

Matter of Hendricks v New York City Hous. Auth.

2009 NY Slip Op 30713(U)

March 19, 2009

Supreme Court, New York County

Docket Number: 402540/08

Judge: James A. Yates

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. JAMES A. YATES PART 50Y
Justice

In the Matter of the Application of

Index No. 402540-08
MOTION DATE

BURNELL HENDRICKS,

Petitioner,

MOTION SEQ. NO. 001

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

against

NYC Housing Authority,

Respondent.

The following papers, numbered 1 to _____ were read on the motion to file

FILED
MAR 31 2009
COUNTY CLERK'S OFFICE
NEW YORK
Papers Numbered

Notice of Motion/Order to Show Cause - Affidavits - Exhibits... | _____

Answering Affidavits - Exhibits _____ | _____

Replying Affidavits _____ | _____

Cross-Motion: Yes No

Petitioner's application for an order and judgement, pursuant to Article 78, annulling NYCHA's determination, dated February 29, 2008, finding him ineligible for participation in NYCHA's Section 8 Housing Assistance Program based on his prior criminal conviction, is denied on statute of limitations grounds. He commenced this proceeding over seven months after NYCHA issued its final determination (see attached Decision and Order).

Dated 3-19-09

ENTER: HON. JAMES A. YATES, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

PARTY BY
SUP. CT. N.Y. COUNTY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50Y

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 In the Matter of the Application of :
 BURNELL HENDRICKS, :
 :
 Petitioner, :
 :
 For an Order Pursuant to Article 78 : Decision and Order
 of the Civil Practice Law and Rules, : Index No. 402540/08
 :
 -against- :
 :
 NEW YORK CITY HOUSING AUTHORITY, :
 :
 Respondent. :
 :
 -----X

Hon. James A. Yates, J.S.C.

In this CPLR Article 78 proceeding, pro se petitioner Burnell Hendricks seeks to annul the New York City Housing Authority's determination dated February 29, 2008, which, after a hearing, denied his application for Section 8 Housing Assistance because of his criminal record. Mr. Hendricks alleges that as a result of this adverse determination, he has been forced to live in several squalid SROs. Respondent New York City Housing Authority (NYCHA) filed a cross-motion to dismiss, arguing Mr. Hendricks' claims are time-barred under the four-month statute of limitations applicable to this special proceeding. ¹

In view of the circumstances of this case and the relevant law, the petition is denied. Accordingly, for the reasons that follow, the petition is dismissed.

¹ The Section 8 Housing Assistance Program (Section 8) is a federal program administered by local public housing authorities; NYCHA administers the program in New York City. Section 8, also known as the Housing Choice Voucher Program, provides funding for rent subsidies to eligible low-income families for safe, decent and affordable housing. Families can select housing within a neighborhood of their choice from a landlord willing to participate in the program (see <http://www.nyc.gov/html/nycha/html/section8/section8.shtml> [accessed March 17, 2009]).

Factual Background

Mr. Hendricks is a homeless, 63 year old man. His mailing address is 2771 Bainbridge Avenue, apt. 2E, Bronx, New York 10458. He was an applicant for Section 8 housing under NYCHA's subsidized housing program.² On March 23, 2007, Mr. Hendricks was interviewed by Elaine Kitt, NYCHA Presenting Official. He was asked if he or another family member had a prior criminal record. Mr. Hendricks allegedly answered, "No." On June 1, 2007, NYCHA conducted a criminal background check on Mr. Hendricks and discovered he had been convicted of Criminal Sale of a Controlled Substance in the Third Degree, a Class B felony, on September 26, 1995, for which he was sentenced to an indeterminate prison term of ten to twenty years. NYCHA sent Mr. Hendricks a letter on June 5, 2007, and again on July 9, 2007, informing him that he was ineligible for Section 8 housing assistance because of his criminal record.

