

Fleming v Hernandez
2009 NY Slip Op 30170(U)
January 23, 2009
Supreme Court, New York County
Docket Number: 110420/2008
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: **HON. CAROL EDMEAD**

PART 36

Index Number : 110420/2008

FLEMING, ROSE
vs.
HERNANDEZ, TINO

SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE 12/16/08

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

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 1425).

Upon the foregoing papers, it is ordered that this motion and the instant application and cross motion are decided in accordance with the accompanying Memorandum Decision. It is hereby


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

ORDERED and ADJUDGED that the application of Petitioner Rose Fleming, for an order and judgment pursuant to Article 78 (1) enjoining respondents Tino Hernandez, As Chair of the New York City Housing Authority, and New York City Housing Authority from commencing or prosecuting any termination proceedings brought against petitioner pending the resolution of the present Petition; and (2) reversing NYCHA's determination to terminate petitioner's tenancy on the grounds that such denial violates applicable laws and regulations, is arbitrary and capricious, and is an abuse of discretion, is **denied in its entirety**; and it is further

ORDERED and ADJUDGED that the cross motion of respondents Tino Hernandez, As Chair of the New York City Housing Authority, and New York City Housing Authority for an order and judgment striking petitioner's arguments raised for the first time in the Petition, and for dismissal of the Petition is **granted 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.

Dated: 1/23/09


HON. CAROL EDMEAD 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:

ROSE FLEMING, x

Petitioner,

Index No. 110420/2008

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

DECISION/ORDER

-against-

TINO HERNANDEZ, as Chair of the
New York City Housing Authority, and the
NEW YORK CITY HOUSING AUTHORITY,

Respondents.

EDMEAD, J.S.C. x

MEMORANDUM DECISION

Petitioner Rose Fleming (“petitioner”) moves for an order and judgment pursuant to Article 78 (1) enjoining respondents Tino Hernandez, As Chair of the New York City Housing Authority, and New York City Housing Authority (“NYCHA”) from commencing or prosecuting any termination proceedings brought against petitioner pending the resolution of the present Petition; and (2) reversing NYCHA’s determination to terminate petitioner’s tenancy on the grounds that such denial violates applicable laws and regulations, is arbitrary and capricious, and is an abuse of discretion.

NYCHA cross moves to strike petitioner’s arguments raised for the first time in the Petition, and for dismissal of the Petition.

Background

Petitioner is fifty years old, and has lived in NYCHA housing for twenty-seven years. Petitioner has been diagnosed with panic attacks, and more recently with diabetes. In 1991,

petitioner became the tenant of record for Apartment 2C at 131 Jersey Street, Staten Island, New York, in the Richmond Terrace Houses development (the "apartment"). Petitioner resided in the four-bedroom apartment with her husband, Royal Wiggins ("Wiggins"), her six children, Royal, Grant, Pernell, Keenan, Kerri Fleming ("Kerri"), and Tamika Fleming ("Tamika"), and her grandchildren, Carlos Flenny, Shai-Kera Flenny, and Avyon. Over the years, various members of the household moved out of the apartment. In 2000, petitioner's household composition included herself, Kerri, Grant, Keenan, and Avyon. Thereafter, Avyon left the household, and NYCHA permanently excluded Kerri, Grant, and Royal. Petitioner's current household composition includes herself, Pernell, and Keenan.

On January 21, 1999, Kerri, in concert with another person, was charged with selling controlled substances to an undercover officer in petitioner's apartment building. After asking petitioner to meet with management, NYCHA preferred administrative termination-of-tenancy charges against her based on this alleged criminal misconduct in May 1999. Petitioner did not proceed to a hearing; instead, petitioner resolved these charges in a stipulation, dated June 29, 1999, agreeing to subject her tenancy to a five-year probationary period ("1999 Stipulation"). Petitioner signed her name on the 1999 Stipulation underneath the statements:

"[t]his stipulation was read and explained to the tenant. The tenant acknowledges that she completely understands the terms of this stipulation and agrees to the terms set forth herein."

On November 17, 1999, NYCHA's Board approved the 1999 Stipulation.

On November 23, 2000, Kerri, in concert with another individual, is alleged to have assaulted another tenant in petitioner's building by punching her and striking her in the head with an object. The next day, on November 24, 2000, petitioner is alleged to have assaulted the same

tenant by pushing her to the floor and hitting her. After asking petitioner to meet with management, NYCHA preferred administrative termination-of-tenancy charges against petitioner in April 2001 based on Kerri's and petitioner's assaults. Instead of proceeding to a hearing, petitioner resolved these charges in a stipulation, dated July 25, 2001, agreeing to permanently exclude Kerri from her apartment and to be subject to one additional year of probation upon the expiration of the five-year probationary period, to which she was already subject (the "2001 Stipulation"). Petitioner again signed and acknowledged reading and understanding the 2001 Stipulation.

On February 16, 2003, Royal called 911 from petitioner's apartment and filed a false police report that gun shots were fired at his girlfriend's residence. The above procedure was followed, resulting in a stipulation dated January 7, 2004 (the "2004 Stipulation"), with the same acknowledgments by petitioner. Future incidents resulted in further Stipulations.

Less than three months after petitioner signed the last stipulation ("2006 Stipulation"), petitioner and her family members continued to engage in illegal criminal activity, including among other crimes, robbery, assault, larceny, harassment and possession of drugs. Grant and Royal continued to reside in petitioner's apartment after petitioner agreed to exclude them. Petitioner also continued to be chronically delinquent in the payment of her rent and failed to return a completed transfer request form.

By notice and specification of charges, dated July 9, 2007, NYCHA detailed the charges against petitioner. After several adjournments for petitioner to retain counsel the hearing commenced on January 22, 2008 before Hearing Officer Joan Pannell ("Hearing Officer"). Various documents were admitted, testimony was taken, including from Police Officers Marcel

Touma, James Piscopo, and Anthony Moon and testimony from petitioner's neighbors.

Petitioner was represented by counsel, and petitioner testified.

As to NYCHA's notice to petitioner to move to a smaller apartment, petitioner said she needed more time to do so.

By Amended Decision dated March 6, 2008, the Hearing Officer sustained the charges for: (1) violation of probation; (2) violation of permanent exclusion based on Grant's statement to police that he resided at petitioner's apartment when he was arrested on January 2, 2007 on NYCHA premises; (3) violation of continued absence based on Royal's statement to police that he resided at petitioner's apartment when he was arrested on April 6, 2007 on NYCHA premises; (4) chronic rent delinquency; and (5) breach of rules and regulations.

Petitioner's Contentions

Petitioner's rent is calculated based on her income and Pernell's supplemental security income. During the past year, Pernell has intermittently refused to pay his portion of the rent, and petitioner experienced the onset of diabetes. These factors affected petitioner's ability to pay rent.

On several occasions, petitioner picked up the paperwork for transfer to a smaller apartment. But, because petitioner did not select an apartment, the paperwork was never processed by NYCHA.

NYCHA failed to present any evidence at the hearing showing that either Royal or Grant was ever seen inside of petitioner's apartment, despite numerous searches by NYCHA officials. Nor was there any evidence that any incidents involving Grant or Royal occurred in petitioner's apartment. Also, the evidence at the hearing that Grant was seen sleeping outside petitioner's

door is strong evidence that petitioner had excluded Grant from her apartment.

Further, the record includes an unchallenged document from the Department of Correctional Services website indicating that Royal will be incarcerated until 2014.

Petitioner lacked specific notice in the vague wording of the charges, to prepare a proper defense. Until the time of the hearing, petitioner was unaware that she could voluntarily exclude Pernell, and she expressed her intent to do so.

At the end of the hearing the Hearing Officer indicated that there was substantial mitigating evidence that petitioner would not be evicted because of her rent delinquency. Thus, insofar as NYCHA ultimately terminated petitioner's tenancy based on chronic rent delinquency, NYCHA's actions were disproportionate to the offense charged and arbitrary and capricious.

In light of NYCHA's own failure to assist petitioner in completing a transfer, NYCHA's termination of petitioner's tenancy for failing to transfer is disproportionate to the offense charged and arbitrary and capricious.

Without specific notice, petitioner was unable to properly prepare a defense to the charge of violating NYCHA rules and regulations.

Respondents' Contentions

NYCHA's determination to terminate petitioner's tenancy is supported by substantial evidence and is consistent with its own policies and procedures, petitioner's lease obligations, and applicable law, including (1) a rational policy to protect public housing residents from criminal activity and activity that disturbs other residents' peaceful enjoyment of the premises; (2) NYCHA's duty under federal law to ensure the prompt payment of rent and the prompt processing of evictions of tenants who fail to timely pay their rent; and (3) NYCHA's mandate to

maintain healthy, sanitary, and safe dwellings by ensuring residents are assigned to apartments of the appropriate size.

Analysis

CPLR 7803 states that the court review of a determination of an agency, such as NYCHA, 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 NYCHA'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)), 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, 517 N.E.2d 193; *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]).

In the instant case, this court finds that on the entire record the Hearing Officer's determination is supported by substantial evidence, including police reports, court documents, complaints of misconduct, evidence of chronic rent delinquency, and testimony from several police officers. Respondents have met the minimal burden required to support the charges. The Hearing Officer's decision to terminate petitioner's tenancy after petitioner had violated the conditions of her four prior periods of probation, was not arbitrary or capricious.

This court recognizes that petitioner has mitigating circumstances. However, those circumstances are far outweighed by the substantiated charges in support of terminating petitioner's tenancy.

Conclusion

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of Petitioner Rose Fleming, for an order and judgment pursuant to Article 78 (1) enjoining respondents Tino Hernandez, As Chair of the New York City Housing Authority, and New York City Housing Authority from commencing or prosecuting any termination proceedings brought against petitioner pending the resolution of the present Petition; and (2) reversing NYCHA's determination to terminate petitioner's tenancy on the grounds that such denial violates applicable laws and regulations, is arbitrary and capricious, and is an abuse of discretion, **is denied in its entirety**; and it is further

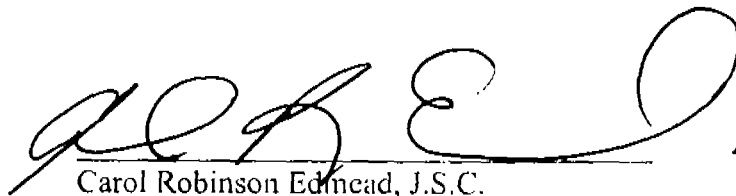
ORDERED and ADJUDGED that the cross motion of respondents Tino Hernandez, As

Chair of the New York City Housing Authority, and New York City Housing Authority for an order and judgment striking petitioner's arguments raised for the first time in the Petition, and for dismissal of the Petition **is granted 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 23, 2009



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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).