

Matter of Cummiskey v Rhea

2011 NY Slip Op 30016(U)

January 3, 2011

Sup Ct, NY County

Docket Number: 401289/10

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD
Justice

PART 61

In the Matter of the Application of
TARA CUMMISKEY,

Petitioner,

-against-

JOHN B. RHEA, *et al.*,

Respondents.

INDEX NO. 401289/10

MOTION DATE Sept. 10, 2010

MOTION SEQ. NO. 001

MOTION CAL. NO. 33

The following papers, numbered 1 to 5 were read on this petition pursuant to CPLR Article 78

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

3-4

5

Cross-Motion: Yes No

Upon the foregoing papers, the petition pursuant to CPLR Article 78 is decided in accordance with the accompanying decision and judgment

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 418)

Dated: 1/3/11

O.P. Sherwood
O. PETER SHERWOOD, 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: IAS PART 61

-----X
In the Matter of the Application of
TARA CUMMISKEY,

Petitioner,

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

Index No.: 401289/10
DECISION/ORDER

-against-

UNFILED JUDGMENT

JOHN B. RHEA, as Chairman of the NEW YORK
CITY HOUSING AUTHORITY, and the NEW YORK
CITY HOUSING AUTHORITY,

**This judgment has not been entered by the County Clerk
and notice of entry cannot be served hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
'1B)**

Respondents.

-----X
HON. O. PETER SHERWOOD, JSC:

In this Article 78 proceeding, petitioner seeks a judgment overturning, as arbitrary and capricious, a determination of the respondent agency (motion sequence number 001). For the following reasons, this petition is denied.

FACTS

Along with her two minor children, petitioner Tara Cummiskey (Cummiskey) is the current tenant of apartment 6F in a housing complex known as Stapleton Houses, which is located at 27 Warren Street in the County of Richmond, City and State of New York. *See* Petition, ¶ 4. The respondent New York City Housing Authority (NYCHA) is the owner and manager of Stapleton Houses. *Id.*, ¶ 6. Co-respondent John B. Rhea (Rhea) is sued here in his capacity as the Chairman of NYCHA. *Id.*, ¶ 5.

The parties agree that Cummiskey resided in apartment 6F from 1975 through 1988 as a registered member of the household of her mother, Betsy Cummiskey, the original tenant of record. *See* Answer, ¶ 47; Exhibit I. NYCHA states that Cummiskey left the apartment in 1988,

but submitted a request to return to the apartment on October 24, 2005 to care for her mother, who had become ill. *Id.*, ¶ 48. NYCHA presents a copy of the document by which it granted Cummiskey and her children temporary written permission to reside in apartment 6F for a period of 90 days (i.e., until February 2, 2006). *Id.*; Exhibit J. NYCHA also presents documents to show that Betsy Cummiskey entered an extended-care facility on December 21, 2005, and that she eventually passed away there on February 4, 2008. *Id.*, ¶¶ 49, 51; Exhibits K, L, O. The parties agree that Cummiskey and her children thereafter remained in apartment 6F without submitting any further residency applications to NYCHA.

On June 20, 2007, NYCHA commenced a residential holdover proceeding against Cummiskey in the Civil Court of the City of New York (Index No. 10763/2007) to remove her from the apartment on the ground that she was not authorized to reside there under NYCHA rules. *See* Notice of Petition, ¶ 11; Exhibit C. In response, Cummiskey filed an administrative grievance proceeding with NYCHA that claimed that she had the right to continue to reside in apartment 6F as a “remaining family member.” *See* Answer, ¶ 50. NYCHA states that, rather than pursue the holdover proceeding, it directed Stapleton Houses project manager Philip John (John) to meet with Cummiskey on September 17, 2007 to discuss her grievance petition. *Id.* John later issued a written denial of that grievance on the grounds that: 1) Cummiskey was not a legal resident of the apartment at the time her mother entered the long-term care facility; and 2) she had also failed a criminal background check (the John decision). *Id.*; Exhibit M. After Cummiskey requested a review of this decision by NYCHA’s borough manager, NYCHA deputy director Rodney Armanie (Armanie) issued a second written decision on October 26, 2007 that agreed with John’s determination (the Armanie decision). *Id.*; Exhibit N. Finally, after

Cummiskey requested an appeal of this decision, a hearing was held over several dates in 2009 by NYCHA hearing officer Arlene Ambert (Ambert), who issued a decision (the Ambert decision), dated January 6, 2010, that agreed with the conclusions of both John and Armanie. *Id.*, ¶ 51; Exhibit CC. The Ambert decision found, in pertinent part, as follows:

NYCHA regulations require that written permission be obtained for the occupancy of additional members in a tenant's household. Tenants are apprised of this requirement via a head note on the annual Occupant's Affidavit of Income Forms. Those individuals who fail to obtain written permission for permanent residence, or thereafter to remain continuously in occupancy until after the death or departure of the tenant of record, may not succeed to residual tenancy. An exception to the requirement for written permission has been made for original family members who returned to the household *prior to November 2002*, upon actual notice to management.

The case law submitted by [Cummiskey's] attorney ... pre-dates November 2002 and therefore the conclusions reflected therein, in relation to an original member of the family composition returning to the subject apartment, are not applicable to the instant matter.

[Cummiskey] is not a remaining family member as defined by Housing Authority regulations. A tenant who wishes to have an additional person, including former household members, join the household on a permanent basis must submit a written request to the development manager and receive written approval for the additional occupant. [Cummiskey] did not obtain the written permission of the Housing Authority to permanently reside in the subject apartment.

Based upon [Cummiskey's] inability to prevail in her remaining family member claim, there is no need to explore the issue of whether she is otherwise eligible/ineligible for public housing [*italics in original*].

Id.; Exhibit CC. On January 20, 2010, NYCHA's board issued a determination that officially adopted the findings of the Ambert decision, and dismissed Cummiskey's grievance (the NYCHA decision). *Id.*, ¶ 62; Exhibit DD.

Cummiskey commenced the instant Article 78 proceeding on May 13, 2010 by filing a petition and notice of petition that request an order from this court to overturn the NYCHA decision as arbitrary and capricious. NYCHA filed its answer on July 30, 2010.

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of the towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. and Community Renewal*, 232 AD2d 302 (1st Dept 1996). "The interpretations of respondent agency of statutes which it administers are entitled to deference if not unreasonable or irrational." *Matter of Metropolitan Assoc. Ltd. Partnership v New York State Div. of Hous. & Community Renewal*, 206 AD2d 251, 252 (1st Dept 1994), citing *Matter of Salvati v Eimicke*, 72 NY2d 784, 791 (1988). After a review of this record, the court finds that the NYCHA decision withstands review pursuant to the foregoing criteria.

Cummiskey first argues that NYCHA had "implicitly approved [of] her residency" because the agency "knew she was present and failed to seek her removal." *See* Memorandum of Law in Support of Motion, at 3-4. She cites the decision of the Appellate Division, First Department, in *Matter of McFarlane v New York City Housing Auth.* (9 AD3d 289 [1st Dept 2004]) for the proposition that this factual scenario establishes a tenant's right to be treated as a remaining family member despite the absence of written consent from NYCHA. *Id.* NYCHA responds that Cummiskey has misconceived the law, and that her failure to obtain the aforementioned written consent is a bar to her claim of residency based on remaining family member status. *See* Memorandum of Law in Opposition to Motion, at 4-10. After reviewing the record and the applicable law, the court agrees with NYCHA.

