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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS **PART** 58

Justice

In the Matter of the Application of
BARBARA LICHTMAN,

Index No. 100496/13

Petitioner,

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

-against-

MOTION DATE

MOTION SEQ. NO. 001

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT and VILLAGE VIEW HOUSING CORPORATION,

Respondent.

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
Answering Affidavits– Exhibits	2-4
Replying Affidavits	5

CROSS-MOTION: _____ YES ✓ NO

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

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 8/5/13

J.S.C.
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 59

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To enter judgment, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B)

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In the Matter of the Application of BARBARA LICHTMAN,

Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against-

Index No. 100496/13

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT and VILLAGE VIEW HOUSING CORPORATION,

Respondents.

----------X

DONNA M. MILLS, J.:

In this special proceeding pursuant to C.P.L.R. Article 78, Petitioner Barbara Lichtman ("Petitioner") challenges a determination by the Respondent, New York City Department Of Housing Preservation And Development ("HPD"), which denied her application for a Mitchell-Lama apartment located at a residential building owned by the Respondent Village View Housing Corporation ("Village View").

On or about June 23, 2006, Petitioner submitted an application to purchase a two bedroom apartment located at 175 East 4th Street, New York New York (the "subject premises"). As a result, Village View placed Petitioner's name on a wait list to purchase a two bedroom apartment in the event one became available.

By letter dated June 1, 2012, Village View notified Petitioner that: 1) a two bedroom apartment had become available: 2) it would offer apartments to individuals in chronological order it had received applications from them; and 3) if Petitioner was interested in being considered for an apartment, she needed to return the letter to Village View indicating such.

Petitioner subsequently returned the letter to Village View indicating that she was interested in obtaining a two bedroom apartment at the subject premises. On or about August 24, 2012, Petitioner submitted an updated application to Village View to purchase an apartment in the Cooperative building. In the application, Petitioner indicated that she and her daughter would reside in the apartment. Petitioner also indicated that she earned $68,637.24, while her daughter earned no income as a college student. Petitioner also submitted 2011 joint tax returns which she filed with her husband reflecting that their actual adjusted gross income was $132,702.

Village View having received Petitioner's application, forwarded it to HPD, which in turn determined that Petitioner's application had to be denied as her income exceeded the maximum allowable income. By letter dated September 17, 2012, Village View notified Petitioner that HPD had denied her application because her income exceeded the maximum allowable for a two person household ($66,437.50). Village View further notified Petitioner that she could appeal HPD's determination to Joseph Quigley of HPD within 60 days of the date of the letter.

Acting pro se, Petitioner, in a timely manner, wrote to Mr. Quigley at HPD stating that she was appealing the HPD decision, and explained that she had arranged for a reduction in her yearly pay. By letter dated November 26, 2012, HPD denied Petitioner's appeal and informed her that she could not manipulate her income so as to establish income eligibility.

By undated letter, Petitioner requested that HPD reconsider its November 26, 2012 determination. Petitioner alleged that she arranged to have her income reduced due to medical reasons. Petitioner further alleged that her husband, whom she was still

residing with was abusive and that she had not left him due to her illness.

By letter dated February 6, 2013, HPD denied Petitioner's request for reconsideration since she was declared income ineligible and had not provided any basis upon which HPD's prior determination to deny her application could be reversed.

By Notice of Petition and Verified Petition dated March 25, 2013, Petitioner commenced the instant Article 78 proceeding, seeking an order annulling HPD's determination denying her application.

Mitchell–Lama housing projects provide subsidized housing for low-income families, and, as is to be expected, the demand for such apartments far exceeds the available supply. As a result, each housing company maintains waiting lists, and as each unit becomes available it is filled from either an internal waiting list (residents who want to move from one apartment to another) or an external waiting list (people who do not live in Mitchell–Lama housing). See Waldman v New York City Dept. Of Housing Preservation and Development, 10 Misc3d 1075(A) (NY Sup. 2005).

In Article 78 proceedings, the doctrine is well settled that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (see, Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222 at 230–231). The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals (id.). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious (id.). Rationality is

what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard (id.).

Further, the "arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (id. at 231; see also Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 300, 417 [1986]). On review of agency action under CPLR Article 78, the courts may not "second guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence (Montefusco v. New York State Div. of Housing and Community Renewal, 2009 WL 595564[NY Sup.2009]).

Under CPLR § 7803, subd. 4, the substantial evidence test applies only where a hearing has been held and evidence taken pursuant to direction by law (Colton v. Berman, 21 N.Y.2d 322, 329 [1967]). When there is no hearing pursuant to direction by law, then CPLR § 7803, subd. 3 applies. Under CPLR § 7803, subd. 3, the court reviews whether the determination 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 imposed (see Felton v. Halperin, 228 A.D.2d 595 [2nd Dept., 1996]).

Here, HPD rationally upheld the denial of Petitioner's application due to income ineligibility, since her household income exceeded the maximum income allowable for both a two and three person household. The record established that Petitioner was still living with her husband at the time of the application, so his income should rightfully be

included. Additionally, even were this Court to not include Petitioner's husband's income, she alone exceeded the maximum income limit for a two person household.

Since it is clear to this Court that Petitioner did not meet income eligibility requirements, HPD's determination can not be said to have been arbitrary and capricious. The Court has considered Petitioner's other contentions and find them unavailing.

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

Dated: 8/5/13

ENTER:

J.S.C.

DONNA M. MILLS, J.S.C.

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).