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

PRESENT: Hon. Carol R. Edmead PART 35
Justice

Cupidon, Keith

- v -

Shiva Donovan, ET AL.

INDEX NO. 400850/05
MOTION DATE May 3rd, 2005
MOTION SEQ. NO. 01
MOTION CAL. NO.

The following papers, numbered 1 to were read on this motion to/for Article 78

	Papers Numbered
Notice of Motion/Order to Show Cause - Affidavits - Exhibits...	
Answering Affidavits - Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers

FILED
JUL 19 2005
COUNTY CLERK'S OFFICE
NEW YORK

the motion is decided in accordance with the accompanying memorandum decision. It is hereby:

ORDERED that the petition is granted to the extent that the decision of the HPD to deny relocation assistance to petitioner on the grounds that he was displaced from an illegal unit is annulled. The matter is remitted to the HPD, which is directed forthwith to provide petitioner with any and all services and assistance it determines to be appropriate and required to be provided to a "relocatee" pursuant to applicable statute and regulation, consistent with the decision herein. It is further

ORDERED that counsel for respondent, is directed to serve a copy of this decision and order on counsel for petitioner with notice of entry within twenty days of entry.

Dated 07/01/05 ENTER: , J.S.C.
CAROL EDMEAD
J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY I.A.S. PART 35
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In the Matter of the Application of
KEITH CUPIDON

Petitioner,

For Judgment Pursuant to Article 78
of the CPLR

Index No. 400850/05
Mot. Seq. No. 001

-against-

SHAUN DONOVAN, as Commissioner of the
DEPARTMENT OF HOUSING PRESERVATION
and DEVELOPMENT,

Respondent.

----------X

Memorandum Decision

CAROL R. EDMEAD, J.:

In this Article 78 proceeding, petitioner Keith Cupidon seeks an order annulling the decision of respondent Commissioner of the Department of Housing Preservation and Development ("HPD") that petitioner, a disabled adult who was removed from his apartment pursuant to a vacate order, is not entitled to relocation assistance, and compelling respondent to provide such assistance (petition, para. 31). Respondent asserts that petitioner is not entitled to relocation assistance because HPD regulations (28 RCNY § 18-01), only provide for offering temporary relocation services to those vacated from lawful dwelling units, and petitioner was vacated from an illegal dwelling. For the reasons set forth below, the court determines that petitioner is a "relocatee" as defined in 28 RCNY § 18-01, for purposes of eligibility for relocation assistance. Respondent's unwritten determination that petitioner was not a relocatee is

annulled, and the matter remitted for provision of relocation assistance services as determined by HPD to be required pursuant to statute and regulation for a relocatee.

Factual Background

Petitioner shows that he began living in a rooming unit in the basement of a two-family house located at 3223 Newkirk Avenue in Brooklyn, New York, in September 2003. He alleges he paid rent of $280.00 in cash to the owner, Osmond Stephens (the "Landlord"), every month through March of 2005, when he was forced to leave as a result of respondent's execution of a vacate order.

Petitioner presents evidence that the chain of events resulting in his removal from the unit began on November 8, 2004, when his Landlord served a notice of termination of tenancy, effective December 31, 2004, and then commenced an ejectment action in Supreme Court, Kings County (supplemental affirmation, exhibits A and B). Landlord alleged in that action that petitioner rented the unit pursuant to an oral lease, and paid $60 per week (*id.*, exhibit B).

At or about the time Landlord served the notice of termination, petitioner commenced a housing action against his Landlord in Civil Court, Kings County, alleging lack of heat and other conditions (petition, para. 11). An HPD housing inspector was sent to inspect the unit, and told petitioner it was an illegal unit. On November 29, 2004, an order was entered on consent by the court directing the Landlord to provide heat (petition, exhibit A). On February 17, 2005, Civil Court, Kings County, issued a decision finding that, because the premises constituted an illegal apartment, the court could not order repairs other than directing the landlord to cure the heat violation found by the HPD inspector, which "constitutes an illegal constructive eviction in winter" (exhibit B).

