

Timm v New York Child Support Enforcement Unit
2020 NY Slip Op 34354(U)
December 28, 2020
Supreme Court, New York County
Docket Number: 157033/2020
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

-----X

CHRISTOPH TIMM,

Petitioner,

- v -

NEW YORK CHILD SUPPORT ENFORCEMENT
UNIT, SUNITA IYER

Respondents.

-----X

INDEX NO. 157033/2020
MOTION DATE 11/25/2020
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 10, 12, 13, 14, 15, 16, 17, 18

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 Christoph Timm (motion sequence number 001) is denied; and it is further

ADJUDGED that the cross motion for relief pursuant to CPLR Article 78 of respondent Sunita Iyer (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondent New York Child Support Enforcement Unit (motion sequence number 001) is granted and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent New York Child Support Enforcement Unit shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Christoph Timm (Timm) moves by order to show cause for an order in the nature of mandamus against the respondent New York Child Support Enforcement Unit (CSEU), respondent Sunita Iyer (Iyer) cross-moves separately for an order in the nature of mandamus against the CSEU, and the CSEU cross-moves to dismiss Timm's petition (together, motion sequence number 001). This decision disposes of all applications for relief.

BACKGROUND

Timm and Iyer are the divorced parents of a minor child. *See* petition, ¶¶ 5-10. Iyer is the custodial parent, and Timm the non-custodial parent. *Id.* The dispute underlying this proceeding concerns Timm's recurring failure to meet his child support payment obligation.

On March 21, 2008, this court (Evans, J.) entered a judgment of divorce between the parties under Index Number 306541/06 (*Timm v Timm*) that incorporated the terms of a stipulation under which Timm agreed to pay Iyer \$920.00 per month in basic child support for their son and 50% of their son's add-on expenses. *See* notice of cross motion (Iyer), exhibit D, ¶ 4, exhibit D-A. The divorce judgment provided that this court did not retain exclusive jurisdiction to modify its terms. *Id.*, exhibit D, ¶ 5, exhibit D-A.

Subsequently, on April 23, 2015, Iyer filed petitions with New York County Family Court for "violation and enforcement" of the divorce judgment (the enforcement petition) and for "modification of the support order" set forth in the divorce judgment (the modification petition). *See* notice of cross motion (Iyer), Iyer aff at 2-3, exhibits D, E. Iyer notes that, pursuant to Social Services Law § 111-g, the enforcement and modification petitions were deemed to be "applications for child support enforcement services." *Id.*, Iyer aff at 2. Pursuant to Family

Court Act § 413-a, Iyer's enforcement and modification petitions both also requested that review of Timm's child support obligation include an assessment of whether to include the "cost of living adjustment" (COLA) authorized by Social Services Law § 111-n. *Id.*, exhibits D, E.

On January 6, 2020, the Family Court Magistrate (Clarke, J) issued an order of disposition that resolved Iyer's enforcement and modification petitions by: 1) continuing the order of support set forth in the parties' March 21, 2008 divorce judgment that required Timm to pay \$920.00 per month in basic child support; 2) entering a money judgment against Timm for \$2,658.50 (plus interest) in unpaid child support; and 3) directing Timm to make all future child support payments to Iyer through the CSEU in a manner to be determined by the CSEU. *See* notice of cross motion (Iyer), Hartje aff, ¶ 8; exhibit C. The CSEU thereafter commenced collections efforts against Timm.

The CSEU avers that it originally miscalculated Timm's monthly child support payment at \$1,337.00 by mistakenly including an additional \$417.00 childcare charge to Timm's actual \$920.00 monthly obligation. *See* notice of cross motion (CSUE), Hartje aff, ¶ 10. The CSEU asserts that it subsequently corrected that error and recalculated Timm's total monthly child support obligations from January 6, 2020 forward to remove the \$417.00 excess charge. *Id.* The CSEU does not contest that Timm satisfied the \$2,658.50 money judgment for support arrears by paying it on January 23, 2020. *Id.*; exhibit E.

