

Matter of Diaz v Morales

2010 NY Slip Op 30229(U)

January 29, 2010

Supreme Court, New York County

Docket Number: 107689/09

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 : 107689/2009
DIAZ, GEORGINA
VS.
MORALES, RICARDO ELIAS
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
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

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NEW YORK COUNTY CLERK'S OFFICE

ORDERED and ADJUDGED that the application of Petitioner Georgina Diaz for an order and judgment, pursuant to Article 78 of the CPLR, annulling and vacating the order of the respondent Richard Elias Morales (respondent), as Chairman of the New York City Housing Authority (NYCHA), dated March 4, 2009, which adopted the recommendation of a hearing officer that petitioner be evicted from her apartment for allegedly having unauthorized boarders in her apartment, on the grounds that the respondent's determination violates his agency's own regulations, is contrary to law, arbitrary and capricious, lacked substantial evidence in support thereof and was violative of petitioner's due process rights under the United States and New York State Constitution, is **denied in its entirety, and the instant Verified Petition is dismissed.** And it is further

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for petitioner.
This constitutes the decision and order of this court.

Dated: 1/29/10


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

_____x
In the Matter of the Application of
GEORGINA DIAZ,

Petitioner,

Index No. 107689/09

DECISION/ORDER

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

-against-

RICARDO ELIAS MORALES, as Chairman of the
New York City Housing Authority,

Respondent.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Georgina Diaz (petitioner) moves for an order and judgment, pursuant to Article 78 of the CPLR, annulling and vacating the order of the respondent Richard Elias Morales (respondent), as Chairman of the New York City Housing Authority (NYCHA), dated March 4, 2009, which adopted the recommendation of a hearing officer that petitioner be evicted from her apartment for allegedly having unauthorized boarders in her apartment, on the grounds that the respondent's determination violates his agency's own regulations, is contrary to law, arbitrary and capricious, lacked substantial evidence in support thereof and was violative of petitioner's due process rights under the United States and New York State Constitution.

Background

Since May, 1988, petitioner was the tenant of record for apartment 3C, located at 1780 Madison Avenue in Manhattan, in the housing complex known as the Milbank-Frawley Houses. Petitioner's husband, Alfredo, her son, Alfred, and her daughter, Crystal, are also authorized

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[* 3]

occupants of petitioner's apartment.

Petitioner's lease provides that the tenant shall not sublet or assign the apartment or any part of the apartment and shall only permit individuals to reside in her apartment after obtaining management's written approval. Her lease further provides for termination in the event she violates the obligations set forth therein.

In November 2006 Tamara Burgess ("Ms. Burgess") reported to development management that she was renting a room in petitioner's apartment for a weekly rent of \$115.00 and she presented documents confirming her "lease." NYCHA management called U.S. Rooms for Rent ("US Rooms") which processed the rental, and confirmed Ms. Burgess was their client. Ms. Burgess also informed NYCHA management that two other individuals were renting rooms in petitioner's apartment, and each "tenant" used the kitchen and bathroom. Additionally, Ms. Burgess advised NYCHA management that petitioner had vacated the apartment and that petitioner's husband was using the master bedroom. NYCHA management also received a complaint from an unidentified source that petitioner was subletting her apartment.

NYCHA management subsequently sent petitioner a letter urging her to attend an appointment to discuss the possible termination of her lease for subleasing rooms in her apartment. Petitioner did not appear for her interview. Another opportunity to appear was offered to petitioner. On September 11, 2007, petitioner contacted NYCHA management and asserted that she could not attend the interview because she was waiting for a carpenter to fix her damaged floor. Petitioner agreed to allow the manager and superintendent to visit the apartment to investigate the alleged floor damage. While the manager was in the apartment, a woman opened the front door with a key and admitted to the manager that she was renting a room from

petitioner. The manager also observed three dogs and one cat in the apartment, which violates the pet policy that limits pet ownership to one registered dog or cat. The manager informed petitioner that it would forward the record of her tenancy for the preparation of charges.

In October 2007, NYCHA preferred charges against petitioner alleged she (1) sublet her apartment to another person or persons without NYCHA's permission or consent; (2) permitted unauthorized occupants to reside in her apartment; (3) failed to occupy her apartment; and (4) violated the Housing Authority's pet policy. Petitioner was also advised that her hearing would take place on November 20, 2007, and that she was entitled to be represented by counsel.

Petitioner's first administrative hearing was held on June 11, 2008. The hearing officer found that all allegations against petitioner were true, but only sustained two of the charges and placed petitioner on probation for one year. The NYCHA Board remanded for a new hearing because the decision was "irregular and inconsistent."

For example, the hearing officer sustained charge five, which alleged petitioner violated her lease agreement when she "assigned the lease or sublet or transferred the use and possession" of her apartment to another person, but dismissed charge two, which alleged that petitioner "assigned, sublet or transferred possession" of her apartment or rooms in her apartment to another person. Pursuant to the NYCHA Board Determination dated August 13, 2008, the NYCHA Board concluded "the inconsistent rulings in this case make it impossible to determine which of [the charges] [petitioner] has breached," and because the hearing officer was no longer employed by NYCHA, "a new hearing [was] necessary to determine the facts."

