

Matter of Ortiz-Taitt v Hernandez

2009 NY Slip Op 31612(U)

July 17, 2009

Supreme Court, New York County

Docket Number: 402645/2008

Judge: Shirley Werner Kornreich

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

PART 54

PRESENT: KORNREICH
Justice

ROSARIO ORTIZ-TAIT
- v -
NYCHA

INDEX NO. 402645/08
MOTION DATE 4/2/09
MOTION SEQ. NO. 001
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
<u>1-4</u>
<u>5-6</u>

Cross-Motion: Yes No

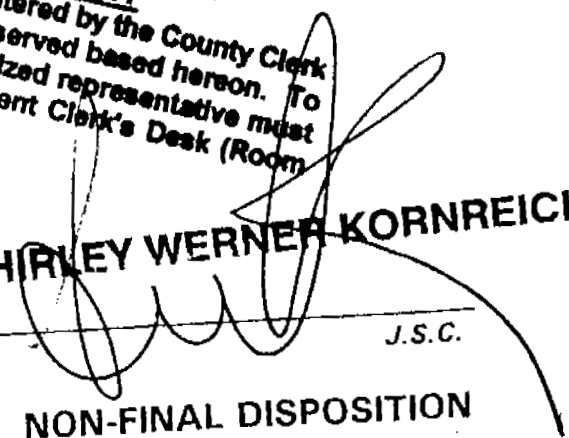
Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

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).

JUSTICE SHIRLEY WERNER KORNREICH

Dated: 7/16/09



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):

appear in person at the Judgment Clerk's Desk (Room 141B), counsel or authorized representative must

SUPREME COURT OF THE STATE OF YORK
COUNTY OF NEW YORK

-----X
In the Matter of the Application

ROSARIO ORTIZ-TAITT,

Index No.: 402645/2008

Petitioner,

**DECISION, ORDER and
JUDGMENT**

-against-

TINO HERNANDEZ, as Chair of the New York City Housing Authority, THE NEW YORK CITY HOUSING AUTHORITY and 1963 RYER AVENUE CORP.,

Respondents.

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

-----X
KORNREICH, SHIRLEY WERNER, J.

FILED 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).

In this Article 78 proceeding, petitioner, Rosario Ortiz-Taitt, seeks: (i) payment of her Section 8 rent subsidy by respondent New York City Housing Authority (NYCHA), retroactive to March 1, 2007, and (ii) a stay of the summary non-payment proceeding in Bronx Housing Court, brought against her by her landlord 1963 Ryer Avenue, pending payment of the subsidy. Petitioner contends that in violation of Federal law and its own procedures, NYCHA terminated her from the Section 8 program, without notice. Respondent opposes. The court granted a temporary stay pending the hearing of the petition, which was extended until final determination, pursuant to a stipulation of the parties.

I. Background

The Federal low-income housing assistance program, known as the Section 8 program,

pays rent subsidies to landlords so that eligible low-income families can afford decent, safe, and habitable housing. See 42 U.S.C. § 1437(a)(1)(a); 24 C.F.R. §982.1 (a). Under the Section 8 program, the United States Department of Housing and Urban Development (HUD) contracts with local public housing authorities (HAs), such as NYCHA, to operate the program. NYCHA is one such agency.

Federal regulations govern the administration of the Section 8 program. 24 C.F.R. §982.1 et seq. NYCHA also adopted rules in its Department of Applications Manual, Chapter VI, which are on its website in a document entitled "Guide to Section 8 Housing Assistance Program" (Guide). Applications are processed initially by the Department of Housing Applications. Guide at 3. Following a screening and eligibility interview, a disposition is made on the application. *Id.* at 4. If an applicant is found eligible, the application is forwarded to the Leased Housing Department for processing. *Id.* The Leased Housing Department schedules a "briefing" at which the applicant is informed about the rules of the Section 8 program. 24 C.F.R. §982.301. At the briefing, applicants are issued a Housing Choice Section 8 voucher. Guide at 4.

Once the applicant finds an apartment, the HA must inspect the unit to determine whether it meets the HUD promulgated Housing Quality Standards (HQS). 24 C.F.R. §982.401. If the apartment complies with HQS, the HA will enter into a Housing Assistance Payment (HAP) contract with the owner. 24 C.F.R. §982.305. An applicant for Section 8 becomes a participant in the Section 8 program on the effective date of the first HAP contract executed by the HA (the first day of the initial lease term). 24 C.F.R. §982.4(b).

Petitioner applied for a Section 8 voucher in 2003. She received her voucher on November 2, 2006, after attending a briefing session at NYCHA. In January 2007, petitioner

located the subject apartment at 1963 Ryer Avenue, where the landlord was willing to accept her Section 8 voucher. In February 2007, petitioner requested approval from NYCHA for the apartment. NYCHA scheduled an HQS inspection for the apartment and, on February 17, 2007, the apartment passed inspection. Petitioner entered into a lease with the landlord, effective March 1, 2007. Petitioner gave a signed copy of the lease to her caseworker at NYCHA.

Subsequently, NYCHA sent two letters, dated February 27, 2007. The first was sent to petitioner. It informed her that the rental process was complete and that she could move into the apartment, that the HAP contract for the period March 1, 2007 to February 28, 2009 would be "forthcoming," and that subsidy payments would be made by NYCHA retroactive to the lease commencement date. NYCHA sent the second letter, containing the same information, to the landlord.

On February 29, 2009, two days after sending the letters, petitioner's caseworker at NYCHA, Ana Sosa, (Sosa) got an error message when trying to key the information into her computer. Sosa had conducted a computer search using petitioner's social security number and found that petitioner had been a previous Section 8 participant and was terminated from the program "code 11"—for failure to report her income and income sources. Sosa contacted petitioner and the landlord by phone to let them know that there was a problem with petitioner's application and that a HAP contract could not be executed until petitioner reported to the Applications Department. Sosa claims that she instructed petitioner not to move into the apartment and told the landlord not to deliver the keys to petitioner. It is undisputed that NYCHA did not send written approval or rejection of the HAP contract to petitioner or the landlord.

The landlord gave keys to petitioner and she moved into the apartment. Petitioner claims that she relied on Sosa's February 27th letter and was not aware that the Section 8 subsidy payments were not being made by NYCHA. Almost eight months later, in November 2007, the landlord informed petitioner that he had not received any Section 8 subsidy payments from NYCHA and commenced a non-payment proceeding against petitioner.

II. Discussion

The applicable federal regulations require an HA to give all required notices in writing. 24 C.F.R. §982.5. The HA must give prompt notice to the owner and the family when the assisted tenancy is approved. 24 C.F.R. §982.305. Further, the HA must give written notice of denial of an application for assistance, which must contain a brief statement of the reason for the denial. 24 C.F.R. §982.554(a). An HA's refusal to enter into a HAP contract is a denial of assistance to an applicant. 24 C.F.R. §552(a)(2).

An Article 78 proceeding was designed to replace the three prerogative writs formerly known as certiorari, mandamus and prohibition. *De Milio v. Borghard*, 55 N.Y.2d 216, 219; see *McKinney's Cons Laws of NY*, Book 7B, CPLR 7801:1, p 27. "Traditionally, [m]andamus lies to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought." *Klosterman v. Cuomo*, 61 N.Y.2d 525, 539 (1984), citing *Matter of Legal Aid Soc. v. Scheinman*, 53 N.Y.2d 12, 16 (1981). "While a mandamus is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which the officer may exercise judgment of discretion." *Id.*, citing *Matter of Gimprich v. Board of Educ.*, 306 N.Y. 401, 406 (1954). "The general principle [is] that mandamus will lie against an administrative officer only to compel him to perform a legal

duty, and not to direct how he shall perform that duty.'" *Id.* at 540, *citing, People ex rel. Schau v. McWilliams*, 185 N.Y. 92, 100 (1906).

NYCHA had a legal duty to provide written notice to petitioner that her Section 8 application was either granted or denied. 24 C.F.R. §982.5; 24 C.F.R. §982.305; 24 C.F.R. §982.554(a) and 24 C.F.R. §552(a)(2). Respondent argues that petitioner was an "applicant" and not a "participant" in the Section 8 program and therefore the notice requirements for termination of subsidies in 24 C.F.R. §555 is inapplicable. However, there are other regulations requiring written notice to applicants. Notice is a ministerial act for which mandamus is appropriate relief.

However, the balance of the petition cannot be granted. The court cannot order NYCHA to pay the rent subsidy or stay the non-payment proceeding commenced by 1963 Rycr Avenue Corp. The decision to approve or deny the HAP contract is discretionary. Accordingly, it is

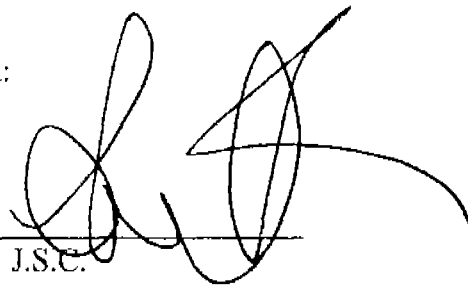
ORDERED and ADJUDGED that the petition is granted solely to the extent that NYCHA shall give written notice to petitioner of its decision approving or denying her HAP contract within 10 days of service upon NYCHA of a copy of this order with notice of entry, and in all other respects the petition is denied with prejudice; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that all stays issued in this action by the court are hereby lifted.

Dated: July 17, 2009

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 1419).