The CSEU's counsel also avers that the CSEU initiated the driver's license suspension process against Timm on May 22, 2020 by serving him with the requisite notification. *See* respondents' mem of law at 7. Counsel states that Timm submitted a timely response, which has resulted in an ongoing review. *Id.* Counsel represents that the CSEU has not yet issued a determination on the matter, and alleges that Timm's driver's license is not now suspended. *Id.*

The CSEU presents a copy of a letter that it sent to Timm, dated September 10, 2020, which informed him of his obligation to remit his monthly payments to the CSEU and attached a copy of a proposed “income withholding order” (IWO) that the CSEU intended to serve on Timm’s employer in the event that he did not comply. *See* notice of cross motion (CSEU), Hartje aff, exhibit E. Timm’s response informed the CSEU about the aforementioned improper \$417.00 monthly charge, which he requested the CSEU to remove, and stated that he intended to continue making his monthly child support payments to Iyer directly, using a private service that his bank provided. *Id.*

The CSEU states that, pursuant to Social Services Law § 111-n, it issued Timm a COLA order on June 26, 2020 that increased his \$920.00 monthly child support obligation by \$194.00 for a total of \$1,114.00 due each month. *See* notice of cross motion (CSEU), Hartje aff, ¶¶ 13-14; exhibit F. The CSEU asserts that Timm soon accumulated new child support arrears by not making his recalculated monthly payments, and that those arrears eventually exceeded a threshold amount that authorized the CSEU to implement more stringent “enforcement measures,” which include the “property execution process.” *Id.*, Hartje aff, ¶ 15. Pursuant to that process, the CSEU placed a restraint on Timm’s bank account on August 5, 2020, received his objection to the restraint on August 25, 2020, and issued a decision denying his objection on August 27, 2020. *Id.*, Hartje aff, ¶ 16. The CSEU asserts that it did not take the final step of executing on Timm’s bank account. *Id.*, Hartje aff, ¶ 17. Instead, it reviewed his account and issued a report, dated October 22, 2020, which recalculated his arrears by removing the aforementioned improper \$417.00 monthly charge and crediting all of the payments he made. *Id.*, Hartje aff, ¶ 18; exhibit G. The CSEU’s report indicates that Timm’s total arrears as of that date were \$8,826.08. *Id.*, exhibit G.

At that point, Timm initiated this Article 78 proceeding via pro se order to show cause on September 2, 2020, and the court signed an amended order to show cause on September 15, 2020. *See* order to show cause. Timm's petition seeks findings that the CSEU acted arbitrarily and capriciously by: 1) finding that he is in arrears in his child support payments; 2) using the property execution process to withdraw monies from his bank account; 3) using the IWO to withhold monies from his salary; and 4) adding a COLA to his monthly child support obligation. *See* petition. The petition also seeks orders to enjoin and restrain the CSEU from: 1) taking any monies from his bank account; 2) suspending his driver's license; or 3) imposing an IWO on his employer. *Id.* Iyer submitted opposition to Timm's petition on October 23, 2020, and concurrently filed a cross motion for an order to compel the CSEU to correct the start date for its child support enforcement services to April 23, 2015, the date she originally filed the enforcement and modification petitions. *See* notice of cross motion (Iyer). The CSEU filed a cross motion to dismiss the petition on October 23, 2020. *See* notice of cross motion (CSEU). This matter is now fully submitted (together, motion sequence number 001).

DISCUSSION

Normally, the court's role in an Article 78 proceeding is to determine, upon the facts before an administrative agency, whether a challenged agency 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, 231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1st Dept 1996). A determination will only be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of the . . . facts . . ." *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell*, 34 NY2d at 231.

However, if there is a rational basis for the agency's determination, there can be no judicial interference. *Matter of Pell*, 34 NY2d at 231-232. In this case, however, the CSEU asserts that the court cannot perform a standard Article 78 review of Timm's petition.

