

Matter of Byrd v New York City Hous. Auth.
2010 NY Slip Op 32981(U)
October 20, 2010
Supreme Court, New York County
Docket Number: 401864/2010
Judge: Carol Edmead
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. CAROL EDMEAD

PART 35

Justice

Theresa Byrd

INDEX NO. 401864/2010

MOTION DATE 10.18.10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

New York City Housing Auth.

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

PAPERS NUMBERED

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

The instant application and cross motion (sequence 001) are decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that the relief sought in the Petition for an order reversing the determination of respondent New York City Housing Authority, dated January 22, 2010, terminating the tenancy of Patricia Byrd, is denied. And it is further

ORDERED and ADJUDGED that the cross motion of respondent New York City Housing Authority to dismiss the instant Petition is granted, said Petition is dismissed, and the Clerk of the Court is directed to enter judgment accordingly. 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 Theresa Byrd.

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: 10.20.10


HON. CAROL EDMEAD *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 35

_____ X
**In the Matter of the Application of
THERESA BYRD,**

Index No. 401864/2010

Petitioner,

Decision/Order

**For an Order Pursuant to Article 78 of the
Civil Practice Law and Rules,**

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

_____ X
EDMEAD, J.S.C.

MEMORANDUM DECISION

The Petition seeks an order reversing the determination of respondent New York City Housing Authority (NYCHA), dated January 22, 2010, terminating the tenancy of Patricia Byrd (Patricia).

Respondent NYCHA cross moves for an order dismissing the instant proceeding pursuant to CPLR 3211(a)(2), 3211(a)(5), 3211(a)(7) and 7804(f) because (1) petitioner has no standing to bring this proceeding; (2) the Petition fails to state a cause of action; and (3) this proceeding is barred by the four-month statute of limitations set forth in CPLR § 217.

Background

Until NYCHA terminated Theresa's tenancy, she was the tenant of record and the only authorized occupant of 281 East 143rd Street, Apartment 3E, a four-room apartment in the NYCHA Patterson Houses in the Bronx, New York (the subject apartment). After Theresa's failure to verify her income and failure to occupy the subject apartment were not resolved at the

development level, NYCHA management subsequently notified Theresa 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.

NYCHA preferred charges against Patricia on February 9, 2009, and the hearing was scheduled for March 6, 2009. On March 6, 2009, neither Theresa nor an authorized representative appeared at the administrative hearing. The Hearing Officer issued a decision recommending termination of Theresa's tenancy. NYCHA's Board approved the Hearing Officer's decision on March 25, 2009.

Two months later, on May 8, 2009, Tina applied to open Theresa's default using a power of attorney. NYCHA objected to Tina's application in part because (1) Tina's application showed Theresa was living in South Carolina and had been so for several years; and (2) the power of attorney was not properly notarized. On July 1, 2009, the hearing officer granted the application to re-open the default, specifically instructing Theresa to send a properly-executed and notarized power of attorney. On July 24, 2009, NYCHA notified Theresa that a hearing was rescheduled for August 20, 2009 and re-sent a copy of the charges. Again, neither Theresa nor a representative authorized by Theresa appeared for the hearing. The hearing officer issued a decision recommending termination of Theresa's tenancy. NYCHA's Board approved the hearing officer's decision on September 9, 2009.

Almost three months later, on December 7, 2009, Tina applied to re-open Theresa's second default, submitting an unlimited power of attorney dated November 23, 2009, in which Theresa stated under oath that she resided at an address in Orangeburg, South Carolina. In her application, Tina claimed she had "abided by all of what was asked of me to do as [Theresa]'s

proxy," but did not submit or claim she submitted a properly-executed and notarized power of attorney obtained prior to the second hearing.

NYCHA objected to Tina's application to re-open Theresa's second default on the grounds that, among other things, (1) Tina waited four months to apply to re-open the default and therefore did not do so in a reasonable amount of time; (2) Tina had no reasonable excuse for missing the hearing; and (3) Tina offered n meritorious defense to the charges.

On January 22, 2010 the hearing officer denied Tina's application to vacate Theresa's default, concluding that Tina failed to present an excusable default or a meritorious defense. On January 22, 2010, NYCHA mailed the hearing officer's decision to Theresa.

The instant Article 78 proceeding was commenced by filing a Verified Petition on July 13, 2010, almost six months after NYCHA issued its denial of Tina's application to open Theresa's default.

Tina's Contentions

Theresa has been temporarily residing in Orangeburg, South Carolina. Theresa is terminally ill and cannot travel due to her illness at this time.

On March 6, 2009, Tina appeared on Theresa's behalf at the NYCHA hearing and submitted a doctor's note from Theresa's physician about her declining health and her inability to travel. When Tina was directed by NYCHA to provide a power of attorney, it was rejected because it was not supposed to be notarized in New York. The last power of attorney was notarized in South Carolina.

Theresa and Tina Byrd have fully complied with each and every NYCHA request.

Respondent's Contentions

The Petition seeks to restore Patricia's tenancy after she defaulted twice at her administrative hearing on charges that she failed to verify her family income and composition and breached NYCHA rules and regulations by failing to occupy the apartment. Although the caption names Theresa as the petitioner, the Petition itself indicates that it is the Petition of Tina Byrd (Tina), Theresa's daughter. Theresa has not signed or verified the Petition, and there is no indication that Tina is an attorney authorized to represent Theresa. Furthermore, this proceeding is time barred inasmuch as petitioner commenced this action after the expiration of the four-month statute of limitations.

Discussion

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 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 [1st Dept.], *aff'd* 66 N.Y.2d 1032 [1985]).

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 Env'tl. 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]).

Statute of Limitations

Further, an Article 78 proceeding must be commenced within four months after the administrative determination to be reviewed becomes "final and binding upon the petitioner" (*Yarbough v Franco*, 95 NY2d 342 [2000]; CPLR §217[1]; *New York State Assn. of Counties v Axelrod*, 78 NY2d 158 [1991]). An administrative determination becomes "final and binding" when the petitioner seeking review has been aggrieved by it. An administrative action is not final and binding within the contemplation of CPLR §217 until it "has its impact" upon the petitioner (*Bludson v Popolizio*, 166 AD2d 346, 347 [1st Dept 1990], citing *Matter of Edmead v McGuire*, 67 NY2d 714 [1986]). The statute of limitations does not begin to run until the petitioner receives notice of the determination (*Matter of Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]).

The record indicates that NYCHA mailed the hearing officer's decision to Theresa on January 22, 2010. With the presumption of receipt, she would have received said notice by January 27, 2010. Theresa should have commenced this Article 78 proceeding by May 27, 2010 at the latest. This proceeding, was not commenced until July 13, 2010 and is therefore time barred.

Further, Tina improperly commenced this proceeding signing the name of Theresa Byrd.

It has been well stated in *In re Friedman*, 126 Misc.2d. 344 (Surr. Ct. Bronx Co. 1984):

The statutory short-form power of attorney which was executed by petitioner's principal permits petitioner, as agent, to act for his principal in a wide gamut of transactions. With respect to "claims and litigation" and "estate transactions", the statutory short-form power of attorney is broad and sweeping (see General Obligations Law, §§ 5-1502H, 5-1502G). Subdivision 10 of both of the above sections, in addition to all of the specific powers enumerated therein, also confers upon the agent the power "to do any other act or acts, which the principal can do through an agent". Among such powers are the power to hire, discharge, and compensate any attorney or other assistants when the agent thinks such action to be desirable for the proper execution by him of the powers described in the foregoing sections.

However, notwithstanding the broad sweep of these powers, no authority has been presented which would permit a lay person by virtue of his capacity as attorney in fact for his principal to appear on his principal's behalf and act as legal counsel in a court of law unless admitted to so practice. Under the applicable statutes of this State, only those persons duly admitted to practice before the courts of this State may act as a legal representative of another person in a court proceeding or in the further capacity of a practicing attorney (see Judiciary Law, §§ 478, 484). The seriousness with which the Legislature views this requirement is manifest since a violation of the statutory proscription is punishable as a misdemeanor (Judiciary Law, § 485). Moreover, the potential problems created by the use of this device as a means of encouraging the unauthorized practice of law is obvious. (See Code of Professional Responsibility, EC 3-1). Of course, if petitioner's principal wishes to proceed *pro se*, she may do so. However, she cannot use a power of attorney as a device to license a layman to act as her attorney in a court of record. To sanction this course would effectively circumvent the stringent licensing requirements of attorneys by conferring upon lay persons the same right to represent others by the use of powers of attorney.

It is concluded that petitioner's capacity as attorney in fact does not give him, as a layman, the authority to proceed *pro se* on behalf of his principal in the instant proceeding (see *Matter of Stokes v Village of Wurtsboro*, 123 Misc 2d 694; see, also, *Matter of Maldonado v New York State Bd. of Parole*, 102 Misc 2d 880). As a matter of law, petitioner does not have the status to obtain the relief he seeks. Additionally, the court cannot sanction a course which constitutes the illegal practice of law without a license. Accordingly, the petition is dismissed on the court's own motion.

Conclusion

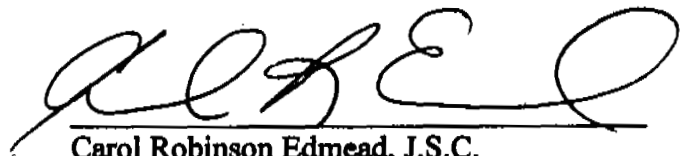
Based on the foregoing, it is hereby

ORDERED that the relief sought in the Petition for an order reversing the determination of respondent New York City Housing Authority, dated January 22, 2010, terminating the tenancy of Patricia Byrd, is denied. And it is further

ORDERED and ADJUDGED that the cross motion of respondent New York City Housing Authority to dismiss the instant Petition is granted, said Petition is dismissed, and the Clerk of the Court is directed to enter judgment accordingly. 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 Theresa Byrd.

Dated: October 20, 2010



Carol Robinson Edmead, J.S.C.
HON. CAROL EDM EAD

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).