

Matter of Markey v Tietz

2024 NY Slip Op 34902(U)

June 7, 2024

Supreme Court, Albany County

Docket Number: Index No. 910060-23

Judge: Gerald W. Connolly

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STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
PETER MARKEY,

Petitioner,

DECISION AND ORDER

Index No.: 910060-23

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

-against-

DANIEL W. TIETZ, as Commissioner of
Office of Temporary Disability Assistance
(Emergency Rental Assistance Program),
an Agency of the State of New York,

Respondent.

(Supreme Court, Albany County Special Term)

APPEARANCES: Rene Kathawala, Esq.
Orrick, Herrington & Sutcliffe LLP
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New York, New York 11019

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New York, New York 10005

CONNOLLY, J.:

Peter Markey (petitioner) commenced this CPLR article 78 proceeding in Supreme Court, New York County, by verified petition dated February 2, 2023, against respondent Daniel W. Tietz, as Commissioner of Office of Temporary Disability Assistance (OTDA).¹ Petitioner challenged OTDA's denial of his COVID-19 Emergency Rental Assistance Program of 2021 (ERAP) application. On September 6, 2023, respondent's cross-motion to change venue to Supreme Court,

¹ By letter dated December 15, 2023, Assistant Attorney General Vivian Costandy Michael provided notice that Barbara C. Guinn is now Acting Commissioner of OTDA.

Albany County, was granted (Engoron, J.), and on February 9, 2024, this court granted respondent's cross-motion to dismiss the petition as moot. Petitioner now moves for attorneys' fees under the New York State Equal Access to Justice Act (CPLR art 86 [EAJA]).

Background

ERAP was enacted in 2021 to provide financial assistance to tenants facing eviction as a result of economic hardship caused by the COVID-19 pandemic (*see* ERAP, L 2021, ch 56, § 1, part BB, § 1, subpart A, as amended by L 2021, ch 417, § 2, part A). ERAP provided, among other things, that a household "shall be eligible if it . . . has a household income at or below 80% of the area median income [AMI], adjusted for household size" (L 2021, ch 56, § 1, part BB, § 1, subpart A, sec 1, § 5 [1] [a] [iv]). It directed that "income may be considered: (a) the household's total income for calendar year 2020; or (b) the household's monthly income at the time of application for such assistance" (*id.* § 5 [2]). ERAP also placed a cap on payments to eligible households: "No more than 12 months of rental and/or utility assistance for arrears and 3 months of prospective rental assistance may be paid on behalf of any eligible household" (*id.* § 9 [1]). ERAP was administered by OTDA.

On March 24, 2022, petitioner, a resident of New York County, applied for ERAP assistance after his landlord commenced a summary proceeding in housing court. On August 23, 2022, OTDA denied petitioner's application, stating "[t]he application was not approved for an ERAP payment because it did not meet the program requirements for household income eligibility" (NY St Cts Elec Filing [NYSCEF] Doc No. 5 at MARKEY0054). Petitioner appealed the denial, and, on October 5, 2022, OTDA denied the appeal, stating "we confirm the original decision that you are not eligible for ERAP because you live in an area of New York State that is not participating in the State ERAP" (NYSCEF Doc No. 5 at MARKEY0019).

On February 2, 2023, petitioner commenced this article 78 proceeding, arguing that OTDA erred in denying both his ERAP application and his appeal of the denial. Petitioner requested, relevant here,² judgment directing respondent to grant his ERAP application or, alternatively, remanding the application back to OTDA for further decision, and awarding petitioner attorneys' fees under the EAJA.

On February 14, 2023, the parties stipulated to adjourn the return date on the petition until April 21, 2023, which date was further extended to June 30, 2023. In a series of notifications beginning on or about February 28, 2023, and ending on or about April 27, 2023, OTDA informed petitioner that he would be receiving the maximum benefits allowable under ERAP—12 months of rental arrears, three months of prospective rent and 12 months of utility arrears.

On June 27, 2023, respondent cross-moved to change venue and to dismiss the petition as moot. After venue was changed to Albany County, petitioner, in a January 25, 2024 letter to this court, stated that he “agree[d] with the government that the [c]ourt should deny his petition as moot on the basis that the government provided him with the relief that he sought in his petition,” but stated that after the petition was dismissed, he intended to file a motion for attorneys' fees under the EAJA.

On February 9, 2024, this court dismissed the petition as moot. The court found that respondent's “reversal of its prior denial” of petitioner's ERAP application provided petitioner with “all the relief that he was entitled to under that program [and] constitute[d] a change in circumstances that both resolved the matter and removed any controversy that existed between the parties” (citing *Garnet Health Med. Ctr.-Catskills v Center for Discovery, Inc.*, 218 AD3d 939, 940

² Petitioner also requested and received a stay of the underlying housing court proceeding pending determination of the article 78 proceeding (*see* NYSCEF Doc No. 11, Order to Show Cause [Engoron, J.]).

