

**Matter of Delgado v Office of Temporary & Disability
Assistance Div. of Child Support Enforcement**

2009 NY Slip Op 31645(U)

July 17, 2009

Supreme Court, New York County

Docket Number: 101149/09

Judge: Lewis Bart Stone

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.

SCANNED ON 7/24/2009
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: STONE
HON. LEWIS BART STONE Justice

PART 505

JOSE DELGADO

INDEX NO. 101149/09

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion ^{the cross} is granted and the motion is dismissed in accordance with the annexed decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

RECEIVED
JUL 22 2009
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

MDA

Dated: 7/17/09
HON. LEWIS BART STONE

Lewis Bart Stone
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

----- X
 In the Matter of the Application :
 JOSE DELGADO, :
 :
 Petitioner, : DECISION AND
 : ORDER
 - against- :
 : Index Number
 : 101149/09

OFFICE OF TEMPORARY AND DISABILITY
ASSISTANCE DIVISION OF CHILD SUPPORT
ENFORCEMENT, David A. Hansell, Commissioner,

Respondents

----- X
Hon. Lewis Bart Stone, J

FILED
 JUL 24 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

This proceeding was commenced by Petitioner, Jose Delgado ("Delgado"), pro se, by Order to Show Cause dated January 29, 2009, pursuant to Civil Practice Law and Rules ("CPLR") Article 78 to vacate a Child Support Judgment of Arrears issued in favor of respondent, Office of Temporary Disability Assistance, Division of Child Support Enforcement ("OTDA"), on the grounds that "it has been determined by law to be uncollectible."

Before responding to the merits of the Petition, OTDA cross moved to dismiss the petition on three grounds, viz:

1. The Petition failed to state a cause of action.

2. That pursuant to General Obligations Law §17-101, the Statute of Limitations is inapplicable, and
3. Delgado has failed to exhaust his administrative remedies.

OTDA further seeks dismissal claiming that OTDA is not the proper respondent entity in a proceeding of this nature.

Pro se litigants who wish to assert a claim against a City agency are often faced with assertions by the Respondent agency that the wrong body has been cited in the petition, as OTDA has claimed here that the City of New York should have been named. While a technical violation of procedure and one for which a represented petitioner may have to bear the risk of dismissal, it is unfair to the unrepresented to dismiss for this purpose, especially where the City has had full and timely notice as evidenced by the filing of response by the New York City Corporation Counsel within the time set for OTDA's response to the Order to Show Cause and the inclusion in such response of an extensive cross-motion to dismiss. As the being sued is another mayoral agency of the City (unlike an independent fund or non-mayoral entity), and as there is clearly no prejudice to the City and its agencies occasioned by the naming of an improper respondent entity, the Court will not deprive Delgado of the opportunity to have his claim considered by reason of this technical pleading defect. Accordingly, the Petition shall be deemed amended to submit proper party

respondent, the City of New York or such agency as shall be properly designated by OTDA as the proper party.

FACTS

On August 23, 1983, Family Court, Bronx County, ("Bronx Family Court"), ordered Delgado to pay the new York City Department of Social Services ("DSS") \$90.00 per month or about or about \$5,280 per year, commencing August 29, 1983, to reimburse DSS with respect to support for his two sons, Gabriel, born February 3, 1981 and Alexander born March 5, 1983 (the "children"). DSS was to receive the funds because the children and their mother were on public assistance.

By reason of Delgado's failure to make the required payments, DSS took Delgado to Bronx Family Court, which, on November 6, 1996, entered an order fixing the arrears due to DSS at \$28,801.35 and modified the 1983 order to terminate is prospectively, thereby terminating Delgado's obligation to provide further support for his children after such date.

Subsequently, Delgado made a series of attempts to have the arrears fixed in the November 6, 1996 order reduced. He has been unsuccessful in these applications. On July 29, 1998, Bronx Family Court reiterated that the arrears to DSS were \$28,801.35. On July 16, 1997 and December 19, 1997, Delgado sought through

Bronx Family Court, New York County (“New York Family Court”), in its Centralized Child Support Enforcement Term, to adjust the arrears. These request were denied. He again applied to New York Family Court, and was heard on May 19, 1999, seeking to have the order of Support terminated. The hearing examiner denied the petition because the Order had already been suspended. In this application Delgado acknowledged the amount of arrears.

Under new York law, the driver’s license of a person in arrears on an order of support may be suspended by the New York State Department of Motor Vehicle (“DMV”). Under the threat of such a suspension, on October 1, 2005, Delgado signed a payment agreement to pay DSS \$50.00 per week towards the arrears to avoid the suspension of his license.¹ It was to no avail as Delgado defaulted on that agreement and on May 2, 2006, his license was suspended.

Again, Delgado petitioned new York Family Court on November 1, 2005, to adjust the arrears. Such petition was dismissed on November 1, 2005

DSS has also sought to enforce the arrears payment through the State Department of Taxation and Finance and Federal Internal Revenue Service to capture Delgado’s tax refunds and to the United States State Department to enforce the

¹ OTDA has not presented a copy of this agreement but claims it is still searching for this agreement which it further claims has been archived.

obligation by a denial of Delgado's passport.

As the arrearage were set by New York Family Court, and as no appeal has been taken as to the fixation of the arrearage to the Appellate Division, the amount of arrearage is not subject to question. The enforceability of the arrearage as ordered is, however, another matter.

Delgado asserts that enforcement of the arrearage is barred by the Statute of Limitations. OTDA asserts that the proper limitation period is the twenty-year statute for the enforcement of support order, citing CPLR §211(e) is inapplicable here. Thus, the resolution of this dispute turns on the State of New York law prior to effectiveness of CPLR §211(e). Delgado in turn asserts that the applicable limitation period is six years.

CPLR §211(e) which was added to CPLR §211(e) by NY Laws 1987, Chapter 815 and became effective on August 7, 1987 expressly provides "This section shall only apply to orders which have been entered subsequent to the date upon which this section² shall become effective." Accordingly, as the order in question predates the effective date of CPLR §211(e) , CPLR §211(e) is inapplicable here. Thus, the

² Although §211(e) is not a "section" but a "subdivision," the legislative history is clear that subdivision (e) was to be prospective and not to relate back to the original enactment of Section 211 as part of the CPLR in 1962. Thus, the reference to this section must be considered a typographic error in the legislative draft which may be ignored. NY Statutes §362.

resolution of this dispute turns on the State of New York law prior to the effectiveness of CPLR §211(e).

The Respondents assert that General Obligation Law (“GOL”) §17-101 extends the Statute of Limitations on Delgado’s obligation. As GOL §17-101 was in force prior to August 7, 1987 (when CPLR §211(e) became effective), its impact on Delgado’s claim must be considered by this Court.

On October 31, 2005 Delgado signed an agreement³ to pay DSS \$50 per week on account of the arrears, which agreement stated the amount of arrears. Under GOL §17-101, such agreement constitutes a written acknowledgment of the debt so as to “take an action out of the operation of the provisions of limitations of time for commencing actions under the “CPLR.”

Thus, the commencement date of Delgado’s obligation for statute of limitation purposes is no earlier than October 31, 2005. As this proceeding was commenced in January 2009, even if the pre-August 7, 1987 six year state of limitation is applied, Delgado cannot assert any statute of limitation basis for relief against the collection of the arrearage as against him.

Respondents further argue that the defense of State of Limitations is solely to

³ Although Respondents have not supplied the Court with a copy of this agreement, Delgado has not denied its existence.

be used as a defense and not the basis for an affirmative action to stop collection efforts. While usually true, Delgado presents an unusual situation where the efforts to collect the debt include license suspensions and passport withholding, powers of coercion not available to a non-governmental creditor. However, because this case may be decided on Delgado's acknowledgment of the obligation in 2005, this Court need not address whether Delgado may assert the Statute of Limitations in a CPLR Article 78 proceeding, or event in a Declaratory Judgment action, which Delgado has suggested this CPLR Article 78 proceeding may be converted to address this issue.

The Court will also not, as it need not, address Respondents assertion that Delgado has failed to exhaust his administrative remedies, except to note that for years Respondents have been successfully opposing Delgado's attempts to modify the arrears judgment on the ground that it was final.

Thus, for the reason set forth above Respondents have established their entitlement to have the petition dismissed, the petition is dismissed.

This is the Decision and Order of the Court.

DATED: JULY 17, 2009
 NEW YORK, NEW YORK

FILED
 JUL 24 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

Lewis Bart Stone
 Hon. Lewis Bart Stone
 Justice of the Supreme Court