[* 1]

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

PRESENT: HON. PAUL G. FEINMAN Justice

PART 53

Index Number : 402485/2007
WILLIAMS, JAMES T.
VS.
HANSELL, DAVID A.
SEQUENCE NUMBER : 003
REARGUMENT/RECONSIDERATION

INDEX NO. 402485/07

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-5
Answering Affidavits — Exhibits	6, 8
Replying Affidavits	7

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

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).

MOTION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION AND ORDER.

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

Dated: oct. 6, 2008

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52
----------X
In the Matter of the Application of
JAMES T. WILLIAMS,
Petitioner,

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

- against -

DAVID A. HANSELL, as Commissioner of the New York State Office of Temporary and Disability Assistance, and ROBERT DOAR, as Commissioner of the New York City Human Resource Administration,
----------X

Index Number 402485/2007
Mot. Seq. Nos. 003

DECISION & ORDER

For the Petitioner:
Housing Works, Inc.
By: Robert F. Bacigalupi, Esq.
330 West 38th Street, Suite 106
New York NY 10018
(212) 967-1500 x 151

For the State:
Andrew M. Cuomo, Esq.
NYS Attorney General
By: Dominic Turziano, Esq.
120 Broadway, 24th Floor
New York NY 10271
(212) 416-8555

For the City:
Michael A. Cardozo, Esq.
Corporation Counsel
By: Ramin Taheri, Esq.
180 Water Street, 17th Floor
New York NY 10038
(212) 331-5155

Papers considered in review of this motion to reargue:

Papers	Numbered
Notice of Motion	1
State's Verified Answer, Memo of Law	2, 3
City's Verified Answer, Memo of Law	4, 5
Petitioner's Memo of Law in Opposition	6
State's Reply Affirmation	7
Aff. of Wade Howell	8

PAUL G. FEINMAN, J.:

By decision and order dated April 3, 2008, the court denied the respondents' pre-answer motion and cross-motion to dismiss the verified petition, which seeks CPLR article 78 mandamus relief against the City respondent, and vacatur and reversal of a fair hearing determination conducted by the New York State Office of Temporary and Disability Assistance (OTDA) on December 21, 2006. Although petitioner conceded that he had subsequently been reimbursed the

monies owed to him by the City, the court did not find persuasive the arguments by respondents that petitioner's claims did not form an exception to the mootness doctrine. The respondents were accordingly directed to answer the petition, and they have done so.

The State of New York moves to renew and reargue its cross-motion to dismiss the petition.

CPLR 2221 (a) permits a party to seek to renew or reargue a prior motion. A motion for leave to renew is based on new facts not offered in the prior motion and should include reason for the failure to include such facts (*Castillo v Zimmerly*, 260 AD2d 243 [1st Dept. 1999]). A motion to reargue allows a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law (*Foley v Roche*, 68 AD2d 558 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]).

In the branch of its motion to renew, the State respondent submits its verified answer which includes as Exhibit B a copy of the transcript from the fair hearing of December 6, 2006. The transcript was not previously provided to the court as the State had not yet answered the petition, although the petition included claims of due process violations occurring during the hearing.

In the branch of its motion to reargue, the State argues that the court misapprehended the process of recording and transcribing the fair hearings conducted by the State Office of Temporary and Disability Assistance (OTDA), and that the conduct of the hearings are capable of due process review.

The State's motion for leave to renew and reargue is granted, and upon renewal and reargument, the motion is granted.[1]

---

[1]This decision presumes familiarity with the court's previous recitation of the facts and arguments in its decision dated April 3, 2008, and will not repeat them here, except as needed.

The hearing transcript, referred to by the State in its motion to renew, confirms petitioner's claims that the hearing officer stated she had no jurisdiction to address his claim that during the time when New York City's Section 8 program was paying most of petitioner's rent, it was also issuing monthly shelter allowance checks to petitioner's landlord, and that she stated that "we've been through this [before]," that in her opinion a "test case" or a class action suit was viable, and that she would not discuss the issue in her written decision (Ver. Ans. Ex. B, Tr. of Fair Hearing of 12/18/06: 13, 14, 15-16). The State refers to its previously submitted affirmation by a Principal Hearing Officer of OTDA, to reiterate its argument that the hearing officer was incorrect in stating that a fair hearing cannot address issues regarding Section 8 benefits in the context of an issue of federally issued benefits, and that her statements do not reflect a policy or practice of the OTDA (Memo of Law in Supp. of State' Resp. Ver. Ans., at 13-14, citing Addamo Reply Aff. in Further Supp. of State Resp. Cross-Mot. to Dismiss the Ver. Pet.).

Although petitioner has been made whole, the issue of concern for the court, which was not sufficiently addressed by the State in its original cross-motion, was not only whether the hearing officer's incorrect rulings on the matter of jurisdiction were reflective of a wider misunderstanding among the OTDA hearing officers, but whether her decision not to include any ruling concerning jurisdiction in her written decision, would evade judicial review, and thus provide an exception to the mootness doctrine (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

According to the regulations promulgated by the New York State Department of Social Services, the record of the fair hearing consists of "[a] written transcript or recording of the fair hearing testimony and exhibits, *or* the hearing officer's official report together with the recommended decision of the hearing officer, all papers and requests filed in the proceeding" (18

NYCRR § 358-5.11 [a], emphasis added). Although the regulation is written in the disjunctive, according to the affirmation of the principal hearing officer, the State implements the regulation by electronically recording "every fair hearing," as well as the hearing officer issuing a written decision (Not. of State Resp. Mot. for Leave to Renew, Addamo Aff. ¶¶ 2, 4). A written transcription of the hearing is prepared when the State is litigating an Article 78 proceeding in State Supreme Court, however the electronic recording is available upon request upon request (Not. of State Resp. Mot. for Leave to Renew, Addamo Aff. ¶¶ 2, 3).

It is conceded that petitioner's attorney requested and was provided a copy of the recording of the hearing (see Carmody Aff. in Opp. to Resp. Mot. to Dismiss ¶ 19). Petitioner's argument is that someone reviewing the written determination would not be likely to realize that there had been a decision by the hearing officer to exclude any discussion of jurisdiction, for instance, or to exclude other improper actions. However, because the State establishes that the hearing record is comprised of *both* the recording and or transcript of the hearing, *and* the hearing officer's written report and the exhibits, there is sufficient ability for a review of the proceeding. Here, for example, petitioner's attorney, having been advised by the attorney who represented petitioner at the fair hearing that the hearing officer had made incorrect rulings, listened to the recorded hearing and discovered "numerous procedural and substantive errors," and commenced this proceeding (Carmody Aff. in Opp. to Resp. Mot. to Dismiss ¶¶ 13, 17-19).

The transcript of the hearing, filed as part of the State's answer, bears out the claims of petitioner's attorney concerning the hearing officer's improper rulings. Thus, the course of this proceeding does not lead to a finding that the hearing officer's rulings, or the issue of jurisdiction, evaded review. An issue that is capable of review will not fall under the exception to the mootness

doctrine, even if it is capable of repetition (*Matter of Hearst Corp. v Clyne*, 715; *Johnson v Pataki*, 91 NY2d 214, 237 and n 3 [1997] [holding that all three elements of the mootness exception (issues that typically evade review, are likely to recur, and present a weighty, important, or novel question), must be demonstrated in order to the exception to be triggered]). Therefore, upon renewal and reargument, the court grants the State respondent's motion to dismiss the petition on the ground that the proceeding was rendered moot.

Turning to the branch of the petition as concerns the City respondent, it is well-settled that judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]).

Petitioner alleges that the City wrongly deducted $3,529 from an initial SSI payment to petitioner, in an attempt to recoup monies it had mistakenly sent to petitioner's landlord during a time when the landlord was also being paid by the Section 8 Program (Ver. Pet. ¶ 1). The City contends that it merely miscalculated the amount it was entitled to recoup from plaintiff and upon review, refunded the amount sought in the petition (Ver. Ans. ¶ 99). It points out that it is required under State law to recoup monies expended during the period when an applicant is eligible for SSI but has not yet received benefits (18 NYCRR 353.2[b], [c] [3]), and argues that when it makes an error in calculation, as was the case in the instant matter, such error is incapable of evading review because of the availability of the fair hearing process (Ver. Ans. ¶¶ 100-101). It has reimbursed petitioner for the entire amount at issue, after the fair hearing determined that the City's calculation

that petitioner was not entitled to a refund was held to be incorrect and was directed to recalculate. Although the City's re-calculations were not completed nor payment made until after the commencement of this proceeding, at this juncture the claims set forth in the petition seeking mandamus are academic. For the reasons stated above, the claim is not an exception to the mootness doctrine.

During oral argument, petitioner's attorney argued that the City regularly seeks recoupment for mistakenly paid rent not from the landlords, but from the SSI recipients. In support of this argument, petitioner subsequently submitted an affidavit by non-party Wade C. Howell, which the court did not previously review as it was received after the initial motion and cross-motion were submitted. The Howell affidavit avers that when Howell received his initial SSI benefit payment, the City improperly retained the amount of money that it had erroneously sent to his former landlord. However, to the extent that the petition seeks a declaration concerning the City's recoupment policies, it has insufficiently established the basis for a remedy such that the court would convert this Article 78 proceeding into a declaratory action pursuant to CPLR 103 (c) (*see, Lakeland Water Dist. v Onondaga Cty. Water Auth.*, 24 NY2d 400, 408-409 [1969]). It is therefore

ADJUDGED and ORDERED that the petition is denied in its entirety and the proceeding is dismissed.

The foregoing shall constitute the decision, order and judgment of this court.

ENTER:

Dated: Oct. 6, 2008
New York, New York

J.S.C.

2008 Pt 52_402485_2007_003