

Matter of Ortega v New York City Hous. Auth.

2012 NY Slip Op 30872(U)

April 2, 2012

Sup Ct, NY County

Docket Number: 402775/11

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 4
In the Matter of the Application of
Nelson Ortega,

Index No.: 402775/11
Submitted: 1/27/12

Petitioner,

-against-

DECISION, ORDER
AND JUDGMENT

New York City Housing Authority,

Respondent.

Present: HON. ARLENE P. BLUTH, JSC

Petitioner commenced this Article 78 proceeding on October 18, 2011 challenging respondent New York City Housing Authority's ("NYCHA") determination dated December 1, 2010. The determination, made after a hearing, dismissed petitioner's remaining family member status grievance claim in connection with apartment 14H at 60 East 104th Street in Manhattan. NYCHA cross-moves to dismiss the petition on the grounds that (1) this proceeding is barred by the statute of limitations, and (2) the petition fails to state a cause of action. For the reasons set forth below, NYCHA's cross-motion is granted, the petition is denied and the proceeding is dismissed.

Petitioner claims entitlement to a lease for the subject apartment as a remaining family member of his mother, Reyes Ortega, who was the tenant of record of the subject apartment until her death in April of 2008. Upon learning of Ms. Ortega's death and petitioner's presence in the apartment, NYCHA notified petitioner that he might be subject to eviction but that he had the right to commence a grievance if such demand was timely made and if he was current in the payment of use and occupancy equal to the amount of the rent payable by his mother in the last month of her tenancy (letter dated November 16, 2009; exh F).

After a meeting held on February 9, 2010, NYCHA's Project Manager denied petitioner's claim as a remaining family member on the grounds that he never requested or was granted permission to reside in the subject apartment before his mother's death. Petitioner then sought review of that denial; by decision dated March 12, 2010, NYCHA's Borough Manager stated that he agreed with the Project Manager's reasoning and her decision.

Thereafter, petitioner filed a request for a grievance hearing; by letter dated April 22, 2010 he was informed that NYCHA's grievance procedures required him to be current in the payment of use and occupancy. The grievance hearing began on June 10, 2010 and continued on July 22, 2010 before Chief Hearing Officer Tomicic Hines. Based on petitioner's statements at the July 22, 2010 session and the hearing officer's recommendation, on August 23, 2010, NYCHA's Office of the Secretary, in consultation with the New York State Office of Court Administration, appointed Evette Harrison as guardian ad litem to assist petitioner at his grievance hearing. Ms. Harrison appeared with petitioner on September 21, 2010 and October 26, 2010, the continued hearing dates.

After hearing testimony and reviewing the evidence submitted, the hearing officer rendered a decision dated November 12, 2010, granting NYCHA's motion to dismiss the grievance on the grounds that it was undisputed that petitioner owed \$3,770.44 in use and occupancy for the subject apartment. In her decision, the hearing officer referred to petitioner's statements (1) that he has expenses such as private school tuition for his daughter which make it difficult for him to pay the use and occupancy, and (2) admitting that he has not paid use and occupancy, which is \$219.50 per month, since August 2009. In her findings and conclusions, the hearing officer cited to NYCHA's regulations (NYCHA Grievance Procedures para. 9, "Hearing

Prerequisites”, exhibit D to cross-motion) which require that a grievant be current with use and occupancy as a prerequisite to a hearing on the merits for a remaining family member grievance claim. The Court notes that petitioner admitted on the record that he receives \$1,437.00 monthly as Social Security disability. The Hearing Officer’s decision was approved by NYCHA’s “Determination of Status” dated December 1, 2010.

Petitioner commenced this Article 78 proceeding on October 18, 2011 with the filing of a verified petition¹ wherein he seeks either a toll or a waiver of the statute of limitations based on the following allegations: he has several physical ailments, depression and stress, he is limited by his lack of education, Ms. Harrison did not properly represent him at the hearing, he was never informed of the statute of limitations applicable to an Article 78 proceeding, and he did not understand the law. NYCHA cross-moves to dismiss the proceeding on the grounds that the petition is time-barred and fails to state a cause of action.

Statute of Limitations

The four month statute of limitations governing Article 78 proceedings which challenge an administrative determination begins to run on the date the determination becomes “final and binding” upon the petitioner, which is the date petitioner receives notice of the decision. See CPLR §217(1); *Matter of Metropolitan Museum Historic District Coalition v De Montebello*,

¹A handwritten petition dated October 11, 2011 was submitted; it was signed and verified by petitioner. Additionally a typed petition, stamped “New York County Clerk’s Office October 18, 2011 not compared with copy file” was apparently prepared (although not signed) by Jonathan Rubin, who served as petitioner’s guardian ad litem in a housing court proceeding. Mr. Rubin indicates that petitioner orally provided him with the facts contained therein. The Court has reviewed the two documents and has determined they are not identical. Freddie J. Berg, Esq. submitted a reply affirmation to NYCHA’s cross-motion to dismiss as pro bono counsel to petitioner “upon Mr. Rubin’s recommendation” (Berg aff., para.1).

