

Matter of Smith v New York City Hous. Auth.
2007 NY Slip Op 30078(U)
March 8, 2007
Supreme Court, New York County
Docket Number: 0405222
Judge: Carol R Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART 35

Justice

In the MATTER of the Application of
Lovie Smith

INDEX NO. 405222/06

MOTION DATE 3/6/07

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

New York City Housing Authority

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

MAR 13 2007

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

The within application is decided in accordance with the accompanying Memorandum Decision.
It is hereby

ORDERED that the application of Petitioner Lovie Smith for an order, pursuant to CPLR Article 78, reversing the Determination of the New York City Housing Authority, dated August 8, 2006, is denied and the within Petition is dismissed. It is further

ORDERED that counsel for Respondent New York City Housing Authority shall serve a copy of this Order with notice of entry, within twenty days of entry, on Petitioner.

This constitutes the decision and order of this Court.

Dated: 3/8/07

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):
NOT FULLY REFERRED TO JUSTICE

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

In the Matter of the Application of
LOVIE SMITH,

Petitioner,

Index No. 405222/06

DECISION/ORDER

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

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Lovic Smith ("Petitioner") moves for an order, pursuant to CPLR Article 78, reversing the Determination of the New York City Housing Authority ("NYCHA"), dated August 8, 2006 (the "Determination").

Petitioner argues that she has been a NYCHA tenant for 35 years and has never had any type of trouble until now. When the NYPD came into her home on January 13, 2006 the people in her home were her grandchildren, her nephew and some family friends. When questioned by the NYPD at the police station, all of the people who were in her home at the time of arrest gave addresses other than her address because they do not live at her home. Petitioner asserts that she has never had anything to do with drug dealings or drug transactions. To her knowledge, there were no drugs in her apartment.

According to NYCHA, by letter dated and hand-delivered January 13, 2006, development management informed Petitioner it was considering recommending termination of her tenancy

because the police found drugs and unauthorized occupants in her apartment, but offered her the opportunity to discuss the matter with management on January 18, 2006 before it took any action. After receiving no response, management hand-delivered a second letter dated January 18, 2006 informing Petitioner it was giving her another opportunity to appear to discuss the matter on January 20, 2006, but warned that if she failed to keep the appointment, management would forward the record of her tenancy to the Office of Tenancy Administrator (“OSTA”) and recommend her tenancy be terminated. Petitioner failed to appear on January 20, 2006. By letter dated January 20, 2006, management informed Petitioner it was sending her tenant folder to OSTA. Management sent Petitioner’s tenant folder to OSTA on January 23, 2006.

By notice and specification of charges, NYCHA charged Petitioner with non-desirability and breach of rules and regulations for unlawful possession/sale/attempted sale of marijuana and cocaine; unlawful possession of drug paraphernalia, including cell phones, empty baggies, and other property reflecting illegal drug activity; and permitting unauthorized occupants to reside in her apartment. A hearing was scheduled for May 10, 2006; and was adjourned, by stipulation, until July 13, 2006, at which time the hearing occurred before Hearing Officer Stuart G. Laurence (“Hearing Officer”). At the outset, the Hearing Officer advised Petitioner that she had a right to be represented, but Petitioner indicated that she was prepared to represent herself. After recounting the testimony and the evidence submitted, the Hearing Officer sustained the charges against Petitioner. On August 6, 2006, the NYCHA Board adopted the Hearing Officer’s decision issuing the Determination terminating Petitioner’s tenancy.

Analysis

CPLR 7803 states that the court review of a determination of an agency, such as

NYCHA, 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 DHCR*, 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 NYCHA's determination (*see Howard v Wyman*, 28 N.Y.2d 434 [1971]). Where the authority'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.

On judicial review of an agency action under CPLR Article 78, the courts must uphold the agency's exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." *Pell v Board of Ed. Union Free School District*, 34 NY2d 222, 230-31, 356 NYS2d 833, 839 (1974) "The arbitrary and capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." 34 NY2d at 231, 356 NYS2d at 839 *See also Jackson v New York State Urban Dev Corp.*, 67 NY2d 400, 417, 503 NYS2d 298, 305 (1986) (on review of agency action under CPLR Article 78, the courts may not "second guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence").

Moreover, where, as here, the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference. *See Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363, 514 NYS2d 689, 693 (1987). Courts are required to "resolve [any] reasonable doubts in favor of the administrative findings and decisions" of the responsible agency. *Town of Henrietta v Department of Env'tl. Conservation*, 76 A.D.2d 215, 224, 430 NYS2d 440, 448 (4th Dep't 1980). *See also Jackson*, 67 NY2d at 417, 503 NYS2d at ____; *City of Rome v Department of Health Dept.*, 65 A.D.2d 220, 225, 441 NYS2d 61, 64 (4th Dep't 1978), *lv. To*

app. denied, 46 NY2d 713, 416 NYS2d 1027 (1979).

And, “Where evidence conflicts, issues of credibility are the province of an administrative hearing officer, since ‘the decisions by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts.’ ” *Wooten v Finkle*, 285 AD2D 407, 408 (1st Dept 2001) (*quoting Berenhaus v Ward*, 70 NY2d 436, 443 (1987)).

Under the Federal Housing Act 42 USC § 1437 d(1)(6), drug related criminal activity, on or off the premises, by a public housing tenant, constitutes grounds for termination of the tenancy. This rule has been held constitutional and a valid basis for the termination of such a tenancy. *See Department of Housing and Urban Development v Rucker*, 535 U.S. 125 (2002). Federal Housing and Urban Development regulations obligate tenants in public housing to refrain from “drug-related criminal activity on or off the premises.” 24 CFR § 966.4(f)(12)(i)(B). Petitioner and NYCHA are bound by these provisions. It is for a violation of these provisions that Petitioner’s tenancy was terminated.

Conclusion

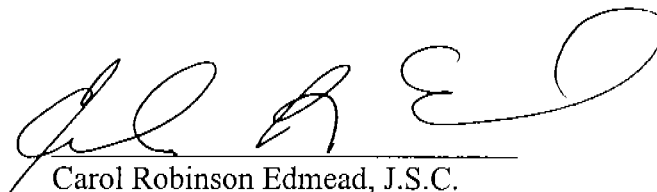
In the instant case, the record amply supports NYCHA’s determination that Petitioner permitted unauthorized occupants to reside in her apartment and possessed and/or sold marijuana and cocaine, either alone or in concert with those people. Petitioner has presented no basis for disturbing the NYCHA Determination. Based on the foregoing, it is hereby

ORDERED that the application of Pctitioner Lovie Smith for an order, pursuant to CPLR Article 78, reversing the Determination of the New York City Housing Authority, dated August 8, 2006, is denied and the within Petition is dismissed. It is further

ORDERED that counsel for Respondent New York City Housing Authority shall serve a copy of this Order with notice of entry, within twenty days of entry, on Petitioner.

This constitutes the decision and order of this Court.

Dated: March 8, 2007



Carol Robinson Edmead, J.S.C.

FILED
MAR 13 2007
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