

Matter of DeJesus v Hansell

2010 NY Slip Op 30772(U)

March 30, 2010

Supreme Court, New York County

Docket Number: 400143/09

Judge: Alice Schlesinger

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

LA PART 16

PRESENT: _____

Index Number : 400143/2009

DEJESUS, VENMAR

vs

HANSELL, DAVID A.

Sequence Number : 002

COUNSEL FEES, EXPENSES

INDEX NO. _____

MOTION DATE _____

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 by petitioner for an award of attorney's fees is granted in accordance with the accompanying memorandum decision.

FILED

APR 07 2010

NEW YORK COUNTY CLERK'S OFFICE

MAR 30 2010

Dated: March 30, 2010

Alice Schlesinger

ALICE SCHLESINGER c.

Check one: FINAL DISPOSITION

~~NON-FINAL DISPOSITION~~

Check if appropriate:

DO NOT POST

REFERENCE

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

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

-----X

In the Matter of the Application of

VENMAR DEJESUS,
Petitioner,

Index No. 400143/09
Motion Seq. No. 002

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

-against-

DAVID A. HANSELL, as Commissioner of the
New York State Office of
Temporary and Disability Assistance,

Respondent.

FILED
APR 07 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X

SCHLESINGER, J.:

Before the Court is a motion by petitioner for an award of attorney's fees in this Article 78 proceeding pursuant to Article 86 of the Civil Practice Law and Rules. Respondent opposes the motion.

Background

The facts of this case are set forth in greater detail in the August 7, 2009 decision of this Court determining the underlying proceeding. The following summary outlines the facts relevant to the instant motion.

Petitioner Venmar DeJesus and her nine-year-old daughter are recipients of public assistance benefits from The City of New York Human Resources Administration ("HRA"). In June 2006, HRA determined that Ms. Dejesus was unable to work due to her various medical conditions. The following year, HRA advised Ms. Dejesus by notice dated August 2, 2007, that the agency had classified her as "employable with limitations," and it directed her to appear at an appointment with Vocational Rehabilitation Services as a condition of her continued eligibility for benefits.

Ms. Dejesus appeared for her appointment on August 16, 2007, as is confirmed by the HRA Case Notes. Nevertheless, HRA sent Ms. Dejesus a Notice of Decision dated September 12, 2007, advising her that her monthly benefits were being substantially reduced. The Notice of Decision explained the reduction as follows:

VENMAR DEJESUS did not VOCATIONAL REHAB on or by August 16, 2007. We told VENMAR DEJESUS about this ahead of time. We have decided that VENMAR DEJESUS willfully and without a good reason failed or refused to comply with the requirement to VOCATIONAL REHAB.

On or about January 15, 2008, Ms. Dejesus requested a fair hearing with respondent New York State Office of Temporary and Disability Assistance (the State) to challenge the September 12, 2007 decision reducing her benefits. The hearing was held on February 13, 2008 before Administrative Law Judge Bipin Engineer. Ms. Dejesus appeared representing herself. Despite the attempt by Ms. Dejesus to explain that she had appeared at the Vocational Rehab appointment, the ALJ interrupted her and *sua sponte* raised the issue of the timeliness of the fair hearing request. Then, by decision dated February 19, 2008, the State held that Ms. Dejesus was not entitled to a fair hearing on the merits because she had not requested the hearing in a timely manner.

With the assistance of newly retained counsel, Ms. Dejesus asked the State to reopen the hearing and assign a new ALJ, relying in part on a memorandum from State Deputy General Counsel Hanks indicating that the issue of alleged defects in the notice must be determined regardless of any timeliness dispute. Over HRA's objection,

Deputy General Counsel Hanks reopened the fair hearing, but declined to assign a new ALJ.

Ms. Dejesus appeared at the hearing on September 3, 2007 with counsel. The HRA representative testified that it was the agency's position that Ms. Dejesus had not reported for her vocational rehab appointment on August 16. Counsel then confronted the HRA representative with the agency's own records, which established that Ms. Dejesus had, in fact, reported to the appointment on August 16. HRA nevertheless maintained that Ms. Dejesus had somehow failed to comply and that the fair hearing request was untimely.

As before, the State determined that it could not review the matter on the merits because the request by Ms. Dejesus for a fair hearing was not timely. (See October 1, 2008 Decision). Counsel again requested a reopening and reassignment of the fair hearing. The request was denied, and this Article 78 proceeding ensued. In her petition, Ms. Dejesus asserted that any untimeliness with respect to her fair hearing request should be excused because the Notice of Decision was defective. Although not conceding the Notice's defectiveness, the State consented to vacate the October 1, 2008 Decision After Fair Hearing and to remand the matter for a new hearing before a new ALJ.

The Court therefore granted the petition on consent to that extent and remanded the matter for a new hearing before a new ALJ. The Court identified the threshold issue to be determined on remand as whether the September 12, 2007 Notice of Decision was facially defective in that it failed to afford Ms. Dejesus reasonable notice of the asserted grounds for the reduction in her benefits. The Court directed that, if the ALJ

were to find the Notice defective, then HRA was required to reinstate Ms. Dejesus' benefits in full and pay all retroactive benefits due. Only if the State were to find that the Notice adequately advised Ms. Dejesus of the issue framed for the hearing could it proceed to receive evidence and determine whether HRA had satisfied its burden of proving petitioner's willful noncompliance with employment regulations.

This third fair hearing was held on September 18, 2009 before ALJ Douglass Alvarado. At the hearing the HRA informed ALJ Alvarado that the agency was withdrawing its September 12, 2007 Notice of Decision. By Decision After Fair Hearing dated September 23, 2009, the State directed HRA to: (1) Withdraw its September 12, 2007 Notice; (2) Take no further action on the Notice; and (3) Restore any public assistance benefits lost by Ms. Dejesus as a result of HRA's actions.

Ms. Dejesus then submitted this application for attorney's fees to the Court requesting \$11,082.75 pursuant to CPLR Article 86. Respondent opposed the request on various grounds. In reply, counsel amended the amount requested to include the full cost of the motion, for a total of \$18,128.95.

The Law Governing Attorney's Fees

Entitlement to attorney's fees is governed by New York's Equal Access to Justice Act, New York CPLR Article 86 (EAJA). The intent of the Act is to "improv[e] access to justice for individuals and businesses who may not have the resources to sustain a long legal battle against an agency that is acting without justification" by creating a mechanism for the recovery of counsel fees in certain actions against the State of New York (Governor's Approval Mem., L 1989, ch 770, 1989 NY Legis Ann., at 366). The State EAJA is modeled on the Federal Equal Access to Justice Act [28 USC 2412(d)] and the significant body of case law that has evolved thereunder. (CPLR §8600).

[* 6]
CPLR §8601(a) directs that:

[A] court shall award to a prevailing party, other than the state, fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust. Whether the position of the state was substantially justified shall be determined solely on the basis of the record before the agency or official whose act, acts, or failure to act gave rise to the civil action. Fees shall be determined pursuant to prevailing market rates for the kind and quality of services furnished, except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings.

Therefore, Ms. Dejesus is entitled to an award of attorney's fees if this Court determines that: 1) Ms. Dejesus was the prevailing party in the Article 78 proceeding; 2) the State's position was not substantially justified; and 3) no special circumstances exist to make this award unjust. The Court must also determine the amount using the statutory guidelines.

Ms. Dejesus is a Prevailing Party

The State Equal Access to Justice Act defines the term "prevailing party" as a "plaintiff or petitioner in a civil action against the state who prevails in whole or in substantial part where such party and the state prevail upon separate issues." CPLR §8602(f). As the Court of Appeals explained, a court determining prevailing party status should consider "whether the parties 'succeed[ed] on any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit." *New York State Clinical Laboratories Ass'n, Inc. v. Kaladjian*, 85 N.Y.2d 346, 352 (1995), *citing, inter alia, Hensley v Eckerhart*, 461 US 424, 433.

Ms. Dejesus here meets that standard. In January 2009 she petitioned the Court to annul the decision reducing her benefits and dismissing her fair hearing as untimely. With the consent of the State, the Court granted the petition to the extent of vacating the fair hearing decision and remanding the matter for a new hearing. At that hearing, HRA consented to the reinstatement of Ms. Dejesus' benefits in full. Thus, Ms. Dejesus succeeded in achieving the very benefits she had sought in bringing suit. Even if the analysis were to end with this Court's remand decision, since it was for the agency rather than the Court to finally determine the entitlement of Ms. Dejesus to public assistance benefits, petitioner obtained in this Article 78 proceeding all the relief the Court was empowered to grant. As a matter of common sense, and pursuant to the definitions discussed above, Ms. Dejesus plainly qualifies as a "prevailing party."

Respondent argues that Ms. Dejesus does not qualify as a prevailing party because the relief was granted largely on their consent. The argument has no merit. The fact that the State abandoned its arguments – presumably after recognizing that they would likely have proved unsuccessful – cannot rob Ms. Dejesus of her status as a prevailing party.

The State's Position was not Substantially Justified

Turning to the next statutory criterion, a party cannot receive a fee award under the EAJA if the government's position was "substantially justified." CPLR §8601(a). Whether the government's position was substantially justified is determined "solely on the basis of the record before the agency or official whose act, acts, or failure to act gave rise to the civil action." CPLR 8601(a). The phrase "substantially justified" has been interpreted "as meaning 'justified to a degree that could satisfy a reasonable

person', or having a "reasonable basis both in law and fact.'" *NYS Clinical Laboratory*, 85 NY2d at 356, quoting *Pierce v. Underwood*, 487 US 552, 565. The government bears the burden on this point, and it "must make a strong showing that its position was substantially justified." *In the Matter of Barnett*, 212 A.D.2d 696, 697-98 (2nd Dep't 1995), *lv. dismissed* 85 NY2d 1032, citing *Environmental Defense Fund v Watt*, 722 F2d 1081 (2nd Cir. 1985).

The government has not met its burden in this case. The Notice of Decision sent to Ms. Dejesus was incomplete and incomprehensible to a reasonable person. It did not come close to affording Ms. Dejesus appropriate notice of HRA's reason for reducing her benefits, and it was wholly unreasonable for the State to argue that it did.

The State's own course of conduct during this litigation reflects the lack of substantial justification for its position. The State never raised the untimeliness argument in front of the ALJ; the ALJ raised the issue *sua sponte*. And after initially arguing untimeliness in this Court, the State ultimately conceded that Ms. Dejesus was entitled to a new hearing that would address the merits of her claims rather than timeliness. This position was virtually compelled by the memorandum from Deputy General Counsel Hanks, which indicated that any claim of a notice deficiency must be determined regardless of a timeliness issue. Under the circumstances, the Court finds that the State's initial opposition to the Article 78 petition was not substantially justified. *See Auguste v Wing*, 269 AD2d 239, 240 (1st Dep't 2000)(agency's position was not substantially justified where benefits were terminated in contravention of principles addressed in case law).

The statute allows an exception if special circumstances exist. The State does not argue that any such "special circumstances" exist that would bar a fee award to Ms. Dejesus. Nor does the Court perceive any. Accordingly, Ms. Dejesus is entitled to attorney's fees under the EAJA.

Counsel has Requested Reasonable Attorney's Fees

Having determined that Ms. Dejesus is entitled to attorney's fees, the Court now turns to the calculation of the award. The fees to be awarded under New York's EAJA are "reasonable attorneys' fees" [CPLR §8602(b)] which "shall be determined pursuant to prevailing market rates for the kind and quality of the services furnished" [CPLR 8601(a)].

Petitioner's attorney, who has over twenty years of experience specializing in litigation related to government benefits, requests a fee based on an hourly rate of \$350. He has demonstrated that this rate is consistent with the market rate for legal representation by an attorney with his experience and background in the local community. Wholly unavailing is the State's claim that the hourly rate is excessive because this Article 78 proceeding was "garden variety." The record demonstrates that the State opposed the petition on the merits in the first instance, and both sides prepared substantial papers that cited to numerous cases. Were the case so "garden variety," respondent should have resolved it promptly rather than litigate it.

Regarding the time spent, petitioner's attorney requests an award for 51.797 hours of work, including this motion. Again, the State characterizes this amount as "excessive," but counsel has not challenged any particular expenditure with specificity. To the extent the State complains that a substantial portion of the time claimed was

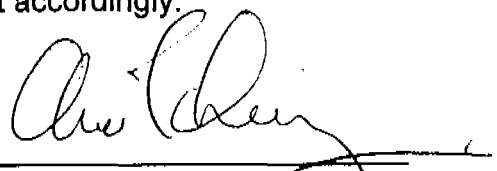
spent litigating this fee motion, the challenge is unavailing, as the Supreme Court has specifically held that the EAJA authorizes awards of "fees for fees." *Commissioner v. Jean*, 496 U.S. 154, 162-64 (1990). After review of the itemized statement submitted by petitioner's counsel, the Court concludes that the number of hours spent on this litigation was reasonable and appropriate.

Multiplication of 51.797 hours by an hourly rate of \$350 yields a total amount of \$18,128.95, the amount requested by petitioner, an amount that this Court views as reasonable. Accordingly, it is hereby

ORDERED that petitioner's motion for attorney's fees is granted in the amount of \$18,128.95. The Clerk is directed to enter judgment accordingly.

Dated: March 30, 2010

MAR 30 2010



ALICE SCHLESINGER

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