

Matter of Valentin v New York City Hous. Auth.

2009 NY Slip Op 30048(U)

January 9, 2009

Supreme Court, New York County

Docket Number: 401849/2008

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Victor Valentin

INDEX NO. 401849/08

MOTION DATE 1/7/09

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

NYCHA

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED
JAN 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

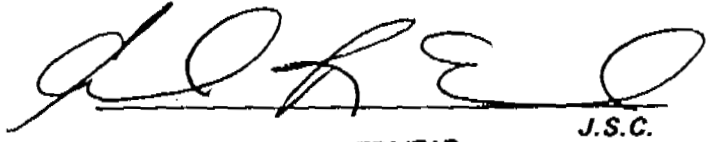
In accordance with the annexed Memorandum Decision, it is here

ORDERED that the application of Petitioner Victor Valentin for an order and judgment pursuant to Article 30 and 78 of the Civil Practice Law and Rules: (1) reversing and annulling the determination of respondents New York City Housing Authority and Tino Hernandez, as Chair of the New York City Housing Authority (collectively "respondents"), dated March 6, 2008, dismissing petitioner's Remaining Family Member grievance upon the grounds that respondents' determination was arbitrary and capricious, contrary to law, an abuse of discretion and in violation of Federal regulations; and (2) directing respondents to recognize petitioner's tenancy rights in the subject premises and provide petitioner with a lease; or alternatively, (3) annulling and remanding the matter to respondents for appropriate relief, **is denied in its entirety and the instant Petition is dismissed**; and it is further

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

This constitutes the decision and order of this court.

Dated: 1/9/2009


J.S.C.

HON. CAROL EDMEAD

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

_____x
In the Matter of the Application of

VICTOR VALENTIN

Index No. 401849/2008

Petitioner,

DECISION/ORDER

For a Judgment Pursuant to Article 30 and
Article 78 of the Civil Practice Law and Rules

-against-

NEW YORK CITY HOUSING AUTHORITY and
TINO HERNANDEZ, as Chair of the
NEW YORK CITY HOUSING AUTHORITY,

Respondent.

_____x
EDMEAD, J.S.C.

FILED
JAN 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

MEMORANDUM DECISION

Petitioner Victor Valentin (“petitioner”) moves for an order and judgment pursuant to Article 30 and 78 of the Civil Practice Law and Rules: (1) reversing and annulling the determination of respondents New York City Housing Authority (“NYCHA”) and Tino Hernandez, as Chair of the New York City Housing Authority (collectively “respondents”), dated March 6, 2008, (the “Determination”), dismissing petitioner’s Remaining Family Member grievance upon the grounds that respondents’ determination was arbitrary and capricious, contrary to law, an abuse of discretion and in violation of federal regulations; and (2) directing respondents to recognize petitioner’s tenancy rights in the subject premises and provide petitioner with a lease; or alternatively, (3) annulling and remanding the matter to respondents for appropriate relief.

Background

Petitioner in this case is a sixty-one year old disabled individual who allegedly suffers from limited mobility due to an accident suffered in 1991, while training to be a New York City Auxiliary Police Officer, in which both of his legs were broken. Petitioner asserts rights of succession as a remaining family member to a public housing apartment, previously leased to his deceased grandmother.

In 1985, Esperanza Marrero ("Ms. Marrero"), petitioner's grandmother, moved into apartment 31 at 819 FDR Drive, in the Jacob Riis Houses Development. The apartment is a three-room, one-bedroom apartment and petitioner was never an authorized member of Ms. Marrero's household. In January 1995, Ms. Marrero made a request to add petitioner to her household permanently. On or about March 2, 1995, the Housing Manager mailed a letter to Ms. Marrero notifying her of the denial. Ms. Marrero did not bring a grievance to challenge the denial of this request. In 1998, Ms. Marrero made a second request to add petitioner to her household. Respondents assert that based on petitioner's failure to pass a criminal background check, the Housing Manager denied the request. The NYCHA's criminal investigation revealed that petitioner pled guilty to assault in the third degree and was ineligible until February 2, 2000. Ms. Marrero did not bring a grievance to challenge the denial of this request.

On February 24, 2004, Ms. Marrero died. However, the family did not notify management of her death until three months later in response to an inquiry by management.

Petitioner's Contentions

Petitioner contends that respondents failed to afford him a full due process hearing in violation of federal regulations and case law, and made a decision affirmed by the NYCHA

Board that was contrary to applicable federal, state or local law, and HUD regulations.

The NYCHA rule regarding apartment size and “overcrowding” which was used to deny the petitioner’s joining the household and resulted in the ultimate denial of his remaining family member status was improper. The application of such a rule resulted in disparate treatment of petitioner, gender discrimination, a violation of his right to privacy and family integrity and is the case of an irrational and arbitrary rule without any basis.

It is clear that petitioner has been known to NYCHA since at least 1995; he has resided in the apartment since 1991, when, after a debilitating accident he moved in to assist his very aged grandmother, Ms. Marrero. Ms. Marrero’s apartment was a one-bedroom unit. Petitioner slept in the bedroom and Ms. Marrero slept in the living room.

When NYCHA denied the initial request for petitioner to become a permanent member of the household, based on petitioner’s alleged criminal record, NYCHA failed to provide petitioner with the opportunity to present mitigating evidence demonstrating, *inter alia*, rehabilitation and community service.

With respect to the 1998 denial of the request for petitioner to become a permanent member of the household, petitioner asserts that he reviewed all of the mail and that neither he nor Ms. Marrero ever received notice of the denial, nor did they know that petitioner would be eligible on February 2, 2000. They did not know that the denial was based on petitioner’s criminal record; nor were they provided a copy of the criminal background check.

Further, petitioner was known to NYCHA project management by (a) his being listed in the 1997 Occupant’s Affidavit of Income; and (b) his signature on the inspection reports for 1997 and 1998.

Respondents' Contentions

The United States Department of Housing and Urban Development (“HUD”) has mandated that NYCHA promulgate and adhere to certain tenant selection guidelines to determine which of the hundreds of thousands of applicants will be accepted as tenants for the relatively few public housing apartments that become available each year. HUD regulations further mandate that NYCHA regularly monitor family composition and income after it has admitted a family into public housing.

Tenant families must fulfill their corresponding obligations to (1) “request [NYCHA’s] approval to add any other family member as an occupant of the unit” (24 CFR § 966.4(a)(1)(v)); and (2) “supply any information requested by [NYCHA] or HUD for use in a regularly scheduled reexamination or interim reexamination of family income and composition in accordance with HUD requirements” (24 CFR § 960.259(a)(2)).

Consistent with its obligations under federal law, NYCHA provides for certain exceptions to its usual tenant-selection procedures. One exception is made when, as an accommodation to a tenant already in residence, NYCHA allows a non-tenant to become a permanent member of the tenant’s household. To permanently add a person to the household, a tenant must first request and obtain the written consent of the NYCHA manager. This obligation is now in the lease itself which expressly requires tenants to “obtain the written consent of the Housing Manager of the development in which the Leased Premises is located... before allowing any person to reside in the Leased premises.” NYCHA reminds tenants of the written-consent policy on an annual basis. The affidavit of income and family composition form, which tenants are required to complete once each year, clearly notifies tenants of the following: “failure [to list

all authorized occupants living in the apartment] may deprive them of all rights of occupancy. No one is allowed to join your household ... unless written permission is REQUESTED and GRANTED by project management.”

In accordance with Federal regulations and state law, NYCHA has adopted occupancy standards setting forth the number of persons allowed to permanently occupy an apartment of any given size. The occupancy standards are in place to ensure residents are assigned to apartments of the appropriate size for their households and NYCHA can fulfill its mandate to operate and maintain healthy, safe, and sanitary dwellings. Management cannot grant permanent permission if adding the proposed occupant would render the household overcrowded. For a one-bedroom apartment, the household is deemed overcrowded if two persons occupy the apartment unless the two persons are a married couple, domestic partners, or a single adult with a child less than six years old.

NYCHA provides a second exception to the usual tenant-selection procedures when the tenant of record either moves or dies. Under certain circumstances, NYCHA allows a “remaining family member” to succeed to the former tenant’s lease.

An occupant who wishes to succeed to the lease of a tenant of record as a remaining family member must: (1) have moved into the apartment lawfully; (2) fall within certain categories of relatives of the tenant of record; (3) have remained in the apartment continuously after lawful entry for not less than one year immediately prior to the date the tenant of record vacates the apartment or dies; and (4) be “otherwise eligible” for public housing in accordance with the admissions standards for applicants.

In the instant case, NYCHA management met with petitioner to discuss his remaining

family-member claim. The Housing Manager concluded that petitioner was not entitled to remaining family-member status because he was not an authorized member of the household. That decision was forwarded to the Manhattan Management Office for review. That office sent petitioner a letter explaining he had an opportunity to submit additional documentation of his claim and to have an interview with someone in the office. After meeting with petitioner, the Borough Manager upheld the Housing Manager's decision, stating:

A review of the file shows that the tenant of record, Esperanza Merrero was the tenant of record and sole occupant of the apartment until she passed away on February 24, 2004. Victor Valentin was not an original member of the household. While requests for Victor Valentin to permanently join the household were submitted in 1995 and 1998, both requests were denied by the manager. Since Mr. Valentin was never authorized to reside in the apartment, he is ineligible for remaining family member status. As such, this grievance is denied.

