

Matter of Brown v Hernandez
2008 NY Slip Op 32950(U)
October 16, 2008
Supreme Court, New York County
Docket Number: 401918/08
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

BROWN, ANNETTE

INDEX NO. 401918/08

MOTION DATE 10/7/08

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -
TINO HERNANDEZ,
ET AL.

The following papers, numbered 1 to 40 were read on this petition motion to for under Art. 78

Petition
Notice of ~~Motion~~ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits Answer
Replying Affidavits _____

PAPERS NUMBERED	
<u>1-17</u>	
<u>19-32</u>	<u>33-35</u>
<u>36-40</u>	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this petition motion is decided
in accordance with the accompanying decision.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 10/16/08 JBK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

-----X
In the Matter of the Application of

ANNETTE BROWN,

Petitioner,

Index No. 401918/08

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

Decision, Order and Judgment

-against-

TINO HERNANDEZ, as Chairman of the
NEW YORK CITY HOUSING AUTHORITY, the
NEW YORK CITY HOUSING AUTHORITY,
and FIRST ATLANTIC TERMINAL HOUSING
CORPORATION,

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
941B).

Respondents.

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner Annette Brown brings this Article 78 proceeding, seeking to annul the determination by respondent, the New York City Housing Authority ("NYCHA"), to deny her original application for rent assistance, pursuant to Section 8 of the United States Housing Act of 1937 (42 U.S.C. § 1437f), commonly referred to as a "Section 8" subsidy. Petitioner contends that the determination was arbitrary and capricious and in violation of both state and federal law. She asks for an order directing the NYCHA to issue Section 8 payments to her landlord, First Atlantic Terminal Housing Corporation (the "Landlord" or "First Atlantic"), retroactive to the date of her initial application. Alternatively, she seeks an order directing the NYCHA to issue Section 8 payments retroactive to the date on which she would have been eligible for reconsideration of her enhanced voucher application. The NYCHA opposes the petition. Respondent First Atlantic takes no position of the merits of the petition, but asks that the court direct that the monies owed to the

Landlord be paid expeditiously and retroactively or, in the alternative, that the Landlord be allowed to proceed in its underlying nonpayment case against petitioner.

For the past sixteen (16) years, petitioner has resided in a privately-owned, subsidized housing complex in Brooklyn that is operated by First Atlantic. The 202 units in the housing complex are operated under Section 236 of the Housing and Urban Development Act of 1968 ("Section 236"), 12 U.S.C. § 1715z-1. In 2003, petitioner began to receive a Rental Assistance Payment ("RAP") subsidy through the Section 236 program. Her monthly rental payments were recalculated annually, at approximately 30% of her adjusted income under HUD recertification guidelines. Her last recertification was completed on July 10, 2006.

First Atlantic received benefits from the Department of Housing and Urban Development ("HUD"), including a reduced interest rate on its mortgage in exchange for following certain procedures for tenant selection, occupancy, and rent-setting by HUD. In or about 2006, First Atlantic elected to refinance its HUD-issued mortgage. When a landlord chooses to refinance, it agrees to enter into any income and rent restrictions required by HUD. The owner is required to submit a plan to protect tenants from any rent increases or involuntary displacement as a result of the conversion. Once a conversion occurs, HUD notifies the public housing authority ("PHA") responsible for the property (in this case, the NYCHA), and specifies which tenants affected by the conversion may be entitled to receive enhanced Section 8 tenant-based vouchers.¹

¹ Under 42 U.S.C. § 1437, there are two types of Section 8 rental subsidies. One is commonly referred to as "tenant-based" and the other is commonly referred to as "project-based." The "tenant-based" subsidy is in essence a portable voucher which a tenant can use to pay some or all of the rent on any apartment, within certain limits. The "project-based" subsidy is associated with a specific dwelling unit or building. It cannot be transferred and it can be

In the summer of 2005, petitioner attended a meeting at which she was informed of First Atlantic's plans. She was told that she would no longer be eligible for a RAP subsidy, but would now be eligible for a Section 8 enhanced voucher, to be administered by the NYCHA. Sometime after this meeting, Rence Wigfall, an employee in First Atlantic's management office, completed an enhanced Section 8 voucher application on behalf of petitioner and submitted it to the NYCHA. On August 5, 2005, petitioner signed a form, NYCHA Form D, which authorized the NYCHA to collect certain income verification information.

