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

PRESENT: MOULTON Justice

PART 40B

MELVYN SPANN

-v-

NYCHA

INDEX NO. 112004/11

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	1
Replying Affidavits	none

Cross-Motion: ☒ Yes ☒ No

Upon the foregoing papers, it is ordered that this ~~motion~~ Petition and cross motion are decided for attached

FILED

JUN 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6/26/12

HON. PETER H. MOULTON

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 40 B

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In the Matter of the Application of
MERVIN SPANN,

Petitioner,

Index No.
112004/11

- against -

JOHN B. RHEA, as Chairman of the New York City Housing Authority, the NEW YORK CITY HOUSING AUTHORITY, and HIGHBRIDGE HOUSE OGDEN. INC.,

Respondents.

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PETER H. MOULTON, J.S.C:

Petitioner, who is a partially paralyzed stroke victim and long term tenant, moves to reverse the determination of respondent New York City Housing Authority ("NYCHA") terminating petitioner's Section 8 rent subsidy.[1] Petitioner maintains that the decision is arbitrary and capricious, is an abuse of discretion, and is in error of law, in violation of respondents' own procedures, the consent decree in *Williams v New York City Housing Authority* (81 Civ. 1801 [US Dist. Ct. SDNY 1994]), and federal and constitutional law. Petitioner additionally seeks an order restoring his subsidy retroactive to the date of termination. Alternatively, he seeks an informal hearing to contest the termination.

Respondents cross move to dismiss the proceeding as time barred, alleging that petitioner knew or should have known that his Section 8 was terminated. In support of the cross motion,

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[1]According to respondents, NYCHA terminated petitioner's Section 8 in 2000, for failing to provide annual financial information.

respondents cite cases which are not applicable to this proceeding.

Discussion

The four-month statute of limitations to challenge an agency decision runs from notice of a final determination (*see Matter of Gonzalez,* 47 NY2d 922 [1979]).[2] However, where a party is entitled to receive written notice, the statutory period of limitations does not run until notice is received in that form (*see 90-92 Wadsworth Ave. Tenants Assn. v City of N.Y. Dept. of Hous. Presev. & Dev.*, 227 AD2d 331 [1st Dept 1997] [HPD complied with the notices mandated in connection with an Article 8A rehabilitation loan and therefore, the proceeding was barred by the four-month statute of limitations]). Where there is no showing that NYCHA complied with the notice requirements of *Williams*, the termination is improper (*see Matter of Fair v Finkel*, 284 AD2d 126 [1st Dept 2001] (termination of Section 8 subsidy was in violation of lawful procedure because only two of three required notices were mailed, and none employed certified mail). As explained in *Matter of Fair*:

> [B]efore assistance may be terminated, NYCHA must follow certain procedures, which include three separate written notices. These procedures were established in a "First Partial Consent Judgment" entered into on October 4, 1984, to which NYCHA was a party, in a Federal challenge to NYCHA's methods of terminating Section 8 assistance. . . First, after a preliminary determination that there exists a basis for termination, NYCHA must send the participant a warning letter specifically stating the basis for the termination and, if appropriate, seeking the participant's compliance. Thereafter, if the conditions which led to the preliminary determination have not been remedied within a reasonable time, NYCHA must send a second written notice, the Notice of Termination, by certified and regular mail, stating the specific grounds for termination and informing the participant that he or she may request a hearing (and an optional pre-hearing conference). If the participant does not respond to the Notice of

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[2]Where the record indicates the existence of an established and regularly followed office mailing procedure, a rebuttable presumption of mailing arises (*see Matter of Gonzalez*, 47 NY2d at 923).

> Termination or T-1 letter, NYCHA is required to mail a Notice of Default advising the participant that the rent subsidy will be terminated and the grounds therefor and affording the participant another opportunity to request a hearing. If the participant takes no action after the Notice of Default or T-3 letter, the rent subsidy will be terminated on the 45th calendar day following the date of mailing of the Notice of Default.

(*Matter of Fair v Finkel*, 284 AD2d at 127-28).

NYCHA's own internal memorandum regarding Section 8, LHD #01-14, provides that:

> If in the judgement of a supervisor, our borough office cannot demonstrate compliance with our procedure, then we must conclude that termination of the tenant was flawed even if staff believe that we actually acted properly. We must then offer the tenant an opportunity to be restored, provided that the tenant submits and we receive and approve all required documents for annual review, or that staff are able to schedule and perform an annual inspection. If these standards are met, the borough office shall then restore the tenant retroactively to the date of termination.

(available at https://a996-housingauthority.nyc.gov/Landlord/view_doc.aspx?id=259).

Ignoring NYCHA's obligations under *Williams* and established case law, respondents cite to the well known (but irrelevant) cases indicating that the statute of limitations in an Article 78 proceeding runs from when the party knows, or should have known, that he or she was aggrieved.[3] However, none of these cases apply to this proceeding. Citing to fundamental fairness and the strong policy that government not be trammeled by stale litigation, respondent

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[3]Respondents maintain that petitioner knew or should have known that his Section 8 was terminated, at the very latest in May 2008, as a result of a prior housing court nonpayment proceeding. Respondents also rely upon a single computer generated form, which purportedly indicates that petitioner was terminated in 2000 (but cannot be deciphered by the court). Respondent further cites to comment in a 2008 decision of housing court judge Deighton S. Waithe indicating that petitioner's Section 8 subsidy was terminated. Respondent ignores housing court judge Verna L. Saunder's decision, which notes that Judge Waithe's conclusion was not a final determination and was not made on an issue "squarely before the Court in the non-payment proceeding." Respondent further cites to a letter purportedly sent to petitioner in 2007, denying a request to restore the subsidy.

ignores the fundamental fairness in, and strong policy requiring that, government adheres to its own legal obligations. Respondents also ignore the Appellate Division First Department's steadfast holding that "[p]ursuant to paragraph 22(f) of the first partial consent judgment in Williams . . . the four-month statute of limitations of CPLR 217 began to run on the date of receipt of respondent's letter notifying petitioner that her Section 8 subsidy would be terminated in 45 days if she did not request a hearing" (*see e.g., Matter of Lopez v New York City Hous. Auth.*, 93 AD3d 448 [1st Dept 2012] [internal citation omitted]). What petitioner should or should not have known is completely irrelevant. If the requisite mailings have not been made under *Williams,* then the statute of limitations has not began to run.

Respondents also request permission to answer, in the event that the cross motion to dismiss is denied (*see* CPLR 7804 [f]). A court must generally grant a respondent the opportunity to submit an answer, except where the answer serves no purpose (*see Matter of Nassau BOCES Cent. Council of Teachers v Board of Coop. Educ. Servs. of Nassau County*, 63 NY2d 100, 102 [1984]). Here, respondents do not attach proof of service of the requisite notices, attempt to rely on other irrelevant documents, and do not dispute that the NYCHA file produced in housing court did not contain the requisite notices.[4] Therefore, it appears that an answer would serve no purpose (*see Matter of Matos v Hernandez*, 10 Misc 3d 1068A [Sup Ct, New York County 2005] [Judge Acosta vacated NYCHA's decision to terminate petitioner's Section 8 subsidy, denied NYCHA's cross motion advancing the same arguments made here, and directed

[4]In a 2008 nonpayment proceeding, housing court judge Paul Albert directed petitioner to file this proceeding because "NYCHA Section 8 produced the original file that contained no evidence of a proper termination of Respondent's subsidy or proof of mailing"(*see* Decision/Order of Judge Paul Alpert dated April 7, 2011, attached as Exh B to the Verified Pet).

retroactive reinstatement of the subsidy, because NYCHA did not comply with *Williams* or its own stated procedures]). However, as the issue was not specifically briefed, the court directs that briefs be submitted on the limited issue of whether NYCHA should be permitted to answer the petition.

It is hereby

ORDERED that the cross motion to dismiss is denied except as to respondents' request to submit an answer; and it is further

ORDERED that the parties submit briefs on the limited issue of whether NYCHA should be permitted to answer the petition, within two weeks after a settlement conference is held; and it is further

ORDERED that the parties contact the court at afield@courts.state.ny.us regarding a mutually convenient date for a settlement conference.

This constitutes the Decision and Order of the Court.

FILED

JUN 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: June 25, 2012

ENTER:

J.S.C.

HON. PETER H. MOULTON