

**Nuraina v State of New York Off. of Temporary
Disability Assistance**

2011 NY Slip Op 32746(U)

October 4, 2011

Supreme Court, New York County

Docket Number: 401317/11

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice

Part 36

HAMED NURAINA and CHERYL NURAINA,

Petitioners,

**STATE OF NEW YORK OFFICE OF TEMPORARY
DISABILITY ASSISTANCE and SETH DIAMOND,
Commissioner of Department of Homeless Services.**

Respondents.

INDEX NO. 401317/11

MOTION SEQ. NO. 001

FILED

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The following papers, numbered 1-5 were considered on this Article 78:

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NUMBERED**

PAPERS

Notice of Motion/Order to Show Cause, — Affidavits — Exhibits _____

1, 2

Answering Affidavits — Exhibits _____

5

Replying Affidavits _____

3, 4

Cross-Motion: [X] Yes [] No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided as indicated below.

Petitioners Hamed Nuraina and Cheryl Nuraina (collectively the Petitioners) bring this proceeding *pro se* and by order to show cause, pursuant to CPLR article 78, to compel respondents State of New York Office of Temporary and Disability Assistance (OTDA) and Seth Diamond, Commissioner of Department of Homeless Services (DHS), (collectively the Respondents), to enforce the decision, after a fair hearing, dated April 18, 2011 (Hearing Decision), in fair hearing # 5772355N (Fair Hearing).

Petitioners, mother and son, receive temporary housing assistance and currently reside at the Parkview Hotel. On or about March 18, 2011, Petitioners received notice that they would be transferred to the Millenium Care Center. Although Petitioners were not transferred, they received another notice, dated April 7, 2011, that they would be transferred to the Aladdin Hotel. On April 8, 2011, petitioner Hamed Nuraina requested a fair hearing to contest DHS's decision to transfer him and petitioner Cheryl

Nuraina to the Aladdin Hotel, an alleged non-cooking facility. After the Fair Hearing, the administrative law judge (ALJ) issued the Hearing Decision. Thereafter, Petitioners commenced this Article 78 proceeding to compel enforcement of the Hearing Decision. DHS filed an answer on or about June 13, 2011 asserting several defenses including, *inter alia*, ripeness. In lieu of filing an answer, OTDA cross-moved to dismiss the petition on the grounds that petitioner Cheryl Nuraina does not have standing to bring this proceeding and that Petitioners have failed to state a cause of action. Alternatively, OTDA seeks time to answer pursuant to CPLR § 7804(f).

Petitioners receive temporary housing assistance pursuant to Administrative Directive 94 ADM-20 and 18 NYCRR § 352.35 which “sets forth the requirements with which an individual or family who applies for temporary housing must comply in order to be eligible for temporary housing assistance.” 18 NYCRR § 352.35(a). Petitioners argue that “the present transfer order violates the administrative court’s order.” Petitioners’ Order to Show Cause (OSC), at 2. Petitioners seek a “mandamus order requiring the Department of Homeless Service[s to] adhere to the...[Hearing Decision]. Petitioners’ OSC, at 2.

New York Courts have held that a “[m]andamus [to compel] is available...only to enforce a clear legal right where the public official has failed to perform a duty enjoined by law.” *New York Civil Liberties Union v. State of New York*, 4 NY3d 175, 184 (2005). Here, Petitioners have failed to even allege that Respondents failed to perform a duty enjoined by law. Instead, Petitioners allege that the *possible* transfer would violate the Hearing Decision and they seek to compel compliance with the Hearing Decision. However, the Hearing Decision finds that “[t]here is no issue to be decided.” Exhibit A of Stephanie M. Aronzon’s Affirmation in support of cross-motion to dismiss, at 3.

Homeless persons are entitled to an administrative fair hearing to challenge certain determinations made by a social service agency. *See* 18 NYCRR § 358-3.1. However, 18 NYCRR §

358-3.1(f) states that recipients of services “do not have the right to a fair hearing in all situations.” As the Hearing Decision states, “Administrative Directive 94 ADM-20, dated December 29, 1994, provides that homeless persons do not have the right to choose their own temporary placements.” Exhibit A of Petitioners’ OSC, at 2. Administrative Directive 94 ADM-20 goes on to state that “[w]henver a homeless person is transferred from any temporary housing accommodation to another,...[a]s long as the shelter need is being met in some form, it is unnecessary to provide timely notice and prior hearing.” Administrative Directive 94 ADM-20, at 36. As petitioner Hamed Nuraina requested a fair hearing prior to a transfer, the ALJ found that “[t]here is no right to challenge a transfer so that there is no issue to be decided, and no relief to grant the [Petitioners].” Exhibit A of Petitioners’ OSC, at 2.

Judicial review of an administrative determination is limited to whether the determination was made “in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion”. CPLR 7803 (3). When Petitioners received a notice of transfer, petitioner Hamed Nuraina requested a fair hearing on the grounds that he has severe food allergies and petitioner Cheryl Nuraina requires a low sodium diet such that cooking facilities are required to prepare their own food. The Hearing Decision states that “[s]hould the Appellant and his mother be transferred to another shelter, the Agency is directed to place them in a shelter that meets their medical needs.” Exhibit A of Petitioners’ OSC, at 2. The ALJ determined that Petitioners’ medical needs must be met by a new placement. There is no opposition or allegations that Respondents need not meet Petitioners’ medical needs. 18 NYCRR § 358-6.4 governs compliance with hearing decisions. Accordingly, Respondents must comply with the Hearing Decision to the extent that their medical needs are met if transferred to another shelter; however, Respondents have not transferred Petitioners and thus there is no controversy for the court to decide.

However, since Petitioners are currently residing at Parkview Hotel and have not been

transferred, Respondents are not in violation of the provisions of the Hearing Decision. “Whether the agency action is ripe for review depends upon several considerations. First, the action must impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process...[and] there must be a finding that the apparent harm inflicted by the action may not be prevented or significantly ameliorated by further administrative action or by steps available to the complaining party.” *Gordon v Rush*, 100 NY2d 236, 242 (2003) (internal citations and quotations omitted). “The policy underlying the dismissal for prematurity of article 78 proceedings before a final and binding determination is to preclude the initiation of litigation that may thereafter become academic.” *Committee to Save the Beacon Theater v City of New York, et al.*, 146 AD2d 397, 404 (1st Dep’t 1989).

If Petitioners are ultimately transferred and their right to adequate temporary housing violated, Petitioners may file a complaint or request a fair hearing. “Upon receipt of a complaint that a social services agency has not complied with the fair hearing decision, the commissioner, through action coordinated by OAH, will secure compliance by whatever means is deemed necessary and appropriate under the circumstances of the case.” 18 NYCRR § 358-6.4(c). As such, at this juncture, the agency action is not ripe for review as there has been no transfer. Here, as also stated in the Hearing Decision, there is no ripe issue to be decided. Petitioners prematurely commenced this proceeding, therefore, the petition is denied and dismissed as premature.

OTDA cross-moves to dismiss the petition for, *inter alia*, failure to state a cause of action. However, the Court need not address this argument in detail as it has already determined that the agency action is not ripe for review and the petition premature. On a motion to dismiss a pleading for legal insufficiency, the court accepts the facts alleged as true and determines simply whether the facts alleged fit within any cognizable legal theory. *Morone v Morone*, 50 NY2d 481, 484 (1980). The pleading is to

be liberally construed, accepting all the facts alleged therein to be true and according the allegations the benefit of every possible favorable inference. *Leon v Martinez*, 84 NY2d 83, 87 (1994). For the reasons stated above, even accepting Petitioners' allegations as true, the petition has failed to state a cause of action as there are no ripe issues to be determined. OTDA's cross-motion is granted.

Accordingly, it is

ORDERED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that respondent State of New York Office of Temporary Disability Assistance 's cross-motion to dismiss is granted; and it is further

ORDERED that within 30 days of entry of this order, respondent State of New York Office of Temporary Disability Assistance shall serve a copy upon all parties with notice of entry.

Dated: 10/4/11


DORIS LING-COHAN, J.S.C.

Check one: FINAL DISPOSITION
Check if Appropriate: DO NOT POST

NON-FINAL DISPOSITION

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