Jimenez v Russ
2020 NY Slip Op 33551(U)
October 27, 2020
Supreme Court, New York County
Docket Number: 451420/2020
Judge: Carol R. Edmead

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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PERLA JIMENEZ,

Plaintiff,

- v -

GREGORY RUSS, CHAIR AND CHIEF EXECUTIVE OFFICER OF THE NEW YORK CITY HOUSING AUTHORITY, ALIR INC

Defendant.

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INDEX NO. 451420/2020

MOTION DATE 12/08/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Perla Jimenez (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondents New York City Housing Authority and Gregory Russ (motion sequence number 001) is granted, and the petition is dismissed in its entirety as against said respondents, and it is further

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

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on all parities within twenty (20) days.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Perla Jimenez (Jimenez) seeks an order to overturn a determination of the respondent New York City Housing Authority (NYCHA) as arbitrary and capricious, NYCHA and its chair, Gregory Russ, cross-move to dismiss the petition (together, motion sequence number 001). For the following reasons, the petition is denied, the cross motion is granted, and this proceeding is dismissed.

BACKGROUND FACTS

Jimenez is the tenant of record of apartment 5W in a residential apartment building located at 342 East 146th Street in the County of the Bronx, City and State of New York (the building). *See* verified petition, ¶ 4. From 2004 until December 2019, Jimenez was a participant in the "Section 8 Housing Choice Voucher program," a low-income, rental assistance program that is administered by NYCHA. *Id.*, ¶¶ 1, 24. Co-respondent Alir, Inc. (Alir) is the building's owner. *Id.*, ¶ 35.

Participants in "Section 8" programs are required to submit annual income recertification statements that demonstrate their continued eligibility for program benefits, and the failure to do so may result in a participant's termination from a program. 24 CFR §§ 982.551 (b) (2), 982.552 (c) (1) (i). NYCHA asserts that Jimenez failed to submit her 2018 annual income recertification statement that was due in October 2018. *See* notice of cross motion, Kramer affirmation, ¶ 10. NYCHA has presented (a) a copy of the "T-3 termination notice," dated October 6, 2018, that notified Jimenez that NYCHA would terminate her Section 8 subsidy in 45 days unless she made a timely request for a termination hearing within that 45-day period, and (b) proof of service of the T-3 notice via regular mail with a certificate of mailing. *Id.*, Kramer affirmation, ¶¶ 10-11; exhibit B; Ho aff, ¶¶ 5-6, exhibits 1-3. NYCHA asserts that Jimenez failed to either submit her

2018 income certification, or to request a termination hearing within the specified 45-day period. *Id.*, Kramer affirmation, ¶ 11. NYCHA further asserts that those failures caused it to send Jimenez a letter on December 4, 2018 that notified her that she would be terminated from the Section 8 Housing Choice Voucher program" effective December 31, 2018. *Id.*, Kramer affirmation, ¶ 12; exhibit C. For her part, Jimenez avers that she never received the T-3 notice, and also that NYCHA improperly denied the two applications that she subsequently submitted in 2019 to have her Section 8 subsidy restored. *See* verified petition, ¶¶ 28-35. Jimenez also notes that, in January 2020, Alir commenced a summary holdover proceeding against her in the Housing Part of the Civil Court of the City of New York under Index Number LT-002063-20/BX (the Housing Court proceeding). *Id.*, ¶ 35; exhibit O.

Jimenez commenced this Article 78 proceeding on June 23, 2020, at which time the Covid-19 national pandemic forced the court to indefinitely suspend the bulk of its operations. *See* verified petition. NYCHA nevertheless filed a cross motion to dismiss this proceeding on July 30, 2020. *See* notice of cross motion. Despite the pendency of the Housing Court proceeding, Jimenez is currently protected from eviction through the end of this year by the moratoria imposed by the New York State and federal governments. This matter is now fully submitted (motion sequence number 001).

DISCUSSION

Normally, a court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 (1974); *Matter of E.G.A. Assoc. Inc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d

302, 302 (1st Dept 1996). Jimenez's petition asks the court to find that NYCHA's decision to terminate her from the Section 8 program was an arbitrary and capricious act. *See* verified petition, ¶¶ 36-41. However, NYCHA's cross motion asserts that the court cannot perform the normal Article 78 analysis in this case because Jimenez's petition is time-barred. *See* notice of cross motion, Kramer affirmation, ¶¶ 15-40. For the following reasons, the court agrees.

In *Matter of Banos v Rhea* (25 NY3d 266 [2015]), which reviewed the notice and termination procedures for Section 8 programs that the United States District Court for the Southern District of New York approved in the consent decree that it entered in *Williams v NYCHA* (81 Civ 1801 [SDNY 1984]), the Court of Appeals held as follows:

> "The plain language of the *Williams* consent judgment draws a distinction between what is required to commence the limitations period for a challenge to a termination of Section 8 benefits, on the one hand, and what is required for NYCHA to establish the merit of such a termination - including NYCHA's full compliance with the notice requirements - on the other hand. The consent judgment addresses the statute of limitations in paragraph 22 (f) as follows: '[F]or the purposes of Section 217 and Article 78 of the [CPLR], the determination to terminate a [Section 8] subsidy shall, in all cases, become final and binding upon receipt of the Notice of Determination pursuant to paragraph "22(a)" hereinabove, or the notice of Default, pursuant to paragraph "3 (e)" above' - i.e., the T-3 letter - with an exception that is not relevant here.
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> "For these reasons, we hold that the timeliness of a proceeding against NYCHA challenging a termination of Section 8 benefits is measured from the tenant's receipt of the T-3 letter, regardless of whether NYCHA proves that it mailed the other two notices. . . . While this rule may result in the dismissal of petitions for some tenants with otherwise meritorious claims, such a result is inherent in any limitations period. However, statutes of limitations embody an important public policy of providing finality for agency determinations and reflect a legislative judgment to shield parties from having to defend against stale claims. . . . In arriving at the terms of the *Williams* consent judgment, this policy - set forth in paragraph 22 (f) - was evidently balanced against the policy underlying the procedural requirements of paragraphs 2 and 3 for a valid termination of benefits.
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> "Turning to the contentions of [respondents] that NYCHA failed to establish that it properly mailed the T-3 letters, paragraph 22 (g) of the *Williams* consent judgment contains a rebuttable presumption that the T-3 letter is received 'on the fifth day following the date of mailing.' *In each case before us, the Appellate Division found, either explicitly or implicitly, that NYCHA established proper mailing of the T-3 letter . . . Those factual determinations are supported by the record in each case, and each*

> *petitioner's bare denial of receipt is insufficient to rebut the presumption contained in paragraph 22 (g) of the consent judgment. . . . Thus, the statute of limitations began to run five days after mailing of the T-3 letters, notwithstanding the absence of proof regarding mailing of the warning letters or T-1 letters.* The parties do not dispute that, under this interpretation of the consent judgment, each of these proceedings was untimely if measured from the applicable date."
> 25 NY3d at 276-281 (internal citations omitted, emphasis added).

In this case, NYCHA has presented a copy of the U.S. Post Office certificate of mailing that shows that its General Services Department placed Jimenez's October 6, 2018 T-3 termination notice in the mail on October 10, 2018. *See* notice of cross motion, Ho aff, ¶ 6; exhibit1 1, 2. Pursuant to the holding of *Matter of Banos v Rhea*, "paragraph 22 (g) of the *Williams* consent judgment contains a rebuttable presumption that the T-3 letter is received 'on the fifth day following the date of mailing.'" 25 NY3d at 280. In this case, that means that a rebuttable presumption arose that Jimenez received the T-3 notice on October 15, 2018, which was also the day on which the four-month statute of limitations applicable to Article 78 proceedings began to run. However, Jimenez did not commence this Article 78 proceeding until June 23, 2020, four months after the limitations period had expired on February 15, 2019. *See* verified petition. Therefore, pursuant to the holding of *Matter of Banos v Rhea*, Jimenez's Article 78 petition is untimely, her claim is time-barred, and this proceeding must be dismissed. *See also Matter of Vuksan Realty, LLC v Olatoye*, 179 AD3d 465 (1st Dept 2020). Jimenez nevertheless raises several arguments in opposition.

First, Jimenez's counsel argues that she "never received the notice of default." *See* verified petition, ¶ 28; petitioner's memo of law at 5-6. However, the court notes that counsel's allegation is not accompanied by an affidavit of merits from Jimenez herself, or by any evidence to overcome the rebuttable presumption that she received the T-3 notice on October 15, 2018. The court also notes the Court of Appeals' directive that "[a] petitioner's bare denial of receipt is

insufficient to rebut the presumption contained in paragraph 22 (g) of the consent judgment." *Matter of Banos v Rhea*, 25 NY3d at 280. Therefore, the court rejects Jimenez's first opposition argument.[1]

Jimenez's counsel also argues that "the T-3 notice . . . must be sent by [both] regular and certified mail prior to the termination of a subsidy." *See* petitioner's memo of law at 6. However, neither the terms of the *Williams* consent decree nor the Court of Appeals' holding in *Matter of Banos v Rhea* includes or imposes a certified mailing requirement for T-3 notices. Nor does Jimenez's counsel identify any appellate case law that recognizes such a requirement. Therefore, the court rejects counsel's second opposition argument as unsupported.

Jimenez's counsel next argues that NYCHA's "T-3 Notice . . . was vitiated by subsequent notices" that it sent to her in response to her applications for restoration of her Section 8 subsidy. *See* petitioner's memo of law at 7-8. NYCHA correctly notes that that such subsequent communications do not toll the four-month statute of limitations applicable to Article 78 proceedings once the Authority has issued a valid Section 8 termination. *See* notice of cross motion, Kramer affirmation, ¶¶ 27-33; *see e.g.*, *Matter of Saunders v Rhea*, 92 AD3d 602, 603 (1st Dept 2012); *Matter of Thorton v New York City Hous. Auth.*, 100 AD3d 556, 557 (1st Dept 2012). NYCHA also notes that the "subsequent notices" that it sent to Jimenez denying her applications for restoration to the Section 8 program all specifically recited that she had been terminated effective December 31, 2018, and all indicated that it was necessary for her to submit her missing 2018 income recertification before NYCHA could consider her restoration

[1] Jimenez's counsel repeats her "nonreceipt" argument in her reply papers. *See* Lynch affirmation in opposition, ¶¶ 4-7. However, she fails to cite any case that supports her assertion that a tenant's mere allegation of "nonreceipt" of a T-3 termination notice is sufficient to warrant a hearing on the issue of service. She also does not address the case law which does hold that a certificate of mailing of a T-3 termination notice creates a presumption that the tenant received the notice five days later. *Matter of Banos v Rhea*, 25 NY3d at 280.

applications. *Id.*; see verified petition, exhibit E. The court agrees that this language belies the assertion by Jimenez's counsel that the "subsequent notices" somehow created ambiguity about the finality of NYCHA's termination decision.

Therefore, the court rejects counsel's third opposition argument.[2]

Jimenez's counsel next argues that "NYCHA's denial of petitioner's request for restoration must be reversed because it was arbitrary and capricious." *See* petitioner's memo of law at 8-15. However, as previously discussed, the fact that Jimenez's Article 78 petition is time-barred precludes the court from analyzing the merits of her claim. *See e.g.*, *Matter of Henry v New York City Hous. Auth.*, 122 AD3d 448 (1st Dept 2014). Therefore, the court rejects counsel's fourth opposition argument.

Jimenez's counsel finally argues that NYCHA's "termination of petitioner's Section 8 subsidy constitutes a disproportionate penalty and an abuse of discretion." *See* petitioner's memo of law at 15-21. However, courts only address this issue when performing the "arbitrary and capricious" analysis of the merits of Article 78 petitions that the Court of Appeals promulgated in *Matter of Pell* (34 NY2d at 233-235). As just discussed, the court cannot perform that analysis of Jimenez's petition because her claims are time-barred. Therefore, the court rejects counsel's final opposition argument.

Accordingly, the court concludes that Jimenez's Article 78 petition should be denied and that NYCHA's cross motion should be granted. The court is mindful that Jimenez is potentially subject to eviction, should Alir obtain a possessory judgment against her in the Housing Court

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[2] Jimenez's counsel repeats this "ambiguity" argument in her reply papers as well. *See* Lynch affirmation in opposition, ¶¶ 8-36. She cites the First Department's decision in *Matter of Cole v New York City Hous. Auth.* (122 AD3d 527 [1st Dept 2014]) for the proposition that "subsequent notices" are sufficiently ambiguous to warrant tolling the statute of limitations if they contain an instruction from NYCHA "to disregard the notices of termination which she had received." *Id.*, ¶ 9. However, this misstates both the holding and the facts of *Matter of Cole*, which did not order that the statute of limitations be tolled.

proceeding. However, the court is also mindful that, on September 4, 2020, the Centers for Disease Control and Prevention - an agency of the U.S. Department of Health and Human Services - issued an additional moratorium on residential evictions through December 31, 2020 pursuant to a contemporaneous presidential executive order. 42 USC § 264; 42 CFR § 70.2. As a result, Jimenez is protected from eviction through the end of this year. Nevertheless, out of an abundance of caution, the court directs Jimenez's counsel to include a copy of this order with any material that she may submit to the Housing Court when litigation of the summary holdover proceeding resumes.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Perla Jimenez (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondents New York City Housing Authority and Gregory Russ (motion sequence number 001) is granted, and the petition is dismissed in its entirety as against said respondents, and it is further

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

ORDERED that counsel for respondents shall serve a copy of this order along with notice of entry on all parities within twenty (20) days.

10/27/2020
DATE

CAROL R. EDMEAD, J.S.C.

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