

Matter of Silva v Rhea
2010 NY Slip Op 32597(U)
September 13, 2010
Sup Ct, NY County
Docket Number: 400214/10
Judge: Saliann Scarpulla
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SCANNED ON 9/21/2010
SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: SCAROLLA
Justice

PART 19

VICTORIA SILVA
- v -
NYCHA

INDEX NO. 400214/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Article 78

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

~~MOTION AND CROSS-MOTION~~ ^{is} are decided in accordance with accompanying memorandum decision.

This constitutes ^{the} decision and judgment of the Court.

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: 9/13/10

[Signature]
J.S.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: CIVIL TERM: PART 19

-----X
In the Matter of the Application of
VICTORIA SILVA,

Petitioner,

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

Index No.: 400214/10
Submission Date: 06/16/10

- against -

JOHN B. RHEA, as Chairman of the New York City,
Housing Authority, THE NEW YORK CITY
HOUSING AUTHORITY, and ANDREWS 103 LLC,

**DECISION, ORDER
AND JUDGMENT**

Respondents.

-----X

For Petitioner:
Kathleen Dennin
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Bronx, NY 10451

For Respondent:
Sonya M. Kaloyanides
General Counsel
New York City Housing Authority
By: Seth E. Kramer
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Papers considered in review of this Article 78 petition:

- Petition..... 1
- Aff. in Supp..... 2
- Answer..... 2
- Mem of Law..... 3
- Reply Aff..... 4

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HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner Victoria Silva ("Petitioner") seeks (1) immediate and retroactive restoration of Petitioner's Section 8 subsidy, which respondent New York City Housing Authority ("Housing Authority") terminated in June 2007, (2) restitution of all rental arrears attributable thereto, and (3) a stay of Housing Court proceeding (Index No. 41673/08) pending restoration of these benefits. In the alternative,

Petitioner seeks a hearing before an impartial hearing officer regarding the retroactive restoration of the Section 8 voucher.

Beginning in 1987, Petitioner's mother, Lidia Silva received a Section 8 voucher, which she applied toward her rent at 103 West 183rd Street, Apartment #22, Bronx, New York (the "residence"). In June, 2007, the Housing Authority terminated Lidia Silva's voucher. During this entire time period, Petitioner lived at the residence and was an authorized member of Lidia Silva's household. In 2004, Lidia Silva was incarcerated, but Petitioner continued to live at the residence alone. Petitioner avers that she informed the Housing Authority that Lidia Silva no longer resided at the residence. Petitioner further avers that a Housing Authority representative informed Petitioner that she could be made the head of the household instead of Lidia Silva, but the actual Section 8 subsidy could not be transferred to Petitioner's name because Lidia Silva was still alive.

Consequently, Lidia Silva recertified the subsidy from prison from 2004 to 2007, but could no longer recertify when she transferred to a Florida prison in 2007. Ms. Joseph, a representative of the Housing Authority, informed Petitioner that the Housing Authority needed proof that Lidia Silva was still in prison. Petitioner attempted to get proof, but representatives at the prison informed her that the Housing Authority had to contact the prison directly. Petitioner allegedly informed the Housing Authority of this requirement, but received no response. In June 2007, Lidia Silva was deported. Petitioner did not supply the Housing Authority with documentation informing management that Lidia would not return to the residence following her imprisonment.

In March 2007, the Housing Authority sent a T-1 Notice of Termination of Section 8 Subsidy to Lidia Silva's attention at Petitioner's residence. The T-1 Notice specified that the Housing Authority terminated the subsidy, but Lidia Silva could still submit her income recertification documents and request a hearing to contest the termination within 20 days of the letter.

Petitioner did not respond to the T-1 Notice of Termination, so the Housing Authority sent a T-3 Notice of Default: Termination of Section 8 Subsidy to Lidia Silva's attention at Petitioner's residence in June 2007. The T-3 Notice stated that the subsidy would be terminated 45 days after the letter, but Lidia Silva could still request a hearing to challenge the determination within those 45 days. Neither Lidia Silva nor the Petitioner ever formally responded to the notices or requested a hearing to challenge the termination of the subsidy, so the Housing Authority terminated Lidia Silva's subsidy in July 2007.

In 2008, Petitioner was sued (in Lidia Silva's name) for nonpayment of rent in New York City Housing Court (Index No. 41673/08). During the course of that proceeding, Ms. Caban of the Housing Authority informed Petitioner that her subsidy could be restored and arranged a meeting for July 31, 2009 to discuss the restoration. The Housing Authority claims that Petitioner missed that appointment, but Petitioner disputes that allegation. Petitioner claims that she went to the meeting, at which a representative from the Housing Authority told her that the subsidy would not be reinstated because she waited too long. Petitioner does not have the name of the representative with whom she met and there is no written record of her attending the meeting.

Petitioner then missed the following court date on October 20, 2009. As a result of Petitioner's non-appearance, the Housing Authority retracted its offer to reconsider the subsidy termination. The suit against Lidia Silva is still pending in Housing Court.

Petitioner commenced this Article 78 petition on January 25, 2010. Petitioner first argues that the Housing Authority's initial failure to respond to Petitioner's request for a transfer of Lidia Silva's subsidy to her name and ultimate refusal to reinstate the subsidy was arbitrary and capricious and a denial of equal protection of the law because there was no rational basis for such actions. Petitioner also argues that in failing to provide her with proper notice of the termination of the subsidy that the Housing Authority acted arbitrarily and capriciously, and violated her rights to due process and equal protection of the law. Finally, Petitioner argues that the Housing Authority violated the housing assistance payment contract, of which Petitioner is the intended beneficiary as a remaining family member, by refusing the Petitioner an opportunity for a hearing to obtain a transfer of her subsidy.

In opposition, Respondents argue that the applicable law does not provide for remaining family member succession rights to a terminated subsidy. Second, Respondents argue that Petitioner did not and does not have standing to challenge the Housing Authority's determination to terminate Lidia Silva's subsidy. Additionally, Respondents argue that Petitioner's claims are time barred by the Statute of Limitations for an Article 78 proceeding because the Housing Authority terminated the subsidy in 2007. Further, Respondents state that the Housing Authority's decision to deny Petitioner remaining family member status is in accord with the Housing Authority policies and law.

Discussion

Initially, the Court finds that Petitioner does have standing to bring this Article 78 proceeding even though the Section 8 subsidy was never in the Petitioner's name. Standing requires that the Petitioner have a stake in the outcome of the proceeding. *LaBarbera v. Town of Woodstock*, 29 A.D.3d 1054, 1055 (2006). To establish standing, New York courts require that the petitioner show that he or she suffered an injury from the administrative action and "the interest asserted is arguably within the zone of interest to be protected by the statute." *Dairylea Coop. v. Walkley*, 38 N.Y.2d 6, 9 (1975); *see also Via v. Franco*, 223 A.D.2d 479, 479 (1st Dep't 1996) (The original Section 8 subsidy holder's sister had standing to challenge a Housing Authority determination denying remaining family member succession rights because she and her children would become homeless if the Housing Authority implemented the decision, and thus, she was within the "zone of interests" safeguarded by the regulation.) Here, Petitioner faces eviction from her apartment if the Housing Authority's determination is implemented, thus Petitioner clearly has an injury worthy of adjudication. Further, Petitioner was a member of Lidia Silva's Section 8 subsidy household, so she is within the "zone of interest" that the legislature intended to protect by enacting the remaining family member regulations.

Even though Petitioner has standing to bring this proceeding, the petition is barred by the four-month statute of limitations period for Article 78 review. This period begins when the agency's decision becomes final and binding, which occurs when the agency reaches a definitive position that imposes an actual, concrete injury, and that injury cannot be prevented or mitigated by further administrative action or other steps available

to the complaining party. *Best Payphones, Inc. v. Dep't of Information Technology and Telecommunications of the City of New York*, 5 N.Y.3d 30, 34 (2005). A letter unambiguously communicating the agency's final determination commences the running of the statute of limitations time period for bringing an Article 78 proceeding even where the letter provides an opportunity to submit documentation for reconsideration of the decision because the only way the determination can be changed is by acquiescing to the agency's demand. *Best Payphones, Inc.*, 5 N.Y.3d at 34-35.

Additionally, application for an agency to reconsider its decision does not extend the statute of limitations period within which an Article 78 proceeding must be commenced. *Todd v. New York City Housing Authority*, 262 A.D.2d 202, 202 (1st Dep't 1999). More importantly, "[i]n the absence of a statutory right to further proceedings, mere negotiations attempting to reopen a matter for further consideration will not extend the time in which to seek review." *Johnston v. Curry*, 68 A.D.2d 991, 991 (3rd Dep't 1979).

Here, the statute of limitations period started when the Housing Authority sent the T-1 Notice of Termination to Lidia Silva at the Petitioner's home in March 2007, and thus the four month statute of limitations period expired in July 2007. Even supposing the T-3 Notice of Termination marked the start of the statute of limitations period, this Article 78 proceeding would not be timely. The Housing Authority sent the T-3 Notice in June 2007 and the statute of limitations would have expired in October 2007, with Petitioner having filed this Article 78 proceeding some twenty-seven months late.

Moreover, Petitioner did not appeal the termination, and has no written record of her attempts to transfer the subsidy into her name. The fact that the Housing Authority permitted Lidia Silva to submit her recertification documents and request a hearing to challenge the determination does not change that the notice specifically and unambiguously terminated Lidia Silva's subsidy. The meeting scheduled for July 31, 2009 to revisit the termination of Lidia Silva's subsidy did not reopen the statute of limitations period, as the Housing Authority was under no statutory obligation to conduct it. Therefore, this Article 78 proceeding is dismissed as untimely.

In any event, were the court to consider the merits, the petition would be denied. In reviewing an administrative determination pursuant to Article 78, the Court may not substitute its own reasoning for that of the administrative agency and should respect the agency's "rational interpretation of its own regulations in its area of expertise." *Peckman v. Calogero*, 12 N.Y.3d 424, 431 (2009) (internal citations omitted). The Court should only overturn the agency's determination if the agency violated lawful procedure, used arbitrary and capricious reasoning, or abused its discretion, including an abuse of discretion as to the penalty imposed. CPLR 7803.

An administrative determination should be rationally supported and factually relevant, otherwise the determination is arbitrary and capricious. *Peckman*, 12 N.Y.3d at 431. The Housing Authority based its decision to terminate Lidia Silva's subsidy on her failure to recertify her income. The Section 8 subsidy contract requires that each family member in the Section 8 household annually recertify his or her income. Basing a decision on a subsidy household's violation of this contractual provision is a rational

interpretation of the Housing Authority's rules and regulations, and that interpretation should be respected.

Additionally, Petitioner's claim that the Housing authority acted arbitrarily and capriciously by not giving her proper notice of the termination is meritless, because Petitioner admittedly received both a Notice of Termination from the Housing Authority in June 2007 and thus clearly knew of the termination.

Finally, the Housing Authority did not act arbitrarily or capriciously by not transferring the subsidy into Petitioner's name because Petitioner did not follow the proper procedure to capitalize on her remaining family member status. She never filed a Notice to Vacate with the Housing Authority, and she did not request a hearing when she received the T-1 and T-3 Notices of Termination, thus missing her opportunity to explain to the Housing Authority the extenuating circumstances of Lidia Silva's incarceration and deportation and to resolve the discrepancy in her favor before the Housing Authority terminated the subsidy. Consequently, even if the statute of limitations did not bar this Article 78 proceeding, the petition would be denied based on the merits.

In accordance with the foregoing, it is

ORDERED and ADJUDGED that the petition is denied and this Article 78 proceeding is dismissed, without costs and disbursements to respondent.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York
September 13, 2010

ENTER:

Saham Pargamilla
Saham Pargamilla, 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).