

Matter of Sarmiento v New York City Hous. Auth.

2009 NY Slip Op 31954(U)

August 3, 2009

Supreme Court, New York County

Docket Number: 400615/2009

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

Dawn Sarmiento

INDEX NO.

400615/09

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

NYCHA

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

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

ORDERED and ADJUDGED that the application of petitioner Dawn Sarmiento, for an order and judgment, pursuant to CPLR Article 78 annulling the determination of respondent New York City Housing Authority terminating her tenancy, is **denied in its entirety**; and it is further

ORDERED that all stays issued by this court are hereby lifted; 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: 8/3/09

[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
 DAWN SARMIENTO,

Petitioner,

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

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

 EDMEAD, J.S.C.

x

Index No. 400615/2009

DECISION/ORDER

x

MEMORANDUM DECISION

Petitioner Dawn Sarmiento (“petitioner”) moves for an order and judgment, pursuant to CPLR Article 78 annulling the determination of respondent New York City Housing Authority (“NYCHA” or the “Authority”) terminating her tenancy.

Background

Prior to the termination of her tenancy, petitioner was the tenant of record at 801 Manor Road Apartment 2E, Staten Island, New York, in NYCHA’s Todt Hill Houses development (the “subject apartment”).

In January 2003, NYCHA management informed petitioner that NYCHA was considering terminating her lease, and urged her to attend an appointment with management, which petitioner did at a meeting on January 27, 2003. At said meeting, petitioner admitted that she permitted Andrews - an unauthorized occupant who the NYPD arrested for assault - to stay in her apartment. NYCHA management recommended termination of petitioner’s tenancy, and

NYCHA preferred charges against petitioner alleging she permitted Andrews, an unauthorized occupant, to take up residence in her apartment without having obtained the prior written consent of the development's Housing Manager. In June 2003, instead of proceeding with the hearing on the charges, as was her right, petitioner chose to settle the charges by agreeing to a two-year probationary period. Petitioner also agreed to not permit Andrews "to reside in or visit the Tenant at the subject apartment" for "as long as the Tenant is a Tenant with the Authority." Further, petitioner agreed that the Authority could seek to terminate her tenancy for violation of probation if she, or any member of her household or guest, committed "any act or omission which would constitute grounds for termination of tenancy" under the NYCHA Termination Procedures. The Members of the Housing Authority thereafter adopted a final and binding Determination of Status approving the stipulation. Petitioner's probation commenced on July 2, 2003 and expired on July 2, 2005.

In 2004, petitioner sought the removal of the permanent exclusion of Andrews. A hearing officer denied petitioner's request, explaining petitioner failed to meet her burden to establish "a substantial change has occurred." Andrews had "brutally assaulted" her and he had been convicted of two offenses - trespass and disorderly conduct - since petitioner entered into the 2003 Stipulation, which rendered him ineligible to occupy public housing until October 6, 2007.

In 2005, although it was not required to do so, NYCHA management again informed petitioner that the Authority was considering terminating her lease, and urged her to attend an appointment with management after the police arrested Jason Ortiz ("Ortiz"), petitioner's son an authorized occupant, for the sexual abuse of a fourteen-year-old resident. Management met with

petitioner on August 29, 2005, and she admitted Ortiz has severe problems. Management recommended termination of petitioner's tenancy, and the Authority preferred charges against petitioner.

In March 2006, instead of proceeding with the hearing on the charges, as was her right, petitioner chose to settle the charges by agreeing to a three-year probationary period. She agreed that the Authority could seek to terminate her tenancy for violation of probation if she, or any member of her household or guest, committed "any act or omission which would constitute grounds for termination of tenancy" under the Termination Procedures. The Members of the Housing Authority thereafter adopted a final and binding Determination of Status approving the stipulation. Petitioner's probation commenced on April 5, 2006 and expired on April 5, 2009.

On or about May 14, 2008, the police arrested petitioner on charges of assault and endangering the welfare of a child for choking her daughter, Justina Arnez ("Arnez"), with her hands "causing pain and a scratch to her neck."

About two months later, Arnez notified the police that Andrews repeatedly had raped her in petitioner's apartment - where Andrews resided in violation of the 2003 Stipulation - until May 2008, when the authorities removed her from her mother's home and placed her in foster care. Police interviewed Andrews at the Bergen Correctional facility in Connecticut, where he was incarcerated, and Andrews denied the allegation. However, he conceded that petitioner, he and Arnez would sleep in the same bed and he and petitioner would have sex while Arnez watched. He also admitted that petitioner would sometimes hit Arnez for being "bad.."

On October 6, 2008 the Authority preferred charges against petitioner alleging violation of her probation and the terms of her 2003 Stipulation and violated rules and regulations of

NYCHA. The charges were later supplemented to add petitioner's assault of her eight-year-old daughter on May 14, 2008. Petitioner was notified of her hearing date and her right to be represented by counsel. The hearing was held on November 21, 2008 before Hearing Officer Ester Tomicic Hines (the "Hearing Officer"). Testimony included that of Detective Scott Simon who interviewed Arnez. Detective Simon determined that Arnez was not "swearable" which is distinguished from "credible." After testimony from witnesses and petitioner, by Decision, dated December 10, 2008, the Hearing Officer recounted the evidence and sustained the charges. By Determination of Status, dated December 24, 2008, the Authority adopted the Hearing Officer's decision terminating petitioner's tenancy.

Petitioner's Contentions

Petitioner states that this is her home of 18 years. And, although she has made some poor decisions, she has learned her lesson. She is in therapy sessions at the Jewish Board for Family and Children's Services for her conditions of depression, panic and anxiety. She is also taking classes in anger management. She also states that she has learning disabilities.

She also states that she no longer had any contact with Andrews.

Her sister, Darlene Cooper, submits an affidavit in support of petitioner's application, in which she confirms that her sister has learning disabilities. She does not believe that petitioner ever understood the gravity of her situation.

Dr. Mary Beth Andrews, a Clinical Psychologist with the Jewish Board of Family and Children's Services writes in support of petitioner's application, and states that it would be devastating for petitioner to lose her home at this time. She adds that petitioner needs ongoing supportive and clinical services.

Diane Mena, petitioner's social worker with the Madeleine Borg Community Services Staten Island Office, also writes in support of petitioner's application. She states that petitioner has been in treatment for Panic Disorder as well as Dysthymic Disorder, and is under the care of a psychiatrist, Dr. Vadim Azbel. Petitioner attends individual therapy once a week and has been faithful to her session and working on managing her Panic Disorder. Ms. Mena states that a disruption of petitioner's home environment could impact her mental health.

Respondent's Contentions

NYCHA terminated petitioner's tenancy after an administrative hearing officer found petitioner had (1) violated her agreement to not permit Travis Andrews ("Andrews"), an unauthorized occupant, to visit or reside in her apartment; (2) allowed Andrews to return to the apartment where he repeatedly raped petitioner's eight-year-old daughter; and (3) petitioner herself assaulted and choked her daughter.

Petitioner contends that she no longer has contact with Andrews, but this claim is undercut by her failure to abide by her similar assurances in the past.

Further, petitioner's protestations that she was unaware of Andrews' repeated rape of her daughter does not warrant a lesser penalty, particularly in light of the prior criminal conduct of Andrews and petitioner's son.

Respondent further argues, *inter alia*, that petitioner's learning disability argument should be rejected because petitioner failed to raise it in her hearing; petitioner's alleged learning disability does not mitigate her assault of her daughter; petitioner's enrollment in Parenting classes does not appear to be voluntary.

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]).

First, the court notes that neither petitioner's psychiatrist nor her social worker claim that petitioner was incompetent to understand the three stipulations she entered into with NYCHA. Second, petitioner's sister is not a competent witness to establish that petitioner did not know what she was doing when she entered into the stipulations with NYCHA.

And, the Housing Authority's evidence herein far exceeds the minimal burden required to support the charges.

It is hoped that petitioner continues to receive the mental health assistance she needs. And, it is further hoped that petitioner will receive the needed assistance in locating suitable housing.

Conclusion

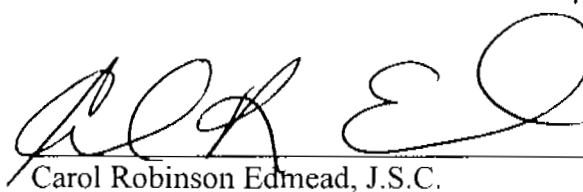
Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of petitioner Dawn Sarmiento, for an order and judgment, pursuant to CPLR Article 78 annulling the determination of respondent New York City Housing Authority terminating her tenancy, **is denied in its entirety**; and it is further

ORDERED that all stays issued by this court are hereby lifted; 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.

Dated: August 3, 2009



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD