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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Smallwood, Norman

INDEX NO. 401317/08

MOTION DATE 10/6/08

- v -

MOTION SEQ. NO. 001

MOTION CAL. NO. ____

New York City Housing Authority

The following papers, numbered 1 to ____ were 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

FILED
FEB 11 2009
COUNTY CLERK'S OFFICE
NEW YORK

Based on the foregoing, it is hereby

ORDERED that the application of petitioner Norman Smallwood for an order, pursuant to Article 78 of the Civil Practice Law and Rules, finding the determination of respondent New York City Housing Authority on the underlying Petition for Administrative Review unfair is denied, and the petition is dismissed in its entirety. It is further

ORDERED that counsel for respondent New York City Housing Authority, 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. The Clerk may enter judgment accordingly.

Dated: 2/9/09

HON. CAROL EDMEAD J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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In the Matter of the Application of

SMALLWOOD, NORMAN,

Petitioner,

For judgment under Article 78 of the
Civil Practice Law & Rules

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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Index. No. 401317/08

DECISION/ORDER

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Norman Smallwood ("petitioner"), *pro se*, moves for an order, pursuant to Article 78 of the Civil Practice Law and Rules, for a judgment reversing the determination of respondent New York City Housing Authority ("NYCHA") to refuse "to allow [petitioner] to reopen" the June 27, 2007 dismissal of his grievance.

NYCHA opposes the application on the grounds that 1) petitioner's claim is barred by the statute of limitations; 2) NYCHA's Hearing Officer properly dismissed petitioner's grievance; 3) NYCHA's decision to dismiss petitioner's grievance was supported by substantial evidence, and was not arbitrary and capricious; 4) petitioner's claim as a remaining family member lacks merit; and 5) petitioner fails to state a cause action.

Background[1]

Ethel Smallwood ("Mrs. Smallwood") became a public housing tenant in May 1975, when she moved into 255 West 127th Street, Apt. 1A, (the St. Nicholas Houses) in Manhattan. Petitioner, Mrs. Smallwood's husband, moved out of the apartment on August 27, 1992[2]. On June 7, 2001, Mrs. Smallwood signed a lease as the tenant of record. On that same day, Mrs. Smallwood made a request to transfer, listing only herself and her son, Eric Smallwood ("Eric") as members of the household.

On April 28, 2005, Mrs. Smallwood died. In June, Mrs. Smallwood's brother, Aaron Bishop, informed the apartment management of Mrs. Smallwood's death. Mr. Bishop also told management that Eric was incarcerated, and petitioner "had taken over the apartment and [was] unauthorized to do so" (NYCHA's answer, ¶ 23). In July 2005, petitioner came to the management office and told the management that he lived in the apartment while Mrs. Smallwood was sick; he gave up his apartment to take care of Mrs. Smallwood; and he was not leaving the apartment (*id.*). In that same meeting, the management told petitioner that "there was no record of his occupancy and he had no rights to the apartment." Also in July, Eric submitted to management a Notice of Intent to Vacate.

Administrative History[3]

In December 2005, the management initiated a holdover licensee proceeding against petitioner in Housing Court. (The case was adjourned by stipulation 11 times prior to being

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[1]Information taken from NYCHA's Verified Answer.

[2]From 1992 through 2005, petitioner was not mentioned in Mrs. Smallwood's annual affidavits of income.

[3]Information taken from NYCHA's Answer and petitioner's Petition.

marked off the Court calendar in April 2007.) In a meeting with petitioner on January 20, 2006, the Housing Manager told petitioner that Mrs. Smallwood had never sought permission for petitioner to rejoin the household after petitioner left in August 1992. The Housing Manager also "concluded Petitioner was not entitled to a remaining-family-member hearing because he had an outstanding use and occupancy balance" of $1,273 (Ans., ¶ 24).

The Housing Manager forwarded her decision to the Borough Management Office for review. In October 2006, after meeting with petitioner, the Borough Administrator upheld the Housing Manager's decision, on the grounds that petitioner did not qualify as a remaining family member,[4] and petitioner had $2,430 in use and occupancy outstanding. The Housing Manager told petitioner that if he wanted to pursue the matter further, he needed to request a formal hearing in writing.

A hearing before the NYCHA was scheduled for April 12, 2007. At that hearing, Hearing Officer Joan Pannell ("Hearing Officer") explained to petitioner that before he could have a hearing on the merits, he had to be up to date with his use and occupancy. At that time, petitioner owed $2,718 in use and occupancy through April 2007[5]. Petitioner told the Hearing Officer that management advised him not to pay. "Petitioner further alleged he needed money for other expenses, including costs associated with [Mrs. Smallwood's] death, Eric's incarceration, Petitioner's own arrest for drugs, and damages to the apartment after police executed a search warrant in the apartment for drugs" (NYCHA's Ans., ¶ 28). Petitioner said he would pay use and

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[4]The original members of the household who move out need to acquire written permission from the Housing Manager for a person to rejoin a household. Petitioner did not have the required written permission from the Housing Manager.

