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

PRESENT: HON. EILEEN A. RAKOWER PART 5

Index Number : 107290/2009
NIEVES, ANTONIO
VS.
PARDUS-ABBADESSA, FRANCES
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5, 6, 7

Cross-Motion: ✓ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / 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).

Dated: 10/2/09

HON. EILEEN A. RAKOWER J.S.C.

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

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 5

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In the Matter of the Application of
ANTONIO NIEVES,

Petitioner,

-against-

FRANCES PARDUS-ABBADESSA, as Commissioner of the Office of Child Support Enforcement; ROBERT DOAR, as Commissioner of the New York City Human Resources Administration; and DAVID A. HANSELL, as Commissioner of the New York State Office of Temporary and Disability Assistance,

Respondents.

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Index No.
107290/09

DECISION
and ORDER

Mot. Seq.
001

HON. EILEEN A. RAKOWER:

Petitioner Antonio Nieves ("Petitioner"), brings this Article 78 Petition seeking an order (1) annulling and setting aside the January 22, 2009 denial of Petitioner's request for a refund of monies which Petitioner alleges were improperly seized from him; (2) directing the respondents to refund Petitioner's wrongly withheld funds, which Petitioner estimates to be no less than $3,000; and (3) awarding attorneys' fees to Petitioner.

The record indicates that, by order of the Family Court dated October 2, 1985, Petitioner was required to pay support of his child, Sylvia Nieves ("the child"). The order provided that support was payable to the Commissioner of Social Services, as assignee of Laura Ponsaing ("Ponsaing"), the mother and custodian of the child, and a recipient of public assistance cash benefits for herself and for the child. Pursuant to the order, payment was to be made through the Support Collection Unit ("SCU"). An SCU is the division of a local social services district responsible for the enforcement of child support obligations pursuant to New York Social Services Law ("SSL") §111-b(1). The New York City Office of Child Support Enforcement ("OCSE") is the SCU for five boroughs which constitute the City of New York. In 1986, the order became payable to the child

when her cash assistance case was closed. However, the proceeds were still payable through OCSE, the SCU.

By letter dated August 17, 2007, Petitioner received a notice from the Social Security Administration ("SSA") alerting him that, starting in August 2007, $216.70 would be deducted from his Social Security Disability ("SSD") benefits each month.

On October 11, 2007, Petitioner requested an administrative review of by OCSE, claiming that he did not owe the amount of child support due. By decision dated November 28, 2007, OCSE denied Petitioner's challenge, finding that the amount of support due was correct and was accurately computed. In addition, pursuant to SSL §111-b(15)(b), OCSE referred Petitioner's account to the New York State Department of Taxation and Finance ("DTF") for collection, as Petitioner's account showed that he owed arrears in the amount of $15,150.

Petitioner states that on May 12, 2008, MFY Legal Services ("MFY") wrote a letter[1] to OCSE on behalf of Petitioner alleging that the garnishment of his SSD benefits violated state law. According to Petitioner, OCSE did not respond to this letter. Petitioner states that MFY subsequently made a series of phone calls to OCSE on Petitioner's behalf, and that, in July 2008, a supervisor verbally agreed that the garnishment would be reduced to $25 per month, starting in August 2008. However, the supervisor stated that none of the money prior to this period would be refunded.

According to respondents OCSE Commissioner Pardus-Abbadessa and New York City Human Resources Administration ("HRA") Commissioner Robert Doar (collectively "City Respondents"), OCSE sent an amended income execution notice to the SSA on July 14, 2008, directing that the sum of $25.00 per month be garnished from Petitioner's benefits prospectively. City Respondents state that OCSE sent the amended income execution notice "after receiving notice and documentation from Petitioner's attorney indicating Petitioner was in receipt of social security benefits and establishing that his income fell below the self-support reserve."

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[1]This letter is not annexed as an exhibit to Petitioner's papers, or otherwise made part of the record.

However, in August 2008, rather than decrease *to* $25, Petitioner's monthly garnishment was actually increased *by* $25, bringing the monthly total to $241.70. City Respondents state that Petitioner contacted OCSE on or around August 1, 2008 to bring the increase to OCSE's attention. According to City Respondents, OCSE confirmed that SSA did not correctly amend the income execution. On August 18, 2008, SSA informed OCSE that it received the amended income execution notice and that it would only deduct $25.00 per month from Petitioner's benefits.

In October 2008, Petitioner received notice that his entire $300 check as part of the federal stimulus plan was being garnished and sent to OCSE. City Respondents advised a social worker who inquired on Petitioner's behalf that Petitioner previously received notice from DTF informing him of the intercept since his account was flagged in 2007 for non-payment.

