

**Matter of Bao Zhu Cai v New York City Hous. Auth.**

2010 NY Slip Op 32965(U)

October 15, 2010

Supreme Court, New York County

Docket Number: 106779/10

Judge: Alexander W. Hunter

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

PRESENT: Alexander W. Hunter, Jr.  
*Justice*

PART 33

Index Number : 106779/2010  
CAI, BAO ZHU  
vs.  
NYC HOUSING AUTHORITY  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE 9/3/10

MOTION SEQ. NO. \_\_\_\_\_

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

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1 - 7

8 - 23

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

*See memorandum decision and judgment attached hereto.*

**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: October 15, 2010

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.  SETTLE ORDER /JUDG.

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 33

-----X  
In the Matter of the Application of Bao Zhu Cai,

Index No.: 106779/10

Petitioner,

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

-against-

New York City Housing Authority,

Respondent.

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-----X  
**HON. ALEXANDER W. HUNTER, JR.**

The application by petitioner for an order pursuant to C.P.L.R. Article 78, vacating and annulling respondent's determination conditioning petitioner's eligibility for public housing tenancy on the permanent exclusion of his son, Rickey Cai, a/k/a Ruiwen Cai, on the grounds of non-desirable behavior and breach of respondent's rules and regulations, is denied.

Petitioner asserts that he is a tenant at the Marlboro Houses, a public housing project owned and operated by the respondent, located at 30 Avenue V, Apartment 14C, Brooklyn, New York and has lived at said apartment for the past three years with his son, Rickey Cai. Respondent scheduled a hearing for October 7, 2009, charging the petitioner with non-desirability in that his son directed threatening or abusive remarks toward an employee of respondent and he removed and damaged the property of said employee. Additionally, petitioner breached respondent's rules and regulations by failing to ensure that one of the members of his household acted in a manner consistent with the terms of his lease.

The hearing was held on December 15, 2009 before an impartial hearing officer. Respondent's employee, Saron Mullings, testified that she was a social worker employed by respondent, assisting residents with mental impairments. She made a pre-arranged visit on May 12, 2009 to petitioner's apartment and Rickey Cai asked for her identification. When he saw it, he claimed that it was fake and told her he was going to call the police. Ms. Mullings took her cellular phone out to call a Chinese interpreter and Rickey Cai then grabbed the phone out of her hand and threw it against the floor, breaking it to pieces. Petitioner then picked up the cellular phone pieces and gave them back to Ms. Mullings and walked her out of the apartment. As they were walking out, petitioner's son walked up to her and raised his hand. Ms. Mullings testified that she thought he was going to hit her. She then quickly left the building and called the police. Police did not take a report and did not arrest petitioner's son.

Petitioner also testified at the hearing that his son, Rickey Cai, has a psychological condition. Petitioner did not inform his son that there was a scheduled visit with Ms. Mullings. On the day of the incident, Rickey Cai did not take his medication and when Ms. Mullings arrived at the apartment, he had been asleep and woke up when she knocked on the door. Petitioner then concedes that when his son saw Ms. Mullings' identification, he thought it was fake and wanted to call the police. However, petitioner stated that Rickey Cai took the cellular

phone from Ms. Mullings because he knew that petitioner did not speak English and was trying to help. When he took the phone, he accidentally dropped it. Petitioner also testified that his son did not threaten Ms. Mullings and he was not agitated. However, since he knew that his son had not taken his medication, he was concerned that his son might say or do something so he escorted Ms. Mullings out of the apartment.

Petitioner testified at the hearing that his son is a good person, that his presence in the apartment is not a danger and that he makes every effort to ensure that his son takes his medication as required.

Rickey Cai also testified that he had not taken his medication on the day of the incident. He was not aware of Ms. Mullings' pre-arranged visit and he had never seen her in the building before. He testified that when she came to the apartment, he had just woken up and was confused. He thought she was his upstairs neighbor who was always making noise while he was sleeping. He also testified that he did not throw Ms. Mullings' cell phone to the floor, but rather that it fell when he grabbed it from her in an effort to help the petitioner.

Petitioner asserts that Rickey Cai has been taking his medication regularly and has not behaved poorly since the subject incident. He has participated in a program with the Brooklyn Act team where he has received mental health services and psychiatric treatment since June 23, 2009. A letter from the Brooklyn Act team was admitted into evidence at the hearing.

On December 21, 2009, the hearing officer issued a decision conditioning petitioner's continued tenancy on the permanent exclusion of his son, Rickey Cai, from his apartment. The hearing officer found that the action taken by petitioner of escorting Ms. Mullings out of his apartment was clear evidence that Rickey Cai's conduct may jeopardize the safety of other residents, respondent's employees and members of the community. On January 13, 2010, respondent's Board issued a Determination of Status, approving the hearing officer's decision of December 21, 2010. This Article 78 application then ensued.

Petitioner contends that the hearing officer's holdings are without a rational basis since the misconduct of petitioner's son was only a single isolated incident and there is no way petitioner could have been able to foresee that his son would act inappropriately on the day of the incident. Moreover, there is no prior report of Rickey Cai that would lead anyone, including petitioner, to reasonably believe that Rickey has an inclination to harm others when he does not take his medication. Petitioner further argues that Rickey Cai's belief that Ms. Mullings was his upstairs neighbor who constantly harassed petitioner and his son while they were sleeping was justified. In addition, petitioner did what he could to alleviate the situation. Therefore, respondent's determination to condition petitioner's tenancy on the ground of permanent exclusion of his son, was arbitrary and capricious and an abuse of discretion, thereby depriving petitioner of a property interest without due process of law. Moreover, the determination is disproportionate to the misconduct.

