

**Matter of Gaines v New York City Hous. Auth.**

2013 NY Slip Op 32337(U)

September 16, 2013

Supreme Court, New York County

Docket Number: 400797/13

Judge: Tanya R. Kennedy

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

PRESENT: HON. TANYA R. KENNEDY  
Justice

PART 25

INDEX NO. 400797/13

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

-v-

Jezeel games

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

- Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_  No(s). 1-2
- Answering Affidavits — Exhibits \_\_\_\_\_  No(s). 3-4
- Replying Affidavits \_\_\_\_\_  No(s). 5

Upon the foregoing papers, it is ordered that this motion and cross-motion are  
decided in accordance with the accompanying decision.

### 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).

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

Dated: September 16 2013

Hon. Tanya R. Kennedy J.S.C.  
**TANYA R. KENNEDY**

- 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

PRESENT: TANYA R. KENNEDY  
Justice

PART 25

In the Matter of the Application of  
JEZELL GAINES,  
Petitioner,

INDEX NO. 400797/13

MOTION DATE \_\_\_\_\_

- v -

MOTION SEQ. NO. 001

NEW YORK CITY HOUSING AUTHORITY,  
Respondent.

MOTION CAL. NO. 1

The following papers, numbered 1 to \_\_\_\_\_ were read on this petition to/for Art. 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-2</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>3-4</u>
Replying Affidavits _____	<u>5</u>

**Cross-Motion: X Yes No**

Petitioner, who is illiterate and self-represented, commenced this Article 78 proceeding to challenge the determination of respondent New York City Housing Authority (hereinafter respondent) which terminated her tenancy at the NYCHA Fort Washington Heights Rehab III Houses, 457 West 164<sup>th</sup> Street, Apt. 2A, New York, NY 10032, due to chronic rent delinquency, non-desirability and breach of rules and regulations, on the ground that it is arbitrary and capricious.

Respondent cross-moves to dismiss this proceeding on the grounds that petitioner: (1) failed to timely commence this proceeding within the four month statute of limitations; and (2) cannot collaterally attack the Civil Court award of final judgment of possession in favor of respondent.

For the reasons set forth below, the petition is denied, the cross-motion is granted and the proceeding is dismissed.

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

On April 2, 2009, during a meeting between petitioner and the Housing Manager regarding petitioner's rental arrears, a Housing Assistant entered the meeting to provide petitioner with documentation of such arrears. A verbal altercation ensued when petitioner felt that the Housing Assistant purposefully provoked her by handing petitioner documents which she was unable to read.

Respondent served petitioner with an October 6, 2009 Notice recommending the termination of her tenancy due to charges of repeated failure to timely pay rent at least five times between October 2008 and February 2009; for failure to pay any rent between March 2009 and September 2009; and for non-desirability and breach of rules and regulations as a result of the April 2, 2009 verbal altercation. Petitioner and respondent appeared at a hearing before a Hearing Officer on April 2, 2010 regarding such charges and respondent appointed a *guardian ad litem* (hereinafter GAL) to assist her.

On May 18, 2010, the Hearing Officer issued a decision sustaining the charges and recommending the termination of petitioner's tenancy. The Hearing Officer determined, *inter alia*, that petitioner acknowledged that she owed \$1,003.00 in rent arrears, and that even if petitioner perceived that the Housing Assistant disrespected petitioner because of her disability, petitioner's reaction was nonetheless inappropriate. Respondent adopted the Hearing Officer's decision on June 2, 2010 and mailed its determination to petitioner and the GAL on June 9, 2010.

Respondent commenced a holdover proceeding against petitioner in Civil Court on or about October 6, 2010 and a GAL was appointed to assist her. Following a trial in the holdover proceeding, respondent was granted a final judgment of possession on May 30, 2012. Petitioner then commenced this Article 78 proceeding on May 14, 2013 and this Court appointed a GAL to assist her.

An Article 78 proceeding must be commenced within four months after the administrative determination to be reviewed becomes final and binding on the aggrieved party (*see* CPLR 217 [1]; *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom. of City of N.Y.*, 5 NY3d 30, 34 [2005]; *Matter of Yarbough v Franco*, 95 NY2d 342, 346 [2000]). The four month limitations period, which is strictly construed, begins to run from petitioner's

receipt of the adverse determination (see *Matter of Yarbough v Franco*, *supra* at 345; *Solnick v Whalen*, 49 NY2d 224, 232-233 [1980]).

Respondent submitted affidavits from the Tenancy Administrator charged with mailing its Determination of Status form and from the Administrative Manager of respondent's Mail Center, establishing that respondent's determination was mailed to petitioner on June 9, 2010 in accordance with respondent's regular business practice. These affidavits serve as *prima facie* evidence giving rise to a rebuttable presumption of proper delivery and receipt (see *Northern v Hernandez*, 17 AD3d 285, 286 [1st Dept 2005]; *Matter of Rodriguez v Wing*, 251 AD2d 335, 336 [2d Dept 1998]), which petitioner did not challenge. The four month limitations period expired on October 14, 2010 (see CPLR 217[1]; 2103[b][2]) and petitioner waited more than two and a half years after the expiration of the statute of limitations before commencing this proceeding.

During oral argument, the GAL acknowledged that the tolling provision of CPLR 208 was limited to infancy or insanity and, thus, inapplicable to the present circumstances. While the GAL noted that respondent is under a disability due to her illiteracy, the GAL recognized that CPLR 208 was silent with respect to illiteracy and urged the Legislature to address this situation in the interest of justice. This Court has little doubt that petitioner's delay in commencing this proceeding resulted from her inability to read and to understand respondent's determination terminating her tenancy. As the GAL correctly noted, it is for the Legislature and not the courts to expand the current law to include those persons, such as petitioner, who are unable to read and write. This Court has no authority to otherwise extend the statute of limitations (see *Matter of Thorton v New York City Hous. Auth.*, 100 AD3d 556, 557 [1st Dept 2012]).

Although this Court sympathizes with petitioner, who became quite emotional during oral argument, this Court must dismiss this petition since she failed to commence this proceeding within four months after respondent issued its determination to terminate her tenancy (see CPLR 217[1]; *Matter of Best Payphones, Inc. v Department of Info. Tech. & Telecom of City of N.Y.*, *supra* at 34; *Matter of Yarbough v Franco*, *supra* at 346).

Even if petitioner had timely commenced this proceeding, petitioner may not commence an Article 78 proceeding to collaterally attack the Civil Court judgment awarding final possession to respondent (see *Matter of Cherry v New York City Hous. Auth.*, 67 AD3d 438, 438

[1st Dept 2009]). The proper vehicle to challenge a Civil Court judgment is an appeal to the Appellate Term (*see Matter of Winters v Gould*, 143 Misc 2d 44, 45 [Sup Ct, New York County 1989]).

Therefore, in light of the foregoing, it is

ORDERED and ADJUDGED, that the petition is denied, respondent's cross-motion to dismiss is granted; and the proceeding is dismissed.

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

Dated: September 16, 2013

*Tanya R. Kennedy*  
J.S.C.  
TANYA R. KENNEDY  
J.S.C.

Check one:  FINAL DISPOSITION       NON-FINAL DISPOSITION  
Check if appropriate:       DO NOT POST       REFERENCE

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