPD continued to make no HAP payments to La Puerta on her behalf. In September 2005, La Puerta sued petitioner for rental arrears. Eleven months later, petitioner commenced this proceeding.

It is well-settled that "[a]n article 78 proceeding must be brought 'within four months after the determination to be reviewed becomes final and binding upon the petitioner'" (Matter of Best Payphones, Inc. v Dept. of Info. Technology and Telecommunications of the City of New York, 5 NY3d 30, 34 [2005], citing CPLR 217 [1]). This abbreviated statutory time frame favors the public policy that "government agencies shall not be unnecessarily clouded by potential litigation" (id.). It must be strictly applied as the legislature is clear that "[n]o court shall extend the time limited by law for the commencement" of a CPLR article 78 proceeding (CPLR 201).

As petitioner never received a written determination informing her that her voucher was cancelled, a question exists as to when HPD's determination became "final and binding" upon her so as to trigger the four-month limitations period. Two requirements exist for fixing the time when agency action is final and binding upon the petitioner (see Best Payphones, 5 NY3d at 34). First, the agency must have reached a definitive position on the issue that inflicts actual, concrete injury and second, the injury inflicted may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party" (id. [citations omitted]).

Here, it is undisputed that HPD cancelled petitioner's voucher in July 2003. Such cancellation inflicted an actual and concrete injury as petitioner did not receive any housing payments for her Third Avenue apartment. Petitioner had some hope of further administrative action until December 2004 when she inquired with the HPD about the status of her application for recertification. At or around that time, she received no further indication that an inspection was pending or that her subsidy would be reinstated. As petitioner waited a year and eight months thereafter to commence this CPLR article 78 proceeding, it is untimely pursuant to CPLR 217 (1).

Petitioner's contention that "the Statute of Limitations

ORDERED that the counterclaims of La Puerta against petitioner are denied.

The foregoing constitutes the decision and judgment of the court.

Date: *March 9, 2007*

Enter: _____

KFP

Kibbie F. Payne, J.S.C

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never began to run" because she did not receive written notice of the determination is unavailing. Generally, where a party is entitled to written notice of an agency's determination, the statutory period begins to run when "notice is received in that form" (see 90-92 Wadsworth Ave. Tenants Assoc. v The City of New York Dept. of Hous. Preservation and Dev., 227 AD2d 331 [1st Dept 1997] [citations omitted]). However, where, as here, "a party would expect to receive notification of a determination, but has not, the Statute of Limitations begins to run when the party knows, or should have known, that it was aggrieved by the determination" (id.). In this case, there are several dates in which it was clear to petitioner that she was aggrieved. Picking the date most favorable to petitioner, September 16, 2005, the date La Puerta filed a non-payment petition against her in housing court, would not save her from the elapsed Statute of Limitations. Petitioner waited almost a year after being sued to commence this proceeding.

A different standard applies for the timely commencement of a proceeding in the nature of mandamus to compel an agency to perform an obligation (see generally Matter of Bottom v Goord, 96 NY2d 870, 872 [2001]). "Under those circumstances, the proceeding must be commenced within four months 'after the respondent's refusal, upon the demand of the petitioner. . . to perform its duty'" (id., [citation omitted]). However, the

remedy of mandamus does not lie here where the act sought to be compelled -- reinstatement of petitioner's Section 8 voucher -- involves an exercise of judgment and discretion, not the performance of a purely ministerial act (see generally Matter of Brusco v Braun, 84 NY2d 674, 679 [1994]; see also Matter of Bottom, 96 NY2d at 872). Thus, any discussion as to whether this proceeding for a writ of mandamus was commenced within four months would be academic.

The court reviewed petitioner's remaining contention and finds it to be without merit. The court also reviewed La Puerta's counterclaims against petitioner for unpaid rent and legal fees. Prior to petitioner filing this application, La Puerta commenced an action against her in Housing Court for non-payment of rent seeking, among other things, a final judgment for the rent demanded. Therefore, the court will deny La Puerta's counterclaim for rental arrears to avoid the existence of competing rulings. Finally, the court will not award attorneys' fees. Accordingly, it is

ORDERED that the cross-motion of respondents Shaun Donovan, as Commissioner of the Department of Housing Preservation and Development, and the Department of Housing Preservation and Development is granted; it is further

ORDERED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that the counterclaims of La Puerta against petitioner are denied.

The foregoing constitutes the decision and judgment of the court.

Date: *March 9, 2007*

Enter: _____

KFP

Kibbie F. Payne, J.S.C

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