In October 2008 NYCHA noticed a new hearing asserting the same charges. In a Decision dated February 19, 2009, the hearing officer sustained the charges that petitioner sublet

rooms in her apartment and permitted unauthorized occupants, and concluded her conduct warranted termination of her tenancy. On March 4, 2009, NYCHA's Board approved the decision and disposition of the hearing officer terminating petitioner's tenancy.

Petitioner's Contentions

The Decision, and administrative proceedings for which review is sought herein, were contrary to the agency's own regulations, contrary to law, arbitrary and capricious and lacked substantial evidence in support thereof and was violative of petitioner's due process rights under the United States and new York State Constitution.

Respondent's Opposition

This court should uphold the hearing officer's credibility finding that petitioner cannot be believed because her statements concerning the rental of rooms in her apartment, were contradictory and unrealistic, whereas NYCHA's manager demonstrated candor. Further, the penalty of termination for subletting rooms in a public housing apartment and permitting unauthorized occupants to reside in the apartment without management's consent, is appropriate.

Substantial evidence before the hearing officer supports the charges against petitioner including, *inter alia*:

- the testimony of Housing Manager Joy that Ms. Burgess informed Joy that petitioner was renting her a room for \$115 per week;
- the testimony of Housing Manager Joy that Ms. Burgess reported to Joy that she, along with three others, were subletting rooms in petitioner's apartment;
- a receipt and an agreement from U.S. Rooms confirming it arranged for Ms. Burgess to rent a room in petitioner's apartment through a company called American Plaza; and
- an Apartment Sharing Contract stamped by American Plaza for Ms. Burgess with

the name "Georgina" and petitioner's address written on the top-left of the page.

Petitioner's Reply

Without prior notice to petitioner, the NYCHA Board rejected the decision of the Hearing Officer who recommended probation, and remanded the matter for a new administrative hearing. In its Verified Answer, respondent admits that it failed to send the petitioner or her attorney a notice that the decision was under review by the members of the respondent's Authority.

At no time did respondent's agency send petitioner or her attorney a notice that the decision was under review by the respondent's members of the Authority. Despite petitioner's objection to further proceedings, NYCHA insisted on further prosecution of the administrative proceeding although clearly barred by its own regulation. Since the determination of the first hearing officer imposing a one-year probationary period on petitioner was, by operation of law, binding on NYCHA, its subsequent determination which is subject to this court's review and which directs the eviction of petitioner and her family must be vacated and annulled.

If it is determined that respondent could proceed with further prosecution of the petitioner, petitioner argues that the second NYCHA determination was based on an administrative hearing that violated petitioner's due process rights by: (1) allowing and considering testimony relating to a period prior to that set forth in the specification of charges; and (2) allowing non-notice testimony in and the hearing officer basing her decision partly on that testimony and evidence for the earlier period.

And, as the only witness to testify against petitioner was the building manager, and the manager's documentary evidence consisted of copies of two documents purporting to demonstrate that petitioner had contracted with a rental agency to rent rooms in her apartment,

NYCHA's determination was not supported by substantial evidence.

As demonstrated by petitioner's Memorandum of Law, respondent's continued prosecution of petitioner through a remand and second hearing was a clear violation of lawful procedure. And, NYCHA's conduct in these proceedings was a clear violation of petitioner's due process rights.

And, even if NYCHA's final determination were somehow affirmed, the penalty of forfeiture of her long term home based on the flimsiest of hearsay and questionable evidence is an unwarranted severe penalty and should be reduced to probation.

Further Submission

After a conference call with the court and counsel for both parties on December 18, 2009, the court ordered the parties to submit papers concerning NYCHA's compliance with paragraph 11 of its Termination of Tenancy Procedures. In particular, the court requested that the parties address whether NYCHA properly mailed a Notice of Review to Petitioner.

Respondent's Further Opposition

On January 18, 2008, NYCHA sent a Notice of Review to Petitioner after Hearing Officer Stuart Laurence issued a decision on July 16, 2008. On February 20, 2009, NYCHA sent a Notice of Review to Petitioner after Hearing Officer Arlene Ambert issued a decision on February 19, 2009. NYCHA enclosed a copy of the appropriate decision with each Notice of Review. The Notices of Review informed petitioner that the matter "[i]s under review by the members of the New York City Housing Authority."

This court should reject petitioner's contention, improperly raised for the first time in her reply memorandum of law, that NYCHA admitted an allegation in the Petition that it had failed

* 8]

to send the Notices of Review. Petitioner relies on NYCHA's response to paragraph 13 of the Petition and claims that paragraph 13 alleges that NYCHA did not send notice that the Hearing Officer's decision was under review by the Board. As the court and counsel for NYCHA confirmed during the December 18, 2009 conference call, the copy of the Verified Petition filed with the court and the copy served on NYCHA do not contain this allegation. Rather, paragraph 13 of the coy petitioner filed and served reads: "On or about August 13, 2008, the then Members of the Board of NYCHA rejected the decision of the Hearing Officer and remanded the matter for a new administrative hearing." The paragraph does not include any allegation concerning whether NYCHA mailed the Notices of Review.

Petitioner's counsel alleged during the December 18, 2009 conference call that he never received the Notices of Review. However, the Termination Procedures do not require NYCHA to mail a Notice of Review to counsel.

Petitioner's Further Submission

Counsel for Petitioner acknowledges that a draft petition was inadvertently served. Petitioner adds that although the petition served on respondent does not specifically allege that the respondent failed to send petitioner or her attorney a notice that the first decision was under review by the members of NYCHA, it does clearly allege in both the Notice of Petition and Verified Petition that the decision which is the subject of review in this proceeding is "...contrary to the agency's own regulations, contrary to law...and was violative of petitioner's due process rights..."

The hearing record clearly shows that petitioner's counsel timely raised the objection to the right of respondent's agency to subject the petitioner to a second hearing on substantially the

same charges.

No "Notice of Review" is included in the administrative record provided by respondent in its Verified Answer (despite six months' of adjournments at the request of respondent to prepare the full record.) No "Notice of Review" was served on petitioner's counsel despite his appearance during the entire first and second administrative proceedings and being sent all other notices and decisions. Respondent now submits not one but two "Notice of Review" documents it purports were sent to petitioner (which petitioner denies receiving).

Since the respondent admittedly failed to serve a copy of the critical Notice of Review on petitioner's counsel, any reliance by respondent on the legal effect of such notice should be estopped and precluded.

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]).

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 Envtl. 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]).

Final Determination

The Housing Authority is obliged to follow procedures which ensure that due process is accorded the tenant subjected to eviction proceedings (*Escalera v New York City Hous. Auth.*, 425 F2d 853 (2nd Cir. 1970), *cert denied* 400 US 853; *Matter of Vinson v Greenburgh Hous. Auth.*, 29 AD2d 338, *affd* 27 NY2d 675).

The Termination of Tenancy Procedures provides, in pertinent part, that:

11. The decision of the Hearing Officer shall be binding on the Authority, which shall take all action, or refrain from any action, necessary to carry out the decision, unless notice is mailed to the tenant or his/her representative within ten (10) days from the date of such decision that the decision is under review by members of the Authority.

The purpose of requiring that notice be given to the tenant before the hearing is to insure that the tenant is adequately informed of the nature of the evidence against him so that he can effectively rebut that evidence.

If NYCHA had failed to follow its own administrative procedures, this court would nullify NYCHA's determination. (*See Garner v Tuckahoe Housing Auth.*, 81 A.D.2d 915 [2nd Dept 1981], cited in *Brown v Popolizio*, 166 A.D.2d 44 [1st Dept 1991]) [Where NYCHA fails to follow its own procedures in terminating a public housing tenant, the termination must be annulled .] However, in the instant case, the record establishes that NYCHA did, in fact, follow its "notice" procedures.

The court is disinclined to follow petitioner's suggestion that since the respondent admittedly failed to serve a copy of the critical Notice of Review on petitioner's counsel, any reliance by respondent on the legal effect of such notice should be estopped and precluded. As

the Termination of Tenancy Procedures provides, notice must be mailed to the tenant *or* his/her representative.

And, the record establishes that substantial evidence before the hearing officer supports the charges against petitioner.

Conclusion

Based on the foregoing, this court concludes that NYCHA properly terminated petitioner's tenancy after an impartial hearing officer sustained charges that petitioner (1) attempted to assign, sublet, or transfer possession of her apartment without NYCHA's permission or consent; and (2) permitted unauthorized occupants to reside in her apartment. And, said determination by NYCHA was neither arbitrary nor capricious.


Further, this court concludes that NYCHA properly complied with its Termination of Tenancy Procedures in terminating petitioner's tenancy. As such, it is hereby

ORDERED and ADJUDGED that the application of Petitioner Georgina Diaz for an order and judgment, pursuant to Article 78 of the CPLR, annulling and vacating the order of the respondent Richard Elias Morales (respondent), as Chairman of the New York City Housing Authority (NYCHA), dated March 4, 2009, which adopted the recommendation of a hearing officer that petitioner be evicted from her apartment for allegedly having unauthorized boarders in her apartment, on the grounds that the respondent's determination violates his agency's own regulations, is contrary to law, arbitrary and capricious, lacked substantial evidence in support thereof and was violative of petitioner's due process rights under the United States and New York State Constitution, **is denied in its entirety, and the instant Verified Petition is dismissed.** And it is further

ORDERED that counsel for respondent shall serve a copy of this order with notice of entry within twenty (20) days of entry on counsel for petitioner.

This constitutes the decision and order of this court.

Dated: January 29, 2010



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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