

<b>Matter of Moses v New York City Hous. Auth.</b>
2009 NY Slip Op 31202(U)
May 29, 2009
Supreme Court, New York County
Docket Number: 106113/09
Judge: Carol Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD  
Justice

PART 35

KAREN MOSES  
-v-  
NYCHA, ET AL.

INDEX NO. 106113/09  
MOTION DATE 5/29/09  
MOTION SEQ. NO. 1  
MOTION CAL. NO. \_\_\_\_\_

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

Notice of Motion/ Order to Show Cause — Affidavits Exhibits \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

**UNFILED JUDGMENT**  
The 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).

Cross-Motion:  Yes  No


Upon the foregoing papers, It is ordered that this motion

The instant motion and cross motion are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the motion of Petitioner, Karen Moses for an order and judgment, pursuant to Article 78 of the Civil Practice Law and Rules (1) reversing and/or setting aside the Decision and Disposition of the Hearing Office Arlene Ambert, dated October 22, 2008 (the "Determination"); and (2) granting petitioner reasonable attorneys' fees in an amount that the court sets, along with costs and disbursements herein, is denied in its entirety; and it is further

ORDERED and ADJUDGED that the cross motion of Respondents New York City Housing Authority and improperly sued herein Taft Houses to dismiss the Petition pursuant to CPLR 3211(a)(5) and 7804(f) as barred by the four-month statute of limitations set forth in CPLR section 217, is granted, and the instant Petition is dismissed with prejudice; and it is further

ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

Dated: 5/29/09  
  
HON. CAROL EDMEAD, 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 35

\_\_\_\_\_ x  
In the Matter of the Application of

KAREN MOSES

Index No. 106113/09

Petitioner,

**DECISION/ORDER**

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

-against-

THE NEW YORK CITY HOUSING AUTHORITY  
and TAFT HOUSES,

Respondents.

\_\_\_\_\_ x  
EDMEAD, J.S.C.

**UNFILED JUDGMENT**  
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obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

**MEMORANDUM DECISION**

Petitioner, Karen Moses ("petitioner") moves for an order and judgment, pursuant to Article 78 of the Civil Practice Law and Rules (1) reversing and/or setting aside the Decision and Disposition of the Hearing Office Arlene Ambert, dated October 22, 2008 (the "Determination"); and (2) granting petitioner reasonable attorneys' fees in an amount that the court sets, along with costs and disbursements herein.

Respondents New York City Housing Authority and improperly sued herein Taft Houses (the "Housing Authority"<sup>1</sup>) cross move to dismiss the Petition pursuant to CPLR 3211(a)(5) and 7804(f) as barred by the four-month statute of limitations set forth in CPLR section 217.

\_\_\_\_\_  
<sup>1</sup> As used herein, "Housing Authority" also refers to Taft Houses, which, although named as a respondent in this proceeding, is one of the Housing Authority's developments and, as alleged by the Housing Authority, not properly sued in its own name.

*Background*

Petitioner asserts that she has been a tenant of the subject premises since approximately June, 1998, and she has always been a good tenant and abided by all of the Housing Authority rules. She has always been an animal lover and, in or about 1999, she found two cats outside the subject premises, began feeding them, and ultimately took them in. Unfortunately, one of the cats was pregnant at the time and the other one was a male. By virtue of her emotional illness, she did not have them neutered and, by virtue of same, the original two cats multiplied into fifteen cats.

Petitioner further asserts that in or about 2006, she did have some problems with the neighbors being upset with alleged odors emanating from her apartment by virtue of the cats. To alleviate the animosity, petitioner began leaving the apartment very early in the morning and coming back very late at night. In addition, because of her other health issues, petitioner needed care and spent time with her parents at 1901 Madison Avenue, NY 10035, as it was difficult, by virtue of their advanced age, to travel between their house and hers. However, the subject premises has always been petitioner's primary residence.

The most recent tenancy-termination proceedings against petitioner's tenancy began in 2006 after petitioner failed on several occasions to grant access to her apartment for an inspection. In October and November 2006, development management sent letters to petitioner inviting her to meet with the Housing Manager about this situation but she failed to appear. Accordingly, by letter dated February 2, 2007, the Housing Manager notified petitioner that management was forwarding the record of her tenancy to its Applications and Tenancy Administration Department for further proceedings. Thereafter, petitioner failed to sign a new

public housing lease, notwithstanding development management's requests that she do so.

By notice of specification of charges dated June 18, 2007, the Housing Authority charged petitioner with breaching rules and regulations and violating her lease in that she failed to grant access and failed to sign a new lease. In or about July 2007, petitioner retained counsel from the Legal Aid Society. In March 2008 counsel for the Housing Authority made a referral to Social Services requesting a mental competence evaluation for petitioner. Because petitioner was not responsive, as a default, Social Services recommended that a guardian ad litem be appointed for petitioner. Petitioner admits that she permitted the appointment of Maurice Gray, Esq., as her guardian. In the interim the Housing Authority adjourned the hearing on the tenancy termination charges several more times.

By the time of the hearing petitioner fired her attorney. The Hearing Officer denied the request for an adjournment for petitioner to obtain new legal counsel because the matter had been adjourned several times before, witnesses had appeared for the purpose of testifying twice, and the Housing Authority objected to an adjournment because the health and safety of other residents was compromised by petitioner's household. By decision dated October 6, 2008, the Hearing Officer denied petitioner's belated request to remove Mr. Gray as guardian. By determination dated October 22, 2008 the Housing Authority's Board approved the Hearing Officer's decision to terminate petitioner's tenancy.

*Petitioner's Contentions*

The Determination is arbitrary and capricious and/or not based on substantial evidence. The Determination denied petitioner an opportunity to adjourn the hearing, as she was ill and she wished to obtain new counsel. The Determination also failed to give petitioner the appropriate

opportunity to be represented, testify as to her medical condition and/or any explanation as to the situation in the apartment, to hear evidence against her, and/or cross-examine the witnesses. This is the case, notwithstanding the fact that a Guardian appointed on behalf of the petitioner, as it was the petitioner and not the Guardian who had a personal knowledge of all of the circumstances. And, petitioner asserted her displeasure with the Guardian.

No one, including the Guardian, informed petitioner that she could appeal the Determination through an Article 78 proceeding. She first became aware of this right when the instant landlord-tenant proceeding was commenced to enforce the Certificate of Eviction.

And, by virtue of petitioner's psychological condition and medical condition, petitioner was not fully aware of the import and/or, in essence, what was going on.

#### *Respondents' Contentions*

Petitioner acknowledges this proceeding is subject to time restrictions but contends it should be permitted to go forward, notwithstanding the expiration of the statute of limitations, for two reasons, neither of which has any merit. First, petitioner argues no one explained that she had to take an appeal. As a matter of law, the Housing Authority had no obligation to advise petitioner, who was represented by a guardian ad litem (and counsel until she discharged them) about an appeal. The Housing Authority, however, did provide petitioner with a copy of the procedures governing the tenancy-termination proceedings ("Termination Procedures") against her. The Termination Procedures indicate a tenant may seek judicial review of the Housing Authority's determination in an Article 78 proceeding. Moreover, the Hearing Officer advised petitioner's guardian ad litem on two occasions during the hearing that petitioner had four months or 120 days to challenge any adverse decision. The Hearing Officer went so far as to

recommend petitioner not wait until the last day in case the court required additional information and gave the guardian ad litem (himself an attorney) the address of the court to which petitioner could appeal. The guardian ad litem represented to the Housing Authority that he would give the information to petitioner.

Second, petitioner suggests her "psychological/emotional and health issues" "impeded her judgment and/or understanding." This argument also fails on the law and the facts. The legal standard for tolling the statute of limitations is not an "impeded" judgment or understanding. Instead, petitioner must show that she was "insane" within the meaning of CPLR section 208. Petitioner's own letters that she submitted to the Hearing Officer concerning her guardian ad litem and a proposed plan of action refute any claim that petitioner was insane, but show that petitioner knew that her apartment was a nuisance. Petitioner wrote, "I fully understand that the amount of cats I have and the odor coming from my apartment are in violation of my lease" and "Yes, I do have too many cats and yes, there is an odor coming from my apartment. All these things, I have attempted to rectify before I became badly ill from [a physical ailment]."

