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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOBIS Justice

PART 6

WARD, CARL

-v-

N.Y.C. HUMAN RESOURCES

INDEX NO. 401455/11

MOTION DATE 8/4/11

MOTION SEQ. NO. 001

The following papers, numbered 1 to 16, were read on this motion to/for Article 78 relief

Notice of Motion/Order to Show Cause — Affidavits — Exhibits Petition No(s). 1-5

Answering Affidavits — Exhibits x mot. No(s). 6-15

Replying Affidavits No(s). 16

Upon the foregoing papers, it is ordered that this motion is

FILED

DEC 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION, Order

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

Dated: 12/9/11

JOAN B. LOBIS, 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
NEW YORK COUNTY: IAS PART 6

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CARL WARD,

Petitioner,

-against-

NYC HUMAN RESOURCES ADMINISTRATION, OFFICE OF CHILD SUPPORT ENFORCEMENT,

Respondent.

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Index No. 401455/11

Decision, Order, and Judgment

JOAN B. LOBIS, J.S.C.:

Petitioner Carl Ward, proceeding pro se, brings this petition under Article 78 of the C.P.L.R. seeking an order reversing the February 1, 2011 determination (the "Determination") of the Support Collection Unit ("SCU") of respondent Office of Child Support Enforcement ("OCSE") of the Human Resources Administration. The Determination denied Mr. Ward's request for an administrative review of respondent's issuance of a "special notice" of a determination of child support arrears. Respondent cross-moves to dismiss the petition on the grounds that the documentary evidence shows that the Determination was neither arbitrary and capricious nor an abuse of discretion; that petitioner fails to state a cause of action; that petitioner is barred from re-litigating the issue of child support; and that petitioner failed to exhaust his administrative remedies.

On May 17, 2006, the Hon. Sarah L. Krauss of the Kings County Supreme Court issued a judgment of divorce (the "Judgment") which, inter alia, ordered petitioner to pay the sum of four hundred forty five dollars ($445) semi-monthly to his former wife, Brigitte Moore Ward ("Ms. Moore"), for the support of Imara Ward, born on March 30, 1993, pursuant to a stipulation executed by the parties on January 4, 2006. The payments were to be made through the Kings

County SCU. As set forth in the cross motion, on or about January 29, 2009, Ms. Moore requested that OCSE administratively enforce the child and medical support provisions contained in the Judgment. OCSE then created an account for the matter under the Child Support Management System ("CSMS"), under account number NQ80326A1, to collect, account for, and enforce the child and medical support provisions. By notice dated February 6, 2009 (the "February 2009 Notice"), SCU notified petitioner that as of that date, he owed support arrears in the amount of $32,930, an amount greater than four months of support. As a result, SCU set forth that it is authorized by law to notify the Department of Motor Vehicles ("DMV") to suspend petitioner's driving privileges. The February 2009 Notice stated that in order to avoid DMV suspending his driving privileges, within forty-five days of the date of the notice, petitioner had to either make full payment of the arrears; make a satisfactory payment arrangement with SCU for payment of what he owed in arrears and his current support obligations; send a written challenge regarding the contents of the notice; or provide SCU with proof that his annual income falls below the self support reserve ($14,000 for 2008) or that the amount of his annual income after paying the support obligation would fall below the self support reserve.

Petitioner challenged the February 2009 Notice, disputing the amount of the arrears and claiming that his income was below the self support reserve for 2008. On April 20, 2009, SCU denied petitioner's challenge to the February 2009 Notice (the "SCU Denial"). The SCU Denial set forth that there was a basis for suspending petitioner's driving privileges in New York, because the amount that petitioner owed by April 2009—$35,155—and the amount in the February 2009 Notice were equal to at least four months of current support payments, and because petitioner had failed to

submit required documentation to prove his claim that the amount of income remaining after payment of support obligations would fall below the self support reserve. The SCU Denial set forth that in order to avoid his license being suspended, within thirty (30) days of the date SCU Denial, petitioner must either pay the arrears in full or make a satisfactory payment arrangement with SCU for payment of what he owed in arrears and his current support obligations. Alternatively, if petitioner disagreed with the SCU Denial, he could file an objection with the Kings County Family Court.

On or about June 8, 2009, and September 15, 2010, petitioner filed petitions in the Queens County Family Court, seeking downward modifications of his child support obligations. On both occasions, the petitions were dismissed due to petitioner's failure to appear.

Respondent sets forth that on August 27, 2010, petitioner was notified by "special notice" (the "Special Notice") that he owed support arrears in the amount of $33,374.84, and that the child support owed would be certified to the federal and state authorities for the "Tax Refund Offset/Passport Denial" process unless he paid his arrears on or before October 31, 2010, or unless he challenged the certification by making a written request for review within thirty (30) days of the Special Notice. Petitioner requested administrative review.[1] On February 1, 2011, SCU issued the Determination, which denied petitioner's request for administrative review on the grounds that a review of his account reflected that the amount due is correct and was accurately computed.

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[1] Although respondent states in the attorney's affirmation underlying the cross motion that it received petitioner's request on November 3, 2010, and initially rejected it as untimely, it appears that petitioner's request was reviewed by respondents on the merits, nonetheless.

A certified account statement for account number NQ80326A1 is annexed to the cross motion. Between May 17, 2006 (the date of the Judgment) and June 30, 2011 (the date of the statement), petitioner was obliged to make one hundred thirty-one (131) semi-monthly payments of $445, for a total amount of $58,295 in child support. The statement shows that between May 17, 2006 and February 1, 2009, petitioner did not pay his support obligations and accrued arrears of $32,485. After Ms. Moore sought enforcement of the child support order, an employer income execution was applied in or about September 2009, and some portion of Mr. Ward's income was used to make payments going forward. He has paid a total of $25,359.71 via income execution since September 11, 2009. The total amount of child support petitioner owed through the statement date—$58,295—minus his total payments through the date of the statement—$25,359.71—equals $32,935.29.

Although neither party states this outright, it is presumed that at some point after denying petitioner's request for administrative review of the Special Notice, OCSE did certify petitioner's arrears to the federal and state authorities for the "Tax Refund Offset/Passport Denial" process. It is unclear whether petitioner's passport has actually been revoked or if he is seeking to preempt the revocation.

Some background on the Passport Denial process is necessary to understand the circumstances of this case. The State of New York is required, by federal law, to maintain the CSMS database to record, enforce, and update child support accounts for orders payable through OCSE, and to report arrears of more than $2,500 to the United States Department of Health and

Human Services ("HHS"). 42 U.S.C. § 654(31). If HHS receives a certification by a State agency that an individual owes more than $2,500 in child support arrears, HHS must report the individual to the State Department, which in turn shall refuse, revoke, restrict, or limit that individual's passport. 42 U.S.C. § 652(k). The Passport Denial process has been found to comport with due process requirements because notice and an opportunity to be heard must be provided before a passport is revoked or denied due to child support arrears. Weinstein v. Albright, 261 F.3d 127, 135 (2d Cir. 2001).

On or about June 3, 2011, petitioner filed the instant proceeding, seeking to annul respondent's decision to cancel or seize his passport and disputing the amount of arrears he owes. He maintains that his income was less than the amount he was expected to pay in child support.[2] He states that he paid for his daughter's school tuition, which he states is a form of child support that should be considered. He further maintains that he paid his wife $3,000 from the settlement of their divorce, although he claims to have lost the money order receipt. Petitioner argues that his mother is eighty-three years old and lives abroad by herself. He argues that without his passport, he will be unable to visit his mother should she become ill. He further maintains that the seizure of his passport is too harsh a punishment. Finally, he maintains that OCSE should have considered that he was eligible for an earned income tax credit in 2007. For the above reasons, petitioner asks the court to reverse OCSE's decision to cancel his passport.

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[2] Although petitioner states in the petition that income tax returns are attached to his petition, the petition does not contain such documentation.

As a pro se litigant, the court must construe petitioner's pleadings liberally. Pezhman v. City of New York, 29 A.D.3d 164, 168 (1st Dep't 2006), citing Rosen v. Raum, 164 A.D.2d 809, 811 (1st Dep't 1990). Petitioner asks the court to reverse OCSE's decision to seize his passport. It is clear that OCSE does not have authority or jurisdiction to seize a passport. To the extent that the Determination denied petitioner's request for administrative review of OCSE's certification of support owed for tax refund offset/passport denial, the petition will be construed as challenging that denial on the grounds specified in C.P.L.R. § 7803(3). Petitioner also maintains that the amount of child support that OCSE states that he owes is incorrect. To the extent that the Determination confirmed OCSE's prior calculation that petitioner owes child support arrears in excess of $30,000, the petition will also be construed as challenging the calculation under C.P.L.R. § 7803(3).

Respondent argues, in support of its pre-answer motion to dismiss the petition, that the documentary evidence shows that OCSE is properly enforcing petitioner's child support arrears, which it properly determined to be $33,374.84 as of August 27, 2010. See C.P.L.R. Rule 3211(a)(1). Respondent further argues that petitioner has failed to make out a cause of action that the Determination was arbitrary and capricious. See C.P.L.R. Rule 3211(a)(7) and § 7803(3). Respondent maintains that it is not empowered to reduce petitioner's support obligations or cease enforcement of a child support order; it is merely the fiduciary in collecting child support payments. Until and unless a further court order is issued modifying or reducing the arrears or support obligations, OCSE maintains that it is bound to collect petitioner's support obligations in conformity with the Judgment. Respondent further asserts that it has no authority to deny plaintiff a passport, it is merely a certifying agency for the State of New York, which in turn forwards the certification

of arrears to the United States Department of Health and Human Services, which then in turn notifies the State Department of the certified arrearage amount.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974); C.P.L.R. § 7803(3). "In this regard, the court's scope of review is limited to an assessment of whether there is a rational basis for the administrative determination without disturbing the underlying factual determinations." In re Heintz v. Brown, 80 N.Y.2d 998, 1001 (1992) (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Pell, 34 N.Y.2d at 231 (citation omitted). If the court finds a rational basis for the determination, its inquiry is over and the determination must be sustained. See In re Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009) (citation omitted). Further, the "court[] must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise." Id. (citation omitted).

On a motion to dismiss a special proceeding, the court must "determine only whether the facts as alleged fit within any cognizable legal theory.'" Yan Ping Xu v. New York City Dep't of Health, 77 A.D.3d 40, 43 (1st Dep't 2010) (citation omitted); see also In re Y & O Holdings (NY), Inc. v. Bd. of Mgrs. of Exec. Plz. Condo., 278 A.D.2d 173 (1st Dep't 2000). Accordingly, "the court must afford the pleadings a liberal construction." EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 19 (2005). However, the petition must not consist of only a "conclusory assertion" of the wrong;

it must contain factual allegations. Goldin v. Eng'rs Country Club, 54 A.D.3d 658, 659-60 (2d Dep't 2008), app. denied, 13 N.Y.3d 763 (2009); see also Chappo & Co., Inc. v. Ion Geophysical Corp., 83 A.D.3d 499, 500 (1st Dep't 2011). Furthermore, the court may examine the evidence presented to determine if "a material fact as claimed by the [petitioner] . . . is not a fact at all . . . ." Rietschel v. Maimonides Med. Ctr., 83 A.D.3d 810 (2d Dep't 2011), citing Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977) (other citation omitted). "[T]he court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law." Beal Sav. Bank v. Sommer, 8 N.Y.3d 318, 324 (2007) (internal quotation marks and citations omitted). If the court considers extrinsic evidence submitted with the motion, the

> motion should be granted where the essential facts have been negated beyond substantial question by the affidavits and evidentiary matter submitted. [A]llegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference.

Biondi v. Beekman Hill House Apt. Corp., 257 A.D.2d 76, 81 (1st Dep't 1999) (internal quotation marks and citations omitted), aff'd, 94 N.Y.2d 659 (2000).

Respondent's motion to dismiss the petition is granted. The documentary evidence submitted shows that petitioner's child support arrears are currently in excess of $30,000 and that the arrears have hovered above $30,000 since respondent first started garnishing petitioner's wages in 2009. Therefore, it was not arbitrary and capricious for respondent to confirm in the Determination that petitioner owes child support arrears in excess of $30,000 and to deny his request for administrative review of the Special Notice. Furthermore, respondent is obligated to certify child

support arrears of more than $2,500 for the Passport Denial process, so the fact that it did so neither arbitrary nor capricious. Petitioner has failed to set forth factual allegations sufficient to demonstrate that respondent should not have certified his arrears for the Passport Denial process. The court notes that respondent is without jurisdiction to reduce petitioner's support obligations, and any reduction in petitioner's support obligations would have to be addressed in the form of a motion or petition for a downward modification of the order of support in the Judgment or the arrears that petitioner owes.

Accordingly, it is hereby

ORDERED that the cross motion to dismiss the petition is granted; and it is further

ORDERED that the proceeding is dismissed in its entirety and the clerk is directed to enter judgment accordingly.

Dated: Dec. 9, 2011

ENTER:

JOAN B. LOBIS, J.S.C.