

**Matter of Moringiello v Human Resources Admin.  
Off. of Child Support Enforcement**

2019 NY Slip Op 30980(U)

February 7, 2019

Supreme Court, Richmond County

Docket Number: 080101/2018

Judge: Wayne M. Ozzi

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

-----X Part 23  
In the Matter of the Application of  
MICHAEL MORINGIELLO,

Petitioner,

Present:

HON. WAYNE M. OZZI

-against-

DECISION AND ORDER

HUMAN RESOURCES ADMINISTRATION OFFICE  
OF CHILD SUPPORT ENFORCEMENT,

Respondent.

Index No. 080101/2018

Motion Nos: 4726-001  
5028-002

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The following papers numbered 1 to 3 were fully submitted on the 13<sup>th</sup> day of December 2018:

	Papers Numbered
Petitioner's Order to Show Cause in a Special Proceeding (Verified Petition, Affidavit of Merit, Emergency Affirmation) (Dated: November 2, 2018).....	1
Respondent's Notice of Cross Motion to Dismiss (Attorney Affirmation in Support of Cross Motion to Dismiss and in Opposition to the Extension of the Temporary Restraining Order, Affidavit of Kashwayne Burnett, Memorandum of Law in Support) (Dated: November 30, 2018).....	2
Petitioner's Affirmation in Opposition to Cross-Motion (Dated: December 12, 2018).....	3

RICHMOND COUNTY CLERK  
2018 FEB 15 A 9 55

Upon the foregoing papers, the application of Petitioner, Michael Moringiello, (Motion No: 4726-001) pursuant to Article 78 of the CPLR to, *inter alia*, review, reverse, vacate and set aside a child support arrears determination made by Respondent and to preclude Respondent from seeking payments to satisfy arrears on the ground that Petitioner overpaid child support and is owed a credit, is denied; and the cross-motion by Respondent (Motion No. 5028-002) to dismiss the petition pursuant to CPLR §§3211(a)(1), (2), (5), (7) and (10) is granted.

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Petitioner and his ex-wife, Catherine Buonofiglia, divorced on December 7, 1995. Two children were born of the marriage: Jodi, whose date of birth is November 28, 1989, and Ashly, whose date of birth is December 18, 1992 (*i.e.*, Petitioner's daughters are currently age 29 and 26 respectively). Petitioner has been obligated to pay child support in the amount of \$113.00 per week since August 12, 1994, pursuant to a New York City Family Court Order of that date, which also provided for retroactive support in the amount of \$7,629.00 as of August 11, 1994 (*see* Respondent's Exhibit A).

The instant petition originates from two Orders made on August 16, 2013 by Kings County Support Magistrate, Nicholas J. Palos, one of which entered a money judgment against Petitioner for arrears in the amount of \$13,002.00 (Respondent's Exhibit A), and the other which modified an October 30, 2006 New York City Family Court Order (*see* Respondent's Exhibit B) changing Petitioner's child support obligation for Ashly, his unemancipated child, to \$432.00 per month, effective September 26, 2012. Petitioner appeared and presented proof in defense of the September 26, 2012 application brought by his ex-wife in Family Court, Kings County (*id.*).

By correspondence dated June 5, 2018 (*see* Petitioner's Exhibit G), Petitioner asked Respondent to "review all [of my] records and the enclosed documents of proof...[to see] that an overpayment for Jodi Moringiello from November 28, 2010-2012" was not credited, "which overpayment should have been applied for Ashly Moringiello after Jodi turned 21 years of age" (Jodi turned age 21 on November 28, 2010). Petitioner requested an audit of his account arguing that his "case is paid in full" (*id.*) since he had paid support for Jodi until she reached the age of 23.

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On August 14, 2018, Respondent notified Petitioner, by correspondence entitled "Child Support Account Resolution Notice," that he owed child support arrears in the amount of \$17,392.54 (*see* Petitioner's Exhibit A).

On November 8, 2018, Petitioner moved by Order to Show Cause and Verified Petition for an Order from this Court reviewing, reversing, vacating and setting aside Respondent's determination that \$17,392.54 is owed by Petitioner, on the ground that Respondent acted arbitrarily and capriciously in making said determination and, further, that "[p]etitioner is entitled to a refund because he overpaid in the amount of \$15,000.00<sup>1</sup> in child support...and to this day creditors are taking money out of his account" (*see* November 2, 2018 Verified Petition, para 19; November 2, 2018 Affidavit of Merit, para 7). This Court temporarily stayed enforcement of the August 14, 2018 determination, and set a return date for Petitioner's application of December 13, 2018. In the interim, Respondent cross moved to dismiss the Petition pursuant to: (1) CPLR §3211(a)(10) [failure to join the custodial parent, a necessary party in this case]; (2) CPLR § 3211(a)(1), [the defense is founded upon documentary evidence, *i.e.*, enforcement of a valid order of support]; (3) CPLR §§3211(a)(2) and (a)(7), [the Court lacks subject matter jurisdiction and Petitioner's failure to state a claim upon which relief may be granted, since Respondent's determination is not final and may be adequately reviewed by Family Court pursuant to CPLR 7801]; (4) CPLR §3211(a)(5), that the New York City Family Court has already made a determination and, as such, the matter is barred by *res judicata* and collateral estoppel; and (5) CPLR 7803(3), [Respondent's decision was not arbitrary and capricious, as it is statutorily obligated to administratively enforce valid child support orders].

