

Matter of Dickerson v Cestero
2013 NY Slip Op 30189(U)
January 29, 2013
Sup Ct, New York County
Docket Number: 401884/2012
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 Appointment of MICHAEL DICKERSON,
Petitioner,
For a Judgment pursuant to Article 78 of the Civil Practice
Law and Rules,

INDEX NO. 401884/12

MOTION DATE _____

-v-

MOTION SEQ. NO. 001

DEPARTMENT OF HOUSING PRESERVATION and
DEVELOPMENT, et al.,

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
411B).

MOTION CAL NO. _____

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1

Answering Affidavits- Exhibits 2, 3

Replying Affidavits 4-6

CROSS-MOTION: YES NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 1/27/13

Donna M. Mills
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION
DONNA M. MILLS, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 61

-----X
In the Matter of the Application of
Michael Dickerson,

Petitioner,

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

Index Number:

-against-

401884/2012

Raphael Cestero, Commissioner of
the Department of Preservation
and Development and the Department
of Housing Preservation and
Development,

Respondents.

-----X
Donna Mills, J.:

Petitioner brings this proceeding to set aside a
determination (the Determination) of the Department of Housing
Preservation and Development (HPD), dated May 8, 2012, that
denied his application for rental assistance, that was issued
after a hearing (the Hearing) on March 5, 2012.

Procedural History and Underlying Facts

Petitioner contends that he previously resided in an
apartment, Apartment 4B, in a building (the Building) located at
1050 Hancock Street, Brooklyn, New York, which he obtained under
HPD's Tenant Interim Lease Program, that, on June 1, 2009, he
entered into a housing assistance interim payment agreement with
HPD and that he believed that he would eventually obtain a

Section 8 housing subsidy, but that HPD never issued or processed a Section 8 housing subsidy for him (Petition, ¶¶ 19-20, 21, 23). He states that the Building's owner, 1050 Hancock Street HDFC (the Landlord), sought his eviction based upon non-payment of rent and ultimately obtained a stipulation dated December 20, 2011 (the Stipulation) in which he and the landlord agreed to a judgment of possession in favor of the Landlord, with a stay of eviction until February 20, 2012 (*id.*, ¶ 26; Exhibit B).

Petitioner also states that he was issued a temporary housing voucher (the Voucher) on June 7, 2011, and, while the Voucher expires by its terms on October 5, 2011, it amounts to a permanent Section 8 subsidy, so that he anticipated receiving a Section 8 transfer voucher to obtain alternative housing, but that he "claims to have missed" receiving notices that HPD sent him due to other tenants who must have "tampered with his mail" (*id.*, ¶¶ 32-35). Since he claims he did not receive the notices advising him that he would not be issued a Section 8 subsidy, he seeks to set aside the Determination, which upheld the denial of his Section 8 housing assistance.

Respondents note that the Voucher, by its own term, is a temporary program, expiring on October 5, 2011, that it further required petitioner to obtain a Housing Assistance Program Contract (HAP) with the Landlord, that the Landlord refused to sign a HAP contract with petitioner due to a claimed \$8000 rent

arrearage and that HPD sent petitioner notices on July 3, 2011, August 18, 2011, September 9, 2011, November 4, 2011 and December 7, 2011 regarding his failure to submit a HAP contract, and the impact of his failure on his proposed Section 8 subsidy, but that petitioner's only response was on December 14, 2011, in which he sought a hearing reviewing HPD's decision to deny his Section 8 subsidy application (Answer, ¶¶ 66-76). They note that at the Hearing, petitioner acknowledged receiving the September 9, 2011 notice, which stated in bold capital letters "Section 8 HAP Contract Void" (Hearing Transcript, at 33-34).

Respondents further note that at the Hearing, they presented evidence that most of the above notices were received by both petitioner and the Landlord, and, in particular, that U.S. Post Office track and confirm records indicated that petitioner received the September 9, 2011, November 4, 2011 and December 7, 2011 notices and that petitioner was consequently given "proper notice of the need for a completed HAP contract or the ability to move to another unit to complete his application ... in another building or unit" (Determination, at 6). They assert that since there are limited resources in the Section 8 housing subsidy program and many other applicants, the decision to deny petitioner based upon his lack of response has a reasonable basis and should be upheld (*id.* at 7).

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]).

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], *affd* 11 NY3d 859 [2008]).

Alternatively, since a hearing was held in this matter and the Determination was upon evidence presented at the Hearing, the matter could be transferred to the Appellate Division, First Department pursuant to CPLR 7803 for a determination as to whether it is supported by substantial evidence (*Pell*, 34 NY2d at 231; *300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 179-181 [1978]).

Discussion

The Determination found that petitioner received the September 9, 2011, November 4, 2011 and December 7, 2011 notices, that he had an adequate opportunity to obtain alternative housing

after receipt of the notices, and that to give an additional opportunity to obtain a Section 8 housing subsidy would negatively impact the many other potential recipients of housing assistance (Determination, at 6-7). While petitioner claimed that he did not receive some notices, "[a] mere conclusory denial of receipt [is] insufficient" (*Northern v Hernandez*, 17 AD3d 285, 286 [1st Dept. 2005]). HPD produced evidence at the Hearing of U.S. Post Office documentation supporting its assertion that the notices were received and the hearing officer found this evidence credible (Determination, at 6-7).

The court cannot find the Determination to be arbitrary and capricious, since there is a reasonable basis to support it (*Pell*, 34 NY2d at 231; *Partnership 92*, 46 AD3d at 429) and, therefore, the petition must be dismissed.

Order and Judgment

It is, therefore,

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

Dated: 1/29/ , 2013

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.