

Matter of Nixon v Rhea
2011 NY Slip Op 32749(U)
September 23, 2011
Supreme Court, New York County
Docket Number: 401818/11
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

In the Matter of the Application of JOHN NIXON,

INDEX No. 401818/11

Petitioner,

MOTION DATE _____

-against-

MOTION SEQ. No. 001

JOHN B. RHEA, as Chairperson of the NEW YORK
CITY HOUSING AUTHORITY, et al.,
Respondents.

MOTION CAL No. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1, 2, 3, 4

Answering Affidavits- Exhibits _____ 5, 6 **FILED**

Replying Affidavits _____

SEP 27 2011

CROSS-MOTION: YES NO

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 9/20/11

Donna M. Mills
DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

-----x
In the Matter of the Application of
JOHN NIXON,

Petitioner,

Index No.: 401818/11

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

-against-

DECISION

JOHN B. RHEA, as Chairperson of the
NEW YORK CITY HOUSING AUTHORITY,
NEW YORK CITY HOUSING AUTHORITY, and
745 GATES LP,

FILED

SEP 27 2011

Respondents.

-----x
DONNA MILLS, J.:

NEW YORK
COUNTY CLERK'S OFFICE

Petitioner John Nixon (Nixon) moves, pursuant to CPLR Article 78: (1) to annul the determination of respondents John B. Rhea and New York City Housing Authority (together, NYCHA) to terminate petitioner's section 8 subsidy as arbitrary and capricious, an abuse of discretion, and in violation of due process, federal law and regulations and NYCHA's own practices and procedures; (2) to direct NYCHA to reinstate petitioner's section 8 subsidy; (3) to direct NYCHA to pay the section 8 subsidy for petitioner's apartment retroactive to the date of termination; (4) to stay the summary proceedings now pending in the civil court asserted against petitioner by respondent 745

[* 3] .
Gates LP (Gates); and (5) to stay Gates from enforcing any possessory judgment against petitioner pending reinstatement of petitioner's section 8 subsidy. NYCHA cross-moves, pursuant to CPLR 3211 (a) (5) and 7804 (f), to dismiss the petition as being time-barred.

BACKGROUND

Nixon is a 74-year-old disabled man who has been a section 8 participant for over 15 years. Section 8 is a rent subsidy program for low-income individuals, federally administered by the Department of Housing and Urban Development (HUD), and locally administered by NYCHA, pursuant to an annual contract with HUD. Nixon claims that he did not receive any notices from NYCHA to recertify his income and household composition in 2010, and his failure to so recertify caused him to lose his section 8 benefits.

At the end of January of 2011, Nixon's landlord, Gates, commenced a nonpayment proceeding against Nixon, seeking the entire lease rental amount of \$1,303.69 per month from August, 2010. The housing court action has been stayed pending the resolution of this petition.

Pursuant to section 8 regulations (24 CFR Part 982 *et seq.*), all section 8 participants are required to receive written notice of the grounds for terminating the benefits, and all participants whose benefits are terminated are entitled to a hearing to

contest the termination. In addition, after NYCHA has made an initial determination that a participant's benefits should be terminated, NYCHA is required to issue a warning letter to the participant, stating specifically the basis for the proposed adverse action. After sending the warning letter, if the condition that forms the basis for the adverse action is not remedied, NYCHA must follow the warning letter with a notice of the proposed adverse action, known as a T-1 Notice, which must include the specific grounds for the adverse action, detailed with sufficient specificity to allow the participant to prepare a defense. Two copies of this letter must be sent, by regular and certified mail respectively.

If the section 8 participant fails to respond to the warning notice, NYCHA is required to serve the participant with a notice of default (T-3 Notice), and termination of benefits will not occur until the 45th calendar day following the date of mailing the T-3 Notice.

The participant is entitled to a hearing to contest the termination of benefits, if such a hearing is requested in writing within 20 days after the mailing of the T-3 Notice. If a written request for a hearing is made within the requisite time, NYCHA may not implement the proposed termination of benefits until a final determination is made after the hearing. If NYCHA cannot locate its proof that it mailed the required notices to

the participant, it is required to reinstate the participant's rent subsidy retroactive to the date of termination.

According to Nixon, the first time that he became aware that his section 8 benefits had been terminated was when he received the court papers stating that Gates was seeking his eviction for nonpayment of rent. Petition, Ex. B. Nixon filed an answer pro se, in which he stated that his rent was paid by "Direct Vendor." Petition, Ex. C. Nixon claims that he did not believe that he owed any more than the \$94 per month rent that he had always been paying, since his income and apartment composition had not changed. Allegedly, after he received the court papers for the nonpayment proceeding in February of 2011, he called NYCHA, with the assistance of his nephew, and was told not to worry, that there was no problem with his section 8 subsidy.

Nixon failed to appear for the first court date, but he had the matter restored to the court calendar by filing an order to show cause (OSC). Nixon missed the second court date, but the matter was again restored to the court calendar by a second OSC. Nixon was allegedly too ill to appear for the third court date, and the judge refused to restore the matter a third time. Nixon returned to the court with his daughter, who filed an OSC on his behalf, which was denied. The daughter filed a second OSC on behalf of Nixon, which was signed by the judge, and the matter was restored.

Nixon retained Bedford-Stuyvesant Community Legal Service to represent him in the nonpayment proceeding. At the court hearing, the default was vacated and the matter was adjourned. As noted above, the housing court action has been stayed pending the resolution of this petition.

In the petition, Nixon claims: (1) that NYCHA failed to provide him with adequate notice of the termination of his section 8 subsidy; (2) that NYCHA failed to provide him with a hearing to contest the adverse action; and (3) that NYCHA should reinstate his section 8 subsidy retroactively to the date of termination.

In support of its cross motion, NYCHA asserts that this Article 78 proceeding must be denied because Nixon failed to institute the action within the four months following the determination to terminate his section 8 benefits.

NYCHA states that there is a rebuttable presumption of receipt of the requisite notices on the fifth day following the mailing. NYCHA claims that it provided Nixon the mandated T-3 Notice by mailing the notice to his apartment by both certified and regular mail. In support of its contention that the T-3 Notice was properly mailed, NYCHA has provided the affidavits of Michelle McGill-Felix (McGill-Felix) and Shawn Younger (Younger).

McGill-Felix affirms that she is an assistant manager for NYCHA and, based on her own personal knowledge, states that she

was responsible for supervising the secretary who prepared and mailed the T-3 Notice, that she recognizes the copy of the T-3 Notice affixed to her affidavit that was sent to Nixon, that the regular mailing practice is to insert such notices into a window envelope so that the address shows through the window, that a Accountable Mailing Log is prepared with a list of certified mail numbers, together with the recipient's name and address, prepared contemporaneously with the mailing, and that the envelopes, once prepared, are placed in an out box to be picked up by a mailroom clerk for posting. McGill-Felix has also provided a copy of the Accountable Mailing Log indicating that the notice was sent by certified mail to Nixon at his correct address on May 17, 2010.

In his affidavit, Younger affirms that he is the administrative manager for NYCHA and is responsible for the sorting, routing and distributing of all NYCHA's incoming and outgoing mail, and that, as part of its regular business practice, a NYCHA employee brings all outgoing mail to the NYCHA mail center, where the mail is pre-sorted by zip code, imprinted with postage, and placed in regular USPS receptacles, provided by USPS.

NYCHA has also provided the printout of a USPS Track and Confirm result for the certified copy of the T-3 Notice allegedly sent to Nixon, and that document indicates that a notice of certified mail from NYCHA, bearing the same article number that

appears for Nixon in NYCHA's Accountable Mailing Log, was delivered to Nixon's address on May 26, 2010, but was returned to NYCHA as unclaimed on June 17, 2010. Cross Motion, Ex. B.

The instant proceeding was commenced on or about July 8, 2011, more than four-months after presumptive receipt of the notices. Hence, according to NYCHA, the petition must be denied as untimely.

In addition, NYCHA contests Nixon's assertion that he called NYCHA in February of 2011, after he received the nonpayment petition, claiming that NYCHA's records only indicate that a call was made to it from Nixon's telephone number on April 21, 2011, in which he asked to have his section 8 subsidy reinstated. Aff. of Brendan Neary.

Gates, by its attorney, has filed an affirmation in support of Nixon, stating that it does not believe that the NYCHA evidence of its procedures is sufficient to raise a presumption of mailing and that, therefore, its termination of Nixon's benefits was arbitrary, capricious and contrary to law. Gates also states that the continuation of the section 8 subsidy is vitally important to Nixon, whose annual income is only \$7490.00.

In opposition to NYCHA's cross motion, Nixon argues that NYCHA has failed to demonstrate that it sent the three notices required prior to terminating benefits, since the evidence submitted with the cross motion only refers to the T-3 Notice,

and makes no reference to the T-1 Notice. Therefore, states Nixon, since NYCHA failed to provide proof of mailing the requisite notices, the statute of limitations to challenge the adverse action has yet to run.

In reply, NYCHA asserts that the statute of limitations begins to run after the mailing of the T-3 Notice, at which time all determinations become final and binding, and that Nixon is incorrect in stating that proof must be provided of the mailing of all three requisite notices. In the alternative, should the court deny NYCHA's cross motion, it requests an opportunity to interpose an answer, since it has only addressed the statute of limitations issue in its papers.

It is noted that Nixon has submitted a sur-reply without leave of court, which will, therefore, not be considered.

DISCUSSION

It is well settled that "a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [internal quotation marks and citation omitted] [emphasis in original]." *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaronack, Westchester County*, 34 NY2d 222, 232 (1974). The test is whether the action taken is justified or without foundation in fact. *Id.* at 231. "Arbitrary action is

without sound basis in reason and is generally taken without regard to the facts." *Id.*

However, before the court can address the agency action itself, it must first determine whether the petition was filed in a timely manner.

CPLR 217 (1) provides, in pertinent part:

"Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner."

The Section 8 program is subject not only to the rules established by federal law pursuant to 42 USC § 1437f, but is also subject to a federal consent judgment, *Williams v New York City Housing Authority* (SD NY, Oct 17, 1984), 81 Civ 1801 (RW) (the "Williams Consent"), which sets forth comprehensive notice procedures which must be followed before terminating section 8 assistance. The First Partial Consent Judgment in *Williams* provides that termination of the section 8 subsidy "shall be made only after a determination in accordance with the procedures and provisions herein." Those procedures provide that no fewer than three notices must be sent to the section 8 subsidy recipient pending termination. These procedures have been discussed earlier in this decision.

Pursuant to paragraph 22 of the Williams Consent, NYCHA's determination to terminate a section 8 recipient's subsidy

becomes final and binding upon the tenant's receipt of the T-3 Notice of default. According to that same paragraph, a rebuttable presumption of receipt is established five days after the notice was properly mailed as demonstrated by the evidence presented.

The thrust of the statute of limitations arguments presented by the parties is the determination as to whether the four-month statutory period commences after receipt of the T-3 Notice, or whether the statute does not begin to run unless all proper procedures, pursuant to the Williams Consent, are followed. The court finds that the CPLR 217 statutory period begins to run upon receipt of the T-3 Notice. *Matter of Fernandez v NYCHA Law Department*, 284 AD2d 202 (1st Dept 2001); see *Matter of Lopez v New York City Housing Authority*, 30 Misc 3d 1237(A), 2011 NY Slip Op 50390(U) (Sup Ct, NY County 2011). "This is the case even where the determination allegedly violates a public policy ... [or was] 'affected by an error of law' [internal citations omitted]." *Blackman v New York City Housing Authority*, 280 AD2d 324, 325 (1st Dept 2001).

The issue regarding vacatur of the administrative agency's decision to terminate a section 8 subsidy concerns the determination as to whether the action was arbitrary, capricious or contrary to law (*Matter of Fair v Finkel*, 284 AD2d 126 [1st Dept 2001]; *Matter of Matos v Hernandez*, 10 Misc 3d 1068(A), 2005

NY Slip Op 52188(U) [Sup Ct. NY County 2005]), not whether the failure to follow procedures delays commencement of the statute of limitations. NYCHA's final determination must be challenged within the appropriate statutory timeframe.

In the case at bar, NYCHA has presented sufficient evidence of mailing the T-3 Notice to Nixon by certified and regular mail by providing the affidavits of McGill-Felix and Younger, NYCHA's Accountable Mailing Log and the USPS printout confirming that notice of the certified letter was delivered but was unclaimed. This creates a rebuttable presumption of delivery sufficient to start the running of the statute of limitations five days after the date of mailing. The instant petition was not filed until approximately nine months after the presumptive receipt of the T-3 Notice.

In opposition, Nixon has only presented conclusory statements of nonreceipt, unaccompanied by further probative facts, which are insufficient to rebut the presumption of delivery. *Matter of Diaz v Morales*, 81 AD3d 470 (1st Dept 2011); *Stephanie R. Cooper, P.C. v Robert*, 78 AD3d 572 (1st Dept 2010); *Northern v Hernandez*, 17 AD3d 285 (1st Dept 2005).

NYCHA has shown, by sufficient evidence, that the mailing procedures were complied with, and the mere fact that the certified T-3 Notice went unclaimed does not in and of itself deem NYCHA's attempts legally insufficient, since the regular

mailings were not also returned as unclaimed. Since only the certified mailings were returned as unclaimed, which for purposes of the Postal Service means that the addressee abandoned or failed to call for the mail, there is a rebuttable presumption of receipt of the regular mailing. See *Matter of Harner v County of Tioga*, 5 NY3d 136 (2005). Thus, under the circumstances of the case, the notice procedures satisfied the Williams Consent.

Having determined that this petition must be denied as untimely, the court need not address the underlying issues raised by Nixon.

CONCLUSION

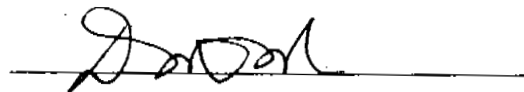
Based on the foregoing, it is hereby

ORDERED that respondent's motion to dismiss is granted; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: 9/23/11

ENTER:



Donna Mills, J.S.C.

FILED

SEP 27 2011

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