SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 62

- X

CARMEN BRANNIGAN and BARBARA STEPHENSON,

Plaintiffs,

- against -

CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES and NEW YORK CITY OFFICE OF CHILD SUPPORT SERVICES,

Defendants.

- X

Index No. 159056/2019

Motion Sequence No. 001

SWEETING, J.:

Plaintiffs Barbara Stephenson ("Stephenson") and Carmen Brannigan ("Brannigan") commenced this action against defendants City of New York, New York City Department of Social Services ("DSS") and the New York City Office of Child Support Services ("OCSS"), (collectively "Defendants"), to recover $73,080 that defendants seized from plaintiffs' joint bank account in partial satisfaction of Stephenson's child support obligations. The complaint, alleges that: (1) the account contained Brannigan's money only, which was not subject to seizure; (2) the seized funds were duplicative of payments Stephenson had already made to defendants; and (3) defendants have miscalculated Stephenson's payments, entitling her to an accounting.

Defendants now move to dismiss the complaint pursuant to Civil Practice Law and Rules ("CPLR") §§3211 [a][1], [2], [5], [7]; §7801 and §7803.

In support of their motion, defendants submit the affidavit of Maria Mikhailov ("Mikhailov"), a supervisor in the Support Collection Unit ("SCU") of OCSS. Mikhailov's affidavit, is "based upon [her] review of the records maintained by OCSS, which were . . . kept in the ordinary course of the regularly conducted business activity of federal, state and local child

support enforcement agencies, as well as OCSS." As averred therein: On September 3, 2003, the New York County Supreme Court, under Index No. 350827/1999, ordered Stephenson to pay support to Frank Demeri. On June 4, 2005, SCU notified Stephenson that it would refer her case to the State Department of Taxation and Finance ("DTF") for enforcement. On November 12, 2014, under New York County Family Court Docket Number F-08901-04/14D, a superseding money judgment for $63,003.66 was issued against Stephenson. In September 2018, SCU, through DTF, seized $73,080.90 from a bank account belonging to Stephenson.[1] On October 3, 2018, SCU received notice that Stephenson contacted DTF, claiming that the account was a joint account and that the funds belonged to a third party. SCU contacted Stephenson and requested that she supply the last three bank statements for the account. On October 5, 2018, SCU determined that the documents that Stephenson provided were redacted and insufficient to sustain her claim. SCU requested that Stephenson submit unredacted bank statements. However, Stephenson again submitted redacted statements for June, July, and August of 2018. On October 18, 2018, SCU determined that Stephenson had not demonstrated that the seized funds belonged to a third party. On October 19, 2018, it mailed its determination to Stephenson. On October 25, 2018, Stephenson appeared at SCU's offices and complained that her request was denied. On December 27, 2018, SCU received plaintiffs' notice of claim.

In support of their motion, defendants also submitted "a support obligation summary detailing the total amount charged against Plaintiff Barbara Stephenson and the total payments received," which SCU prepared on October 24, 2018. According to the attorney affirmation submitted in support of defendants' motion, the summary shows that, including the $73,080.90

[1]In her affidavit, Mikhailov states that a "[c]opy of CHASE Bank Account Statement ending with 1239 [is] annexed as Exhibit 'A'." However, the exhibit is not among defendants' submissions.

credited to Stepheson on October 18, 2018, "[t]he total amount charged was $199,670.25 and the total paid was $198,942.95, leaving a net due of $727.30."[2]

Defendants argue that the complaint must be dismissed for failure to state a claim, because: (1) SCU acted within its legal authority, enforcing a valid order of support pursuant to Social Services Law (SSL) §111-b [15][b][1]; (2) the seizure was not duplicative of payments already made; and (3) plaintiffs fail to offer any facts to support their contention that the seized funds in the joint account were Brannigan's exclusive property. In addition, defendants contend that the complaint should be dismissed, because plaintiffs failed to exhaust their administrative remedies before commencing litigation and failed to commence an article 78 special proceeding within four months of SCU's denial of Stephenson's challenge. Defendants also argue that the claim for accounting should have been brought in Family Court. Lastly, they argue that the action should be dismissed for failure to join a necessary party, namely, Stephenson's former spouse, Frank Demeri.

Plaintiffs counter that, on a motion to dismiss, they need not demonstrate that the funds in the joint account were solely Brannigan's property. In addition, they argue that the motion should be denied, because defendants failed to annex the complaint to their moving papers and offer nothing more than a self-serving, hearsay affidavit and an unauthenticated printout in support of their motion. In opposition to defendants' article 78 argument, plaintiffs contend that, pursuant to CPLR §103[c], improper form is not a barrier to this litigation. Plaintiffs also argue that Stepheson's former spouse is not a necessary party and that, in any event, this is not a ground for dismissal, as he can be added as a defendant to the action. Lastly, they argue that Brannigan's

[2] The summary shows that eight credits totaling $73,080.90 were applied to Stephenson's account on October 18, 2018.

claim for conversion is independent of Stephenson's claims and that defendants fail to address the sufficiency of Brannigan's claims.

As a preliminary matter, defendants' failure to include the pleadings with their motion does not require denial of the motion, "as the pleadings were filed electronically and thus were available to the parties and the court" (*Studio A Showroom, LLC v. Yoon*, 99 AD3d 632, 632 [1st Dept 2012] [finding that the failure "to include the pleadings with [the defendant's] motion . . . was properly overlooked"]; *see also Galpern v. Air Chefs, L.L.C.*, 180 AD3d 501, 502 [1st Dept 2020] [same]).