On July 13, 2007, Mr. Hendricks wrote a letter requesting a formal evidentiary hearing on the Housing Authority's determination. His request was granted and the hearing occurred on February 13, 2008. At the hearing, Mr. Hendricks admitted that he was convicted at trial for the sale of crack cocaine, but stated that he did not commit the offense. He submitted a letter from Eric D. Levy, a staff attorney from the Legal Aid Society, who represented him in Bronx Criminal Court where he pleaded guilty to a misdemeanor in 2001. The letter stated that "Mr. Hendricks has grown and matured into a leader in his community and is clearly not the person who spent a significant period of his life in state prison." Mr. Hendricks also disputed the accuracy of his criminal background check, claiming that he was convicted for the sale of crack cocaine in 1987, released in 1997 and received his final discharge from parole on July 12, 2007.³ Furthermore, Mr. Hendricks denied answering "no" at his Section 8 interview when asked if he had ever been convicted of a criminal offense. He testified that he has not been employed since 1988. Nonetheless, he stated he had been doing volunteer counseling for the Willing Workers Baptist Church for the past 15 or 20 years. He failed to provide, however, any documentary support for his claim. He also testified that he is receiving a monthly Supplemental

³ Mr. Hendricks attached a certificate of discharge from the New York State Executive Department Division of Parole dated July 12, 2007 as part of his Article 78 petition.

Security Income (SSI) payment of approximately \$700. He did not submit proof of income at the hearing.

On February 29, 2008, Hearing Officer Barry Carey sustained the original decision that Mr. Hendricks was ineligible for Section 8 housing based on his criminal record. NYCHA indicated to Mr. Hendricks that he would not be eligible for Section 8 housing until September 26, 2021, six years after the completion of his prison sentence, including probation and parole. The Housing Authority mailed notification of its decision to Mr. Hendricks on March 3, 2008.

On June 13, 2008, Mr. Hendricks sent a letter to NYCHA objecting to the result of the February 13th hearing and requesting reconsideration of his case. Mr. Hendricks, having received no response to his June 13th letter, went to the NYCHA office in Manhattan, where he was redirected to the NYCHA Brooklyn Eligibility Office because his application originated in Brooklyn. On July 10, 2008, Mr. Hendricks went to the Brooklyn Eligibility Office and resubmitted his letter requesting reconsideration. On October 2, 2008 Mr. Hendricks, having received no response to his letter, went again to the NYCHA Brooklyn office, where Ms. Perry, a supervisor, informed Mr. Hendricks that, "NYCHA does not answer letters of reconsideration." This encounter led Mr. Hendricks to initiate his Article 78 proceeding on October 15, 2008. Mr. Hendricks indicates that he does not expect to be alive at the age of 73 when the hearing officer indicated he would be eligible for housing assistance.

Legal Analysis

In an Article 78 proceeding the court's review is limited to deciding "[w]hether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." CPLR § 7803(3). There is no doubt that Mr. Hendricks' claim for Article 78 relief is time-barred. CPLR § 217 (1). However, even if it were not time-barred, there is no merit to Mr. Hendricks' appeal of NYCHA's denial of Section 8 housing assistance application. He did not present enough evidence to show that he met the standards for admission into Section 8 housing.

Mr. Hendricks was convicted of Criminal Possession of a Controlled Substance on July 8, 1988, not in 1995 as claimed by the NYCHA. See *New York v Hendricks*, 216 AD2d 970 (1st Dept

[* 5]

1995). Mr. Hendricks provided evidence that his final discharge from incarceration was on July 12, 2007. See Petition, exhibit B. However, this time frame still leaves Mr. Hendricks ineligible for Section 8 housing assistance until 2013 according to NYCHA guidelines. See Housing Applications, Chapter VI, Eligibility Division - Section 8, at II(E) (4) (a) (2).⁴

Mr. Hendricks advances two arguments against NYCHA's statute of limitations assertion. First, Mr. Hendricks acknowledges that an Article 78 petition must be commenced within four months of the administrative determination, but claims that, "the fact that a determination is final for the purpose of its present execution does not mean it is final for judicial review purposes where, as here, it rests upon an empty record."⁵ See Reply to Notice Cross-Motion to Dismiss, ¶ 11. Although NYCHA points out that Mr. Hendricks cites no case law to support his position, courts have held that, "the fact that a determination is final for the purpose of its present execution does not mean it is final for judicial review purposes (cf., *Matter of New York Cent. R. R. Co. v Public Serv. Commn.*, 238 NY 132, 135-136 (1924)). An administrative determination is not final for judicial review purposes if it rests upon an empty record." *Yarbough v Franco*, 95 NY2d 342, 346-347 (2000). However, as NYCHA argues, the administrative determination in this case does not rest on an empty record. Mr. Hendricks was afforded a full hearing on NYCHA's refusal of Section 8 housing assistance in the presence of a Hearing Officer.

Although the Housing Authority incorrectly believed Mr. Hendricks was ineligible for Section 8 housing until 2021 instead of 2013, this mistake does not affect Hearing Officer

⁴ Chapter VI of the Department of Housing Applications Manual states that anyone convicted of "Class A, B, or C Felonies for Violent Behavior, Controlled Substances or Alcohol Related Offenses [are] ineligible until the convicted person has served the sentence (including the completion of probation and/or parole and the payment of any fine), and has no further convictions or pending charges for six years after completing the sentence.

⁵ Courts have held an empty record exists if the hearing did not give, "petitioner an opportunity to develop a factual record setting forth the reasons for the nonappearance and any meritorious defenses." *Yarbough v Franco*, 95 NY2d 342 (2000). Also there must be a, "hearing, [at which] the parties will be in a position to make a complete record so that the administrative department with the responsibility to enforce the statute has all of the facts before it prior to making a final and binding determination." *Menorah Campus Ind. Senior Apts., Inc. v Novello*, 11 Misc 3d 668 (Sup Ct, Erie County 2005).

[* 6]

Carey's determination. Officer Carey also based his determination on Mr. Hendricks' failure to prove he had engaged in any employment, schooling, job training or general rehabilitation since his conviction. See Petition, exhibit A. Therefore, the facts of this case do not demonstrate the type of empty record that has caused courts to revisit the administrative result. *Yarrough v Franco*, supra; *Novello Menorah Campus Ind. Senior Apts., Inc. v Novello*, 11 Misc 3d 668 (Sup Ct, Erie County 2005).

Mr. Hendricks' second argument is that his letter to NYCHA, dated June 13, 2008, was within the four-months statute of limitations and NYCHA's failure to timely respond to his letter should extend the statute of limitations. See Reply to Notice Cross-Motion to Dismiss, ¶ 9. As NYCHA points out, courts have consistently held that a letter requesting reconsideration does not extend the four-month statute of limitations. See *De Milio v Borghard*, 55 NY2d 216, 220 (1982) ("an application for reconsideration of the administrative determination to discharge the employee does not serve to extend the four-month limitations period."); *Todd v New York City Hous. Auth.*, 262 AD2d 202, 202 (1st Dept 1999) ("The Statute of Limitations is not extended by an application to the agency to reconsider its determination."); *Nieves v Martinez*, 285 AD2d 410, 411 (1st Dept 2001) ("any request for reconsideration did not toll the statute of limitations period."). Regardless of the merits of NYCHA's policy of refusing to respond to letters of reconsideration, the law clearly does not accept letters of reconsideration as extending the statute of limitations.

New York City Housing Authority's cross-motion to dismiss the petition is granted. Mr. Hendricks filed his Article 78 petition on October 15, 2008, more than seven months after he received notice of NYCHA's rejection of his application for reconsideration of its denial of Section 8 housing. The fact that Mr. Hendricks submitted a letter for reconsideration within the four-month period is legally irrelevant. Further, because of his criminal record, he is prohibited from obtaining Section 8 Housing Assistance at this time. For all these reasons, the petition is denied.

Dated: March 19, 2009
New York, New York

FILED
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JAMES A. YATES, J.S.C.