Petitioner further argues that the hearing officer did not take any other factors into account, such as the letter from the Brooklyn Act team, when she reached her assessment that Rickey Cai's conduct may jeopardize the safety of other residents, respondent's employees and members of the community. Accordingly, since respondent's determination was arbitrary and capricious, it should be set aside.

Respondent opposes the application by petitioner. Respondent argues that since federal and state law requires respondent to provide a safe, decent and sanitary environment for all public housing residents, the sanction of permanent exclusion to remove an offending member of a household while preserving the tenancy for the rest of the family, has been upheld by the Appellate Division, First Department. Respondent asserts that in sustaining the charges, the hearing officer found the testimony of respondent's social worker, Saron Mullings, to be credible. Therefore, this court must defer to the credibility determinations of administrative hearing officers.

Respondent further argues that substantial evidence supports respondent's determination to permanently exclude his son Rickey Cai from the apartment. The claims made by petitioner that the hearing officer's decision is disproportionate to the misconduct and deprives petitioner of a property interest without due process is without merit. Moreover, Rickey Cai's belief that Ms. Mullings was his upstairs neighbor is not a mitigating factor. The hearing officer specifically concluded that Rickey Cai's behavior was not an isolated incident based on the testimony by petitioner that he frequently stops taking his medication and becomes out of control requiring petitioner to hospitalize him. In addition, Rickey Cai admitted that he was having delusional thoughts on the day of the incident because he was angry and did not believe that Ms. Mullings was from the Housing Authority and instead believed that she was his upstairs neighbor. He also explained at the hearing that he has delusional thoughts and hallucinations when he does not take his medication. Therefore, since substantial evidence supports respondent's determination, this court should not disturb it.

Next respondent argues that the Housing Authority's determination to permanently exclude Rickey Cai is consistent with law and proportionate to the offenses. Therefore, the court should defer to the agency when reviewing a sanction. In order for the reviewing court to overturn a penalty imposed by an administrative agency, the punishment must be so disproportionate to the offense as to be shocking to one's sense of fairness.

In the case at bar, respondent argues that permanent exclusion of Rickey Cai from the apartment is appropriate as petitioner's lease makes him responsible for the conduct of members of his household. When Rickey Cai threatened Ms. Mullings and took her identification card and cellular phone and broke her cellular phone, petitioner breached his obligations and was subject to termination of his tenancy. Therefore, the hearing officer's decision to condition petitioner's tenancy on the permanent exclusion of his son Rickey Cai from the apartment was not unduly harsh. The fact that the hearing officer imposed only permanent exclusion of petitioner's son rather than terminating petitioner's tenancy illustrates that she considered mitigating factors.

In **Matter of Edwin A. Pell v. Board of Education of Union Free School District, 34 N.Y.2d 222**, the Court of Appeals reiterated, "It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [citations omitted]." Thus, this court's role is limited to the determination of whether or not there was a rational basis for the final determination made by NYCHA. This court cannot, "...substitute its own judgment for that of the agency. Even though the court might have decided differently were it in the agency's position, the court may not upset the agency's determination in the absence of a finding, not supported by this record, that the determination had no rational basis [citations omitted]." **See, Matter of Mid-State Management Corp. v. New York City Conciliation and Appeals**

Board, 112 A.D.2d 72 (1<sup>st</sup> Dept. 1985); Matter of Sullivan County Harness Racing Assoc., Inc. v. Robert A. Glasser, 30 N.Y.2d 269 (1972).

Additionally, in Berenhaus v. Ward, 70 N.Y.2d 436 (1987), the Court of Appeals held that, "It is basic that the decision by an Administrative Hearing Officer to credit the testimony of a given witness is largely unreviewable by the courts, who are disadvantaged in such matters because their review is confined to a lifeless record. The Hearing Officer before whom the witnesses appeared, on the other hand, was able to perceive the inflections, the pauses, the glances and gestures- - all then nuances of speech and manner that combine to form an impression of either candor or deception." Id. at 433. Therefore, this court cannot disturb the hearing officer's credibility findings.


Even though petitioner argues that the penalty imposed by respondent was unduly harsh because it was based on a single isolated incident, the evidence adduced at the hearing demonstrated that petitioner's son was not consistent with taking his medication. He also admitted to experiencing delusions and hallucinations when he did not take his medication. Since petitioner's son posed a danger to others, the penalty imposed by respondent of permanently excluding the son from the apartment while still preserving petitioner's tenancy, is not shocking to the conscience and is in no way unreasonable. See, Romero v. Martinez, 280 A.D.2d 58 (1<sup>st</sup> Dept. 2001); Baldwin v. Hernandez, 68 A.D.3d 663 (1<sup>st</sup> Dept. 2009).

Accordingly, it is hereby,

ADJUDGED, that the petition is denied and the proceeding is dismissed, with costs and disbursements to the respondent; and it is further

ADJUDGED, that respondent having an address at \_\_\_\_\_, do recover from petitioner, having an address at \_\_\_\_\_, costs and disbursements in the amount of \$ \_\_\_\_\_, as taxed by the Clerk, and that respondent have execution therefor.

Dated: October 15, 2010

  
\_\_\_\_\_

J.S.C.

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