*Petitioner's Reply*

Petitioner asserts that she was never informed by the law guardian that she could appeal. Her relationship with her law guardian was strained, at best.

And, the statute of limitations should be tolled by virtue of petitioner's disability. Based on her doctor's support and the medications petitioner must take, she qualifies as disabled due to mental illness.

### Analysis

An article 78 proceeding must be commenced within four months after the administrative determination to be reviewed becomes "final and binding upon the petitioner" (*Yarbough v Franco*, 95 N.Y.2d 342, 717 N.Y.S.2d 79 [2000]; CPLR 217[1]; *New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 165, 573 NYS2d 25, 577 N.E.2d 16). An administrative determination becomes "final and binding" when the petitioner seeking review has been aggrieved by it. An administrative action is not final and binding within the contemplation of CPLR 217 until it "has its impact" upon the petitioner (*Bludson v Popolizio*, 166 AD2d 346, 347, 561 N.Y.S.2d 14 [ Dept 1990], citing *Matter of Edmead v McGuire*, 67 NY2d 714, 716, 499 NYS2d 934, 490 NE2d 853). The Statute of Limitations does not begin to run until the petitioner receives notice of the determination (*Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834, 470 NYS2d 130, 458 NE2d 371).

Petitioner argues that the statute of limitations should be extended due to her mental disability. Although CPLR § 208 provides that a statute of limitations may be tolled on grounds of "insanity," CPLR § 208 is narrowly interpreted. The Court of Appeals has held that the insanity toll extends only to those who are able to prove that they were incapable of protecting their legal rights when their causes of action accrued because of an overall inability to function in society (*Cerami v. City of Rochester School Dist.*, 82 N.Y.2d 809, 604 N.Y.S.2d 543, 624 N.E.2d 680 [1993] *reconsideration denied* 83 N.Y.2d 847, 612 N.Y.S.2d 110, 634 N.E.2d 606 [1994]; *McCarthy v. Volkswagen of America, Inc.*, 55 N.Y.2d 543, 450 N.Y.S.2d 457, 435 N.E.2d 1072 [1982] ).

Petitioner does essentially claim that at the time of the Housing Authority proceedings,

she was unable to function in society. However, during these proceedings, petitioner's rights were asserted and protected by counsel from the Legal Aid Society (until its dismissal by petitioner) and a guardian ad litem who was, also, an attorney. If at any time either of petitioner's representatives believed an "insanity" determination was warranted to stay proceedings and/or to toll any accruing statute of limitations, they were obligated to so advise, and did not.

And, petitioner's correspondence to the Housing Authority substantiates that she understood the circumstances surrounding the Housing Authority's actions against her.

Further, this court finds petitioner's assertion incredible that not the Housing Authority Hearing Officer, not petitioner's guardian ad litem and not petitioner's Legal Aid attorney ever advised petitioner of her options for judicial review of any determination by the Housing Authority.

Although the court is sympathetic to petitioner's position and life circumstance, petitioner has not met her burden of proving that the statute of limitations was tolled. As such, the Petition is untimely and is dismissed as a matter of law.

#### Conclusion

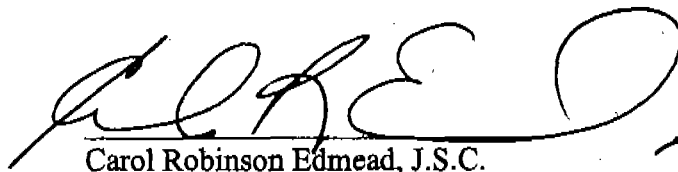
Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the motion of Petitioner, Karen Moses for an order and judgment, pursuant to Article 78 of the Civil Practice Law and Rules (1) reversing and/or setting aside the Decision and Disposition of the Hearing Office Arlene Ambert, dated October 22, 2008 (the "Determination"); and (2) granting petitioner reasonable attorneys' fees in an amount that the court sets, along with costs and disbursements herein, is denied in its entirety, and it is further

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ORDERED that counsel for respondents shall serve a copy of this order with notice of entry within twenty days of entry on counsel for petitioner.

Dated: May 29, 2009



Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMED**

**UNFILED JUDGMENT**

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