

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

2011 NY Slip Op 30263(U)

February 4, 2011

Supreme Court, New York County

Docket Number: 401059/2010

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  
PATRIA LOPEZ

Petitioner,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

INDEX NO. 401059-2010

MOTION DATE Oct. 13, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO. 66

The following papers, numbered 1 to 6 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

3-6

Cross-Motion:  Yes  No

Upon the foregoing papers, the petition to annul a determination of respondent New York City Housing Authority 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 1419).

Dated: 2/4/11

O. P. Sherwood  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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  
PATRIA LOPEZ,

DECISION, ORDER  
AND JUDGMENT

Petitioner,

Index No. 401059/2010

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

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

**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).

-----X  
O. PETER SHERWOOD, J.:

In this proceeding pursuant to CPLR Article 78, petitioner Patria Lopez (“petitioner” or “Lopez”) *pro se* seeks a judgment reversing the determination of respondent New York City Housing Authority (“NYCHA”) terminating her Section 8 rent subsidy for failure to comply with the annual recertification process and restoring same retroactive to the date of its discontinuance. The petition is opposed by NYCHA which seeks dismissal of the petition on the grounds that the claim is barred by the applicable statute of limitations and further that its determination terminating petitioner’s section 8 subsidy is neither arbitrary nor capricious, is rational and is in compliance with federal regulations and NYCHA’s policies.

*Background*

Petitioner is a tenant in apartment 6J, located at 1459 Wythe Place, Bronx, New York (the “Building”) and was a participant 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])<sup>1</sup>. NYCHA administers the Section 8 program and pays rent subsidies to participating landlords on behalf of participating tenants. In order to maintain eligibility in the Section 8 program, participants must recertify their total household income on an annual basis (*see* 24 C.F.R. §§ 982.516, 982.551). Section 8 regulations also require that recipients allow the Housing Authority to inspect their apartments at

<sup>1</sup> For a brief description of the regulatory framework of the program *see Matter of Ortiz-Taitt v. Hernandez*, 2009 NY Slip Op 31612U; 2009 WL 2221466 (NY Sup 2009).

least annually at reasonable times and after reasonable notice to assess whether they continue to meet housing quality standards (*see* C.F.R. §§ 982.405, 982.551 [d]). If the recipients fail to meet their obligations under the Section 8 program, the Housing Authority may terminate the Section 8 subsidy (Ver. Ans. ¶¶ 7, 10; C.F.R. § 982.552).

The Housing Authority's administration of its Section 8 program is subject not only to rules established by the federal law (42 U.S.C. § 1437 [f]), but is also subject to a federal consent decree entered in the case of *Williams v New York City Housing Authority* (81 Civ. 1801 [R.J.W.] [S.D.N.Y. 1984]) (the "Williams Consent Decree") which sets forth comprehensive notice procedures which must be followed before a Section 8 subsidy may be terminated (Ver. Ans. ¶ 11, Ex. "A"). Those procedures provide that no fewer than three notices must be sent to the Section 8 participant before the subsidy is terminated. After a preliminary determination is made that the participant is subject to having his or her subsidy terminated, NYCHA must send a letter specifically stating the basis for the termination. If the conditions which led to the preliminary determination are not met, NYCHA must send a second notice, which NYCHA calls a "T-1 Notice", providing the specific grounds for termination and advising the participant that he or she may request a hearing. If the participant does not respond, NYCHA must mail a Notice of Default, which NYCHA calls a "T-3 Notice", informing the participant that the rent subsidy will be terminated, advising him or her of the grounds for the termination and the right to request a hearing. All three notices must be sent by regular and certified mail. This mailing procedure is required to increase the likelihood that the participant will actually receive the notice. The Williams Consent Decree further provides that "there is a rebuttable presumption of receipt of the requests or notices referred to herein on the fifth day following the date of mailing" (Ex. "A", ¶ 22 [g]). If the participant does not to respond to the "T-3 Notice", the Section 8 subsidy is terminated on the 45<sup>th</sup> calendar day following the date of mailing of the Notice of Default. For statute of limitations purposes, the Williams Consent Decree provides that "the determination to terminate a subsidy shall, in all cases, become final and binding upon receipt of the . . . Notice of Default" (Ex. "A" ¶ 22 [f]). "The burden rests on the agency to establish that the requisite notice of an action or hearing was given" (*see 72A Realty Assocs. v New York City Env'tl. Control Bd.*, 275 AD2d 284, 286 [1<sup>st</sup> Dept 2000], quoting *Matter of Bludson v Popolizio*, 166 AD2d 346, 347 [1<sup>st</sup> Dept 1990], *lv. dismissed* 77 NY2d 938 [1991], *lv. denied* 78 NY2d 854 [1991]).

