SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T: HON. ROBERT J. MCDONALD
Justice

- x
In the Matter of the Application of

CRAIG GOTTLIEB,

Petitioner,

- against -

THE CITY OF NEW YORK; NEW YORK COUNTY SUPPORT COLLECTION UNIT; NEW YORK CITY HUMAN RESOURCES ADMINISTRATION/OFFICE OF THE CHILD SUPPORT ENFORCEMENT; FRANCES PARDUS-ABBADESSA, in her capacity as Executive Deputy Commissioner of the City of New York, Child Support Enforcement Unit/Human Resources Administration/Department of Social Services; RODRIQUE JEAN BAPTISTE, in his capacity as Supervisor of The City of New York, Child Support Enforcement Unit; Human Resources Administration/Department of Social Services; WILOMA CHURCHIL, in her capacity as Supervisor of The City of New York, Child Support Enforcement Unit; Human Resources Administration/Department of Social Services; SUNDAY ETSEKHUME, in his capacity as Supervisor of The City of New York, Child Support Enforcement Unit; Human Resources Administration/Department of Social Services; RUTH BORCHARDT, in her capacity as Supervisor of The City of New York, Child Support Enforcement Unit; Human Resources Administration/Department of Social Services; DOLORES HENDERSON, in her capacity as Supervisor of The City of New York, Child Support Enforcement Unit; Human Resources Administration/Department of Social Services,

Respondents.

Index No.: 4841/13

Motion Date: 6/11/13

Motion Seq.: 1

Administrative Decision and Order
Dated: 11/14/2013 New York Case Identifier: NV 18991T1
- x

The following numbered papers read on this application by petitioner, appearing pro se, pursuant to CPLR article 78 to review a determination of the respondent New York City Office of Child Support Enforcement/Support Collection Unit (OCSE) s/h/a "New York County Support Collection Unit, New York City Human Resources Admin./Office of the Child Support Enforcement, Frances Pardus-Abbadessa, in her capacity as Executive Deputy Commissioner of the City of New York, Child Support Enforcement Unit/ Human Resources Admin./ Dept. of Social Services, Rodrique Jean Baptiste, in his capacity as Supervisor of the City of New York , Child Support Enforcement Unit/ Human Resources Admin./ Dept. of Social Services, Wiloma Churchil, in her capacity as Supervisor of the City of New York, Child Support Enforcement Unit/ Human Resources Admin./ Dept. of Social Services, Sunday Etsekhume, in his capacity as Supervisor of the City of New York, Child Support Enforcement Unit/ Human Resources Admin./ Dept. of Social Services, Ruth Borchardt, in her capacity as Supervisor of the City of New York, Child Support Enforcement Unit/ Human Resources Admin./ Dept. of Social Services, dated November 14, 2012, to direct respondents to refund an overpayment of child support to petitioner, to compel respondents to take steps to cause all credit reporting bureaus to remove or expunge any negative or derogatory information provided by respondents regarding the support collection account maintained by respondents in relation to petitioner's support obligations, to enjoin respondents from reporting derogatory information related to such child support collection account to the credit bureaus, to direct respondents to reimburse all costs and damages sustained by petitioner in relation to his compliance with the "Commissioner's" order, pursuant to CPLR 8601(a) an award of costs and disbursements and "reasonable fees," and to award compensatory and exemplary damages; and this cross motion by respondents pursuant to CPLR 3211(a)(1), (5) and (7) to dismiss the petition and any and all motions with prejudice, or in the alternative, pursuant to CPLR 7804(f) and 3012(d) for leave to answer the petition.

	Papers Numbered
Notice of Petition- Petition, Affidavits - Exhibits	1-4
Notice of Cross Motion - Affidavits - Exhibits	5-9
Answering Affidavits - Exhibits	10-12
Reply Affidavits	13-16

Upon the foregoing papers it is ordered that the petition and cross motion are determined as follows:

By a temporary support order dated February 24, 2009, the Support Magistrate of the Family Court directed petitioner to pay $100.00 per week to Carolina Gottlieb, payable through the Support Collection Unit (SCU), commencing on February 27, 2009, for the support of petitioner's child. By a final order of support dated July 7, 2009,

entered upon consent of the parties, the Support Magistrate directed petitioner to, among other things, pay $1000.00 per month to Carolina Gottlieb for child support, and $215.00 per month as spousal support, payable through the SCU, effective January 23, 2009, and to pay retroactive support, established to be $8440.00 for the period January 23, 2009 to July 30, 2009, payable through the SCU by a payment schedule to be determined by the SCU. The Support Magistrate also directed the SCU to credit petitioner with "all payments" made by him "since January 23, 2009 to reduce the retro[active] amount."

On September 11, 2009, petitioner was notified that his arrears would be reported to the credit reporting agencies because they were in excess of the threshold amount of $1,000.00 or totaled two missed child support payments. The notification informed petitioner of the process by which he could submit a request for review of his account if he believed the past due support amount indicated in the notice was in error. When petitioner did not submit, within 10 days thereafter, a request for review or challenge the decision by respondent OCSE to report his arrears to the credit reporting agencies, respondent OCSE notified the credit reporting bureaus on October 9, 2009 that petitioner's account was delinquent as of September 30, 2009, with a net amount due of $6,855.00.

Petitioner filed a petition dated May 11, 2010 in Family Court for modification of the final order of support of the Support Magistrate dated July 7, 2009, claiming he made an overpayment, and requesting an adjustment of the amount of arrears owed and a refund. By order dated March 8, 2011, the Support Magistrate dismissed the petition without prejudice for lack of jurisdiction. The Support Magistrate indicated petitioner's remedy was with the SCU, and noted the SCU had advised petitioner that it was conducting an audit of his account which had not yet been completed, and he could file for further relief, if warranted, upon the completion of the audit.

Petitioner filed a petition in Family Court dated September 29, 2011, for modification of the final order of support dated July 7, 2009, requesting a refund of a claimed overpayment of $2,400.00. By order dated October 24, 2011, the Support Magistrate dismissed the September 29, 2011 petition due to its withdrawal. Petitioner then filed an objection with the Family Court to the final order made by "the Support Magistrate on October 24, 2011 and prior," claiming that notwithstanding his demands, the SCU had failed to credit him with payments he made since January 23, 2009 to reduce the retroactive support amount. Petitioner asserted that the SCU should be required to credit his account in the amount of $2,397.29, and in connection therewith, to set forth a payment schedule. By order dated January 4, 2012, the Family Court denied the objection on the ground that petitioner had failed to allege an error committed by the Support Magistrate. The Family Court noted that to the extent petitioner claimed an error on the part of the SCU, his avenue of redress was through administrative review by SCU-- not the Family Court.

On September 30, 2012, respondent OCSE determined that petitioner's account was delinquent in a net amount of $3209.21, and caused restraining notices to be sent to New York Community Bank and Dime Savings Bank of Williamsburg, restraining petitioner's bank accounts. In response, petitioner submitted a "mistake of fact" form dated October 9, 2012 to the SCU, claiming the SCU had miscalculated the amount of child support which he owed. On the form, petitioner claimed he had paid $52,615.79 in court-ordered support covering the period January 23, 2009 through October 9, 2012 and indicated he had availed himself of a credit pursuant to the July 7, 2009 order of the Support Magistrate. Petitioner attached a copy of the July 7, 2009 order, a "payment history" printout from OCSE, and his own letters dated February 1, 2012 and October 7, 2012 addressed to OCSE and the "NYS Child Support Processing Center," respectively. In the February 1, 2012 letter, petitioner claimed, among other things, that he had overpaid the amount of $2397.29, and advised the OCSE of his intention to withhold the payment due on March 28, 2012 and remit only $50.79 for the amount due on April 28, 2012. In the October 7, 2012 letter, petitioner admitted that he had withheld payment for March 2012 and remitted only $50.79 in April 2012, but asserted he did so as a means of settling his claim of overpayment. He also asserted that he in fact was entitled to a credit of $18.08.

Respondent OCSE reviewed petitioner's claim of mistake of fact and issued a notice of determination dated November 14, 2012, denying that SCU had made an error in calculating the amount of child support debt owed by petitioner. On November 20, 2012, respondent OCSE caused petitioner's funds to be seized in the amount of $964.94 from New York Community Bank and in the amount of $795.00 from Dime Savings Bank. Respondent OCSE also caused petitioner's income tax refund for 2012 in the amount of $1779.00 to be seized. Petitioner, however, was refunded the amount of $1759.73, by check dated February 6, 2013. The execution against petitioner's bank accounts had satisfied all but $20.00 of the arrears due and owing on his account.

Petitioner commenced this proceeding on March 13, 2013, pursuant to CPLR article 78, seeking to review the OCSE's determination of November 14, 2012 denying his claim of overpayment, and for injunctive and monetary relief. He alleges that he owed a total of $52,597.71 as child and spousal support for the period of January 23, 2009 to August 2010 and actually paid $52,615.79. He claims that the respondent OCSE's determination of November 14, 2012 was made arbitrarily and capriciously, and is erroneous, and that respondent OCSE failed to review the underlying records and file maintained with respect to his child support account. He also claims the seizure by respondent OCSE of his bank accounts and tax refund was unlawful, that respondents violated the Fair Credit Reporting Act and committed intentional infliction of emotional distress and gross negligence in the reporting of inaccurate information to credit reporting bureaus regarding his support account.

In lieu of answering, respondents cross move to dismiss the

petition on the grounds that the petition fails to state a cause of action, petitioner does not have a clear legal right to compel the OCSE to refund or credit his child support account, petitioner does not have standing to restrain the OCSE from reporting future arrearages to credit bureaus or have existing child support arrearage amounts expunged, petitioner failed to exhaust his administrative remedies, his claims are barred by the expiration of the statute of limitations, and respondent OCSE is entitled to immunity for any claim of damages for its acts. Respondents alternatively asserts that petitioner's request for an award pursuant to CPLR 8601 is premature. Petitioner opposes the cross motion.

Petitioner has failed to state a cause of action pursuant to CPLR article 78 with respect to the November 14, 2012 determination of respondent OCSE. To the extent petitioner claims the OCSE should have credited him with the payment of $2400.00, the certified account and records statements of OCSE indicate that six monthly payments of $400.00 made by petitioner from February 2009 through July 7, 2009 were accounted for and added to the sum total of payments made by petitioner. To the extent petitioner claims the OCSE should have credited him for payments he made voluntarily to his wife and not through the OCSE in January and February 2009, before the issuance of the temporary support order, OCSE does not have the authority to credit payments made before the existence of an order of support. The Family Court has the duty of establishing the amount of retroactive support, whereas the OCSE/SCU has the obligation to enforce the order of support (*see* Family Court Act § 440; *Tosques v Ponyicky*, 89 AD3d 1097 [2d Dept 2011]). Furthermore, voluntary payments made by a parent for the benefit of his or her child and not made pursuant to a court order, may not be credited against amounts due under the order (*see Horne v Horne*, 22 NY2d 219, 224 [1968]; *LiGreci v LiGreci*, 87 AD3d 722 [2d Dept 2011). In addition, the child support payments made by petitioner to the SCU during the period his child was in foster care were remitted to the Department of Social Services for reimbursement of expenditures made on behalf of petitioner's child (*see* Social Services Law § 398; *Matter of Commissioner of Social Servs. v Grifter*, 150 Misc 2d 209 [Fam Ct, New York County 1991]), and petitioner received credit for such payments. Petitioner, furthermore, has failed to allege any other basis upon which he claims that his child support account should have been adjusted. Under such circumstances, petitioner has failed to state any basis for his claim that the November 14, 2012 determination by respondent OCSE was arbitrary or capricious.

Furthermore, to the extent petitioner separately challenges the reporting by the OCSE of information about him to the credit reporting bureaus on October 9, 2009, information regarding past-due support owed by a respondent must be reported to consumer reporting agencies whenever the amount of past-due support exceeds $1,000 or is at least two months delinquent, whichever occurs first, and must indicate the name of any respondent who owes past-due support and the amount of the delinquency (*see* Social Services Law § 111-c [1][h], 18 NYCRR 347.19).

The past-due support owed by petitioner warranted the OCSE to report such information to the credit reporting bureaus on October 9, 2009. In addition, petitioner did not file a timely "mistake of fact form" for a review of his account on the ground that he believed the past-due support amount indicated in the notice of the proposed release of information to the credit reporting bureaus was in error (*see* 18 NYCRR 347.19[b][4][v],[vii]), and thus, failed to exhaust his administrative remedies (*see generally Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978] ["It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law"]). Nor did petitioner challenge the decision made by respondent OCSE to release information to the credit reporting agencies pursuant to an Article 78 proceeding within the time limits provided by law (*see* 18 NYCRR 347.19[b][4][xii]; *see also* CPLR 217[1] ["a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner"]).

To the extent petitioner separately challenges the seizure of his bank accounts, the OCSE is authorized to seize funds held in financial institutions, of child support obligors, for the purpose of collecting overdue support (*see* Social Services Law § 111-t [2], 18 NYCRR 346.11), and CPLR 5232 provides the procedural mechanism by which OCSE may levy upon an obligor's bank account. Petitioner was notified of the impending restraint. The records of the SCU and OCSE indicate that at the time of the seizure of the funds in his bank accounts, he had arrears for two months of child support excluding any retroactive support. Petitioner, furthermore, admits in his letter dated October 7, 2012 that he did not remit the $1215.00 amount due in March 2012, and paid only $50.59 towards the $1215.00 amount which was due for April 2012.

To the degree petitioner seeks to enjoin respondent OCSE from reporting derogatory information related to his account to credit bureaus, petitioner lacks standing to seek such relief. Respondent OCSE is obligated under Social Services Law § 111-c (1)(h) and the corresponding regulations (18 NYCRR 347.19[b][4]) to provide such information whenever the amount of past-due support exceeds $1,000 or is at least two months delinquent, whichever occurs first. In addition, petitioner has not shown injury in fact relative to any claimed future credit reporting *(see Matter of Brunswick Smart Growth, Inc. v Town of Brunswick*, 73 AD3d 1267 [3d Dept 2010]). Petitioner, of course, has the recourse under an Article 78 proceeding for an injury in fact resulting from an actual administrative determination (*see* 18 NYCRR 347.19[b][4][xii]).

With respect to petitioner's claim seeking a mandatory injunction directing respondent OCSE to take steps necessary to have the credit reporting agencies remove all negative or derogatory information regarding petitioner's support collection account, he does not have a clear right to an injunction in that OCSE correctly calculated his

arrears (*see Weinreb v 37 Apts. Corp.*, 97 AD3d 54 [1st Dept 2012]). Again, respondent OCSE acted within its statutory authority by reporting petitioner's outstanding arrears in excess of $1000.00 to credit reporting agencies (*see* Social Services Law § 111-c[1][h]; 18 NYCRR 347.19[b][4]).

The claim for damages by petitioner that respondent OCSE violated the Fair Credit Reporting Act (15 USC § 1681[b]) (the FCRA), by disseminating negative credit information about him to credit reporting agencies, is not cognizable. There is no private right of action under the section of the FCRA which requires furnishers of information to provide accurate information to consumer reporting agencies because enforcement of this section is limited to government agencies and officials (see 15 USC § 1681s-2[a]) (see *Ladino v Bank of America*, 52 AD3d 571 [2d Dept 2008]). Petitioner additionally makes no allegation that he notified any credit reporting agency that he was disputing the accurancy of information provided by the OCSE (*see* 15 USC § 1681s-2 (b); *Ladino v Bank of America*, 52 AD3d at 573-574).

Nor has petitioner stated a cause of action against respondent OCSE for intentional infliction of emotional distress. "Public policy bars claims alleging intentional infliction of emotional distress against governmental entities (*see Eckardt v City of White Plains*, 87 AD3d 1049 [2d Dept 2011]; *Ellison v City of New Rochelle*, 62 AD3d 830 [2d Dept 2009]; *Lillian C. v Administration for Children's Servs.*, 48 AD3d 316, 317 [1st Dept 2008]; *Pezhman v City of New York*, 47 AD3d 493, 494 [1st Dept 2008]; *Wyllie v District Attorney of County of Kings*, 2 AD3d 714, 720 [2d Dept 2003])" (*Afifi v City of New York*, 104 AD3d 712 [2d Dept 2013]). Any claim against the other respondents for intentional infliction of emotional distress acts likewise must fall, insofar as they are being sued in their representative capacities only.

The claim of gross negligence against respondents likewise must fall. It is merely a restatement, albeit in slightly different language, of petitioner's claim that respondent OCSE erred in determining that his account was accurate. Such employment of language familiar to tort law does not transform a claim seeking review of an administrative determination into a tort claim.

Under such circumstances, the petition is denied, and the cross motion by respondents to dismiss the petition is granted (CPLR 3211[a][7], 7804[f]).

Dated: Long Island City, NY
October 1, 2013

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ROBERT J. McDONALD
J.S.C.