

Whitaker v New York State Child Support Collection Unit (CSCU)
2011 NY Slip Op 31786(U)
June 27, 2011
Supreme Court, New York County
Docket Number: 401463/2010
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

SALIANN SCARPULLA

PRESENT: _____
Justice

PART 19

Barbara Whitaker

INDEX NO. 40/463/2010

MOTION DATE 3/9/11

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

NYSCSC

Article 78 petition

The following papers, numbered 1 to 2 were read on this ~~motion~~ Article 78 petition for _____

PAPERS NUMBERED

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

2

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ Article 78 petition is decided in accordance with the accompanying memorandum 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: 6/27/11

Saliann Scarpulla
SALIANN SCARPULLA, 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: CIVIL TERM: PART 19

-----X
BARBARA WHITAKER,

Plaintiff,

- against -

Index No.: 401463/2010
Motion Sequence No.: 1
Submission Date: 3/9/11

NEW YORK STATE CHILD SUPPORT
COLLECTION UNIT (CSCU),

DECISION AND ORDER

Defendant.

-----X

For Plaintiff:
Barbara Whitaker, *pro se*
210 W. 79th St.
Apt. 2F
New York, NY 10024

For Defendants:
Elizabeth Haynes, Esq.
Child Support Litigation Unit
180 Water Street, 18th Floor
New York, NY 10038

Papers considered in review of this order to show cause and cross motion to dismiss:
Order to Show Cause.....1
Notice of Cross Motion.....2
Dec in Opp.....3

HON. SALIANN SCARPULLA, J.:

In this Article 78 proceeding, petitioner Barbara Whitaker (“Whitaker”) challenges respondent New York City Human Resources Administration s/h/a New York State Child Support Collection Unit’s (“CSCU”) denial of her request to take further action to collect child support arrears that she is allegedly owed by her son’s father, James Phelps (“Phelps”). Whitaker seeks an order directing CSCU to pay her the back child support arrears, in the amount of \$21,274.41 and additional monetary compensation for emotional distress and loss of her rent-stabilized apartment in the amount of \$1,250,000.00. CSCU cross-moves to dismiss the petition.

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In her petition, Whitaker alleges that CSCU failed properly to collect the child support arrears from Phelps. Whitaker alleges that she contacted CSCU on December 31, 2008, to request that CSCU deduct more money from Phelps's income towards the child support arrears. CSCU declined this and all other subsequent requests from Whitaker. Whitaker further alleges that because of the CSCU's actions, she suffered emotional distress and was evicted from her rent-controlled apartment.

CSCU cross-moves to dismiss this petition arguing *inter alia* that the petition: (1) is time barred under the statute of limitations; (2) fails to state a cause of action; and (3) is barred by the Supremacy Clause of the United States Constitution.

Discussion

An Article 78 proceeding may only be brought in a certain set of circumstances. An Article 78 proceeding is appropriately brought to determine “whether the body or officer failed to perform a duty enjoined upon it by law” (CPLR 7803 (1)) or “whether a determination was [. . .] affected by an error of law or was arbitrary and capricious or an abuse of discretion” (CPLR 7803 (3)). Article 78 proceedings are also appropriate to: prevent a judicial or quasi-judicial authority from proceeding “without or in excess of jurisdiction” (CPLR 7803 (2); *Dondi v. Jones*, 40 N.Y.2d 8, 13 (1976)); to review the formal decision of an agency after a hearing (CPLR 7803 (4)); or to challenge the decision of a state official in the area of education (CPLR 7803 (5)).

An Article 78 proceeding brought to compel a body to perform a duty required under the law, an action formerly known as a writ of mandamus, “[. . .] is an appropriate remedy to compel performance of a statutory duty that is ministerial in nature

[* 4]

but not one in respect to which an officer may exercise judgment or discretion.” *Liggett v. Pichler*, 142 A.D.2d 206, 210 (1st Dept. 1988), quoting *Posner v. Levitt*, 37 A.D.2d 331, 332 (3rd Dept. 1971). See also *Matter of Maron v. Silver*, 14 N.Y.3d 230 (2010); *Gimprich v. Board of Education of the City of New York*, 306 N.Y. 401 (1954); *People ex rel. Hammond v. Leonard*, 74 N.Y. 443, 445 (1878).

Here, Whitaker has filed this Article 78 petition alleging that CSCU has failed to comply with her requests to take further and different action against Phelps. Essentially, Whitaker alleges that CSCU has failed to perform its duty in accordance with the applicable law. Whitaker’s main complaint stems from the fact that she believes CSCU should have deducted sixty-five percent of Phelps’ wages, instead of the fifty-five percent that the CSCU was deducting. It is unclear from her petition on what ground Whitaker seeks Article 78 relief. As Whitaker is prosecuting this proceeding *pro se* the Court will treat her petition as seeking both mandamus relief and review under the “arbitrary and capricious” standard.

The CPLR provision pursuant to which CSCU executed against Phelps’ wages (CPLR 5242 (c) (2) (i)) and the provision that Whitaker believes to be applicable (CPLR 5242 (c) (2) (ii)) both state that the amount deducted by the employer “shall not exceed” the given percentage. This language clearly demonstrates that the CSCU has a sufficient degree of discretion to determine the deduction to be taken, and its wage deduction authority is not simply the application of a ministerial act. As such, mandamus to compel does not lie. See *Mullen*, 74 N.Y.2d at 583; *Stratton v. Lyons*, 36 N.Y.2d 686 (1975)

(“mandamus [. . .] was particularly inappropriate where a relevant statutory duty involved the exercise of judgment and discretion”).

In addition, the Court finds that CSCU’s action with regards to collecting the child support arrears owed to Whitaker was not arbitrary or capricious. Whitaker has failed to show that CSCU was acting in bad faith to recover the arrears, and has submitted no evidence, other than her belief that CSCU should have deducted more, to show that CSCU was acting in any way contrary to the law. For example, while Whitaker claims that the amount of income collection should be increased due to the emancipation of Phelps’ other dependent, Whitaker has failed to provide any documentation to support this allegation. She has also failed to show that CSCU did not consider any alleged emancipation of other dependents or even that CSCU had, but chose to ignore, such alleged evidence.

Lastly, Article 78 proceedings are meant to address the determination of an administrative agency, but a petitioner may seek damages if the damages are incidental to the primary relief sought. *Gross v. Perales*, 72 N.Y.2d 231 (1988). But, “where a party seeks only money damages against the State, the proper forum for such an action is the Court of Claims.” *Id.* at 235 (internal citations omitted).

Here, Whitaker has not only requested monetary relief incidental to the challenged administrative determination, but has also sought to introduce independent tort claims for negligent infliction of emotional distress against CSCU. Whitaker’s \$1,250,000.00 claim of tort damages eclipses her request for additional child support of \$21, 274.41. Whitaker must assert her tort claims in a plenary action, not through the limited scope of

an Article 78 proceeding. *See City of New York v. Wing*, 12 A.D.3d 180 (1st Dept. 2004) (holding that an Article 78 proceeding may properly be dismissed “on the ground that it essentially seeks to recover money damages on the ground of negligence”).

In accordance with the foregoing, it is hereby

ORDERED and ADJUDGED that the motion to dismiss the petition by defendant New York City Human Resources Administration s/h/a New York State Child Support Collection Unit is granted; and it is further


ORDERED and ADJUDGED that the petition of Barbara Whitaker is denied and dismissed.

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

Dated: New York, New York

June 27, 2011

ENTER:


Saliann Scarpulla, J.S.C.

UNFILED JUDGMENT

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