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

PRESENT: HON. CAROL EDMEAD PART 35

Index Number : 402739/2009

WATKINS, RENEE

vs

NYC HOUSING AUTHORITY

Sequence Number : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 3/8/10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

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 Article 78 application is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the application of petitioner Renee Watkins for an order and judgment, pursuant to CPLR Article 78, reversing the determination of respondent New York City Housing Authority (NYCHA), dated November 7, 2007, **is denied in its entirety and the instant 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 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: 3/8/10

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 ☐ REFERENCE

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

x

In the Matter of the Application of
RENEE WATKINS,

Index No. 402739/09

Petitioner,

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

x

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Renee Watkins (petitioner) moves for an order and judgment, pursuant to CPLR Article 78, reversing the determination of respondent New York City Housing Authority (NYCHA), dated November 7, 2007.

Background

Prior to bringing charges against petitioner's tenancy, on two occasions, NYCHA requested petitioner meet with the NYCHA development management to discuss her "chronic" rent delinquency. Petitioner failed to appear for both appointments. Additionally, on three separate occasions, NYCHA requested petitioner meet with the NYCHA development management to discuss her breach of rules and regulations in failing to sign a new lease agreement. Petitioner failed to appear for all three appointments. The NYCHA development management also attempted to contact petitioner by telephone and in person, to no avail.

NYCHA preferred charges against petitioner on September 13, 2007, for chronic rent delinquency inasmuch as petitioner had paid her rent late or not at all for at least eight months between August 1, 2006 and August 1, 2007, and for breach of rules and regulations for her refusal to sign a new lease agreement. Petitioner did not appear at her administrative hearing on October 18, 2007 and Hearing Officer Joan Pannell (Hearing Officer) issued a decision recommending termination of petitioner's tenancy, dated October 19, 2007. NYCHA's Board approved the Hearing Officer's decision. Six months after NYCHA approved the Hearing Officer's decision to terminate petitioner's tenancy, petitioner attempted to apply to open her default in May 2008. Instead of submitting a request to the Impartial Hearing Office, petitioner mailed a letter to the General Counsel of NYCHA's Law Department.

In June 2008, as petitioner's letter to open her default was being transferred to the Impartial Hearing Office and before the Hearing Officer had an opportunity to consider petitioner's request, petitioner commenced an Article 78 proceeding against NYCHA to challenge the October 2007 determination terminating her tenancy. NYCHA cross moved to dismiss said Petition as premature; petitioner failed to exhaust administrative remedies. By order and judgment dated November 13, 2008, and the transcript So Ordered on February 9, 2009, Justice Marcy Friedman dismissed the Petition noting that petitioner's claims should have been made to NYCHA by an application requesting vacateur of the default.

Thereafter, NYCHA considered petitioner's May 2008 letter as an application to reopen her default. Petitioner's basis for missing her hearing was that the notice went to another party under another address; she was unaware of the charge against her or that a default could be rendered by the Hearing Officer. Her defense to chronic late rent payments was that she had

made consistent advanced rent payments until January 2007. And, she argued that she was not required to sign a new lease because it would be a violation of her tenant's rights. Petitioner indicated that she did not want a new hearing under NYCHA provisions because of NYCHA's lack of good faith in handling the matter. NYCHA opposed petitioner's request arguing that she failed to establish a reasonable excuse for her failure to appear and state a meritorious defense to the charges. On August 6, 2009, the Hearing Officer denied petitioner's application to open her default.

Petitioner's Contentions

NYCHA's harassing termination of petitioner's tenancy appears to have been precipitated upon notification to NYCHA that NYCHA received and retained a huge rent overpayment from HRA for petitioner's benefit.

The HUD federal code does not support the contention by NYCHA that a tenant is to cancel an existing lease for a new one. NYCHA cited federal regulations Title 24 CFR 966.4 (1)(2)(i)(iv) which says nothing to address NYCHA's request to change over to a new lease in lieu of petitiioner's federal lease.

Late payments did not ensue until HRA took over petitioner's rent payments in January 2007, when petitioner became ill. Rent payments are still current to date.

Petitioner was unaware that the "Notice to Vacate" was actually a hostile legal proceeding for which a tenant could be brought up on charges. And requesting a new hearing did not appear to be the appropriate solution for this miscommunication issue and time was wasted.

Respondent's Opposition

Petitioner's application to open her default lacked an excusable default because petitioner

failed to establish she was not properly notified of the hearing and, did not explain the reason she waited six months before moving to vacate the default. Also, by continuing to refuse to sign a new lease, petitioner remained in breach of NYCHA's rules and regulations. Petitioner's defense that she did not have to sign a new lease was in contravention of the federal regulations requiring all public housing tenants to sign the updated lease agreements.

The only issue before the court is whether the Hearing Officer properly denied petitioner's request to open her default. Petitioner cannot now raise new claims in this proceeding.

Discussion

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]).

Pell v Board of Ed. of Union Free School Dist. No...., 356 N.Y.S.2d 833 N.Y. 1974, 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, ss 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, ss 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 839.

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").

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]).

Apparently, petitioner did not realize that the requirement that all tenants sign a new lease was mandated by federal law. Pursuant to the Quality Housing and Work Responsibility Act of 1998, federal law required NYCHA to replace mon-to-month tenancies with leases renewable on an annual term. NYCHA complied by implementing a new lease agreement that incorporated the change and, thereafter, required all new and existing tenants sign the new lease during the calendar year 2001. Failure to sign shall subject a tenant to termination of tenancy proceedings for breach of rules and regulations.

Petitioner's argument that she did not receive notice of the proceedings against her is belied by the fact that based on the certified letter's tracking number, which indicates the notice was returned to NYCHA more than three weeks after it was sent to petitioner's correct address because she refused receipt and ignored the mail carrier's notice and instructions to claim the

certified letter.

Petitioner's argument that she was unaware a default could be rendered by the Hearing Officer ignores the fact that she had previously defaulted on chronic rent delinquency charges in 2002.

Conclusion

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of petitioner Renee Watkins for an order and judgment, pursuant to CPLR Article 78, reversing the determination of respondent New York City Housing Authority (NYCHA), dated November 7, 2007, **is denied in its entirety and the instant 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 days of entry on petitioner.

This constitutes the decision and order of this court.

Dated: March 8, 2010

Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD