

**Matter of Pinkins v City of New York**

2009 NY Slip Op 30649(U)

March 5, 2009

Supreme Court, New York County

Docket Number: 402812/2008

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
PRESENT: HON. PAUL GEORGE FEINMAN PART 12

Justice

TONYA PINKINS

INDEX NO. 402812/2008

- v -

MOTION DATE 1/14/09

MOTION SEQ. NO. 001

CITY OF NEW YORK, et al.

MOTION CAL. NO. 5

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_.

- Notice of Motion/Petition — Affidavits — Exhibits \_\_\_\_\_
- Answering Affidavits — Exhibits (Memo) \_\_\_\_\_
- Notice of Cross-Motion — Affidavits — Exhibits \_\_\_\_\_
- Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>
<u>4</u>
<u>5</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ORDERED that this motion

*AND CROSS MOTION ARE*  
PETITION *AND* DECIDED IN ACCORDANCE WITH  
THE ANNEXED DECISION, ORDER AND JUDGMENT.

**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 1478).

Dated: 3/5/09

J.S.C.  
J.S.C.

- Check one:
- FINAL DISPOSITION
  - DO NOT POST
  - Preliminary Conference \_\_\_\_\_
  - Compliance Conference \_\_\_\_\_
  - NON-FINAL DISPOSITION
  - REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X  
In the Matter of the Application of TONYA PINKINS,  
Petitioner,

against

THE CITY OF NEW YORK, THE HUMAN  
RESOURCES ADMINISTRATION OFFICE OF  
CHILD SUPPORT ENFORCEMENT, FAMILY  
COURT SUPPORT MAGISTRATE NICOLAS  
PALOS; AND RON BRAWER,  
Respondents.

Index Number 402812/2008  
Mot. Submit Date Jan. 14, 2009  
Mot. Seq. No. 001  
Mot. Cal. No. 5

**DECISION, ORDER AND  
JUDGMENT**

-----X  
**For the Petitioner:**  
Tonya Pinkins, *pro se*  
22442 Amber Eve Drive  
Corona CA 92883

**For Municipal Respondents:**  
Michael A. Cardozo, Esq.  
Corporation Counsel, City of New York  
Roy A. Esnard, Esq.  
Human Resources Administration  
By: Elizabeth Haynes, Esq., of counsel  
Human Resources Administration  
Office of Legal Affairs  
Child Support Litigation Unit  
180 Water Street, 18<sup>th</sup> Fl.  
New York NY 10038

**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).

Papers considered in review of this petition for Article 78 relief:

Papers	Numbered
Order to Show Cause w/ T.R.O.	1
Affidavit of Compliance	2
Notice of Cross-Motion	3
Amended Petition, Exhibits	4, 5
Affidavit of Service	6
Letter from Ron Brawer of 1/12/09	7

**PAUL G. FEINMAN, J.:**

In this Article 78 proceeding which was commenced by order to show cause, petitioner seeks, in her amended petition, a writ of mandamus or prohibition (CPLR 7803 [1], [2]) a restraining order that would prohibit respondent Human Resources Administration Office of Child Support Enforcement (HRA OCSE) from garnishing her accounts, executing wage

executions, or any other enforcement proceedings, an order directing co-respondent Family Court Support Magistrate Nicolas Palos to credit \$6,300 paid by petitioner toward future add-ons, and an order directing co-respondent Ron Brawer, the father of two of her children, to turn over monies placed in custodial accounts for the benefit of the two sons, and to repay sums entrusted for the benefit of the younger son.<sup>1</sup> Respondent HRA OCSE cross-moves to dismiss the petition and to lift the temporary stay of enforcement against petitioner's arrears. For the reasons which follow, the petition is denied in its entirety, and the cross-motion is granted.

Petitioner is the mother of two children for whom she provides child support. The children are in the legal custody of their father, co-respondent Brawer. Matters of custody and child support have been overseen in the past several years in Family Court, New York County, in particular by co-respondent Support Magistrate Palos. The following facts are relevant to the petition.

In April 1998, a Support Magistrate in Queens County Family Court entered an order which set petitioner's child support arrears at \$90,599.36 (Cross-Mot. Haynes Aff. ¶ 2). In October 1998, New York County Family Court Magistrate Palos granted co-respondent Brawer's motion brought by order to show cause and directed the brokerage firm Dreyfus to turn over to Brawer all the money market funds held in petitioner's name or the names of the two children (Amended Pet. Ex. 3). Notably, Magistrate Palos's order did not direct HRA OCSE to credit the

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<sup>1</sup>The initial order to show cause and petition did not include either Ron Brawer or Support Magistrate Nicolas Palos as respondents. According to the affidavit of service, both were served with a copy of the amended petition. Brawer subsequently contacted the court by letter to state he had received the amended petition but not the original order to show cause, and has not otherwise appeared.

funds totaling \$5,275.78, toward any of the child support arrears, and Family Court did not apparently adjust the arrears to reflect the transfer (Cross-Mot. Haynes Aff. ¶ 6, n. 2).<sup>2</sup>

In May 2002, Magistrate Palos issued a downward modification of the child support order in a detailed decision, which among other issues noted a credit owed to petitioner of \$9,164.90 for payments toward child care; the decision indicated that the child arrears were then \$99,762.46. (Am. Pet. Ex. 4, 16-17). Petitioner filed several subsequent petitions in Family Court seeking adjustment to her arrears, including one on July 29, 2003 that sought a credit for the “seizure of custodial accounts [petitioner] maintained on behalf of her children” (Cross-Mot. Ex. C, Decision on Motions, February 10, 2005, p. 8). That petition was dismissed by Magistrate Palos who noted that she had never appealed any of the Family Court’s decisions and orders (Cross-Mot. Ex. C, Decision on Motions, February 10, 2005, p. 9). Petitioner again pursued the crediting of the custodial accounts in a petition brought by her in November 2003, but withdrew it in April 2004 (Cross-Mot. Ex. C, Decision on Motions, February 10, 2005, pp. 9-10, 12).

Petitioner was notified that she was removed from all enforcement actions in October 2004, after HRA OCSE received a trust account check in the amount of \$98,417.29 (Cross-Mot. Haynes Aff. ¶ 9). She continued to owe no arrears according to the March 2006 notice issued by HRA OCSE (Cross-Mot. Ex. D). However, by August 2008, petitioner had again fallen behind and was notified by the New York City Support Collections Unit that her tax refunds

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<sup>2</sup>Magistrate Palos noted in a subsequent decision dated May 10, 2002, that Brawer “was willing to credit the balance in these accounts towards the nearly \$40,000 in arrears due on the April order” but Magistrate Palos did not direct such a crediting (Cross-Mot. Ex. B, Decision and Findings of Fact, May 10, 2002, p. 4). The Dreyfus Family of Funds confirmed to petitioner in a letter dated August 18, 2008, that on April 19, 1999, the account was closed and a full redemption was made for \$5,205.78, but gave no further details. (Pet. Ex. D)

would be garnished (Cross-Mot. Haynes Aff. ¶ 15). Petitioner submitted a timely challenge to OCSE arguing that the arrears were incorrect as she should have received credit for the transfer of the custodial accounts; this challenge was denied (Cross-Mot. Haynes Aff. ¶ 15). Restraining notices were issued on five different financial institutions, and petitioner submitted a Mistake of Fact as to the notices and alleged that she was never given credit for the transfer of the property; her claim was denied (Cross-Mot. Haynes Aff. ¶ 16). As of December 7, 2008, she owed \$4,948 in child support arrears (Cross-Mot. Haynes Aff. ¶ 13, Ex. E).

Petitioner commenced this proceeding by order to show cause signed November 24, 2008, seeking a preliminary restraint on the seizure of tax refunds, driver's license, passport, and bank accounts. She seeks credit for the Dreyfus transfer of funds, and a refund of monies in a Fidelity account attached by HRA OCSE. She also seeks an accounting of funds in Brawer's control.

Co-respondent HRA OCSE cross-moves to dismiss the petition on several grounds, including that there is another action pending in Family Court between petitioner and Brawer, statute of limitations, payment made in full accord and satisfaction of the arrears as set by the Family Court on May 10, 2002, and that section 451 of the Family Court Act precludes retroactive cancellation of arrears. According to HRA OCSE, it has initiated administrative enforcement mechanisms against petitioner to satisfy the current outstanding arrears, in particular the seizure of her tax refund and denial of a passport (Cross-Mot. Haynes Aff. ¶ 14). It is not seeking to suspend petitioner's driver's license because it is instead levying an income execution on her salary (Cross-Mot. Haynes Aff. ¶ 14).

An Article 78 proceeding against a public body may be commenced only when a matter

has been finally determined (CPLR 7801[1]). CPLR 217(1) provides that an Article 78 proceeding must be commenced within four months of the date of the final determination (*Carter v State of New York*, 95 NY2d 267, 270 [2000]). If there is further administrative action that could be taken to prevent or ameliorate the harm, then commencement of an Article 78 proceeding would be premature (*see, Church of St. Paul & St. Andrew v Barwick*, 67 NY2d 510, 520, *cert denied* 479 U.S. 985 [1986]).

A proceeding seeking mandamus to compel (CPLR 7803 [1]) seeks an order commanding an officer or body to perform a specified ministerial act required by law to be performed (*Hamptons Hosp. & Med. Ctr., Inc. v Moore*, 52 NY2d 88, 96 [1981]). Mandamus is not appropriate to compel an officer or tribunal to reach a particular outcome with respect to a decision that turns on the exercise of discretion or judgment (*Klostermann v Cuomo*, 61 NY1d 525, 539-540 [1984]). The petitioner must show a “clear legal right” to the relief and if there is “reasonable doubt or controversy” as to whether the right to performance exists, the petition must be denied (*Matter of Assn. of Surrogate and Supreme Court Reporters within the City of N.Y. v Bartlett*, 40 NY2d 571, 574 [1976]).

The writ of prohibition (CPLR 7803 [2]) serves to restrain judicial or quasi-judicial officers from acting without jurisdiction or in excess of their jurisdiction (*Town of Huntington v New York State Div. of Human Rights*, 82 NY2d 783 [1993]). The remedy is usually only available to restrain conduct of judges and adjudicatory officials (*Van Wie v Kirk*, 244 AD2d 13, 23-24 [4<sup>th</sup> Dept. 1998]). The error must be jurisdictional and not substantive or procedural (*Matter of Rush v Mordue*, 68 NY2d 348, 353 [1986]). The existence of an adequate alternative remedy, such as an appeal, will militate against the relief of prohibition (*Matter of Molea v*

*Marasco*, 64 NY2d 718, 720 [1984]).

Turning first to petitioner's claim that HRA OCSE wrongly took funds in a Fidelity Education Account earmarked for a child of petitioner's not fathered by Brawer, petitioner submits a copy of a notice from Fidelity dated from August 2007, which indicates that on August 2, 2007, a check for \$1,803.71 was issued from her Fidelity Education Account to the NYS Child Support Proc. Center (Amend. Pet. Ex. 10). The petition seeks the return of those funds as they do not pertain to the two sons who live with co-respondent Brawer and for whom petitioner pays child support. Here, however, it is not apparent that petitioner has pursued the available administrative remedy of asserting a Mistake of Fact to the agency, which would review it along with the documentation, and a remedy given if appropriate (Cross-Mot. Haynes Aff. ¶ 44). Failure to exhaust her administrative remedies before applying to Supreme Court must result in a dismissal of that branch of the petition (*Lovelace v Gross*, 80 NY2d 419, 425, n. 3 [1992]; *Commissioner of Social Services v Daryl S.*, 235 AD2d 126 [1<sup>st</sup> Dept. 1997]).

The petition also focuses on the Dreyfus fund accounts which were allegedly seized and not credited by respondents. There is no merit to this branch of her petition. The 1998 order directing the transfer of the Dreyfus funds was silent as to crediting petitioner's account, but issued after a hearing at which petitioner was present, and petitioner did not appeal the decision and contrary to her portrayal of events, has subsequently raised the issue in other Family Court proceedings and has again denied relief. Thus, the application must be denied on the ground of issue preclusion and claim preclusion (*Ryan v New York Tel. Co.*, 62, NY2d 494 [1984]). Moreover, property transferred under the Uniform Transfer to Minors Act, which replaced the Uniform Gifts to Minors Act, cannot be used to satisfy child support obligations, and is "an

addition to, not a substitution for” the obligation of the person supporting the minor (EPTL 7-6.14[c]). Third, the application is untimely.<sup>3</sup> Accordingly, the branch of the petition regarding a credit for the funds in the Dreyfus accounts is also denied.

To the extent that petitioner seeks an accounting of the monies received from her and disbursed by the City agency, HRA OCSE has attached certified copies of the account covering June 2002 through October 10, 2008, and a copy of the document prepared for an earlier hearing in September 2005 which covers June 2002 through August 31, 2005 (Cross-Mot. Ex. E, F; see also Haynes Aff. ¶ 46). To the extent she seeks an order directing co-respondent HRA OCSE to stop calculating sums relating to the support of the oldest son because of his age, she must first pursue administrative remedies. To the extent she seeks an order directing Magistrate Palos to credit her account for the Dreyfus funds or any other amounts, her petition is denied, as she has no “clear legal right” to this relief under the Family Court Act (*Matter of Assn. of Surrogate and Supreme Court Reporters*, 40 NY2d at 574). Nor has she established that HRA OCSE should be directed to adjust child support arrears or credit the transfer of the custodial accounts.

The petition also seeks an accounting from Brawer, alleging among other allegations, that the custodial accounts of the two sons were “emptied” of between \$30,000 and \$50,000 over a two year period from 2005-2006 (Amended Pet., Pinkins Aff. ¶¶ 54, 56-57, ex. 17), and that it is unclear what has become of the income received by the two sons from the Ford Modeling Agency from 2005-2007 (Amended Pet. Pinkins Aff. ¶¶ 61-62). Mandamus is not appropriate

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<sup>3</sup>According to the attorney representing HRA OCSE, petitioner also brought a recent application in Family Court seeking a credit for the same \$5,275.78; this was scheduled to be heard on January 14, 2009 (Cross-Mot. Haynes Aff. ¶ 1).

as concerns an individual such as Brawer. Accordingly, this branch of the petition too, must be denied. However, an adult member of a minor's family may petition the court for an accounting by the custodian (EPTL 7-6.19). Therefore, although the petition is denied in its entirety, it is without prejudice to commencement of a special proceeding seeking an accounting from Brawer pursuant to EPTL 7-6.19.

Respondent's cross-motion seeking dismissal of the petition is granted, and the stay of enforcement against petitioner's outstanding arrears is vacated upon entry of this order. It is

ORDERED and ADJUDGED that the petition is denied and the cross-motion granted and the proceeding is dismissed without prejudice to the commencement of a special proceeding in Supreme Court seeking an accounting from Ron Brawer pursuant to EPTL 7-6.19; and it is further

ORDERED that the stay of enforcement by HRA OCSE against petitioner's outstanding arrears is vacated upon entry of this order.

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

Dated: March 5, 2009  
New York, New York

ENTER:

  
\_\_\_\_\_  
J.S.C.

**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).