

Matter of Hill v New York City Hous. Auth.

2010 NY Slip Op 31961(U)

July 21, 2010

Sup Ct, NY County

Docket Number: 400385/10

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD
Justice

PART _____

Index Number : 400385/2010
HILL, MONIQUE
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 7/9/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

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).

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

This Petition is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED and ADJUDGED that the application of Petitioner Monique Hill for a judgment pursuant to Article 78 of the CPLR (1) annulling the determination of respondent the New York City Housing Authority, dated September 28, 2009, approved by the NYCHA Board on October 14, 2009, to terminate petitioner's tenancy, on the grounds that the decision is arbitrary and capricious because it imposes a penalty disproportionate to the offense; or (2) alternatively, vacating and remanding the administrative decision for imposition of a punishment less severe than termination of tenancy; and (3) awarding petitioner reasonable attorney's fees incurred in prosecuting this proceeding in an amount to be determined by the Court, is denied in its entirety and the 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.

Dated: 7/21/10


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

In the Matter of the Application of
MONIQUE HILL

Index No. 400385/10

Petitioner

DECISION/ORDER

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

-against-

**THE NEW YORK CITY HOUSING AUTHORITY
and JOHN B. RHEA, as Chairman and Member
of the New York City Housing Authority,**

Respondents.

EDMEAD, J.S.C.

MEMORANDUM DECISION

Petitioner Monique Hill (petitioner) moves for a judgment pursuant to Article 78 of the CPLR (1) annulling the determination of respondent the New York City Housing Authority (NYCHA), dated September 28, 2009, approved by the NYCHA Board on October 14, 2009, to terminate petitioner's tenancy, on the grounds that the decision is arbitrary and capricious because it imposes a penalty disproportionate to the offense; or (2) alternatively, vacating and remanding the administrative decision for imposition of a punishment less severe than termination of tenancy; and (3) awarding petitioner reasonable attorney's fees incurred in prosecuting this proceeding in an amount to be determined by the Court.

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).

Background

Petitioner is a thirty one year old NYCHA resident living in the Lincoln Houses, located on 2140 Madison Avenue, Apt. 4C New York, NY (the subject premises), for approximately three years with her nine year old daughter, Niaja L. Nazario. Prior to residing in the subject premises, with the exception of the time period between August 2005 through March 2007, when petitioner resided in a homeless shelter, petitioner resided with her mother in a NYCHA Development at Vladecks Houses since her birth. She has approximately a twenty nine year history of NYCHA residency with a spotless complaint record other than the instant dispute.

In or about November 2008, the manager of Lincoln Houses learned that the police had arrested petitioner for assault on October 14, 2008. On November 13, 2008, the manager met with petitioner to discuss the incident. Petitioner claimed her encounter with the other person involved only "incidental contact." The manager advised petitioner the matter would be forwarded for a termination-of-tenancy hearing at which petitioner could be represented by counsel.

In December 2008, the manager offered petitioner two additional opportunities to visit the office to discuss her chronic rent delinquency and failure to submit annual income recertification papers. Petitioner did not appear for either scheduled appointment.

By notice and specification of charges dated April 9, 2009, NYCHA charged petitioner with non-desirability, breach of rules and regulations, and chronic rent delinquency. Specifically, NYCHA alleged that on or about October 14, 2008, petitioner, on or in the vicinity of NYCHA property, struck, hit or punched another person causing injury and pain. NYCHA further alleged petitioner had repeatedly paid rent late from March 1, 2008 to February 1, 2009 and did not pay

any rent for July 2008 to February 1, 2009. The notice set a hearing date of May 22, 2009 and advised petitioner she could be represented by an attorney or another representative of her choice.

Petitioner appeared *pro se* on August 18, 2009 and confirmed she would represent herself. The hearing resumed on September 22, 2009. Ms. Vega (the alleged assaulted person) and petitioner both testified. After reviewing the testimony and evidence presented, the hearing officer sustained the charges and entered a disposition of termination. The hearing officer also sustained the chronic rent delinquency charge noting that although petitioner had recently become current with rent this “did not negate the fact that she had continuously and repeatedly been late in her payment of rent.”

On October 14, 2009, the NYCHA Board adopted the hearing officer’s decision and disposition and issued a Determination of Status terminating petitioner’s tenancy.

Petitioner’s Contentions

Petitioner does not challenge the findings, but in light of the fact that her alleged chronic rent delinquency was caused by public assistance error and the non-desirability was based on one incident with one tenant, the termination of a long term tenancy under these circumstances is a penalty disproportionate to the offense and a breach of NYCHA’s rules and internal procedures.

Further, NYCHA failed to follow its own procedures because NYCHA failed to interview petitioner accused on non-desirability and failed to make an investigation into the source of the problem.

Respondents’ Contentions

The penalty was appropriate in light of the fact that the hearing officer concluded a mitigated sanction was not appropriate, partly as a consequence of the hearing officer’s rejection

of petitioner's credibility and finding that petitioner's behavior was triggered by her perception of being "disrespected." The hearing officer specifically concluded that there was no assurance that petitioner would not again react in a violent way if she once again believed herself or a family member to have been "disrespected." This court should defer to the hearing officer's credibility assessments.

As to petitioner's claim that NYCHA failed to comply with its own rules and regulations, in fact the NYCHA manager met with petitioner to discuss the assault and petitioner misrepresented to him that she had only "incidental contact" with the victim of her aggression. The NYCHA manager also offered petitioner subsequent opportunities to discuss her chronic rent delinquency but petitioner did not respond to the manager's letters or attend either of the appointments scheduled to discuss that matter.

And, although petitioner claimed that her rent delinquency was due to the Department of Social Services erroneously closing her public assistance case, petitioner presented no evidence to support this claim and, in any event, waived it by failing to raise it at the administrative hearing. The claim is outside the record and the Court's review here is limited to the record adduced before the agency.

Petitioner's Reply

Petitioner reiterates that the single incident of non-desirability does not rise to the level of the course of conduct necessary to support a determination of termination. Likewise, petitioner's rent delinquency absent a breach of probation is not sufficient to support a determination of termination. Finally, the hearing officer's conclusion of law that probation is not an option under the facts of this case is contrary to NYCHA's Management Manual and the

case law interpreting it.

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 the DHCR'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]).

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").

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]).

Likewise, the “construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld” (*In re Barie v Lavine*, 40 NY2d 565, 568, 388 NYS2d 878 [1976]). “Where, however, the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight. And, of course, if the regulation runs counter to the clear wording of a statutory provision, it should not be accorded any weight” (*Kurcsics v Merchants Mutual Ins. Co.*, 49 NY2d 451, 459, 426 NYS2d 454 [1980]; see *Tze Chun Liao v New York State Banking Dept.*, 74 NY2d 505 [1989]). If the agency's implementation of its powers violates the clear enablement of the statute, the Court need accord it no weight; the Court's exclusive judicial reviewing duty in such instances requires it to act autonomously (*Tze Chun Liao v New York State Banking Dept.*, 74 NY2d 505 [1989] citing *Kurcsics*, at 459).

This court finds that substantial evidence supports NYCHA's determination to terminate petitioner's tenancy. The charge of non-desirability is substantiated by the record of the hearing and the conclusion reached by the hearing officer. The finding by the hearing officer that the testimony of Ms. Vega concerning the incident and encounters with petitioner was “credible and reasonable” is itself credible. And, it is well settled that the hearing officer's credibility determination should not be disturbed. Where from the evidence two conflicting inferences may be drawn, the duty of weighing the evidence and making the choice rests solely with the

administrative agency.

More importantly substantial evidence is inadequately refuted by petitioner with respect to the charge of chronic rent delinquency.

Further, this court finds that the penalty imposed by NYCHA is no so disproportionate to the offense as to be shocking to one's sense of fairness. The decisions in the First Department sustaining a NYCHA decision to terminate a tenancy as a result of an assault are legion: *See, e.g., Stafford v Hernandez*, 52 ad3D 304 [1ST Dept 2008]; *Smalls v New York City Hous. Auth.*, 25 AD3d 478 [1st Dept 2006].

This court finds the remaining bases for annulling or remanding the action to be without merit.

Conclusion

Based on the foregoing, it is hereby

ORDERED and ADJUDGED that the application of Petitioner Monique Hill for a judgment pursuant to Article 78 of the CPLR (1) annulling the determination of respondent the New York City Housing Authority, dated September 28, 2009, approved by the NYCHA Board on October 14, 2009, to terminate petitioner's tenancy, on the grounds that the decision is arbitrary and capricious because it imposes a penalty disproportionate to the offense; or (2) alternatively, vacating and remanding the administrative decision for imposition of a punishment less severe than termination of tenancy; and (3) awarding petitioner reasonable attorney's fees

incurred in prosecuting this proceeding in an amount to be determined by the Court, is denied in its entirety and the 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.

Dated: July 21, 2010



Carol Robinson Edmead, J.S.C.

HON. CAROL EDMED

UNFILED JUDGMENT

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