On August 31, 2005, petitioner attended an eligibility interview at the NYCHA's Brooklyn office. Petitioner, who is self-employed, was asked to submit various documents from January 1 through December 31, 2003 to verify her self-employment income. An August 31, 2005 letter sets forth that petitioner is required to submit a certificate of net worth, copies of cash receipts and cash disbursement books, copies of expenses paid from the operation of the business, and copies of bank statements from personal and business accounts. Also listed in the letter is a request for a copy of a "Tax Return Transcript" for the year 2004. The letter sets forth that the tax return transcript can be ordered at no charge from the Internal Revenue Service ("IRS"), and provides a telephone number to call. The August 31, 2005 letter further sets forth that the documents must be received by October 31, 2005, or the NYCHA will assume that the applicant does not wish to be considered for Section 8 assistance.

Petitioner sent various documents to the NYCHA, which were received on or about

claimed only by the tenant of the dwelling. A tenant eligible for Section 8 assistance pays thirty percent (30%) of her adjusted gross income toward rent, while HUD pays the balance to the property owner. 42 U.S.C. § 1437f(c)(3); 1437a(a)(1).

October 17, 2005, according to the NYCHA's interview record. On November 9, 2005, the forms were reviewed. The notation by the NYCHA reviewer sets forth that petitioner did not submit a copy of a tax return transcript for 2004. By letter dated November 9, 2005, the NYCHA advised petitioner that her application could not be further processed because she failed to submit additional information or documentation required to determine her eligibility. The NYCHA file is marked "Disp: YAI," which means that the application was "Yet Pending Additional Information" and was deemed to be "dead." According to the NYCHA, after the application was deemed to be "dead," it was purged from the system.

On or about November 23, petitioner telephoned the NYCHA and stated that she sent all of the requested material and wants her case reviewed. A second letter was sent by the NYCHA, dated December 5, 2005, stating that copies of the tax return transcript still need to be submitted. The place on the letter for the deadline for the submission of the tax return transcript was left blank. But, a cover letter was apparently included with this mailing which states that the information must be submitted by December 19, 2005. The letter further provides that if the information is not submitted by February 9, 2006, petitioner would have to file a new application to be considered for an apartment, which would not happen until February 2007. Petitioner, who had never received a Section 8 subsidy before, sets forth that she believed all that was needed was her tax return, which she resubmitted.

Petitioner claims that she first learned that a tax transcript is a document that is separate and apart from a tax return sometime in or about September 2006. Petitioner contacted the

IRS and received the transcript in September 2006. Petitioner contends that she brought the document to the NYCHA,² and was told that she must go through the Landlord's management office to follow up on her application. The management office informed petitioner that Section 8 had "closed" for the building, and that petitioner would have to submit a new Section 8 application on her own. Petitioner then went to the NYCHA housing application office in late 2006, and completed an application for Section 8 assistance; petitioner returned to the management office, where she was told by the Landlord's representative that she applied for the wrong type of Section 8 subsidy, and must reapply with a new application. Apparently, petitioner had applied for a regular Section 8 subsidy rather than an enhanced Section 8 subsidy. Although the NYCHA states in its answering affidavit that the agency "does not have any record of any additional application for Section 8 assistance from Petitioner other than her 2005 application," the NYCHA sent petitioner an undated form letter, which petitioner states she received in February 2007. This form letter states that the NYCHA was "**discarding** [her] application" (emphasis in original) because she did not claim that she qualified as a victim of domestic violence, which was one of three categories for which the NYCHA was currently accepting Section 8 applications.

Petitioner states that she returned again to the NYCHA and completed another application for a Section 8 subsidy. Petitioner then returned to the management office, and was told that First Atlantic's Section 8 program would be reopening soon. Petitioner believed that the management office would forward her application for the enhanced voucher to the NYCHA. In fact, annexed to the petition is a copy of a letter, dated February 20, 2007, indicating that First Atlantic

² The NYCHA contends that it has no record that petitioner ever submitted the 2004 tax transcript.

forwarded petitioner's new Section 8 application to the NYCHA for processing. By letter dated January 3, 2008, First Atlantic forwarded a second submission on behalf of petitioner to the NYCHA.³

First Atlantic continued to credit petitioner's account with Section 8 subsidies through February 2007. Beginning in March 2007, First Atlantic subtracted the Section 8 credits and added a charge to petitioner's account for the accumulated unpaid subsidy, which totaled \$3,624. In February 2008, First Atlantic commenced a non-payment proceeding against petitioner, seeking payment of all rent arrears. According to First Atlantic's papers, petitioner owes \$18,553 in rent arrears through September 2008.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). "The arbitrary or 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.'" Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id.

³ In its answer, the NYCIIA states that it has no record of any separate or additional applications by petitioner for a Section 8 voucher, other than her 2005 application, which the NYCHA ceased processing on or about February 8, 2006, after petitioner failed to provide the tax return transcript.

Under the facts presented here, the NYCHA acted in an arbitrary and capricious manner in failing to process petitioner's Section 8 application. The NYCHA was required to verify petitioner's self-employment income. HUD developed a system that sets forth five levels of third-party verification for review of income, with Level 5, "up-front income verification," being the most rigorous, down to Level 1, which is "tenant verification." The NYCHA staff is required to first attempt to verify income at Level 5, which requires the NYCHA staff to use income verification databases. The HUD Verification Guidance booklet, dated March 9, 2004, sets forth that an "up-front income verification" or Level 5 review is "not available" where the income is derived from self-employment. The highest level available is "written third party" or Level 4 review, which states that the PHA, which in this case is the NYCHA, "mails or faxes a verification form directly to sources identified by the family to obtain income information." The HUD procedures further note that it is "a challenge for PHAs to obtain third party verification of self-employment income. When third party verification is not available, the PHA should always request a notarized tenant declaration that includes a perjury statement." It is readily apparent that an IRS tax transcript is not required in order to verify an applicant's income.

In any event, the NYCHA could have obtained the tax transcript directly. Petitioner asserts, incorrectly, that the August 5, 2005 authorization (NYCHA Form D) signed by petitioner allowed the NYCHA to obtain taxpayer return information from the IRS. However, this form, and the federal regulations, permit only HUD, and not the NYCHA, to obtain taxpayer return information from the IRS. Section 5.230(c)(3) of Title 24 of the Code of Federal Regulations provides that the consent form shall contain "[a] provision authorizing HUD to request income return information

from the IRS and the [Social Security Administration] for the sole purpose of verifying income information pertinent to the assistance applicant's or participant's eligibility or level of benefits."

But, a second authorization form does allow the NYCHA to obtain this information directly from the IRS. As set forth in a June 30, 2004 memorandum by the Director of the NYCHA's Leased Housing Program (the "June 2004 Memorandum," which is annexed as Appendix 5 to petitioner's memorandum of law), a "newly created IRS form," IRS Form 4506T, "permits [the] NYCHA to obtain a certified transcript of the tenant's tax return directly from the IRS." According to the NYCHA's own internal memorandum, this authorization form is included in every Section 8 packet, must be signed by every family member, and must be returned to the NYCHA; immediately upon return of the form, the NYCHA staff member is required to mail or fax the form to the IRS. The June 2004 Memorandum states that "[s]ince the IRS may not return the tax transcript promptly and since the information will not be current, staff should **not** delay completing the income review pending its return." (Emphasis in original.) Thus, the contention in the answering affidavit of Mamie Louie, the manager in the Application and Tenancy Administration Department of the NYCHA, that the NYCHA could not process petitioner's application without the tax transcript and was "unable" to make a determination is flatly contradicted by the June 2004 Memorandum. It is also clear from the HUD Verification Guidance document, dated March 9, 2004, that a PHA is expected to obtain the third-party verification of income directly from the IRS.

Thus, the NYCHA violated both its own internal procedures and HUD's procedures by failing to request a copy of the transcript directly from the IRS in the first instance, and by

insisting that the application could not be processed since petitioner failed to provide it; the NYCHA's own policies and procedures expressly provide that the application should be processed without the IRS tax transcript. There was no reason for the NYCHA to delay the processing of petitioner's application, particularly when it had all of the other necessary income verification information.⁴ The NYCHA's decision to stop processing petitioner's application was arbitrary and capricious since it was a violation of the NYCHA's own procedures.

Moreover, once the determination was made that petitioner's application was incomplete and her request for a Section 8 voucher would be "dead," the NYCHA had an obligation to provide petitioner with prompt notice of the determination, together with an explanation. Petitioner never received a notice from the NYCHA that complied with the regulations; the only notification she received was the November 9, 2005 notice which informed her that if she did not submit additional information by February 9, 2006, her application "will be dead," and a subsequent notice, dated December 5, 2005, which stated that additional information must be submitted by December 19, 2005. Petitioner argues that she was required to receive notice of the denial, pursuant to 24 C.F.R. § 982.554(a).⁵ While the NYCHA inexplicably contends that the application was not "denied," but that it was merely deemed "dead," and, therefore, the notice provisions in the regulation do not apply, the distinction between a denial and a dead application is of no moment.

⁴ The NYCHA also could have called to obtain income information (Level 3) or could have accepted alternative documentation, including documents that petitioner already provided (Level 2).

⁵ The federal regulation provides that "The PHA must give an applicant for participation prompt notice of a decision denying assistance to the applicant. The notice must contain a brief statement of the reasons for the PHA decision. The notice must also state that the applicant may request an informal review of the decision and must describe how to obtain the informal review."

Under either terminology, petitioner was entitled to notice. The NYCHA's Tenant Selection and Assignment Plan, approved by HUD in December 2000, and the subsequent plan approved by HUD in 2006, both provide that when an application is "deemed dead," an applicant "shall receive written notification to that effect, indicating the reason for the action, and that notification shall be considered a final agency determination." Again, the NYCHA violated its own procedures by failing to notify petitioner that her application was "dead."

For all of these reasons, the petition is granted, the determination of the NYCHA is annulled and reversed. Given the fact that the eligibility requirements for a RAP subsidy and enhanced Section 8 voucher are comparable, there is no basis to deny petitioner the enhanced Section 8 voucher. The matter is remitted to the NYCHA, with the direction that the NYCHA is to process petitioner's 2005 application forthwith and award her an enhanced Section 8 voucher, retroactive to the date of her initial application. The NYCHA shall take all steps necessary to complete the approval process expeditiously, including the required inspection, and provide all such retroactive housing assistance payments directly to First Atlantic as soon as practicable. The stay of the eviction proceeding shall continue until such time that a determination has been made by the NYCHA and/or payment is made to First Atlantic, whichever is later. I find that petitioner will suffer irreparable harm if the stay is not continued. Reynolds v. Division of Hous. and Comm. Renewal, 199 A.D.2d 15, 16 (1st Dep't 1993). Moreover, the stay of eviction upholds the HUD policy that an existing tenant should not be displaced as a result of the conversion of her housing complex.

The petition is granted. The NYCHA's arguments for dismissal on the ground of

laches and all of their other arguments have been considered and rejected. This constitutes the decision, order and judgment of the court.

Dated: October 16, 2008



JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).