

Matter of Glenn v Rhea
2012 NY Slip Op 32317(U)
September 5, 2012
Sup Ct, New York County
Docket Number: 400399/2012
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS

Justice

PART 58

*In the Matter of the Application of
JAMILLA GLENN,*

INDEX NO. 400399/12

Petitioner,

MOTION DATE _____

-against-

MOTION SEQ. NO. 001

JOHN B. RHEA, as Chairman of the New York City
Housing Authority, et al.,

Respondents.

MOTION CAL NO. _____

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

PAPERS NUMBERED

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

1, 2

Answering Affidavits- Exhibits _____

3, 4

Replying Affidavits _____

5

CROSS-MOTION: _____ YES ☒ NO

UNFILED JUDGMENT

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

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).

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated:

9/5/12

Donna M. Mills

DONNA M. MILLS, J.S.C.

Check one: ☒ FINAL DISPOSITION

☐ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58

-----X

In the Matter of the
Application of Jamilla Glenn,

Petitioner,

Index
Number:

-against-

400399/2012

John B. Rhea, as Chairman of
the New York City Housing
Authority, and the New York
City Housing Authority and
Mott Haven Victory HDFC,

Respondents.

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

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).

-----X

Donna M. Mills, J.:

Petitioner seeks an order annulling what she characterizes
as a determination by the New York City Housing Authority
(NYCHA), effective May 2009, of which she claims she learned on
April 9, 2010 when she received a letter (the April 2010 Letter)
from Mott Haven Victory HDFC (Mott Haven) (petition, ¶ 40).

Underlying Facts and Procedural History

Petitioner has resided in an apartment, Apartment 3-A, (the
Apartment) in a building (the Building) located at 496 Southern
Boulevard, Bronx, New York with her brother Jelani O'Neal
(O'Neal) since January 7, 2008, with a temporary Section 8
housing voucher for the period from January 7, 2008 and expiring
July 6, 2008 (Answer, Exhibit B). Mott Haven is currently the

owner of the Building and it became the owner in May 2009, when NYCHA transferred ownership of the Building to it, pursuant to the Multifamily Home Ownership program (MHOP) (petition, ¶ 11; Answer, ¶¶ 52, 55). On November 9, 2009, petitioner, with the assistance of a housing assistant, submitted documents including income information indicating a household income for herself at an annual rate of \$25,154, and for O'Neal at an annual rate of \$9880, for a total household income of \$35,034, in connection with an application for Section 8 housing (*id.*, ¶ 58, Exhibit 1). Under the applicable formula, petitioner's monthly rent would have amounted to \$876 (*id.*, ¶ 9).

On April 9, 2010, Mott Haven sent petitioner the April 2010 Letter, stating that her income exceeded the Section 8 household income limit for a two-person household (*id.*, ¶ 61). As of December 2009, NYCHA has stopped processing applications for new rentals in the Section 8 housing program, due to funding constraints (*id.*, ¶ 63). On February 17, 2012, petitioner submitted an order to show cause and petition, commencing this proceeding.

Petitioner contends that the April 2010 Letter indicates that her Section 8 housing subsidy was terminated as of May 2009, that she was not given proper notice of this termination and that the termination was without the proper notice and was, therefore, arbitrary and capricious and should be set aside.

Respondents contend that petitioner was not a Section 8 housing recipient, since NYCHA never entered into a Housing Assistance Payment (HAP) contract, under which NYCHA agrees to pay the difference between the contract rent and the tenant's portion of the rent, based upon the household's income. They also assert that, after the Building was transferred to Mott Haven in May 2009, under the MHOP, petitioner sought to apply for the Section 8 housing subsidy, but that due to the household's 2009 income of \$35,034 exceeding the Section 8 program's limitation of \$30,700 for a two-person household, petitioner was not eligible for the Section 8 housing subsidy. They state that since she was never accepted into the program, the requirements for notice for termination are inapplicable.

Respondents also contend that the petition is untimely, since it was brought on February 17, 2012, more than twenty two months after petitioner learned of the April 2010 Letter. Consequently, respondents state that the petition should be dismissed as time-barred under CPLR's four month statute of limitations.

Arbitrary and Capricious

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*

Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc. v Division of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]).

"[T]he construction given statutes ... by the agency responsible for their administration, if not irrational or unreasonable, should be upheld" (*Matter of Brooklyn Assembly Halls of Jehovah's Witnesses, Inc. v Department of Env'tl. Protection of City of N.Y.*, 11 NY3d 327, 334 [2008] quoting *Matter of Howard v Wyman*, 28 NY2d 434, 438 [1971]).

"[R]egulation reflecting the choice made by the department ... is beyond [the court's] power to disturb unless it is 'so lacking in reason for its promulgation that it is essentially arbitrary'" (*Goodwin v Perales*, 88 NY2d 383, 396 [1996], quoting *Matter of Bernstein v Toia*, 43 NY2d 437, 448 [1977]).

The court may not weigh conflicting choices by the administrative agency, if the agency's determination has a basis in reason (*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], *aff'd* 11 NY3d 859 [2008]).

CPLR 217

"A CPLR article 78 proceeding against a public body or officer must be commenced within four months 'after the determination to be reviewed becomes final and binding upon the

petitioner' ... [and] '[a]n administrative determination becomes 'final and binding' when the petitioner seeking review has been aggrieved by it'" (*Matter of Rocco v Kelly*, 20 AD3d 364, 365-366 [1st Dept 2005] quoting *Matter of Yarbough v Franco*, 95 NY2d 342, 346 [2000])).

"[W]here the determination is unambiguous and its effect certain, the statutory period [of four months] commences as soon as the aggrieved party is notified" (*Matter of Edmead v McGuire*, 67 NY2d 714, 716 [1986])).

Analysis

In this matter, the April 2010 Letter was sent on April 9, 2010 and petitioner has stated that she learned of it on or about that date (petition, ¶ 40). Petitioner commenced this proceeding on February 17, 2012 by filing the order to show cause and the petition, more than twenty two months after she learned of the April 2010 Letter. The petition must, therefore, be dismissed as time-barred by CPLR 217's four month limitations period (see *Matter of Hazeltine v City of New York*, 89 AD3d 613, 614 [1st Dept 2011; *Matter of Cowen v Kelly*, 89 AD3d 572 [1st Dept 2011])).

Moreover, petitioner's household income in 2009 of \$35,034 exceeded the Section 8 program's two-person household income limit of \$30,700. NYCHA's decision not to offer petitioner a HAP contract and entry into the Section 8 program, due to her household's income exceeding this limit, cannot be considered to

be arbitrary and capricious (*Partnership 92*, 46 AD3d at 429; *Matter of Tockwotten Assoc. v New York State Div. of Hous. & Community Renewal*, 7 AD3d 453, 454 [1st Dept. 2004]).

Respondents distinguish between the rejection of an application for entry into the Section 8 program, which they contend does not require termination notices, from the termination of an existing recipient from continuing to receive Section 8 subsidies, where termination notices are required.

"[A]n administrative agency's construction and interpretation of its own regulations and of the statute under which it functions is entitled to the greatest weight" (*Matter of Herzog v Joy*, 74 AD2d 372, 375 [1st Dept 1980], *affd* 53 NY2d 821 [1981]; see also *Partnership 92*, 46 AD3d at 430; *Tockwotten Assoc.*, 7 AD3d at 454). Giving NYCHA's interpretation the appropriate deference, the court cannot find the distinction in its approach between prospective Section 8 tenants and already existing Section 8 tenants to be unreasonable (*Brooklyn Assembly*, 11 NY3d at 334).

Consequently, the petition must be dismissed.

Order and Judgment

It is, therefore,

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

Dated: 9 / 5 / 2012

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

UNFILED JUDGMENT

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