Matter of McQuaige v New York City Hous. Auth.
2013 NY Slip Op 32707(U)
October 25, 2013
Supreme Court, New York County
Docket Number: 401007/13
Judge: Cynthia S. Kern
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index Number : 401007/2013

MCQUAIGE, SHARON

vs

NYC HOUSING AUTHORITY

Sequence Number : 001

ARTICLE 78

PART ______

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. ______

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

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

is decided in accordance with the annexed decision.

FILED
OCT 30 2013
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
OCT 30 2013
MOTION SUPPORT OFFICE
SUPREME COURT-CIVIL

Dated: 10/25/13

CK, 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 55

---x

In the Matter of the Application of

SHARON MCQUAIGE,

Petitioner,

Index No. 401007/13

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

DECISION/ORDER

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

---x

HON. CYNTHIA S. KERN, J.S.C.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Notice of Cross Motion and Answering Affidavits	2
Replying Affidavits	3
Exhibits	4

Petitioner Sharon McQuaige commenced the instant Article 78 proceeding seeking to challenge the determination of respondent New York City Housing Authority ("NYCHA") denying her application to vacate her second default for failing to appear at a hearing on termination-of-tenancy charges. NYCHA cross-moves to dismiss the petition on the ground that it is barred by the statute of limitations. For the reasons set forth below, the cross-motion to dismiss the petition is granted and the petition is denied.

The relevant facts are as follows. Petitioner is a tenant in the Marcy Houses, a NYCHA-run property located at 113 Nostrand Avenue, Apt. 5C, Brooklyn, New York (the "subject

premises"). In January 2012, NYCHA sent petitioner a notice that it was recommending her tenancy be terminated due to her chronic delinquency in the payment of rent (the "Notice of Termination"). Specifically, the Notice of Termination stated that petitioner had paid her rent late each month in the previous 12 months and that a dispossess proceeding had been instituted against her. The Notice of Termination further informed petitioner that a hearing on the charges was scheduled before a Hearing Officer on February 23, 2012 at 9:45 a.m.

Petitioner failed to appear at the February 23, 2012 hearing. Thus, in March 2012, NYCHA terminated petitioner's tenancy due to her failure to appear at the hearing to address her rent delinquency. Petitioner then submitted an application for a new hearing and to open her default. In her application, petitioner stated that she failed to appear for the hearing due to a medical appointment and that her tenancy should not be terminated because "[s]ome repairs were needed some made others not" and that "rent has been paid." In a letter dated August 30, 2012, NYCHA informed petitioner that her application to open her default was granted and a second hearing was scheduled for October 2, 2012 at 9:00 a.m.

Petitioner failed to appear at the October 2, 2012 hearing, failed to adjourn the hearing and failed to send a representative to appear on her behalf. Thus, NYCHA's Hearing Officer sustained the chronic rent delinquency charge on default and concluded termination of tenancy was warranted. NYCHA's Board then adopted the Hearing Officer's decision. On November 5, 2012, petitioner applied to vacate her second default. In her application, petitioner stated that she failed to appear for the second hearing because she "did not receive mail." Counsel for NYCHA opposed the application on the ground that proper notice of the hearing was sent to petitioner and that petitioner had no meritorious defense to the action. In a decision dated December 27, 2012, NYCHA denied petitioner's application to open her second default. Specifically, the decision

states that the application was denied because NYCHA had included "an affidavit reflecting that a copy of the notice was forwarded to the Tenant via certified and regular mail on August 31, 2012" and that petitioner's defense of "Repairs never made" was inadequate as "there was not indication that a court of proper jurisdiction determined that rent payments should be withheld pending completion of repairs or that an alternative rent payment schedule was ordered." Further, the decision noted that petitioner "did not present a viable plan to become current with the rent and to remain current with future rent payments." NYCHA mailed the decision to petitioner on December 28, 2012. Petitioner then commenced the instant Article 78 proceeding seeking to challenge NYCHA's denial of her application to open her second default on June 28, 2013 with the filing of a Verified Petition.

There is a four month statute of limitations to bring an Article 78 proceeding to challenge an administrative determination that is measured from the date the determination becomes final and binding upon the petitioner. NY CPLR § 217. Where NYCHA terminates a tenancy upon default, the final determination for purposes of Article 78 review is the Hearing Officer's decision denying the application to vacate the default and the limitations period begins to run from the receipt of such decision. *See Matter of Yarbough v. Franco*, 95 N.Y.2d 342, 345 (2000)(holding that "the limitations period begins to run from receipt of the denial of the request to vacate the default.") Here, NYCHA has affirmed that the denial of petitioner's application to vacate her second default was mailed to petitioner on December 28, 2012. This gives rise to a presumption that petitioner received the decision. *See Nassau Ins. Co. v. Murray*, 46 N.Y.2d 828, 829-30 (1978)(holding that where proof that a decision was duly addressed and mailed, "a presumption arises that those notices have been received by [the aggrieved]"); *see also Matter of Noel v. New York City Hous. Auth.*, 98 A.D.3d 981, 982 (2d Dept 2012)(holding that as

"NYCHA submitted uncontroverted evidence that a copy of the determination...was mailed to the petitioner on November 5, 2009...the petitioner's time within which to commence a CPLR article 78 proceeding to review the determination expired four months after November 5, 2009....") Thus, petitioner's time to commence an Article 78 proceeding challenging the denial of her application to vacate her second default expired on April 28, 2013, or at the latest, May 2, 2013. *See* CPLR § 2103(b)(2)("where a period of time prescribed by law is measured from the service of a paper and service is by mail, five days shall be added to the prescribed period.") However, petitioner did not commence the instant proceeding until June 28, 2013, almost two months after her time to do so had already expired.

Petitioner's assertion in her petition and in a letter in opposition to the cross-motion that she is having "issue[s] with her mail boxes" which has "caused [her] to miss very important documents and credit cards on several occasions" is unavailing. As an initial matter, petitioner has not specifically alleged that she did not receive the December 27, 2012 decision nor does she allege a specific date when she did receive it. Additionally, petitioner has not alleged that the issues with her mailbox occurred at or around the time NYCHA mailed its December 27, 2012 determination. Indeed, NYCHA has affirmed that it did not receive any requests to fix petitioner's mailbox or notifications that there were issues with the mailbox in 2012 or 2013. Therefore, petitioner has not sufficiently rebutted the presumption that she received the decision.

Accordingly, the cross-motion to dismiss the petition is granted and the petition is hereby dismissed. This constitutes the decision and order of the court.

Dated: 10/25/13 Enter: _______CK_______
J.S.C

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OCT 30 2013
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