[5]The petitioner owed $193 for 11 months and $55 for one month.

occupancy, on a monthly basis, until he caught up. Petitioner also contended that he had applied for a one-shot deal from the New York City Human Resources Administration ("HRA") several months earlier but that he was denied because the apartment was not in his name. Petitioner said he had made payments toward use and occupancy, including a payment of $760 in February 2007 and several payments of $325. The hearing was adjourned to May 23, 2007 to give petitioner "the opportunity to (1) pay the outstanding use and occupancy; (2) re-apply to HRA for a one shot deal; and (3) retain counsel" (Ans., ¶ 29).

On May 23, 2007, petitioner appeared at the hearing and told the Hearing Officer that he had re-applied for a "one-shot deal" and had been denied again. Petitioner also said that he had made a payment of $325 toward use and occupancy on May 11, 2007 (reducing the outstanding amount to $2,046). The Hearing Officer explained that the use and occupancy had to be paid in full, and that by not paying the use and occupancy by the adjourned hearing date, petitioner "had failed to meet a prerequisite for pursuing a grievance procedure," (*id.* at ¶ 32). Accordingly, the Hearing officer dismissed petitioner's grievance. The Hearing Officer further advised that if petitioner could catch up "the next month or two, put the request [to reopen] in writing."

NYCHA's Board subsequently adopted the decision on July 18, 2007, and dismissed petitioner's grievance. The determination was mailed on July 25, 2008.

On or about July 7, 2008, petitioner commenced this action.

Petitioner's Contentions

Petitioner disputes NYCHA's contention that he had not paid use and occupancy. He contends that he has "paid the rent." Plaintiff also explained his situation:

I am 66 years old. I am diabetic and have been ill. I lived with my wife [Mrs. Smallwood]

> for 31 years. My wife died of liver disease three years ago and I was devastated by her death. I believe that I have a right as a remaining family member to become the head of household. My wife and I raised our five children in this apartment. I would appreciate the opportunity to be heard.

Petitioner argues that NYCHA dismissed his grievance on "a technicality" and that its refusal to let petitioner "re-open the determination is unfair."

NYCHA's Contentions[6]

First, NYCHA contends petitioner's claim is barred by the statute of limitations. The statute of limitations to commence an Article 78 proceeding challenging a Housing Authority decision is four months. NYCHA mailed its July 18, 2007 decision dismissing petitioner's grievance on July 25, 2007. Petitioner does not dispute that he received the decision within five days of mailing. Petitioner should have commenced this Article 78 proceeding by November 30, 2007. However, petitioner failed to commence this proceeding until July 7, 2008, when he purchased the index number. Thus, he waited more than eight months after the statute of limitations expired, resulting in an untimely filed claim.

Second, NYCHA contends that the Hearing Officer properly dismissed petitioner's grievance on the ground that petitioner failed to pay use and occupancy. Citing caselaw, NYCHA contends that an administrative agency's decision withstands judicial scrutiny if it has a rational basis and is based on substantial evidence. NYCHA maintains that its decision had a rational basis and was based on substantial evidence. "The Housing Authority's Management Manual specifically provides that to pursue a remaining-family-member-grievance a claimant must 'continue to pay use and occupancy for the subject apartment'" NYCHA argues. This

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[6]NYCHA's Answer and Memorandum of Law.

requirement is valid and conforms to federal regulations. Further, a landlord is entitled to the payment of use and occupancy for the time that the occupant enjoys possession of a landlord's space, and petitioner may still litigate the merits of his claim in the eviction proceedings pending in Housing Court. Here, NYCHA had proof that $2,178 in use and occupancy was outstanding on April 19, 2007 and $2,046 was outstanding on May 23, 2007. In addition, petitioner admitted that he had not become current in use in occupancy. Therefore, the Court should reject petitioner's assertion that respondent's dismissal of his grievance was a "technicality."

Third, NYCHA's decision to dismiss petitioner's remaining-family-member grievance was supported by substantial evidence, consistent with law, in accord with NYCHA's policies, and not arbitrary and capricious. Under NYCHA's rules, petitioner is not a remaining family member, because he did not have written permission of the Housing Manager to rejoin the household. Petitioner cannot show he had the written permission of the manager because petitioner moved out of the apartment in 1992, he was removed from the tenant data summary, and he was not listed on the 13 annual affidavits of income Mrs. Smallwood submitted between January 15, 1993 and October 24, 2004.

Even if petitioner had entered lawfully, he is not eligible under NYCHA's standards for admission because of his poor payment history. An applicant's rent-payment record is one of the factors NYCHA considers when determining whether an applicant is eligible for public housing. Specifically, NYCHA looks at whether the applicant has made prompt rent payments for a period of six months to one year. Petitioner cannot qualify for a lease under this standard because he was not current in use and occupancy for well over one year.

NYCHA argues that petitioner's alleged mitigating circumstances do not justify granting

him a lease as a remaining family member. The Court should not allow petitioner to "slip in through the back door" when nearly 130,000 applicants with their own hardships have complied with all requirements and are patiently waiting their turn for an apartment.

Further, petitioner's claims are barred by unclean hands. Petitioner admitted that Mrs. Smallwood removed him from the household to lower her rent. Petitioner states in the Petition he lived with Mrs. Smallwood in the apartment for over 30 years, and received a monthly Social Security Disability payment in the amount of $968.00. If this is true, petitioner and Mrs. Smallwood perpetrated a fraud on the Housing Authority by concealing his presence in the apartment and his income. Mrs. Smallwood and petitioner profited financially from the fraud by paying a lower rent than management would have calculated if petitioner's income had been taken into account. Therefore, NYCHA argues, it would be inequitable to let petitioner "bypass the thousands of law-abiding applicants waiting their turn for an apartment when he and [Mrs. Smallwood] failed to pay their fair share" (*id.* at 14).

Analysis

Statute of Limitations

At the outset, the Petition is untimely. According to CPLR §§217(1) and 304, a petition for an Article 78 proceeding must be filed no later than four months after an administrative decision becomes final and binding (*Best Payphones, Inc. v Department of Information Technology and Telecommunications of City of New York*, 5 NY3d 30, 34 [2005] ["A strong public policy underlies the abbreviated statutory time frame: the operation of government agencies should not be unnecessarily clouded by potential litigation" (*id., citing Solnick v Whalen*, 49 NY2d 224, 232 [1980]). Courts have construed the four-month limitations period

strictly against Article 78 petitioners seeking to challenge a NYCHA decision (*see e.g. Stephens v New York City Housing Auth.*, 293 AD2d 318 [2002], *lv denied*, 98 NY2d 610 [2002] ["The proceeding was properly dismissed as time-barred on the ground that it was not commenced within four months of petitioner's receipt of either (1) [NYCHA's] 'Determination of Status for Continued Occupancy' dated February 23, 2000 . . . or (2) [NYCHA's] 'Notice to Vacate,' dated April 13, 2000"]). Courts have upheld the statute of limitations despite harsh results *(see e.g. Rodriguez v New York City Hous. Auth.*, Index No. 403538/07, at *1 & 4 (Sup Ct NY Co. Dec. 31, 2007) (Abdus-Salaam, J.) [Court was constrained to deny a housing petition for failure to meet the statute of limitations, despite petitioner's "extremely sympathetic plight" (*id.*)[7].

Here, NYCHA mailed its final July 18, 2007 decision dismissing petitioner's grievance on July 25, 2007 (*see* the affidavits of Robin D. Wall and Raisa Arias in support of NYCHA's Answer.) Petitioner does not dispute that he received the decision within five days of mailing. Accordingly, petitioner should have commenced this Article 78 proceeding by November 25, 2007. Instead, petitioner filed his Petition on July 21, 2008, eight months after the statute of limitations expired.

Review of Administrative Proceedings

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*

[7]A copy of *Rodriguez v New York City Hous. Auth.*, Index No. 403538/07, at *1 & 4 (Sup Ct NY Co. Dec. 31, 2007) (Abdus-Salaam, J.) is attached to the Answer in the Appendix.

Place Corp. v New York State DHCR, 161 AD2d 279 [1st Dept 1990]; *Mazel v DHCR*, 138 AD2D 600 [1st Dept 1988]; *Bambeck v DHCR*, 129 AD2d 51 [1st Dept 1987], *lv. den.* 70 NY2d 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 NY2d 222, 231 [1974]). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*id.*). The court's function is completed on finding that a rational basis supports an agency's determination (*see Howard v Wyman*, 28 NY2d 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 AD2d 72 [1st Dept. 1985], *aff'd* 66 NY2d 1032 [1985]).

Pell is instructive on the basic standard of Article 78 review:

> In article 78 proceedings, "the doctrine is well settled, that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; 'the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is "substantial evidence."' (Cohen and Karger, Powers of the New York Court of Appeals, s 108, p. 460; 1 N.Y.Jur., Administrative Law, § 177, 185; see Matter of Halloran v. Kirwan, 28 N.Y.2d 689, 690, 320 N.Y.S.2d 742, 743, 269 N.E.2d 403 (dissenting opn. of Breitel, J.)). 'The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals. The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is 'arbitrary and capricious.' " (Cohen and Karger, Powers of the New York Court of Appeals, pp. 460-461; see, also, 8 Weinstein-Korn-Miller, N.Y.Civ.Prac., par. 7803.04 Et seq.; 1 N.Y.Jur., Administrative Law, § 177, 184; Matter of Colton v. Berman, 21 N.Y.2d 322, 329, 287 N.Y.S.2d 647, 650-651, 234 N.E.2d 679, 681-682).
> *Pell* at 230-31.

Upon review of the submissions, this Court concludes that there was a "rational basis" for

NYCHA's decision not to reopen the June 27, 2007 dismissal of petitioner's grievance. NYCHA's decision was not "arbitrary and capricious." Further, NYCHA's decision to dismiss petitioner's grievance was not unfair.

There is a sufficient basis in the record to support NYCHA's determination that petitioner did not pay the full amount of use and occupancy, which is required of claimants seeking to pursue a grievance for remaining family member status. Although petitioner insists that he has "paid the rent," the record shows that petitioner, by his own admission, did not. Petitioner was first told that he had outstanding use and occupancy in 2006. The case was adjourned by stipulation 11 times prior to being marked off the Court calendar in April 2007. NYCHA points out that "[n]early every stipulation noted the outstanding use and occupancy Petitioner owed throughout the year" (Ans. footnote 2, citing Exh. M). At the grievance hearing on April 12, 2007, petitioner again was told that he was not up to date on his use and occupancy. So the hearing was adjourned to May 23, 2007 to give petitioner the opportunity to pay the outstanding use and occupancy. At the May 23 hearing, petitioner said he had made a payment of $325 on the outstanding use and occupancy, but he still had not paid the complete outstanding amount.

While petitioner argues that NYCHA dismissed his grievance on "a technicality" and that its refusal to let petitioner "re-open the determination is unfair," this Court finds that the dismissal of petitioner's grievance was rationally based on NYCHA's policies and procedures.

Further, there is a rational basis for NYCHA's determination that even if petitioner had paid use and occupancy, he would not qualify as a remaining family member. The record indicates that petitioner did not obtain the required written permission of the Housing Manager to rejoin the household, and that he had poor payment history, rendering him ineligible for a lease.

Notably, there is evidence that petitioner and Mrs. Smallwood tried to defraud NYCHA by failing to report petitioner's income for the period that petitioner allegedly resided in the apartment.

In light of the above, petitioner failed to state a cause of action. According to CPLR § §7803, which governs Article 78 proceedings, the only questions that may be raised in such a proceeding are:

> 1. whether the body or officer failed to perform a duty enjoined upon it by law; or
> 2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
> 3. whether a 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 or discipline imposed; or
> 4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.
> (*id.*)

Based on the above, NYCHA's determination was not arbitrary and capricious or an abuse of discretion, and was supported by substantial evidence. And, petitioner has not alleged that NYCHA failed to perform a duty enjoined upon it by law, or that NYCHA proceeded, is proceeding or is about to proceed without or in excess of jurisdiction.

The Court also notes that the Court can review the penalty or discipline imposed by an administrative decision for fairness "where the finding of guilt is confirmed and punishment has been imposed, the test is whether such punishment is 'so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of *fairness*'" (*Pell v Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2D 222, 233 [1974]) (*emphasis added*). The Court in *Pell* goes on to describe what may

be considered shocking to one's sense of fairness: "At this time, it may be ventured that a result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals" (*id.* at 234).

Petitioner's claim that NYCHA's decision not to reopen petitioner's grievance was unfair does not warrant reversal of its decision.

Accordingly, the petition for an order, pursuant to Article 78 of the Civil Practice Law and Rules, reversing NYCHA's decision not to allow petitioner to reopen the June 27, 2007 dismissal of his grievance is denied, and the petition is dismissed.

Conclusion

Based on the foregoing, it is hereby-

ORDERED that the application of petitioner Norman Smallwood for an order, pursuant to Article 78 of the Civil Practice Law and Rules, finding the determination of respondent New York City Housing Authority on the underlying Petition for Administrative Review unfair is denied. It is further

ORDERED that counsel for respondent New York City Housing Authority, 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 the Court. the decision and order of this court.

Dated: February 9, 2008

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD