Ciancimino v New York City Human Resources Admin.
2020 NY Slip Op 32822(U)
August 28, 2020
Supreme Court, New York County
Docket Number: 451354/2020
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL R. EDMEAD** **PART** **IAS MOTION 35EFM**

Justice

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JACK CIANCIMINO,

Plaintiff,

- v -

THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, STEVEN BANKS, AS COMMISSIONER OF THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, ADULT PROTECTIVE SERVICES, JEWISH ASSOCIATION FOR SERVICES FOR THE AGED, ENIGN ASH LLC & PNL EQUITIES LLC

Defendant.

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INDEX NO. 451354/2020

MOTION DATE 8/13/2020

MOTION SEQ. NO. 001,002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 17, 18 were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

The following e-filed documents, listed by NYSCEF document number (Motion 002) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

ORDERED that the petition for relief, pursuant to CPLR Article 78, of Petitioner Jack Ciancimino (Motion Seq. 001) is denied and the petition is dismissed; and it is further

ORDERED that the motion by Respondents New York City Human Resources Administration, Steven Banks as the Commissioner of the Social Services of the City of New York, Adult Protective Services and Jewish Association for Services for the Aged (City Respondents) to dismiss the petition (Motion Seq. 002) is granted; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that the counsel for City Respondents shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for all parties.

MEMORANDUM DECISION

In this Article 78 proceeding, Petitioner Jack Ciancimino seeks an order: (i) declaring Respondents New York City Human Resources Administration (HRA), Steven Banks as the Commissioner of the Social Services of the City of New York, Adult Protective Services (APS) and Jewish Association for Services for the Aged (JASA) (collectively, "City Respondents") to be in violation of New York Social Services Law and New York State regulations and administrative directives governing the provision of social services; (ii) directing City Respondents to expeditiously provide Petitioner with appropriate protective services; and (iii) staying the eviction proceeding against Petitioner in *Enign Ash LLC, PNL Equities LLC v. Jack Ciancimino* (L&T No. 056804/19).

City Respondents oppose the petition and move for its dismissal pursuant to CPLR 3211(a)(2) and (7), on the grounds that: (i) Petitioner failed to exhaust administrative remedies; (ii) Petitioner seeks improper mandamus relief; (iii) Petitioner's claims are moot; and (iv) City Respondents' determination that Petitioner is ineligible for APS services was not arbitrary or capricious (Motion Seq. 002).

For the following reasons, the petition is dismissed.

BACKGROUND FACTS

Petitioner is 66 years old with a number of health issues, including Lyme disease diagnosis, surgeries from a serious staph infection and dependence on an oxygen tank at home (NYSCEF doc No. 1, ¶ 30). Petitioner allegedly needs surgeries but has yet to undergo surgeries due to the COVID-19 crisis (*Id.*, ¶ 31).

Respondent HRA is a division of the New York City Department of Social Services. APS is one of its divisions. APS engages third-party vendors, including Respondent JASA, to perform evaluations of applicants for APS services.

APS Referrals

Petitioner was referred to APS for protective services on five separate occasions in 2019, all in the context of Petitioner facing an eviction proceeding (Eviction Proceeding) commenced by his landlord, Enign Ash LLC (Enign), for nonpayment of rent.

The first referral, made in June 2019, was assigned to third-party vendor, Village Care Adult Protective Services (VCAPS). VCAPS found Petitioner ineligible for APS services after finding that Petitioner was not at risk (NYSCEF doc No. 21, p. 3).

The four subsequent referrals in August, September, October and December 2019 were all assigned to JASA for evaluation. In all four instances, JASA found Petitioner ineligible. Specifically, JASA found that Petitioner had "sufficient mental and physical capacity" when he was referred in August and October 2019 (NYSCEF doc No. 25, p. 67); that Petitioner could not be located when he was referred in September 2019 (*Id.*, p. 63); and that Petitioner had someone willing and able to assist him when he was referred in December 2019 (*Id.*, p. 2). APS issued the determination of ineligibility relating to the December 2019 referral on February 25, 2020 (February 2020 Determination). On March 9, 2020, Petitioner's counsel requested a fair hearing with the Office of Temporary and Disability Assistance (OTDA) to challenge the February 2020 Determination.

Article 78 Proceeding

During the pendency of the OTDA fair hearing, and without awaiting any decision from the OTDA, Petitioner's counsel commenced this Article 78 proceeding on June 6, 2020 seeking

an order: (i) declaring City Respondents to be in violation of law and regulations governing provision of APS; (ii) compelling, by way of mandamus, City Respondents to provide Petitioner "with appropriate protective services in an expedited manner to prevent his eviction and resulting harm" (NYSCEF doc No. 1); and (iii) staying the Eviction Proceeding pending the final resolution of this matter. Petitioner's counsel argued that requiring Petitioner to exhaust administrative remedies "would result in the irreparable injury of the eviction of [Petitioner] and subsequent homelessness" (NYSCEF doc No. 1, ¶ 65).

