

**Matter of Delgado v New York City Housing
Authority**

2008 NY Slip Op 33571(U)

June 8, 2008

Supreme Court, New York County

Docket Number: 402686/2008

Judge: Carol R. Edmead

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SCANNED ON 6/10/2009

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

PRESENT: **HON. CAROL EDMEAD**

PART 35

Justice

Index Number : 402686/2008

DELGADO, VILMA

vs.

ELLIOT-CHELSEA HOUSES

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 402686-08

MOTION DATE 6/8/09

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

are read 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

The instant application is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the application of Petitioner Vilma Delgado for an order and judgment annulling and vacating the determination of respondent New York City Housing Authority and Chelsea Elliot Houses, dated June 12, 2008, denying petitioner succession rights as a remaining family member to the apartment previously leased to the tenant of record, petitioner's deceased mother, Gloria Peralta, is **denied in its entirety and the instant Petition is dismissed**; and it is further

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry within twenty days of entry on Petitioner.

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: 6/8/09

[Signature]
HON. CAROL EDMEAD 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
COUNTY OF NEW YORK: PART 35

In the Matter of the Application of
VILMA DELGADO,

Petitioner,

Index No. 402686/2008

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules

DECISION/ORDER

-against-

NEW YORK CITY HOUSING AUTHORITY
CHELSEA ELLIOT HOUSES,

Respondent. ^{141B},

EDMEAD, 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).

MEMORANDUM DECISION

Petitioner Vilma Delgado (“petitioner”) moves for an order and judgment annulling and vacating the determination of respondent New York City Housing Authority and Chelsea Elliot Houses (“respondent”), dated June 12, 2008 (the “Determination”) denying petitioner succession rights as a remaining family member to the apartment previously leased to the tenant of record, petitioner’s deceased mother, Gloria Peralta (“Ms. Peralta”).

Background

Ms. Peralta, petitioner’s mother, was the tenant of record at 466 West 26th Street, Apartment 7E, in the Chelsea Elliot Houses in Manhattan. Petitioner, whose maiden name is Fernandez, formerly had been a co-tenant on the lease and was listed as part of the family composition until March 2002, when she moved out. Petitioner’s daughter, Arlenne Delgado (“Arlenne”), continued to be listed on the family composition after petitioner moved out.

On January 25, 2007, petitioner notified the Housing Manager of Ms. Peralta’s death. On

February 9, 2007, management provided petitioner with a Remaining Family Member Claim Notice, informing petitioner that she may be subject to eviction but is “first entitled to a grievance proceeding on the issue of whether you may be entitled to keep the apartment.” This notice also stated the grievance procedure is conditioned upon petitioner being and remaining “current in the payment of use and occupancy equal to the amount of rent due and payable by the tenant of record in the last month of said tenant’s occupancy.” On that same day, petitioner informed management that she would seek a remaining-family-member grievance.

The Housing Authority send call-in letters to petitioner to schedule an appointment to discuss her remaining-family-member-grievance. These interviews took place on June 6, 2007 and November 1, 2007.

On November 13, 2007, the Housing Manager denied petitioner’s grievance because she “has failed to pay use and occupancy and had a search warrant executed on the apartment 9/13/07 when she and her daughter were arrested” for criminal use of drug paraphernalia. On December 20, 2007 the Borough Manager sent a letter to petitioner informing her that the office would review her claim and she was entitled to submit documentation or request a personal interview. On January 14, 2008, the Borough Manager issued her decision agreeing with the Housing Manager, noting petitioner “was once a member of the household however, she subsequently vacated and the lessee never requested or obtained permission for her to rejoin the household.” The Borough Office also notified petitioner of her rights to request a formal hearing before an impartial hearing officer.

On January 23, 2008, petitioner requested a hearing. On May 22, 2008, petitioner appeared *pro se* before Hearing Officer Stuart G. Laurence (the “Hearing Officer”), who

adjourned the hearing from May 22, 2008 to June 10, 2008 to "give [Petitioner] a chance to get caught up" on her use and occupancy payments. On the next hearing date, June 10, 2008, the Housing Authority moved to dismiss the grievance based on petitioner's failure to have become current in use and occupancy. On June 25, 2008, the Housing Authority's Board approved the decision and disposition of the Hearing Officer dismissing the grievance.

As of the date of respondent's Answer to the Petition, petitioner remains in arrears totaling \$562.30 or approximately three months use and occupancy at a monthly rate of \$192.60.

Petitioner's Contentions

Petitioner argues that her daughter is being terminated and she is too young to be out on the street without a home. Also, the Housing Authority has not afforded petitioner the opportunity to rejoin the household on the lease. Petitioner's daughter was born in that apartment and should be able to remain.

