

Matter of McQuaige v New York City Hous. Auth.

2013 NY Slip Op 32707(U)

October 25, 2013

Supreme Court, New York County

Docket Number: 401007/13

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 401007/2013

MCQUAIGE, SHARON

vs

NYC HOUSING AUTHORITY

Sequence Number : 001

ARTICLE 78

PART _____

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

is decided in accordance with the annexed decision.

FILED
OCT 30 2013
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
OCT 30 2013
LIS MOTION SUPPORT OFFICE
NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 10/25/13

CRK, 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: Part 55

-----X

In the Matter of the Application of

SHARON MCQUAIGE,

Petitioner,

Index No. 401007/13

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

DECISION/ORDER

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

-----X

HON. CYNTHIA S. KERN, J.S.C.

FILED

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____
OCT 30 2013

Papers

**NEW YORK
COUNTY CLERK'S OFFICE** Numbered

Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Sharon McQuaige commenced the instant Article 78 proceeding seeking to challenge the determination of respondent New York City Housing Authority ("NYCHA") denying her application to vacate her second default for failing to appear at a hearing on termination-of-tenancy charges. NYCHA cross-moves to dismiss the petition on the ground that it is barred by the statute of limitations. For the reasons set forth below, the cross-motion to dismiss the petition is granted and the petition is denied.

The relevant facts are as follows. Petitioner is a tenant in the Marcy Houses, a NYCHA-run property located at 113 Nostrand Avenue, Apt. 5C, Brooklyn, New York (the "subject

premises”). In January 2012, NYCHA sent petitioner a notice that it was recommending her tenancy be terminated due to her chronic delinquency in the payment of rent (the “Notice of Termination”). Specifically, the Notice of Termination stated that petitioner had paid her rent late each month in the previous 12 months and that a dispossess proceeding had been instituted against her. The Notice of Termination further informed petitioner that a hearing on the charges was scheduled before a Hearing Officer on February 23, 2012 at 9:45 a.m.

Petitioner failed to appear at the February 23, 2012 hearing. Thus, in March 2012, NYCHA terminated petitioner’s tenancy due to her failure to appear at the hearing to address her rent delinquency. Petitioner then submitted an application for a new hearing and to open her default. In her application, petitioner stated that she failed to appear for the hearing due to a medical appointment and that her tenancy should not be terminated because “[s]ome repairs were needed some made others not” and that “rent has been paid.” In a letter dated August 30, 2012, NYCHA informed petitioner that her application to open her default was granted and a second hearing was scheduled for October 2, 2012 at 9:00 a.m.

Petitioner failed to appear at the October 2, 2012 hearing, failed to adjourn the hearing and failed to send a representative to appear on her behalf. Thus, NYCHA’s Hearing Officer sustained the chronic rent delinquency charge on default and concluded termination of tenancy was warranted. NYCHA’s Board then adopted the Hearing Officer’s decision. On November 5, 2012, petitioner applied to vacate her second default. In her application, petitioner stated that she failed to appear for the second hearing because she “did not receive mail.” Counsel for NYCHA opposed the application on the ground that proper notice of the hearing was sent to petitioner and that petitioner had no meritorious defense to the action. In a decision dated December 27, 2012, NYCHA denied petitioner’s application to open her second default. Specifically, the decision

states that the application was denied because NYCHA had included “an affidavit reflecting that a copy of the notice was forwarded to the Tenant via certified and regular mail on August 31, 2012” and that petitioner’s defense of “Repairs never made” was inadequate as “there was not indication that a court of proper jurisdiction determined that rent payments should be withheld pending completion of repairs or that an alternative rent payment schedule was ordered.”

Further, the decision noted that petitioner “did not present a viable plan to become current with the rent and to remain current with future rent payments.” NYCHA mailed the decision to petitioner on December 28, 2012. Petitioner then commenced the instant Article 78 proceeding seeking to challenge NYCHA’s denial of her application to open her second default on June 28, 2013 with the filing of a Verified Petition.

There is a four month statute of limitations to bring an Article 78 proceeding to challenge an administrative determination that is measured from the date the determination becomes final and binding upon the petitioner. NY CPLR § 217. Where NYCHA 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 and the limitations period begins to run from the receipt of such decision. *See Matter of Yarbough v. Franco*, 95 N.Y.2d 342, 345 (2000)(holding that “the limitations period begins to run from receipt of the denial of the request to vacate the default.”) Here, NYCHA has affirmed that the denial of petitioner’s application to vacate her second default was mailed to petitioner on December 28, 2012. This gives rise to a presumption that petitioner received the decision. *See Nassau Ins. Co. v. Murray*, 46 N.Y.2d 828, 829-30 (1978)(holding that where proof that a decision was duly addressed and mailed, “a presumption arises that those notices have been received by [the aggrieved]”); *see also Matter of Noel v. New York City Hous. Auth.*, 98 A.D.3d 981, 982 (2d Dept 2012)(holding that as

