Rivers v Rhea

2010 NY Slip Op 31894(U)

July 15, 2010

Supreme Court, New York County

Docket Number: 401073/10

Judge: Eileen A. Rakower

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[* 1]

SCANNED ON 7/20/2010

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

PRESENT: Hon. EILEEN A. RAKOWER, *Justice* — PART 15

RIVERS,

Petitioner,

- v -

RHEA,

Respondent.

INDEX NO. 401073/10

MOTION DATE ______

MOTION SEQ. NO. 1

MOTION CAL. NO. ______

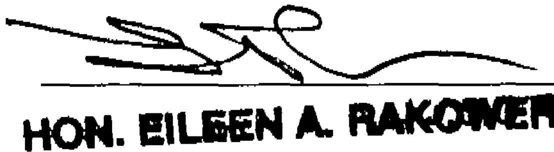
The following papers, numbered 1 to ____ were read on this motion for/to

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answer — Affidavits — Exhibits	2, 3
Replying Affidavits	4

Cross-Motion: X Yes No

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION/ORDER

Dated: July 15, 2010



HON. EILEEN A. RAKOWER

J.S.C.

Check one: XFINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: ___ DO NOT POST ___ REFERENCE

___ SETTLE ORDER _X_ SETTLE JUDGMENT

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED:

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

---X

PAMELA RIVERS,

Petitioner,

- against -

JOHN B. RHEA, as Chairman of the New York City Housing Authority, THE NEW YORK CITY HOUSING AUTHORITY and 104 W. 174th Corp.,

Respondents.

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Index No. 401073/10

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER

Petitioner brings this Article 78 petition by order to show cause seeking annulment of Respondent New York City Housing Authority's ("NYCHA") decision to terminate her Section 8 housing subsidy, as well as its refusal to restore her benefits.

According to the petition, Petitioner has been a participant in the Section 8 program administered by NYCHA since approximately December 9, 2003. She currently resides in Apartment 3B in 104 West 174th Street in the Bronx, a rent stabilized apartment ("the current apartment"). Prior to living in the current apartment, Petitioner lived in a multiple dwelling unit located at 1247 College Avenue, Apartment 2, in the Bronx ("the prior apartment"). In 2007, monthly rent in the prior apartment was $976.00; Petitioner's housing subsidy paid $839.00, while Petitioner herself paid $137.00.

On or around August 31, 2007, the housing subsidy for the prior apartment was suspended after a November 30, 2006 inspection by NYCHA revealed HQS violations. Accordingly, pursuant to NYCHA procedures, Petitioner was moved out of the apartment, and Section 8 payments for the prior apartment ceased. Due to the prior landlord's failure to repair the conditions in the prior apartment, and pursuant to NYCHA procedures, Petitioner received an emergency transfer voucher on or

around May 27, 2008. Due to her inability to find another apartment, Petitioner obtained an extension of the voucher, which expired on November 27, 2008, until December 31, 2008,.

On or around January 5, 2009, Petitioner (at this point living in a shelter with her children) requested a second emergency transfer voucher. She attended a mandatory transfer briefing session on March 3, 2009, and was approved by NYCHA for a second transfer voucher dated March 3, 2009, which would expire on September 3, 2009. Petitioner states that she found her current apartment in June of 2009 and submitted her transfer package the following month. NYCHA states that it received Petitioner's transfer package on September 1, 2009. Petitioner moved out of the shelter and into the current apartment in or around July of 2009, prior to the approval. Petitioner states that she moved in with the expectation that her Section 8 subsidy would be restored, and that she would use money from her tax return to pay rent until that time. NYCHA requested an inspection of the apartment on September 1, 2009.

The current apartment failed an inspection for HQS violations on September 18, 2009. However, the apartment subsequently passed inspection on October 15, 2009. Petitioner states that she was advised by a NYCHA representative that, upon passing inspection, Petitioner would receive a letter from NYCHA confirming the restoration of her Section 8 subsidy. Not having received any correspondence from NYCHA, Petitioner contacted NYCHA in the first week of November, and was advised that NYCHA was waiting for the Section 8 inspection report and would call Petitioner upon receipt thereof.

However, on or around November 24, 2009, the NYCHA representative called Petitioner and informed her that her Section 8 subsidy had been terminated since August 31, 2007, and that restoration of her subsidy was therefore denied. Petitioner states that this is the first time that she was advised that her subsidy had been terminated.

On or around December 17, 2009, Petitioner's landlord commenced a nonpayment proceeding in Housing Court. That proceeding has been stayed by this court pending the present petition.

Petitioner alleges that NYCHA's termination of her Section 8 subsidy, and its

refusal to restore same is arbitrary and capricious, affected by error in law, and violative of due process.

NYCHA has cross-moved to dismiss the Petition on the grounds that the petition is barred by the four month statute of limitations, which NYCHA claims began to run on November 24, 2009, when Petitioner received telephonic notice of the termination of her subsidy.

CPLR §7803 provides that judicial review over agencies such as NYCHA is limited to whether a challenged 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. It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy-Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]).

NYCHA's Leased Housing Department Memo ("LHD 04-42") provides that when a tenant's Section 8 housing subsidy has been suspended for six consecutive months due to HQS violations (known as "Suspension Code A"), the tenant loses active voucher status. However, LHD 04-42 provides that these tenants "must receive the same specific protections they would receive as active voucher holders," as detailed in LHD 04-43. LHD 04-43 provides that Code A tenants enjoy "specific tenant protections as if they were continuing as active voucher holders." LHD 04-43 further provides that "[NYCHA] staff shall follow standard procedure to process" a Code A tenant's request for a transfer voucher, "even if after the effective date of the tenant's removal from our program data base as an active voucher holder." If the Code A tenant submits an approvable rental package within the duration of his or her transfer voucher, "staff shall restore the tenant to the program as an active voucher holder, as of the effective date of the new rental." LHD 06-17 further provides that Code A tenants

> shall have the opportunity to gain restoration to our Section 8 program... [b]y moving to another apartment, if the tenant

> requests a transfer voucher prior to termination or within one year of the termination date, receives a transfer voucher, and then submits an approvable rental package leading to a completed Section 8 rental in that apartment.

Based upon its review of the record, the court finds that NYCHA's termination of Petitioner's Section 8 subsidy was arbitrary and capricious, and affected by error in law, and therefore must be annulled. Prior to terminating a tenant from the Section 8 program, a public housing agency must comply with the three-stage written notice requirements set forth in the consent decree in *Williams v. New York City Housing Authority* (81 Civ. 1801 [S.D.N.Y. 1994])[1] (*see Fair v. Finkle*, 284 A.D.2d 126 [1st Dept. 2001]). It is undisputed that no such notice was provided here, and the above cited NYCHA memoranda make clear that Petitioner, as a Code A tenant, was to be accorded the same procedural protections as active voucher holders (*see Robinson v. Martinez*, 308 A.D.2d 355 [1st Dept. 2003]) (Article 78 petition challenging termination of tenancy properly granted where NYCHA failed to abide by its own procedures). Moreover, when a party is entitled to written notice of an agency determination, the statute of limitations does not begin to run until such notice is received (*see 90-92 Wadsworth Ave. Tenants Ass'n*, 227 A.D.2d 331 [1st Dept. 1997]). Accordingly, the petition is not barred by the statute of limitations.

Finally, NYCHA's request that it be granted thirty days to interpose an answer in the event that it does not prevail on the cross-motion is denied. As stated by the First Department,

> *CPLR 7804(f)* should not be construed to give a respondent two bites at the apple by permitting the submission of duplicative pleadings on the merits (*CPLR 7804[d]*). The procedural aspects of this matter are inextricably intertwined with the issue to be decided, the question presented is straightforward and there is no reason to protract the proceeding.

(*Crooms v. Corriero*, 206 A.D.2d 275, 277 [1st Dept. 1994]).

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[1]The consent decree defines "termination" as "a discontinuance for any period of Housing Assistance payments *or eligibility* under the Section 8 program" (emphasis added).

Accordingly, Petitioner is entitled to restoration to the Section 8 program. Wherefore it is hereby

ORDERED that the petition is granted and NYCHA's termination of Petitioner from the Section 8 program and its refusal to restore Petitioner to same is hereby annulled; and it is further

ORDERED that the parties are directed to settle judgment in accordance with the foregoing by Friday, July 30, 2010.

This constitutes the decision and order of the Court. All other relief requested is denied.

DATED: July 15, 2010

EILEEN A. RAKOWER, J.S.C.