

Matter of Frazier v Donovan

2008 NY Slip Op 33420(U)

December 18, 2008

Supreme Court, New York County

Docket Number: 401664/08

Judge: Marilyn Shafer

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

PRESENT: Marilyn Shaffer
Justice

PART 8

VANESSA FRAZIER

INDEX NO. 401664/08

MOTION DATE _____

- v -
SHAUN DONOVAN, ET AL.

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this ~~motion~~ ^{petition} to/for art. 78

~~Notice of Motion/~~ Order to Show Cause - ^{petition} Affidavits - Exhibits memo
Answering Affidavits - Exhibits memo
Replying Affidavits _____

PAPERS NUMBERED	
1, 2, 3	
4, 5, 6	
7	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this ~~motion~~ ^{petition} is granted in accord with the answered ~~memo~~ ^{memorandum}.

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

FILED

DEC 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/18/08

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 8

In the matter of the application of
VANESSA FRAZIER,
Petitioner,

INDEX NO. 401664/08

MOTION SEQ. NO. 001

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

-against-

SHAUN DONOVAN, as Commissioner of the
NEW YORK CITY HOUSING PRESERVATION
AND DEVELOPMENT; and SEA PARK WEST, L.P.,
Respondents.

FILED
DEC 22 2008
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 7, were read on this petition:

	<u>PAPERS NUMBERED</u>
Order to Show Cause, Verified Petition – Exhibits	1,2
Memorandum of Law	3
Verified Answer – Exhibits	4
Affirmation in Opposition	5
Memorandum of Law	6
Memorandum of Law in Reply	7

Cross-Motion: Yes No

Upon the foregoing papers, the petition is granted.

Introduction

This is a proceeding brought pursuant to Article 78 challenging the determination of the New York City Housing Preservation and Development terminating Frazier's Section 8 assistance.

Background

Petitioner lives with two of her children at 2930 West 30th Street, Apt. 2A1, Brooklyn, New York, owned by respondent Sea Park West, LP. Another son, Vernon, receives SSI and lives elsewhere.

Frazier received Section 8 assistance, administered by respondent NYCHA, until 2005 when the owner "opted out" of the Mitchell-Lama program. Thereafter, she became eligible for "enhanced" Section 8 subsidy vouchers administered by respondent HPD. During her application process for the enhanced vouchers, she spoke with an HPD representative who, noting that Frazier was the "representative payee" for Vernon's SSI payments, advised her to include Vernon on her application, notwithstanding her understanding that he did not live with Frazier and his income was not included in her income. She did do. In March, 2007, Frazier was advised that her subsidy was being substantially decreased due to the inclusion of Vernon's SSI income in the calculation of her income. Frazier objected to the decrease and submitted documentation that Vernon had not resided with her since 2003. HPD terminated her subsidy based upon her failure

“to report correct family income and household composition.” She appealed HPD’s decision and a hearing was held on June 13, 2008. The hearing officer rejected Frazier’s testimony that she had been told to include Vernon in her application although she retains no part of his income as “both self serving, and unsupported by the Record and therefore not credible.” Frazier submitted documentation showing that she had previously reported the correct family composition to NYCHA. The hearing officer found that her formerly proper reporting made “her violation with HPD all the more egregious”:

The Participant [Frazier] improperly included Vernon Evans in her family composition and failed to report his income. The Participant’s motivation for including Vernon Evans in her household was probably an attempt to ensure that she would not have to move to a smaller apartment. The Participant was probably worried that because there were only three persons living in a four bedroom apartment, she might have to move from the Premises [in which she had lived since 1994]. Therefore, I speculate that the Participant included her son Vernon even though he was not actually living in the Premises. This is a significant violation and is ground for termination.

However, the Participant was unsuccessful in her attempt to obtain a four bedroom voucher. HPD’s rules regarding unit size and subsidy standards resulted in her being granted a three bedroom voucher – despite her inclusion of Vernon Evans.

Discussion

“It is well settled that judicial review in an Article 78 proceeding is limited to a determination of whether the administrative action complained of is arbitrary and capricious, or lacks a rational basis” (*In re Application of Chelrae Estates, Inc. v State Division of Housing and Community Renewal, Office of Rent Administration*, 225 AD2d 387, 389 [1st Dept. 1996]). In *Pell v Board of Education of Union Free School District*,

the Court of Appeals defined arbitrary and capricious action as “action without sound basis in reason and generally taken without regard to the facts” (*Pell v Board of Education of Union Free School District*, 34 NY2d 222, 231 [1974]) The court has the power to review, either as a matter of law or an exercise of discretion, the measure of discipline imposed by an administrative agency. (*Bovino v Scott*, 22 NY2d 214 [1968]). The court will annul a sanction when it is so disproportionate to the offense, in light of all of the circumstances, as to be shocking to one’s sense of fairness. (*Pell, supra*).

This Court finds that, in light of all the circumstances, the penalty imposed, termination of Frazier’s subsidy, is so disproportionate to the offense as to be arbitrary and capricious.

While this Court cannot review the hearing officer’s findings with respect to Frazier’s credibility, his “speculation” regarding her “true motivation” is similarly without basis in the record. Moreover, even if his speculation is accurate, and Frazier lied in order to get a bigger apartment, the record shows that she did not get a bigger apartment. She obtained no benefit whatsoever from her conduct.

This Court finds that to deprive Frazier and her family of their subsidy and their home of 14 years is disproportionate to her “offense”, especially in light of the facts that (1) the officer did not reject Frazier’s testimony that Vernon is not part of her household and his income is not a part of her household income; and (2) Frazier obtained no benefit from including Vernon in her application. The balance of equities tips in favor of

Frazier. vis. This Court annuls the HPD's decision to terminate Frazier's subsidy and directs the matter be returned to the HPD for further proceedings in accord with this decision.

We have considered the other arguments raised by the parties and find them to be without merit.

Accordingly, it is hereby

ORDERED, that the petition is granted; and it is further

ORDERED, that the matter is returned to the HPD for further proceedings in accord with this decision; and it is further

ORDERED, that the Civil Court eviction proceeding, *Sea Park West, LP v Vanessa Frazier*, L&T Index No 63962/08 (Civ Ct Kings Co), be stayed pending determination of the above proceeding.

This reflects the decision and order of this Court.

Dated: 12/18/08

Check one: FINAL DISPOSITION

[Handwritten signature]
J.S.C.

NON-FINAL DISPOSITION

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