

Devine v New York City Hous. Auth.
2008 NY Slip Op 32262(U)
August 6, 2008
Supreme Court, New York County
Docket Number: 0407302/2007
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

JOHN DEVINE

INDEX NO. 104982/08

407302/07

MOTION DATE 02-15-08

- v -

MOTION SEQ. NO. 001

NEW YORK CITY HOUSING AUTHORITY

MOTION CAL. NO. _____

The following papers, numbered 1 to 3 were read on this motion for Article 78

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...	<u>1</u>
Answering Affidavits -- Exhibits _____	<u>2, 3</u>
Replying Affidavits _____	

Cross-Motion: Yes No

Upon the foregoing papers, the motion is decided in accordance with the annexed Judgement/Decision.

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 141B).

Dated: August 6, 2008

KFP
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: PART 4

-----X
In the Matter of the Application of
JOHN DEVINE,

Petitioner,

407302/07

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

Index No. ~~104982/08~~

Judgment/Decision

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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 1415).

KIBBIE F. PAYNE, J.:

In this article 78 proceeding, petitioner, John Devine, challenges a determination of respondent New York City Housing Authority ("NYCHA") dated October 23, 2006, which dismissed his remaining-family member grievance. NYCHA now cross-moves, pursuant to CPLR 3211 (a) (4) and (5), to dismiss the proceeding on the grounds that it is both time-barred and barred by res judicata.

Petitioner is the brother of the former tenant of record, Thomas Devine, of 419 West 19th Street, Apartment 5-D, New York, New York (the "premises"). Petitioner brought a remaining-family member grievance before NYCHA, asserting that he had been wrongfully denied a lease for the apartment. On October 23, 2006, the hearing officer dismissed the grievance because petitioner had failed to pay use and occupancy since June 2006.

Thereafter, petitioner commenced an article 78 proceeding challenging NYCHA's determination, under Index No. 400112/07. NYCHA answered the petition, and asserted that petitioner had failed to remain current in use and occupancy, and that it had acted in accordance with controlling law. After petitioner failed to appear for oral argument on June 18, 2007, the proceeding was marked off calendar.

In support of the instant petition, petitioner alleges that he has lived at the premises for 42 years, and took care of his brother, the tenant of record, who had AIDS for 10 years. On April 2, 2005, petitioner's brother was tragically killed in an automobile accident. Petitioner was able to pay rent for 14 months until he lost his part-time job and went on welfare. He states that his caseworker is willing to pay his rent if he obtains a receipt or lease with his name on it.

An article 78 proceeding against a public "body or officer must be commenced within four months after the determination to be reviewed becomes final and binding" (CPLR 217 [1]). An agency determination is final when the petitioner is aggrieved by the determination (*Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]).

Here, NYCHA submits affidavits of service showing that, pursuant to its regular mailing procedures, it sent its determination of status to petitioner on December 5, 2006.

Petitioner commenced this proceeding on December 31, 2007 (see CPLR 304), or more than eight months after the statute of limitations expired. Petitioner does not assert that any toll applies. Although the court is not unsympathetic to the significant difficulties described in the petition, the court does not have the authority to extend the statute of limitations (*McCoy v. Feinman*, 99 NY2d 295, 300 [2002]). It is well settled that "A Statute of Limitations is not open to discretionary change by the courts no matter how compelling the circumstances." (*Arnold v Mayal Realty Co. Inc.*, 299 NY 57, 60 [1949]) Thus despite the repeated calamities endured by this petitioner and his family, the court is constrained to dismiss this proceeding as time-barred (see *Matter of Stephens v New York City Hous. Auth.*, 293 AD2d 318 [1st Dept], lv denied 98 NY2d 610 [2002]; *Blackman v New York City Hous. Auth.*, 280 AD2d 324, 325 [1st Dept 2001]). Accordingly, it is

ORDERED that the cross-motion by respondent New York City Housing Authority to dismiss the proceeding is granted; and it is further

ADJUDGED that the petition is denied and the proceeding is

dismissed.

The foregoing constitutes the decision and judgment of the Court.

Dated: August 6, 2008

ENTER:

KFP

KIBBIE F. PAYNE
J.S.C.

UNFILED JUDGMENT

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