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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ARLENE P. BLUTH

PRESENT: _____ **PART** 4

Justice

Index Number : 401516/2012
QUINTANA, DIANA
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, **were read on this motion to/for** Art 78

Notice of ~~Motion~~/Order to Show Cause — Affidavits — Exhibits petition **No(s).** 1

~~Answering Affidavits~~ — Exhibits cross-motion to dismiss **No(s).** 2

Replying ~~Affidavits~~ (10-4-12 letter) **No(s).** 3

Upon the foregoing papers, it is ordered that this motion is cross to dismiss is granted; the proceeding is dismissed

See Decision + Order + judgment

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 12/10/12

_____, J.S.C.

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

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 NY
COUNTY OF NEW YORK: PART 4

Index No.: 401516/12

In the Matter of the Application of
Diana Quintana,

Petitioner,

-against-

New York City Housing Authority,

Respondent.

DECISION, ORDER
AND JUDGMENT

Present: HON. ARLENE P. BLUTH

Petitioner, self-represented, commenced this Article 78 proceeding to challenge respondent New York City Housing Authority's ("NYCHA") March 5, 2010 determination wherein Hearing Officer Ambert denied petitioner's application to vacate her July 21, 2009 default. Having already vacated a prior default, the Court notes that this July date was her second scheduled hearing on her termination-of-tenancy charges based on chronic rent delinquency. Her application to vacate that July 2009 default, made over seven months after her default, was denied because the hearing officer found that petitioner failed to show both a reasonable excuse and a meritorious defense.

NYCHA cross-moves to dismiss the petition on the grounds that the proceeding is barred by the Statute of Limitations. For the reasons set forth below, NYCHA's cross-motion is granted, the petition is denied and the proceeding is dismissed.

The four month statute of limitations governing Article 78 proceedings which challenge an administrative determination begins to run on the date the determination becomes "final and binding" upon the petitioner, which is the date petitioner receives notice of the decision. *See* CPLR §217(1); *Matter of Metropolitan Museum Historic District Coalition v De Montebello,* 20AD3d 28, 796 NYS2d 64 (1st Dept 2005).

Here, NYCHA submits two employee affidavits which, when read together, describe how the March 5, 2010 determination was mailed to petitioner. First, Shannon Holley, a Hearing Office employee, states that in accordance with her office's regular business practice, on March 5, 2010 she placed a copy of the Hearing Officer Ambert's decision in an envelope, folded it so that petitioner's name and address were visible through the window in the envelope, and placed it in the box where outgoing mail was picked up every day by NYCHA's Mail Center employees. Annexed as exhibit 2 to Ms. Holley's affidavit is a copy of the administrative history where she noted that on March 5, 2010 she mailed the decision denying petitioner's application to open her July 21, 2009 default, which was the second time she defaulted.

NYCHA also submits the affidavit of Shawn Younger, administrative manager of the Mail Center, who states that in March 2010 it was the practice of Mail Center employees to pick up mail designated for post office delivery from a box in the Hearing Office labeled "outgoing mail", imprint the envelopes with the proper postage, and place the mail in a USPS receptacle within one business day of pick up from the Hearing Office.

There is a presumption that regular mail is received within five (5) days of mailing, in this case, March 11, 2010; *see* CPLR §2103(b)(2). Petitioner does not deny receipt of the March 5, 2010 decision declining to vacate the July 21, 2009 default, which was her second default; in fact, she attached it to exhibit A of her petition. Accordingly, NYCHA has established its mailing of Hearing Officer Ambert's March 5, 2010 decision, and that petitioner received it; petitioner has not denied that she received it. Therefore, the four month statute of limitations to commence an Article 78 proceeding challenging this determination expired four months after March 11, 2010, which was July 11 2010. Petitioner did not commenced this Article 78 proceeding until July 10,

2012, when she filed her petition, approximately two years after the statute of limitations expired.[1]

In her petition (para. 3), petitioner claims that she has a "mental history" which dates back four to five years. She annexes to her petition (1) a June 28, 2012 letter from the Roberto Clemente Family Guidance Center which states that petitioner has been seen there since April 26, 2012, (2) a psychiatric evaluation report dated June 24, 2011, and (3) several reports following appointments at the Ryan Center for the period June 8 through October 28, 2010 (exh B).

To the extent that petitioner seeks to toll the statue of limitations based on alleged insanity, this argument fails. Here, petitioner has asserted that she "had extremely justifiable reasons for not appearing for [her] hearings" and she "thinks it is only right that her defaults be vacated" and for her case "to go back....to be tried and heard again". Finally, petitioner asks that this Court make necessary inquiries and requests for more medical assessments from her service providers (petition, para. 3). However, the burden is on the petitioner to establish an applicable exception to the statute of limitations. *See Santo B. v Roman Catholic Archdiocese of New York,* 51 AD3d 956, 957, 861 NYS2d 674 (2d Dept 2008). As the court recently stated in *Gray v Hernandez*, 22 Misc.3d 678, 684, 868 NYS2d 500, 504-505 (Sup Ct, NY County 2008):

> The Court of Appeals has held that the insanity toll applies only to individuals who are able to prove that they were incapable of protecting their legal rights when their causes of action accrued because of an overall inability to function in society. *Cerami v City of Rochester School Dist.*, 82 NY2d 809, 604 NYS2d 543 (1993); *McCarthy v Volkswagen of America, Inc.*, 55 NY2d 543, 450 NYS2d 457 (1982) .

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[1]On December 28, 2011, more than one year after NYCHA notified petitioner of the Hearing Officer's decision, petitioner submitted a second request to open her July 2009 default. By letter dated June 7, 2012, Hearing Officer Ambert indicated that the March 5, 2010 decision remained unchanged and that any further action would need to take place in the appropriate judicial forum. Petitioner cannot extend the statute of limitations merely by filing another request to vacate the same default.

Here, petitioner has not claimed, much less demonstrated, that she was incapable of protecting her rights when the cause of action accrued, March 11, 2010 through July 11, 2010. In fact, on December 28, 2011 she attempted to get "a second bite at the apple" by bringing a second application to open her second default, which was subsequently denied. Nor has petitioner demonstrated that by seeking psychiatric and psychological counseling for depression and other disorders, as millions of people do, she was unable to function in society. Additionally, her statement that she did not have a guardian ad litem for her case is unavailing; she could have requested such an appointment had she appeared on the noticed hearing date and has not otherwise shown an entitlement thereto. Finally, the October 4, 2012 letter from the Roberto Clement Center, submitted as a reply, which states that petitioner received treatment for a stress disorder since April 2012 does not address the relevant period, March 11 through July 11, 2010.

As such, petitioner has not submitted any evidence that she is or was under a disability which would toll the statute of limitations pursuant in accordance with CPLR § 208, which is narrowly interpreted. Therefore, the Court finds that this proceeding is barred by the four month statute of limitations applicable to Article 78 proceedings.

Accordingly, it is hereby ORDERED and ADJUDGED that the cross-motion to dismiss the petition is granted and the proceeding is dismissed as time-barred. Any stays issued by this Court are vacated.

This is the Decision, Order and Judgment of the Court.

Dated: December 10 , 2012
New York, New York

HON. ARLENE P. BLUTH, JSC