

Matter of Thornton v Cestero

2009 NY Slip Op 32536(U)

October 9, 2009

Supreme Court, New York County

Docket Number: 401940/09

Judge: Eileen A. Rakower

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

PRESENT: RAKOWER
Justice

PART 5

THORNTON, SHAREEN

INDEX NO. 401940/09

RAFAEL CESTERO

MOTION DATE _____

MOTION SEQ. NO. 01

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 ...

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

3, 4

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.
FILED
OCT 15 2009
COUNTY CLERKS OFFICE
NEW YORK

Dated: 10/9/09

[Signature]
HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
In the Matter of the Application of
SHAREEN THORNTON,

Petitioner,

-against-

Index No.
401940/09

DECISION
and ORDER

RAFAEL CESTERO, as Commissioner of the New York
City Department of Housing Preservation and
Development, and MARTINAJ REALTY LLC

Mot. Seq.
001

Respondent

FILED
OCT 15 2009

COUNTY CLERK'S OFFICE
NEW YORK

HON. EILEEN A. RAKOWER:

Petitioner Shareen Thornton ("Petitioner"), brings this Article 78 Petition seeking an order (1) annulling the determination of Respondent Rafael Cestero, Commissioner of the New York City Department of Housing Preservation and Development ("HPD"), to terminate Petitioner's Section 8 housing subsidy; (2) directing HPD to reinstate Petitioner's subsidy, restore all benefits retroactively and provide ongoing benefits; (3) alternatively, remanding the matter for a new administrative hearing, restoring all benefits retroactively and prospectively until a new determination is made which accords with due process; (4) staying Respondent Martinaj Realty LLC ("Martinaj") from enforcing any possessory judgment against Petitioner pending the outcome of this proceeding; and (5) awarding costs and disbursements to Petitioner.

Under §1802(3) of the New York City Charter, HPD is vested with the power of "all functions of the city, and all powers, rights and duties as provided by any federal, state or local law or resolution, relating to," *inter alia*, "publicly-aided... housing." The housing subsidy known as Section 8 housing was created by the United States Housing Act ("Housing Act") for "the purpose of assisting lower-income families in obtaining a decent place to live and of promoting economically mixed housing..." (42 U.S.C. §1437f(a)). To that end, the Housing Act provides for "assistance payments" for "existing, newly constructed and substantially rehabilitated housing..." (*id.*). The Section 8 program is administered

on the federal level by the U.S. Department of Housing and Urban Development (“HUD”), which provides funding to “public housing agencies” (“PHAs”) (*see* 24 C.F.R. §982.1). HPD is the public housing agency for the City of New York. As a PHA and recipient of HUD funding, HPD is required to comply with “HUD regulations and other HUD requirements” for the Section 8 program (24 C.F.R. §982.52).

HUD regulations require that families or individuals who participate in the Section 8 program comply with certain obligations in order to maintain their Section 8 status. Among these responsibilities, Section 8 participants must

supply any information requested by the PHA or HUD for use in a regularly scheduled reexamination or interim reexamination of family income and composition in accordance with HUD requirements.

(24 C.F.R. §982.551(b)(2)). HUD Regulations further provide that a family’s failure to comply with its obligation to supply information verifying its income shall constitute grounds for termination of Section 8 assistance (*see* 24 C.F.R. §982.552(c)(i)).

PHAs are required to adopt a written administrative plan which establishes local policies for administration of the Section 8 program in accordance with HUD regulations and requirements (*see* 24 C.F.R. §982.54). Part I of Chapter 7 of HPD’s Administrative Plan requires that a family which participates in the Section 8 program must “[s]upply any information that HPD or HUD determines is necessary in the administration of the program,” including “any information regarding family income and composition as requested by HPD for use in any annual or interim recertification.” The Administrative Plan provides that failure to comply with these obligations constitutes grounds for denial or termination of Section 8 subsidies.

