

**Matter of Alvarez v New York City Hous. Auth./RIIS
Houses**

2011 NY Slip Op 33147(U)

September 26, 2011

Supreme Court, New York County

Docket Number: 400772/11

Judge: Kathryn E. Freed

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CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: Part 11C

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In the Matter of the Application of

BEATRICE ALVAREZ,

Petitioner,

Index No. 400772/11

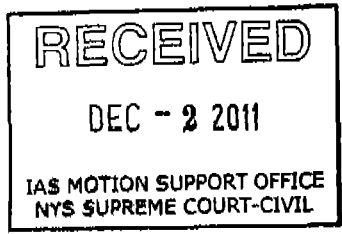
For a Judgment Pursuant to Article 78 of the CPLR,

DECISION/ORDER

-against-

NEW YORK CITY HOUSING AUTHORITY/
RIIS HOUSES,

Respondent.



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HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR §2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....
ORDER TO SHOW CAUSE AND AFFIDAVITS ANNEXED.....
ANSWERING AFFIDAVITS.....
REPLYING AFFIDAVITS..... 3.....
EXHIBITS.....
STIPULATIONS.....
OTHER.....(Verified Answer & respondent's memo of law)....1,2.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THIS MOTION IS AS FOLLOWS:

Petitioner challenges the determination of respondent which terminated her tenancy on default because she consistently failed to timely pay her rent. Respondent seeks an Order dismissing the proceeding. After a review of the papers presented, all relevant statutes and caselaw, the Court denies the petition.

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).

According to respondent, petitioner was the tenant of record in Apartment 8B at 466 East 10th Street, (Jacob Riis Houses), New York, New York 10009. Petitioner's lease provides in pertinent part that the rent is due and payable the first day of each month or at such other day each month as the Landlord may decide. The lease also provides that respondent may terminate petitioner's tenancy based on her failure to make timely payments under the lease. Prior to bringing charges against petitioner's tenancy, management afforded her two opportunities to meet with the property manager to discuss her chronic rent delinquency. Petitioner failed to avail herself of these opportunities. Management then informed her that it would forward her tenant folder for the preparation of charges and also informed her that she would have an opportunity to appear at a hearing scheduled for August 20, 2009 at 9:25 A.M. Petitioner was also advised that she could be represented by counsel or a representative of her choice at the hearing. Petitioner failed to appear at the scheduled hearing, prompting the hearing officer to issue a decision recommending termination of her tenancy.

On October 22, 2010, petitioner applied to have her default opened, claiming that she did not receive any notification of the hearing. Respondent objected. On November 16, 2010, the hearing officer denied petitioner's application. Respondent then commenced a nonpayment proceeding against petitioner. Petitioner consented to the entry of a final judgment of possession in favor of respondent with both parties agreeing that the warrant of eviction would be stayed if she paid \$7,751.64 on or before June 3, 2011. Petitioner failed to do this and commenced the instant proceeding on March 24, 2011.

Respondent proffers several arguments in response to petitioner's challenge. First, it argues that petitioner's claim is barred by documentary evidence in the form of the Civil Court judgment in a nonpayment action awarding possession of her apartment to the Housing Authority, which this

Court cannot collaterally attack.

Respondent next argues that the four month statute of limitations reserved for administrative determinations bars this proceeding. Additionally, respondent also argues that since the Housing Authority terminated petitioner's tenancy on her default, the court may only review the denial of petitioner's application to open her default, and not the underlying determination. Respondent further argues that the hearing officer properly denied petitioner's application to open her default because petitioner failed to establish a reasonable excuse for her failure to appear at the hearing or a meritorious defense to the charge against her tenancy.

In reviewing the various arguments and responses promulgated by both sides, the Court turns its attention solely to the question of whether the petitioner's claim is barred by the statute of limitations. The Court's affirmative answer to this question, essentially renders the remaining issues moot.

First, it is important to note that petitioner has not proffered any caselaw in support of her arguments. Her response to the statute of limitations issue is that "[t]he New York City Housing Authority's denial to re-open Petitioner's default is dated November 16, 2010. However, attorney for Petitioner was out of state, without contact with her office, from November 19, 2010 until November 29, 2010 for the Thanksgiving holiday. Petitioner's attorney did not received [sic] the final decision until November 29, 2010 when counsel she returned to her office [sic]. Accordingly, Petitioner's claim is not time-barred in that this Article 78 proceeding should have commenced by March 25, 2011. Petitioner commenced this action on March 24, 2011."

Respondent argues that where the Housing Authority terminates a tenancy upon default, the final determination for purposes of Article 78 review is the hearing officer's decision denying the

application to vacate the default. Additionally, it argues that “[t]he Office of Impartial Hearings mailed the hearing officer’s decision to Petitioner on November 17, 2010,... and Petitioner does not deny she received it within five days of mailing, or by November 22, 2010.” Petitioner cites to well settled caselaw promoting the proposition that a mere conclusory denial of receipt of correspondence is insufficient to rebut the presumption that a proper mailing has occurred.

C.P.L.R. §217 states in pertinent part that, “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.....” An administrative action is not final and binding, within the contemplation of C.P.L.R. § 217 until it “ ‘has its impact’ ” upon Petitioner (Matter of Edmead v. McGuire, 67 N.Y.2d 714, 716 [1986]; *see also* Rocco v. Kelly, 20 A.D.3d 364 [1st Dept. 2005]; Yarbough v. Franco, 95 N.Y.2d 342,436 [2000]; Matter of Carter v. State, Executive Dept., Div. of Parole, 95 N.Y.2d 267 [2000]; Lewis v. New York Housing Authority, 262 A.D.2d 16 [1st Dept. 1999]).

The four month limitations period is applicable to claims challenging stipulations of settlement of administrative actions (Lockett v. New York City Housing Authority, 56 A.D.3d 280 [1st Dept. 2008]; Folks v. New York City Housing Authority, 27 A.D.3d 270 [1st Dept. 2006]; Blackman v. New York City Housing Authority, 280 A.D.2d 324 [1st Dept. 2001]). It is well established that a request for reconsideration of an administrative determination will not extend the four month limitations period, (*see* De Milio v. Borghard, 55 N.Y.2d 216[1982]; Eldaghar v. New York City Housing Authority, 8 N.Y.3d 955 [2007]; Multi- Pak Sales Corp. v. New York City Housing Authority, 131 A.D.2d 334 [1st Dept. 1987]; Matter of Johnson v. Christian, 114 A.D.2d 321 [1st Dept. 1985]).

Furthermore, the four month limitations period for Article 78 review runs from petitioner's receipt of the adverse termination (Yarborough v. Franco, *supra*). Therefore, in Housing Authority termination cases, the statute of limitations does not begin to run until the petitioner receives notice of the decision to terminate (*see* Bludson v. Popolizio, 166 A.D.2d 346 [1st Dept. 1990], *lv dismissed* 77 N.Y.2d 938 [1991] & *appeal denied* 78 N.Y.2d 854 [1991]; Matter of Robinson v. Finkel, 194 Misc.2d 55, 74 8 N.Y.S.2d 448 (N.Y. Co. Sup. Ct. 1991), *affd* 308 A.D.2d 355 [2003].

It is a general rule that the law presumes that a letter, properly addressed, stamped and mailed, is duly delivered to the addressee" (Trusts & Guarantee Co. v. Bernhardt, 270 N.Y.2d 350, 351 [1936]; Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 829 [1978]; Northern v. Hernandez, 17 A.D.3d 285 [1st Dept. 2005]; Gholian v. Mmakwe, 2011 WL 3861613 (N.Y. Sup.)). A mere conclusory denial of receipt would be insufficient to rebut the presumption of receipt (*see* American Sav. & Loan Ass'n v. Twin Eagles Bruce, Inc., 208 A.D.2d 446 [1st Dept. 1994], *lv denied* 85 N.Y.2d.1032 [1995]).

Additionally, under New York law, there is a presumption that a regular mail is received within five days of mailing. C.P.L.R. § 2102(b)(2) provides in pertinent part that "where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period....."

In the instant case, the exhibits annexed to respondent's papers reflect that upon petitioner's failure to appear, the hearing officer issued a decision to terminate her tenancy dated August 24, 2010, and Notice of Review, dated August 24, 2010 (Exhibit G). Respondent rendered written approval of the hearing officer's decision on September 8, 2010 (Exhibit H). On October 22, 2010, petitioner applied to open the default. Petitioner's application was subsequently denied on November

16, 2010. Respondent mailed the hearing officer's decision to petitioner on November 16, 2010. Petitioner received it on November 22, 2010.

In support of its mailing argument, respondent annexes to its papers, an affidavit from Doris Hoffler, an employee of the Housing Authority in the Office of Impartial Hearings. In her affidavit, Ms. Hoffler avers that "in November 2010, it was the Hearing Office's regular business practice to prepare hearing officers' decisions on applications to vacate defaults for mailing by first-class mail on or about the same day the hearing officers rendered those decisions." She further avers that she mailed the letter denying petitioner's application to open her default on November 17, 2010 pursuant to the customary procedures of the Hearing Office. (Hoffler Aff. ¶ 1-5).

Additionally, respondent appends an affidavit of Shawn Younger, the Administrative Manager of the New York City Housing Authority's Mail Center. In his affidavit, Mr. Younger explains the Mail Center's role in mailing hearing officers' decisions concerning the applications of individuals who apply to open their defaults in appearing at administrative hearings from the Office of Impartial Hearings. He avers that "in November 2010, it was the practice of employees assigned to the Mail Center to visit the Hearing Office twice each business day to pick up mail designated for delivery, through the United Postal Service ("USPS"), from a receptacle in the Hearing Office clearly labeled 'outgoing mail.' " Mr. Younger further avers that 'in accordance with regular practice at that time, the Housing Authority's mail was delivered to the USPS within one business day of when the Mail Center employees picked it up from the Hearing Office" (Younger Aff. ¶ 1-4).

The Court finds petitioner's argument unavailing. Indeed, it seems that by claiming that respondent's denial to reopen her default is dated November 16, 2010 and alleging that her "attorney did not received [*sic*] the final decision until November 29, 2011 when counsel she returned to her

office" [sic], petitioner seems to be conceding that her commencement of the action was time barred, however, due to circumstances beyond her control. Moreover, in contemplation of the caselaw regarding mailing, C.P.L.R. 2103§(b)(2) and the two aforementioned affidavits, the Court finds that respondent correctly presumes that petitioner received the default decision on or by November 22, 2010. Petitioner then commenced the instant proceeding on March 24, 2011, two days past the four month statutory requirement.

Since C.P.L.R. § 217 specifically mandates that "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....," (*emphasis added*), the Court has no alternative but to deny the petition.


Accordingly, for the foregoing stated reasons, it is hereby ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED: that the Landlord Tenant proceeding under index number L&T 012832/2010 is transferred to Housing Court Part E for further proceedings; and it is further

ORDERED: that all stays in Landlord Tenant proceedings are vacated.

This constitutes the decision and order of the Court.

DATED: September 26, 2011


Hon. Kathryn E. Freed
Judge of the Civil Court

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).