Baldera v Hernandez
2005 NY Slip Op 30582(U)
November 29, 2005
Supreme Court, New York County
Docket Number: 111776/04
Judge: Shirley Werner Kornreich
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KORNREICH Justice PART 54

BALDERA, JOSEFINA

-v-

TINO HERNANDEZ, ET AL.

INDEX NO. 401383/05

MOTION DATE 6/30/05

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion to/for Dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2,3,4,5
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the annexed decision and order.

FILED
DEC 06 2005
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/29/05

SHIRLEY WERNER KORNREICH J.S.C.

J.S.C.

Check one: ☒ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

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JOSEFINA BALDERA,

Petitioner,

Index No.: 111776/04

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

DECISION and ORDER

-against-

TINO HERNANDEZ, as Acting Chairperson
of the New York City Housing Authority and
THE NEW YORK CITY HOUSING AUTHORITY,

Respondents,

BABULALL RAGOO,
SUSTICKA RAGOO,

Respondents.

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KORNREICH, SHIRLEY WERNER, J.:

This is a special proceeding pursuant to Article 78. Petitioner Josefina Baldera became a Section 8 tenant[1] at 272 Linden Street, Apt. # 3, Brooklyn, New York 11237 (the "Premises"), beginning on or about August 1, 2003. Petitioner seeks to annul a determination of Respondent The New York City Housing Authority ("NYCHA")[2] terminating her Section 8 benefits, in or about July 2004. Respondents have cross-moved to dismiss the petition.

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[1]According to petitioner, she has received federal subsidies pursuant to 42 U.S.C. § 1437(f), since January 2003.

[2]Pursuant to Public Housing Law § 401, NYCHA administers the payment of federal rent subsidies to participating landlords on behalf of participating tenants. Affirmation of S. Sohn, para. 4. The program is known as the "Section 8 Existing Housing Program" or "Section 8 Program."

I. Factual Background

As a recipient of Section 8 subsidies, petitioner was "annually required to re-certify her family composition and income for the purposes of determining her continued eligibility for said subsidy, and to calculate the amount of her subsidy." Verified Petition, para. 13. NYCHA is empowered to terminate a tenant's Section 8 subsidy for failure to re-certify. *See* 24 C.F.R. §§ 982.551, 982.552.

A. Required Termination Procedures

Required procedures for termination of a Section 8 subsidy are set forth in the partial consent judgment docketed in the United States District Court for the Southern District of New York, on October 17, 1984, in *Williams, et al. v. New York City Housing Authority* (the "Williams Consent Judgment"). *See Williams v. New York City Hous. Auth.*, 975 F. Supp. 317, 319 (S.D.N.Y. 1997). Under the Williams Consent Judgment, NYCHA must send the tenant: (1) a warning notice; (2) a notice of termination ("T-1" notice), if no response is received to the warning letter; and (3) a notice of default ("T-3" notice), if no response is received to the T-1. The T-1 and T-3 notices must be sent by regular *and* certified mail. They must be printed in English and Spanish.

Under the Williams Consent Judgment, the limitations period for commencing an Article 78 proceeding to contest NYCHA's termination of Section 8 subsidies is four months from the tenant's receipt of the T-3 notice. The consent degree provides that "there is a rebuttable presumption of receipt of the requests or notices received herein on the fifth day following the date of mailing." Sohn Aff., para. 13.

B. Termination of Petitioner's Section 8 Subsidies

a. The Re-Certification Letter

NYCHA sent petitioner a re-certification package on or about March 2, 2004.[3] Petitioner submitted "portions of the re-certification package on or about March 11, 2004." Sohn Aff., para. 20. NYCHA determined that petitioner "failed to provide the requisite proof of household income and an employment form from her employer, with attached W2 forms or two current paystubs." *Id.* On March 12, 2004, NYCHA sent petitioner a letter requesting the missing information and providing the number of a Housing Assistant. *Id.*, Ex. 12.

b. The T-1 Notice

Because NYCHA received no response to the letter, which was written in English, it sent petitioner a T-1 notice on March 12, 2004. *Id.*, Ex. 2. According to NYCHA, the T-1 was a two-sided form, printed in English on one side, and Spanish on the other. The T-1 submitted with NYCHA's papers is a standardized form, with spaces left blank for specific information. The form sent to petitioner was filled out on the English side, with the Spanish side left blank. *See id.* According to NYCHA, the T-1 was mailed by both "regular and certified mail on April 22, 2004." Sohn Aff., para. 22.