Instead, the CSEU notes that under the Family Court Act, the Family Court:

"has continuing jurisdiction over any support proceeding brought under this article until its judgment is completely satisfied and may modify, set aside or vacate any order issued in the course of the proceeding, provided, however, that the modification, set aside or vacatur shall not reduce or annul child support arrears accrued prior to the making of an application pursuant to this section."

Family Court Act § 451 (1). The CSEU also notes that it commenced child support enforcement services on Iyer's behalf pursuant to the Family Court's . *See* respondents' mem of law at 8-12.

The CSEU finally notes that, pursuant to CPLR 7801 (1);

"a proceeding under this article shall not be used to challenge a determination . . . which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application."

The Appellate Divisions have long recognized that child support obligees who are aggrieved by CSEU enforcement measures must exhaust all available administrative remedies before they seek judicial review of CSEU actions. *Matter of Commissioner of Social Servs. of City of N.Y. v Daryl S.*, 235 AD2d 126 (1st Dept 1997); *see also Matter of Circe v Circe*, 68 AD3d 1194 (3d Dept 2009). Here, the available evidence shows that the administrative review process is not yet complete with respect to Timm's complaints about the CSEU's execution on his bank account, or its use of the driver's license suspension program or of the IWO, since the CSEU has not yet issued final determinations denying Timm's objections to its use of any of those enforcement measures. Instead, the CSEU represents that its final decisions on all of those matters are still pending. *See* notice of cross motion (CSEU), Hartje aff, ¶ 17; exhibit E; respondents' mem of law at 7. Timm has presented no evidence that the CSEU has undertaken any of these actions to date. As a result, Timm's application for judicial review of these matters is premature. In any

event, Family Court Act § 451 (1) requires Timm to direct such applications to New York County Family Court, which has continuing jurisdiction over the January 6, 2020 order that authorized the CSEU to commence child support enforcement services on Iyer's behalf. Seeking review in this court instead pursuant to CPLR Article 78 is an improper collateral attack on the Family Court's order.

The same holds true with respect to Timm's claims that the CSEU improperly found: 1) that he owed child support arrears; and 2) that a \$194.00 COLA should be added to his \$920.00 monthly child support payments. Family Court Act § 451 (1) plainly vests the Family Court with continuing jurisdiction over determinations as to whether any of its judgments have been satisfied and/or should be modified. Timm must direct his objections to that forum.

Accordingly, the court concludes that Timm's Article 78 petition should be denied as meritless.

The CSEU's cross motion requests dismissal of Timm's petition pursuant to CPLR 3211 (a) (2), on the ground that this court lacks subject matter jurisdiction over Timm's claims. *See* respondents' mem of law at 15-17. The court finds that the CSEU's cross motion should be granted on that ground, since Family Court Act § 451 (1) clearly acknowledges the Family Court's continuing jurisdiction over the subject matter in Timm's petition.

The court similarly finds that Iyer's cross motion should be denied because the relief that she seeks therein - i.e., an order to compel the CSEU to utilize an earlier start date for its provision of child support enforcement services - would necessarily require a modification of the Family Court's January 6, 2020 order (which did not provide for an earlier start date). As was just observed, Family Court Act § 451 (1) vests New York County Family Court with continuing jurisdiction over applications to modify any of its orders. Therefore, the court concludes that Iyer's cross motion should be denied as meritless, as well.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

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

ADJUDGED that the cross motion for relief pursuant to CPLR Article 78 of respondent Sunita Iyer (motion sequence number 001) is denied; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the respondent New York Child Support Enforcement Unit (motion sequence number 001) is granted and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent New York Child Support Enforcement Unit shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days.

Carol R. Edmead
HON. CAROL R. EDMead J.S.C.
J.S.C.

12/28/2020
DATE

CAROL R. EDMead, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE