

Matter of Phillip-Horne v Rhea

2012 NY Slip Op 30071(U)

January 11, 2012

Supreme Court, New York County

Docket Number: 401769/2011

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

BARBARA JAFFE
J.S.C.

PRESENT

Index Number : 401769/2011

PART _____

PHILLIP-HORNE, SHENNETH

vs

RHEA, JOHN B.

INDEX NO. 401769/11

MOTION DATE 10/25/11

Sequence Number : 001

MOTION SEQ. NO. 001

ARTICLE 78

T

CAL. # 102

vacate administrative determination

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1

Answering Affidavits — Exhibits _____ | No(s) 0

Replying Affidavits _____ | No(s) 3

Upon the foregoing papers, it is ordered that this motion is

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

FILED

JAN 13 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 1/11/12

JAN 11 2012

[Signature], J.S.C.

BARBARA JAFFE

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X

In the Matter of the Application of:
SHENNETH PHILLIP-HORNE,

Petitioner,

Index No. 401769/11

Argued: 10/25/11
Motion Seq. No.: 001
Motion Cal. No.: 102

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

DECISION & JUDGMENT

-against-

JOHN B. RHEA, as CHAIRMAN OF THE NEW
YORK CITY HOUSING AUTHORITY,

Respondent.

-----X

BARBARA JAFFE, JSC:

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FILED
JAN 18 2012
NEW YORK
COUNTY CLERK'S OFFICE

By notice of petition dated June 27, 2011, petitioner brings this Article 78 proceeding seeking an order vacating New York City Housing Authority's (NYCHA) denial of her public housing application. Respondent opposes.

I. BACKGROUND

The purpose of the United States Housing Act of 1937 is to, *inter alia*, "remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families." (42 USC § 1437[a][1][A]). The Act authorizes the United States Department of Housing and Urban Development to "assist public housing agencies (PHAs) with the development and operation of low-income housing projects. . . ." (24 CFR 941.101[a]).

NYCHA, a PHA, was created by the New York Legislature to build and operate

low-income housing in New York City. (Verified Ans.). Pursuant to 24 CFR 960.201(a), NYCHA may admit into its housing only income-eligible families, and its Tenant Selection and Assignment Plan and Application and Administration Department Manual detail the process by which it determines income eligibility, each providing that “[f]amily composition is a key factor in determining apartment size, income limit, and rent” and that “[a]pplicants whose family composition cannot be verified are ineligible for two years from the date they are declared ineligible.” (*Id.*, Exhs., A, B).

An applicant’s family composition is considered non-verifiable when “[t]here is evidence of change or instability in the family composition making it impossible to determine family size.” (*Id.*, Exh. B). Thus, where an applicant claims a person with whom he or she currently lives will not live with him or her in public housing, he or she must provide verification thereof. (*Id.*).

On July 30, 2009, petitioner submitted to NYCHA an application for a public housing project apartment, listing herself and her three children as those who will live in the apartment. (*Id.*, Exh. D).

On March 19, 2010, NYCHA interviewed petitioner to determine her eligibility for public housing, and petitioner stated that she lived with her husband and her three children, that she and her husband have lived together since 1991, that they shared rent payments until he recently lost his job, that they have not separated and that there is no domestic violence, and that she is applying for public housing for herself and her children because she is “constantly argu[ing]” with her husband, and he plans to remain in their current apartment. (*Id.*, Exh. E).

On March 24, 2010, NYCHA denied petitioner’s application, stating that “[w]e cannot determine whether or not your husband will live with you should you get an apartment” as they

had lived together since 1991. (*Id.*, Exh. E).

On or about May 21, 2010, petitioner requested a hearing to review NYCHA’s denial of her application. (*Id.*, Exh. H). On February 14, 2011, the hearing was held, during which petitioner offered in evidence, *inter alia*: 1) a notarized letter dated May 17, 2010 wherein she states that “my husband [] will not be moving with me, nor will he be living with me at the project apartment. He resides at [my current] address to which he is the lease holder”; 2) a lease renewal form for her current apartment dated July 22, 2010 reflecting that her husband is the lessee and that the lease will expire on September 30, 2012; 3) a letter from counsel memorializing that petitioner retained him to represent her in a divorce action and that he expects to file the summons within two weeks; and 4) a notarized letter dated February 25, 2011 in which her husband states, “I am the lease holder at the apartment [in] which I reside, and there’s no way I will jeopardize my lease and give up my apartment to move in with Shenneth into the project apartment she’s applying for.” (*Id.*, Exhs. J, L, M, N).

At the hearing, NYCHA offered, *inter alia*, an affidavit of family composition dated March 19, 2010 wherein petitioner states that her husband will not live in the project apartment. (*Id.*, Exhs. F, J).

On March 4, 2011, the hearing officer issued his decision, sustaining the denial of petitioner’s application on the ground that she failed to provide “sufficient objective evidence to verify [that] her relationship with [her husband] has been terminated and that [he] will not reside with her in an apartment in [p]ublic housing,” noting that although she has retained an attorney for the purpose of filing for divorce and has paid all expenses necessary for same, she has yet to do so, and that her claim that her husband will not live in the apartment is inconsistent with their

long history of cohabitation. (*Id.*, Exh. J).

II. CONTENTIONS

Petitioner claims that the hearing officer's decision is arbitrary and capricious, as she submitted evidence demonstrating that her husband will not live in the project apartment, notwithstanding that they have lived together since 1991, and no evidence to the contrary was offered. (Pet.). She relies on her divorce summons, which is annexed to her petition and which reflects that it was filed on April 13, 2011, in arguing that she was planning to end her marriage at the time of the hearing. (*Id.*).

In opposition, respondent denies that the hearing officer's decision is arbitrary or capricious, as petitioner submitted no evidence demonstrating that her marriage had ended, and her claim that her husband will not move with her is inconsistent with their long history and present cohabitation. (Ans.; Respondent's Mem. of Law). Additionally, respondent asserts that petitioner is precluded from offering her divorce summons, as my review is limited to the evidence adduced at the hearing, and in any event, absent a judgment of divorce, petitioner has failed to demonstrate that her marriage has ended. (Ans.; Respondent's Mem. of Law).

In reply, petitioner maintains that she submitted evidence sufficient to show that her husband will not live in the project apartment, as her statements with respect to her husband's tenancy have been consistent, and NYCHA's rules do not premise eligibility on marital status. (Affirmation of Stephen Shephard, Esq., in Reply, dated Sept. 15, 2011).

III. ANALYSIS

A. Waiver

In an Article 78 proceeding, a court may not consider evidence not presented during the

administrative hearing. (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [1st Dept 2007]; *Matter of Patrick v Hernandez*, 309 AD2d 566, 566 [1st Dept 2003]). Consequently, I do not consider petitioner's divorce summons.

B. Arbitrary or capricious

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 under CPLR Article 78, the test is whether the determination "is without sound basis in reason and . . . 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 Kenton Assocs., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]). Moreover, the determination of an administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

Here, although the hearing officer acknowledged that petitioner offered evidence demonstrating that her husband is the lessee of their shared apartment, he failed to consider that

petitioner's husband is obligated, pursuant to the lease renewal, to pay rent on the apartment until September of 2012 and therefore has incentive to remain there, as confirmed by his notarized letter. Additionally, absent any indication that he considered petitioner's testimony incredible, the hearing officer's reliance on the parties' history of cohabitation is arbitrary and capricious, as petitioner consistently represented that she was seeking public housing in order to move away from her husband, and no evidence to the contrary was offered. And NYCHA's rules neither provide for the nature of the proof necessary to demonstrate that a person with whom an applicant lives will not live with her in project housing nor that a married applicant must file for divorce to demonstrate same.

For these reasons, I find the hearing officer's decision arbitrary and capricious, and I remand the matter for NYCHA's consideration of petitioner's application in accordance with her account of her family composition.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the petition is granted and the matter is remanded to NYCHA for its consideration of petitioner's application in accordance with her account of her family composition.

ENTER:

FILED

DATED: January 11, 2012
 New York, New York
JAN 11 2012

Barbara Jaffe, JSC
BARBARA JAFFE
 J.S.C.

JAN 13 2012
 NEW YORK
 COUNTY CLERK'S OFFICE