

Matter of Holmes v New York City Hous. Auth.
2012 NY Slip Op 31840(U)
July 3, 2012
Supreme Court, New York County
Docket Number: 400604/12
Judge: Arlene P. Bluth
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH Justice

PART

Index Number : 400604/2012
HOLMES, SAMUEL
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE

MOTION SEQ. NO. _____

The following papers, numbered 1 to 2, were read on this motion to/for

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

No(8). _____

Answering Affidavits — Exhibits

No(s). 2

Replying Affidavits

No(s). _____

Upon the foregoing papers, it is ordered that this ~~motion~~ petition and cross-motion are

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

UNFILED 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).

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

Dated:

J.S.C.

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 NY
COUNTY OF NEW YORK: PART 4

Index No.: 400604/12

In the Matter of the Application of
Samuel Holmes,

Petitioner,

-against-

New York City Housing Authority,

Respondent.

DECISION, ORDER
AND JUDGMENT

Present: HON. ARLENE P. BLUTH

UNFILED JUDGMENT

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Petitioner Samuel Holmes, who is self-represented, commenced this Article 78 proceeding to challenge NYCHA's determination dismissing his remaining family member grievance because he failed to remain current in the payment of use and occupancy while his grievance was pending. NYCHA cross-moves to dismiss this proceeding on the grounds that petitioner has failed to state a cause of action because it is undisputed that he did not pay use and occupancy and the rules require that such payments are made in order to have the grievance considered. For the reasons set forth below, NYCHA's cross-motion is granted and the proceeding is dismissed.

Background

Petitioner seeks to succeed to the tenancy of his mother, Ella Mae McCaskill, who was the tenant of record (until she vacated on March 28, 2008) of the subject apartment, #4G at 71 West 112th Street in Manhattan, a public housing development owned and operated by NYCHA. After his mother vacated the apartment, petitioner filed a grievance seeking remaining family member status. In order to determine if an occupant qualifies as a remaining family member,

NYCHA provides a multi-step grievance procedure (exh D to the cross-motion). Both the Property Manager and the Borough Manager denied petitioner's grievance because management never granted petitioner permission to join his mother's household¹ (exhs F and G to the cross-motion).

At the conclusion of the hearing held before hearing officer Arlene Ambert on January 5, 2012, NYCHA made a motion to dismiss petitioner's grievance because he was not current in his payment of use and occupancy; specifically, he owed \$7,138.62. Petitioner's guardian ad litem stated that he did not dispute any of the evidence submitted by NYCHA, but wanted to record to reflect that petitioner had \$1,100 to pay towards his use and occupancy arrears.

Hearing Officer's Determination

In her decision dated January 12, 2012, hearing officer Ambert granted NYCHA's motion to dismiss the grievance for lack of jurisdiction on the grounds that petitioner was not current with use and occupancy. By determination dated February 1, 2012, NYCHA's Board adopted the hearing officer's decision.

In his petition dated March 7, 2012, petitioner does not dispute that he failed to pay use and occupancy during the pendency of his grievance. Instead, he claims that he will become current with all payments by April 2012 and asks this court to order NYCHA to enter into a payment plan with him. Significantly, annexed to the cross-motion (exh W) is a copy of the rent

¹NYCHA asserts, as alternative ground for dismissal, that the petition fails to state a cause of action because petitioner is unable to establish remaining family member status. However, that issue was not addressed by the hearing officer, and accordingly the merits of petitioner's remaining family member status is not before the court in this Article 78 proceeding.

ledger which shows that petitioner still owed \$7,574.44 in unpaid use and occupancy as of May 9, 2012, the date of the affirmation in support of the cross-motion. Finally, petitioner attaches his doctor's letter detailing his illnesses.

Standard of Review

The “[j]udicial review of an administrative determination is confined to the ‘facts and record adduced before the agency’.” (*Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000], quoting *Matter of Fanelli v New York City Conciliation & Appeals Board*, 90 AD2d 756 [1st Dept 1982]).

The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept 1983]). Once the court finds that a rational basis exists for the agency's determination, then the court's review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]). The court may only declare an agency's determination “arbitrary and capricious” if the court finds that there is no rational basis for the agency's determination. (*Matter of Pell v Board of Education*, 34 NY2d 222, 231 [1974]).

Here, petitioner has not demonstrated that the hearing officer's determination was arbitrary, capricious, or an abuse of discretion. NYCHA's rules (NYCHA's Management Manual, ch VII, § IV [E] [1] [c] [2]) require that use and occupancy be up-to-date as a condition precedent to pursuing a remaining family member status grievance (also set forth in the grievance procedures instructions annexed as exhibit D, para. 9 to the cross-motion). As petitioner admits that he had failed to pay use and occupancy as it was due, and indeed owed thousands of dollars as

of the date of the hearing, it was rational and reasonable for the hearing officer to grant NYCHA's motion to dismiss the grievance, and that determination was not an abuse of NYCHA's discretion.

Hawthorne v NYCHA, 81 AD3d 420, 421 (1st Dept 2011).

Finally, this Court lacks the authority to consider mitigating circumstances, such as petitioner's health issues, as a basis for annulling NYCHA's determination (*see Guzman v NYCHA*, 85 AD3d 514, 925 NYS2d 59 [1st Dept 2011]). In addition, petitioner's request that this Court "order NYCHA to accept a payment plan" implies that it is unfair for NYCHA to enforce its rule requiring petitioner's use and occupancy be up-to-date. However, enforcing the rules, even against petitioner, is rational. As the court in *Florence v NYCHA*, 28 Misc.3d 1213(A), 2010 WL 2921626 (Table) (Sup Ct, NY Co. 2010) noted, "a failure to impose the penalties associated with the applicable rule violations is unfair to other tenants and enforcement is essential for respondent to maintain its federal funding".

Accordingly, it is ORDERED and ADJUDGED that NYCHA's cross-motion to dismiss this proceeding is granted, and the proceeding is dismissed. All stays are vacated.

This is the Decision, Order and Judgment of the Court.

Dated: July 3, 2012
New York, New York



HON. ARLENE P. BLUTH, JSC

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