On December 24, 2008, OCSE contacted Petitioner's attorney to obtain Petitioner's most recent SSA award letter in order to determine his yearly salary. After obtaining Petitioner's award letter for the period beginning December 2008, OCSE determined that Petitioner's yearly salary would fall below the self-support reserve. Accordingly, OCSE notified the SSA to terminate the $25 monthly income execution. By letter dated January 22, 2009 (but apparently drafted on January 23rd or some time thereafter), OCSE advised Petitioner as follows:

> Our records show that you owe arrears of $12,037.10. Of this sum, $11,697.10 is owed to the custodial parent, Laura Ponsaing, and $340.00 is owed to the New York City Department of Social Services, DSS.
>
> In regards to monies collected, we are unable to refund monies to you because monies were mailed to the custodial parent, Laura Ponsaing, and the $300.00 tax intercept was applied to the arrears owed to DSS. If we had prior notice of your income, we could have been able to terminate the garnishment with SSA earlier.
>
> On January 23, 2009, we received a letter from the Office of Social Security Administration verifying your income. Since your income is below poverty level, we sent a "Termination of our Income Execution," on January 23,

2009, to the Office of Social Security Administration (SSA).

Petitioner commenced this Article 78 proceeding on May 21, 2009 against City Respondent and Respondent David A. Hansell, ODTA Commissioner ("State Respondent"). As noted above, Petitioner seeks the return of monies he alleges were wrongfully garnished by the respondents. These include deductions made when Petitioner claims that his income was below the self-support reserve, as well as the garnishment of his $300 stimulus check. Petitioner submits a verified petition and a memorandum of law in support of his petition. Annexed to the petition as exhibits are the 10/24/08 letter from MFY to OCSE; and the OCSE letter dated January 22, 2009.

State Respondent cross-moves to dismiss on the grounds that Petitioner fails to state a cause of action against him, arguing that the petition "is totally devoid of any allegations or facts demonstrating a violation by the State respondent of any of petitioner's rights." Alternatively, State Respondent also claims that, even had Petitioner stated a cause of action against him, dismissal is warranted based upon Petitioner's failure to exhaust administrative remedies. State Respondent has submitted an affirmation and memorandum of law in support of its cross motion.

City Respondents also cross-move for dismissal of the complaint on the grounds that Petitioner fails to state a claim for which relief can be granted. City Respondents submit an affirmation in support of their cross-motion. Annexed to the affirmation as exhibits are Petitioner's 10/11/07 request for administrative review; OCSE's 11/28/07 determination denying Petitioner's challenge; and records indicating the transfer of monies paid by Petitioner pursuant to his support obligations.

Petitioner submits a memorandum of law in opposition to the cross-motions, and the City Respondents have responded with a reply affirmation.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections*

of the City of New York, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

18 NYCRR §347.9(c) provides, in pertinent part,

> Calculation of the amount of additional deduction for income execution.
>
> (1) When an income execution is issued... for a debtor who owes arrears/past due support, the SCU must set the amount of the additional deduction to be made from the debtor's income. Such deduction must be in addition to the amount withheld to ensure compliance with the support obligation directed in the order of support....
>
> (2) Where the debtor provides documentary proof to the SCU that the imposition of the additional amount would reduce the debtor's remaining income below the self-support reserve, the SCU must eliminate or reduce the amount of the additional deduction as appropriate to ensure that the debtor's remaining income does not fall below the self support reserve. Thereafter, the SCU must increase the amount of the additional deduction to the amount calculated pursuant to paragraph (1) of this subdivision at such time as its application would no longer reduce the debtor's remaining income below the self-support reserve.

The court finds that, even if Petitioner's income were in fact lesser than the self-support reserve, all garnishments made prior to August 2008 were proper, and were not arbitrary or contrary to law. As 18 NYCRR §347.9(e) makes clear, it is incumbent upon a child support debtor to provide sufficient documentary evidence that his income falls below the self-support reserve level. Petitioner provides no evidence that he provided OCSE with sufficient documentary evidence at any time prior to around July 2008, and thus the court cannot conclude that those monies were improperly garnished at all.

As for the excessive garnishment in August 2008, the record indicates that this was commissioned by a ministerial error on the part of SSA, and through no fault of OCSE, which promptly advised SSA of the error upon notification by Petitioner. Accordingly, it would be inappropriate to compel OCSE to refund these monies when the money has already been forwarded to Ms. Ponsaing, the mother of the child. Moreover, "It has long been held that there is a 'strong public policy against restitution or recoupment of support overpayments'" (*Johnson v. Chapin*, 2009 NY Slip Op 3630, *3 [2009]) (*citing Baraby v Baraby,* 250 AD2d 201, 681 N.Y.S.2d 826 [3d Dept 1998]; *Rosenberg v Rosenberg,* 42 AD2d 590, 590, 345 N.Y.S.2d 73 [2d Dept 1973]). Plaintiff's claim that he is entitled to reimbursement for the garnishment of his federal stimulus check may be disposed of for the same reason, and thus the court need not even pass upon whether the stimulus check was properly garnished in the first instance.

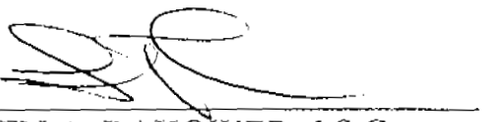
Finally, the State Respondent is entitled to dismissal, as Petitioner fails to allege any actionable acts or omissions by State Respondent which entitle Petitioner to relief as against State Respondent.

Wherefore it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: October 2, 2009



EILEEN A. RAKOWER, J.S.C.