

Matter of Tijani v Cestero
2010 NY Slip Op 33369(U)
December 3, 2010
Supreme Court, New York County
Docket Number: 400948/10
Judge: O. Peter Sherwood
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: O. PETER SHERWOOD
Justice

PART 61

In the Matter of the Application of
AYOTOKUNBO TIJANI,

Petitioner,

-against-

RAFAEL CESTERO, *et al.*,

Respondents.

INDEX NO. 400948/10

MOTION DATE July 2, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO. 82

The following papers, numbered 1 to 5 were read on this petition pursuant to CPLR Article 78

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

3-4

5

Cross-Motion: Yes No

Upon the foregoing papers, this CPLR Article 78 petition is decided in accordance with the accompanying 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 1415).

Dated: 12/3/10

O.P. Sherwood
O. PETER SHERWOOD, 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 61

-----X

In the Matter of the Application of
AYOTOKUNBO TIJANI,

DECISION, ORDER
AND JUDGMENT

Petitioner,

Index No. 400948/2010

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

-against-

UNFILED JUDGMENT

RAFAEL CESTERO as Commissioner of the New York City Department of Housing Preservation and Development and THE NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT and SEA PARK WEST, L.P.,

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).

Respondents.

-----X

O. PETER SHERWOOD, J.:

In this proceeding pursuant to CPLR Article 78, petitioner seeks a judgment annulling the determination of respondents Rafael Cestero, as Commissioner of the New York City Department of Housing Preservation and Development and The New York City Department of Housing Preservation and Development (collectively "HPD") terminating her Section 8 rent subsidy on the ground that the determination was arbitrary and capricious and reinstating same retroactive to the date of its termination, or, alternatively, remanding the matter to HPD for a hearing. Petitioner also seeks a stay of a non-payment proceeding commenced against her by respondent Sea Park West, L.P. ("Sea Park") in the Housing Part of the New York City Civil Court, Kings County. The petition is opposed by HPD.

Background

Petitioner is a tenant in apartment 16H4, located at 2929 West 31st Street, Brooklyn, New York (the "Building"). The Building is owned and operated by Sea Park and is part of a low- and middle-income, federally-subsidized residential housing complex (Verified Petition, ¶¶ 3, 5, 17). As part of Sea Park's restructuring and refinancing of its mortgage, Housing Choice Vouchers under the Federal law-income housing assistance program, also known as the Section 8 program (*see* 42

U.S.C. § 1437 [a][1][a]; 24 C.F.R. § 982.1 [a)]¹, were issued to Sea Park tenants in mid-2004 and 2005 (*id.* ¶ 20). By application dated March 29, 2004, petitioner, as a Sea Park tenant, submitted a Section 8 Existing Housing Program Application for Rental Assistance (Verified Answer, ¶ 44, Ex. “B”). The application was approved and on April 26, 2004, HPD issued petitioner a Section 8 voucher, which petitioner signed and which enumerated the rules of the Section 8 Program (*id.* ¶ 45, Ex. “C”). Section 4 titled “Obligations of Family” provides, in relevant part, that in order for a family to continue participating in the Section 8 program: B. “[t]he family must:

1. Supply any information that the PHA [public housing agency] or HUD determines to be necessary including evidence of citizenship or eligible immigration status, and information for use in a regularly scheduled reexamination or interim reexamination of family income and composition.

HPD also entered into a Housing Assistance Payment contract (“HAP Contract”) with Sea Park for a lease term beginning December 1, 2004 and expiring November 30, 2005 (*id.* ¶ 46, Ex. “D”). Pursuant to the Section 8 rules and regulations, HPD sent petitioner a 2006 recertification package which contained an advisement that failure to submit the recertification package and required documentation might result in the termination of her Section 8 subsidy (*id.* ¶ 47).

After receiving no response from petitioner, HPD sent petitioner a follow-up Request for Additional Information form on March 15, 2007, which directed that petitioner submit certain documents related to family composition and income and cautioned that her failure to submit the requested documentation within fifteen (15) days of the date of the letter could result in termination of her Section 8 subsidy (*id.* ¶¶ 49-50, Ex. “E”).

On March 30, 2007, when petitioner again failed to respond, HPD sent a pre-termination notice of Section 8 non-compliance (“Pre-Termination Notice”) which advised petitioner that her Section 8 subsidy may be terminated due to her failure to submit the requested documentation. Petitioner was further advised that she could request a conference with a HPD staff member within fifteen (15) days of the date of the Pre-Termination Notice and that her failure to respond within

¹ For a brief description of the regulatory framework of the program see *Matter of Ortiz-Taitt v. Hernandez*, 2009 NY Slip Op 31612U; 2009 NY Misc LEXIS 4147 (NY Sup 2009).

fifteen (15) days may result in termination of her Section 8 rent subsidy. (*id.* ¶¶ 51-52, Ex. "F"). HPD claims that the Pre-Termination Notice was sent to petitioner by regular and certified mail (*id.*).

Petitioner did not request a conference or otherwise respond to the Pre-Termination Notice. Accordingly, on April 17, 2007, a HPD Section 8 Case Manager recommended that HPD terminate petitioner's Section 8 rent subsidy because petitioner failed to submit the requisite documentation to process her annual recertification and did not respond to the Pre-Termination Notice (*id.* ¶ 54, Ex. "G"). HPD's Section 8 Director also recommended that petitioner's Section 8 rent subsidy be terminated due to her failure to comply with the annual recertification procedures or to respond to the Pre-Termination Notice (*id.*).

A Notice of Section 8 Subsidy Termination, dated May 7, 2007 ("Termination Notice") was sent to petitioner allegedly by regular and certified mail (*id.* ¶¶ 56, 58, Ex. "H"). The Termination Notice advised petitioner that she could appeal HPD's determination by requesting an informal hearing within twenty-one (21) days of the date of the Termination Notice and that her failure to respond to the Termination Notice within twenty-one (21) days would result in termination of her Section 8 rent subsidy as of June 30, 2007 (*id.* ¶ 57). Petitioner did not request an informal hearing or otherwise respond to the Termination Notice (*id.* ¶ 59).

On April 12, 2010, petitioner commenced the instant CPLR Article 78 proceeding by filing the Notice of Petition and Verified Petition seeking to annul HPD's determination terminating her Section 8 rent subsidy and to have the Section 8 rent subsidy reinstated, or, alternatively, for an informal hearing at HPD. The petition which is verified by petitioner alleges that she never received any notification that HPD was planning to terminate her Section 8 rent subsidy or had already done so (Ver. Pet. ¶¶ 26, 31). Petitioner claims that she first learned that her Section 8 rent subsidy had been terminated in 2007 from documents she obtained by subpoena at the end of 2009 in connection with a summary non-payment proceeding commenced against her by Sea Park in the Housing Part of the New York City Civil Court, Kings County, titled *Sea Park West, L.P. v Tijani*, Index No. L&T 10252/2009 (the "Nonpayment Proceeding") (*id.*). Petitioner claims further that in 2007 or 2008 she noticed a change in the account number on her rent bills and inquired at the Sea Park management office about the change and was told not to worry about it and continue to pay her portion of the monthly rent (*id.* ¶¶ 27-28). Although the petition in the non-payment proceeding alleged that

petitioner's monthly rent was \$928.00, petitioner contends that she was paying a monthly rent of \$416.00, an amount set by HPD (*id.* ¶ 30).

Petitioner states that if she loses her Section 8 rent subsidy and, as a result, her apartment, the health of her 15-year old son Babahinde, who has physical and mental disabilities and suffers from seizures, will be jeopardized, and she will be forced to leave her job to care for him full-time.

Petitioner contends that HPD's failure to notify her of its intention to terminate her Section 8 rent subsidy deprived her of due process, which requires that she receive notice and an opportunity to be heard. She also contends that HPD's determination is arbitrary and capricious and an abuse of discretion as to the measure of the penalty imposed. Petitioner seeks to stay prosecution of the Nonpayment Proceeding pending the resolution of this proceeding.

HPD in its answer contends that petitioner's belated request for an informal hearing should be denied as she never made such a request in response to the Termination Notice and her time to do so has long since expired. Although HPD has not cross moved to dismiss, it contends in its answer that the petition must be dismissed as time-barred, as the four-month statute of limitations for commencing a CPLR Article 78 proceeding commenced to run on May 7, 2007, when the Termination Notice was mailed to petitioner, and expired on September 7, 2007. Lastly, HPD contends its determination to terminate petitioner's Section 8 rent subsidy based upon petitioner's failure to submit her 2006 recertification package is reasonable and has a rational basis in the record.

Discussion

In a CPLR Article 78 proceeding, the court's review is limited to a determination of whether an administrative determination was made in violation of lawful procedure or is arbitrary and capricious or is an abuse of discretion (CPLR § 7803; *see Matter of Pell v Bd. of Educ.*, 34 NY2d 222, 231 [1974]). Whether or not a determination is arbitrary and capricious "relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is . . . without sound basis in reason and is generally taken without regard to the facts." (*Id.*). Where there is a rational basis to support the finding and conclusions of an administrative agency, a court may not substitute its judgment for that of the agency (*see Howard v. Wyman*, 28 NY2d 434, 438 [1971] ("The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body"); *Walker v. Franco*, 275 AD2d 627, 628 [1st Dept

2000] [“The decision need not be the best which could have been made and need not be free from flaws - it must only have a rational basis”]; *Montgomery v. New York City Hous. Auth.*, 56 AD2d 778 [1st Dept 1977] [reviewing court’s duty “had been completed, when it satisfied itself that there was a rational basis for the administrative determination”]). However, even if the challenged administrative determination is not arbitrary and capricious, it may be set aside if the punishment or penalty imposed “is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one’s sense of fairness” (*Matter of Pell*, 34 NY2d at 233).

The Statute of Limitations for Article 78 proceedings is four months and runs from the time the determination to be reviewed becomes final and binding on petitioner (CPLR § 217 [1]). An administrative determination becomes final and binding, thereby triggering the four month statute of limitations, when the petitioner is aggrieved by it (*see Yarbough v Franco*, 95 NY2d 342, 346 [2000]; *Rocco v Kelly*, 20 AD3d 364 [1st Dept 2005]). The determination to terminate a Section 8 rent subsidy becomes final and binding upon receipt of the adverse determination, here, the Termination Notice (*see Smith v New York City Hous. Auth.*, 2010 WL 3536824 [Sup. Ct., N.Y. Co. 2010]; *Matter of Singletary v Hernandez*, 9 Misc3d 1127 [A] *4 [Sup. Ct. Kings Co. 2005]; *Matter of Almeida v Hernandez*, 9 Misc3d 986 [Sup. Ct. Kings Co. 2005]). Thus, it is the date of receipt of the notice, rather than the date of the mailing of the notice, which starts the running of the four month limitations period.

Here, HPD claims to have sent both the Pre-Termination Notice and the Termination Notice by regular and certified mail. Annexed to HPD’s answer as Exhibit “F” is a copy of the Pre-Termination Notice, dated March 30, 2007, allegedly mailed to petitioner, together with a copy of a certified mail receipt, bearing petitioner’s name and address but indicating no date of mailing, and a copy of an unsigned return receipt also bearing petitioner’s name and address. Annexed as Exhibit “H” is the Termination Notice, dated May 7, 2007, together with a request that it be mailed by certified mail, an undated certified mail receipt and an unsigned return receipt. The answer is verified by Catherine Patterson, the Coordinator of HPD’s Subpoena Unit/Housing Court for the Division of Tenant Resources, who states that the source of her information and the basis for her belief “are the books and records of the HPD and discussions with employees of the City of New York”.

Although there is a presumption of receipt of notices five days after mailing (*see Matter of Almeida*, 9 Misc3d at 989), such presumption is refuted here by petitioner's sworn statements as to the non-receipt of the pertinent documents (*id.*; *see Matter of Drew v Donovan*, 2008 WL 5375248 [Sup. Ct., N.Y. Co. 2008]; *Matter of Singletary*, 9 Misc3d at *4). HPD's submitted evidence is wholly inadequate to contradict petitioner's denial of receipt. HPD proffers no documentary evidence that the first class mailing of the subject notices was made or to establish that the alleged certified mailings were actually sent to petitioner or, if they were, the date of such certified mailings. Nor has HPD submitted an affidavit by anyone with personal knowledge attesting that the subject notices were sent to petitioner by regular and certified mail. Consequently, the court cannot hold that the four month limitations period had even commenced to run prior to the filing of this Article 78 petition and, therefore, the proceeding is not time barred. Under these circumstances, the court further finds that petitioner is entitled to an informal hearing to resolve the genuine factual issues as to the termination of her Section 8 rent subsidy.

Accordingly, it is

ORDERED AND ADJUDGED that the petition is granted and the matter is remanded to respondent The New York City Department of Housing Preservation and Development for an informal hearing on the termination of petitioner's Section 8 rent subsidy; and it is further

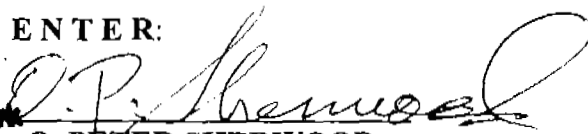
ORDERED that the non-payment proceeding titled *Sea Park West, L.P. v Tijani*, Index No. L&T 10252/2009, pending in the Housing Part of the New York City Civil Court, is hereby stayed during the pendency of the proceedings before The New York City Department of Housing Preservation and Development; and it is further

ORDERED that petitioner shall continue to pay use and occupancy/rent without prejudice to any claims or defenses in the Housing Court proceeding.

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

DATED: December 3, 2010

ENTER:



O. PETER SHERWOOD

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 141B).