

**Matter of Wilens v New York City Hous. Auth.**

2012 NY Slip Op 31824(U)

July 11, 2012

Supreme Court, New York County

Docket Number: 100858/12

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 B. WILENS,*  
  
Petitioner,  
For a Judgment pursuant to Article 78 of the Civil Practice  
Law and Rules,

INDEX No. 100858/12

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. No. 001

NEW YORK CITY HOUSING AUTHORITY,  
  
Respondent.

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, 5

CROSS-MOTION: YES  NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

**FILED**

JUL 13 2012

Dated: 7/11/12

NEW YORK  
COUNTY CLERK'S OFFICE

**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 Appointment of MICHAEL B. WILENS,

Petitioner,

Index No.

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

100858/12

-against-

**FILED**

NEW YORK CITY HOUSING AUTHORITY,

FEB 13 2012

Respondent.

-----X  
DONNA MILLS, J. :

CLERK OF THE COURT  
COUNTY CLERK'S OFFICE

In this Article 78 proceeding, petitioner seeks a reversal of respondent's determination to suspend its subsidy with respect to the premises located at Apartment PH, 2867 Briggs Avenue, Bronx, New York.

Petitioner is the landlord of the aforesaid premises. He entered into a written agreement with respondent wherein respondent was to subsidize a portion of the rent for petitioner's tenant. For the period of February 1, 2011 to May 31, 2011, respondent was supposed to pay petitioner a subsidy in the amount of \$5,788.00. For the period of July 1, 2011 to November 30, 2011, respondent was supposed to pay petitioner a subsidy in the amount of \$7,235.00.

Petitioner brought this proceeding to recover subsidies for the February to May period and the July to November period. The parties have subsequently agreed that the subsidy for the February to May period shall be paid, rendering that portion of the proceeding moot. The second period remains in dispute.

Respondent defends its determination to deny petitioner the subsidy for that period,

claiming that petitioner failed to meet Housing Quality Standards inspections of the premises in April 2011 and September 2011. According to respondent, petitioner's failure to meet those standards prevented the payment of the subsidy. Respondent claims that the staircase at the premises was rotted and damaged, a structural hazard. The nonpayment of the subsidy for the second period was allegedly related to respondent's inspection of the staircase on September 14, 2011. Respondent stated that it warned petitioner of the negative results of this inspection. The subsidy was resumed after a positive inspection in January 2012.

Respondent argues that its determination cannot be reversed by this court unless respondent had an irrational basis in making its determination. Respondent asserts that it acted rationally in denying the subsidy, based on petitioner's purported violation of housing standards.

In an amended reply, petitioner disputes respondent's argument, stating that he was not informed of the results of the September 14 inspection. Petitioner also states that he was not informed of the April inspection until August 31, 2011. This apparently contradicts the statements in the original petition, which stated that petitioner received notice of that inspection in April. Thereafter, petitioner made the necessary repairs and notified respondent via a Certificate of Completed Repairs signed by petitioner. Moreover, petitioner disputes that the staircase was defective in September 2011. Petitioner submits, as evidence, photographs of the staircase provided by his managing agent. Petitioner also submits an affidavit from his tenant, who avers that the staircase was repaired in August 2011.

Petitioner claims that he was informed via a telephone call that the subsidy would be reinstated. A transmitted copy of a part of a telephone conversation is submitted. Petitioner seeks a reversal of the determination on the ground that it was arbitrary and capricious.

In reply, respondent questions the evidentiary value of the phone transcript, claiming it is not dated. Respondent states that the transcript may be referring to the reinstatement of a subsidy payment for May 2011, prior to the first inspection, and not related to the current dispute. Respondent argues that the photographs are not dated and therefore, are inadequate proof. Respondent also argues that the affidavit of the tenant is probably self-serving, when compared with its inspector's findings.

It is settled that in these matters, “[t]he courts cannot interfere unless there is no rational basis for the exercise of discretion” by the administrative agency. “It is well settled that a court may not substitute its judgment for that of the board or body it reviews *unless* the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion.” *Matter of Arrocha v Board of Education of City of N.Y.*, 93 NY2d 361, 363 (1999), quoting *Matter of Pell v Board of Education of Union Free School District No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231-32 (1974). If an agency fails to follow its own rules and regulations in rendering a determination, a determination can be deemed arbitrary and capricious. *See Matter of Frick v Bahou*, 56 NY2d 777, 778 (1982).

The court must uphold the determination. Petitioner's proof attesting to the repaired condition of the subject staircase prior to the September inspection is not substantiated. Whereas, if petitioner could demonstrate that respondent failed to notify him of the results of the September inspection, this could show that respondent failed to follow its own rules with respect to proper notice. However, in response to petitioner's assertion, respondent submits records that indicate its timely service to petitioner of that information. Without any other evidence to the contrary, respondent's actions were not irrational, and the determination should not be reversed.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed, with costs and disbursements to respondent.

DATED: 7/17/12

FILED

ENTER

10:13 AM

*Donna M. Miles*

NEW YORK COUNTY CLERK'S OFFICE  
DONNA M. MILES, J.S.C.