The annual recertification process is governed by Chapter 13 of the Administrative Plan. Part I of Chapter 13 provides that HPD will provide a recertification program to a Section 8 household 90-120 days prior to its due date. Part I further provides:

The entire package, including all required third party verifications, must be returned to HPD on or before the

return date printed on the package, or within **21 calendar days of receipt** by the participant, which is deemed by The Housing Choice Voucher program to be five calendar days after mailing. If HPD has not received the package within this timeframe, HPD will send the tenant a 'Pre-Termination Notice of Section 8 non-Compliance,' along with a 'Request for Conference' form. Participants will be given 15 calendar days from the date of the notice to request a conference at which they will be granted the opportunity to meet with HPD staff to resolve any outstanding matters that prevent HPD from determining their eligibility for a Section 8 rent subsidy....

If the family fails to respond or inadequately responds to the pre-termination notice, a termination notice will be sent that provides information concerning appeal procedures to contest the decision. Terminations will become effective the first day of the following month after the termination notice has been sent.

The denial or termination of Section 8 assistance is governed by Chapter 15 of the HPD Administrative Plan. Chapter 15 provides that the following constitute *permissible* grounds for termination of Section 8 assistance:

- The family has violated one of the family obligations listed on the... HPD's Administrative Plan;
- The family has failed to provide information requested by HPD....

Chapter 15 further states that "HPD has discretion to consider all of the circumstances in each case including the seriousness of the case," as well as the family's "record of compliance" prior to terminating Section 8 assistance.

Chapter 16 of the Administrative Plan sets forth the process which is afforded to a family prior to the termination of Section 8 assistance.

Chapter 2, Part II of the Administrative Plan provides that it is HPD policy to "make reasonable accommodations to persons with disabilities to ensure that

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they may fully access and use the voucher program and related services.” However, where the need for the accommodation is not readily apparent, the Administrative Plan requires that the Section 8 beneficiary seeking the accommodation “must fully explain the relationship between the requested accommodation and the disability,” such that HPD finds “an identifiable relationship between the requested accommodation and the individual’s disability.”

Petitioner is a 40 year old woman who resides with her 12 year old daughter in a rent-stabilized apartment located at 3018 Kingsbridge Avenue, in Bronx, NY pursuant to a written lease. Petitioner has been a recipient of Section 8 housing assistance since August 1, 1990. The building in which Petitioner resides is owned by Martinaj. The rent for Petitioner’s apartment was \$996.57 per month. Of that rent, HPD paid \$947.57 under the Section 8 program, leaving Petitioner to pay the remaining \$49.00. Petitioner states that her household income is dependent on public assistance and child support.

The events surrounding Petitioner’s 2007 recertification for Section 8 assistance are disputed by Petitioner and HPD. HPD claims that it sent Petitioner a Section 8 Recertification Declaration Form on or around January 29, 2007, to be completed and returned to HPD by February 28, 2007. A printout of HPD records indicates that the form was sent on January 29, 2007. The printout states that HPD never received a completed form from Petitioner. On June 14, 2007, HPD sent Petitioner a Pre-Termination Notice of Section 8 Non-Compliance form. The notice stated that Petitioner’s Section 8 housing subsidy may be terminated based upon Petitioner’s failure to return her recertification. “1/29/07” - the date the recertification package was reportedly sent by HPD - is handwritten by the grounds checked off for the notice. The notice advises that the recipient may request a conference with an HPD representative to review the recipient’s file within fifteen days of the calendar date of the notice, and a form requesting a conference was attached to the notice reportedly sent to Petitioner. The notice further provides

**FAILURE TO RESPOND WITHIN FIFTEEN (15)
CALENDAR DAYS FROM THE DATE OF THIS
NOTICE MAY RESULT IN TERMINATION OF
YOUR SECTION 8 RENT SUBSIDY. TERMINATION
OF THIS SUBSIDY MAY INCREASE YOUR
MONTHLY RENT OBLIGATION AND MAY
RESULT IN POSSIBLE EVICTION BY YOUR**

* 6]

LANDLORD IF YOU CANNOT PAY YOUR RENT IN FULL.

