

<b>Matter of Foxe v New York City Hous. Auth.</b>
2010 NY Slip Op 32755(U)
October 1, 2010
Sup Ct, NY County
Docket Number: 401357/2010
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 35

DENISE FOX

INDEX NO. 401357/2010

MOTION DATE 8-12-10

MOTION SEQ. NO. 00/

MOTION CAL. NO. \_\_\_\_\_

- v -

NEW YORK CITY HOUSING AUTHORITY

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

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

**FILED**  
OCT 05 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

PAPERS NUMBERED

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The instant application is decided in accordance with the accompanying Memorandum Decision. It is hereby

**ORDERED and ADJUDGED** that the application of Petitioner Denise Foxe, for an order and judgment, pursuant to Article 78 of the CPLR, annulling and vacating the order of the respondent New York City Housing Authority, dated February 17, 2010, 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.

Dated: 10-1-10

[Signature]  
J.S.C.

**HON. CAROL EDMEAD**

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

\_\_\_\_\_  
In the Matter of the Application of  
**DENISE FOXE,**

Petitioner,

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

-against-

**NEW YORK CITY HOUSING AUTHORITY,**

Respondent.  
\_\_\_\_\_

EDMEAD, J.S.C.

Index No. 401357/2010

DECISION/ORDER

**FILED**  
OCT 05 2010  
COUNTY CLERK'S OFFICE  
NEW YORK

**MEMORANDUM DECISION**

Petitioner Denise Foxe (petitioner) moves for an order and judgment, pursuant to Article 78 of the CPLR, annulling and vacating the order of the respondent New York City Housing Authority (NYCHA or respondent), dated February 17, 2010, which approved the decision and disposition in this proceeding of a hearing officer finding the petitioner ineligible for continued occupancy, and that petitioner's tenancy shall therefore be terminated.

*Background*

On or about June 14, 2004, petitioner applied for and as granted participation in NYCHA's Rental Assistance Amnesty Payment Agreement (2004 Amnesty Agreement). Under that agreement, petitioner recognized that she owed NYCHA \$9,751.00 in unpaid rent based on unreported income or assets for the period of 1998 to 2001. To repay that debt, petitioner pledged to make monthly payments to NYCHA, in addition to her rent, starting from July 1, 2004, until the \$9,751.00 was fully paid. If petitioner did not make the payments, the entire

unpaid balance of the debt would become due and NYCHA was entitled to “use any legal steps available to collect such sums, includ [ing], but not limited to ... the commencement of termination of tenancy.”

Petitioner violated the 2004 Amnesty Agreement by failing to make her monthly payments. On August 9, 2007, NYCHA contacted petitioner to request she meet with development management to discuss her failure to adhere to the 2004 Amnesty Agreement. Petitioner failed to reply to that notice, and on August 15, 2007 development management again sent petitioner a notice requesting she contact management to discuss the issue. Management subsequently notified petitioner it would forward her tenant folder for the preparation of charges, and she would be offered an opportunity to appear at a hearing at which she could be represented by counsel or a representative of her choice.

Instead of proceeding with a hearing as was her right, petitioner chose to settle the charges by entering into a stipulation of settlement with NYCHA (2008 Stipulation). In exchange for the preservation of her tenancy, petitioner admitted the charges and agreed to (1) repay, pursuant to a Payment Affidavit and Payback Agreement (Payback Agreement), the remaining unpaid rent (referred to as “retroactive charges”) totaling \$8,646, by paying NYCHA \$150. for 57 months and paying \$96 for the 58<sup>th</sup> month; and (2) subject her tenancy to a five-year probation.

In the 2008 Stipulation, petitioner agreed that NYCHA could seek to terminate her tenancy for violation of probation under the Termination Procedures if she did not comply with its conditions.

Petitioner again did not make her monthly payments and NYCHA preferred charges

against her. On May 6, 2009. On September 24, 2009, petitioner appeared *pro se* before NYCHA hearing officer Ester Tomicic-Hines (the Hearing Officer). After the Hearing Officer recounted the documentary evidence and the witnesses' testimony, she sustained the charges and recommended the termination of petitioner's tenancy. Thereafter, the NYCHA Board reviewed and then adopted the Hearing Officer's decision denying petitioner's remaining-family member grievance.

Petitioner then commenced this proceeding on May 10, 2010

*Petitioner's Contentions*

Petitioner promises in her Petition in this Article 78 proceeding that she is able to pay the past due payment and that her daughter will help her with \$150.00 a month towards her rent until her "retroactive charges" is paid in full.

*Respondent's Opposition*

To begin, contrary to petitioner's assurances in her Petition, she has not made one additional payment towards the retroactive payments since her last hearing date in January 2010. Although petitioner did not make timely payments of retroactive rent as she had agreed, she nonetheless challenges NYCHA's actions as arbitrary and capricious.

NYCHA's determination that petitioner has violated her probation and the Payback Agreement is supported by substantial evidence, including: (1) the 2008 stipulation and Payback Agreement; (2) NYCHA Hayes' testimony and the confirming rent ledger showing that petitioner owed \$2,367 in outstanding payments at the time of the administrative hearing; and (3) petitioner's admission that she did not make the payments required by the Payback Agreement.

### *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 [1<sup>st</sup> Dept.1990]; *Mazel v DHCR*, 138 A.D.2d 600 [1<sup>st</sup> Dept.1988]; *Bambeck v DHCR*, 129 A.D.2d 51 [1<sup>st</sup> 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 [1<sup>st</sup> Dept.], *aff'd* 66 N.Y.2d 1032 [1985]).

### *Termination*

The penalty herein was imposed following a hearing conducted in compliance with NYCHA's termination of tenancy procedures, at which the hearing officer explained the proceedings, and petitioner availed herself of the opportunity provided to present evidence in mitigation (*see Matter of Jackson v Hernandez*, 63 A.D.3d 64, 69, 877 N.Y.S.2d 274 [2009]). Notwithstanding the hardship to petitioner resulting from termination, the penalty imposed for

violation of her agreements with NYCHA for retroactive payments does not shock the conscience ( see *Matter of Featherstone v Franco*, 95 N.Y.2d 550, 720 N.Y.S.2d 93, 742 N.E.2d 607 [2000]; *Matter of Smith v New York City Hous. Auth.*, 40 A.D.3d 235, 236, 835 N.Y.S.2d 131 [2007], *lv. denied* 9 N.Y.3d 816, 849 N.Y.S.2d 32, 879 N.E.2d 172 [2007] ).

Conclusion

This court find that NYCHA properly terminated petitioner's tenancy after an impartial hearing officer found that she failed to make timely retroactive rent payments in accordance with her repayment agreement in resolution of prior misrepresentation-of-income charges.

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

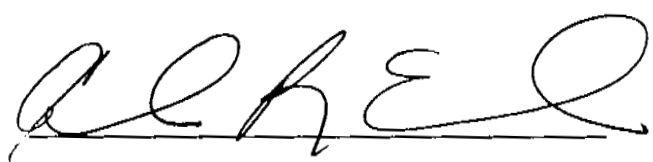
**ORDERED and ADJUDGED** that the application of Petitioner Denise Foxe, for an order and judgment, pursuant to Article 78 of the CPLR, annulling and vacating the order of the respondent New York City Housing Authority, dated February 17, 2010, is **denied in its entirety, and the instant Verified Petition 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: October 1, 2010

**FILED**  
**OCT 05 2010**  
**COUNTY CLERK'S OFFICE**  
**NEW YORK**



Carol Robinson Edmead, J.S.C.  
**HON. CAROL EDMEAD**