

Hochmuller v NYS Div. of Human Rights
2011 NY Slip Op 32254(U)
August 12, 2011
Sup Ct, NY County
Docket Number: 403535/2010
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
Justice

PART 10

Hochmuller

Plaintiff (s),

INDEX NO.

403535/10

MOTION DATE

MOTION SEQ. NO.

001,002,003

- v -

*MYS Division of Human Rts
et al*

Defendant(s).

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

PAPERS NUMBERED

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

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 1418).

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING JUDICIAL DECISION.

order to judgment

Dated: 8-13-2011

[Signature]
HON. JUDITH J. GISCHE, J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check If appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supreme Court of the State of New York
Country of New York: Part 10

-----x
BARBARA KULIG HOCHMULLER,

Petitioner

-against-

NYS DIVISION OF HUMAN RIGHTS
BELLEVUE SOUTH ASSOCIATES LP
PHIPPS HOUSES SERVICES, INC.,
KIPS BAY COURT MANAGMENT,

Respondents,
-----x

****CORRECTED****

DECISION/ORDER AND JUDGMENT

Index No.: 403535/2010

Seq. Nos.: 001, 002, 003

PRESENT:

Hon. Judith J. Gische

JSC

UNFILED JUDGMENT
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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).

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this
(these) motion(s):

Papers

Numbered

Motion Sequence No. 001

Pet's Verified Petition [article 78] w/ exhs	1
Pet's Poor Person Order w/ BH affid in support w/exhs	2
Resp NYSDHR Answer	3
Resp NYSDHCR written Record (2 volumes)	4,5
Resp Kipps Answer	6
Resp Kipps opp w/JRP affirm	7

Motion Sequence No. 002

Pet's Motion w/ BH affid in support w/exhs	8
Resp Reply w/MC affirm in opposition to motion	9
Resp letter in comply	10

Motion Sequence No. 003

Pet's n/m w/ BH affid in support w/exhs	11
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Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Presently before the court is a summary proceeding brought pursuant to Article 78.

Petitioner Barbara Hochmuller ("Hochmuller") seeks judicial review of the New York State

Division of Human Rights' ("SDHR") Determination and Order After Investigation dated October 28, 2010 (SDHR case number 10143258). SDHR has appeared and answered the petition, denying each of petitioner's claims and seeking a dismissal of this proceeding without a trial.

This court rendered a decision, order and Judgment in this summary proceeding dated July 19, 2011 ("prior order"). In that prior order the court indicated that Respondents Bellevue South Associates, Phipps Houses Service, Inc., and Kips Bay Court Management (collectively "Phipps") had not answered the petition, nor taken any position on whether the petition should be granted or denied. This is, however, incorrect and this correct decision, order and Judgment is being issued to address that error and properly identify the papers that were (and presently are being) considered by the court. The result, however, reached by the court is the same, which is that Hochmuller has failed to show that the agency's determination is without a rational basis.

There are two motions before the court, each by petitioner who is self represented. The first motion is for SDHR to provide her with a copy of the administrative record of her case (Seq. 002). The court granted this motion during oral argument on June 2, 2011, and respondent has submitted a letter to the court, on notice, confirming that this record was sent to petitioner. Hochmuller has not denied that the record has been provided to her; Therefore this motion is denied as moot.

Hochmuller's second motion (Seq. 003) is to suppress SDHR's transcripts of prior proceedings regarding this case. Though it is not clear from petitioners' submissions exactly what transcripts she is seeking to "suppress," the transcripts of the parties' oral argument will be considered as they are important to the courts' decision process; Therefore the motion to suppress is denied.

Although the petition appears in the court's records as having been marked as "disposed," clearly this was an inadvertent marking, since the petition remains to be decided. Accordingly, the petition (sequence 001) is hereby restored nunc pro tunc and marked submitted to be decided along with motion seq. no. 002 and 003, all of which are hereby consolidated for consideration in this single decision.

Hochmuller seeks to vacate, reverse or otherwise annul SDHR's determination that she received no discriminatory treatment in connection with her housing accommodations. Since an Article 78 proceeding is a special proceeding, it may be summarily determined upon the pleadings, papers, and admissions to the extent that no triable issues of fact are raised (CPLR § 409[b]; CPLR §§ 7801, 7804 [h]). Therefore, the court will decide the issues raised on the papers and grant judgment for the prevailing party, unless there is an issue of fact requiring a trial (CPLR § 7804 [h]); York v. McGuire, 99 A.D.2d 1023 [1st Dept 1984] *aff'd* 63 N.Y.2d 760 [1984]; Battaglia v. Schumer, 60 A.D.2d 759 [4th dept 1977]).

Facts Alleged and Background

Beginning in 2003, Hochmuller became a recipient of public assistance benefits from the City of New York in the form of Housing Choice Vouchers ("HCV"). The HCV program assists rent payments for low income individuals. It is established procedure that all requests to transfer apartment units which would increase the HCV rent subsidy must be approved by the New York City Department of Housing Preservation and Development ("HPD"). Hochmuller submitted her formal transfer request to HPD to move from a studio unit to a one bedroom unit. The request was reviewed and denied by the HPD.

Respondents Bellevue South Associates LP., Phipps Houses Services, Inc., and Kips Bay Court Management, the owner and Management Company of the building where petitioner

resides, also denied Hochmuller's transfer request, claiming that they have not granted transfer requests to any other tenants since October 1, 2004.

After her application was denied, Hochmuller filed a complaint with SDHR alleging discrimination because she is disabled and because of her gender. She alleged (and still claims) that respondents Bellevue South Associates, Phipps Houses Service, Inc., Kips Bay Court Management and HPD subjected her to discriminatory treatment. Petitioner's SDHR complaint stated that Hochmuller had requested a transfer to another apartment over a period of several years, and that respondents had denied her transfer request because of her disability and gender. Hochmuller also claimed that respondents' refusal to make renovations to her apartment were for those reasons as well. In support of her claims, Hochmuller stated that a neighbor, who lived with her two daughters, was permitted to move from a two bedroom unit to a three bedroom unit, and that this woman "may have a similar psychological issue [to petitioner's]."

On October 28, 2010, after a formal investigation, SDHR found "No Probable Cause to believe that respondents have engaged or are engaging in the unlawful discriminatory practice complained of." (SDHR case number 10143258). The SDHR report found that Respondents notified Hochmuller that they were willing to make renovations to her medicine cabinet and vanity, but that Hochmuller did not respond to this offer. The report also identified other disabled tenants who had received renovations to their units, including females and individuals with disabilities. Thus, SDHR concluded that "Complainant has produced insufficient evidence showing that comparators outside Complainant's protected class were treated more favorably than [Hochmuller]." Based upon this report, Hochmuller's complaint was dismissed.

Hochmuller now appeals the SDHR determination, and claims that the SDHR's finding was arbitrary and capricious and not supported by any evidence.

In its answer, SDHR indicates that it will not actively participate in this proceeding but replying upon the written transcript of the record of all prior proceedings, as it is allowed to do under Executive Law § 298. Respondent Phipps denies the allegations and seeks to have this action dismissed on the basis that Hochmuller fails to state a claim upon which relief may be granted. In its opposition, Phipps states that Hochmuller's expressed fear of losing her lease is unfounded, they have not discriminated against her, she has no evidence of discriminatory remarks, actions, etc., against her and after SDHR did a comparative analysis of her housing situation, they found no disparate treatment.

Discussion

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision being challenged has a rational bases (CPLR 7803 [3]). Thus, where it is alleged the decision was arbitrary and capricious, or without a rational basis, the petitioner must set forth facts that establish it is "without sound basis in reason" (Matter of Pell, Jr. v. Board of Educ. of Union Free School District No. 1 of the Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222 at 231 [1974]; Matter of Colton, Jr. v. Berman, 21 N.Y.2d 322 [1967]). The court cannot and must not disturb such a decision, even if it would have arrived at a different decision itself. For the reasons that follow, the court finds that petitioner has failed to establish that the determination by the SDHR was without a rational basis.

The SDHR has broad discretion in determining the method to be employed in investigating a claim, therefore its determination will not be overturned unless the record demonstrates that the investigation was abbreviated or one-sided. Bal v. State Div. of Human Rights, 202 AD2d 236, 237 *lv den* 84 NY2d 805 (1994). Such circumstances are not presented (not alleged) by petitioner, even affording her papers the greatest latitude because she is self-represented. The SDHR investigated petitioner's claims and gave her a

full opportunity to develop and present them. Based upon the facts Hochmuller put before SDHR, SDHR concluded her claims were without any factual basis.

Hochmuller has failed to identify any facts or information that she put before the SDHR which it failed to consider or that her complaint was improperly investigated. Hochmuller does not deny that other disabled tenants had renovations made, or that respondents denied her request for renovations. Petitioner does not address, let alone deny that respondents contacted her about making renovations to her unit.

Hochmuller's only support for her claim of discrimination is that an unnamed neighbor was allegedly relocated to a larger apartment. According to Hochmuller's own testimony however, this neighbor is both a woman and disabled and has a family apparently necessitating the move to larger quarters. This directly contradicts Hochmuller's claim that her gender and disability were the sole reasons for her denied transfer request. Furthermore, Hochmuller does not allege that this neighbor was, like her, an HPD aid recipient.

Although Hochmuller requested a transfer from a studio to a larger apartment, she did not present sufficient facts before the HPD to support the need for such a move entitling an increase in the HCV benefits paid to her. SDHR's determination has adequate support in the record that Hochmuller developed before that agency. She has the burden of showing the agency's determination is without a rational basis (see, Koch v. Dyson, 85 AD2d 346 [2nd Dep't 1982]) and has not met it.

Based upon the foregoing, the Determination and Order of the SDHR has a rational basis in the record and it was not arbitrary or capricious. Therefore, the SDHR's decision and order is not subject to review and it will not be disturbed. McFarland v. New York state Div. of Human Rights, 241 AD2d 108, 112 (1st dept. 1998). The petitioner is hereby denied and dismissed.

Conclusion

In accordance herewith, it is hereby:

ORDERED AND ADJUDGED that the petition is **DENIED** and this summary proceeding against the New York State Division of Human Rights is hereby **DISMISSED**; it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order and Judgment of the court.

Dated; New York, New York
 August 12, 2011

So Ordered:



Hon. Judith J. Gische, JSC

UNFILED JUDGMENT

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