

Matter of McLeod v New York City Hous. Auth.

2010 NY Slip Op 33282(U)

November 19, 2010

Supreme Court, New York County

Docket Number: 401238/10

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
- Kern J.S.C.
Justice

PART 52

SILVIA McCEDA

- v -

MICHA

INDEX NO. 401238/10
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

	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 is decided in accordance with the annexed decision.

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: 11/19/10 _____
CYNTHIA S. KERN J.S.C. CK

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 52

-----X
In the Matter of the Application of
SHNTHA MCLEOD,

Petitioner,

Index No. 401238/10

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

DECISION/JUDGMENT

-against-

NEW YORK CITY HOUSING AUTHORITY, and
NORTH BRONX ASSOCIATES,

Respondents.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	<u>3</u>

In this Article 78 proceeding, petitioner Shntha McLeod seeks to annul the determination of the New York City Housing Authority (the "Housing Authority") terminating her Section 8 subsidy for failing to permit the Housing Authority to inspect her apartment. The Housing Authority opposes petitioner's claim on the grounds that the claim is time-barred and that its actions were not arbitrary or capricious. This court denies petitioner's request for the reasons set forth below.

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 1212).

The Housing Authority, although an agency of the City of New York, is a public housing authority regulated and funded by the United States Department of Housing and Urban Development (“HUD”). The Housing Authority, among other agencies in New York City, administers the Section 8 housing program. Section 8 is a federally funded program that provides rent subsidies to low-income families so they may rent privately owned housing. *See generally* 42 U.S.C. § 1437f; 24 C.F.R. § 982 *et seq.* The Housing Authority administers the Section 8 program in accordance with HUD regulations and directives. HUD regulations require Section 8 recipients to permit the Housing Authority to inspect their apartments on at minimum an annual basis. *See* 24 C.F.R. § 982.405. If the recipient fails to comply with this regulation, the Housing Authority may terminate the Section 8 subsidy. *See* 24 C.F.R. §§ 982.551(d) & 982.552. However, if the Housing Authority elects to terminate a Section 8 subsidy participant, the Housing Authority must abide by the terms of the consent judgment entered in *Williams v. New York City Hous. Auth.*, Case No. 81-CV-1801, docketed October 17, 1984 (S.D.N.Y.)(Ward, J.). *Williams* – a federal challenge to the Housing Authority’s methods of terminating section 8 assistance – sets forth the guidelines the Housing Authority must follow before terminating a participant’s Section 8 subsidy. The details of the *Williams* consent judgment as it applies to the instant action will be discussed more fully below.

Petitioner was a recipient of a Section 8 housing subsidy. According to the Housing Authority, petitioner missed two inspection appointments scheduled for July 1, 2008 and July 25, 2008. The Housing Authority alleges that after petitioner missed the second inspection appointment, it sent a notice of termination of Section 8 subsidy dated August 4, 2008 (the “T-1 Notice”) by regular and certified mail. The T-1 notice advised petitioner that she had violated

her obligations under the Section 8 program by failing to permit her apartment to be inspected and informed her that she could request a hearing within 20 days of the letter. Petitioner did not respond to this letter and did not request a hearing. According to the Housing Authority, it sent another notice of termination of subsidy dated September 5, 2008 (the "T-3 Notice") by regular and certified mail. The T-3 Notice informed petitioner that her Section 8 subsidy would be terminated 45 days after the letter but she could still request a hearing. Petitioner did not respond to the letter and did not request a hearing. The certified copies of the T-1 and T-3 notices were returned to the Housing Authority as unclaimed but the notices sent by regular mail were not returned. On November 30, 2008, more than 45 after the mailing of the T-3 notice, the Housing Authority moved petitioner off of the Section 8 program. Petitioner alleges that she was "never notified of the termination" and that although she was home on the dates of the inspection, she did not know that the inspector came to her apartment building because her buzzer was broken.

There is a four month statute of limitations to bring an Article 78 proceeding to challenge an administrative determination that is measured from the date the determination becomes final and binding upon the petitioner. CPLR § 217(1). In accordance with the *Williams* consent judgment cited above, the determination to terminate a subsidy becomes final and binding upon the receipt of the Notice of Default [T-3 Notice]. See *Williams*, Case No. 81-CV-1801; *Fair v. Finkel*, 284 A.D.2d 126, 128 (1st Dept 2001). "[A]ffidavits attesting to service by mail ... create a rebuttable presumption of proper delivery and receipt" See *Northern v. Hernandez*, 17 A.D.3d 285, 286 (1st Dept 2005). In accordance with *Williams*, there is a "rebuttable presumption of receipt" of the notice on the fifth day following the date of mailing. Although

the presumption is rebuttable, "a mere conclusory denial of receipt would be insufficient to rebut that presumption." See *Northern*, 17 A.D.3d at 286.

Petitioner is time-barred from bringing the instant action as the four-month statute of limitations for petitioner's Article 78 challenge has expired. The Housing Authority met its burden of demonstrating proper delivery and receipt by submitting an affidavit attesting to service of the T-3 Notice by regular and certified mail on September 5, 2008. On the other hand, petitioner has failed to meet her shifting burden of rebutting the presumption of proper delivery and receipt because petitioner has failed to provide any evidence that she did not receive the notices apart from her conclusory denial. Therefore, in accordance with the *Williams* consent order, the statute of limitations began running on September 10, 2008, the fifth day following the mailing of the T-3 Notice, and expired on January 10, 2009. Since petitioner did not commence her action until May 6, 2010, nearly four months after the expiration of the statute of limitations, petitioner is time-barred from bringing the instant action.

Accordingly, the court denies petitioner's request for relief under Article 78 of the CPLR and dismisses the proceeding in its entirety. This constitutes the decision, order and judgment of the court.

Dated: 11/19/10

Enter: CK
J.S.C.

CYNTHIA S. KERN
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 1717).