

**Matter of Johnson v New York City Hous. Auth.**

2010 NY Slip Op 31683(U)

June 24, 2010

Supreme Court, New York County

Docket Number: 402521/09

Judge: Joan A. Madden

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

PRESENT: Hon Joan A Madder

PART 11

Index Number : 402521/2009  
JOHNSON, DORIS  
vs.  
NYC HOUSING AUTHORITY  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE 2-4-10

MOTION SEQ. NO. \_\_\_\_\_

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

p.h.w  
this motion to/for Article 78 relief

PAPERS NUMBERED

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

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

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ <sup>Article 78 proceeding</sup> is decided in accordance with the attached Memorandum 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 141B).

Dated: June 25, 2010

[Signature]  
HON. JOAN A. MADDER <sup>C.</sup>

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: PART 11

-----X

In the Matter of the Application of  
DORIS JOHNSON,

Index No. 402521/09

Petitioner,

For an Order Pursuant to Article 78 of the  
Civil Practice Law and Rules,

-against-

NEW YORK CITY HOUSING AUTHORITY

Respondent.

-----X

**Joan A. Madden, J.**

In this Article 78 proceeding, petitioner Doris Johnson (“Johnson”), appearing pro se, seeks to annul the respondent New York City Housing Authority’s (“The Housing Authority”) termination of her tenancy. 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

Johnson lives in an apartment for low income families located at 711 FDR Drive, New York, New York, Apt. 11D (the “apartment”). Johnson entered into a Resident Lease Agreement pertaining to the apartment on September 26, 2003.

In May 2006, Johnson settled termination-of-tenancy charges and preserved her tenancy by, *inter alia*, agreeing to permanently exclude her son, James Weeks from the apartment. Johnson also agreed and to be placed on probation for two years, that the violation of the terms of the stipulation would subject her to additional penalties, including termination of her tenancy.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel and married respondent must appear in person at the County Clerk's Office (Room 1415) at the County Court Building, 100 West Street, New York, NY 10038.

On January 18, 2008, during Johnson's probation period, Housing Authority investigator Gilbert Perez ("Perez") found Weeks inside of Johnson's apartment. During the investigation Weeks informed Perez that he lived in the apartment.

Subsequently, in June 2008, the Housing Authority issued charges against Johnson and set the matter for a hearing. On February 19, 2009 an administrative hearing was held before Hearing Officer Desiree Miller ("Hearing Officer Miller") and both sides presented their cases. Johnson testified that she believed Weeks was authorized to return to the apartment because his name appeared on a Community Service Policy Status Notice ("status notice"). Hearing Officer Miller found Johnson's reliance on the status notice unreasonable because there is no evidence that Johnson contacted management to determine if the status quo had changed regarding Weeks' exclusion from the apartment.

In a decision dated February 24, 2009, Hearing Officer Miller recommended that Johnson's tenancy be terminated as she violated her probation and her agreement to permanently exclude Weeks. On March 11, 2009, the Housing Authority approved Hearing Officer Miller's determination and terminated Johnson's tenancy. The Housing Authority submits proof that on March 26, 2009, the determination was mailed to Johnson.

On October 6, 2009 Johnson commenced this Article 78 proceeding, challenging the Housing Authority's termination of her tenancy. In the petition, Johnson seeks reversal of the determination on the grounds that she did not fully understand the hearing process and was thus unable to adequately show that Weeks did not reside in the apartment. She also asserts that she was "very sick and couldn't make it to every hearing that was held for determination."

The Housing Authority cross moves to dismiss the petition as time barred as it was made more than six months after the Housing Authority issued its final and binding determination.

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Thus, the Housing Authority asserts that the action was commenced after the expiration of the four month statute of limitations provided by CPLR 217. Specifically, the Housing Authority asserts that a copy of the March 11, 2009 determination was mailed to Johnson on March 26, 2009, and therefore she presumably received it within five days of mailing, or by March 31, 2009.

In support of its position, the Housing Authority submits the affidavit of Raisa Arias (“Arias”), an employee of the Housing Authority’s Applications and Tenancy Administration Department (“ATAD”), whose duties include preparing the hearing officers’ decisions to tenants (Arias Affidavit, ¶¶ 1, 2). Arias states that on March 26, 2009 she placed a copy of Johnson’s Determination of Status, dated March 11, 2009, in a “window” envelope, properly folded so that Johnson’s address was visible through the window, and that she then placed the envelope in an outgoing mail box, from which mail is picked up everyday by employees of the Housing Authority’s Mail Center. She also states that she made an entry in the computer database indicating that she had placed the Determination of Status in the outgoing mail box on March 26, 2009 (Id, ¶ 3).

The Housing Authority also submits the affidavit of Shawn Younger (“Younger”), the Administrative Manager of the Housing Authority’s Mail Center, who states that “it is the practice of employees assigned to the Mail Center to visit ATAD twice each business day to pick up mail designated for delivery through the United States Postal Service (“USPS”)” and that “the receptacle in ATAD for mail to be delivered by the USPS is clearly labeled ‘outgoing mail’” (Younger Affidavit, ¶ 2).

Johnson submits no opposition to the cross motion.

[\* 5]

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 (1<sup>st</sup> Dept 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 (1<sup>st</sup> Dept 1989); See also, Yarbough v. Franco, 95 N.Y.2s 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 the mailing.

Here, the Article 78 proceeding challenging the Housing Authority's determination is untimely, as the record shows that the proceeding was commenced more than six months after Johnson received notice of the determination. The Housing Authority's affidavits of its employees regarding its mailing practices "establish that it followed regular office procedures designed to insure that [notice of the decision was] properly addressed and mailed, raising a presumption of receipt by the petitioner." Cruz v. Wing, 276 AD2d 307, 307 (1<sup>st</sup> Dept 2000), lv denied, 96 NY2d 702 (2001) (citations omitted). Moreover, Johnson does not deny that she received the mailing by March 31, 2009, five days after it was mailed, and thus fails to overcome this presumption.

In addition, while Johnson asserts that she was too ill to attend all of the hearings, her alleged sickness does not provide a legal basis for tolling or extending the statute of limitations

period. Notably, she does not specifically allege that she was too ill to challenge the Housing Authority's determination. In any event, 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, Johnson has not shown that she was incapable of protecting her rights during the four month period after the decision was issued.

While the termination of Johnson's tenancy due to her son's presence in her apartment based on a stipulation she entered into agreeing to exclude him is a harsh penalty, this court is constrained to dismiss this petition as barred by the statute of limitations.

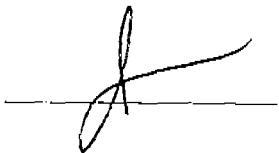
Conclusion

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.

*June 24, 2010*  
Dated: June 2010.



J.S.C.

**HON. JOAN A. MADDEN**  
**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 1415).**