

Matter of McNeal v New York City Hous. Auth.
2007 NY Slip Op 33205(U)
October 3, 2007
Supreme Court, New York County
Docket Number: 0119188/2006
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY

PRESENT: SHIRLEY WERNER KORNREICH
Justice

PART 54

Gina McNeal

INDEX NO. 119188/06

MOTION DATE 8/2/07

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

- v -

New York City Housing Authority

The following papers, numbered 1 to 6 were read on this motion to/for Article 78

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1

2,3

4,5,6

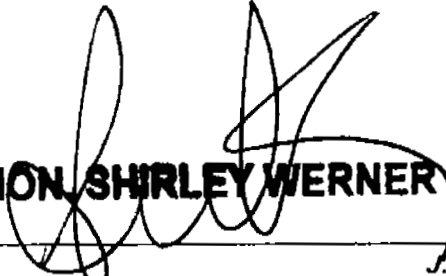
Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
OCT 09 2007
NEW YORK
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**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 10/3/07


HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----- X
In the Matter of the Application of
GINA MCNEAL,

Petitioner,

Index No.: 119188/06

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

DECISION
and ORDER

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

----- X
KORNREICH, SHIRLEY WERNER, J.:

FILED
OCT 09 2007
NEW YORK
COUNTY CLERK'S OFFICE

Petitioner Gina McNeal ("petitioner" or "McNeal"), occupant of an apartment owned by respondent New York City Housing Authority ("respondent" or "Housing Authority"), brings this Article 78 proceeding and seeks a judgment reversing respondent's dismissal of her remaining-family-member grievance for lease succession rights to her ex-mother-in-law's apartment. Respondent opposes.

I. *Background*

The Housing Authority is a corporate governmental entity created to build and operate low-income housing in New York City. Since the federal government funds and regulates public housing, the Housing Authority must annually certify to the Department of Housing and Urban Development ("HUD") that it has admitted individuals and families in accordance with HUD regulations. HUD mandates that the Housing Authority regularly monitor the composition and income of each family that has been admitted into public housing. Tenant families also have

corresponding obligations to request respondent's approval before adding any family members as occupants of a unit, and to supply any information necessary when the Housing Authority conducts examinations of family income and composition.

Pursuant to Housing Authority regulations, there are two exceptions to its formal tenant selection process where a tenant of record can lawfully add "authorized family members" to live in their unit. The first is where the Housing Authority allows another individual to become a permanent member of the tenant's household. To add a person to the household, the tenant of record must obtain the written consent of the building development manager. The second exception allows a remaining-family-member to take over a lease if the tenant of record either moves or dies. To qualify under this exception, the remaining-family-member must have moved into the apartment lawfully, remained in the apartment continuously, and be eligible for public housing. Lawful members of a tenant's household include the original tenant family, a person born to the tenant of record or to an authorized permanent family member, a person legally adopted by or judicially declared to be the ward of the tenant of record or an authorized family member, or a person who receives written permission to reside in the apartment permanently. In each instance, the person claiming remaining-family-member status must have become an authorized family member of the tenant household and must have remained in the apartment continuously from their date of entry.

On July 11, 2003, the Housing Authority revised its remaining-family-member policy regarding any requests for permanent occupancy that were either pending or made on or before November 24, 2002. The revised policy provides that certain relatives of the tenant of record "may have remaining-family-member rights if they receive the Housing Manager's permission

for permanent occupancy in writing on or after November 24, 2002 [and they] thereafter remain in continuous occupancy, i.e., on all [of an] Occupant's Affidavits of Income from the date of the issuance of written permission for permanent occupancy from the Housing Manager for not less than one year immediately prior to the date the tenant of record vacates the apartment or dies, subject to independent verification from the Housing Manager."

The Housing Authority provides a grievance procedure to determine if an occupant qualifies as a remaining-family-member. First, the grievant must meet with the development manager to discuss the claim. If the development manager does not offer the grievant a lease, he must submit the grievant's file to the District Office for further review. If, after review, the District Office denies the grievant's request, but determines the grievant has made some showing that she could qualify for relief, the grievant is given the opportunity to request a formal hearing. The Housing Authority will then notify the grievant of a hearing date before an impartial hearing officer. The notice also informs the grievant of her right to appear in person, have witness testimony and be represented by counsel. After the hearing, the presiding officer determines whether the grievant should be granted a lease to the apartment as a remaining-family-member. Finally, members of the Housing Authority's Board review the hearing officer's decision and make a final determination.

Petitioner's ex-mother-in-law Velma McNeal ("Velma") was the tenant of record for apartment #15F located at 1420 Amsterdam Avenue, New York, N.Y. ("the premises"), from May 1980 until she vacated in June 2005. During that period, McNeal, her husband and children moved into the premises. McNeal remained in the premises, with her children, after Velma vacated it.

Pursuant to respondent's grievance procedure, on or about September 30, 2005, McNeal met with Development Manager Gay Chestnut ("Chestnut") regarding her remaining-family-member status. At this time, Chestnut informed petitioner that she was not entitled to lease succession on the premises noting that although she had been residing there for approximately 10 years, Velma never reported on any of her affidavits of income that petitioner and her children were residing in the premises. On December 16, 2005, the District Office upheld Chestnut's decision concluding that petitioner was not entitled to remaining-family-member status because Velma never received written permission for McNeal and her children to permanently join the household. Petitioner subsequently requested and was granted a formal grievance hearing regarding her remaining-family-member status.

Petitioner's grievance hearing took place on October 6, 2006, before Hearing Officer Stuart Lawrence ("Lawrence"). On October 10, 2006, Lawrence dismissed petitioner's remaining-family-member claim. In the decision, he noted that despite petitioner's credible testimony that she and her children had been residing at the premises for the past 10 years:

it is apparent that management first noted the occupancy of Grievant and her children in February 2005 and management subsequently disapproved a permission request three weeks later for overcrowding...Petitioner had no written permission to reside at the Manhattanville Houses. Indeed, permission was specifically denied. And, had it been granted, Grievant would yet not have been in occupancy for the full year prior to the tenant's departure as required for residual tenancy. [As a result] Gina McNeal has failed to present a prima facie case.

On November 1, 2006, the Housing Authority's Board affirmed Hearing Officer Lawrence's ruling and dismissed McNeal's grievance.

II. *Conclusions of Law*

A court reviewing an Article 78 proceeding must judge the propriety of an administrative action solely on the reasons cited by the administration. *See Scherbyn v. Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). Such an action must be upheld unless it “shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law.” *See Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000). CPLR section 7803 states that the following questions may be raised in an Article 78 proceeding: “Whether a determination was made in violation of lawful procedure, was effected by 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 or discipline imposed.”

The transfer of an Article 78 proceeding from the Supreme Court to the Appellate Division is authorized when “the substantial evidence” issue outlined in CPLR 7803(4) is raised and must be resolved in order to decide the proceeding. *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 771 (2nd Dept 2005). A substantial evidence issue can only be present when a quasi-judicial evidentiary hearing has been held. *Halperin*, 24 A.D.3d at 771. If after the hearing the agency’s findings of fact are challenged, the standard of review is the substantial evidence test and the proceeding must be transferred to the Appellate Division. *See Hudson River Fisherman’s Ass’n v. Williams*, 139 A.D.2d 234 (3rd Dept 1988).

Here, petitioner is challenging the findings of fact made by Lawrence at her formal grievance hearing. In her amended verified petition, McNeal claims that the “Hearing Officer rigidly applied the relevant [Housing Authority] policy without considering relevant factors such as [the Housing Authority’s] implicit approval of Ms. McNeal’s occupancy” and, further, that the Hearing Officer “failed to adequately develop the record concerning whether the application for

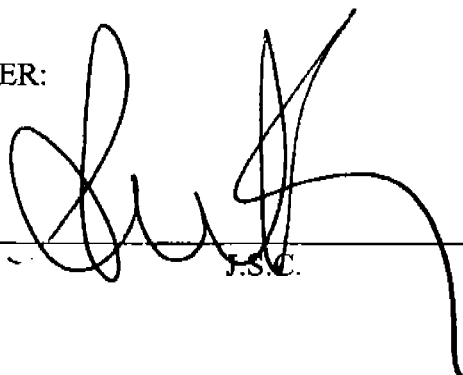
inclusion was correctly determined." Therefore, since petitioner is challenging the findings of fact made by Lawrence at her administrative hearing, the substantial evidence test applies and the entire case must be transferred to the Appellate Division, First Department, for further proceedings. Accordingly, it is

ORDERED that the application by petitioner seeking to vacate and annul a determination by respondent is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR 7804(g). This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law, is, on the entire record, supported by substantial evidence; and it is further

ORDERED that the Clerk is directed to transfer the file to the Appellate Division, First Department, upon service of a copy of this order with notice of entry.

Date: October 3, 2007
New York, New York

ENTER:



J.S.C.

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