SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 401150/2013
ESTEVEZ, GERTRUDIS
VS
NYC HOUSING AUTHORITY
Sequence Number : 001
ARTICLE 78

PART 33

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 47, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1-28
Answering Affidavits — Exhibits _____ | No(s). 29-40; 41-4
Replying Affidavits _____ | No(s). 43-47

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

decided in accordance with the decision and judgment 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).

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

Dated: 1/6/14

_____, J.S.C.
ALEXANDER W. HUNTER JR

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 33

----------X

In the Matter of the Application of
Gertrudis Estevez,

Index No.: 401150/13

Petitioner,

Decision and Judgment

-against-

The New York City Housing Authority and John B. Rhea,
as Chairman of the New York City Housing Authority,

Respondents.

----------X

HON. ALEXANDER W. HUNTER, JR.

The application by petitioner for an order pursuant to CPLR Article 78, annulling the final determination of respondent New York City Housing Authority ("NYCHA") terminating the Section 8 benefits of petitioner, is denied and the proceeding is dismissed without costs and disbursements to either party. The cross motion by respondents to dismiss the petition is granted.

Petitioner Gertrudis Estevez received Section 8 subsidy benefits for the apartment that she resides located at 580 West 176th Street, apartment 25, New York, NY. By Termination Warning Letter dated June 17, 2012 and Notice of Termination of Section 8 Subsidy ("T-1 Notice") dated July 13, 2012, NYCHA informed petitioner that it had not received her income recertification documents. By Notice of Default: Termination of Section 8 Subsidy (" T-3 Notice") dated October 20, 2012, NYCHA informed petitioner that she violated her obligations by failing to complete her annual income recertification forms. The T-3 Notice further informed petitioner that her Section 8 subsidy would be terminated 45 days after the date of the letter, unless petitioner requested a hearing within 45 days after the date of the letter, in which case, the Section 8 subsidy would continue until a final determination was made.

The United States Postal Service ("USPS") track and confirm records show that on October 25, 2012, the USPS left a notice at the address of petitioner advising her to retrieve the T-3 Notice that was sent via certified mail. Although, the T-3 notice was unclaimed, NYCHA continued making subsidy payments to the landlord while it manually reviewed its files to confirm that petitioner did not respond to the T-3 Notice.

By Landlord Notice of Possible Termination, NYCHA informed the landlord that the Section 8 subsidy for petitioner would be terminated effective December 4, 2012 due to her failure to recertify. By Notice of Tenant Termination to Landlord dated March 21, 2013, NYCHA informed the landlord that effective March 31, 2013, the rent subsidy paid by NYCHA would be terminated.

Petitioner avers that: (1) the final determination terminating her subsidy was in violation of lawful procedure and not rationally based on the available facts; (2) neither the T-1 Notice nor the T-3 Notice were received by petitioner; and (3) NYCHA created an ambiguity and tolled the statute of limitations when it continued issuing subsidy payments to her landlord for three additional months after the time period provided on the T-3 Notice.

Respondents cross-move to dismiss the petition on the grounds that the proceeding is time-barred and the petition fails to state a cause of action. Respondents aver that: (1) the T-3 Notice was properly mailed by regular and certified mail in October 2012; (2) petitioner is avoiding the triggering of the statute of limitations by evading receipt of the T-3 Notice; and (3) the extended Section 8 subsidy payment to the landlord did not toll the statute of limitations.

Petitioner opposes the cross motion to dismiss on the grounds that the instant proceeding was timely commenced and that the petition states a cause of action. Petitioner avers that: (1) NYCHA created an ambiguity about the finality of its determination to terminate her subsidy, thereby tolling the statute of limitations; (2) NYCHA is not entitled to the presumption of receipt of the T-3 Notice; and (3) the presumption of receipt of the T-3 Notice was sufficiently rebutted by petitioner.

The Section 8 program is a federally funded program administered by the United States Department of Housing and Urban Development ("HUD"). **See 42 U.S.C. § 1437f**. The purpose of the Section 8 program is to aid low-income families in obtaining affordable rental housing. HUD regulations for the Section 8 program are set forth in Part 982 of Title 24 of the Code of Federal Regulations ("C.F.R."). **See 24 C.F.R. § 982, et seq**. In New York City, NYCHA is one of three public housing agencies that administer the Section 8 program. Federal regulations require Section 8 participants to furnish NYCHA with information regarding household income. **See 24 C.F.R. § 982.551(b)(2)**. The regulations also provide that NYCHA may terminate a Section 8 subsidy if a participant fails to comply. **See 24 C.F.R. § 982.552(c)(1)(I)**.

The administration of the Section 8 program by NYCHA is subject to the consent judgment entered in Williams v. NYCHA, 81-Civ-1801, docketed October 17, 1984 (S.D.N.Y.) (RJW), which sets forth the notice and hearing procedures NYCHA must follow before terminating a Section 8 subsidy of a subject tenant (the "Williams consent decree") (Kramer affirmation, exhibit A, ¶3). Pursuant to the Williams consent decree, the T-3 Notice must be sent to the subject tenant via certified and regular mail. This procedure is required to increase the likelihood that the subject tenant will actually receive the notice. **Matter of Green v. Hernandez, 6 Misc.3d 1041A (2005)**. The Williams consent decree provides that "there is a rebuttable presumption of receipt of the requests or notices referred to herein on the fifth day following the date of mailing." (Kramer affirmation, exhibit A, ¶22[g]). For statute of limitations purposes, "the determination to terminate a subsidy shall, in all cases, become final and binding upon receipt of...[the T-3] Notice of Default." (Kramer affirmation, exhibit A, ¶22[f]).

The four-month statutory period in which to challenge a determination commences "after the determination to be reviewed becomes final and binding upon the petitioner." **See CPLR 217(1) & 304; Best Payphones, Inc. v. Dept. of Info Tech. & Telecomms., 5 N.Y.3d 30, 35 (2005); Edmead v. McGuire, 67 N.Y.2d 714, 716 (1986); Biondo v. New York State Bd. of Parole, 60 N.Y.2d 832, 834 (1983).** Here, the applicable four-month statute of limitations runs from the date of receipt of the T-3 Notice. **See Matter of Lopez v. New York City Hous. Auth., 93 A.D.3d 448 (1st Dept. 2012).**

NYCHA is entitled to the presumption of receipt based on an affidavit of its employee attesting to the proper mailing of the determination to a petitioner. **Nassau Ins. v. Murray, 46 N.Y.2d 828, 829-830 (1978); Matter of Lopez, 93 A.D.3d at 448-449; Northern v. Hernandez, 17 A.D.3d 285, 286 (1st Dept. 2005).** A petitioner cannot rebut this presumption with mere denial of receipt and without additional factual support. **Northern, 17 A.D.3d. at 286.** Furthermore, a petitioner cannot purposely frustrate the procedure established to provide due process by refusing to claim a properly addressed letter. **Gryphon Dom. VI, LLC v. APP Intl. Fin. Co., B.V., 41 A.D.3d 25, 32 (1st Dept. 2007).**

Here, the Administrative Manager in the General Services Department of NYCHA attests that NYCHA mailed the T-3 Notice on October 25, 2012, which raises a rebuttable presumption that petitioner received the T-3 Notice on October 30, 2012. Petitioner claims that during the applicable time period, which coincided with Hurricane Sandy, mail was routinely misdelivered causing her to not receive the T-3 Notice. Although petitioner submits a photocopy of a USPS Delivery Notice/Reminder/Receipt dated March 2013 and addressed to an apartment not her own, this is not probative on the issue of whether mail was misdelivered in October 2012. As such, petitioner has failed to rebut the presumption of receipt.

The Voucher Change Notification and Rent Share Determination letters dated February 11, 2013, did not create an ambiguity as to whether the decision of NYCHA was final and binding, nor did it toll the statute of limitations. Petitioner had until February 28, 2013 to commence an Article 78 proceeding, however she did not commence the instant proceeding until July 24, 2013, almost five months after the expiration of the statute of limitations. Accordingly, the application by petitioner is time-barred and the proceeding is dismissed. **See CPLR 217(1), 304, & 3211(a)(5); Parks v. New York City Hous. Auth., 100 A.D.3d 407 (1st Dept. 2012); Matter of Lopez, 93 A.D.3d at 448-449; Matter of Fernandez v. NYCHA Law Dept., 284 A.D.2d 202 (1st Dept. 2001).**

Accordingly, it is hereby

ADJUDGED that the application by petitioner for an order pursuant to CPLR Article 78, annulling the final determination of respondent NYCHA terminating the Section 8 benefits of petitioner, is denied and the proceeding is dismissed without costs and disbursements to either party. The cross motion by respondents to dismiss the petition is granted.

Dated: January 6, 2014

ENTER:

J.S.C.

ALEXANDER W. HUNTER JR.

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).