

**Matter of Davis v New York City Hous. Auth.**

2011 NY Slip Op 30214(U)

January 27, 2011

Sup Ct, New York County

Docket Number: 402544/10

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN  
J.S.C. Justice

PART 52

Wayne Davis  
- v -  
NYC Housing Authority

INDEX NO. 402544/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

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 \_\_\_\_\_

PAPERS NUMBERED
_____
_____
_____

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: 1/27/11

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  
WAYNE DAVIS AND STEPHANIE DAVIS,

Petitioners,

Index No. 402544/10

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

DECISION/JUDGMENT

-against-

NEW YORK CITY HOUSING AUTHORITY

Respondent.

**UNFILED JUDGMENT**  
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-----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.....	1
Answering Affidavits.....	2
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	_____
Replying Affidavits.....	3
Exhibits.....	4

Petitioners commenced this Article 78 proceeding to challenge the determination of defendant New York City Housing Authority (NYCHA) denying petitioners' application to open NYCHA's default judgment against them. For the reasons set forth below, the petition is hereby dismissed.

The relevant facts are as follows. Petitioners reside in apartment 4E at 1134 Burke Avenue in the borough of the Bronx at Eastchester Gardens Houses, a NYCHA-owned public

housing project. On July 8, 2009, NYCHA brought charges against petitioners for chronic rent delinquency. After two adjournments by NYCHA to amend the charges against petitioners to reflect their ongoing rent delinquency, a hearing was scheduled for April 21, 2010. Petitioners did not appear at the hearing and Hearing Officer Desiree Miller sustained the charges against them on default. On May 5, 2010, NYCHA adopted a final determination of status approving the Hearing Officer's decision and terminating petitioners' tenancy. On May 4, 2010, petitioners submitted an application to vacate the default claiming that they did not attend the hearing because they did not receive a notice of the hearing date. NYCHA opposed petitioners' application and submitted an affidavit of mailing by the NYCHA secretary in charge of mailing swearing to service by regular and certified mail on March 15, 2010. She further swore that neither of the envelopes sent by regular nor certified mail were returned to NYCHA as undelivered. NYCHA also presented evidence that petitioners had not paid any rent since November 2009 resulting in an outstanding balance of \$5577.43. On May 13, 2010, Hearing Officer Miller denied petitioners' application to vacate the default decision on the grounds that petitioners failed to establish an excusable default or a meritorious defense. Specifically, Hearing Officer Miller noted that the breach of chronic delinquency had not been cured as petitioners still owed \$5577.43 in rent and that petitioners' excuse that the letter containing the hearing date "was never received" did not constitute an excusable default as an affidavit submitted by NYCHA established timely and proper notification of the hearing date and time to petitioners. Petitioners filed this petition to commence this proceeding with the court on September 13, 2010.

"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 (1<sup>st</sup> 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 addition, when an action is taken on default, the petitioner is not entitled to CPLR Article 78 review of the underlying determination to terminate the tenancy. The review is limited to whether the hearing officer’s decision to deny petitioner’s request to open the default judgment had a rational basis. See *Yarbough v Franco*, 264 A.D.2d 740, 741 (1<sup>st</sup> Dept 1999).

In the instant action, the court finds that the Hearing Officer’s decision to deny petitioners’ request to reopen the default judgment was made on a rational basis. As stated above, the Hearing Officer made her determination on the grounds that not only did petitioners fail to provide a reasonable excuse for the default, they still owed \$5577.43 in rent arrears to NYCHA. The court finds that there is a rational basis for this determination.

It is therefore

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: 1/27/11

Enter: ca  
J.S.C.

CYNTHIA S. KERN  
J.S.C.

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