

Matter of Hines v Wambua

2013 NY Slip Op 30456(U)

February 28, 2013

Supreme Court, New York County

Docket Number: 102765/12

Judge: Peter H. Moulton

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

PRESENT: MOULTON
Justice

PART 40 BM

HINES, JAKET

INDEX NO. 102765/12

MATHEW M. WANBUA

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

per attached
portion is denied

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).

Dated: 2/28/13

[Signature]
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 REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 40 B

-----X
In the Matter of the Application of
JANET HINES,

Petitioner,

Index No.
102765/12

- against -

UNFILED JUDGMENT

MATTHEW M. WAMBUA, as Commissioner
of the New York City Department of Housing
Preservation and Development and

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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

**NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT**, and

KNW APARTMENTS LLC, as Landlord of the Building
Located at 1990 Lexington Ave., New York, NY 10035

Respondents.

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

-----X
PETER H. MOULTON, J.S.C.:

Petitioner claims that she moved in with her now deceased brother ("Bob Hines" or "Bob")
in 2007 to care for him. She seeks to vacate the determination by New York City Department of
Housing Preservation & Development ("HPD") which terminated Bob Hines' section 8 subsidy (and
purportedly his tenancy) and denied her request to obtain his subsidy.¹ In the event that the subsidy
is not restored, petitioner seeks an evidentiary hearing.

¹The papers do not contain any discussion regarding the termination of Bob's tenancy,
other than in the context of termination of his section 8 subsidy. No party has addressed whether
petitioner could succeed to the apartment at market rate, and that is presumably not the issue
here.

In opposition to the petition, HPD argues that the proceeding is time barred. It further contends that it did not act in arbitrarily or capriciously by denying petitioner's request to retain Bob's subsidy or for an evidentiary hearing, because petitioner was not part of the household composition for at least six months prior to her brother's death.

The court asked the parties to address several issues in post submission briefs, including HPD's procedure for reviewing a family member's request to retain a deceased family member's section 8 subsidy.² As discussed below, it is troubling that in instances where HPD records do not indicate that the family member was previously certified as part of the household, there is no procedure to review requests, or to notify the family member of HPD's decision. However, as discussed below, the court does not reach the whether this deficiency is arbitrary and capricious or violates law or due process because the proceeding is time barred.³

Background

In July or August 2010, petitioner states that "Mr. Jenkins" informed her that she should write a letter to "management" to be added to the family composition, because he noticed that petitioner resided with her sick brother. It is undisputed that petitioner's brother made such a request by letter dated August 2, 2010, but HPD states that it should have been made to HPD and not

²The briefs also address the reference to "Janet" Doe in Bob's March 16, 2010 section 8 recertification. According to HPD, that reference is not to "Janet" Hines. Rather, HPD maintains that it preprints Janet Doe on its forms to "assist participants by providing an example of how to properly complete the form."

³The court considered the following papers: (1) petitioner's order to show cause, verified petition, affirmation and exhibits; (2) HPD's verified answer and exhibits; (3) KNW Apartments LLC's affirmation in opposition to stay; (4) HPD's supplemental memorandum of law; (5) petitioner's reply affidavit; (6) petitioner's memorandum of law in reply; (7) HPD's second supplemental memorandum of law; and (8) petitioner's supplemental memorandum of law in reply.

management, and that in any event, it should have been made more than two months (specifically, six months) prior to Bob's death.⁴

By letter dated November 26, 2010, addressed to the then deceased Bob Hines, HPD stated that "[w]e received notice that the sole household member died on or about 9/30/10" and that within 21 days "[y]ou may appeal this decision at an informal hearing . . . by returning the attached form." The letter is confusing, to say the least, given that it would be impossible for Bob Hines to appeal the determination. By letter dated December 14, 2010, HPD sent another letter to the deceased Bob Hines, stating that it received an appeal but that the signatory was not "recognized by HPD as being part of the household composition." However, HPD did not deny the appeal at that time, but went on to state that it could not process the appeal, absent further documentation.⁵

Discussion

The Department of Housing Preservation and Development Housing Choice Voucher Program Administrative Plan Effective March 1, 2010 (the "Plan") specifies those individuals who may retain use of a deceased family member's section 8 subsidy.⁶

Section 5.1.4 "Family Break-Up" provides, in relevant part, that:

In the event that the head of household moves out of the assisted unit or dies, a remaining adult household member (without children) may retain use of the tenant-

⁴Petitioner's papers state that her brother had dialysis dementia and therefore, he could not request petitioner's addition to the household. However, petitioner's brother did make such request, albeit at the suggestion of Mr. Jenkins, and presumably, with the help of petitioner.

⁵That documentation was either a notarized letter, signed by the head of the household, or a notarized power of attorney authorizing "you" (the deceased Bob Hines) to act on behalf of the head of the household.

