

Matter of Zerillo v NYC Hous. Auth.

2009 NY Slip Op 30361(U)

February 18, 2009

Supreme Court, New York County

Docket Number: 401739/2008

Judge: Marilyn Shafer

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Marilyn Shafer
Justice

PART 8

Index Number : 401739/2008

ZERILLO, JOANN

vs

NYC HOUSING AUTHORITY

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

petition is transferred to the Appellate Division, First Department, in accord with the annexed memorandum.

FILED

FEB 19 2009

COUNTY CLERK'S OFFICE
NEW YORK

HON. MARILYN SHAFER, JBC

Dated: 2/18/09

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 8

-----x

In the Matter of the Application of
JOANN ZERILLO

Petitioner, Index # 401739/2008

For an Order Pursuant to Article 78 of
the Civil Practice Law and Rules

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

-----x

SHAFER, J.:

Petitioner *pro se*, Joann Zerillo, seeks a judgment pursuant to CPLR Article 78 vacating respondent New York City Housing Authority's determination, dated April 16, 2008, which sustained charges of fraud in connection with her participation in a Section 8 housing program, and determined that she was not entitled to a Section 8 rent subsidy. The petition is hereby transferred pursuant to CPLR 7804 (g) to the Appellate Division, First Department, for disposition, since it involves the question of whether the determination which was made after an evidentiary hearing was supported by substantial evidence (CPLR 7803 (4)).

FILED
FEB 19 2009
COUNTY CLERK'S OFFICE
NEW YORK

Zerillo was a recipient of a United States Department of Housing and Urban Development Section 8 housing subsidy administered by respondent. As a result of a tip, investigations were commenced by New York City's Department of Investigation and by the Social Security Administration's Office of the Inspector General that led to the filing of an August 20, 2004 federal criminal complaint against Zerillo. In that complaint, she was charged with unlawfully obtaining in excess of \$41,000 in Supplemental Security Income (SSI) and in excess of \$33,000 in Section 8 subsidies, and with falsifying income affidavits that she had provided to respondent to obtain her housing subsidy. In essence, she was charged with obtaining SSI while claiming to be disabled and unable to work at a time when she was in fact employed under a different name, using another Social Security number. In addition, as to the Section 8 subsidy, she was charged with failing to inform respondent that she was employed and that her son, who was also employed, lived with her, and with providing respondent with false documents in that regard.

Shortly after the filing of that complaint, respondent notified Zerillo that she would be receiving a Notice of Termination of her Section 8 subsidy because she had committed fraud. In particular it was claimed that she had willfully misstated or concealed on affidavits of income, which she had submitted in August 2000 and 2001, her family composition and

income. She was advised that she could request an informal conference or a hearing in connection with the impending termination of her benefits, but Zerillo did not respond, on advice of her counsel in the criminal proceeding. Ultimately, respondent terminated the Section 8 subsidy on December 31, 2004. On February 7, 2005 Zerillo pled guilty to the charges set forth in the criminal complaint, but limited to the period of the five prior years because of perceived statute of limitations issues. She was sentenced to time served and was required to make restitution of the monies fraudulently obtained.

In June 2007, Zerillo wrote to her criminal defense attorney requesting that he write to respondent advising it of why she (Zerillo) had not responded in connection with the Section 8 subsidy termination. Counsel then wrote to respondent, explaining that he had advised Zerillo that her making any statements in connection with the termination of her subsidy might negatively impact her criminal case. Respondent then, despite Zerillo's untimely request, afforded her the opportunity of having a hearing and gave her additional time to obtain counsel. She ultimately decided to proceed *pro se* at the hearing, which was held on the record on January 31, 2008.

At the hearing several investigators testified on behalf of respondent, and entered into evidence were, among other things, the criminal complaint and judgment, Zerillo's plea allocution,

and her income affidavits and tax returns. Zerillo gave limited testimony, and instead chose to rely on a three page written statement as well as a few letters from medical providers as to various maladies, letters from friends and relatives attesting to her good character and correspondence from the Social Security Administration. In her written statement Zerillo asked for reconsideration of the determination to terminate her subsidy "or a possible amnesty," recited the hardships of her life in an attempt to explain her actions and asserted that she believed that the termination of her subsidy was "double or triple jeopardy." Answer, exh. V. As previously indicated, Zerillo did not prevail at her hearing.

She now seeks to vacate the hearing officer's determination. The petition is quite unclear, as are some other documents that are bound as a two-part exhibit that appears to be in reply to respondent's answering papers. However, as best as can be deciphered, Zerillo seems to be trying to undercut her criminal conviction. She again alleges that the termination of her subsidy was "double/triple jeopardy," maintains that some of the allegations (evidently at the hearing) were "not true," and claims that she had requested from respondent an amnesty form at some unspecified time prior to her arrest on the criminal charges, but never received one. See Petition. This latter claim appears not to have been raised at the hearing. Specifically,

while Zerillo's written submission at the hearing indicated that she was seeking "possible amnesty," there was no mention in that submission that respondent had failed to act on a prior request for an amnesty form. She also maintains in the instant proceeding that Social Security has reinstated her despite the felony conviction; so, she urges that respondent should do likewise with respect to her Section 8 subsidy.

Respondent seeks an order dismissing the petition and claims that its determination is supported by substantial evidence, that Zerillo cannot claim that she did not commit the underlying acts since she pled guilty to them, that the penalty of termination must be upheld since it was not disproportionate to the offense, that the hardships of Zerillo's life do not serve as a mitigating circumstance for her fraud sufficient to vacate the termination of Zerillo's subsidy and that respondent's alleged failure to provide Zerillo with an amnesty application, which she allegedly requested, as claimed in her petition, is unavailing.

This proceeding is hereby transferred to the Appellate Division, First Department, since it involves the determination of whether the administrative finding after a hearing on the record was supported by substantial evidence and whether the penalty imposed was appropriate (*See Matter of Bush v Mulligan*, 57 AD3d 772 [2d Dept 2008]; *Matter of Brown v Lannert*, 272 AD2d 323 [2d Dept 2000]; *Matter of Langton v Rutkoske*, 252 AD2d 504

[2d Dept 1998]; *Sanchez v Popolizio*, 156 AD2d 210 [1st Dept 1989]) and since there are no objections within the meaning of CPLR 7804 (g) which could have terminated the entire proceeding (See *Matter of Stein v County of Rockland*, 259 AD2d 552 [2d Dept 1999]; Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7804:8, at 677-679).

Accordingly, it is

ORDERED that the application by petitioner, Joann Zerillo, seeking to vacate and annul a determination by respondent, New York City Housing Authority, is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR 7804 (g). This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law, is, on the entire record, supported by substantial evidence (CPLR 7803 (4)).

The Clerk of the Court is directed to transfer the file to the Appellate Division, First Department, upon service of a copy of this order with notice of entry.

Dated: 2/18/09

FILED
 FEB 19 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

ENTER: _____
 J.S. _____