

Matter of Spadaro v New York City Hous. Auth.

2010 NY Slip Op 30610(U)

March 17, 2010

Supreme Court, New York County

Docket Number: 402753/09

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. M. Judd

PART 11

Index Number : 402753/2009

SPADARO, RAIMOND

vs

NYC HOUSING AUTHORITY

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 1-14-10

MOTION SEQ. NO. _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion per how is decided in accordance with the attached Memorandum Decision Order + Judgment address motion are

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

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 147B).

Dated: March 17, 2010

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

This decision was adopted by the Members of the Board of the New York City Housing Authority (the "Board") in June 2005. Spadaro applied to re-open the default judgment rendered against him and his wife and the application was granted.

A second hearing regarding the termination of tenancy was scheduled for June 8, 2006; however, the Spadaros did not attend this second hearing and a decision recommending the termination of their tenancy was rendered. This decision was adopted by the Board on June 28, 2006.

In or around June 2006, Spadaro sought to re-open the default judgment, but the request was denied. In August 2006, Spadaro commenced an Article 78 proceeding by filing a Notice of Petition and Verified Petition. Spadaro and the Housing Authority settled the proceeding in late 2006. The Housing Authority agreed to vacate the second default and grant Spadaro a new hearing.

In December 2006, the Housing Authority scheduled a third hearing for January 10, 2007, and amended the charges to include, among others, the addition of a charge of heroine possession against Spadaro. The new hearing took place on January 10, 2007, but the Spadaros did not appear. Spadaro contends that the reason he did not appear was that he did not receive written notice of the time and date of the hearing until the date when the hearing was scheduled to take place, January 10, 2007. A third default judgment terminating the Spadaros tenancy was made on January 10, 2007, in a decision by Hearing Officer Hines. On January 31, 2007, the Board adopted Hearing Officer Hines' decision that Spadaro's tenancy be terminated.

On January 24, 2007, Spadaro made an application to re-open the third default. In this application, Spadaro stated that he missed the January, 2007 hearing because he was not notified

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of it until the day when the hearing was scheduled to take place. Spadaro also stated, as a defense to the charges of non-desirability and breach of rules and regulations, that the charges related to non-desirability and breach of rules could be reasonably explained, that back rent owed was due to hardships, and that Spadaro was a good neighbor who wanted to do everything possible to keep his apartment. The Housing Authority argued that Spadaro's application should be denied because Spadaro failed to establish an excusable default or a meritorious defense to the charges against him.

On May 22, 2007, Hearing Officer Hines wrote a decision (the "May 2007 Decision") denying Spadaro's request to re-open the default on the grounds that Spadaro failed to present an excusable default and a meritorious defense. Specifically, Hearing Officer Hines found that Spadaro's explanation for failing to appear was not credible and, with respect to the various of non-desirability and breach of rules and regulations, Hearing Officer Hines noted that Spadaro pled guilty to certain legal charges in court which makes these issues res judicata, despite Spadaro's assertion that all the legal issues had a reasonable explanation.

On October 30, 2009, Spadaro commenced this Article 78 proceeding, challenging the May, 2007 Decision. In the petition, Spadaro seeks reversal of the May 2007 Decision on the grounds that (1) he had a valid excuse for missing the hearing on January 10, 2007, regarding the termination of his tenancy, (2) he provided a meritorious defense to the non-desirability charges against him, and (3) he is a good neighbor who has assisted others in the complex, including by shoveling the sidewalks and preventing robberies and break-ins. Spadaro also states that "[i]t is now 2 years later that I receive notice of [the Housing Authority'] decision with an eviction notice for October 31, 2009."

The Housing Authority cross moves to dismiss the petition as time barred as it was made more than two years after the expiration of the four month statute of limitations provided by CPLR 217. Specifically the Housing Authority asserts that a copy of the May 2007 Decision was mailed to the Spadaros on May 22, 2007, and therefore they presumably received it on May 28, 2007, which is five business days later.¹ Accordingly, the Housing Authority argues that the limitations period expired on September 28, 2007.

In support of its position, the Housing Authority submits the affidavit of Shannon M. Holley ("Holley"), an employee of the Housing Authority's Office of Impartial Hearings, whose duties include "preparing the hearing officers' decisions for mailing to tenants who fail to appear for hearings scheduled before hearing officers and who subsequently apply to vacate their default" (Holley Affidavit, ¶ 1). Holley states that on May 22, 2007 she was responsible for mailing out such decisions and that it is the regular business practice of the office to prepare such decisions for mailing by first class mail on or about the same day that the hearing officer makes his or her decision. She also states that a notation on the bottom decision of "smh" which are her initials, confirms that she is the employee that mailed the decision. Holley further states that "consistent with the Housing Authority's regular business practice, on May 22, 2007, I enclosed a copy of the (May 2007 Decision) in a 'window' envelope folded in such a way that Petitioner's name and address were clearly visible through the envelope's window and placed the envelope in a box in my office from which outgoing mail is picked up every day by employee's of the Housing Authority's Mailing Center" (*Id.*, ¶ 4).

The Housing Authority also submits the affidavit of Shawn Younger ("Younger"), the

¹ May 27, 2007 was a Sunday.

Administrative Manager of the Housing Authority's Mail Center, who states that "it is the practice of the employees assigned to the Mail Center to visit the Hearing Office twice a day to pick up mail designated for delivery to the United States Postal Service" and that the receptacle in the office "is clearly labeled 'outgoing mail'" (Younger Affidavit, ¶¶ 1, 2). He also states that it is "the regular practice" of the Mail Center to deliver the mail to the United States Postal Service within one day of picking it up from the Hearing Office.

Spardaro submits no opposition to the cross motion.

Discussion

An Article 78 proceeding "...must be commenced within four months after the determination to be reviewed becomes final and binding." CPLR §217(1). See Sumpter v. New York City Hous. Authority, 260 A.D.2d 176, 177 (1st Dep't 1999) (refusing to consider petitioner's due process challenge to the Housing Authority's determination to terminate petitioner's tenancy on default when petitioner's request for relief was made six weeks after the expiration of the four month statute of limitations). In cases involving an administrative determination, the statute of limitations does not begin to run until the party aggrieved by it, receives notice of the determination. Gruber v. New York State Division of Housing and Community Renewal, 151 AD2d 426, 428 (1st Dept 1989); See also, Yarbough v. Franco, 95 N.Y.2d 342, 346-347 (2000). Under CPLR 2103(b)(2), there is a presumption that a regular mailing in New York is received within five days of the date of mailing.

Here, the Article 78 proceeding challenging the May 2007 Decision is untimely, as the record shows that the proceeding was commenced more than two years after the Spadaros received notice of the May 2007 Decision. The Housing Authority's affidavits of its employees

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regarding its mailing practices "establish that it followed regular office procedures designed to insure that [the notice of the decision was] properly addressed and mailed, raising a presumption of receipt by petitioner." Cruz v. Wing, 276 AD2d 307, 307 (1st Dept 2000), lv denied, 96 NY2d 702 (2001) (citations omitted). In the petition Spadaro does not deny receiving the May 2007 Decision shortly after it was issued, but only alleges that he did not receive the eviction notice and the attached January 2007 decisions terminating his tenancy until in or about September 2009.

In any event, even if Spadaro's statement in the petition that "[i]t is now 2 years later that I receive notice of [the Housing Authority's] decision with an eviction notice for October 31, 2009" could be construed as indicating that he did not receive the May 2007 Decision until he received the eviction notice in or about September 2009, this unsubstantiated denial of receipt is insufficient to overcome the presumption raised by the Housing Authority's affidavits. See e.g. Nelson Management Group, Ltd v. New York State Division of Housing & Community Renewal, 259 AD2d 411 (1st Dept), lv denied, 93 NY2d 814 (1999)(holding that petitioner's denial of receipt of notice of agency's order until it was notified by its attorney "is insufficient to overcome the presumption of receipt raised by respondent's evidence of its routine mailing procedures"); Dowling v. Holland, 245 AD2d 167, 169 (1st Dept 1997)(tenants' claim that doorman received but failed to deliver their mail insufficient to overcome presumption of mailing by agency).

Accordingly, the four month statute of limitations expired on September 28, 2007, and this proceeding, which was commenced in October, 2009, must be dismissed as time barred. As the proceeding is untimely, the court does not reach Spadaro's apparent argument that the

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Housing Authority is estopped from evicting him as it waited more than two years after the decision terminating his tenancy to do so.

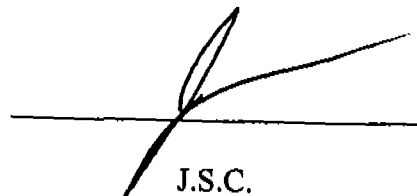
Conclusion

In view of the above, it is

ORDERED that the New York City Housing Authority's cross motion to dismiss is granted; and it is further

ORDERED and ADJUDGED that the petition is denied and dismissed.

Dated: March 17 2010


J.S.C.

UNENFORCEABLE
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 1418).