⁶HUD is required to adopt a written administrative plan, pursuant to 24 CFR 982.54.

[* 5]

based voucher if that adult has been part of the household for at least six months, is in compliance with all program rules and regulations and meets all other program eligibility and continued occupancy requirements.⁷

The same section also provides that:

Exceptions to the remaining family member' requirement will be reviewed by the authorized staff member on a case-by-case basis . . .

If exceptional circumstances exist concerning the remaining member of a tenant family, a discretionary administrative determination may be made by the authorized staff member on a case-by-case basis.

Section 5.1 "Family" provides, in relevant part, that:

To be eligible for HCV assistance, an applicant must qualify as a "family" pursuant to the table definitions below. Each family must identify all of the individuals who are included in the family at the time of application. This information must be updated at the time of annual recertification or within 60 days of the change, whichever is sooner.

Section 5.1.1 "Definitions of Family and Household Members" provides, in relevant part, that:

The head of household is the adult member of the household who is designated by the family as head, is wholly or partly responsible for paying the rent, and has the legal capacity to enter into a lease under State and local law. Emancipated minors who qualify under State law will be recognized as head of household.

Section 5.1.1 "Definitions of Family and Household Members" provides, in relevant part, that:

A family member of an assisted tenant family who remains in the unit when other members of the family have left the unit. *To be considered the remaining family member of the family, the person must have been a member of the family in a current or prior certification of the family composition during the family's participation in the program, and previously approved by HPD to live in the unit (emphasis added).*

⁷This provision was adopted in accordance with 24 CFR 982.315 which gives the housing agency "discretion to determine which members of an assisted family continue to receive assistance in the program if the family breaks up."

Unless a shorter period is specified by law, a proceeding against an agency “must be commenced within four months after the determination to be reviewed becomes final and binding” (CPLR § 217 [1]). “An administrative determination becomes ‘final and binding’ when the petitioner seeking review has been aggrieved by it” (*Matter of Yarbough v Franco*, 95 NY2d 342 [2000]). However, “[i]f an agency has created ambiguity or uncertainty as to whether a final and binding decision has been issued, the courts should resolve any ambiguity created by the public body against it in order to reach a determination on the merits and not deny a party his day in court” (*Matter of Carter v State of N.Y., Exec. Dept., Div. of Parole*, 95 NY2d 267, 270 [2000] [internal quotation marks omitted]). Where a party is entitled to receive written notice in a particular form, the statutory period of limitations does not run until notice is received in that form (*see 90-92 Wadsworth Ave. Tenants Assn. v City of N.Y. Dept. of Hous. Presev. & Dev.*, 227 AD2d 331 [1st Dept 1996] [HPD complied with the notices mandated in connection with an Article 8A rehabilitation loan and therefore, the proceeding was barred by the four month statute of limitations]).⁸

Here, HPD unpersuasively maintains that the letters constitute a final determination. Neither letter indicates any finality, are nonsensically addressed to a deceased person, and give no notice to petitioner concerning retention of her brother’s subsidy (*see Matter of Carter v State of N.Y. Exec. Dept, supra*). The letter was apparently created to satisfy the notice and hearing requirements for Bob Hines as a “participant” in accordance with 24 CFR 982.555, and was not intended to notify petitioner that her request was denied.

As evidenced in HPD’s supplemental brief, no procedure exists to review requests akin

⁸24 CFR 982.554 and 24 CFR 982.555 prescribe the form of notice to be given to an applicant and a participant, as well as the hearing requirements.

petitioner's, or provide notice of the determination. HPD explains that:

If there are no remaining family members that have been certified as part of the household for six months prior to the death of the Section 8 holder's death (as required by Chapter 5 of the Administrative Plan), HPD will send a notice terminating the Section 8 subsidy, as HPD did in the instant proceeding. If there is a remaining family member who has been certified by HPD as part of the household, and that remaining family member appeals, then HPD will grant them a hearing, even if that remaining family member is not part of the household for the requisite six months. However, if, as in the instant proceeding, an appeal of the Notice of Termination is made by someone, even a family member, that has never been certified by HPD as part of the household, HPD will not grant that request absent a showing of power of attorney or letter from the head of household granting them the right to appeal. If the family member fails to show this authorization, the family member has no standing to appeal and the Notice of Termination will remain in effect as HPD's final determination.⁹

Petitioner notes that HPD's procedure is flawed in "that Petitioner is not entitled to a hearing because she is not a family member entitled to retain use of the voucher, but, if HPD decided that Petitioner was in fact a family member entitled to retain use of the voucher, she would not need an informal grievance proceeding."

The court has serious concerns regarding the lack of any procedure to review requests made by persons such as petitioner and to provide notice of the determination. However, the court will not decide whether this deficiency is arbitrary and capricious, and in violation of law or of due process, because the proceeding is time barred.¹⁰

⁹Section 16 of the Plan, which governs the process which is given to an applicant (including voucher holders) and a participant, is based on 24 CFR 982.554 and 24 CFR 982.555.

¹⁰The first and second causes of action in petition assert claims against Respondent KNW Apartments, LLC. ("Apartments") which is not an agency subject to the four month statute of limitations. Accordingly, those claims would not be time barred and are in the nature of an action (despite the petitioner's confusing assertion that Apartments' failures were arbitrary, capricious, an abuse of discretion, and in violation of law, due process and equal protection). Apartments has only submitted an affirmation in opposition to the stay, which does not address the claims asserted against it. However, despite this failure, petitioner is not entitled to relief.

In addition to the letters, HPD relies on its "Elite Note History" to support its claim that this proceeding is time barred. These notes, which HPD explains are part of an internal database, reference email correspondence between petitioner and HPD employee Evelyn Ruiz ("Ruiz"), and, Ruiz and other HPD employees. As explained by petitioner, she contacted Ruiz after appearing in person at 100 Gold Street requesting to speak with someone, and was directed to contact Ruiz. In response to an email sent by petitioner to Ruiz, Ruiz stated by email, dated October 27, 2011:

Good Afternoon Ms. Hines:

I am responding to your email to the Department of Housing Preservation and Development (HPD) requesting that you be granted Mr. Bob Hines Section 8 subsidy.

According to HPD records, Mr. Bob Hines became as Section 8 participant effective June 1, 2005. During Mr. Hines participation in the Section 8 program he listed himself as the sole household member and only his income was considered when the subsidy was calculated. HPD reviewed Mr. Hines case file and there is no evidence that he attempted to add you as a household member.

Mr Hines subsidy was terminated effective September 30, 2010 when HPD was notified that he passed away. Due to the fact that you were never listed as a household member, you are not entitled to receive the Section 8 subsidy.

Thank you.

On October 28, 2011, in response to another email from petitioner, Ms Ruiz stated:

Good Morning Ms. Hines:

You were not a household member at the time that Mr. Hines passes away. Per federal regulations, you are not entitled to the Section 8 subsidy. Mr Hines case is officially closed. Thank you.

Both the first and second causes of action allege that Apartments "was in error in its failures to process, and ultimately to issue a written decision, as to Bob Hines' written request to add Petitioner to his lease or household composition." Even if this claim is deemed one based on alleged misinformation given by Mr. Jenkins regarding where to send the request, petitioner does not establish that, had Mr. Jenkins advised petitioner to send the letter directly to HPD, the result would have been different. Nor does petitioner establish that it was within the province of Apartments to issue a written decision.

And again on October 28, 2011, in response to yet another email from petitioner, Ruiz stated:
Ms. Hines, you are not entitled to a hearing because you were not a household member. Thank you.

In response to this email, petitioner replied:

Thank you for information and time to answers my questions. As advise by counsel I am requesting a hearing to show cause why I should have been on my brother's lease and section 8 vouchers. Thank You Janet Hines.

In her reply affidavit, petitioner asserts that she "did not view her email replies to me as official or final determinations of any kind." However, the emails were final, definite, and steadfast in message. Further, petitioner's October 28, 2011 email reflects that she found that Ruiz's responses sufficiently "official" such that she consulted counsel.¹¹ Accordingly, after contacting the individual whom she was directed to contact, petitioner knew or should have known that she was aggrieved by a final and binding determination (*see e.g. Matter of Baloy v Kelly*, 92 AD3d 521 [1st Dept 2012] [New York City Police Department letter advising petitioner's wife that petitioner's application for a pistol license was denied was a final and binding determination and petitioner knew or should have known that he was aggrieved]). Accordingly, this proceeding, which was commenced seven months thereafter, is time barred.¹²

It is hereby

ADJUDGED that the petition is denied as time barred as to respondent New York City

¹¹Petitioner does not argue that she is an applicant who entitled to notice under 24 CFR 982.554. Although the term applicant is not defined, it is presumably refers to a person who has filled out an application for assistance, as opposed to petitioner, who sought to be added to her brother's household and to appeal termination of his subsidy.

¹²The email between Ruiz and another HPD employee in the appeals unit reflect that the matter was closed by HPD on 12/14/10, the date of the second letter. This further indicates that HPD, inexplicably, has no procedure to cover the situation at bar.

Department of Housing Preservation & Development and is otherwise denied as to respondent KNW Apartments, LLC., and the proceeding is dismissed, without costs and disbursements.

This Constitutes the Decision and Judgment of the Court.

Dated: February 28, 2013

ENTER:


J.S.C.

HON. PETER H. MOUNTZ

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 1418).