

**Matter of Velez v New York City Hous. Auth.**

2008 NY Slip Op 33408(U)

December 16, 2008

Supreme Court, New York County

Docket Number: 406635/07

Judge: Herman Cahn

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

PRESENT: HERMAN CAHN

PART 49

*Justice*

Index Number : 406635/2007

VELEZ, MIRIAM

vs

LINCOLN HOUSES

Sequence Number : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

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 IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE . . . .**

**FILED**

DEC 19 2008

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 12/14/08

*Herman Cahn*

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 49

-----X  
In the matter of the Application of  
MIRIAM VELEZ,

Petitioner,

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

Index No. 406635/07

- against -

NEW YORK CITY HOUSING AUTHORITY,  
LINCOLN HOUSES,

Respondents.

-----X  
**Herman Cahn, J.**

**FILED**  
DEC 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Petitioner Miriam Velez brings this Article 78 proceeding against Respondent New York City Housing Authority ("NYCHA") to challenge its denial of her application to vacate the termination of her tenancy.

**BACKGROUND**

Velez resides at 1980 Park Avenue, Apt. #2H, New York, New York, which is part of Lincoln Houses,<sup>1</sup> a public housing development. This apartment development is owned and operated by NYCHA. The size of the apartment or the identity of other persons who may be authorized to reside there with Petitioner is not delineated in the parties' submissions.

NYCHA first brought charges against Velez, in connection with her tenancy, in February 2001, for non-desirability and failure to pay rent. The non-desirability charges stemmed from the unauthorized occupancy of Elaido Almonte, Velez' alleged common law husband. NYCHA

\_\_\_\_\_  
<sup>1</sup> NYCHA contends that Respondent Lincoln Houses is not a proper defendant in this proceeding because it is not an entity that may be sued. The Court need not, and does not opt to, address this issue to reach its determination of Petitioner's claims.

alleges that Almonte had physically assaulted Velez and that she had allowed him to reside in her apartment without first obtaining the required written authorization from the project manager. NYCHA further asserts that Petitioner failed to pay rent from January 2000 through February 2001.

NYCHA brought charges against Petitioner for her continued violation of the NYCHA's rules and regulations, her rent delinquency and failing to verify her income. NYCHA alleges that it notified Velez of a hearing scheduled on the matter on March 22, 2001. Velez failed to appear, and the hearing officer sustained the charges against her on default. Based on the hearing officer's recommendation, NYCHA found Velez ineligible for continued occupancy in public housing.

On June 26, 2001, Velez applied to the hearing officer to vacate her termination on default, claiming that she had not received notice of the hearing. Her application was granted, the default was vacated and a hearing on the substance of the charges was rescheduled for February 13, 2002. On that date, the parties reached a settlement. Velez agreed to permanently exclude Almonte from her residence and to abide by NYCHA's rules and regulations, such as reporting her income and making timely rent payments ("2002 Stipulation"). Velez' continued tenancy was, however, subject to a one year probationary period.

A year later, NYCHA brought charges against Velez, for violating the probationary conditions of the settlement by allowing Almonte to return to her residence. NYCHA alleges that it notified Velez that a hearing was scheduled for February 28, 2003. Velez again failed to appear, and the hearing officer again sustained the charges against her on default. NYCHA found Velez ineligible for continued occupancy in public housing, based on the hearing officer's recommendation. Petitioner again applied for a vacatur of the default determination against her.

The hearing officer granted Velez' application, and a hearing was rescheduled for April 27, 2004. The parties again reached a settlement. Pursuant to the settlement, Velez agreed to continue the terms of the 2002 Stipulation, as it related to Almonte's exclusion, and to a three year general probationary period, in which she agreed to abide by NYCHA's rules and regulations ("2004 Stipulation").

NYCHA subsequently brought charges against Velez for violating the terms of the 2004 stipulation, by failing to verify her income in 2004. It alleges that it notified her of a hearing scheduled for May 5, 2005. It further alleges that she again failed to appear, and the hearing officer again sustained the charges against her on default. Petitioner again applied for a vacatur of the default determination against her, and the hearing officer again granted her application. NYCHA alleges that it then served Velez with amended charges and notified her that a hearing was rescheduled for September 7, 2006. The amended charges alleged that she had violated the probationary terms of the 2004 Stipulation by failing to verify her income in 2004 and 2005 and by being delinquent with rent payments from August 2005 to August 2006.