Petitioner's administrative grievance hearing was initially scheduled to commence on December 15, 2006 before Hearing Officer Joan Pannell ("Hearing Officer"). On that date, petitioner appeared *pro se* and sought an adjournment to retain counsel. Petitioner indicated he was seeking legal counsel with the assistance of Public Housing Residents of the Lower East Side. The matter was adjourned several times thereafter; petitioner appeared *pro se* seeking adjournments. In October, 2007, a guardian *ad litem* ("Guardian") was appointed for petitioner.. Thereafter, the Guardian requested the matter be adjourned so that he could examine the folder and request documentation. Petitioner appeared with the Guardian on January 16, 2008, at which time the Guardian advised the Hearing Officer that he had the opportunity to examine the NYCHA documents.

After recounting the testimony, the documents submitted into evidence, and NYCHA's policies, the Hearing Officer dismissed the grievance, noting:

It may be that [Petitioner] did not see a '98 letter of disapproval but [the Housing Authority's] records indicate that it was sent; [Petitioner] might have made inquiry if he did not receive a response.

However, the subject apartment contains only one bedroom. [The Housing Authority's] occupancy standards do not permit an additional household member in a one-bedroom apartment unless the individual proposed is the tenant's domestic partner. Thus, even had the tenant applied for permission in 2000, permission would nevertheless have been denied pursuant to the occupancy standards.

[Petitioner] is accordingly not a remaining family member as defined by [the Housing Authority's] regulations.

By determination dated March 19, 2008, NYCHA's Board adopted the Hearing Officer's decision and dismissed petitioner's remaining family-member grievance.

Petitioner is not a remaining family member because he did not have the written permission of the Housing Manager to join Ms. Marrero's household. Indeed, the Housing Manager denied petitioner permanent permission to join the household twice, and said determination was substantiated by substantial evidence.

To the extent petitioner challenges management's denial of the 1995 and 1998 permanent permission requests, the four-month statute of limitations in CPLR § 217(1) bars his claims.

Also, there is no implicit approval exception to the written consent requirements. Even if such an implicit approval exception existed, petitioner failed to establish that NYCHA knew about and implicitly approved of his occupancy because NYCHA management expressly denied Ms. Marrero's requests in March 1995 and November 1998.

Petitioner claims that NYCHA failed to notify him that it had denied two of Ms. Marrero's permanent permission requests. Under NYCHA policy, however, it is the tenant who must request permission to add a new household member, and therefore, NYCHA notifies the

tenant of its determination, not the individual proposed to be added to the household. Petitioner was not entitled to notice.

Petitioner lacks standing to challenge NYCHA's denial for permanent permission request on October 2, 1998; assuming arguendo that petitioner has standing, the challenge is untimely, and the challenge lacks merit.

Finally, petitioner's claim that NYCHA's occupancy standards result in disparate treatment of petitioner lacks merit. Tenants in public housing or private housing are not a protected class. Petitioner's claim that the occupancy standards violate his right to privacy and family integrity also lacks merit. There is no evidence substantiating this claim.

Reply

In reply, petitioner argues that the cases cited by respondents in support of its defenses are distinguishable. Further, as the one who read the mail to his "illiterate grandmother," the legal tenant, she did not receive any notice from respondents. The 1995 denial was totally ambiguous and the 1998 denial was never received. Thus, the statute of limitations was tolled. In any case, the 1995 and 1998 notices were insufficient.

Also, NYCHA's application of occupancy standards has no rational basis and there is no rational basis for the one-bedroom occupancy policy. Had the mandated procedure been correctly utilized by NYCHA and been properly administered, petitioner would have been correctly added. Petitioner could have met his burden by demonstrating his rehabilitation and community participation as mitigating factors.

Additionally, the evidence demonstrates that respondents knew of and acquiesced to his occupancy.

Finally, the Court should declare that the NYCHA occupancy standards are not in compliance with HUD policy.

Analysis

CPLR 7803 states that the court review of a determination of an agency, such as DHCR, 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 Ed. Union Free School District*, 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 a finding that a rational basis supports the DHCR'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*, 34 NY2d at 230-31). "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” (*Id.* at 231; *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 N.Y.S.2d 440, 448 (4th Dept. 1980); *see also Jackson*, 67 N.Y.2d at 417, 503 N.Y.S.2d at 305; *City of Rome v Department of Health Dept.*, 65 A.D.2d 220, 225, 441 NYS2d 61, 64 (4th Dept. 1978), *lv. to app. denied*, 46 N.Y.2d 713, 416 N.Y.S.2d 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 A.D.2d 407, 408 (1st Dept. 2001) *quoting Berenhaus v Ward*, 70 N.Y.2d 436, 443 (1987)).

And the courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists (*Berenhaus*, 70 N.Y.2d at 444, 522 N.Y.S.2d 478; *Matter of Stork Rest. v Boland*, 282 N.Y. 256, 267, 26 N.E.2d 247 [1940]; *Matter*

of Acosta v Wollett, 55 N.Y.2d 761, 447 N.Y.S.2d 241, 431 N.E.2d 966 [1981]; *Matter of Verdell v Lincoln Amsterdam House, Inc.*, 27 A.D.3d 388, 390, 813 N.Y.S.2d 68 [2006]).

Statute of Limitations

An article 78 proceeding must be commenced within four months after the administrative determination to be reviewed becomes "final and binding upon the petitioner" (*Yarbough v Franco*, 95 N.Y.2d 342, 717 N.Y.S.2d 79 [2000]; CPLR 217[1]; *New York State Assn. of Counties v Axelrod*, 78 NY2d 158, 165, 573 NYS2d 25). An administrative determination becomes "final and binding" when the petitioner seeking review has been aggrieved by it. An administrative action is not final and binding within the contemplation of CPLR 217 until it "has its impact" upon the petitioner (*Bludson v Popolizio*, 166 A.D.2d 346, 347, 561 N.Y.S.2d 14 [1st Dept. 1990], citing *Matter of Edmead v McGuire*, 67 N.Y.d 714, 716, 499 N.Y.S.2d 934)). The Statute of Limitations does not begin to run until the petitioner receives notice of the determination (*Matter of Biondo v New York State Bd. of Parole*, 60 N.Y.2d 832, 834, 470 N.Y.S.2d 130).

The time for petitioner to pursue his administrative remedies was at the time of the determinations. Having failed to do so, the determinations made in 1995 and 1998 stand and may not be collaterally attacked at this time.

Notice

The First Department in *McLaughlin v Hernandez* (16 AD3d 344 (1st Dept 2005)) has stated that:

The notice provided by NYCHA was clearly consistent with federal and state law, regulations and administrative policy governing tenancy termination proceedings in public housing, wherein NYCHA is not obligated to serve such notice on

household members other than the tenant of record (*see e.g. Escalera v New York City Hous. Auth.*, 425 F2d 853 [1970], *cert denied* 400 US 853 [1970]; 24 CFR 966.4 [e] [8] [ii] [A]; 53 Fed Reg 33216, 33246-33247 [1988] [codified at 24 CFR 966.50 *et seq.*]; *Matter of Abdil v Martinez*, 307 AD2d 238 [2003]; *Matter of Faison v New York City Hous. Auth.*, 283 AD2d 353 [2001]; *Matter of Figueroa v Hernandez*, 194 Misc 2d 413 [2002]; *New York City Hous. Auth. v McClinton*, 184 Misc 2d 818 [2000]).

This court has reviewed and considered the balance of petitioner's claims, and finds that they lack merit.

Conclusion

Based on the foregoing, it is hereby

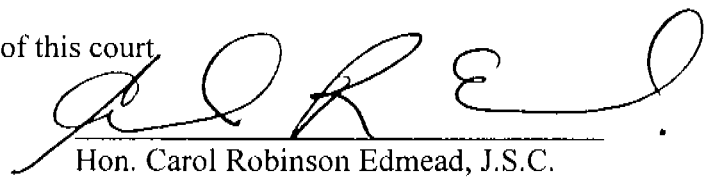
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ORDERED that the application of Petitioner Victor Valentin for an order and judgment pursuant to Article 30 and 78 of the Civil Practice Law and Rules: (1) reversing and annulling the determination of respondents New York City Housing Authority and Tino Hernandez, as Chair of the New York City Housing Authority (collectively "respondents"), dated March 6, 2008, dismissing petitioner's Remaining Family Member grievance upon the grounds that respondents' determination was arbitrary and capricious, contrary to law, an abuse of discretion and in violation of Federal regulations; and (2) directing respondents to recognize petitioner's tenancy rights in the subject premises and provide petitioner with a lease; or alternatively, (3) annulling and remanding the matter to respondents for appropriate relief, **is denied in its entirety and the instant Petition is dismissed**; and it is further

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

This constitutes the decision and order of this court.

Dated: January 9, 2009


Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD