

<b>Matter of Lugo v New York City Hous. Auth.</b>
2010 NY Slip Op 30016(U)
January 4, 2010
Supreme Court, New York County
Docket Number: 400712/2009
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 400712/2009  
**LUGO, YASMEEN**  
 VS.  
**NYC HOUSING AUTHORITY**  
 SEQUENCE NUMBER : 001  
 ARTICLE 78

INDEX NO. \_\_\_\_\_  
 MOTION DATE 10/30/09  
 MOTION SEQ. NO. 001  
 MOTION CAL. NO. \_\_\_\_\_

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 accompanying Memorandum Decision.  
 It is hereby

ORDERED and ADJUDGED that the Petition of Yasmeen Lugo, for an order and judgment, pursuant to CPLR Article 78 annulling the determination of respondent New York City Housing Authority terminating her residency, is **denied in its entirety**; 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: 11/4/2009

  
**HON. CAROL EDMEAD** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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  
YASMEEN LUGO,

x

Petitioner,

Index No. 400712/2009

**DECISION/ORDER**

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

-against-

THE NEW YORK CITY HOUSING AUTHORITY

Respondent,

**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  
1465).

\_\_\_\_\_  
EDMEAD, J.S.C.

x

**MEMORANDUM DECISION**

Petitioner Yasmeen Lugo ("Petitioner") moves for an order and judgment, pursuant to Article 78 of the CPLR, annulling the determination of respondent New York City Housing Authority ("NYCHA"), dated November 26, 2008 (the "Determination"), to terminate Petitioner's tenancy on the grounds that such determination violates applicable laws and regulations, is arbitrary and capricious, and is an abuse of discretion.

*Background*

Petitioner was the sole authorized adult tenant of record for apartment 11D at 118 Avenue D, New York, New York 10009, located within NYCHA's Jacob Riis Houses public housing development. NYCHA determined that Petitioner allowed illegal drug transactions to occur within her apartment and was chronically delinquent in paying her rent. As a result, NYCHA terminated Petitioner's tenancy.

By notice and specification dated August 8, 2008, NYCHA charged petitioner with non-desirability, breach of rules and regulations by unlawfully possessing, selling or attempting to

sell a controlled substance, endangering the welfare of a child and chronic rent delinquency. Specifically, NYCHA alleged that Petitioner, Angel Gonzalez (“Gonzalez”) and Natalie Castro (“Castro”) possessed and sold crack cocaine in the apartment and possessed illegal drug paraphernalia in violation of the rules and regulations of her tenancy. NYCHA also alleged that Petitioner allowed Gonzalez to reside in the apartment without approval of the development manager. Additionally, NYCHA alleged that though Petitioner was up to date with rent payments at the time of her hearing, she was chronically delinquent in providing rent payments.

At the NYCHA hearing, Detective Jeffrey McAvoy (“McAvoy”) of the Manhattan South Narcotics Division testified that he executed a search warrant on Petitioner’s apartment on April 17, 2008 and arrested Petitioner, Gonzalez and Castro. At this time, Gonzalez told McAvoy that he resided in the apartment. McAvoy also testified that Petitioner was present when a confidential police informant made three controlled buys of crack cocaine, over a two-month period in Petitioner’s apartment.

Petitioner testified that she had no knowledge of any drug dealing activities that occurred in the apartment. She stated that Gonzalez and Castro were “close friends” who visited on a “daily basis” and sometimes spent the night. Further, she presented as evidence of her innocence, a copy of the criminal court calendar showing that all charges against her were dismissed.

On November 14, 2008, after reviewing the testimony and evidence presented, NYCHA sustained all charges against Petitioner and recommended termination of Petitioner’s tenancy. NYCHA’s Board adopted the hearing officer’s decisions and disposition and issued a Determination of Status terminating Petitioner’s tenancy on November 26, 2008.

*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 AD2d 279 [1st Dept 1990]; *Mazel v DHCR*, 138 AD2d 600 [1st Dept 1988]; *Bambeck v DHCR*, 129 AD2d 51 [1st Dept 1987], *lv denied* 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" (*Pell v Board of Ed. Union Free School District*, 34 NY2d 222, 231, 356 NYS2d 833, 839 [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 NYCHA'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], *affd* 66 NY 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" (*Matter of Pell v Board of Education*, 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" (*Id.* 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 AD2d 215, 224, 430 NYS2d 440, 448 [4th Dept 1980]; *see also Jackson*, 67 NY2d at 417, 503 NYS2d at 305; *City of Rome v Department of Health Dept.*, 65 AD2d 220, 225, 441 NYS2d 61, 64 [4th Dept 1978], *lv 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 NY2d at 444; *Matter of Stork Rest. v Boland*, 282 NY 256, 267, 26 NE2d 247 [1940]; *Matter of Acosta v Wollett*, 55 NY2d 761, 447 NYS2d 241, 431 NE2d 966 [1981]; *Matter of Verdell v Lincoln Amsterdam House, Inc.*, 27 AD3d 388, 390, 813 NYS2d 68 [2006]).

In the instant case, this court finds that on the entire record there is no basis to annul NYCHA’s decision. NYCHA’s decision was supported by substantial evidence including, rent collection data for Petitioner’s apartment, Petitioner’s arrest report and Detective McAvoy’s testimony. The court notes that Petitioner’s insistence that she was unaware of any illegal drug

transactions occurring within her apartment is insufficient to overcome the evidence and testimony presented at the NYCHA hearing. Further, records clearly show that Petitioner repeatedly failed to pay rent when due.

NYCHA's evidence herein far exceeds the minimum burden required to support the charges and its determination to terminate Petitioner's tenancy had a rational basis and was not arbitrary or capricious.

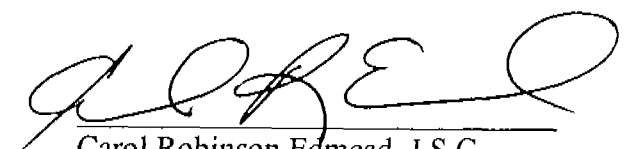
*Conclusion*

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the Petition of Yasmeen Lugo, 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 counsel for Respondent shall serve a copy of this Order with Notice of Entry within twenty days of entry on Petitioner.

Dated: January   4  , 2010

  
\_\_\_\_\_  
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).**