[3d Dept 2023], and *Owner Operator Ind. Drivers Assn., Inc. v Karas*, 188 AD3d 1313, 1316 [3d Dept 2020]).

Petitioner now moves for attorneys' fees, arguing he is a "prevailing party" under the EAJA as his article 78 petition was a "catalyst" for obtaining relief from OTDA (*see* CPLR 8601 [a]; 8602 [f]). He argues that it was only after—and because of—the filing of his article 78 petition that OTDA provided him with the ERAP benefits to which he was entitled. Additionally, he argues that OTDA's denial of his ERAP application was not "substantially justified" as he met the income eligibility requirements for ERAP benefits, and that there are not any "special circumstances" making an award unjust (*see* CPLR 8601 [a]). Respondent opposes the motion, arguing that its position was substantially justified based on the proof of income documentation petitioner submitted with his ERAP application, and that an award of fees would be unjust. Additionally, respondent argues that petitioner is not a prevailing party under the EAJA as his article 78 petition was dismissed as moot, and the Appellate Division, Third Department, does not recognize the catalyst theory under the EAJA.

Applicable Law

The EAJA, which was enacted in 1989, was intended "to create a mechanism authorizing the recovery of counsel fees and other reasonable expenses in certain actions against the state of New York" (CPLR 8600). Notably, the EAJA was designed to be "similar to the provisions of" the Federal Equal Access to Justice Act (28 USC § 2412 [d]) "and the significant body of case law that has evolved thereunder" (CPLR 8600). It was enacted to "improv[e] access to justice for individuals and businesses who may not have the resources to sustain a long legal battle against an agency that is acting without justification" (*Matter of New York State Clinical Lab. Assn. v Kaladjian*, 85 NY2d 346, 351 [1995], quoting Governor's Approval Mem, L 1989, ch 770, 1989

NY Legis Ann at 336). To this end, the benefits of the EAJA are only available to petitioners with a net worth (excluding the value of a principal residence) less than \$50,000 (CPLR 8602 [d]).³

At its core, the EAJA provides that:

“a court shall award to a prevailing party . . . fees and other expenses incurred by such party in any civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust” (CPLR 8601 [a]).

It defines “action” as “any civil action or proceeding brought to seek judicial review of an action of the state” or “any of its agencies or any of its officials acting in [their] official capacity” (*id.* § 8602 [a], [g]). “Prevailing party” is defined as a petitioner who “prevails in whole or in substantial part where such party and the state prevail upon separate issues” (*id.* § 8602 [f]). Additionally, “position of the state” is defined as “the act, acts or failure to act from which judicial review is sought” (*id.* § 8602 [e]). “Whether the position of the state was substantially justified shall be determined solely on the basis of the record before the agency or official whose act, acts, or failure to act gave rise to the civil action” (*id.* § 8601 [a]).

Analysis

Case law from the Appellate Division, Third Department is clear that petitioner was not a “prevailing party.” Preliminarily, this court dismissed petitioner’s article 78 proceeding as moot. As petitioner did not receive any relief in this proceeding, he cannot be said to have “prevailed” (*see Matter of New York State Clinical Lab. Assn.*, 85 NY2d at 355 [“a party has ‘prevailed’ within the meaning of the State EAJA if it has succeeded in acquiring a substantial part of the relief sought in the lawsuit”]).

³ In his verified affidavit dated November 20, 2023, petitioner certifies that his total net worth is under \$50,000.

Moreover, although there is a split of authority in the Appellate Division Departments, and the Court of Appeals has yet to decide the issue, case law from the Third Department is clear that the catalyst theory relied on by petitioner does not apply to EAJA claims (*see Matter of Wittlinger v Wing*, 99 NY2d 425, 433 [2003] [finding position of state was substantially justified and declining to reach catalyst issue]; *Matter of Solla v Berlin*, 24 NY3d 1192 [2015] [assuming, without deciding, that catalyst theory applied, petitioner was not entitled to attorneys' fees]; *compare Matter of Solla v Berlin*, 106 AD3d 80 [1st Dept 2013] [holding that catalyst theory applies to EAJA], *revd on other grounds* 24 NY3d 1192 [2015], *with Matter of Criss v New York State Dept. of Health*, 192 AD3d 1545 [4th Dept 2021] [rejecting application of catalyst theory in EAJA cases], *Matter of Gonzalez v New York State Dept. of Corr. & Community Supervision*, 152 AD3d 680 [2d Dept 2017], *and Matter of Clarke v Annucci*, 190 AD3d 1245 [3d Dept 2021]).

In *Matter of Clarke*, the petitioner commenced an article 78 proceeding following the conclusion of a prison disciplinary hearing at which he was found guilty on several disciplinary charges. After the article 78 petition was filed but prior to any determination by a court, the respondent administratively reversed the disposition, expunged it from the petitioner's institutional record, then moved to dismiss the article 78 petition as moot. The petitioner did not oppose the motion to dismiss, and, after it was granted, he moved for attorneys' fees under the EAJA, relying on the catalyst theory.

The catalyst theory “posits that a petitioner is a prevailing party if the desired result is achieved because the proceeding brought about the voluntary change in the respondent's conduct” (*id.* at 1246 n). As noted in *Matter of Clarke*:

“At the time of the enactment of the EAJA, federal courts allowed recovery of counsel fees based on the catalyst theory. However, this changed in 2001 when the United States Supreme Court held that the catalyst theory is not a permissible basis for the award of counsel fees since a respondent's voluntary change in conduct lacks

the necessary judicial imprimatur” (190 AD3d at 1246, citing *Buckhannon Board & Care Home, Inc. v West Virginia Dept. of Health & Human Resources*, 532 US 598, 605 [2001]).

The Court noted that, in other attorneys’ fee cases, it had declined to adopt the catalyst theory based on *Buckhannon* (citing *Matter of Vetter v Board of Educ., Ravena-Coeymans-Selkirk Cent. School Dist.*, 53 AD3d 847 [3d Dept 2008], *mod on other grounds* 14 NY3d 729 [2010] [counsel fees under 42 USC § 1988]; *Swergold v Cuomo*, 99 AD3d 114 [3d Dept 2012], *lv denied* 20 NY3d 859 [2013] [same]). In *Matter of Clarke*, the Court found that the reasoning of *Buckhannon* applied to the EAJA attorneys’ fees request before it: “The change in the legal relationship was accomplished prior to answering the petition, was based on the voluntary actions of the Department of Corrections and Community Supervision, and was ‘not enforced by a consent decree or judgment of Supreme Court’ ” (*Matter of Clarke v Annucci*, 190 AD3d at 1247, quoting *Swergold v Cuomo*, 99 AD3d 1145, 1145 [3d Dept 2012]).

Here, as in *Matter of Clarke*, respondent reversed its prior position on petitioner’s application and provided him with all the relief he was entitled to under ERAP after petitioner’s article 78 petition was filed but before respondent answered the petition and before any decision on the ERAP application was rendered by the court. Petitioner did not obtain ERAP benefits because he prevailed in the article 78 proceeding or because of any decree or judgment of the court; he obtained ERAP benefits because of respondent’s voluntary reversal of its prior denial. Under precedent from the Third Department, petitioner cannot rely on the catalyst theory to prove he was a prevailing party. Accordingly, petitioner is not entitled to attorneys’ fees under the EAJA.

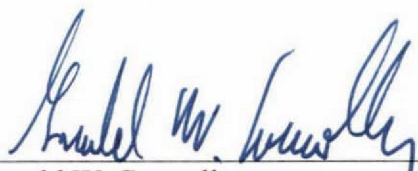
Upon such application of the law, the Court will not reach the parties’ arguments regarding the justification for the State’s initial position

For these reasons, petitioner’s motion is **denied**.

This constitutes the decision and order of the court which is being electronically filed by the court through NYSCEF for entry by the Albany County Clerk. Upon such entry, counsel for respondent shall promptly serve notice of entry on all other parties to this proceeding (*see* Uniform Rules for Trial Cts [22 NYCRR] § 202.5-b [h] [1], [2]).

SO ORDERED.
ENTER.

Dated: June 7, 2024
Albany, New York


Gerald W. Connolly
Acting Supreme Court Justice



06/07/2024

Papers Considered:

1. Exhibit A to affirmation of Geoffrey G. Hu, Esq., attorney for petitioner, in support of petitioner's article 78 petition stay, dated February 2, 2023.
2. Affidavit of Rajni Chawla in support of respondent's cross-motion to dismiss the petition, dated June 27, 2023.
3. Correspondence from Vivian Costandy Michael, Esq., attorney for respondent, dated December 15, 2023.
4. Correspondence from Rene Kathawala, Esq., attorney for petitioner, dated December 20, 2023.
5. Correspondence from Vivian Costandy Michael, Esq., attorney for respondent, dated January 22, 2024.
6. Correspondence from Rene Kathawala, Esq., attorney for petitioner, dated January 25, 2024.
7. Petitioner's notice of motion for attorneys' fees under the Equal Access to Justice Act, dated March 13, 2024.
8. Petitioner's memorandum of law in support of motion for attorneys' fees.
9. Affidavit of petitioner Peter Markey in support of motion for attorneys' fees.
10. Affirmation of Peter Kemper, Esq., in support of motion for attorneys' fees, together with exhibits B and C.
11. Affirmation of Michael Paskin, Esq., in support of motion for attorneys' fees, together with exhibit D.
12. Correspondence from Celina Rogers, Esq., attorney for respondent, dated March 22, 2024.
13. Respondent's memorandum of law in opposition to motion for attorneys' fees.
14. Petitioner's reply memorandum of law in support of motion for attorneys' fees.