In a subsequent email dated July 17, 2020, Petitioner's counsel informed this Court that the Eviction Proceeding against Petitioner had been discontinued. On July 23, 2020, Petitioner voluntarily discontinued this proceeding as against Enign (NYSCEF doc No. 19).

City Respondents are now moving to dismiss this proceeding (Motion Seq. 002). To support their motion, they argue that: (i) Petitioner failed to exhaust administrative remedies (NYSCEF doc No. 21, pp. 6-10); (ii) the petition fails to state a cause of action as City Respondents performed their legal duty and cannot be compelled to provide APS services (*Id.*, pp. 10-17); (iii) the petition has become moot as the Eviction Proceeding was discontinued and APS is already in the process of reassessing Petitioner's eligibility (*Id.*, pp. 17-20); and (iv) the February 2020 Determination is not arbitrary and capricious (*Id.*, pp. 20-25).

On August 3, 2020, the OTDA conducted a fair hearing and issued a decision (the OTDA Decision) finding for Petitioner on August 17, 2020. In the OTDA Decision, the OTDA found that, contrary to the finding in the February 2020 Determination, Petitioner "has no one available to help except his son who does not seem that capable" (NYSCEF doc No. 36). The OTDA also noted that a psychological examination of Petitioner has not yet been conducted. Thus, the OTDA remanded the matter back to APS for further evaluation (*Id.*).

DISCUSSION

Section 7801(1) of the CPLR states that no determination shall be challenged in an Article 78 proceeding "which is not final or can be adequately reviewed by appeal to a court or to some other body or officer…." A determination is deemed final and binding and thereby ripe for review "when it 'has its impact' upon the petitioner who is thereby aggrieved" (*Parent Teacher Ass'n of P.S. 124M v Board of Educ. of City School Dist. of City of N. Y.*, 138 AD2d 108 [1st Dept 1988] citing *Matter of Edmead v McGuire*, 67 NY2d 714 [Ct App 1986]). However, the exhaustion of administrative remedies rule is not inflexible and need not be followed where an agency's action is challenged as unconstitutional, wholly beyond its grant of power, when resort to an administrative remedy would be futile or when its pursuit would cause irreparable injury (*see Lehigh Portland Cement Co. v. New York State Dep't of Envtl. Conservation*, 87 N.Y.2d 136, 140 [1995]; *Watergate II Apartments v. Buffalo Sewer Auth*., 46 N.Y.2d 52, 57 [1978]).

Here, the Court finds that Petitioner failed to exhaust his administrative remedies and this petition must be dismissed. When this proceeding was commenced, a fair hearing before the OTDA was pending pursuant to 18 NYCRR 358. Requiring an aggrieved party to seek an administrative hearing before the OTDA furthers the goal of the exhaustion doctrine, *i.e.*, to prevent the "premature judicial interference with the administrators' efforts to develop, even by some trial and error, a coordinated, consistent and legally enforceable scheme of regulation" *Watergate II Apartments v. Buffalo Sewer Auth*., 46 N.Y.2d 52, 57 [1978]).

Petitioner argues that requiring him to exhaust administrative remedies would result in irreparable injury of eviction and homelessness. The Court, however, finds that Petitioner is no longer in any imminent risk of being evicted from his home as the Eviction Proceeding has already been discontinued. The case cited by Petitioner, *Uswij v Robins* (133 AD2d 695, 698 [2d Dept

1987]), is inapposite here. In *Uswij,* petitioner's landlord obtained a judgement and a warrant of eviction against Uswij and Uswij consequently received a "72-Hour Notice" of eviction. Thus, the Second Department held that since Uswij was faced with imminent eviction, it would have been futile for her to pursue administrative remedies. Petitioner's circumstances in this case are different since, as of the date of this Decision, there is no evidence on record that Enign is trying to evict Petitioner from his home or that Enign has threatened to do so.

The Court rejects Petitioner's argument that exhaustion of administrative remedies is futile as "there is no reason to think [the City Respondents] will act any differently or arrive at different determination upon a remand from the Fair Hearing" (NYSCEF doc No. 30, ¶ 31). This argument is speculative. While City Respondents have assigned Petitioner's case to JASA four times in 2019, the Court notes that the current reassessment of Petitioner, pursuant to the OTDA Decision, was assigned to a different APS office (APS Queens field office) and a different caseworker (NYSCEF doc No. 21, p. 19). Moreover, the OTDA Decision sets out new factual findings that should guide City Respondents in their ongoing reassessment of Petitioner.

Petitioner next argues that the discontinuance of the Eviction Proceeding "does not dissipate any future threat of eviction" (NYSCEF doc No. 30).[1] The Court, however, finds no evidence of future threat of eviction as Petitioner was granted rental assistance by Respondent HRA on June 9, 2020 in the amount of $17,075 (NYSCEF No. 34) which is a little less than $17,225.00 that Petitioner is bound to pay Enign pursuant to their Stipulation of Settlement (NYSCEF doc No. 7). Given this rental assistance, coupled by the current moratorium on eviction

[1] Petitioner raised this argument to address the issue of mootness, but the Court finds this argument also relevant to the issue of exhaustion given that the allegation of "future threat of eviction" affects the finding of this Court that Petitioner is facing no irreparable harm of eviction.

proceedings in place in the State of New York due to the COVID-19 pandemic, the Court finds that any future threat of eviction is, at this juncture, speculative.

Petitioner cites to *McNeil v New York City Housing Authority* (F. Supp. 233 [SDNY 1989]) for the proposition that "eventual eviction" is a threat of irreparable harm, but that is inapplicable here as it was taken out of context. Contrary to Petitioner's assertion that the tenants in *McNeil* were not in active eviction proceeding, the *McNeil* court stated in the background of the case that "[a]ll named plaintiffs have settled [and] [t]he remaining plaintiffs are currently being sued for eviction by their respective landlords in the Housing Part of the New York City Civil Court". Thus, the plaintiffs were indeed facing "eventual eviction." Moreover, the *McNeil* court's finding of irreparable harm was made in the context of issuing a preliminary injunction against plaintiffs' landlords who if "not enjoined, will continue to seek full rental payments from plaintiffs". Here, there is no evidence on record that Enign is continuing to seek eviction of Petitioner; if that were the case, Petitioner himself would not have voluntarily discontinued this case against Enign.

Finally, the fact that Petitioner is seeking relief in the nature of mandamus does not make this case automatically fall under the exception to the exhaustion requirement. *First*, the Court recognizes that the case of *Hamptons Hospital & Medical Center* (52 NY2d 88 [Ct App 1981]) held that "[a]n article 78 proceeding may lie in the absence of a final determination where the relief sought is by way of …of mandamus to compel performance by an administrative agency of a duty enjoined by law". Critically, the *Hamptons* court also held that "[m]andamus for such purpose, however, lies only where the right to relief is 'clear' and the duty sought to be enjoined is performance of an act commanded to be performed by law and involving no exercise of discretion". Here, Petitioner does not deny that the act sought to be compelled, *i.e.*, the provision of APS services, involves an exercise of discretion. Petitioner argues that discretion was

improperly exercised (NYSCEF doc No. 30, ¶36-38). This, however, does not fall under the exception to the exhaustion requirement as contemplated in *Hamptons.*

Second, the doctrine of exhaustion can still apply to mandamus proceedings if petitioner has an adequate remedy at law (*see Martinez 2001 v New York City Campaign Fin. Bd.*, 36 AD3d 544 [1st Dept 2007]["Unlike the motion court, we do not read the Court of Appeals decision in *Hamptons Hospital* as standing for the proposition that the exhaustion requirement is never applicable in proceedings seeking relief in the nature of prohibition or mandamus to compel. On the contrary, the Court of Appeals and this Court have applied the exhaustion requirement to both types of proceedings in circumstances where the petitioner had an adequate remedy at law"], *citing Matter of Doe v Axelrod*, 71 NY2d 484, 490 [1988] [remedy of prohibition unavailable to overturn Commissioner's reversal of administrative officer's evidentiary ruling because petitioner had adequate remedy in right to appeal final agency determination]; and *Matter of DiBlasio v Novello*, 28 AD3d 339, 342 [2006] [absent irreparable injury, exhaustion requirement applicable to petition seeking mandamus to compel a disciplinary agency to comply with hearing officer's order to turn over its file for in camera review]). Since Petitioner has a remedy available before the OTDA, this Court finds that Petitioner was required to exhaust administrative remedies prior to commencing this proceeding.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the petition for relief, pursuant to CPLR Article 78, of Petitioner Jack Ciancimino (Motion Seq. 001) is denied and the petition is dismissed; and it is further

ORDERED that the motion by Respondents New York City Human Resources Administration, Steven Banks as the Commissioner of the Social Services of the City of New York, Adult Protective Services and Jewish Association for Services for the Aged (City Respondents) to dismiss the petition (Motion Seq. 002) is granted; and it is further

ORDERED that the Clerk of the Court is to enter judgment accordingly; and it is further

ORDERED that the counsel for City Respondents shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for all parties.

HON. CAROL R. EDMEAD J.S.C.

8/28/2020
DATE

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED		DENIED	GRANTED IN PART	X	OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE