

Matter of Rivera v Rhea
2010 NY Slip Op 33479(U)
December 2, 2010
Sup Ct, NY County
Docket Number: 401971/10
Judge: Cynthia S. Kern
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: CYNTHIA S. KERN
KERN J.S.C.
Justice

PART 52

RIVERA, AIDA

INDEX NO.

401971/10

MOTION DATE

- v -

JOHN B. RHEA, ETAL.

MOTION SEQ. NO.

01

MOTION CAL. NO.

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 is decided in accordance
with the annexed decision.

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: 12/2/10

CYNTHIA S. KERN J.S.C.
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 52

-----X
In the Matter of the Application of
AIDA RIVERA, by her Proposed Guardian Ad
Litem, Shani Friedman,

Petitioner,

Index No. 401971/10

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

DECISION/JUDGMENT

-against-

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

Respondents.

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).*

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

In this Article 78 proceeding, petitioner Aida Rivera seeks an order compelling the New York City Housing Authority ("Housing Authority") to reinstate petitioner to the Section 8 Housing Choice Voucher Program after losing her subsidy because her apartment failed a Housing Quality Standard ("HQS") inspection. The Housing Authority opposes petitioner's

Article 78 claim on the grounds that it is time-barred and that its actions were not arbitrary or capricious. This court denies petitioner's Article 78 claim for the reasons set forth below.

The Housing Authority, although an agency of the City of New York, is a public housing authority regulated and funded by the United States Department of Housing and Urban Development ("HUD"). The Housing Authority, among other agencies in New York City, administers the Section 8 housing program. Section 8 is a federally funded program that provides rent subsidies to low-income families so they may rent privately owned housing. *See generally* 42 U.S.C. § 1437f; 24 C.F.R. § 982 *et seq.*

In order to qualify for a Section 8 subsidy, the proposed dwelling must meet the HQS performance requirements both at commencement of assisted occupancy and throughout the assisted tenancy. *See* 24 C.F.R. § 982.401(a)(3). The Housing Authority is prohibited from making any subsidy payments for a dwelling unit that does not meet the HQS requirements as defined in the regulations unless the owner corrects the defect within 30 days of the failed inspection. *See* C.F.R. §§ 982.404(a)(3). HUD regulations mandate that if the Housing Authority does not make subsidy payments for six consecutive months, the Section 8 contract is automatically terminated. *See* 24 C.F.R. § 982.455. In accordance with these regulations, the Housing Authority's written policy provides that a Section 8 tenant whose subsidy has been suspended for six or more months is moved off the Section 8 program. However, when an occupant's subsidy is terminated because of a failed inspection, the Housing Authority provides a "transfer voucher" so that the occupant may find other acceptable housing. HUD regulations further provide that the initial term of a voucher be at least sixty days and that the Housing Authority may grant one or more extensions of the initial voucher term at its discretion and in

accordance with the Housing Authority's policy. *See* 24 C.F.R. §§ 982.303(a) & 982.303(b)(1). In this regard, the Housing Authority's policy memorandum LHD #06-5 states that vouchers (including transfer vouchers) issued to tenants shall have a duration of 180 days with an option to issue a new voucher to accommodate disabled or transferring tenants.

Petitioner was a recipient of a Section 8 housing subsidy. She received a Section 8 subsidy while residing at 398 Chester Street, Apt. 398E in Brooklyn, New York. On September 21, 2004, this apartment failed its annual HQS inspection. As landlord did not fix the defective conditions within 30 days of failing inspection, the Housing Authority suspended payment of the subsidy to the landlord effective October 30, 2004. On April 30, 2005, after petitioner's subsidies were suspended for six consecutive months, she was moved off the Section 8 program pursuant to both federal regulations and Housing Authority policy. However, on November 29, 2005, the Housing Authority issued petitioner a Section 8 transfer voucher to find acceptable housing. When this voucher expired six months later before petitioner had found acceptable housing, the Housing Authority extended petitioner's transfer voucher to expire on January 11, 2007. Petitioner ultimately allowed the voucher to expire and stayed in her existing apartment.

On August 15, 2007, seven months after petitioner's voucher had expired, an Adult Protection Services (APS) representative contacted the Housing Authority on petitioner's behalf seeking reinstatement of petitioner's Section 8 subsidy to apply to a new apartment that became available for plaintiff to rent. The Housing Authority denied petitioner's request as the transfer voucher had expired seven months earlier. In or around November 2007, petitioner moved to an apartment at 174 Riverdale Avenue, Apt 174C in Brooklyn without the Housing Authority's permission. Petitioner now moves for an order directing NYCHA to reinstate her Section 8 voucher so that it may be applied to her current apartment at 174 Riverdale Avenue.

There is a four month statute of limitations to bring an Article 78 proceeding to challenge an administrative determination that is measured from the date the determination becomes final and binding upon the petitioner. CPLR § 217(1). Petitioner is time-barred from bringing this action as it has been well over four months since the Housing Authority terminated petitioner's Section 8 subsidy. Even when applying the statute of limitations under the most favorable of scenarios for petitioner – that it began accruing after the transfer voucher expired on January 11, 2007 – this proceeding is still time-barred.

The court rejects petitioner's argument that the statute of limitations has not begun accruing in this proceeding because she did not get a written notice of termination from the Housing Authority as required under the first partial consent decree in *Williams v. NYCHA et al.*, October 17, 1984, 81 Civ. 1801, a federal challenge to the Housing Authority's method of termination Section 8 assistance (the "*Williams* first partial consent decree"). The Housing Authority is not required to abide by the terms of the *Williams* first partial consent decree – which requires a written notice of termination in circumstances specified in that agreement – as it does not apply to the instant proceeding. This consent decree explicitly provides "[t]his agreement does not govern terminations of subsidies that result from a landlord's breach of its obligations under the Section 8 program but does not affect the tenant's eligibility for benefits...." The *Williams* first partial consent decree does not apply to the instant action as the termination of subsidies in this action resulted from the landlord's breach and petitioner remained eligible for Section 8 subsidy in that she was issued a transfer voucher to find other acceptable housing to restore her Section 8 subsidy.

Although the court need not reach this analysis, petitioner's claim is also denied as the Housing Authority's decision not to reinstate the transfer voucher was not arbitrary or capricious. "The law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v. Lewis*, 90 A.D.2d 748, 749 (1st Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); see *Pell v. Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or 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 facts." *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, the Housing Authority's decision not to reinstate petitioner's transfer voucher was not arbitrary or capricious. The Housing Authority relied on its internal policies which were drafted in accordance with HUD regulations. It is undisputed that petitioner's apartment failed the HQS inspection and as a result her Section 8 subsidy was suspended in accordance with both HUD regulations and Housing Authority policy. It is further undisputed that the Housing Authority issued petitioner a transfer voucher which granted petitioner six months to find acceptable housing. Moreover, the Housing Authority extended this voucher for another six months to give petitioner additional time to find acceptable housing. As the Housing Authority has provided a rational basis for its determination – that it was

