

Matter of Medina v Hernandez
2005 NY Slip Op 30435(U)
May 23, 2005
Supreme Court, New York County
Docket Number: 403664/03
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: CAROL EDMEAD
J.S.C.
Justice

PART 35

*In the matter of the Application of
DAISY MEDINA PETITIONER
FOR A Judgment pursuant to
Article 78 of the CPLR
- v -
TINO HERNANDEZ, as Commissioner
of NYCHA, and NYCHA,
Respondents*

INDEX NO. 403664/03
MOTION DATE 5/17/05
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits -- Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

FILED
JUN 14 2005

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the accompanying memorandum decision. It is hereby

ORDERED, that the application of petitioner Daisy Medina for an order pursuant to CPLR 7801, vacating the decision of the hearing officer dated June 6, 2003, and respondent New York City Housing Authority's ratification of said determination, dated July 2, 2003, is denied. It is further

ORDERED, that the application of respondents Tino Hernandez, as Commissioner of the New York City Housing Authority, and the New York City Housing Authority, to dismiss the verified petition in its entirety, is granted. It is further

ORDERED that counsel for respondents shall serve a copy of the decision and order on petitioner with notice of entry within twenty days of entry.

Dated: 5/23/05
[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

In the Matter of the Application of
DAISY MEDINA

Petitioner

Index No. 403664/03

For a Judgment pursuant to
Article 78 of the CPLR

DECISION/ORDER

-against-

TINO HERNANDEZ, as Commissioner of the
NEW YORK CITY HOUSING AUTHORITY, and the
NEW YORK CITY HOUSING AUTHORITY,

Respondents.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Daisy Medina (“petitioner”) moves pursuant to CPLR 7801 for an order vacating the determination dated July 2, 2003 and mailed to petitioner on July 14, 2003, which terminated her tenancy of ten years at the New York City Housing Authority, based on her default in appearance. Respondents Tino Hernandez, as Commissioner of the New York City Housing Authority (“NYCHA”) and NYCHA (collectively “respondents”) request that the within Petition be dismissed in its entirety, with prejudice.

According to petitioner’s Verified Petition, she and her family have resided in NYCHA housing for ten years. NYCHA initiated this termination proceeding on December 28, 2001, alleging chronic rent delinquency, breach of rules and regulations in that petitioner allegedly did not recertify her household income, and breach of probation for late rent payments in 2001. The matter was adjourned several times. Petitioner alleges that the adjournments were to permit

her to catch up and pay back rent so that the matter could be settled. On December 5, 2002, petitioner was unable to make a scheduled hearing date because there was a huge snow storm. She called and left a message with the NYCHA assigned attorney, Sha'ryn Duncan. After that date, she never heard from NYCIA nor received any notices until the notice of decision. Based on petitioner's review of the file, it appears that Ms. Duncan adjourned the hearing a few times after the December 5th date, but petitioner asserts that she never received those notices.

When she received notice of the decision terminating her tenancy, petitioner contacted a private attorney, but could not afford to pay him, since she was still in arrears.

Petitioner claims that her meritorious defense to this case is that as to the claim that she failed to certify her household income in 2000, petitioner states that the prior proceeding resulted in a probationary stipulation. At that time and during the pendency of her prior proceeding, all of her recertification forms for 2000 were provided to NYCIA.

With respect to the claim that petitioner continues to fail to timely pay rent, she has had health problems, gave birth to a son, and lost her full time job. She asserts that her arrears have been paid.

In opposition, and in support of dismissal, NYCIA asserts that chronic rent delinquency is a basis for termination of a public housing tenancy. See 42 USC § 1437d(c)(4)(B) According to the Termination Procedures, the project manager attempts to interview the tenant prior to filing formal charges for the termination of tenancy to see if the problem can be resolved. See Termination of Tenancy Procedures (attached as Exh. A to NYCIA's Answer) Ultimately, a hearing is scheduled. If the tenant fails to appear for the hearing, the Hearing Officer is to proceed and make a written decision based upon the record.

Petitioner has had a long and continuing history of rent delinquency. According to Linda Mimes, the manager of Carver Houses, petitioner owes three months of rent as of the date of NYCHA'S submission in opposition to the petition. In addition, and just as seriously, petitioner has not completed required annual income reviews for the last four years.

