

Noman v Management, West 31st St. Assocs.
2008 NY Slip Op 30494(U)
February 26, 2008
Supreme Court, New York County
Docket Number: 0107838/2007
Judge: Walter Tolub
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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MOHAMMED A. NOMAN

Petitioner,

-against-

MANAGEMENT, WEST 31st STREET APARTMENTS

Respondent.
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Index No. 107838/07
Mtn Seq. 001

AMENDED DECISION

WALTER B. TOLUB, J.:

By this motion Respondent seeks an order converting the instant action at law into a special proceeding under Article 78 of the CPLR and upon conversion dismissal of the proceeding in its entirety.

Facts

Settlement Housing Fund Inc. (SHF) is a non-profit housing development corporation. 125 West 31st Street Associates hired SHF to prepare a marketing plan and to rent up low-income units at the "80/20"¹ building it owned at 125 West 31st Street in Manhattan (Building).

The Petitioner applied for one of the low-income apartments in the Building on behalf of himself, his wife and their two sons. In his application, Petitioner set forth his total gross income as \$33,495.19. Such income was permissible because it

¹80/20 buildings are financed in part with public programs requiring allocation of 20% of the apartments for low income residents.

fell below \$35,450, as set forth in the income guidelines for a four person household.² The Petitioner was invited to an office interview and was directed to bring along various documentation including documents supporting the household's income eligibility. The list of documents requested included six to eight recent and consecutive pay stubs.

Petitioner brought his last eight consecutive pay stubs. Using those pay stubs Petitioner's annualized income was computed as \$43,171. Petitioner was ruled ineligible because his income was calculated to exceed the amount permitted in the program's income guidelines.

Petitioner then appealed the ineligibility determination arguing that the method of computing income is inaccurate. Petitioner argued then, as he does here, that historical income, as reflected in tax returns is the proper and accurate way to determine income. Petitioner argued that he has never come close to earning over \$43,000 and provides his last three years gross income on his tax returns as evidence of that.

Discussion

Petitioner's complaint seeks a review of the method used for calculating income and upon such review to be issued an

²Regulations which explain the method for how the income in an 80/20 building is set: Treasury Regulation §1.103-8(b)(8) and §1.42-5(b)(1)(vii); Internal Revenue Service Notice 88-80, entitled "Low-Income Housing Tax Credit Determination--Determination of Income for Purposes of Section 42 (g)(1)"

affordable apartment. Such a request to compel the Respondent to perform a duty is in the nature of mandamus pursuant to CPLR 7803(1).

Since this motion is actually an Article 78 proceeding, CPLR §103(c) provides that when an application to the court is made in improper form, the court may convert the motion into a special proceeding. Accordingly, and for the reasons stated above, Respondent's motion to convert the instant action at law into a special proceeding under Article 78 of the CPLR is granted.

CPLR 7803(1) and (3) state that the only questions that may be raised in a proceeding under these sections are:

(1) whether the body or officer failed to perform a duty enjoined upon it by law; or

(3) whether a 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 as to the measure or mode of penalty or discipline imposed;

The decision to terminate Petitioner's application for an apartment came after a review of his most recent pay stubs and a determination that his income was in excess of the allowable income. The determination of Petitioner's anticipated annual income using the eight pay stubs provided is mathematically accurate, but not a reliable approach to estimating what Petitioner will earn during the year.

This method of calculating anticipated income to determine

eligibility is not specifically mandated by guidelines governing eligibility. The HUD Handbook explains the methods for projecting and calculating annual income. (HUD Handbook 43503c5-5). The Respondent in this instance projected the Petitioner's annual income simply by annualizing the current income derived from Petitioner's last eight pay stubs.³ The Respondent's determination was logical but arbitrary.

The HUD Handbook points out that some circumstances present more than the usual challenges to estimating anticipated income such as when a family has seasonal or sporadic work. (HUD Handbook 43503c5-5). In all instances "owners are expected to make a reasonable judgment as to the **most reliable approach to estimating what the tenant will receive during the year.**"

(Emphasis added HUD Handbook 43503c5-5[C]). The Handbook even provides the example of a seasonal worker, a roofer. The roofer does not work in the rain or during windstorms. The roofer's employer is able to provide information showing the total number of regular and overtime hours that the roofer worked during the past three years. To calculate the roofer's anticipated income, the Handbook provides that the average number of regular hours over the past three years, multiplied by his current regular pay rate, and the average overtime hours multiplied by his overtime

³Using the gross wages for the eight paystubs, \$13,283.66, Petitioner's income was annualized and computed as \$43,171. [$\$13,283.66 / 8 = \$1,660.45$. Then $\$1,660.45 \times 26$ (pay periods) = \$43,171).

rate should be used to project his annual income. Although maybe not the easiest method of calculating income, this method is the most reliable and reasonable for calculating Petitioner's income under the circumstances. Respondent's failure to use the most reasonable and reliable method was arbitrary and capricious.

For purposes of Article 78, a decision is arbitrary and capricious only if it is taken without sound basis in reason and without regard to the facts. (Pell v. Board of education, 34 NY2d 222, 231 [1974]). Here, Respondent determined Petitioner's year to date income using Petitioner's most recent pay stubs and did not take any of Petitioner's real job and salary factors into account. Petitioner had ample proof that his last eight pay stubs were not reflective of his annual income. Notwithstanding Petitioner's claim that Respondent should consider the consistency of his prior tax returns, which show that he would be eligible for the apartment, Respondent argued that such a review is not determinative of what his current income is and would ignore established rules, procedures and regulations. Respondent's argument is simply misguided. Respondent's determination was not factually based nor reasonable and is therefore arbitrary and capricious.

Accordingly it is

ORDERED that Respondent's motion to convert the instant action at law into a special proceeding under Article 78 of the CPLR is granted; and it is further

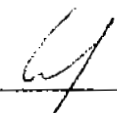
ORDERED that Respondent's motion to dismiss the proceeding in its entirety is denied; and it is further

ORDERED that Respondent is directed to recalculate the Plaintiff's income in accordance with the foregoing decision.; and it is further

ORDERED that the Clerk enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 2/26/08



HON. WALTER B. TOLUB, J.S.C.

FILED
FEB 26 2008
NEW YORK
COUNTY CLERK'S OFFICE