Furthermore, and as defendants correctly argue, "when the claim is one against a governmental body or officer, the form of action . . . . is a proceeding brought under CPLR article 78, a traditional, and surely the most common, vehicle for challenging a governmental decision or action" (*California Suites, Inc. v. Russo Demolition Inc.*, 98 AD3d 144, 153 [1st Dept 2012] [internal quotation marks and citation omitted]; *see also Matter of Gottlieb v. City of New York*, 129 AD3d 724, 725 [2d Dept 2015] ["(a) special proceeding under CPLR article 78 is available to challenge the actions or inaction of agencies and officers of state and local government"]).

Here, the substance of plaintiffs' claim is that the SCU improperly seized funds from plaintiffs' joint bank account and also miscalculated the amount of Stephenson's arrears. Such claims constitute relief pursuant to article 78 of the CPLR and should have been brought as an article 78 proceeding (*see Gottlieb*, 129 AD3d at 726 [stating that "(t)he substance of the cause of action . . . was, in essence, a challenge to the determination by the (Office of Child Support Enforcement) that the petitioner's account was in arrears, which authorized the OCSE . . . to take enforcement action," and "constituted a request for relief pursuant to CPLR article 78"). While this court is empowered to convert [3]this "motion into a special proceeding" (CPLR §103 [c]), here,

[3] To the extent that plaintiffs seek to challenge SCU's decision, which was an administrative action, such claims should have been brought as an Article 78 and not as an alleged tort for conversion.

the complaint must be dismissed, because plaintiffs' failed to exhaust their administrative remedies and to timely commence this litigation.

As has been held, "[o]ne who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Town of Oyster Bay v. Kirkland*, 19 NY3d 1035, 1038 [2012] [internal quotation marks and citation omitted]). Moreover, a proceeding "must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner" (CPLR § 217 [1]).

Here, upon receiving notice that her case was being referred to DTF, Stephenson could have avoided enforcement action by supplying SCU with documentation demonstrating "an error in the calculation of [her] support arrears" (SSL § 111-b [15][d][1]) and Brannigan could have challenged the seizure of her assets based on "a mistake in the identity of the obligor" (SSL § 111-b [15][d][2]; *see also* SSL § 111-h [19][1] [providing that "(a) support obligor may challenge in writing the correctness of the determination" of SCU to refer the case to DTF "and in support of the challenge may submit documentation demonstrating mistaken identity, error in calculation of arrears . . ."). Stephenson had "thirty days [from] the date of notice denying . . . her challenge by [SCU] [to] file objections to such denial with the bureau of special hearings" (SSL § 111-h [19][2]).[4] Defendants state that this did not occur and plaintiffs do not state what, if any, administrative remedies they pursued. Accordingly, the action must be dismissed, as plaintiffs fail to demonstrate that they exhausted administrative remedies prior to commencing this action (*see Town of Oyster Bay*, 19 NY3d at 1038; *see also Matter of Battease v. Washington County Support*

[4] Pursuant to SSL §§111-b, 111-g and 111-h and Title 18 of New York Code Rules and Regulations (NYRR) §§346 and 347, SCU/OCSS is charged with the statutory duty to collect, account, disburse and administratively enforce child support orders. Additionally, SSL §111-t[2] designates the authority to seize assets of support obligors that are held in financial institutions.

Collection Unit, 92 AD3d 1037, 1038 [3d Dept 2012] [affirming dismissal of a petition seeking to recover funds deposited with SCU, where petitioner failed to demonstrate "that he ha[d] exhausted his administrative remedies before the SCU"]).

Additionally, the action must be dismissed as untimely. On a motion to dismiss pursuant to CPLR §3211 [a][5] "the defendant bears the initial burden of demonstrating, *prima facie*, that the time within which to commence the cause of action has expired" (*MTGLQ Invs., LP v. Wozencraft*, 172 AD3d 644, 644 [1st Dept 2019] [internal citations omitted]). Upon such a showing, "[t]he burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period" (*id.* at 645).

Here, based on Mikhailov's affidavit and her review of records "kept in the ordinary course of the regularly conducted business activity of federal, state and local child support enforcement agencies, as well as OCSS," SCU denied Stephenson's challenge on October 18, 2018 and mailed the letter informing Stephenson of the denial on October 19, 2018 (*cf U.S. Bank N.A. v. James*, 180 AD3d 594, 594-595 [1st Dept 2020] [accepting an affidavit of movant's employee that, "based on her review of the business records relied upon in the ordinary course of business, the notices were sent to defendants"]).

It is undisputed that the instant action was not commenced until September 2019. This date is well over the four-month statute of limitations period, which expired in February 2019 (CPLR §217 [1]). As such, defendants have demonstrated, *prima facie*, that this action is untimely. In opposition, plaintiffs neither contest Mikhailov's timeline nor deny receiving notice of SCU's determination. Accordingly, this action is also dismissed as time-barred (*see California Suites*,

Inc., 98 AD3d at 154 [dismissing an action as untimely, because it was not brought within four months after the acts complained of]).

In light of the foregoing, it is hereby:

ORDERED that defendants' motion to dismiss this action is granted and the Clerk is directed to enter judgment in favor of defendants dismissing this action, together with costs and disbursements to defendant, as permitted by law, and as taxed by the Clerk upon presentation of a bill of costs.

Dated: February 10, 2021

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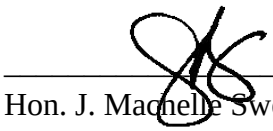

Hon. J. Machelle Sweeting, J.S.C.