As an example of petitioner's delinquency history, respondents state and substantiate with exhibits the following:

- In May 1999, petitioner agreed to a stipulation of probation which provided that she would pay her rent within the first five days of each month. But in February 2000, she already owed four months of rent;
- In August 2000, an administrative hearing officer issued a decision terminating petitioner's tenancy. In December 2000, she brought an Article 78 proceeding to challenge the termination of her tenancy. In February 2001, NYCHA again placed petitioner on probation. But by July 2001, the management staff again referred her case for violation of probation due to chronic rent delinquency and failure to verify her income through the required annual income review.
- In the instant proceeding, the hearing has been adjourned and rescheduled several times. It was eventually rescheduled for July 5, 2003. Petitioner did not appear for that hearing. Pursuant to ¶ 8 of the Housing Authority's Termination Procedures, the hearing officer considered the record before him, found the charges sustained and rendered a disposition of termination.
- On or about July 2, 2003, the Members of the Board of NYCHA adopted the hearing officer's decision and decided to terminate petitioner's tenancy.
- On or about November 17, 2003, NYCHA received petitioner's application to vacate her default. Petitioner's stated reason for missing the hearing was that she did not receive the notice. But, Regina Rodriguez, a NYCHA employee, submitted an affidavit attesting that she mailed petitioner two copies of the notice on or about May 14, 2003.
- Although petitioner states that she has provided her recertification forms for the year 2003, she did not claim that she had provided the forms for the year 2001, one of the charges attached to the hearing notice.

On January 12, 2004, after considering petitioner's application and the NYCHA's

opposition, the hearing officer denied petitioner's application.

Analysis

CPLR 7803 states that the court review of a determination of an agency, such as NYCIA consists of whether the 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, including abuse of discretion as to the measure or mode of penalty imposed. CPLR 7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1st Dept.1990]; *Mazel v DIICR*, 138 A.D.2d 600 [1st Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1st Dept.1987], *lv. den.* 70 N.Y.2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts." *Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. *Matter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's function is completed on finding that a rational basis supports the NYCIA's determination (*see Howard v Wyman*, 28 N.Y.2d 434 [1971]). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1st Dept.], *aff'd* 66 N.Y.2d 1032 [1985]).

Pell v Board of Ed. of Union Free School Dist. No...., 356 N.Y.S.2d 833

N.Y. 1974, is instructive on the basic standard of Article 78 review:

In article 78 proceedings: 'the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; 'the courts have no right to review

the facts generally as to weight of evidence, beyond seeing to it that there is 'substantial evidence.' " (Cohen and Karger, Powers of the New York Court of Appeals, s 108, p. 460; 1 N.Y.Jur., Administrative Law, ss 177, 185; see Matter of Halloran v. Kirwan, 28 N.Y.2d 689, 690, 320 N.Y.S.2d 742, 743, 269 N.E.2d 403 (dissenting opn. of Breitel, J.)). "The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals. The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious.'" (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460--461; see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7803.04 Et seq.; 1 N.Y.Jur., Administrative Law, ss 177, 184; Matter of Colton v. Berman, 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 650--651, 234 N.E.2d 679, 681--682).

Pell at 839.

Conclusion

The only issue properly before this court is whether petitioner's request to the NYCHA hearing officer to vacate the default was properly denied. The NYCHA hearing officer's determination that petitioner failed to establish a reasonable excuse for not appearing at the hearing does not warrant reversal.

Therefore, it is hereby

ORDERED, that the application of petitioner Daisy Medina for an order pursuant to CPLR 7801, vacating the decision of the hearing officer dated June 6, 2003, and respondent New York City Housing Authority's ratification of said determination, dated July 2, 2003, is denied.

It is further

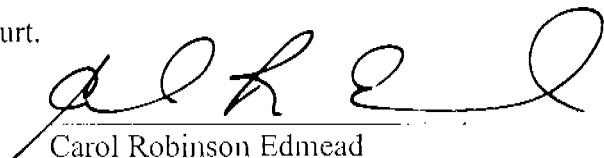
ORDERED, that the application of respondents Tino Hernandez, as Commissioner of the New York City Housing Authority, and the New York City Housing Authority, to dismiss the verified petition in its entirety, is granted. It is further

ORDERED that counsel for respondents shall serve a copy of the decision and order on

petitioner with notice of entry within twenty days of entry.

This constitutes the decision and order of this court.

Dated: May 23, 2005



Carol Robinson Edmead
J.S.C.

FBI
JUN 14 2005
U.S. DEPARTMENT OF JUSTICE