20AD3d 28, 796 NYS2d 64 (1st Dept 2005).

Here, NYCHA submits the affidavit of its employee who states that she placed a copy of the Determination of Status in an envelope addressed to petitioner in NYCHA's outgoing mail box on December 6, 2010, and the affidavit of its administrative manager who states that on that date, in accordance with regular practice, outgoing mail was placed in USPS receptacles within 24 hours. There is a presumption that regular mail is received within five (5) days of mailing, in this case December 12, 2010; *see* CPLR §2103(b)(2). Petitioner has not denied receipt of the Determination of Status. Thus, at the very latest, the four month statute of limitations expired on April 12, 2011. This Article 78 proceeding was not commenced until October 18, 2011, more than six months after the statute of limitations expired.

Here, petitioner has simply asserted that he has limited mental ability due to lack of education, physical ailments, depression and stress, and has not submitted any evidence that he is under a disability which would toll the statute of limitations pursuant in accordance with CPLR § 208, which is narrowly interpreted.

The burden is on the petitioner to establish an applicable exception to the statute of limitations. *See Santo B. v Roman Catholic Archdiocese of New York*, 51 AD3d 956, 957, 861 NYS2d 674 (2d Dept 2008). As the court recently stated in *Gray v Hernandez*, 22 Misc.3d 678, 684, 868 NYS2d 500, 504-505 (Sup Ct, NY County 2008):

The Court of Appeals has held that the insanity toll applies only to individuals who are able to prove that they were incapable of protecting their legal rights when their causes of action accrued because of an overall inability to function in society. *Cerami v City of Rochester School Dist.*, 82 NY2d 809, 604 NYS2d 543 [1993] reconsideration denied 83 NY2d 847, 612 NYS2d 110 [1994]; *McCarthy v Volkswagen of America, Inc.*, 55 NY2d 543, 450 NYS2d 457 [1982].

Here, petitioner has not claimed, much less demonstrated, that he is unable to function in society. Unfamiliarity with the law is no defense. Here, the hearing officer and Ms. Harrison, petitioner's guardian ad litem both informed petitioner, on the record, that he should take prompt action if he did not agree with the hearing officer's determination (T. at 97-98). Petitioner's assertion that Ms. Harrison did not sufficiently or appropriately act in his interest does not warrant a waiver or toll of the statute of limitations. In fact, NYCHA notified petitioner about the requirement to pay use and occupancy in writing (letter dated 11/16/09-exh F) and (letter dated 4/22/10-exh J) and several times at the hearing (T. at 9,12, 51, 71, 73). Accordingly, the Court finds that this proceeding is barred by the four month statute of limitations applicable to Article 78 proceedings.

Failure to State a Cause of Action

Even if this proceeding were not time-barred, it would be futile to grant petitioner a hearing on the merits because there is no merit to petitioner's remaining family member claim. It is undisputed that he never obtained written permission to rejoin his mother's household before she died, and that she never requested or obtained permission for him to be added to her household. As for petitioner's assertions concerning the alleged special needs status of his mother, petitioner has no standing to raise any claims on behalf of his late mother. Finally, as for petitioner's claim that he suffers from numerous health problems, it is well-settled that the Court lacks the authority to consider mitigating circumstances or potential hardship as a basis for annulling NYCHA's determination (*see Guzman v NYCHA*, 85 AD3d 514, 925 NYS2d 59 [1st Dept 2011]).

Conclusion

This Article 78 proceeding was not commenced until October 18, 2011, more than six

months after the statute of limitations expired. Even if NYCHA's December 1, 2010 determination, which dismissed petitioner's remaining family member status grievance on the grounds that he was not current in the payment of use and occupancy, was properly before the Court, petitioner has not demonstrated that the determination was arbitrary, capricious, or an abuse of discretion. The record amply demonstrates that petitioner did not comply with NYCHA's Grievance Procedures, para. 9, "Hearing Prerequisites" (exhibit D to cross-motion) which require that a grievant be current with use and occupancy as a prerequisite to a hearing on the merits for a remaining family member grievance claim. Accordingly, it was rational and reasonable for the hearing officer to grant NYCHA's motion to dismiss the grievance, and that determination was not an abuse of NYCHA's discretion.

Accordingly, it is

ORDERED and ADJUDGED that the cross-motion to dismiss the petition is granted and the proceeding is dismissed.

This is the Decision, Order and Judgment of the Court.

Dated: April 2, 2012
New York, New York



FILED

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HON. ARLENE P. BLUTH, JSC NEW YORK
COUNTY CLERK'S OFFICE
ARLENE P. BLUTH
U.S.C.