

Haran Realty LLC v Department of Hous., Preserv. & Dev. of the City of N.Y.
2004 NY Slip Op 30386(U)
November 3, 2004
Supreme Court, New York County
Docket Number: 104402/04
Judge: Emily Jane Goodman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17

-----X
HARAN REALTY LLC,

Petitioner,

Index No. 104402/04

For a Judgment under Article 78 of
the Civil Practice Law and Rules

-against-

DEPARTMENT OF HOUSING, PRESERVATION
AND DEVELOPMENT OF THE CITY OF NEW
YORK,

Respondent.

-----X
EMILY JANE GOODMAN, J.S.C.:

Upon the foregoing papers, it is ordered that this motion by Candace Simmons to be joined as a petitioner in this action pursuant to CPLR § 1001 or CPLR § 1002, is granted.¹ Respondent's sole opposition to the motion is based on its contention that Ms. Simmons is time barred by the four month statute of limitations governed by CPLR 217.² It is respondent's burden to establish that it provided notice of termination to Ms. Simmons more than four months before commencement of the Article 78 proceeding and any ambiguity in the notice must be resolved in favor of petitioner (see Matter of Vadell v City of NY Health and Hosp. Corp., 233 AD2d 224 [1st Dept 1996]). In this matter, the

¹The Court denies Ms. Simmons' request to enjoin Haran Realty, LLC. from commencing a non-payment proceeding, as the request is premature.

²Petitioner has submitted no papers in connection with this motion.

notice must also be in writing and contain the information required under CFR 982.555

(a) (2).

In support of the argument that Ms. Simmons is time barred, respondent only submits an attorney's Affirmation In Opposition To Proposed Party Petitioner's Motion to Join/Intervene. In that affirmation, the attorney relies upon various documents, attached to her affirmation, which allegedly terminate Ms. Simmons from the Section 8 program. The attorney contends, without having any personal knowledge, that these documents were mailed to Ms. Simmons. Respondent submits no affidavit from the individual(s) who signed these documents, attesting to how they were allegedly mailed, nor submits an affidavit from someone with personal knowledge of Section 8 mailing procedures. Accordingly, the sworn statement of Ms. Simmons, claiming that she did not receive any of the aforementioned documents, is un-rebutted and therefore, her motion is not time barred (see Matter of Ijbara v City of New York, 300 AD2d 251 [1st Dept 2002] [City failed to prove that an Article 78 petition was untimely because it failed to rebut owner's sworn statement regarding lack of notice by submitting an affidavit from a person with knowledge that a mailing occurred, or, an affidavit regarding standard mailing procedures]; see also Matter of Gonzalez, 47 NY2d 922 [1979] [presumption of mailing does not arise where there is no proof that notice was mailed]).

Moreover, the Notice of Subsidy Termination, dated 8/4/01, based on Ms. Simmons' alleged failure to return the re-certification package, could not be the basis for

the termination as it is undisputed that further documents were accepted by the agency subsequent to 8/4/01. Further, that notice, and the Notices of Re-certification, could not be the basis for the termination because they do not contain the information required under 24 CFR 982.555(a)(2) (see 90-92 Wadsworth Ave. Tenants Assoc. v City of New York, 227 AD2d 331 [1st Dept 1997] [where written notice is required, the statutory period of limitations does not run until notice is received in the requisite form]; Matter of Kaufman v Anker, 66 AD2d 851 [2d Dept 1978] [same]. Also, as Respondent admits, the four month statute of limitations only runs from receipt of an unambiguous agency determination which aggrieves a petitioner, and does not run where the agency has created the impression that the determination was inconclusive (see Edmead v. McGuire, 67 NY2d 714 [1986]). No one disputes that subsequent to the aforementioned notices, Section 8 paid all rent through 7/31/03 (which Respondent now claims was paid in error), nor that housing inspections continued, creating the impression that benefits were not terminated.³

It is hereby

ORDERED that the motion of Candace Simmons to intervene is granted; and it is further

³Although the Termination of Assistance letter, dated 8/1/03, which advises Ms. Simmons that her Section 8 is terminated retroactive to 3/1/02 based on “No Rent Hardship,” stands on different footing than the other documents, Ms. Simmons denied receiving this notice and Respondent has failed to establish that the 8/1/03 notice was actually mailed.

ORDERED that the proposed Verified Petition of Intervenor is deemed served upon Respondent, upon service of a copy of this Decision and Order, with Notice of Entry; and it is further

ORDERED that Respondent shall answer the Petition within twenty (20) days after such service; and it is further

ORDERED that the caption is amended to read

The Application of
HARAN REALTY LLC and
CANDACE SIMMONS,

Index No. 104402/04

Petitioners,

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

-against-

DEPARTMENT OF HOUSING,
PRESERVATION AND DEVELOPMENT
OF THE CITY OF NEW YORK,

Respondent.

and it is further

ORDERED that a copy of this Decision and Order shall be served on the office of Trial Support (Room 311) to reflect amendment of the caption.

This constitutes the Decision and Order of the Court.

Dated: November 3, 2004

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
NOV - 9 2004
NEW YORK
COUNTY CLERK'S OFFICE