

Matter of Arocho v Rhea
2010 NY Slip Op 31775(U)
July 7, 2010
Supreme Court, New York County
Docket Number: 403253/09
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: JOAN B. LOBIS

PART 6

Justice

ARBUO, VERONICA

Plaintiff,

- v -

RHEA, JOHN

Defendant.

INDEX NO.

403253/09

MOTION DATE

5/4/10

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to 24 were read on this motion to special proceeding

PAPERS NUMBERED

1-8

9-23

24

^{Petition}
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 petition decided in
accordance with accompanying decision and
judgment

FILED IN THE COUNTY CLERK'S OFFICE OF NEW YORK COUNTY, NEW YORK
ON MAY 11 2010 AT 10:00 AM
BY: [Signature]
CLERK OF THE SUPREME COURT

Dated: 5/7/10

[Signature]
JOAN B. LOBIS, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDGMENT SETTLE ORDER/JUDGMENT

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

-----X

In the Matter of the Application of

VERONICA AROCHO,

Petitioner,

Index No. 403253/09

For a Judgment Pursuant to Articles 78 and 30
of the Civil Practice Law and Rules,

Decision, Order and Judgment

- against -

JOHN B. RHEA, as Commissioner of the
New York City Housing Authority and NEW YORK
CITY HOUSING AUTHORITY,

Respondents.

-----X

JOAN B. LOBIS, J.S.C.

Petitioner Veronica Arocho commenced this Article 78 proceeding against respondents John B. Rhea, in his capacity as Commissioner of the New York City Housing Authority, and the New York City Housing Authority ("NYCHA" or the "Authority"), seeking a court order directing respondents to immediately "reinstitute" petitioner's Section 8 transfer voucher. NYCHA answered in opposition and asserted affirmative defenses. The petition is decided in accordance with the following decision and judgment.

NYCHA is the public housing agency that administers what is referred to as the "Section 8" housing program in the City of New York, through which the federal government provides rent subsidies to lower-income families to enable them to rent privately owned housing. 42 U.S.C. § 1437f; 24 C.F.R. § 982.151. Petitioner was a recipient of Section 8 assistance and was living with her son in an apartment located at 83-02 133 Avenue in Queens (the "Apartment"),

owned by Faysal Qurashi (the "Landlord"). The records annexed to petitioner's papers reflect that as of January 9, 2008, petitioner was paying \$208 per month in rent to the Landlord, and the remainder of the rent, \$904 per month, was covered by her Section 8 voucher. A letter dated January 10, 2008, informed petitioner that the Landlord had failed to make necessary repairs to the Apartment, despite NYCHA's written notification. The January 10, 2008 letter stated that the subsidy to the Apartment had been suspended as of October 31, 2007, and as a result, NYCHA was required to offer petitioner the opportunity to move to another apartment as an "emergency transfer." The letter informed petitioner that if the Landlord made the required repairs, petitioner should notify NYCHA's Leased Housing Department in Queens to arrange for the Apartment to be inspected. If the necessary repairs were not completed and verified within six months of the suspension date, i.e. by April 30, 2008, petitioner was informed that she would be terminated from the Section 8 program. However, she could request restoration of the Section 8 subsidy if the repairs to the Apartment were completed and verified within one year of her termination from the Section 8 program. She would also be entitled to apply for an emergency transfer voucher, so that her Section 8 subsidy could be restored at another approved apartment, as long as she applied for the transfer voucher within one year of her termination from the Section 8 program.

According to the Authority, petitioner was "moved off" the Section 8 program on April 30, 2008, six months after the Authority suspended payments of her subsidy to her Landlord. This act was memorialized by a form titled "Section 8 Move-Out Transcript" (the "Move-Out Transcript"), prepared by an employee the Leased Housing Department in Queens. Petitioner was given a "move-out code" of 99, which stands for a "Long Term Suspension." An "AA" code was

appended to her voucher number, indicating that she had been "moved off" the Section 8 program. Under remarks, the NYCHA employee wrote "Long Term Suspension. Apartment failed Inspection." The Move-Out Transcript is dated May 5, 2008. There is no date as to when notice of the move-out was provided to petitioner or the Landlord.

The next letter, dated June 9, 2008, is directed towards the Landlord. The June 9, 2008 letter informs the Landlord that on June 6, 2008, NYCHA inspected the Apartment and found a leak under the kitchen sink and a cracked ceiling in the bedroom. Based on these violations, NYCHA informed the Landlord that the Landlord's failure to remedy these violations within thirty (30) days of the inspection would result in the suspension of the subsidy paid by NYCHA. It is unclear why the June 9, 2008 letter indicates that the subsidy might be suspended when the subsidy to the Apartment had already been suspended as of October 31, 2007, and according to NYCHA, petitioner at this point was no longer a Section 8 participant.

In August 2008, petitioner submitted a written request for a transfer, giving the reason that her apartment had failed an inspection. A letter dated August 26, 2008, from NYCHA to petitioner, informed petitioner that she was scheduled to attend a Transfer Briefing Session on September 9, 2008. On September 16, 2008, petitioner was issued a transfer voucher that was set to expire in six months, on March 19, 2009. However, she remained in the Apartment, and in March 2009, the Landlord commenced a summary holdover proceeding against petitioner in Queens County Civil Court, Faysal Qurashi v. Veronica Arocho, L/T Index Number 55327/09. On April 7, 2009, petitioner stipulated to settle the summary holdover proceeding and agreed to vacate the Apartment by the end of July 2009.

On May 26, 2009, petitioner submitted a written request for an extension of her transfer voucher. On the request, she stated that she and her son had until July to be out of the Apartment by court order. Petitioner was granted a final extension of her transfer voucher, now set to expire on September 16, 2009. As of September 16, 2009, petitioner had held onto the transfer voucher for one year.

Apparently, petitioner did not vacate the Apartment by the end of July 2009. Petitioner maintains that after settling the summary holdover proceeding, she did attempt to secure a new residence that would accept her Section 8 voucher. She states that she had found a new residence and paid her new landlord a security deposit and the first month's rent. She maintains that thereafter, the new landlord refused to complete the contract paperwork with NYCHA and she was never able to move into the new residence. The petition states that she is currently seeking restitution of the monies she expended to secure the new residence.

The petition sets forth that when petitioner unexpectedly lost her new residence, she returned to the offices of the Leased Housing Department in Queens to request another extension of her transfer voucher. After appearing at the office three times (September 8, September 22, and October 5, 2009) and writing a letter to the director of the office, she was told that NYCHA could not reinstate her transfer voucher because it had already expired. On one of the occasions she appeared at the office, she was apparently told by the director that he had no discretion to extend her voucher because of the "AA" code appended to her voucher number. Petitioner was evicted from the Apartment on October 9, 2009, and according to her petition, she has yet to find a new residence.

She retained Queens Legal Services Corporation to assist her in reinstating the Section 8 voucher. Her attorneys' request, by letter, for NYCHA's voluntary reinstatement of petitioner's voucher was denied in a letter from NYCHA on December 3, 2009, which stated that based on current policy, NYCHA was unable to honor petitioner's request for an extension, and advised petitioner's counsel that petitioner could apply for public housing. This special proceeding followed.

NYCHA administers the Section 8 program in accordance with the rules and regulations promulgated by the United States Department of Housing and Urban Development ("HUD"). A "participant" in the Section 8 program is defined as someone that has been "admitted to the [Public Housing Authority ("PHA")] program and is currently assisted in the program." 24 C.F.R. § 982.4. The "admittee" to the program becomes a "participant" of the program on the "effective date of the first [Housing Assistance Payment ("HAP")] contract executed by the [Housing Authority] for the family (first day of initial lease term)." Under the Section 8 program, the participant, the owner of the unit, the Authority, and HUD each have different relationships to each other. The Authority enters into a Housing Assistance Payment ("HAP") contract with the owner of the unit, under which the Authority agrees to pay the difference between the contract rent for the unit and the tenant's share of the rent for the unit; the owner and the prospective tenant/voucher holder enter into a lease, under which the tenant is obligated to pay her portion of the contract rent; and HUD finances the voucher covering the Authority's share of the rent pursuant to the Annual Contributions Contract with NYCHA.