Velez again failed to appear at the rescheduled hearing, and the hearing officer sustained the charges against her on default, on September 14, 2006. Pursuant to the hearing officer's recommendation, NYCHA again found Velez ineligible for continued occupancy in public housing. It alleges that, on November 20, 2006, it served her with a 30 Day Notice to Vacate. On November 27, 2006, Velez applied to the hearing officer to vacate her termination on default. NYCHA opposed Velez' application on the grounds that she had failed to provide a reasonable excuse for her failure to appear at the hearing or a meritorious defense to the charges. By decision dated February 5, 2007, the hearing officer denied Velez' application to vacate.

On October 15, 2007, Velez filed this Article 78 petition. She challenges NYCHA's February 5, 2007 decision denying her application to vacate her termination on default. In her petition, she states that her daughter has Down's syndrome and requires continuous care. She also states that she did not willingly miss the hearing, that she has medical documentation, that her apartment is her main priority and that she "would never jeopardize [her] children's home and well being." Pct, ¶ 1.

### **DISCUSSION**

In Article 78 proceedings, the Court reviews whether the administrative decision made was supported by substantial evidence or was arbitrary or capricious. *See Nelson v Roberts*, 304 AD2d 20, 23 (1st Dep't 2003); *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 230-35 (1974).

A petitioner seeking to commence "a proceeding against a body or officer must [do so] within four months after the determination to be reviewed becomes final and binding upon the petitioner." CPLR 217(1). Where, as here, the NYCHA denied petitioner's application to vacate a default, that determination, rather than the default itself, "constitutes the final, binding determination from which the four month Statute of Limitations is measured." *Yarborough v Franco*, 95 NY2d 342, 347 (2000).

NYCHA argues that Velez' petition must be dismissed because it was filed beyond the required four month statute of limitations. Indeed, the Petition was filed more than eight months after the decision appealed from. Velez would certainly have been in receipt of the denial of her request to vacate the default shortly after February 5, 2007.

NYCHA claims it has established that it served Velez with the February 5, 2007 decision the following day by regular mail. A NYCHA employee submitted an affidavit in which she

attested to preparing the decision that was mailed to Velez. She states that, “[i]n February 2007, it was the Hearing Office’s regular business practice to prepare hearing officers’ decisions on tenants’ applications to vacate defaults for mailing on or about the same day the Hearing Officers rendered such decisions.” Holley Aff, ¶ 4. Further, she states that, on February 6, 2007, she prepared a copy of the decision and placed it in an outbox, where it awaited pick-up from NYCHA’s mail-room employees. *Id.*, ¶ 5. The Administrative Manager of NYCHA’s Mail Center also submitted an affidavit in which he attested to the Mail Center’s role in mailing Hearing Officers’ decisions to NYCHA tenants. He states that the “regular practice of [NYCHA]’s mail-room was, and still is, to deliver outgoing mail to the [United States] Postal Service within one business day of pick-up from the [ ] Hearing Office.” Younger Aff, ¶ 5.

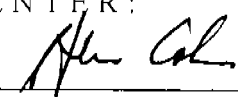
NYCHA, therefore, argues that its evidence of mailing the February 5, 2007 decision, pursuant to the ordinary course of business practice, gives rise to a presumption of receipt by Velez. *See Bennissim v Calogero*, 19 AD3d 135, 135 (1st Dep’t 2005). NYCHA notes that the petition clearly reflects that Velez resides at the same address to which the decision was mailed.

Significantly, both NYCHA and the Court note that Velez does not deny receipt of the decision or provide such an excuse as the basis for challenging NYCHA’s determination.

The NYCHA determination was supported by substantial evidence and was not arbitrary or capricious. The petition is dismissed as untimely.

Accordingly, it is  
ORDERED that the Petition is dismissed in its entirety; and it is further  
ORDERED that the clerk shall enter judgment accordingly.

Dated: December 16, 2008

ENTER:  
  
\_\_\_\_\_  
J.S.C.

**FILED**  
DEC 19 2008  
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