

**Matter of Frederick v New York City Dept. of Hous.
Preserv. & Dev. Hope Community**

2012 NY Slip Op 31086(U)

April 24, 2012

Sup Ct, New York County

Docket Number: 402918/2011

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 402918/2011
FREDERICK, TERRANCE
vs
N.Y.C.D.H.P.D
Sequence Number : 001
ARTICLE 78

HON. PAUL G. FEINMAN

PART 12

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

**THIS MOTION IS DENIED IN ACCORDANCE WITH
THE ANNEXED DECISION, ORDER AND JUDGMENT.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

APR 24 2012

NEW YORK
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Dated: 4/12/2012

847, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : CIVIL TERM: PART 12

-----X

In the Matter of the Application of
TERRANCE FREDERICK,
Petitioner,

Index No.: 402918/2011
Mot. Seq. No.: 001

For a Judgment Pursuant to Article 78 of the CPLR

DECISION, ORDER AND

-against-

JUDGMENT

NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT
HOPE COMMUNITY,
Respondent.

FILED

APR 24 2012

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NEW YORK
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Papers considered in connection with this Article 78 petition:
Notice of petition, verified petition and annexed exhibit
Verified answer, Respondent's memorandum of law and Porter affidavit
and annexed exhibits A - J

Document Numbers
1
2 - 3

PAUL G. FEINMAN, J.:

By notice of petition dated October 28, 2011, pro se petitioner brings this Article 78 proceeding seeking an order annulling respondent's decision to terminate his Section 8 subsidy and granting him a new informal hearing. In its verified answer dated January 11, 2012, respondent New York City Department of Housing Preservation and Development (HPD) argues that its determination to terminate petitioner's Section 8 rent subsidy was reasonable and rational and in conformance with the applicable statutes, laws and regulations (Verified answer, ¶ 46). For the reasons that follow, the petition is denied.

Background

Pursuant to the rules and regulations governing the Section 8 program, HPD mailed petitioner his 2011 annual recertification application on March 31, 2011, which was due back to HPD by May 3, 2011 (Verified answer ¶¶ 36, 49). Petitioner did not complete the recertification application or otherwise respond in writing by the deadline (*id.* at ¶ 37). On May 24, 2011, HPD sent petitioner a “Pre-Termination Notice of Section 8 Non-Compliance” and “Request for a Conference” by first class certified mail to petitioner’s address of record (ex. F, Pre-Termination package). Respondent submits the certified mail receipt showing proof of such mailing (*id.*). The Pre-Termination Notice informed Petitioner that his “Section 8 rent subsidy may be terminated” for failing to provide the required documentation previously requested by HPD. Further, in bold print in all capital letters, the notice advised petitioner that he had fifteen (15) calendar days from the date of the notice to request a hearing to challenge the proposed termination of benefits.

On July 8, 2011, HPD sent petitioner a “Notice of Section 8 Rent Subsidy Termination” by first class certified mail to petitioner’s address of record (ex. G, Termination notice). The Termination Notice informed petitioner that his Section 8 subsidy would be terminated effective August 31, 2011 because he failed to provide the required documents to complete his recertification package (Verified answer ¶ 40). The Termination Notice also informed petitioner that he could appeal HPD’s decision by requesting an informal hearing in writing by submitting the “Appeal of Section 8 Rent Subsidy Termination” form, which was included with the Termination Notice (*id.*). Respondent submits an affidavit of service and certified mail receipt as proof that the Termination Notice had been sent to petitioner (ex. G., Termination notice).

On July 12, 2011, HPD received a completed “Appeal of Section 8 Rent Subsidy

Termination” form from petitioner requesting an informal hearing to contest the termination of his rent subsidy on the basis that he had not received the re-certification package (Verified answer ¶ 41, ex. G, Appeal request). Respondent approved petitioner’s request for an informal hearing and on August 4, 2011, HPD sent petitioner a “Date of Informal Hearing – Section 8” by first class certified mail to petitioner’s address of record (ex. I, Notice of informal hearing). The Notice of Informal Hearing advised petitioner that his informal hearing would be held on September 6, 2011. It further warned petitioner in bold capital letters that failure to appear at the informal hearing or to reschedule would render a final determination of a termination by default. Respondent submitted an affidavit from Barbara Porter, a Senior Hearing Representative at HPD, attesting that she had properly mailed a Notice of Informal Hearing by first class and certified mail to petitioner at his address of record (Porter affid.).

