

Matter of Brenes v New York City Hous. Auth.
2007 NY Slip Op 30549(U)
April 2, 2007
Supreme Court, New York County
Docket Number: 0402056/2006
Judge: Nicholas Figueroa
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Index Number : 402056/2006 *PRESENT.*
HON. NICHOLS FIGUEROA

BRENES, MARILYN
 vs.
HOUSING AUTHORITY

SEQUENCE NUMBER : 002
 VACATE

PART 46

INDEX NO. 40 2056/06
 MOTION DATE 11/22/06
 MOTION SEQ. NO. 002
 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 papers 002 and 003 are
 considered for disposition in the
 accompanying decision and order.*

FILED
 APR 05 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

[Handwritten Signature]
 J.S.C.

Dated: April 2, 2007

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 46

In the Matter of the Application of
MARILYN BRENES,

Index No. 402056/06

Petitioner,

**DECISION
AND ORDER**

For a Judgment Pursuant to CPLR Article 78

- against -

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

Nicholas Figueroa, J.:

Motion sequences 002 and 003 are consolidated for disposition by the following decision and order.

In its prior judgment dated September 20, 2006 and entered September 28, 2006, this court dismissed petitioner's Article 78 proceeding in which she sought to reverse respondent's decision finding her ineligible for public housing. This court dismissed the petition because subsequent to the proceeding, respondent placed her on its eligible list. However, because petitioner was no longer in a homeless shelter, but had obtained housing, her priority was reduced from the highest one to a lower one. This court held that the proceeding was moot, as petitioner had been placed on respondent's eligible list and therefore had been given the relief she had requested.

Petitioner brought the initial Article 78 proceeding *pro se*. Although she apparently obtained counsel sometime after commencing that proceeding, neither she nor her new attorney informed the court of this during the pendency of the initial proceeding. Her attorneys represent her on the instant motions.

The amended petition seeks a vacatur of respondent's determination to lower petitioner's priority and seeks an order raising her priority to the one she initially sought. Alternatively, petitioner asks the court to remand this matter to respondent for a new hearing.

In motion sequence 003, petitioner moves to vacate this court's prior judgment on the ground that the cross-motion on which it was granted was improperly and untimely served in that it was served by facsimile transmission less than five days prior to the return date. Additionally, one of petitioner's attorneys alleges that based on a conversation with respondent's attorney, she believed that he would withdraw the cross-motion to dismiss the petition.

In another affirmation submitted with the motion to vacate, another attorney alleges that his firm did not consent to service by facsimile. He asserts that he informed respondent's attorney that petitioner intended to amend her petition and that respondent's attorney agreed to enter into a stipulation that would allow petitioner to respond to the cross-motion.

According to that attorney, although his office received the cross-motion on September 5, 2006, two days before the return date, the attorney assigned to represent petitioner was out of the office and did not see the cross-motion until September 7, 2006, the return date. However, according to that attorney, based on respondent's attorney's statement that he would withdraw the cross-motion to dismiss, he did not prepare opposition papers; rather, he prepared the instant amended petition and served it on September 25, 2006. As noted, this was after the court had issued its decision and judgment granting the cross-motion on September 20, 2006.

According to petitioner's attorney, respondent's attorney also agreed, during the September 7, 2006 conversation, that the cross-motion was untimely and that he would give petitioner's counsel adequate time to respond on the merits. Petitioner's attorney states that he spoke with respondent's attorney several times during the two weeks following their September 7, 2006 conversation. According to petitioner's attorney, he informed respondent's attorney that petitioner "would exercise

her right to amend the petition as of course, by serving an amended petition by September 25, 2006”, and that he would “e-mail him a draft stipulation memorializing [their] agreement for submission to the court.”

Respondent in motion sequence 002, cross-moves to dismiss the amended petition. It also opposes petitioner's motion to vacate the court's September 20, 2006 order (motion sequence 003).

Respondent argues that unless the court vacates its September 20, 2006 order, petitioner may not serve an amended petition, as the matter is *res judicata*. It also argues that a party may not amend an Article 78 petition as of right.

Respondent also asserts that it did not renege on any agreement with petitioner's counsel and that its attorney informed petitioner's attorney that the court would have to approve petitioner's request for an adjournment. Respondent's attorney asserts that petitioner's attorney never sent him a written stipulation and never contacted the court in the two-week period between the day respondent reserved its cross-motion and the day the court issued its judgment dismissing the original petition.

Respondent argues that in any event, the court correctly dismissed her original petition as moot and that any new claims alleged in the amended petition are premature, as petitioner has not sought administrative review of her new classification.

According to respondent's attorney, he left a message with petitioner's attorney on August 31, 2006, saying that he would serve her with his cross-motion upon receiving written confirmation that she was representing petitioner. He spoke to petitioner's attorney again on September 1, 2006, the day before Labor Day weekend, and repeated this to her, adding that she could send the confirmation by facsimile.

Respondent's attorney left his office at 6:15 P.M., without hearing from petitioner's attorney. However, when he returned to his office, following the holiday, on September 5, 2006, he found a

facsimile from petitioner's attorney stating that she was representing petitioner. Petitioner's attorney had transmitted the document on Friday, September 5, 2006, at 6:22 P.M.

Respondent's attorney, when he retrieved the facsimile, called petitioner's attorney but only received her voicemail. He left a message saying that he would send her the cross-motion by mail and facsimile, and suggested she communicate with him to discuss the matter. Because petitioner's attorney failed to return his telephone call, respondent's attorney proceeded to file his cross-motion.

Finally, respondent argues that the relief petitioner seeks is in the nature of mandamus, since it seeks to compel respondent to provide petitioner with immediate housing. It argues that she has not demonstrated a clear legal right to such relief, nor has she demonstrated a clear legal right to immediate housing, even if her priority were to be raised based on new material in her amended petition; that is, the alleged poor conditions in her present apartment and the state of her health. Rather, housing selection is based on a number of factors, in addition to the priority code: the application date, the particular requested borough, and the size of the apartment suitable for the applicant. Thus, meeting the basic eligibility standard for public housing does not guarantee placement.

At oral argument, petitioner's attorney conceded that petitioner was challenging the new determination administratively; that she was "proceeding on parallel roads"; that is, the instant proceeding and administrative appeals. Moreover, the court learned that her category had again changed, during the course of the litigation, to a higher priority than she received at the time of the court's decision on the cross-motion.

Petitioner, based on the facts in her papers and the statements at oral argument, has failed to establish that the prior judgment should be vacated. Conversely, respondent has established that the amended petition must be dismissed.

Although the cross-motion to dismiss was served late, the untimely service was an irregularity that the court may excuse (see *Crawford v. Codd*, 54 AD2d 878). This is particularly true in this case, as the only reason petitioner's counsel failed to act on the cross-motion is that she absented herself from her office when that office received the papers. Although several attorneys were working on the matter, none of them did anything until after this court's order of dismissal. Had the attorney taken some action, including asking the court for an adjournment or opposing the cross-motion on the merits, instead of merely ignoring it, the court would not have had to grant the cross-motion on default.

In any event, respondent has made further administrative determinations of petitioner's priority since the order granting the cross-motion. Any challenge to these subsequent determinations must be made through the required administrative proceedings. Any judicial challenge now is premature. The court may not usurp the agency's power to make a final administrative determination (see *Watergate II Apartments v. Buffalo Sewer Authority*, 46 NY2d 52, 57; *Matter of Cambridge Development, LLC v. Novello*, 26 AD3d 220). The court has no power to act until petitioner exhausts her administrative remedies.

However, the amended petition alleges events that occurred after the administrative determination appealed from in the initial petition. The court may only review the facts in the administrative record and may not consider new material (see *Fanelli v. New York City Conciliation and Appeals Board*, 90 AD2d 756, *aff'd for reasons stated below* 58 NY2d 952; *Matter of Featherstone v. Franco*, 95 NY2d 550,554).

Additionally, the amended petition seeks relief in the nature of mandamus; it seeks a judgment compelling respondent to provide her with public housing. In order to obtain a judgment of this nature, petitioner must demonstrate a clear legal right to such relief (see *Matter of Council of the City of New York v. Bloomberg*, 6 NY3d 380, 388). "It is well settled that the remedy of

mandamus is available to compel a governmental entity or officer to perform a ministerial duty, but does not lie to compel an act which involves an exercise of judgment or discretion..." (*Matter of Brusco v. Braun*, 84 NY2d 674, 679).

Selection for housing placement is not a ministerial act. It is based on a number of discrete eligibility factors including the suitability of the applicant and apartment size, as well as other criteria established by federal regulation (see 24 CFR §960.203, *et seq.*). Public housing is a limited resource that cannot be granted to every applicant. Respondent must exercise judgment in determining which persons will be admitted to its facilities. The reviewing court cannot usurp respondent's power to determine a person's eligibility. This is a matter within respondent's expertise and the court cannot determine whether petitioner's most recent classification was arbitrary and capricious until it has an administrative record to review (see *Pell v. Board of Education*, 34 NY2d 222).

Accordingly, it is

ORDERED that the motion to vacate the court's order and judgment dated September 20, 2006 and entered on September 28, 2006 is denied, and it is further

ORDERED that the cross-motion to dismiss the amended petition is granted.

This constitutes the decision and order of the court.

Dated: April 2, 2007

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J.S.C.

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