

Matter of Maurinac v New York City Hous. Auth.

2010 NY Slip Op 30864(U)

April 12, 2010

Supreme Court, New York County

Docket Number: 110972/09

Judge: Joan A. Madden

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

PRESENT: JOAN A. MADDEN
Justice

PART 11

MAURINAC

INDEX NO.

110972/09

Plaintiffs,

MOTION DATE

11/12/09

-v-

MOTION SEQ. NO.

001

NYCHA

MOTION CAL. NO.

Defendants.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ORDERED that this motion *cross motion + proceeding*
are decided in accordance with the annexed memorandum
Decision order + Judgment

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1418).

Dated: April 12, 2010

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 : IAS PART 11

In the Matter of the Application of
DAVID MAURINAC,
Petitioner,
For an Order Pursuant to Article 78 of the
Civil Practice Law and Rules,

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).

-against-

Index No. 110972/09

NEW YORK CITY HOUSING AUTHORITY,
Respondent.

-----X
Joan A. Madden, J.

In this Article 78 proceeding, petitioner, who appears pro se, seeks to annul the decision of Hearing Officer Stuart G. Laurence ("Hearing Officer Laurence"), dated July 8, 2008, which denied petitioner's application to succeed to the lease of an apartment (the "Apartment") for low income families, located in the Pelham Parkway Houses at 860 Astor Avenue, Bronx, New York, Apt. 1A, which was previously leased to petitioner's father, Joseph Maurinac. Respondent, the New York City Housing Authority (the "Housing Authority") cross moves to dismiss the petition as time barred. For reasons stated below, the Housing Authority's cross motion is granted.

Background

Petitioner had lived in the Apartment with his parents beginning in 1955. At some point during or after 1970, petitioner left the Apartment. After his father was diagnosed with lymphoma in December 1994, petitioner moved into the Apartment to take care of him. Following the death of his father in May 2004, petitioner sought to succeed to the lease of the Apartment as a remaining family member. In or about 2007, petitioner filed a remaining family

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member grievance with the development manager for his housing project, J. Glasser ("Glasser"). Glasser wrote a project grievance summary (the "project summary"), dated February 27, 2008, recommending that petitioner's grievance should be denied because he fails to qualify as a remaining family member on the grounds that petitioner left his father's household "on or about 3/16/72" and his father did not receive written permission from the Housing Authority for petitioner to rejoin the household. Glasser noted in the grievance summary that petitioner had been diagnosed with malignant cancer.

Petitioner appeared for a review of his remaining family member grievance on April 8, 2008. On that same date, the borough manager/director, Mark Papa ("Papa") wrote a district grievance summary ("the district summary") agreeing with Glasser's recommendation denying petitioner's remaining family member grievance. Papa wrote that the grievance should be denied because NYCHA GM 3692 requires that the tenant of record obtain permission from management for a family member to reside in the household at least one year before the tenant of record dies in order for a remaining family member, such as petitioner, to succeed to the lease. The district summary also states that, since use and occupancy is paid, petitioner may submit a request for a formal hearing before a Hearing Officer.

Petitioner then submitted a request for a formal hearing which took place on June 26, 2008 before Hearing Officer Laurence. Petitioner was represented by an attorney at this hearing. Hearing Officer Laurence dismissed petitioner's grievance because his father did not notify project management of his return. As such, Hearing Officer Laurence stated that, under controlling regulations, he could not rule that petitioner is a residual tenant entitled to a lease. Hearing Officer Laurence also wrote that petitioner admitted at the hearing that he was "kept under wraps." Hearing Officer Laurence noted that, at the time of the hearing, petitioner

4] suffered from "chronic bronchitis, chronic obstructive pulmonary disease, and [gastroesophageal reflux disease ("GERD")]". Hearing Officer Laurence's ruling on the grievance is dated July 8, 2008.

In a determination of status, Hearing Officer Laurence's ruling was approved by the Board of the Housing Authority in a decision dated July 23, 2008.

The Housing Authority asserts that a copy of Hearing Officer Laurence's ruling and the determination of status (together, the "Decision") was mailed to petitioner on August 1, 2008, and that it should be presumed to have been received within five days of mailing. Petitioner does not dispute that he received the Decision within five days of mailing.

On August 3, 2009, petitioner commenced this Article 78 proceeding, challenging the Decision denying his remaining family member grievance. On November 12, 2009, this court issued an interim order staying the summary proceeding in Bronx Housing court seeking to evict petitioner until fifteen days from the date of this court's decision in this proceeding.

The petition seeks to annul the Decision on the grounds that (1) his father did not seek approval for petitioner to be added as a family member due to the suffering and anxiety caused by his father's condition; (2) petitioner is 68 years old, of limited means and in bad health and has been hospitalized twice in the Veterans Administration Medical Center with chronic obstructive pulmonary disease and GERD compounded with an upper respiratory infection.

The Housing Authority cross moves to dismiss the petition as time barred as it was made more than one year after the expiration of the four month statute of limitations provided by CPLR 217. Specifically, the Housing Authority asserts that a copy of the Decision was mailed to petitioner on August 1, 2008, and that petitioner should be presumed to have received it within five days of mailing or by August 6, 2008. Accordingly, the Housing Authority argues

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that petitioner should have commenced this proceeding within four months or by December 8, 2008, at the latest.¹

In support of its position, the Housing Authority submits the affidavit of Erica Graham (“Graham”), an employee of the Housing Authority in the Applications and Tenancy Administration Department (“ATAD”), whose duties include preparing the Board’s determinations of status for mailing to grievants seeking remaining family member status (Graham Affidavit, ¶ 1). Graham states that, when she prepared to mail the Decision to Maurinac, she followed ATAD’s regular business practice. She enclosed a copy of the Decision in a “window” envelope, folded in such a way that petitioner’s name and address would be clearly visible through the envelope’s window, and placed the envelope in a box “in [her] office from which outgoing mail is picked up every day by employees of the Housing Authority’s Mail Center.” (Id., ¶ 2).

The Housing Authority also submits the affidavit of Shawn Younger (“Younger”), the Administrative Manager of the Housing Authority’s Mail Center (the “Mail Center”), who states that it is the practice of the employees assigned to the Mail Center to visit ATAD twice a day to pick up mail designated for delivery through the United States Postal Service and that the receptacle in ATAD for the mail to be delivered “is clearly labeled ‘outgoing mail’” (Younger Affidavit, ¶1). He also states that it is regular practice of the Mail Center to deliver the mail to the United States Postal Service within one business day of picking it up from ATAD.

Petitioner opposes the cross motion and asserts that he was not aware of his option to file an Article 78 petition to appeal the Housing Authority’s decision until May 14, 2009. On this

¹ The four month statute of limitations ran on December 6, 2008, which was a Saturday. December 8, 2008, was the first business day thereafter.

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date, petitioner states that a Bronx Housing Court Judge (the "Housing Court Judge") informed him, in writing, of the possibility of filing an Article 78 petition and that a court clerk, with a housing assistant present, explained to him the nature of an Article 78 proceeding.

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 Decision is untimely, as the record shows that the proceeding was commenced more than one year after petitioner received the Decision. The Housing Authority's affidavits of its employees regarding its mailing practices "establish that it followed regular office procedures designed to insure that [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). Moreover, petitioner does not deny that he received the mailing by August 6, 2008, five days after it was sent, and thus fails to overcome this presumption.

In addition, while the record shows that petitioner has suffered from various serious illnesses throughout the administrative process and afterwards, these illnesses do not provide a legal basis for tolling or extending the statute of limitations period. Specifically, the tolling provision for disability (CPLR 208) only applies "to those who are able to prove that they were incapable of protecting their legal rights when their causes of action accrued because of an overall inability to function in society" Gray v. Hernandez, 22 Misc3d 678, 684 (Sup Ct NY Co. 2008), citing Ceramin v. City of Rochester School Dist., 82 NY2d 809 (1993). Here, petitioner has not shown the he was incapable or protecting his rights during the four month period after the Decision.

Next, to the extent petitioner's statements in his opposition papers can be construed as an argument that the Housing Authority is estopped from a statute of limitations defense as he was not informed of his right to file his Article 78 petition until told by the Housing Court Judge in May 2009, as previously discussed, the statute of limitations to bring an Article 78 petition begins to run at the time the Housing Authority's determination becomes final and binding, not on the date that a petitioner alleges he became aware of his opportunity to bring such a petition.

In any event, even if the court were to reach the merits, it cannot be said that the Housing Authority's decision was irrational since it is undisputed that during the approximately ten years that petitioner resided with his father in the Apartment, his father failed to notify the Housing Authority management that petitioner resided there. As the Housing Authority management manual and the written lease agreement requires the tenant of record to obtained written permission for petitioner to live the Apartment to qualify for remaining family member status, there is no basis for granting petitioner's application for Article 78 relief. Moreover, as petitioner does not claim that the Housing Authority knew he lived in the Apartment and

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admitted that "he was kept under wraps," it cannot be said that the Housing Authority implicitly approved his tenancy. See McFarlane v. New York City Housing Authority, 9 AD3d 289 (1st Dept 2004).

Conclusion

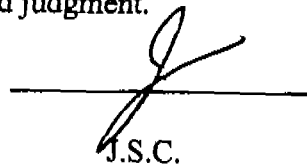
In view of the above, it is

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; and it is further

ORDERED that the stay of the Bronx Housing Court proceeding shall be vacated fifteen days from the date of this decision, order and judgment.

DATED: April 12, 2010


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 1416).