As evidence of certified mailing of the T-1, NYCHA submits a copy of a form titled "Accountable Mail Log." *Id.*, Ex. 4. The log lists several articles, with different adressees. According to NYCHA, the log certifies the receipt by the Postal Service of the listed articles for certified mailing. The log is stamped April 22, 2004, U.S. Postal Service, Old Chelsea Sta., New York, NY. *Id.* Susan Smolowitz, NYCHA's Manager in the Brooklyn Leased Housing

[3]Petitioner's lease was set to expire at the end of July, 2004.

Department Borough Office, avers that the log proves that the T-1 addressed to petitioner was received by the Postal Service for certified mailing. Affidavit of S. Smolowitz. Similar averments are made by Shawn Younger, the Administrative Manager of NYCHA's Mail Center located at 250 Broadway, in Manhattan. Affidavit of S. Younger.

In addition to the Accountable Mail Log, NYCHA submits copies of the "Postal Service's Track & Confirm e-mail report" for the article number corresponding to the T-1 sent to petitioner. Said report states that the "item was delivered on May 17, 2004 at 4:46 pm in Brooklyn, NY 11217. The item was signed for by N. Guay."[4] Sohn Aff., Ex. 5. The report further states as follows:

- NOTICE LEFT, May 15, 2004, 2:56 pm, BROOKLYN, NY 11217
- UNCLAIMED, May 11, 2004, 4:40 pm, BROOKLYN, NY
- NOTICE LEFT, April 23, 2004, 3:04 pm, BROOKLYN, NY 11237
- ARRIVAL AT UNIT, April 23, 2004, 8:36 am, BROOKLYN, NY 11237

Id.

According to NYCHA, the Postal Service e-mail report indicates that "the Postal Service left a notice for Petitioner on April 23, 2004, but that as of May 11, 2004 Petitioner had not claimed the T-1 that the Housing Authority sent her by certified mail." Sohn Aff., para. 24. Thereafter, the T-1 was returned unopened to NYCHA on May 17, 2004, signed for by its employee, Nancy Guay, and placed in a file corresponding to petitioner. Smolowitz Aff., para. 25. NYCHA "has no record that the Postal Service returned the T-1 which the Housing Authority sent to Petitioner by regular mail." Sohn Aff., para. 25.

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[4]The postal code of the Premises is 11237. *See supra.*

c. The T-3 Notice

On June 2, 2004, NYCHA sent petitioner a T-3 stating, *inter alia,* that it "intended to terminate her Section 8 rent subsidy in 45 days if she failed to submit documents required to re-certify her income or failed to request a hearing... ." Sohn Aff., para. 26. NYCHA submits documentation (similar to that described above in relation to the T-1) purporting to demonstrate that: (1) the T-3 was sent by certified and regular mail; (2) a notice was left for petitioner on June 2, 2004; (3) as of June 25, 2004, "petitioner had not claimed the letter"; (4) the letter was returned unopened to NYCHA as "unclaimed" on June 29, 2004; and (5) the letter was placed in petitioner's file. *Id.*, paras. 30-31. Like the T-1, the copy of the T-3 sent to petitioner appears to have been printed in English on one side, and Spanish on the other, with the specific information applicable to petitioner filled in on the English side only. *See id.,* Ex. 3. NYCHA did not receive any response to the T-3 from petitioner within the 45-day period. Sohn Aff., para. 32. Nor does NYCHA have any record that the T-3 sent by regular mail was returned by the Postal Service. *Id.* at 29.

After petitioner's subsidies were terminated, respondents Babulall Ragoo and Susticka Ragoo commenced a nonpayment proceeding against her in Kings County Civil Court, Index No. 53113/05. Pet. para. 20. A settlement stipulation was entered on March 15, 2005, whereby petitioner agreed to a judgment of $5,764.00 for unpaid rent, enforcement of which was stayed through April 30, 2005. Pet., Ex. I.

On February 25, 2005, petitioner's attorney wrote to NYCHA, stating that petitioner's Section 8 subsidies were wrongfully terminated. Pet., Ex. G. The letter stated that petitioner

never received the T-3, that the attorney had reviewed the petitioner's NYCHA file and found no evidence that it was sent by regular mail, or that NYCHA made sufficient attempts to contact petitioner by telephone, as required by the Williams Consent Judgment. *Id.* The letter further stated that petitioner "only speaks Spanish, is working, and did attempt to comply with whatever requests were made regarding work documents. She is still prepared to do so... ." *Id.*

By letter dated April 1, 2005, NYCHA wrote to petitioner's counsel stating that it had reviewed the termination of her subsidies, and concluded that:

> Ms. Baldera was, in fact, provided proper notification that action to initiate [sic] the subsidy was under way. There is proof in the file from the post office that both termination notices, the T-1 and T-3 were mailed. As for contacting Ms. Baldera by telephone, this was not possible because her phone was not in service. By the expiration of the T-3, on July 5, 2004, Ms. Baldera had not supplied the information that was required to complete the recertification process. Consequently, the subsidy was terminated effective July 31, 2004.

Id.

C. *The Instant Petition*

Petitioner commenced the instant proceeding on April 26, 2005. Sohn Aff., Ex. 8. The petition alleges that "[a]t the time she first moved into her apartment the Petitioner was employed as a home attendant, which she reported to NYCHA... ." Pet., para. 13. "From on or about December 2003, the Petitioner has worked as a waitress in a restaurant, Josephine Restaurant Corp., 123 Tompkins Avenue, Brooklyn, New York." *Id.* The petition further alleges that petitioner never received the T-3, that the T-3 in her NYCHA file was printed only in English, and that the termination of her subsidies was improper and failed to abide by the procedures set forth in the Williams Consent Judgment. The petition asserts causes of action for denial of due

process, violation of 42 U.S.C. § 1983, and irreparable harm caused by the nonpayment proceeding. The petition seeks a judgment overturning NYCHA's termination of petitioner's Section 8 subsidies, and retroactively reinstating them.

Respondents have not answered the petition, moving instead to dismiss the proceeding as time-barred.

III. Conclusions of Law

CPLR 217 provides that Article 78 special proceedings must be commenced within four months "after the administrative determination to be reviewed becomes final and binding on the aggrieved party." The issue before the Court is whether NYCHA's termination of petitioner's Section 8 subsidies became final and binding upon petitioner, and if so, when. Petitioner argues that the determination only became final and binding, if at all, upon receipt of the letter dated April 1, 2005, stating that her Section 8 subsidy had been terminated. Respondents argue that the determination became final and binding on "the fifth day following the mailing of the [T-3], i.e., on or about June 7, 2004... ." Respondents' Memorandum of Law, p. 4.

It is undisputed that receipt of a T-3 by the tenant triggers the statute of limitations for bringing an Article 78 proceeding challenging the termination. The Williams Consent Judgment establishes a "rebuttable presumption" that the tenant received the T-3 five days after it was mailed. Petitioner's argument appears to be (though stated somewhat differently) that the presumption of receipt either: (1) does not arise here, because NYCHA has failed to demonstrate a "proper office routine and procedure," *see Francis v. Wing,* 263 A.D.2d 432, 433 (1st Dept. 1999); or (2) is rebutted by evidence on the record demonstrating various infirmities in NYCHA's termination procedures, *e.g.,* failure to document regular mailing of the T-3; failure to

document phone calls to petitioner; failure to send the T-3 in Spanish.

Preliminarily, the Court notes that neither party has cited any authority interpreting or applying the "rebuttable presumption" provision in the Williams Consent Judgment. The Court is aware of two decisions on point, both by trial courts. In *Singletary v. Hernandez,* 2005 NY Slip Op 51807U, 4 (Sup. Ct., Kings Co. 2005), the court held that the presumption of receipt by the tenant was rebutted where the petitioner testified credibly, at a traverse hearing, that NYCHA sent the T-1 and T-3 notices to an address at which she did not customarily receive mail. In *Almeida v. Hernandez,* 2005 NY Slip Op 25429, 3 (Sup. Ct. Kings Co. 2005), the court held that the presumption was rebutted where the petitioner denied receiving the T-3, and evidence showed that the T-3 was returned to NYCHA as unclaimed. Although the Court is not constrained by these rulings, the Court concludes that the presumption of petitioner's receipt of the T-3 notice is rebutted by the verified petition stating that she did not receive it, by the evidence showing that the T-3 sent by certified mail was returned as unclaimed, and the lack of evidence that NYCHA sent another copy of the T-3 by regular mail, or made sufficient attempts to reach petitioner by telephone.

Turning to whether the evidence put forward by NYCHA is sufficient to demonstrate that the instant proceeding is time-barred, the Court concludes concludes that it is not. The Court agrees with petitioner that the evidence purportedly demonstrating certified mail service is confusing. The Postal Service e-mail reports are cryptic, and no statement by a postal employee is provided to explain them. One other court has found that NYCHA's "Accountable Mail Log" does not satisfy the certified mail requirement under the Williams Consent Judgment. *See Quesada v. Hernandez,* 2004 NY Slip Op 51597U, 3 (Sup. Ct. N.Y. Co. 2004). There, Justice

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Wetzel observed that:

> [NYCHA] sent this [T-1] notice by regular and 'accountable mail,' despite the fact that the Williams Consent Decree mandates that this notice be sent by regular and certified mail. As this court has observed in similar cases, it is unclear, indeed, baffling that respondent persists in using a form of mail which is not specified by the Consent Decree nor has it been specifically deemed the 'functional equivalent' of certified mail by the federal judge overseeing the Williams Consent Decree. ...
>
> This court implores the respondent Housing Authority to stop banging its head against the procedural wall of the Williams Consent Decree and to set in place administrative procedures which scrupulously conform to the Decree's requirements. Only then will respondent, as well as the courts, be spared this onslaught of needless litigation.

Id.

Similarly, in *Matter of Green v. Hernandez,* NYLJ March 16, 2005, at 18 (Sup.Ct. NY Co.)(Abdus-Salaam, J.), the court annulled NYCHA's termination of the petitioner's Section 8 subsidies, under facts substantially identical to those *sub judice.* In *Green,* the petitioner claimed that she never received the T-3. NYCHA put forward a copy of an Accountable Mail Log, and proof that the notice was returned unclaimed. The Court found this evidence insufficient, and pointed out that there was no evidence of regular mailing of the notice, and only one phone call to petitioner was made, after the expiration of the 45-day period after mailing of the T-3, and two days prior to the termination of benefits. The court held that NYCHA failed to follow its own procedures, *see Matter of Fair v. Finkel,* 284 A.D.2d 126 (1st Dept. 2001), and thus, ordered NYCHA to reinstate the petitioner's subsidy.

In light of the foregoing discussion, the Court concludes that respondents are not entitled to a judgment dismissing the instant petition as time-barred. The Court does not reach the issue

of whether the notices sent to petitioner, with the pertinent information filled in on the English side only, complied with the Williams Consent Judgment. The Court notes that neither side has cited precedent directly on this point. *Vialez v. New York City Housing Auth,* 783 F.Supp. 109 (S.D.N.Y. 1991), cited by respondent, is not dispositive, as it does not deal with the application of the Williams Consent Judgment. Common sense suggests, however, that the requirement that the notice be in English and Spanish, should apply with equal, if not greater force, to the information most pertinent to the recipient of the form.

If a motion to dismiss an Article 78 petition is denied, "the court shall permit the respondent to answer, upon such terms as may be just. ..." CPLR 7804(f). Accordingly, it is

ORDERED that respondents' motion to dismiss the petition is denied; and it is further

ORDERED that respondents must serve an answer within 30 days.

Date: November 29, 2005
New York, New York

SHIRLEY WERNER KORNREICH