

**Matter of Mercier v Berlin**

2010 NY Slip Op 30725(U)

March 30, 2010

Supreme Court, New York County

Docket Number: 402420/2009

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD  
*Justice*

PART 61

In the Matter of the Application of  
ALAIN MERCIER,

Petitioner,

-against-

ELIZABETH R. BERLIN, *et al.*,

Respondents.

INDEX NO. 402420/2009

MOTION DATE Dec. 2, 2009

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 18 were read on this petition for a judgment pursuant to CPLR Article 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-7

8-11 12-15

16-18


Cross-Motion:  Yes  No

Upon the foregoing papers, the petition for a judgment pursuant to CPLR Article 78 and respondents' respective cross petitions to dismiss the petition are decided pursuant to the accompanying decision, order and judgment.

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 1415).

Dated: March 30, 2010

  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

-----X

In the Matter of the Application of  
ALAIN MERCIER,

Petitioner,

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

-against-

DECISION, ORDER  
AND JUDGMENT

Index No.: 402420/2009

ELIZABETH R. BERLIN, as Executive Deputy  
Commissioner of the State of New York Office of  
Temporary and Disability Assistance, ROBERT  
DOAR, as Commissioner of the New York City  
Human Resources Administration, and MATTHEW  
BRUNE, as Deputy Commissioner, the New  
HIV/AIDS Services Administration,

Respondents,

**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  
4119).

-----X

O. PETER SHERWOOD, J.:

According to the amended petition in this proceeding pursuant to CPLR Article 78, petitioner is indigent and is a client of the New York City HIV/AIDS Services Administration ("HASA"). He challenges as arbitrary and capricious, the decision after fair hearing ("DAFH") of the New York State Office of Temporary and Disability Assistance ("OTDA" or "State") upholding a decision of the New York City Department of Social Services ("Agency" or "City") denying petitioner's application pursuant to 18 NYCRR 352.6(f) and 397.5(k) ("the Regulations") for a special grant to pay then current (July 2009) fees for storage of his furniture and personal belongings and to direct respondents to continue to pay his storage fees so long as he remains eligible for public assistance and the circumstances necessitating the storage continue to exist. Petitioner also alleges that respondents violated his constitutional right to due process in failing to provide timely and adequate notice, failing to provide an unbiased forum and failing to provide continuing aid.

The City filed a cross-motion to dismiss the petition.<sup>1</sup> The City asserts that the petition is moot because the Agency has paid the July 2009 storage fees pursuant to the terms of the Order to

<sup>1</sup>Petitioner filed an amended petition to add claims against the State. The City's cross-motion was filed prior to filing of the amended petition.

Show Cause signed by another Justice of this Court, that the request for ongoing payment of storage fees seeks improper *mandamus* relief and that, to the extent the case is not disposed of on either of the above stated grounds, the proceeding must be transferred to the Appellate Division for substantial evidence review. The State respondent asserts that the amended petition implicates substantial evidence and must be transferred to the appellate division pursuant to CPLR 7804(g) unless it can be dismissed on the basis of an affirmative defense or objection in point of law. The State further argues that the DAFH is supported by substantial evidence, is not arbitrary, capricious, affected by error of law or violative of due process and that the amended petition should be dismissed pursuant to CPLR 7804(f).

Petitioner has been a recipient of a grant of public assistance benefits for a one person household. As a client of HASA, he is entitled to an enhanced shelter allowance. He alleges that he has been renting part of an apartment from a friend since February 2002. He receives a shelter allowance from the Agency to pay his rent obligation which is \$350 per month currently. He testified at the fair hearing that he has been seeking an apartment but is unable to find suitable housing due to the local housing market and his limited financial means.

The amended petition alleges that, commencing in March 2008, petitioner received a special grant of \$144 per month to pay his storage fees. On August 6, 2009, the Agency advised petitioner that his application for a special grant to pay storage fees for July 2009 was denied upon a determination by the Agency that petitioner "has had sufficient time to find housing."

Petitioner appealed that determination to OTDA. Following a fair hearing at which petitioner testified, OTDA upheld the determination of the Agency. It held that the purpose of the regulations providing for assistance to pay storage fees "is to help a recipient through a temporary change in the recipient's housing situation. ...[It] is not a benefit meant to continue for an indefinite period of time." OTDA found that "the fact that [petitioner] has been residing in the same location ... for five years (*sic*), establishes that his current residence could not reasonably be considered to be temporary shelter within the meaning of the [regulations] especially if [petitioner] still has not relocated during the approximately one year period that the Agency has been paying [petitioner's] storage fees."

Despite the narrow scope of the DAFH denying the application for a special grant to pay for storage fees for July 2009, petitioner now seeks a permanent injunction establishing his right to ongoing storage fees "so long as [he] remains eligible for public assistance and the circumstances necessitating the storage fees continues to exist."

### DISCUSSION

In determining whether the case must be decided by this court pursuant to CPLR 7804(3) because it challenges an agency decision as arbitrary and capricious or as affected by an error of law or transferred to the appellate division pursuant to CPLR 7804(g) because it involves substantial evidence questions, the court must examine the amended petition and independently determine whether a substantial evidence issue is raised (*see Segrue v. City of Schenectady*, 132 AD2d 270, 273 [3d Dept 1987]). Where the amended petition challenges respondents' application of a rule or regulation to undisputed facts, no substantial evidence question arises and the case should not be transferred to the appellate division even if the challenged determination followed from an adjudicatory hearing (*see Rosenkranty v. McMickens*, 131 AD2d 389, 390 [1<sup>st</sup> Dept 1987]).

In this case, petitioner seeks review of a determination made after an adjudicatory hearing on facts that are undisputed. Petitioner lost his apartment in 2002 and thereafter shared an apartment with a friend. Petitioner alleges that the apartment sharing arrangement was not intended to be permanent. At the time he moved into the apartment, he placed some of his belongings in storage and paid a monthly rental fee. In 2005, he applied for and since that time has been receiving public assistance. Since March 2008, he has applied each month for and received a grant to pay storage rental fees. On August 6, 2009 petitioner received written notice denying his application for a grant to pay storage fees for the month of July 2009. The notice stated that petitioner "had sufficient time to find an apartment." Thereafter he requested and received a fair hearing to challenge the decision. On appeal, petitioner accepted the finding of the OTDA but contended that under the applicable regulations, he is entitled to continue to receive grants for as long as the storage is necessitated by circumstances such as relocation, eviction or temporary shelter.

In the context of a proceeding pursuant to CPLR 7803(3) seeking review of an administrative determination, the court will not weigh the evidence or substitute its judgment for that of the agency so long as a rational basis can be found in the record for the agency's determination (*see Pell v. Bd. of Educ.*, 34 NY2d 222 [1974]). The court may not disturb an agency determination especially in areas involving technical expertise or broad policy-making discretion (*see City of New York v. Larocca*, 97 AD2d 666 [3d Dept 1983]).

The City is required to assist individuals on public assistance with HIV/AIDS in procuring all necessary social services and benefits for which they are found eligible under section 21-128 of the New York City Administrative Code (*see* 68 RCNY §5-01 [2005]). One form of assistance is

a temporary grant for storage fees (*see* 18 NYCRR §§352.6(f) and 397.5[k]). Assistance to eligible individuals such as petitioner is to be provided “when it is essential for circumstances such as relocation, eviction, or temporary shelter, so long as the circumstances necessitating the storage continue to exist” (18 NYCRR §352.6[f]). Although the regulations do not contain fixed timelimits on the duration of such assistance, the State submits and the language of the regulation confirms that grants to pay storage fees are intended to provide short-term temporary assistance (*see Orenstein v. Perales*, 180 AD2d 579 [1<sup>st</sup> Dept 1992]). The regulations do not require that local departments of social services provide a necessary service to persons in need of temporary assistance for an indefinite period (*see Marquant v. Perales*, 142 AD2d 678 [2d Dept 1988]).

The question of when a grant of assistance is no longer “temporary” necessarily requires exercise of judgment as to where the line should be drawn based on circumstances in the particular case. In the circumstances of this case, it might have been arbitrary and capricious to refuse to make a grant at a point when petitioner had been temporarily housed with a friend for only several months. When petitioner’s housing arrangement has continued for more than seven years, the agency could well decline to accept petitioner’s assertion that his housing arrangements are “temporary.”

The Agency concluded that as of July 2009, petitioner “has had sufficient time to find housing.” OTDA agreed and held that the determination of the Agency was “correct.” It interpreted the regulations to provide assistance to pay storage fees through a temporary change in the recipient’s situation and made clear that such assistance is not meant to continue for an indefinite period of time. The authority to interpret the regulations is well within the broad discretion of the agencies. The interpretation of the regulations applied in this case is neither arbitrary nor capricious.

The fair hearing decision in *Matter of Bernadette W.*, FH #1375669Q on which petitioner relies is not inconsistent with the DAFH in this case. In that case, the client who had been evicted from her apartment moved to a two room basement apartment that did not have a kitchen. A portion of her furniture was placed in storage and she received a grant to pay the storage rental fees. After a year, the agency determined to discontinue payment of storage fees. On those facts, the administrative law judge (“ALJ”) who heard the case concluded that the agency was not correct in its determination to discontinue the grant on the basis of the fact that the client had resided in her current residence for a period in excess of a year. In this case petitioner has been in an apartment with a kitchen for over seven years. The determination to discontinue the grant to pay storage fees had a rational basis.

Petitioner's claim that the notice denying his application for a grant to pay the July 2009 storage fees was insufficient to satisfy due process lacks merit. The notice was adequate to appraise petitioner of the reason for denial of the application and to enable petitioner to present his appeal. That the notice was adequate is confirmed by a reading of the transcript of the proceedings at the hearing on his appeal at which petitioner was well represented by counsel. The record of the hearing and of this petition show that petitioner was fully aware of the reason and legal basis for denial of the application.

Regarding petitioner's claim of bias by the ALJ, the transcript of the hearing and the DAFH fails to reveal any bias that would cause the court to set aside the DAFH. Petitioner was accorded a full opportunity to present his case. In fact, petitioner has not challenged any of the findings of the ALJ. Instead, his arguments are based exclusively on the interpretation the agencies applied to the applicable regulations.

The court has considered the remaining claims and defenses and has rejected them. Accordingly, it is

ORDERED that petitioner's motion for a preliminary and permanent injunction is denied; and it is further

ORDERED that the stay granted by order of Justice Feinman, dated September 25, 2009 is vacated; and it is further

ORDERED and ADJUDGED that the City's cross-motion to dismiss the petition is granted; and it is further

ORDERED and ADJUDGED that the amended petition is dismissed.

This constitutes the decision order and judgment of the Court.

DATED: March 30, 2010

ENTER,



O. PETER SHERWOOD

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 1412).