

**Gokhlerner v Rhea**

2011 NY Slip Op 30550(U)

March 7, 2011

Supreme Court, New York County

Docket Number: 401883/10

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : PART 5

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LEONID GOKHLERNER,

Petitioner,

-against-

Index No. 401883/10

Motion Date: 1/18/10

Motion Seq. No.: 002

Calendar No.: 53

**DECISION & JUDGMENT**

JOHN B. RIHA, as Commissioner of the  
New York City Housing Authority and  
THE NEW YORK CITY HOUSING AUTHORITY,

Respondent

**FILED FOR JUDGMENT**  
This instrument is a true and correct copy of the original as filed with the County Clerk of New York County, New York, on 1/18/10. The original must be presented to the County Clerk of New York County, New York, for filing.

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BARBARA JAFFE, JSC:

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By notice of amended petition dated October 1, 2010, petitioner seeks, pursuant to CPLR 7803, an order directing respondents to process his housing package as complete as of December 31, 2009, and awarding him damages equal to the Section 8 share of his apartment rent from January 2010 forward. Respondents oppose.

I. FACTS

The New York City Housing Authority (NYCHA) was created by the state legislature to administer Section 8 the United States Housing Act of 1937, build and operate low-income apartments in New York City, and provide rent subsidies to lower-income families to enable them to rent privately owned housing. (Respondents' Answer to Verified Amended Petition, dated Oct. 26, 2011 [Ans.]). An applicant for Section 8 housing assistance may use a voucher

funded by the United States Department of Housing and Urban Development (HUD) to obtain a subsidy for a portion of the rent at a privately owned apartment building that accepts vouchers. (*Id.*) These subsidies are available only where NYCHA enters into a Housing Assistance Payment (HAP) contract with the building's owner, whereby NYCHA agrees to pay the difference between the contract rent for the apartment and the tenant's share. (*Id.*) The tenant separately agrees to pay the remaining portion to the landlord. (*Id.*) In order to qualify for a HAP contract, the apartment must pass a housing quality standards (HQS) inspection. (*Id.*) Moreover, if NYCHA lacks sufficient funds, it may place the intended recipients on a waiting list until funds are available. (*Id.*)

In May 2009, HUD notified NYCHA that its funding would be reduced. (*Id.*, Exh. C). As a result, NYCHA concluded that it would not be able to fund new vouchers as of December 2009. (*Id.*) Thus, it decided that it would not enter into new HAP contracts relating to apartments not passing the HQS inspection before December 31, 2009, and not receiving final approval by January 4, 2010. (*Id.*)

Petitioner, a 70-year man who lives on supplemental social security income, was issued a voucher on May 11, 2009, with an expiration date of November 11, 2009. (Pet.). The terms of the voucher reflect that NYCHA is not obliged to approve the tenancy, and that the recipient becomes a participant in the housing choice voucher program when the HAP contract between NYCHA and the owner takes effect. (Ans., Exh. B).

In November 2009, petitioner found a one-bedroom apartment in the Bronx, and spoke with a NYCHA employee regarding the rent. (Pet.). The employee contacted the landlord, who agreed to a monthly rent of \$1,030. (*Id.*, Exh. D). On November 10, 2009, the apartment did not

pass the HQS inspection but passed a second inspection on December 31, 2009, four days before NYCHA's deadline for final approval for rentals. (*Id.*). However, NYCHA's staff was unable to complete the application by January 4, 2010, and consequently did not approve the apartment. (Ans.). In an e-mail to petitioner's counsel dated March 23, 2010, NYCHA advised that it could not complete a final review by the deadline, and had to terminate petitioner's voucher. (*Id.*, Exh. D). Petitioner was placed on the waiting list, and NYCHA assures that he will be contacted when it obtains additional funding and can issue new vouchers. (*Id.*).

## II. CONTENTIONS

Petitioner argues that NYCHA's failure to process his voucher by the deadline was arbitrary and capricious, as was its failure to explain why it had not approved his tenancy. (Pct.). Respondent denies that its decision was arbitrary or capricious, that it is in compliance with federal law and regulations, that petitioner has not established a legal right to the relief sought, and that he fails to state cause of action. (Ans.).

## III. ANALYSIS

Judicial review of an administrative agency's decision is limited to whether the decision "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 or discipline imposed." (CPLR § 7803[3]). In reviewing an administrative agency's determination as to whether it is arbitrary and capricious, the test is whether the determination "is without sound basis in reason and is generally taken without regard to the facts." (*Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *E.W. Tompkins Co., Inc. v. State Univ. of New*

*York*, 61 AD3d 1248, 1250 [3d Dept 2009], *lv denied* 13 NY3d 709; *Matter of Mankarios v. New York City Taxi and Limousine Commn.*, 49 AD3d 316, 317 [1st Dept 2008]; *Matter of Soho Alliance v. New York State Liquor Auth.*, 32 AD3d 363, 363 [1st Dept 2006]; *Matter of Kenton Assoc. Ltd. v. Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]).

NYCHA's decision to deny new vouchers to all applicants due to insufficient funding has been upheld several times as a rational exercise of discretion not to be overturned by courts. (*Yoanson v New York City Hous. Auth.*, US Dist Ct, SD NY 09 Civ 100439, Stein, J., 2010; *Matter of Palomino v Rhea*, 2010 NY Slip Op 32194[U] [Sup Ct, New York County 2010]; *Bonilla v Rhea*, Sup Ct, New York County, Aug. 27, 2010, Sherwood, J., index No. 401120/2010; *Matter of Fialkin v Rhea*, Sup Ct, New York County, Apr. 19, 2010, Solomon, J., index No. 402101/2009).

Moreover, Section 8 applicants are not guaranteed housing by virtue of obtaining a voucher. Rather, they become participants in the Section 8 program only after the HAP is executed by NYCHA (*Bonilla*, index No. 401120/2010; *Matter of Ortiz-Tait v Hernandez*, 2009 NY Slip Op 316212[U] [Sup Ct, New York County 2009]), and it is well within NYCHA's discretion not to enter into contracts due to a lack of funding, even if a petitioner meets his or her deadline.

*Richardson v Rhea* is not to the contrary. There, the petitioner submitted a rental application on October 9, 2009, and the apartment passed inspection on November 13, 2009. NYCHA incorrectly determined that the pertinent deed had not been recorded, even though proof of its recording was "readily available." As a result, NYCHA canceled the voucher, deeming it expired. In response to the petition, NYCHA raised its lack of funding and decision to deny new

vouchers that had not been approved by December 31, 2009. The court held that NYCHA had acted arbitrarily and capriciously to the extent that of its decision that the petitioner's rental application was incomplete, thereby leading to "a string of decisions" resulting in the voucher's cancellation. Although the court acknowledged NYCHA's authority not to process applications that were complete by December 2009, it nonetheless remanded the matter because its decision was based on false information. (2010 Slip Op 32193[U] [Sup Ct, New York County 2010]).

Here, by contrast, NYCHA's decision as to petitioner's application was not based a false conclusion but only on its decision not to process any application not approved by December 31, 2009 because of lack of funds.

While petitioner does not challenge NYCHA's decision to deny all voucher applications, he maintains that his application was not treated fairly and equally. However, by not accepting petitioner's application and by placing him on a waiting list, NYCHA is treating petitioner as it treats other applicants. It is a decision based on NYCHA's lack of available funds, regrettably but equally applied to applicants, even those who have timely submitted the necessary paperwork. There is no evidence that NYCHA denied petitioner's application for any other reason, and no indication that NYCHA intentionally delayed petitioner's application or treated him in a manner inconsistent with that of other applicants whose packages were submitted near the end of 2009. (*See Palomino*, 2010 NY Slip Op 32194[U] [no evidence that petitioner's application was deliberately delayed; no evidence that denial was pretextual]).

For all of these reasons, petitioner has not established that NYCHA acted arbitrarily or capriciously in denying his application.

III. CONCLUSION

Accordingly, it is hereby

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

This constitutes the decision and order of the court.



Barbara Jaffe, JSC

**BARBARA JAFFE**  
J.S.C.

DATED: March 7, 2011  
New York, New York

MAR 07 2011

UNFILED JUDGMENT

~~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 140B).~~