On or about August 31, 2008, NYCHA terminated petitioner's Section 8 subsidy because she failed to comply with the re-certification procedures by failing to submit her completed income affidavit and other documents necessary to determine her eligibility for continuation in the Section 8 program and in failing to respond to either the T-1 or the T-3 notices (*see* Ver. Ans. ¶¶ 14-16; Affidavit of Catrice Houser in support of Verified Answer [Houser Aff.], Ex. "5"). In April 2009, NYCHA began the process of restoring petitioner to the Section 8 program. In furtherance thereof, NYCHA submitted a request to its Inspections Unit to conduct an inspection of the apartment where petitioner resided (Ver. Ans. ¶ 17, Ex. "D"). By letter dated May 19, 2009, NYCHA advised petitioner that an inspection of her apartment would be conducted on May 29, 2009 between 8:00 a.m. and 4:00 p.m. NYCHA calls such notice a "N-1 letter". The N-1 letter contained the following proviso: "YOUR CONTINUED ELIGIBILITY FOR A RENT SUBSIDY IS DEPENDENT ON OUR INSPECTING YOUR APARTMENT". Thus, petitioner was advised further that she should be certain to be home during the noted hours or make arrangements so that the inspection could be conducted even if she was not home (*id.* Ex. "E").

Petitioner was not home on the May 29, 2009 scheduled inspection date. Accordingly, NYCHA sent petitioner a second N-1 letter, dated June 2, 2009, informing her that an inspection of her apartment was scheduled on June 15, 2009, between 8:00 a.m. and 4:00 p.m. The letter contained the same advisements as the previous N-1 letter (*id.* Ex. "G"). Again petitioner was not home at the time of the scheduled inspection (*id.* ¶ 19, Ex. "F").

A third N-1 letter, dated June 16, 2009, which was essentially identical to the previous two N-1 letters, was sent to petitioner informing her that an inspection of her apartment would be conducted on July 1, 2009, between 8:00 a.m. and 4:00 p.m. (*id.* ¶ 20, Ex. "H"). Again the petitioner was not home on the date of the scheduled inspection (*id.*, Ex. "F").

A fourth N-1 letter, dated July 14, 2009, and containing the same advisements as previously, informed petitioner that an inspection of her apartment was scheduled for July 27, 2009, between 8:00 a.m. and 4:00 p.m. (*id.* ¶ 21, Ex. "I"). Petitioner again was not home at the time of the scheduled inspection (*id.* ¶ 21, Ex. "F"). At that point, because petitioner repeatedly failed to allow her apartment to be inspected by NYCHA, her restoration to the Section 8 program could not be

completed and the termination of petitioner's Section 8 subsidy remained in effect as of August 31, 2008.

On April 23, 2010, petitioner *pro se* commenced the instant CPLR Article 78 proceeding by filing the Notice of Petition and Verified Petition seeking to annul NYCHA's determination terminating her Section 8 rent subsidy and to have the Section 8 rent subsidy reinstated. The petition, which is verified by petitioner, alleges that she has "ample proof and witness to lies and deception" (Petition ¶ 3). While petitioner lists certain documents, presumably in support of her petition, the only document actually appended to the petition is a letter from NYCHA, dated March 25, 2010, which indicates that it is in response to petitioner's request to be restored to the Section 8 program. In the letter, NYCHA recounts the details of mailing of the T-1 and T-3 notices to petitioner and states that she failed to timely request a hearing or comply with the recertification process and, therefore, her request for restoration to the Section 8 program was denied. Petitioner circles a portion of the letter referring to the mailing of the T-3 Notice of Default and has handwritten notations that indicate that she has a witness that she went "numerous times with a friend and was told its being reviewed" (an apparent reference to her request to be restored to the Section 8 program) and further inquiring as to the return receipt bearing her signature as to the certified mailing of the T-3 Notice of Default.

NYCHA 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 June 21, 2008, which was 5 days after the T-3 Notice of Default was mailed to petitioner, and expired on October 21, 2008. Thus, the petition filed on April 23, 2010, more than 21 months after NYCHA mailed the Notice of Default, is untimely. Alternatively, NYCHA contends its determination to terminate petitioner's Section 8 rent subsidy based upon petitioner's failure to submit her recertification package is reasonable and has a rational basis in the record. NYCHA contends that although it had mailed her a T-1 letter advising her of the termination of her Section 8 subsidy and a T-3 letter noticing her default, petitioner failed to request a hearing or otherwise respond to the notices. Accordingly, NYCHA contends that it properly terminated petitioner's Section 8 benefits on August 31, 2008, as petitioner was given ample opportunity to preserve her Section 8 subsidy and failed to either submit the requisite documents for her income review, request

a hearing, or, even after her Section 8 subsidy was terminated, to allow NYCHA to conduct an inspection of her apartment so that NYCHA could consider whether to restore her to the Section 8 program.

Annexed to NYCHA's verified answer is an affidavit of Catrice Houser, who from June 2000 to August 2009 was the secretary of NYCHA's Bronx Office of Leased Housing Division. In that position, Ms. Houser was responsible for preparing T-1 and T-3 notices to Section 8 tenants in cases in which tenants failed to complete their income affidavit and other documents necessary for their continued eligibility in the Section 8 program. She details her practice of preparing such notices for mailing. In this respect, after preparing the notices and inserting them into a "window envelope" with the name and address showing through the window, she entered the certified mailing number together with the tenant's name and address on an "Accountable Mailing Log". She then prepared an identical notice for regular mailing. Ms. Houser then deposited the two notices in a mail bag which was picked up by a NYCHA mailroom employee who would take the bag to NYCHA's mail center at 250 Broadway for mailing. Ms. Houser asserts that neither the certified nor regular mail envelopes of the T-1 or T-3 notices sent to petitioner were returned. The Accountable Mail Log, which is annexed to Ms. Houser's affidavit as Exhibit "2", indicates by a stamp of the United States Postal Service that the T-1 notice to petitioner was accepted for mailing on May 20, 2008, and that the T-3 notice was accepted for mailing on June 16, 2008.

#### *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 [1<sup>st</sup> 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 [1<sup>st</sup> Dept 1977] [reviewing court’s duty “had been completed, when it satisfied itself that there was a rational basis for the administrative determination”]).

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 [1<sup>st</sup> Dept 2005]). The determination to terminate a Section 8 rent subsidy becomes final and binding upon receipt of the T-3 Notice of Default (*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.

In accordance with the Williams Consent Decree, there is a presumption of receipt of the notice five days after mailing. Although such presumption is rebuttable, a conclusory denial does not suffice to rebut the presumption of receipt established by proof of proper mailing (*see Stephanie R. Cooper, P.C. v Robert*, 78 AD3d 572 [1<sup>st</sup> Dept 2010]; *Northern v Hernandez*, 17 AD3d 285, 286 [1<sup>st</sup> Dept 2005]).

Here, the court finds that NYCHA’s determination terminating petitioner’s Section 8 subsidy was arbitrary and capricious because NYCHA did not fully comply with the notice procedures outlined in the Williams Consent Decree. Although NYCHA met its burden of demonstrating proper delivery and receipt of the T-1 and T-3 notices by submitting an affidavit and other documentation attesting to the service of such notices by certified and regular mail, there is no proof that NYCHA mailed the initial warning notice. Since the record reflects that NYCHA mailed only two of the three required notices, the termination of petitioner’s Section 8 subsidy was in violation of lawful procedure (*see CPLR 7803 [3]; Matter of Robinson v Martinez*, 308 AD2d 355 [1<sup>st</sup> Dept 2003]; *Matter of Fair v Finkel*, 284 AD2d 126, 129 [1<sup>st</sup> Dept 2001]). Since the notice was defective, the statute of limitations did not begin to run (*see Matter of Matos v Hernandez*, 10 Misc3d 1068 [A]

[Sup Ct, N.Y. Co. 2005]; *Matter of Solanges v Hernandez*, 2005 WL 5960229 [Sup Ct N.Y. Co. 2005]; *Quesada v Hernandez*, 5 Misc3d 1028 [A] [Sup Ct N.Y. Co. 2004]). Consequently, the court finds that petitioner's challenge to NYCHA's termination of her Section 8 subsidy is timely.

Based upon the foregoing, it is

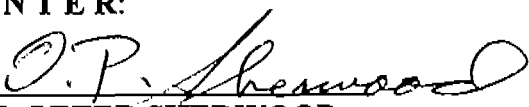
**ADJUDGED** that the petition is granted to the extent that the determination of NYCHA terminating petitioner's Section 8 subsidy effective August 31, 2008 is annulled; and it is further

**ORDERED** that NYCHA is hereby directed to reinstate petitioner to her Section 8 subsidy retroactive to August 31, 2008 pending its final determination on the merits after a hearing and pay any rent subsidy amount that has not been issued because of the unlawful termination; and it is further

**ORDERED** that this proceeding is remanded to respondent NYCHA for a hearing on the merits of the petitioner's compliance with the re-certification procedures for continued participation in the Section 8 program.

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

DATED: 2/4/11

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).