Section 8 landlords are required to maintain the units in accordance with federal Housing Quality Standards ("HQS"). 24 C.F.R. §§ 982.401, *et seq.* The Authority must inspect

units annually to ensure that they are properly maintained. 24 C.F.R. § 405. An owner of a unit that fails an inspection due to a non-life threatening defect has thirty (30) days to remedy the problem. 24 C.F.R. § 982.404(a)(3). The PHA is not permitted to make subsidy payments to an owner whose unit has uncorrected defects. Id. The HAP contract between the PHA and the owner will be automatically terminated, by operation of federal law, one hundred eighty (180) days after the last date of payment of a subsidy. 24 C.F.R. § 982.455. NYCHA's own policy, as of August 2004, is to revoke Section 8 participants' vouchers after one hundred eighty (180) days of suspended subsidy payments, except in special circumstances not applicable herein. NYCHA Leased Housing Department ("LHD") Memorandum #06-16 (annexed to respondent's papers). NYCHA has determined that revoking the voucher when there has been no supporting HAP contract for more than six months, especially if the apartment is suspended for unrepaired defects, is in the "best interests of the [Section 8] program[.]" Id.

Even after revocation of the voucher, however, tenants still retain certain rights to restoration. Section 982.314 states that a family may move to a new unit with continued tenant-based assistance if the PHA has terminated the HAP contract for the owner's breach. 24 C.F.R. §982.314(b)(1)(i). NYCHA's policy is that tenants who have been terminated for suspended subsidy payments may obtain restoration to the Section 8 program by requesting a transfer voucher within one year of the termination date; if the tenant fails to request the transfer voucher within one year, the right to a transfer voucher is deemed waived. LHD Memorandum #06-6. The tenant may also obtain restoration to the Section 8 program by remaining in the subject apartment, if the owner completes the mandated repairs of the defects, subject to verification by an inspection. LHD

Memorandum #06-17. If the tenant's voucher is revoked due to a termination of subsidy payments by NYCHA to the landlord, unless and until the tenant obtains restoration by either of the two methods above, NYCHA treats that tenant as having been terminated from assistance. Id.

With respect to the voucher, federal law requires that the initial term of a voucher must be at least sixty (60) days. 24 C.F.R. § 982.303(a). "At its discretion, the PHA may grant a family one or more extensions of the initial voucher term in accordance with PHA policy as described in the PHA administrative plan." Id. NYCHA's policy is to give all vouchers, including transfer vouchers, an initial term of one hundred eighty (180) days, which is three times as long as the minimum federal term; however, NYCHA generally prohibits extensions. LHD Memorandum #06-5.

Petitioner argues that NYCHA violated her rights under federal law by refusing to reissue her a transfer voucher. Citing 24 C.F.R. § 982.314(b), petitioner argues that she is entitled to a transfer voucher, and that NYCHA's refusal to reissue petitioner's transfer voucher without any basis other than the expiration of an internally mandated timeline is a violation of federal law. Accordingly, petitioner argues that she is entitled to a judgment of mandamus compelling NYCHA to reinstate her transfer voucher. Additionally, citing 24 C.F.R. § 982.552, petitioner states that federal law permits termination from the Section 8 program only based on the tenant's breach of his or her program obligations or the obligations of her lease. She claims that NYCHA's refusal to reinstate the transfer voucher denied her the ability to secure a new residence for herself and her son. Petitioner maintains that this de facto termination violates federal law prohibiting termination of a participant for reasons other than the tenant's own fault.

NYCHA, in opposition, argues that its determination is rational and in compliance with its policies. The burden is on voucher holders to timely submit a rental package in advance of the expiration of the transfer voucher. NYCHA maintains that it gave petitioner ample time to find an approved rental and submit a rental package, but that she “neglected to use this time wisely or efficiently.” NYCHA discredits petitioner’s explanation that she had secured new housing but the landlord reneged and refused to sign a HAP contract, because a HAP contract is a prerequisite for participation in the Section 8 program, and petitioner never submitted an approvable rental package during the term of the voucher.

In response to petitioner’s argument regarding NYCHA’s “internally mandated timeline” for the expiration of transfer vouchers, NYCHA asserts that federal regulations authorize it to make determinations about extensions in accordance with its internal policies. 24 C.F.R. § 982.303(b)(1). NYCHA argues that its own timeline is significantly longer than the federally mandated timeline for allowing Section 8 participants to secure housing under a transfer voucher. Its policy is to restrict extensions because extensions may preclude the issuance of new vouchers; funding for Section 8 is limited and only a certain number of subsidies can be provided each year. NYCHA also claims that extensions cause an “undue administrative burden.” Therefore, NYCHA argues that its policy of discouraging extensions of transfer vouchers is rational. NYCHA further argues that petitioner is not entitled to a writ of mandamus because NYCHA’s determination to deny or grant a request for an extension is discretionary, not mandatory. Thus, NYCHA argues that mandamus does not apply, because an extension is not a ministerial act and petitioner has no clear legal right to the relief requested.

Finally, NYCHA argues that petitioner was afforded all of the due process to which she was entitled. Petitioner was not entitled to a hearing, and she received sufficient notice of the expiration of her transfer voucher, the dates of which are prominently displayed on the face of the voucher. NYCHA further maintains that petitioner's argument that she is still a Section 8 participant is inaccurate. Citing 24 C.F.R. § 982.455, NYCHA maintains that her participation ended by operation of law after six months of her last paid subsidy, and she failed to restore her status to the program by timely using her transfer voucher. NYCHA's position is that petitioner is not entitled to indefinitely hold a transfer voucher, that she was not deprived of any property rights, and that, according to the voucher, tenancy is not guaranteed.

In reply, petitioner argues that NYCHA has improperly confused the rights of Section 8 "participants" with Section 8 "applicants." Petitioner argues that by NYCHA's own rules, participants with suspended subsidies remain participants in the Section 8 program indefinitely, and their subsidies may be restored at any time. Participants may not be terminated from the program without notice, and may not be denied the right to transfer except for reasons set forth in the regulations. Petitioner argues that she remains a Section 8 participant, and that NYCHA's refusal to extend her transfer voucher amounts to a termination of participation in the program without the notice required in federal regulations, and on grounds not permitted by the federal regulations.

Regarding petitioner's claim that she is entitled to a writ of mandamus, "a mandamus to compel may not force the performance of a discretionary act, but rather only purely ministerial acts to which a clear legal right exists." In re Anonymous v. Comm'r of Health, 21 A.D.3d 841, 842

If a HAP contract is terminated due to the owner's breach, NYCHA considers the participant "terminated" from assistance only until she obtains restoration by virtue of the Landlord remedying the HSQ violations, which apparently petitioner's Landlord did not do, or until she requests a transfer voucher within one year from the termination date, which petitioner did do. Essentially, when the transfer voucher was issued, petitioner became a new "voucher holder" and held onto that voucher for one year until it finally expired on September 16, 2009. Since NYCHA gave petitioner the opportunity to move with continued tenant-based assistance, and since the federal rules specifically leave extensions of vouchers to the PHA, it cannot be said that NYCHA violated the federal rules in refusing to extend petitioner's transfer voucher past one year. 24 C.F.R. § 982.303(a).

NYCHA's policy regarding restoration to the Section 8 program is problematic and potentially confusing for tenants who try to remain in their apartments and seek restoration. The period in which a tenant can remain in an apartment whose owner is no longer receiving federal subsidy money is seemingly unlimited as far as NYCHA is concerned. However, the tenant is likely liable to the owner for the market rent. If a tenant stays in an apartment with defects after NYCHA stops paying the subsidy with the hope that the repairs will be fixed by the owner, thereby restoring the subsidy, the tenant risks being evicted by the owner for nonpayment if she cannot cover the market rent. The tenant also risks foregoing the chance to request a transfer voucher within one year of the termination of assistance. However, this was not a risk that this petitioner took; she applied for and received a transfer voucher within the time prescribed by NYCHA, was restored to the Section 8 program as a transfer voucher holder, and was given one year to find suitable housing. The

court is constrained to defer to NYCHA's determination not to extend or reissue petitioner a transfer voucher past the one year that she held the transfer voucher. Accordingly, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: July 7, 2010

ENTER:



JOAN B. LOBIS, J.S.C.

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