

**Solla v Berlin**

2011 NY Slip Op 33638(U)

July 12, 2011

Supreme Court, New York County

Docket Number: 401178/2011

Judge: Alexander W. Hunter Jr

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 33

Index Number : 401178/2011

SOLLA, LUZ

VS.

BERLIN, ELIZABETH R.

SEQUENCE NUMBER : 001

ARTICLE 78

ALEXANDER W. HUNTER JR

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INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

and on this motion to/for

PAPERS NUMBERED

1-8  
9-14, 15-21  
22

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

*Cross-Motions*  
Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

*See memorandum decision annexed hereto.*

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).

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JUL 14 2011

MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

Dated: 7/12/11

*[Signature]*  
ALEXANDER W. HUNTER JR

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 REASONS:

*[Handwritten marks]*

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Handwritten initials and a circled 'S'.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 33**

-----X  
In the Matter of the Application of Luz Solla,

Index No. 401178/2011

Petitioner,

**DECISION AND ORDER**

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

-against-

Elizabeth Berlin, as Executive Deputy Commissioner of the  
New York State Office of Temporary and Disability Assistance,  
Robert Doar, as Commissioner of the  
New York City Human Resources Administration,  
-and-

Jacqueline Dudley, as Deputy Commissioner of the  
New York City HIV/AIDS Services Administration,

Respondents.

-----X  
**HON. ALEXANDER W. HUNTER, JR.:**

The application by petitioner for an order pursuant to C.P.L.R. Article 78, declaring arbitrary and capricious respondents' failure to comply with the decision after a fair hearing dated November 29, 2010, and directing respondents to comply with that decision, is dismissed as moot, because respondents have now fully complied. The cross-motions by respondents to dismiss the petition are also rendered moot and are dismissed. The only issue remaining for this court to decide is petitioner's application for counsel fees pursuant to C.P.L.R. Article 86. That application is denied.

Petitioner asserts that she received a Notice of Intent to reduce her public assistance benefits from city respondents Robert Doar of the Human Resources Administration ("HRA") and Jacqueline Dudley of the HIV/AIDS Services Administration ("HASA") on September 16, 2010. Claiming that the reduction was based on a miscalculation of her housing costs, petitioner requested a fair hearing from the State Office of Temporary and Disability Assistance ("OTDA") as prescribed by Social Services Law § 22(1). In its decision dated November 29, 2010, OTDA found the reduction unjustified and ordered city respondents to retroactively restore petitioner's benefits to their original amount.

Petitioner further asserts that HRA and HASA failed to comply with the OTDA order within the 90-day time limit allowed by 18 N.Y.C.R.R. § 358-6.4. She claims that she notified OTDA's Compliance Unit of the failure on March 28, 2011, but the matter remained uncorrected until after this Article 78 motion was filed on May 6, 2011.

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HRA and HASA do not contest any of petitioner's assertions about the fair hearing or the delay in complying with the OTDA order. They allege that on May 20, 2011, they issued a check to petitioner's landlord to retroactively restore petitioner's lost benefits. They presented documentary evidence, dated May 26, 2011, that her public assistance benefits have been restored to their original amount. Because these actions constitute the full relief petitioner sought, her application is hereby rendered moot, as are both respondents' motions to dismiss the petition.

Petitioner has also applied for attorney's fees pursuant to Article 86 of the C.P.L.R., the New York State Equal Access to Justice Act ("EAJA"). This application must be denied because petitioner is not a "prevailing party" as required by the statute. Respondents have provided petitioner the full relief for which she applied, leaving nothing for this court to grant. Petitioner asserts that under the "catalyst theory" she would still be considered a prevailing party because her petition was not moot when filed but was only rendered moot by actions taken by respondents as a result of the filing. Her petition appears undoubtedly to have been the catalyst for HRA and HASA's compliance; indeed, it appears that it was the only way left for her to get their attention after being ignored for months.

Respondents have, however, correctly relied on the United States Supreme Court's reasoning in Buckhannon Board and Home Care v. West Virginia Department of Health and Human Resources. See 532 U.S. 598 (2001). In that decision, the Court rejected the catalyst theory, holding that a party must be granted some enforceable judgment in order to recover fees as a "prevailing party." The Court recognized that denying fees to a party who is forced to retain counsel and file a petition in order to obtain relief may unfairly allow their opponent to "slink away on the eve of judgment," escaping penalty for arbitrary delay. See *id.* at 618 (Scalia, J., concurring). The Court concluded, however, that this was more efficient and, therefore, a necessary evil. Although the U.S. Supreme Court ruling only applied to federal law, the Appellate Division, First Department has expressly applied it to Article 86's "prevailing party" requirement. See Auguste v. Hammons, 285 A.D.2d 417, 418 (2001). The Court of Appeals has thus far declined to reconsider that application. See Wittlinger v. Wing, 99 N.Y.2d 425, 432 (2003). Therefore, although it apparently took the filing of this Article 78 motion to get respondents' attention after months of arbitrary delay, there is no enforceable judgment for this court to grant and under Auguste petitioner is not entitled to attorney's fees.

Accordingly, it is hereby,

ADJUDGED, that the petition is dismissed as moot and the cross-motions by respondents are also moot and are dismissed without costs and disbursements.

Dated: July 12, 2011

J.S.C.

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