

Matter of Capestancy v Enderlin
2020 NY Slip Op 34414(U)
December 21, 2020
Supreme Court, Bronx County
Docket Number: 260052/2019
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX: IAS PART 4

**Decision , Order and
Judgment**

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In the Matter of the Application of
MARCOLINA CAPESTANCY,
Petitioner

Index No. 260052/2019

-against-

ERIC ENDERLIN, as Commissioner
of the City of New York Department
of Housing Preservation and Development ,
The City of New York Department of
Housing Preservation and Development ,
and OUB Court Housing Company, Inc.

Howard H. Sherman
JSC

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By order to show cause dated January 23, 2019, Petitioner Marcolina
Capestany (Capestany) , as then self-represented¹ commenced this Article 78
Proceeding to challenge , reverse and set aside: 1) the termination of her Section
8 rent subsidy effective July 31, 2014, and 2) the August 2, 2018 Final
Determination of Respondent New York City Department of Housing
Preservation and Development (HPD) which , upon findings after a hearing,
issued a Certificate of Eviction terminating her tenancy . Capestany also
seeks to enjoin the respondent Housing Company from proceeding with a
holdover against her commenced in the Housing Part of the Civil Court of the
City of New York, Bronx County [Index No. 56964/18].

In 2010, petitioner and her family moved into an apartment in a

¹By prior decision and order of this court , the petition was amended to incorporate the amended petition
of counsel.

residential building located at 545 East 144th Street, Bronx, New York , which is owned by OUB Court Housing Company (OUB) , an Article II Housing Company organized under the Mitchell-Lama Law² . By application dated September 5, 2011, Capestany applied for Section 8 rental assistance , and in January 2012, HPD, the Public Housing Agency (PHA)³ , issued to her a voucher for participation in the Housing Choice Voucher (HCV) Program (see, 42 U.S.C. § 1437f), and on July 6, 2012 , HPD agreed to a Housing Assistance Payments (HAP) Contract with OUB .⁴

Capestany recertified in 2013.

An annual Section 8 re-certification package was issued in January 2014 , and in March, HPD requested additional information consisting of recent paycheck stubs and a 2013 W-2 form. A Pre-Termination Notice was issued three weeks later, again seeking petitioner's W-2 form. A conference was then scheduled for May 28th. Petitioner did not appear.

By notice dated June 10, 2014, Capestany was advised that her Section 8 rent subsidy would be terminated as of July 31st as a result of the failures to provide the W-2 form, and attend the conference. The termination notice is accompanied by an affidavit of certified and regular mailing.

²Private Housing Finance Law (PHFL).

³ Local Supervisory Agency (see, PHFL § 11 et seq.) and supervisory agency for City-Aided Limited-Profit Housing Companies (see, § 1802(6)(d) of the New York City Charter).

⁴The Contract Rent was \$1,512.00 per month, with the petitioner's share allocated at \$276.00 .

It is undisputed that the last subsidy payment for the premises was received by OUB on July 31, 2014.

A non-payment proceeding was commenced by OUB in January 2017, and a warrant of eviction issued and executed. By the terms of the stipulation of settlement, Capestany was restored to possession upon her payment of use and occupancy consisting of her share of the outstanding arrears. The terms of the settlement included a reservation that the agreement was without prejudice to the owner's commencement of a holdover proceeding in connection with the termination of petitioner's subsidy.

OUB requested that a Certificate of Eviction be issued against Capestany pursuant to Rules of the City of New York, Title 28, Chapter 3, Section 3-18 due to her failure to re-certify, the subsequent termination of subsidy, and the failure to take steps to restore it. It was also asserted that the subject apartment was not being used as Capestany's primary residence, as she had relocated to Pennsylvania.

A hearing⁵ was conducted before Hearing Officer Helen Levy (Levy) on April 18 and June 20, 2018, and testimony elicited from OUB's property manager, HPD's court liaison, and Capestany. Documents were received into the record, including a letter from an attorney for Mobilization for Justice, Inc., raising issues with the certified mail receipt for the termination notice maintained in

⁵ See, Title 28 RCNY § 3-18

Capestany's file.

In her decision dated August 2, 2018, Levy found that the last lease executed by Capestany and OUB was dated June 30, 2014 , and the tenant "had not renewed her lease or recertified and currently owes \$59,130 in rental arrears."

Capestany maintained that she received none of the HPD notices concerning either the completion of 2014 certification process , or the subsequent subsidy termination , and the Hearing Officer found this assertion not credible. With respect to Capestany's assertion that she was unaware that she was required to complete an annual certification [HRG. 06/20/18: 6-7] , the Hearing Officer noted that Capestany had "in fact recertified in 2013, and thus should have been aware of the basics of the process. " She also referenced the 2017 non-payment proceeding that culminated in the eviction . Finding that Capestany had failed to maintain her Section 8 benefits as required by the terms of her lease, a Certificate of Eviction was ordered to be issued.

The record includes an affidavit of service of the "decision and/or certificate of eviction " attesting to service by mail to petitioner at the subject apartment on August 3, 2018.

OUB commenced its holdover proceeding in October 2018 after service of a 30-day Notice .

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Petitioner seeks to annul the termination of her Section 8 subsidy and to reinstate retroactively all subsidy payments on the grounds that the termination was unlawful, arbitrary and capricious, constituting a denial of due process, and contrary to the agency's own regulations, while effecting a disproportionate penalty. Because the termination should be annulled as unlawful, petitioner maintains that the decision to grant the Certificate of Eviction must be set aside as it is based on insufficient evidence in the record.

HPD cross-moves to dismiss the proceeding as time-barred having been commenced more than four months after the determinations to be reviewed became final and binding upon the petitioner (see, CPLR 217(1)).

OUB opposes petitioner's application arguing that the proceeding was untimely brought and the challenge to the agency determination without merit.

*Discussion and Conclusions**Statute of Limitations*

The applicable statute of limitations provides that "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 or the person whom he represents in law or in fact..." CPLR § 217(1)

On the cross-motion it is respondent's initial burden to demonstrate prima facie, that the time within which to commence the action has expired

(see, Norddeutsche Landesbank Girozentrale v Tilton, 149 AD3d 152, 161-162, 48 N.Y.S.3d 98 [1st Dept 2017]). Upon consideration of the submissions here and the applicable law, including the presumption of receipt of service within five days of regular mailing on August 3, 2019 (see, CPLR 2103(b)(2)), the court finds that respondent has met its burden to demonstrate that this proceeding commenced January 22, 2019 is untimely.

As a consequence, the burden shifts to petitioner to raise a question of fact as to whether the statute of limitations has been tolled or was otherwise inapplicable, or that the proceeding was in fact commenced within the statutory period .

The court finds that petitioner has failed to meet her burden to rebut the prima facie showing that this proceeding should be dismissed as time-barred.

Accordingly, it is


ORDERED that the cross-motion be and hereby is granted, and it is

ORDERED and ADJUDGED that the clerk enter judgment in favor of respondents dismissing the above-entitled proceeding, and it is

ORDERED that all stays be and hereby are vacated.

This constitutes the decision and order and judgment of this court.

Dated: December 21, 2020


Howard H. Sherman