

Matter of White v New York City Hous. Auth.

2011 NY Slip Op 31104(U)

April 28, 2011

Supreme Court, New York County

Docket Number: 402596/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 402596/2010
WHITE, MICHELLE
VS.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78
CAL # 116

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for Article 78

PAPERS NUMBERED
1
2,3

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

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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: 4/28/11
APR 28 2011

BARBARA JAFFE
J.S.C. 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 : PART 5

-----X
In the Matter of the Application of
MICHELLE WHITE,

Petitioner,

Index No. 402596/10

Motion Date:

3/1/11

Motion Seq. No.:

001

-against-

DECISION & JUDGMENT

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

-----X
BARBARA JAFFE, JSC:

For petitioner, self-represented:

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Brooklyn, NY 11205
347-430-0370

For respondent:

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By notice of petition dated September 8, 2010, petitioner brings this Article 78 proceeding seeking to reverse respondent's determination dated August 23, 2010 upholding the termination of her tenancy. Respondent opposes the petition.

I. BACKGROUND

From 2009 to 2010, petitioner was a tenant in respondent's building at the Ingersoll Houses in Manhattan. (Verified Answer, dated Dec. 2, 2010, Exh. C). By notice dated February 3, 2010 and mailed to petitioner by certified mail, respondent advised her that it was recommending the termination of her tenancy due to her chronic delinquency in paying rent as she had paid her rent late or not at all for eight of the last twelve months, and that a hearing on its recommendation would be held on March 11, 2010. (*Id.*, Exh. F). On March 12, 2010, after

petitioner failed to appear for the hearing, respondent's hearing officer issued a decision terminating petitioner's tenancy. (*Id.*, Exh. G). By determination dated March 31, 2010, respondent approved the hearing officer's decision and terminated petitioner's tenancy. (*Id.*, Exh. H).

On August 10, 2010, petitioner filed an application requesting a new hearing, asserting that she did not receive notice of the hearing and that she would pay the overdue rent by the middle of September. (*Id.*, Exh. I).

By decision dated August 23, 2010, respondent denied petitioner's application to vacate the March 2010 decision, finding that petitioner's four-month delay in moving to vacate her default was unreasonable, that her excuse for her default, namely, that she did not receive notice of the hearing was unreasonable given respondent's affidavit of mailing, proof that the mail was not returned as undelivered, and that her defense that she would pay the overdue rent by September 2010 was not meritorious in light of the more than \$2,000 in overdue rent owed by her. (*Id.*, Exhs. J, K).

II. CONTENTIONS

In support of her application, petitioner states that NYCHA should have reversed its determination as she is on unemployment and not welfare and that NYCHA should have thus lowered her rent. (Petition, dated Sept. 8, 2010).

Respondent argues that as its determination was rendered on default, the only issue that may be reviewed in this proceeding is whether respondent properly denied petitioner's application to vacate her default, and that the determination denying petitioner's application was rationally-based and not arbitrary and capricious. (Respondent's Memo. of Law, dated Dec. 2,

2010).

III. ANALYSIS

The only questions that may be raised in a proceeding to challenge action or inaction by a state or local government agency are, in pertinent part, whether a 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 . . . (CPLR 7801, 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]; *Matter of E.W. Tompkins Co., Inc. v State Univ. of New York*, 61 AD3d 1248, 1250 [3d Dept 2009], *lv denied* 13 NY3d 701; *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 Liq. Auth.*, 32 AD3d 363, 363 [1st Dept 2006]; *Matter of Kenton Assocs., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). If the court determines that the administrative determination is rationally based, the court's inquiry is complete; it may not substitute its judgment for that of the administrative agency. (*Paramount Communications, Inc. v Gibraltar Cas. Co.*, 90 NY2d 507 [1997]).

The court's review is limited here to whether respondent properly denied petitioner's application to vacate her default. (*Yarbough v Franco*, 95 NY2d 342 [2000]). In order to establish entitlement to vacatur of the default, the applicant must demonstrate both a reasonable excuse for the default and a meritorious defense to the underlying charges. (*See Cherry v New York City Hous. Auth.*, 67 AD3d 438 [1st Dept 2009] [court properly refused to annul

respondent's denial of petitioner's application to vacate default in appearing at termination-of-tenancy hearing as petitioner failed to provide reasonable excuse for default or documentation supporting defense]; *Daniels v Popolizio*, 171 AD2d 596 [1st Dept 1991] [application to vacate NYCHA default requires reasonable excuse and meritorious defense]).

Here, petitioner's excuse for not appearing, that she had not received notice of the hearing, was controverted by respondent's showing that it had mailed the notice to petitioner by certified mail and that the mailing had not been returned to it. Thus, respondent's determination that petitioner had not set forth a reasonable excuse for her default was rational.

Moreover, as petitioner did not deny that she owed rent and merely sought additional time to pay, respondent's determination that she had not established a meritorious defense to her nonpayment of rent was also rational.

While petitioner asserts that her rent should have been lower, she did not raise this issue before respondent and is thus barred from raising it here. (*Yarbough*, 95 NY2d at 347 [judicial review of administrative proceedings confined to facts and record before agency]; see *Torres v New York City Hous. Auth.*, 40 AD3d 328 [1st Dept 2007] [court could not consider evidence raised for first time in article 78 proceeding]).

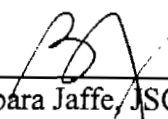
IV. CONCLUSION

Accordingly, it is hereby

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

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).

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: April 28, 2011
New York, New York
APR 28 2011