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<sup>1</sup> The Petition does not include a specific breakdown of the alleged \$15,000.00 overpayment.

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In support of its cross motion the Respondent submits proof through, *inter alia*, the November 30, 2018 affidavit of its account supervisor, Kashwayne Burnett, of the entry of the \$13,002.00 money judgment, an explanation of the accumulation of statutory interest upon the judgment, documentation detailing the amount of the petitioner's child support arrears, payment history (inclusive of checks returned for insufficient funds), and the manner in which Petitioner's payments were apportioned toward his support. Respondent's proof set forth that Petitioner currently owes arrears in the **corrected amount** of \$15,441.34.

It is well settled that "[a] special proceeding under CPLR Article 78 is available to challenge the actions or inaction of agencies and officers of state and local government" (*Matter of Gottlieb v. City of New York*, 129 AD3d 724, 725; see *Matter of Luczaj v. Bortnik*, 91 AD3d 872, 873). The standard of judicial review is whether the administrative determination was made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion (see CPLR 7803[3]; *Matter of Gottlieb v. City of New York*, 129 AD3d at 725; *Matter of JP & Assoc. Corp. v. New York State Div. of Hous. & Community Renewal*, 122 AD3d 739, 739). "An arbitrary determination is one that is without a sound basis in reason and is made without regard to the facts" (*Matter of Gottlieb v. City of New York*, 129 AD3d at 725; see *Matter of Wooley v. New York State Dept. of Correctional Servs.*, 15 NY3d 275, 280; *Matter of Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231). "[I]f the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency" (*Matter of Deerpark Farms, LLC v. Agricultural & Farmland Protection Bd. of Orange County*, 70 AD3d 1037, 1038, quoting *Matter of Peckham v. Calogero*, 12 NY3d 424, 431).

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Here, Respondent based its determination upon the proof it presented by way of, *e.g.*, entry of the money judgment, accumulation of the statutory interest, and Petitioner's payment history inclusive of those payments which were returned for insufficient funds. Petitioner's failure to establish that Respondent should be estopped from collecting interest on the judgment(s), coupled with the rational and factual basis upon which Respondent made its determination, requires that arrears of \$15,441.34 (*see* November 30, 2018 affidavit of Kashwayne Burnett, para 11) be upheld (*see Matter of County of Orange [Al Turi Landfill, Inc.]*, 75 AD3d 224, 238).

The Court is mindful that on a motion pursuant to CPLR §3211(a)(7), "only the petition is considered, all of its allegations are deemed true, and the petitioner is accorded the benefit of every possible inference (*Matter of Brown v. Foster*, 73 AD3d 917, 918; *see Matter of Miller v. Mulligan*, 73 AD3d 781, 783; *Matter of Bloodgood v. Town of Huntington*, 58 AD3d 619, 621). "Under CPLR §3211 (a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez*, 84 NY2d 83, 88; *see Teitler v. Pollack & Sons*, 288 AD2d 302). Here, Petitioner failed to set forth allegations sufficient to make out a claim that Respondent's determination was "made in violation of lawful procedure, was affected by an error of law, or was arbitrary and capricious or an abuse of discretion" (*CPLR 7803[3]*; *see Matter of Miller v. Mulligan*, 73 AD3d at 783). The documentary evidence submitted by respondent conclusively established a defense to this proceeding as a matter of law (*see Matter of Owens Rd. Assoc., LLC v. Town Bd. of Town of Goshen*, 50 AD3d 908). Thus, the Petition is dismissed pursuant to CPLR §§3211(a)(1) and (a)(7).

The foregoing grounds for dismissal notwithstanding, Petitioner has failed to join custodial parent, Catherine Buonofiglia, as a necessary party, in contravention of CPLR 3211§(a) (10), and

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accordingly the relief sought may not be granted because annulment of arrears without the presence of a necessary party would be improper.

Finally, the temporary restraining order previously issued is hereby vacated inasmuch as there has been no showing that petitioner will be irreparably harmed (irreparable harm being defined as "imminent, not remote or speculative" [see *Family-Friendly Media, Inc. v. Recorder. Tel. Network*, 74 AD3d 738; see *Matter of G. Bldrs. IV, LLC v. Madison Park Owner, LLC*, 84 AD3d 694]) absent the temporary restraint (*36<sup>th</sup> & Second Tenants Assoc. v. New York State Div. of Hous. & Community Renewal*, 243 AD2d 321 [1<sup>st</sup> Dept. 1997])). Here, the allegations giving rise to this Court's award of a temporary restraining order (*i.e.*, to protect Petitioner from further injury) have been resolved by Respondent's proof, and the stay is accordingly lifted.

Accordingly, it is

ORDERED, that the motion by Respondent, Human Resources Administration Office of Child Support Enforcement, to dismiss the petition is granted; and it is further

ADJUDGED, that the petition is denied, and the proceeding is dismissed.

Dated: 2/7/19

ENTER, 

J. S. C.

HON. WAYNE M. OZZI  
J.S.C.

GRANTED  
FEB 08 2019  
J. P. HENRY, CLERK