Meanwhile, on February 16, 2005, HPD issued a partial vacate order stating that the dwelling had been found to be dangerous to life and detrimental to the health and safety of occupants, because of an "illegal apartment created at cellar" and "inadequate second means of egress" (exhibit E). On March 2, 2005, HPD left a letter addressed to "tenant" stating that its staff had attempted to visit and that "seal up of illegal occupied space is Wednesday, March 9th 2005 at 11:00 AM" (exhibit D). On March 9, 2005, respondent was forcibly removed from the subject premises, with all of his belongings being left there.[1]

Petitioner alleges he went to HPD's office of Relocation Assistance in New York that same day and was denied relocation assistance, without a hearing, and was sent away without explanation. Respondent alleges it has no record of petitioner's having signed the visitor's log at the HPD office, but affirmatively states that, when the Vacate Order was executed, "HPD did not offer petitioner temporary housing because petitioner was not deemed to be a relocatee within the meaning" of its regulations (verified answer, para. 46).

Petitioner's sole income is public assistance of $352.00 per month, and he receives public assistance, food stamps, and Medicaid at the address from which he was vacated. Petitioner alleges he is currently homeless, and has no prospects of finding a new place to live without relocation assistance.

Legal Discussion

Petitioner's position that he is a relocatee entitled to receive relocation assistance is based on the plain and unambiguous language of the NYC Administrative Code, § 26-301(1)(a), and of

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[1]While Petitioner disputes HPD's finding that the cellar apartment lacked a second means of egress, he emphasizes that such dispute is irrelevant to the issues before the court.

the regulations adopted by respondent HPD, in particular 28 RCNY § 18-01. The Administrative Code provides that the Commissioner of HPD shall provide relocation services to "tenants of any privately owned building" who have been displaced as the result of enforcement of any order pertaining to the health of building occupants:

> "1. The commissioner of housing preservation and development shall have the power and it shall be his or her duty:
>
> > "(a) To provide and maintain tenant relocation services
> >
> > ***
> >
> > "(v) for *tenants of any privately owned building where the displacement of such tenants results from the enforcement of any* law, regulation, *order* or requirement *pertaining to the maintenance or operation of such building or the health, safety and welfare of its occupants*" (Admin. Code § 26-301[1][a]; emphasis added).

The HPD "may commence an action against the owner for recovery of [relocation] expenses" (Admin. Code § 26-305[3]).

The regulations promulgated by HPD define the term "relocatee" to include "an individual ... deprived of a permanent residence rented by him/her in the City of New York as a direct result of the enforcement of a Vacate Order ... and not ineligible for relocation services or benefits under any provision of these regulations or of law" (28 RCNY § 18-01). A vacate order includes an enforcement vacate order issued by the Division of Code Enforcement of HPD pursuant to Administrative Code § 17-159 or other provision of the law (28 RCNY § 18-01), such as the one issued by HPD with respect to the basement premises where petitioner was residing. The regulations provide that the HPD "shall offer temporary shelter to [a] relocatee" and thereafter provide other services, including referral to at least three standard apartments (28

RCNY § 18-01 [b]).

The City relies on the general principle that an agency's interpretation of the statute it is responsible for administering and its own regulations are entitled to deference (*Tommy and Tina, Inc. v. Dept. of Consumers Affairs of the City of New York*, 95 A.D.2d 724 [1st Dept. 1983], affd 62 N.Y.2d 671[1984]). However, where the matter is a pure question of law, and the agency's determination "runs counter to the clear wording of a statutory provision," its determination is given little weight (*Kurcsics v. Merchants Mut. Ins. Co.* 49 N.Y.2d 451, 459 [1980]). Here, the agency's purported interpretation of the statute and regulation negates the plain language, as well as the clear intent of the statute and regulation to provide relocation assistance to tenants "who lose their housing through no fault of their own," including those removed from a permanent residence as the result of enforcement of a vacate order (*Matter of Goodwin v. Gleidman*, 119 Misc. 2d 538, 549 [Sup. Ct, N.Y. County 1983]).

