

Matter of Galva v Rhea
2011 NY Slip Op 31915(U)
July 5, 2011
Supreme Court, New York County
Docket Number: 401429/11
Judge: Tanya R. Kennedy
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KENNEDY
Justice

PART 4

GALVA, ANA

INDEX NO.

401429/11

MOTION DATE

6-16-11

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -
JOHN RHEA, ETAL.

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits _____

3-4

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Upon the foregoing papers, it is ordered that this Article 78 has been decided in accordance with the accompanying Decision, Order 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 141B).

JUL 13 2011

Dated: July 5, 2011

Hon. Tanya R. Kennedy
HON. TANYA R. KENNEDY 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):

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 4**

**In the Matter of the Application of
ANA GALVA,
Petitioner,**

INDEX NO. 401429/11

- v -

**JOHN B. RHEA, as Chairman of the
NEW YORK CITY HOUSING AUTHORITY,
THE NEW YORK CITY HOUSING AUTHORITY,
and 2119 AMSTERDAM LLC,
Respondents.**

**DECISION, ORDER
AND JUDGMENT**

TANYA R. KENNEDY, J:

In this Article 78 proceeding, Petitioner seeks to annul the determination of respondents New York City Housing Authority (Housing Authority) and its Chairman, John B. Rhea, suspending her Section 8 rent subsidy voucher for an apartment located at 481 West 165th Street, Apartment 5W, New York, New York 10039 and owned by respondent landlord 2119 Amsterdam LLC (respondent landlord).

Petitioner contends that the determination by the Housing Authority and Rhea (respondents) was (1) arbitrary and capricious, (2) an abuse of discretion, (3) a denial of due process, and (4) not supported by substantial evidence. Respondents maintain that there was no termination of Petitioner's Section 8 rent subsidy since Petitioner was never a Section 8 program participant. Rather, Respondents maintain that Petitioner was among several other voucher holders whose Section 8 vouchers were withdrawn by the Housing Authority in December 2009 due to a funding shortfall and who is on the list of affected persons who will receive a new voucher when the Housing Authority obtains additional funding. For the reasons set forth below, the petition is denied and the petition is dismissed.

The relevant facts are as follows. The Housing Authority is one of several agencies that administer the Section 8 program in the City of New York through which the federal government provides rent subsidies to lower income families to enable them to rent privately owned housing (Verified Answer, ¶18). One form of Section 8 housing is tenant-based in which the participant uses a United States Department of Housing and Urban Development (HUD) funded voucher to

obtain a subsidy for a portion of the rent at a privately owned building that accepts such vouchers (*id.* at ¶19).

The Housing Authority enters into a Housing Assistance Payments (HAP) contract with the landlord, whereby the Housing Authority agrees to pay the difference between the contract rent for the apartment and the tenant's share of the rent for the apartment (*id.* at ¶20). Federal regulations provide that the Housing Authority may not grant approval for a family to lease a dwelling unit or execute a HAP contract until the Housing Authority determines that the unit has been inspected by the Housing Authority and passes Housing Quality Standards (HQS) (*id.* at ¶21). A voucher holder does not become a Section 8 participant until the Housing Authority enters into a HAP contract and begins paying Section 8 subsidies (*id.* at ¶22).

Sometime in May 2009, the Housing Authority received notice from HUD that it would reduce the Housing Authority's funding allocation for the Section 8 program by approximately \$58 million dollars (*id.* at ¶25). As a result of the funding shortfall, the Housing Authority determined in December 2009 that it could no longer fund new vouchers and that it would not enter into any new HAP contracts for rental packages that were being processed unless the rental packages obtained final approval by December 31, 2009 (*id.* at ¶27).

In July 2009, Petitioner submitted an incomplete rental package for an apartment at 481 West 165th Street in Manhattan (*id.* at ¶29). The rental package was not completed until October 30, 2009 (*id.*). The Housing Authority scheduled a HQS inspection for Petitioner's apartment on November 25, 2009 (*id.*). However, the apartment failed to pass inspection prior to the December 31, 2009 cutoff date to process rental packages (*id.* at ¶30).

Petitioner maintains that respondents failed to inform her of the failed inspection and that she first learned that her Section 8 subsidy was terminated in September 2010 when respondent landlord restored a non-payment proceeding in Civil Court, New York County under Index No. 51384/08, alleging that the Housing Authority failed to pay the Section 8 subsidy (Verified Petition, ¶16; Exhibit C to Petition; Memo of Law at 1). Petitioner also maintains that she was entitled to receive notice of her rent subsidy termination and to a hearing. The trial in the non-payment proceeding has been stayed during the pendency of this matter.

Pursuant to CPLR §7803(3), 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." An administrative decision will withstand judicial scrutiny if it has a rational basis and is not arbitrary and capricious (*see Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

Courts have repeatedly held that it is well within the Housing Authority's discretion not to enter new HAP contracts and to suspend processing of voucher applications due to insufficient funding (*see Yoanson v New York City Hous. Auth.*, US Dist Ct, SD NY 09 Civ 10439, Stein, J. 2010; *Gokhlerner v Rhea*, Sup Ct, NY County, March 7, 2011, Jaffe, J., Index No. 401883/10; *Bonilla v New York City Hous. Auth.*, Sup Ct, NY County, August 27, 2010, Sherwood, J., Index No. 401120/10; *Matter of Palomino v Rhea*, 2010 NY Slip Op 32194[U] [Sup Ct, New York County 2010]; *Matter of Fialkin v Rhea*, Sup Ct, NY County, April 9, 2010, Solomon, J., Index No. 402101/2009). Additionally, possession of a Section 8 voucher does not give the family a right to participate in the Section 8 program (*see Gokhlerner v Rhea, supra; Bonilla v New York City Hous. Auth., supra*).

Pursuant to 24 C.F.R. §982.4(b), a voucher holder is considered an applicant "that has applied for admission to a program but is not yet a participant in the program." In contrast, a participant is "a family that . . . is currently assisted in the program" and "[t]he family becomes a participant on the effective date of the first HAP contract executed by the [Housing Authority] for the family (first day of initial lease term)"(*id.*). It is undisputed that the Housing Authority and respondent landlord did not execute a HAP contract for the subject apartment.

Contrary to Petitioner's contention, respondents were not required to provide notice or an administrative hearing since the challenged determination did not constitute a decision to terminate or deny assistance, but rather a discretionary determination made in response to a funding shortfall (*see 24 C.F.R. §982.554[c][1]; Yoanson v New York City Hous. Auth., supra* at 24).

Accordingly, it is

ORDERED AND ADJUDGED that the petition is denied in its entirety and the proceeding is dismissed; and it is further

ORDERED that the stay of the non-payment proceeding currently pending in Civil Court, New York County under Index Number 51384/2008 is vacated; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision, Order and Judgment of the Court

Dated: July 5, 2011

Hon. Tanya R. Kennedy
TANYA R. KENNEDY
A.J.S.C.

HON. TANYA R. KENNEDY

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