

**Reese v New York City Hous. Auth.**

2008 NY Slip Op 32247(U)

July 31, 2008

Supreme Court, New York County

Docket Number: 0102893/2008

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Cahn

PART 49

Index Number : 102893/2008

**REESE, PAUL**

VS.

**NYC HOUSING AUTHORITY**

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

on this motion to/for \_\_\_\_\_

PAPERS NUMBERED \_\_\_\_\_

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

AUG 12 2008

COUNTY CLERK'S OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE  
WITH ACCOMPANYING MEMORANDUM  
DECISION IN MOTION SEQUENCE .....**

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

Dated: 7/31/08

Alan Cahn

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 49

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PAUL REESE, :

Petitioner. :

-against-

Index No. 102893/08

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

**FILED**  
AUG 12 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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**CAHN, J.**

Petitioner Paul Reese filed this Article 78 Petition (the Petition), seeking relief from his dismissal from employment by Respondent New York City Housing Authority (NYCHA).

Respondent cross-moves to dismiss for lack of subject matter jurisdiction and as barred under the doctrine of election of remedies, CPLR 3211(a)(2), 7804(1).

**Background:**

Petitioner was employed by Respondent for approximately 16 years. For the last five years he has been an Assistant Residential Buildings Superintendent. Pet at ¶ 1; Pet, Exh A at 62.

Respondent commenced a disciplinary action against Petitioner on April 10, 2007, charging him with two counts of incompetence or misconduct. Niederhoffer Aff, Exh 1. A hearing was held on June 8, 2007. Pet, Exh A. The decision was issued on October 8, 2007. Pet, Exh B. Respondent informed Petitioner that he was being dismissed from his employment, by letter dated November 8, 2007, and that the dismissal would be effective November 9, 2007. Niederhoffer Aff, Exh 3.

Petitioner gave notice to the Civil Service Commission that he was appealing his dismissal, by letter dated November 19, 2007. Pet, Exh E. The Civil Service Commission acknowledged its receipt of notice of the Petitioner's Notice of Appeal by letter, dated December 11, 2007, to Respondent's deputy director of Human Resources, and carbon copied to Petitioner. Altman Aff, Exh A.

Almost three months later, Respondent's director of Human Resources acknowledged receipt of the Civil Service Commission's December 11, 2007 letter, and the timeliness of Petitioner's appeal, by letter dated March 7, 2008. Altman Aff, Exh B. During the intervening months, Petitioner commenced this proceeding, with an Article 78 Petition dated February 25, 2008. By letter dated March 14, 2008, the Civil Service Commission notified Petitioner that oral argument regarding his appeal was scheduled for April 24, 2008 at 12:30 PM. Niederhoffer Aff, Exh 4.

Petitioner contends that he filed a timely administrative appeal, but did not hear from Respondent. He argues that, as his time to commence an Article 78 proceeding was coming to an end, and his appeal was not proceeding, he needed to file the instant Petition in order to preserve his rights. He now seeks to proceed with his Petition, rather than with the administrative appeal. Petitioner contends that his discharge "was arbitrary, capricious, irrational, contradictory, and not based upon substantial evidence." Pet ¶ 2.

Basis for Dismissal:

Respondent based its discharge of Petitioner on two claims: (1) an allegation that Petitioner was an unauthorized resident of a residential apartment, located at 77 Tompkins Avenue, Apt 2G, Brooklyn, NY (the Premises), owned or operated by Respondent; and (2) an

allegation that Petitioner provided false or misleading information to Respondent regarding his place of residence. At bottom, both pertain to Respondent's claim that Petitioner allegedly lived at the Premises from 1999 through 2006, falsely advised Respondent that he did not live there, and therefore obtained a better rent for the Premises by not having his income factored into the rent calculation. Pet ¶ 8; Pet, Exh B at 5.<sup>1</sup>

This issue arose when Petitioner needed to renew his workplace parking permit and, in that process, provided identification documents such as his driver's license that listed the Premises as his address. A deputy director of Respondent noticed it was one of Respondent's buildings, and checked the family composition of the apartment to determine if Petitioner was a resident. Pet Exh A at ¶ 10. When Petitioner was not listed as a resident of the Premises, that deputy director asked him if he lived at the Premises and Petitioner told him that he did not. Pet at ¶¶ 28-30; Pet Exh A at ¶ 10, 13-14.

Petitioner asserts that he was never a resident of the Premises, or contributed to the household bills there, but merely used the address as a mailing address. Pet, Exh A at 64-67. He contends that although he himself does not have a stable place of residence, his two children, and their mother, live at the Premises.<sup>2</sup> He argues that although he usually resides with his sister at 196 Martense Street, Brooklyn, NY, he also stays with his brother at times. Pet at ¶ 20; Pet, Exh A at 65; Pet, Exh F. He contends that he used the Premises as his address because his children

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<sup>1</sup> According to the housing assistant for the Tompkins Houses, the rent for the units increase or decrease based on the total income of the tenants. Pet, Exh A at 22. Unreported income is considered a violation and the basis for possible termination of tenancy. *Id.*

<sup>2</sup> Petitioner's two children are among the six children that live at the Premises with their mother. Pet, Exh A at 48. Petitioner was also the father of a third child, who was a seventh child living at the Premises, until she passed away. *Id.*

live there and, therefore, he knows he will constantly be visiting that location.<sup>3</sup> Petitioner estimates that he is at the Premises approximately five times a week. Pet, Exh A at 66.

Following the disciplinary hearing, the Hearing Officer concluded that Petitioner was an unauthorized resident of the Premises. Petitioner argues that the determinations of the Hearing Officer are inherently contradictory, as well as arbitrary and capricious. He contends that the Hearing Officer simultaneously determined that he was an unauthorized resident of the Premises while also living at 196 Martense Street, at least in March 2006. He further argues that all testifying individuals that would have had occasion to witness where he actually resides, stated that he has never lived at the Premises.

**Discussion:**

At the disciplinary proceeding, in addition to Petitioner's own testimony, the mother of Petitioner's children, who lives at the Premises, testified that he had never lived there nor did he ever keep any of his personal belongings there. Pet, Exh A at 49-50.<sup>4</sup> Petitioner's sister also testified that at all relevant time periods he has lived with her at 196 Mantense Street. *Id.* at 56-57. Indeed, no witness testified to seeing anything that indicated that Petitioner lived at the Premises, including the housing assistant employed by Respondent to oversee operations of the complex. *Id.* at 24-27. Further, an associate in Respondent's human resources department testified that Petitioner's use of the Premises as a mailing address was not against Respondent's

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<sup>3</sup> Petitioner also contends that having his mail delivered to the Premises was convenient as his children are covered under his health insurance. Pet at ¶¶ 21-22.

<sup>4</sup> White further testified that she has been married - to someone other than Petitioner - for seventeen years. Pet, Aff A at 54.

and responded to the Civil Service Commission letter, including acknowledging the timeliness of Petitioner's appeal. Lefkowitz Aff, ¶ 7. Now that Petitioner has incurred the costs of this Article 78 proceeding, he seeks to continue with it, rather than the direct appeal, and will formally withdraw the appeal if Respondent's cross motion is denied and it is directed to answer the Petition.

Additionally, counsel for Petitioner notes that he had offered to enter into a stipulation with counsel for Respondent, wherein Petitioner would withdraw his appeal and proceed only with this Article 78 proceeding. Lefkowitz Aff, ¶ 11. He contends that, as this offer was refused, Petitioner is wary of formally withdrawing his direct appeal until the Court dismisses the cross motion, out of concern that he could be left with no avenue for recourse whatsoever. Lefkowitz Aff, ¶ 12.

The Court is concerned by the paucity of evidence that formed the basis of the Hearing Officer's decision. Of particular note is the fact that apparently there was no evidence presented that, at the time Petitioner began his employment and filled out the employment forms, no form existed in which his residence was to be listed separately from his mailing address. That, coupled with the testimony that it was permissible to use a mailing address other than one's residence, is highly significant. This is especially so, given the fact that evidence was presented that Petitioner was willing to, and did, change his listed mailing address when requested to do so by a supervisor. Finally, the Court also notes that no evidence, other than addresses listed on documents, was produced to prove that Petitioner ever lived at the Premises, and all testifying witnesses with first hand knowledge testified that he never resided at the Premises.

However, Petitioner is clearly not entitled to simultaneously pursue a remedy via both this

proceeding and an appeal with the Civil Service Commission, and Respondent is correct that Petitioner first opted to pursue his claim through an appeal of his dismissal. As such, Respondent's cross motion to dismiss is granted at this time, but Respondent is directed to decide Petitioner's administrative appeal within sixty days from the date of notice of entry of this decision.


Accordingly, it is

ORDERED that the cross motion to dismiss the Petition is granted; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

Dated: July 31, 2008

ENTER:

  
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J.S.C.

**FILED**  
AUG 12 2008  
COUNTY CLERKS OFFICE  
NEW YORK