Respondent asserts that its determination that petitioner was not a relocatee, but was only eligible for services through the Department of Homeless Services, was based on a rational interpretation of the applicable regulation because an illegal unit "can never be deemed a permanent residence" and a "resident of such unit can never obtain legal rights to remain there but rather is subject to vacatur at any time because occupancy of the unit violates the law" (answer, para. 53). It asserts that this statement of the law follows the holding of the court in *City of New York v. New York & Hong Kong Reciprocation Exch. Corp.*, 193 Misc.2d 716, 719-720 (Sup. Ct., N.Y. County 2002 [Lehner J.]). However, that case is wholly inapposite, and does not support the position taken by HPD. In that case, the owner of a commercial building leased basement space to a tenant who erected cubicles holding 20 beds. The New York City

Fire Department executed an order to vacate the occupants of the building, resulting in displacement of 55 individuals who had been occupying the premises. The City then provided relocation services for all 55 of the people displaced by the Fire Department, incurring costs in excess of $280,000, and sought to recover the costs from the owner pursuant to Administrative Code § 26-305 (3). After trial, the court reasoned that the Administrative Code only requires that relocation assistance be provided to "tenants" of privately-owned buildings, in contrast to the provision concerning City-owned buildings, which provides for assistance to "occupants." Finding that the City had failed to present evidence to show that any of the 55 relocated persons had been tenants, rather than mere occupants, and that the cubicles holding 20 beds could not be viewed as a permanent residence for 55 individuals, the court held that the owner was not liable for the relocation expenses incurred by the City.

Thus, the decision reached in the *New York & Hong Kong* case tracked the statutory language, which requires HPD to provide relocation assistance to "tenants of any privately owned building" displaced as a result of enforcement of a law or order, and the regulatory language defining relocatee as a person "deprived of a permanent residence rented by him/her ... as a direct result of the enforcement of a Vacate Order" (see *Retek v. City of New York*, 14 A.D.3d 708 [2d Dept. 2005], "petitioner's argument that the term 'tenant[ ]' as used in Administrative Code of City of New York § 26-301 is limited to the named tenant on a lease is without merit," and HPD therefore was entitled to recover costs of offering temporary shelter to relocatees). Nothing in the decision supports the HPD's position that tenants displaced from an illegal housing unit as a result of enforcement of a vacate order are ineligible for relocation assistance.

HPD does not appear to dispute petitioner's status as a "tenant," in light of the evidence that he paid monthly rent to the Landlord (*see Weiden v. 926 Park Ave. Corp.*, 154 A.D.2d 308 [1st Dept. 1989], where "defendants accepted rent from plaintiff, [he was] a month-to-month tenant ... and thus entitled ... to a 30-day notice by defendants of an intention to commence an action or proceeding to recover possession"). Nor does respondent appear to dispute that, having resided in the cellar unit for over a year, petitioner should be deemed a permanent resident thereof (see *Universal Motor Lodges, Inc. v. Seignious*, 146 Misc.2d 395 [N.Y.Just.Ct. 1990], homeless individual who resided at Motor Lodge for more than 90 days was not a transient, regardless of whether motel violated its license by permitting homeless people to be maintained on its premises for a period in excess of 30 days; Multiple Resident Law § 50, "transient occupancy" of a hotel means occupancy "for a period of ninety days or less").

Accordingly, it is hereby

ORDERED that the petition is granted to the extent that the decision of the HPD to deny relocation assistance to petitioner on the grounds that he was displaced from an illegal unit is annulled. The matter is remitted to the HPD, which is directed forthwith to provide petitioner with any and all services and assistance it determines to be appropriate and required to be provided to a "relocatee" pursuant to applicable statute and regulation, consistent with the decision herein. It is further

ORDERED that counsel for respondent, is directed to serve a copy of this decision and order on counsel for petitioner with notice of entry within twenty days of entry.

This decision constitutes the order of the court.

Dated: July 1, 2005

J.S.C.

CAROL EDMEAD
J.S.C.

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