However, petitioner did not appear at the informal hearing on September 6, 2011. Consequently, HPD sent petitioner a “Notice of Determination After Informal Hearing Section 8 Rent Subsidy Terminated” dated September 26, 2011, and mailed via first class, certified mail to petitioner’s address of record (ex. J, Notice of determination). The Notice of Determination informed petitioner that he would be terminated from the Section 8 program effective October 31, 2011, because he had “failed to appear at the scheduled informal hearing and did not contact HPD concerning [his] absence from the informal hearing” (*id.*). Respondent submitted an affidavit of service by Jamar Sass attesting that the notice was delivered by overnight mail to petitioner (ex. J, Sass affid.). Now that petitioner’s housing assistance has been terminated, he will be required to pay the entire contract rent on his apartment.

Petitioner has raised several points in support of his petition. His first contention is that

he never received the re-certification papers mailed to him by respondent (Verified petition at ¶ 3). His second claim is that he never received notice that a date for the informal hearing had been set (*id.*). His third point is that when he spoke to a representative from HPD on the phone, he was told that the “notes” on HPD’s system said that he had been re-certified (*id.*).

Analysis

Judicial review of an administrative agency’s decision is limited to whether the decision “was made in violation of lawful procedure, was affected by an error of law or was arbitrary or capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed” (CPLR 7803 [3]). In evaluating whether an administrative agency’s determination is arbitrary or capricious, courts consider whether the determination “is without sound basis in reason and ... without regard to the facts” (*Matter of Kenton Assoc. v Division of Hous. & Community Renewal*, 225 AD2d 349, 349 [1st Dept 1996] citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Furthermore, the court may only consider evidence that was before the administrative agency at the time of its determination (*Matter of Weill v New York City Dept. of Educ.*, 61 AD3d 407, 408 [1st Dept 2009]; *Matter of HLV Assocs. v Aponte*, 223 AD2d 362, 363 [1st Dept 1996]). A termination entered on default cannot be reviewed absent an application to the HPD to vacate it (*see Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]). “A request to vacate a default affords the defaulting party an opportunity to develop a factual record setting forth the reasons for the non-appearance and any meritorious defenses that would justify re-opening the default” (*id.*; citing *Gray v B. R. Trucking Co.*, 59 NY2d 649, 650 [1983]). Because judicial review is confined to the “facts and record

adduced before the agency, absent an application to vacate, the court has no record upon which to weigh the defaulting party's excuse and potential defenses (*id.* at 347).

HPD is authorized by federal law to administer the Section 8 voucher program and therefore, is bound to "comply with HUD [Department of Housing and Urban Development] regulations and other HUD requirements for the program" (24 CFR 982.52). The Code of Federal Regulations and HPD's Administrative Plan [covering the Section 8 voucher program] require that applicants must supply true and complete information in response to any request that HPD determines is necessary in the administration of the program, including any requested certification, release, or other documentation (24 CFR 982.551[b]; Verified answer ¶ 48; ex. B, Administrative plan, ch. 7.1.2). Failure to comply with this rule is grounds for termination (*id.*).

Petitioner has failed to establish that HPD's termination of the Section 8 subsidy was arbitrary and capricious. The affidavits and documentary evidence submitted by HPD show that each required notice was sent to petitioner at the correct address. This proof of mailing is sufficient to create a rebuttable presumption of proper delivery and receipt, and petitioner's conclusory denial of receipt does not, in itself, rebut the presumption (*see Northern v Hernandez*, 17 AD3d 285, 286 [1st Dept 2005]; *Stephanie R. Cooper, PC v Robert*, 78 AD3d 572, 573 [1st Dept 2010]). Petitioner acknowledges that he received the termination notice and the notice of HPD's termination of his Section 8 rent subsidies after an informal hearing. The telephone conversations mentioned in the petition between petitioner and HPD have not been described with particularity as to when they took place, and in any case, they cannot be considered by this court because they were not before the administrative agency when the determination to terminate petitioner's Section 8 rent subsidies was made (*see Matter of Weill*, 61 AD3d at 408).

The agency did consider his appeal request form, in which he claimed that he did not receive his re-certification papers, and petitioner's default in appearing at his informal hearing. Based on the record adduced at the agency level, the court concludes that HPD's determination to terminate petitioner's Section 8 rent subsidies was not arbitrary and capricious.

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied in all respects and is dismissed in its entirety.

This constitutes the decision, order and judgment of the court.

Dated: April 18, 2012
New York, New York



J.S.C.

(402918_2011_001_LJ)

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APR 24 2012

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