

Matter of Brown v New York City Hous. Auth.

2012 NY Slip Op 32068(U)

July 30, 2012

Supreme Court, New York County

Docket Number: 400362/2012

Judge: Alice Schlesinger

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

ALICE SCHLESINGER

IA PART 16
PART _____

PRESENT: _____

Index Number : 400362/2012
BROWN, DAVID
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

Justice
FILED

AUG - 6 2012

COUNTY CLERK'S OFFICE
NEW YORK

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this ^{Cross} motion is granted, the petition is denied and the proceeding is dismissed in accordance with the accompanying memorandum decision.

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

JUL 30 2012

Dated: July 30, 2012

Alice Schlesinger
ALICE SCHLESINGER J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
In the Matter of the Application of
DAVID BROWN,
Petitioner,

Index No. 400362/2012
Motion Seq. No. 001

For an Order Pursuant to Article 78 of the Civil
Practice Law and Rules

FILED

-against-

AUG - 6 2012

NEW YORK CITY HOUSING AUTHORITY
Respondent.

**COUNTY CLERK'S OFFICE
NEW YORK**

-----X
SCHLESINGER, J.:

Petitioner David Brown commenced this Article 78 proceeding against respondent New York City Housing Authority ("NYCHA") seeking to annul the agency's August 2, 2010 decision related to his remaining family member grievance. Mr. Brown, representing himself, asserts that NYCHA erred in denying his request to vacate his default in appearing at a hearing to challenge the denial of his grievance. NYCHA has cross-moved to dismiss pursuant to sections 3211(a)(5) and 217(1) of the Civil Practice Law and Rules ("CPLR"), arguing that Mr. Brown is barred by the statute of limitations from proceeding here because he waited eighteen months before filing this Article 78 petition when the law requires that the filing be completed within four months of the decision being challenged.

Background Facts

On August 12, 1992 Shirley Robinson signed a lease with the New York City Housing Authority ("NYCHA") to become a tenant in a public housing development located on 315 Livonia Avenue in the Borough of Brooklyn, City of New York. (See NYCHA

contract with Ms. Robinson, Exhibit A)¹. Ms. Robinson lived in the building for sixteen years until she died on February 26, 2009. Thereafter, her son David Brown, the petitioner here, filed a remaining family member grievance with NYCHA. This procedure allows a family member who meets all the eligibility requirements for public housing to take over the lease of a deceased family member. (See NYCHA Management Manual, Chapter VII, Exh. B). A basis for denying eligibility, as relevant here, is a past criminal conviction. (NYCHA Management Manual, Chapter V, Exh. C).

According to NYCHA records, Mr. Brown discussed his request to take over his mother's lease in a meeting with the Project Manager of 315 Livonia Avenue on April 20, 2009. At that time, Mr. Brown was informed that his criminal record rendered him ineligible for public housing. (Project Grievance Summary, Exh. F). A second step grievance² was then requested by Mr. Brown and reviewed by Laurette Nibbs, NYCHA's Brooklyn Deputy Director, on August 17, 2009. Ms. Nibbs agreed with the disposition of the Project Manager, citing Mr. Brown's prior criminal record as the reason for denial. (District Grievance Summary, Exh. F).

The referenced criminal conviction related back to October 3, 2007, when Mr. Brown pled guilty to an attempted assault charge, a misdemeanor. (Criminal Background Check, Exh. G). An individual convicted of a class A misdemeanor is ineligible for public housing based on the following provision found in the NYCHA Management Manual, Chapter V, §F(4)(a)(4) (see Exh C):

¹Hereinafter, all referenced Exhibits, unless otherwise specified, are attached to NYCHA's motion papers.

²All NYCHA grievances are first presented to a Management Office for an initial determination. If a tenant is dissatisfied with the Manager's determination, the tenant shall request a second step grievance, which entails a second review of the grievance by the Borough Management Office.

Such families are ineligible until the convicted person has paid any fine, has served the sentence (including the completion of probation and/or parole), and has also completed four years after the sentence with no further convictions or pending charge.³

In addition to the above-referenced assault conviction, in 2007 and 2008 Mr. Brown pled guilty to two other charges for criminal possession of a controlled substance. These convictions rendered him ineligible for public housing when he filed his request for a lease in 2009. Additionally, in 2009 Mr. Brown was charged with a drug-related offense that resulted in a conviction that further extended his ineligibility period. According to NYCHA's calculations, Mr. Brown is ineligible for public housing until 2015. (NYCHA's affirmation in opposition to applicant's request to vacate the default, Exh. K).

Once Mr. Brown's second step grievance was denied, he appealed the decision of the Deputy Director and requested a formal hearing before NYCHA's Impartial Hearing Officer, Desiree Miller. On October 7, 2009, Mr. Brown was sent a letter informing him that his hearing was scheduled for December 4, 2009; Mr. Brown presumably received that letter as he has attached it to his papers submitted to this Court. (Petition, Exhibit 2). Mr. Brown also presumably received a second letter dated October 30, 2009 confirming the hearing date, explaining NYCHA's hearing procedures, and specifying why Mr. Brown was not eligible for a lease. (Petition, Exh 4). There NYCHA stated that:

You, David Brown, Grievant, are otherwise ineligible to reside in public housing in accordance with the admission standards for applicants contained in the New York City Housing Applications Manual until 2015 because:

³ The period of time is 3 years for a class B misdemeanor and 5 or 6 years for felonies, depending on the class.