HPD provides a copy of the notice along with proof of mailing of same. In addition, the above-mentioned HPD printout indicates that the notice was sent on June 14, 2007. The printout of HPD records indicates that HPD never received a response from Petitioner.

On September 5, 2007, after not receiving any response from Plaintiff, HPD contacted the Citizens Advice Bureau ("CAB"), a homeless prevention and tenant support service organization that occasionally works with HPD, and requested CAB's assistance in helping Petitioner complete and return her certification. In an e-mail dated December 4, 2007, CAB case manager Shournett Brown advised HPD that she had attempted to visit petitioner, but that no one was home. In addition, Ms. Brown advised in the e-mail that she also sent two letters to Petitioner's address, but received no response from Petitioner.

In light of Petitioner's apparent failure to take any action with respect to her recertification, Petitioner's Case Manager recommended termination of Petitioner's Section 8 subsidy. This determination was subsequently approved by the HPD Team Leader, Coordinator, and finally, Director, who all concurred with the initial recommendation, citing Petitioner's failure to return her recertification documents, despite HPD's attempts to reach out to and assist Petitioner. The Director's final determination was issued on January 2, 2008, and Petitioner's subsidy was to terminate effective February 28, 2008. HPD informed Petitioner of the determination by Notice of Section 8 Rent Subsidy Termination dated January 2, 2008. HPD provides a copy of the notice with proof of mailing. The notice provides that Petitioner may appeal the decision by way of an informal hearing with an HPD staff member by returning a request for an informal hearing (attached to the notice) to HPD within 21 calendar days from the date of the notice. HPD states that its records do not indicate that Petitioner submitted a request for an appeal within 21 days.

Petitioner states that she never received any recertification-related documentation until she received a notice of termination in January of 2008. Petitioner further claims to have taken immediate action to prevent the termination of her Section 8 subsidy. Specifically, she claims that she mailed her recertification package to HPD on or around January 8, 2008. In addition to her recertification package, and contrary to HPD's assertions, Petitioner claims that she also

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submitted the HPD form requesting an informal hearing with the recertification package. A copy of Petitioner's request for an informal hearing, signed by Petitioner and dated January 7, 2008, is annexed as an exhibit to the petition. Petitioner states that she mailed the recertification package, along with her request for an informal hearing, to HPD via regular mail. Petitioner's housing subsidy was terminated by HPD on February 28, 2008. She subsequently received an eviction notice in or around October of 2008.

According to HPD, its Office of Intergovernmental Affairs was contacted by the office of a local legislator inquiring into the termination of Petitioner's subsidy. This prompted HPD to consult with its Division of Tenant Resources ("DTR"). After reviewing Petitioner's case, DTR completed a Termination or Reinstatement of Assistance Authorization Form. In this form, it was noted that HPD had been notified in 2006 that Petitioner was wheelchair bound, and that CAB had assisted Petitioner with her recertification efforts that year. As indicated on the form, the HPD Director determined that HPD should give Petitioner the opportunity to provide medical documentation demonstrating that her failure to timely recertify her eligibility for Section 8 assistance was the result of a disability. Upon receiving supporting medical documentation, HPD would provide Petitioner with a recertification package and reinstate Petitioner's housing subsidy retroactively.

Petitioner submitted documentation from Dr. Richard Holmes of Montefiore Medical Center. This documentation includes a letter from Dr. Holmes dated December 11, 2008, stating that Petitioner "has several medical problems including severe arthritis in her knees (see attached)." Attached to the letter are printouts made on that date which list Petitioner's medical problems as follows:

- Osteoarthritis of knee;
- Hypertension;
- Dyslipidemia;
- Obesity; and
- Unlisted Problem.

HPD states that, although the medical documents from Dr. Holmes are dated December 11, 2008, these records were not supplied by Petitioner until March 12, 2009.

Further, and more importantly, HPD did not provide Petitioner with a recertification package. While there is nothing in the record indicating that any

determination was made by HPD in response to her records, HPD apparently takes the position (based upon its written submissions herein) that Petitioner failed to demonstrate that her failure to timely recertify was the result of any of Petitioner's medical conditions. The instant Article 78 proceeding, brought by order to show cause, ensued.

Petitioner submits a verified petition, an affirmation, and a memorandum of law in support of the petition. HPD submits a verified answer and a memorandum of law in support of its answer. Martinaj submits an affirmation, wherein Martinaj states that it takes no position with respect to the merits of the present dispute, but requests that any order by this court provide for payment of the subsidy, or alternatively, limit the stay of summary nonpayment proceeding currently pending in Civil Court to a finite period in time not exceeding thirty days.

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]).

An agency's determination is arbitrary and capricious when the agency fails to abide by its own established rules and procedures, adopted to ensure compliance with notions of due process (*Robinson v. Martinez*, 308 A.D.2d 355 [1st Dept. 2003]) (citing CPLR §7803(3); *Fair v. Finkel*, 284 A.D.2d 126 [1st Dept. 2001]; *Garner v. Tuckahoe Hous. Auth.*, 81 A.D.2d 915 [1981]).

Chapter 16, Part III of the HPD Administrative Plan requires that an opportunity for an informal hearing be afforded where a determination is made "to terminate assistance for a participant family because of the family's action or failure to act." Part III further provides that "*Informal hearings regarding termination of assistance will be conducted prior to terminating assistance if such informal hearing was properly requested within the time limits, as set forth below*" (emphasis added).

Based on the record before it, the court finds that an issue of fact is presented as to the critical issue of whether Petitioner properly and timely requested an informal hearing by returning her request to HPD's Office of Housing Operations. While HPD states that its records do not indicate that Petitioner requested an informal hearing in a timely fashion, Petitioner has submitted a copy of her request for an informal hearing, which is signed by Petitioner and dated January 7, 2008. Further, Petitioner alleges that she mailed this request, along with her recertification package, on or about January 8, 2008, via regular mail.

Petitioner submits a copy of the form requesting an informal hearing that is signed and dated January 7, 2008; however, Petitioner has not provided any proof of mailing in the form of a receipt, or other contemporaneous record of mailing. Since HPD denies receipt of Petitioner's request, merely stating in its answer that HPD records do not indicate that same was received by HPD, the court cannot at this juncture properly determine whether Petitioner's request for a hearing was correctly addressed and mailed to HPD. Accordingly, a hearing is required to determine the issue of whether Petitioner timely and properly mailed her request for an informal hearing to HPD (*see Spencer v. Lombardi*, 267 A.D.2d 13, 14 [1st Dept. 1999]; *Futterman v. New York State Div. Of Hous. & Community Renewal*, 264 A.D.2d 593, 594 [1st Dept. 1999]).

If Petitioner can establish that she properly and timely mailed her request for an informal hearing, the petition must be granted and the matter remanded for further proceedings based upon the failure of HPD to follow its own Administrative Plan, which affords Petitioner the right to an informal hearing *before* the termination of her Section 8 subsidy. If Petitioner fails to make such a showing, HPD's determination must be upheld by the court (*see Futterman* at 594).

Wherefore it is hereby

ORDERED that the parties shall appear before the court on Tuesday, November 10, 2009 at 9:30 am in room 308 or 80 Centre Street, New York, New York where Petitioner shall have the initial burden of establishing that she timely and properly mailed a request for an informal hearing pertaining to the January 2, 2008 Notice of Section 8 Rent Subsidy Termination to HPD.

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

Dated: October 9, 2009



EILEEN A. RAKOWER, J.S.C.

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