Respondent's Opposition

Even if petitioner had been current in use and occupancy at the time of her hearing, petitioner cannot qualify to succeed to Ms. Peralta's lease because she is unable to satisfy the Housing Authority's requirements for remaining-family-member status. Housing Authority policy requires that the tenant have obtained written consent for petitioner to re-join the apartment, that petitioner establish continuous authorized occupancy for at least one year prior to the date the tenant died, and that petitioner be otherwise eligible. Inasmuch as petitioner cannot fulfill these requirements, a full administrative hearing on these issues would be futile.

And, even if an occupant meets all of the requirements for remaining-family-member status, the Housing Authority will not issue a lease if the occupant is not "otherwise eligible" for

public housing in accordance with the admission standards for applicants. Because the Housing Authority has reasonable cause to believe that a member of the applicant family has engaged in the illegal use, or pattern of illegal use, of a controlled substance with the last three years, based on the search warrant executed on the apartment 9/13/07 when petitioner and her daughter were arrested” for criminal use of drug paraphernalia, petitioner would not be “otherwise eligible.”

Analysis

CPLR 7803 states that the court review of a determination of an agency, such as the Housing Authority, consists of whether the 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, including abuse of discretion as to the measure or mode of penalty imposed. CPLR 7803(3) (*see Windsor Place Corp. v New York State DHCR*, 161 A.D.2d 279 [1st Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1st Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1st Dept.1987], *lv. den.* 70 N.Y.2d 615 [1988]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and ... without regard to the facts." *Matter of Pell v Board of Education*, 34 N.Y.2d 222, 231(1974). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion. *Matter of Pell v Board of Education*, 34 N.Y.2d, at 231. The court's function is completed on finding that a rational basis supports the Housing Authority's determination (*see Howard v Wyman*, 28 N.Y.2d 434 [1971]). Where the agency's interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*see Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 A.D.2d 72 [1st Dept.], *aff'd* 66 N.Y.2d 1032 [1985]).

On judicial review of an agency action under CPLR Article 78, the courts must uphold the agency's exercise of discretion unless it has "no rational basis" or the action is "arbitrary and capricious." *Pell v Board of Ed. Union Free School District*, 34 NY2d 222, 230-31, 356 NYS2d 833, 839 (1974) "The arbitrary and 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.' Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." 34 NY2d at 231, 356 NYS2d at 839 *See also Jackson v New York State Urban Dev Corp.*, 67 NY2d 400, 417, 503 NYS2d 298, 305 (1986) (on review of agency action under CPLR Article 78, the courts may not "second guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence").

Moreover, where, as here, the agency's determination involves factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference. *See Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 355, 363, 514 NYS2d 689, 693 (1987). Courts are required to "resolve [any] reasonable doubts in favor of the administrative findings and decisions" of the responsible agency. *Town of Henrietta v Department of Env'tl. Conservation*, 76 A.D.2d 215, 224, 430 NYS2d 440, 448 (4th Dep't 1980). *See also Jackson*, 67 NY2d at 417, 503 NYS2d at 305; *City of Rome v Department of Health Dept.*, 65 A.D.2d 220, 225, 441 NYS2d 61, 64 (4th Dep't 1978), *lv. To app. denied*, 46 NY2d 713, 416 NYS2d 1027 (1979).

And, "Where evidence conflicts, issues of credibility are the province of an administrative hearing officer, since 'the decisions by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts.'" *Wooten v Finkle*, 285

AD2D 407, 408 (1st Dept 2001) (quoting *Berenhaus v Ward*, 70 NY2d 436, 443 (1987)).

Conclusion

This court finds that the Housing Authority's Determination is supported by substantial evidence. As petitioner has failed to remain current in use and occupancy, the Housing Authority properly dismissed her remaining-family-member claim. Further, petitioner cannot establish that she lawfully re-entered the household, and she did not continuously occupy the apartment for at least one year after lawful entry and the death of her mother.

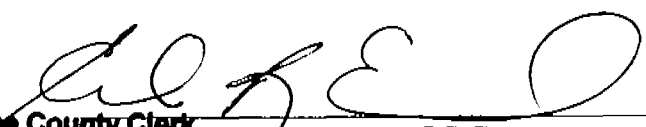
The court is mindful of the hardship this may cause to petitioner and particularly to her daughter; however, this Petition warrants no other decision than dismissal. Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of Petitioner Vilma Delgado for an order and judgment annulling and vacating the determination of respondent New York City Housing Authority and Chelsea Elliot Houses, dated June 12, 2008, denying petitioner succession rights as a remaining family member to the apartment previously leased to the tenant of record, petitioner's deceased mother, Gloria Peralta, **is denied in its entirety and the instant Petition is dismissed.**

Dated: June 8, 2009

UNFILED JUDGMENT

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Carol Robinson Edmead, J.S.C.