First, both the text of the Ambert Decision and the transcript of the grievance hearing

make it clear that NYCHA had considered and rejected Cummiskey's "implicit approval" argument before it rendered its final decision on January 20, 2010. *See Answer, Exhibits T, at 26-29; CC.* Second, NYCHA's legal conclusions were correctly drawn. A number of recent Appellate Division, First Department decisions confirm the rule that one who wishes to succeed to a NYCHA tenant's tenancy rights on the ground of remaining family member status must first obtain NYCHA's written permission. *See e.g. Matter of Edwards v New York City Hous. Auth.*, 67 AD3d 441 (1st Dept 2009); *Matter of Rivera v New York City Hous. Auth.*, 60 AD3d 509 (1st Dept 2009); *Matter of Torres v Hernandez*, 55 AD3d 452 (1st Dept 2008); *Matter of Abreu v New York City Hous. Auth. E. Riv. Houses*, 52 AD3d 432 (1st Dept 2008); *Matter of Rodriguez v Hernandez*, 51 AD3d 532 (1st Dept 2008). These decisions are based on the Court of Appeals determination in *Matter of Schorr v New York City Dept. of Hous. Preserv. and Dev.* (10 NY3d 776 [2008]) which held that to permit such "implicit approvals," would be to improperly invoke an estoppel against a governmental agency and prevent the agency from discharging its statutory duties. Further, the holding in *Matter of McFarlane* (9 AD3d 289, *supra.*) that Cummiskey cites, does not stand for the proposition that "implicit approvals" are acceptable. Rather, in that case, the Appellate Division, First Department, specifically *overturned* a decision by a justice of this court who had adopted the "implicit approval" argument. In dicta the Appellate Division opined that circumstances evincing implicit approval "could be" a factor in determining remaining family member status, but noted that such circumstances were not present in that case (see *McFarland*, 9 AD3d at 291). This court further notes that the grievance at issue in the *McFarlane* case was evidently filed prior to November 2002, a point at which, hearing officer Ambert noted, a different agency rule governed. *See Answer, Exhibit CC.* Thus, the *McFarlane*

holding is not contrary to conclusion NYCHA reached in this matter in January 20, 2010 dismissing Cummiskey's grievance for failure to obtain written permission to reside in her mother's apartment.

Cummiskey next argues that "the penalty imposed by [the NYCHA decision] is disproportionate to the offense and shocking to the conscience." *See* Memorandum of Law in Support of Motion, at 4-6. Cummiskey cites no legal authority to support this argument. For its part, NYCHA responds that "the Appellate Division, First Department, ... has rejected a mitigating-factor approach to remaining family member claims." *See* Memorandum of Law in Opposition to Motion, at 10-11. After reviewing the record and the applicable law, the court agrees.

The record reveals that hearing officer Ambert, NYCHA considered Cummiskey's allegations: 1) that her salary is probably insufficient to pay for rent in private housing; 2) that she is a single parent with two minor children; and 3) that, if she were to lose the subject apartment, she would probably have to go into a shelter. *See* Answer, Exhibits T, at 40-41; CC. However, without minimizing these hardships, NYCHA's legal argument is well taken. In *Matter of Fermin v New York City Hous. Auth.* (67 AD3d 433 [1st Dept 2009]), the Appellate Division, First Department, specifically stated that: "[w]e reject petitioner's assertion that the hearing officer should have considered the totality of the circumstances, such as mitigating factors and hardship to petitioner" in determining petitioner's remaining family member grievance. *Id.* at 433, citing *Matter of Featherstone v Franco*, 95 NY2d 550, 554 (2000); *Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d at 290; *Matter of Wooten v Finkle*, 285 AD2d 407, 408-409 (1st Dept 2001). Thus, it appears that NYCHA was correct to employ the

same analysis when weighing Cummiskey's grievance. In the absence of any legal authority to support it, the court must reject Cummiskey's unconscionability argument.

Accordingly, because Cummiskey has failed to demonstrate that NYCHA's dismissal of her remaining family member grievance was arbitrary and capricious, the court concludes that Cummiskey's Article 78 petition should be denied.


DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition pursuant to CPLR Article 78 of petitioner Tara Cummiskey is denied and the proceeding is dismissed.

Dated: New York, New York
January 3, 2011

ENTER:


Hon. O. Peter Sherwood, JSC

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 11B)