Matter of Cole v New York City Hous. Auth.
2013 NY Slip Op 33284(U)
December 10, 2013
Supreme Court, New York County
Docket Number: 400449/12
Judge: Peter H. Moulton

[* 1] SCANNED ON 12/27/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PETER H. MOULTON Justice

PART 40B

Tiffany Cole
-v-
MCDA

INDEX NO. 400449/12

MOTION DATE _____

MOTION SEQ. NO. 01

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 motion is PETITION IS denied for attached

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

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: 12/3/13

HON. PETER H. MOULTON, 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 : PART 40 B

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In the Matter of the Application of
TIFFANY COLE,

Petitioner, Index No. 400449/12

For a Judgment Pursuant to Article
78 of the Civil Practice Laws and Rules

- against -

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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PETER H. MOULTON, J.S.C:

In this Article 78 proceeding, petitioner seeks restoration of her Section 8 benefits which were terminated effective January 31, 2011 based on petitioner's failure to recertify. The proceeding involves the 1984 First Partial Consent Judgment (the "Consent Judgment"), a court ordered stipulation which arose out of a federal court case, *Williams v New York City Housing Authority* (81 Civ. 1801 [SDNY Oct 4, 1984] [Ward, J]). The Consent Judgment (attached to respondent's Answer) contains detailed and particular bargained-for-procedures and notices which must mailed to tenants in both English and Spanish, in particular format, prior to a termination of Section 8 benefits.

The court previously denied respondent's cross motion to dismiss the proceeding as time barred by Decision and Order, dated July 2, 2012 (the "July Decision."). By affidavit sworn to July 6, 2012, Maria Termini indicated respondent's intent to move for a stay of the court's July Decision because it violated appellate precedent. By order dated October 2, 2012, the First

Department denied leave to appeal. Therefore, the decision is law of the case.[1]

After the cross motion to dismiss was denied, respondent submitted a Verified Answer, dated February 1, 2013 and a memorandum of law. Respondent also submitted the affidavits of Robert Tesoriero and Shawn Younger to demonstrate mailing of the Affidavit of Income-Final Request (the "Warning Letter"), the Notice of Termination of Section 8 Subsidy (the "T-1 notice") and the Notice of Default: Termination of Section 8 Subsidy (the "T-3 notice"). During the period at issue, Tesoriero was the Deputy Director of the Leasing Housing Department of the Housing Authority and attests to respondent's general procedures. Shawn Younger, Administrative Manager of the mail room, attests to the mail room's sorting, routing and depositing of mail with the United States Postal Service.[2]

The Tesoriero and Younger affidavits differ from the affidavits submitted on the cross motion to dismiss. The newly submitted proof includes Accountable Mail Logs referencing article numbers corresponding to petitioner's name and a USPS tracking notices corresponding to those article numbers, establishing that the T-1 and T-3 notices were mailed by certified mail.

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[1]Respondent did not move to reargue or renew the July Decision. Respondent's position is that *Lopez v New York City Hous. Authority*, 93 AD3d 448 [1st Dept 2012]) stands for the proposition that the statute of limitations runs from the date of petitioner's receipt of the T-3 notice, regardless of whether the prior two requisite notices were ever given or mailed in the format required under the Consent Judgment. *Lopez,* which was cited in the July Decision, does not state this. Further, *Matter of Fair v Finkel* (284 AD2d 126 [1st Dept 2001]), which was cited in the July Decision reflects that the three notices under *Williams* are conditions precedent, which require reversal of termination even where, as in that case, more than one year lapsed between the mailing of the T-3 notice and the tenant's challenge to the termination. To the extent this court misconstrued *Lopez*, respondent could have, but did not, move to reargue. Accordingly, the July Decision is law of the case.

[2]Younger does not indicate whether he was employed by respondent during the relevant period.

However, the only proof that the T-1 and T-3 notices were mailed by regular mail is Tesoriero's statement that it was respondent's "regular business practice" to do so and to place both certified and regular mail envelopes in an outgoing box to be taken to the post office (Tesoriero Aff ¶¶ 11-12, 16-17).

The newly submitted proof also attaches a sample Warning Letter, which contains a blank insert for the name and address of the tenant. Tesoriero asserts that warning letters were generated and printed from the Central Office by an automated process and distributed to the borough offices for mailing (Tesoriero Aff ¶¶ 7-8). It is clear that Tesoriero's knowledge is limited to respondent's general business practice and that he has no personal knowledge that the Central Office generated and distributed a Warning Letter addressed to petitioner to the local office, nor does he have personal knowledge that the local office mailed a Warning Letter to petitioner.

Respondent further argues that the decision to terminate petitioner's Section 8 subsidy was not arbitrary or capricious because petitioner did not prove that she submitted a recertification package prior to termination. Respondent also maintains that petitioner admits receiving a recertification package, but petitioner makes no such admission. Rather in her petition, petitioner states "my section 8 voucher which got tooking away from me due to the change of systems." She attaches a letter dated October 3, 2011 addressed to a Director "Ms Rodgers" stating that her "section 8 voucher was terminated for some unknown reason and/or maybe I got caught up in the change of systems." In that letter, petitioner states she received "paperwork" with November and December dates but does not state whether the paperwork was the T-1 and T-3 notices, nor does she state whether the paperwork was received by certified or

regular mail.

Tesoriero acknowledges that although respondent's computer system changed as of January 31, 2011 to the "Siebel" system, the change had no effect on the recertification at issue here.

Discussion

The Consent Judgment provides in relevant part that "Termination of the subsidy or eligibility of any participant in the Section 8 Housing Assistance Program for Existing Housing administered by the New York City Housing Authority . . . shall be made only after a determination in accordance with the procedures and provisions herein." (Consent Judgment ¶ 1 [emphasis added]). The Consent Judgment requires that respondent mail, by regular mail, a warning letter (Consent Judgment ¶ 3 [a]). The Consent Judgment also provides that a T-1 notice must mailed by regular and certified mail but only "if the conditions which lead to the preliminary determination have not been remedied within a reasonable period of time after the mailing of the warning letter." (Consent Judgment ¶ 3 [b]). The Consent Judgment further provides that a T-3 notice must be mailed prior to termination, but can only be mailed "[i]n the event that the participant does not respond to the notice as provided for in Section 3 (b)." (Consent Judgment ¶ 3 [e]).

Where there is no showing that respondent complied with the notice requirements of the Consent Judgment, the termination is improper (*see Matter of Fair v Finkel*, 284 AD2d 126, *supra* [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 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).

Here, respondent has not established that the warning letter was mailed, as required under paragraph 3 (a) of the *Williams* Consent. Respondent has also not established that the T-1 or T-3 notices were mailed by regular mail as required, although respondent has established that they were mailed by certified mail.

Where the record demonstrated that only two of the three requisite notices were mailed, "[a]bsent proof that NYCHA complied with the required procedures, its termination of petitioner's Section 8 subsidy was in violation of lawful procedure" (*Matter of Fair v Finkel*, 284 AD2d at 129). As explained in *Dial v Rhea* (2013 NY Slip Op 7475 [2d Dept 2013]), respondent has the burden to satisfy the conditions precedent of serving all three notices on the tenant who is an "unsophisticated layperson" to "ensure that a Section 8 participant would receive all three letters, giving the participant notice that his or her benefits are in imminent danger of being terminated if no action is taken." Accordingly, as respondent has not demonstrated that the termination was in compliance with lawful procedure, the petition must be granted.

It is hereby

ADJUDGED that respondent's termination of petitioner's Section 8 subsidy is vacated; and it is further

ORDERED and ADJUDGED that within 10 business days of the date of this Decision, Order and Judgment, respondent is directed to mail petitioner a new recertification packet or packets covering the period of time from the effective date of termination of petitioner's Section 8 subsidy to date; and it is further

ORDERED and ADJUDGED that in determining petitioner's Section 8 eligibility for the period of time from the effective date of termination to date, respondent shall follow all of the procedures and notice requirements for an annual recertification, except that respondent is directed to expedite its review of petitioner's eligibility; and it is further

ORDERED and ADJUDGED that if, after petitioner submits the annual recertification packet or packets for the time period at issue, respondent determines that petitioner is eligible for

Section 8 benefits, respondent shall, on an expedited basis, restore and pay those benefits for the period of time for which petitioner is found eligible; and it is further

ORDERED AND ADJUDGED that the court shall retain jurisdiction over enforcement of the terms and conditions of this Decision, Order and Judgment; and it is further

ORDERED and ADJUDGED that respondent contact the court by email with a copy to petitioner regarding the status of compliance with the restoration of petitioner's Section 8 or before January 15, 2014.

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

Dated: December 10, 2013

ENTER:

J.S.C.

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).