

**Matter of Bao Yu Ye v New York City Dept. of Hous.
Preserv. & Dev.**

2003 NY Slip Op 30240(U)

July 9, 2003

Supreme Court, New York County

Docket Number: 103940/03

Judge: Walter B. Tolub

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

PART 15

0103940/2003

YE, BAO YU
vs
NYC DEPT. OF HSG PRESERVATION

INDEX NO.

103940 | 03

MOTION DATE

6 | 10 | 03

MOTION SEQ. NO.

001

MOTION CAL. NO.

SCANNED

JUL 17 2003

SEQ 1
ARTICLE 78

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

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

Answering Affidavits — Exhibits

Replying Affidavits

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE

Dated: 7/9/03

W
WALTER B. TOLUP J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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In the Matter of the Application of

BAO YU YE,
Petitioner,

Index No. 103940/03
Mtn Seq. 001

-against-

NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION & DEVELOPMENT and
GOWERNEUR GARDENS HOUSING CORP.
Respondents,

For Judgment Pursuant to Art. 78 of the
CPLR Reversing the Respondent's Decision
and/or Certificate of Eviction
dated November 6, 2002.

..... x

WALTER B. TOLUB, J.:

In this action petitioner Bao Yu Ye moves, pursuant to CPLR Article 78, to vacate and annul the determination of the New York City Department of Housing Preservation and Development (hereinafter "HPD") of November 6, 2002, finding that petitioner is not a lawful occupant and issuing a Certificate of Eviction. Petitioner claims that HPD's decision violated her due process rights. For the reasons stated herein, petitioner's motion is granted and HPD's determination and issuance of a Certificate of Eviction are vacated and annulled.

Facts

Petitioner Ye resides and is the tenant of record at 675 Water Street, Apt. #3B, New York, NY 10002. The building is owned by Gouverneur Gardens Housing Corporation (hereinafter "Gouverneur Gardens"), an Article II housing company organized under the Private Housing Finance Law of the State of New York, also known as the Mitchell-Lama law. On or around August 12, 1998, Gouverneur Gardens served a "Preliminary Notice of Grounds for Eviction" (hereinafter "Notice") upon petitioner. The Notice set forth four alleged violations by petitioner and/or the tenant of record. The alleged violations were:

- (1) Upon information and belief, you have made material misrepresentations of facts as to your qualifications for the Apartment, the household composition and income of the household members and have secured possession of the Apartment by submission of false information and by making false representations;
- (2) You do not maintain the Apartment as your primary residence. Upon information and belief, you are permanently residing at an address other than the subject premises.
- (3) Upon information and belief, you have accepted things of value from occupants as consideration in exchange for the right to occupy the subject premises.
- (4) Upon information and belief, you have sublet and/or assigned your rights of occupancy to the Apartment to "John and/or Jane Doe" without the approval of the New York City Department of Housing Preservation and Development ("HPD") or Gouverneur Gardens Housing Corp., (the "Landlord");

On May 9, 2002 a hearing was held before a designated hearing officer of HPD. On November 6, 2002 the hearing officer issued a decision determining that petitioner is not a lawful occupant of the apartment (HPD Decision, dated November 6, 2002, p. 4). Based on this determination, the hearing officer issued a Certificate of Eviction.

Discussion

Petitioner makes two claims alleging a violation of due process. One is that she did not receive adequate notice of the charges that formed the basis of the hearing officer's decision. The other is that petitioner did not receive a fair hearing with the benefit of counsel and an interpreter.

Adequate notice

Timely notice of the charges against an individual is an essential component of due process (Goldberg v. Kelly, 397 U.S. 254 [1970], Murray v. Murphy, 24 N.Y.2d 150, 157 [1969]). The individual must receive notice of the specific charges against him or her. If a decision is made against the individual based on charges other than those he or she received notice of, the decision is in violation of lawful procedure and the individual's due process rights (See Murray; Chase v. Binghamton

Housing Authority, 91 A.D.2d 1147 [3rd Dept. 1983] (Eviction violates due process where based on charges petitioner did not receive specific notice of)). This principle equally applies to an administrative proceeding for even in that forum no person may lose substantial rights because of wrongdoing shown by the evidence, but not charged (Murray 157. See ~~also~~ Whitbread-Nolan, Inc. v. Shaffer, 183 A.D.2d 610 [1st Dept. 1992] (annulling revocation of real estate brokers licenses on grounds of failure to give notice of charges); Sulzer v. Environmental Control Board of City of New York, 165 A.D.2d 270 [1st Dept. 1991] (finding violation of due process where board failed to charge petitioner with offense for which he was ultimately found liable); Alvarado v. State, Department of State, Division of State Athletic Commission 110 A.D.2d 583 [1st Dept. 1985] (Notice of hearing for revocation of boxing manager and boxer's license violated due process where failed to present specific charges); Santiago v. Blum 91 A.D.2d 505 [1st Dept. 1982] (Suspension of public assistance violated due process where hearing officer's decision based on different charge than petitioner received notice of); Chase at 1147,1148). An eviction based on charges not presented in the petitioner's Notice could violate due process.

In Ye's case the charge that formed the basis of the hearing officer's issuance of the Certificate of Eviction was not presented in the Notice. The hearing officer's decision contained the following conclusions:

Bao Yu Ye never appeared on the official waiting list for an apartment at Gouverneur Gardens and the application number used on the documentation in her file was assigned to a different individual. She acknowledged that she had no knowledge of this other person or the application made by him in 1994. She was vague in her answers concerning her application procedure and key documents were either missing or blank except for her signature. Her tenancy was never approved by HPD.

Accordingly I find that respondents are not lawful occupants of the subject apartment and hereby issue a Certificate of Eviction.

(HPD Decision, dated November 6, 2002, p. 4).

Nowhere in the conclusion which forms the basis of the decision to issue the Certificate of Eviction does the hearing officer find that petitioner: (1) made material misrepresentations as to her qualification for the Apartment, her household composition, or income; (2) does not maintain the Apartment as her primary residence; (3) accepted things of value in exchange for the right to occupy the premises; or (4) has sublet or assigned her rights of occupancy without the approval of HPD or Gouverneur Gardens. These were the four charges

presented in the Notice and therefore were the only four charges that could form the basis for issuing a Certificate of Eviction.

It may appear that the hearing officer concluded that Ms. Ye had made material misrepresentations as to her qualifications for the apartment and obtained the apartment by submission of false information. However, the hearing officer's conclusions only found that Ms. Ye had not followed the lawful procedure for obtaining the apartment but did not find that Ms. Ye actually obtained the apartment by making misrepresentations or providing false information. Though this court takes no position on the accuracy of the hearing officer's finding that Ms. Ye is an unlawful occupant of the apartment, simply being an unlawful occupant was not one of the charges alleged in the Notice.

However, the inquiry into whether petitioner's due process right were violated by the inadequate notice does not stop here. The determination as to what process is constitutionally due does not depend upon a mechanistic or rigid analysis (Garden Homes Woodlands Company v. Town of Dover, 95 N.Y.2d 516, 519 [2000]). Instead, to determine whether an individual has suffered a deprivation without due process, the court is to balance three factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and

the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

(Mathews v. Eldridge, 424 U.S. 319, 335 [1976]. See also Garden Homes Woodlands Company at 519; People v. David W., 95 N.Y.2d 130, 136 [2000]; Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO v. City of Cohoes, 94 N.Y. 2d 686, 692 [2000]).

In this case the Mathews balancing test results in the finding that petitioners have suffered a deprivation without due process because the Certificate of Eviction was issued on grounds petitioners did not have notice of. The private interest that is affected by this official action is very high; loss of one's tenancy in an apartment is a severe and irreparable harm. The risk of an erroneous deprivation would be lowered if petitioner had received adequate notice as to the charges against her. Such notice would provide her the opportunity to prepare the relevant evidence and arguments for her hearing. The government's interest is considerably lower than petitioner's interest. While the government does have an interest in evicting illegal tenants from public housing and would incur additional costs through providing adequate notice and another hearing, these costs are low in comparison to the

harm to the tenants of a wrongful eviction. Under the Mathews test Ms. Ye has a right to adequate notice of the charges against her before the eviction hearings. Since adequate notice was not provided, Ms. Ye's due process rights were violated.

Interpreter


Ms. Ye claims that her due process rights to a fair hearing were violated by HPD's failure to provide an interpreter at the hearing who speaks Cantonese where Ms. Ye only speaks Cantonese. **An** individual who does not request an interpreter at an administrative hearing or indicate that she will not be able to participate in the hearing without one waives any right she may have to an interpreter (Alvarez v. Hernandez-Pinero, 211 A.D.2d 393 [1st Dept. 1995]). At Ms. Ye's hearing she and her counsel agreed that her counsel would serve as her interpreter at her hearing (HPD hearing transcript, dated March 18, 2003, pp. 1-2). The transcript of the hearing does not suggest that at any point Ms. Ye or her counsel indicated that the interpreter arrangement was ineffective. Since Ms. Ye and her counsel agreed that her counsel would serve as her interpreter during the hearing, Ms. Ye cannot now claim that this arrangement violated her due process right to a fair hearing.

Conclusion

Petitioner's motion to vacate and annul HPD's determination and issuance of a Certificate of Eviction is granted on the grounds that petitioner did not receive notice of the charge that was the basis for the HPD decision to issue the Certificate of Eviction.

Settle judgment on notice.

Dated: July 9, 2003



HON. WALTER E. TOLUB, J.S.C.