- a) On or about April 28, 2008, you were convicted of Criminal Possession of a Controlled Substance (A-Misd) P.L. 220.03 and sentenced to 20 days imprisonment and 6 months license suspension.
- b) On or about October 3, 2007 you were convicted of Attempted Assault (B-Misd) P.L. 110.120 and sentenced to a conditional discharge.
- c) On or about September 6, 2007 you were convicted of Criminal Possession of a Controlled Substance (B-Fel) P.L. 220.16 and have yet to be sentenced.

A few months after he was sent this notice, on December 2, 2009, Mr. Brown was again arrested and then incarcerated for a period of about three and a half months. (Request to the Hearing Officer for a new hearing, Exh. J). Because of his incarceration he did not appear at the December 4 hearing before the Impartial Hearing Officer. As such, the Hearing Officer dismissed Mr. Brown's case on default. (Impartial Hearing Officer Decision, Exh. I). Six months later, on June 23, 2010, Mr. Brown submitted an application for a new hearing, explaining that he was incarcerated on the hearing date. (Exh J). NYCHA opposed, arguing that Mr. Brown had failed to show a valid excuse for his default and that in any event he could not establish merit to his case because his criminal record rendered him ineligible for public housing. (Exh K). NYCHA's Impartial Hearing Officer denied the application on August 2, 2010, stating that:

Grievant failed to establish an excusable default. Grievant indicates that he was incarcerated on December 2, 2009 and on Riker's Island for three and a half months. The record, however, reveals that the notice of the hearing scheduling the matter for December 4, 2009, is dated October 7, 2009. Grievant did not assert that he

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did not receive notice of the hearing, but that he was incarcerated. There is no indication in the application, that Grievant made any effort to notify the attorney for the Authority, that he was incarcerated on the hearing date and unable to attend the hearing. In any event, Grievant could have been represented by an attorney or any other representative during the hearing, in his absence. Grievant has not established both an excusable default and meritorious defense.

On February 15, 2012, 18 months after NYCHA's Impartial Hearing Officer denied the request for a new hearing, Mr. Brown filed this Article 78 petition. NYCHA cross-moved to dismiss pursuant to section 3211(a)(5) of the CPLR, claiming that the petition is time-barred under the applicable four month statute of limitations.

Discussion

NYCHA urges the Court to dismiss the proceeding based on the four month statute of limitations specified in CPLR §217(1). This section states in relevant part that:

Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner ...

The reason for this short statute of limitations "is the strong public policy, vital to the conduct of certain kinds of governmental affairs, that the operation of government not be trammled by stale litigation and stale determinations." *Solnick v Whalen*, 49 NY2d 224, 232 (1980), quoting *Mundy v Nassau County Civ. Serv. Comm.*, 44 NY2d 352, 359, Breitell, Ch. J., dissenting. NYCHA cites *Yarborough v Franco et al.*, 95 NY2d 342 (2000), for the proposition that the determination became "final" when NYCHA's hearing officer rejected Mr. Brown's request to vacate his default and have a new hearing by decision dated August 2, 2010.

This Court agrees that the August 2, 2010 decision was a "final" determination, as Mr. Brown had at that point exhausted all possible administrative remedies. Since the final determination was issued on August 2, 2010, Mr. Brown had four months, until December 2, 2010, to timely file his Article 78 petition. Unfortunately for Mr. Brown, he did not file his petition until February 15, 2012, fourteen months after the statute of limitations expired.

Although Mr. Brown attempted to justify his delay by providing some explanation as to his whereabouts between August 2, 2010 and February 15, 2012, he failed to give the Court a sufficient reason as to why he waited eighteen months after NYCHA's final determination before filing his petition. The only evidence Mr. Brown presented was a certificate of completion of a nine-to-twelve month drug rehabilitation program at New York Therapeutic Communities, Inc., dated September 30, 2011. Additionally, he claims to have spent several weeks in Georgia following the death of his aunt. This Court, however, finds no basis to toll the running of the statute of limitations, given the limited facts presented by Mr. Brown and the even more limited grounds for tolling provided by the law.

As NYCHA correctly argues, Mr. Brown is presumed to have received the Hearing Officer's August 2, 2010 determination. As part of the NYCHA cross-motion to dismiss, affidavits were submitted by two NYCHA employees who attested to the custom and practice of mailing administrative determinations. According to the Court of Appeals, a presumption arises that notice was received when proof of the office's mailing practice and procedure is shown. *Nassau Ins. Co. v. Murray*, 46 NY2d 828 (1978). As Mr. Brown has not affirmatively denied receipt of the two notices nor otherwise presented sufficient evidence to counter this presumption of receipt, NYCHA is entitled to an order dismissing the petition.

Even if this Court were to consider the Article 78 petition on the merits, Mr. Brown could not prevail. While his incarceration could arguably be viewed as a valid excuse for defaulting at the hearing, his request for a lease as a remaining family member was properly denied based on his past criminal convictions. NYCHA rules are explicit in stating that an individual convicted of a crime is ineligible for public housing for a set period of time, and NYCHA's application of the rules to Mr. Brown's case has a rational basis in the record.

Accordingly, it is hereby

ORDERED that the cross-motion by respondent New York City Housing Authority to dismiss the petition pursuant to CPLR §§ 217(1) and 3211(a)(5) based on the statute of limitations is granted; and it is further

ADJUDGED that the petition is denied and the proceeding is dismissed. The Clerk is directed to enter judgment in favor of the respondent without costs or disbursements.

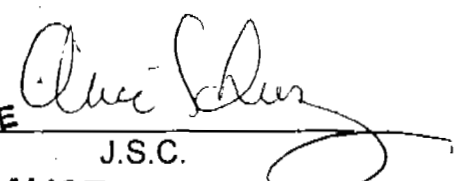
Dated: July 30, 2012

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J.S.C.

ALICE SCHLESINGER