

**Matter of Gates v Hernandez**

2004 NY Slip Op 30307(U)

November 10, 2004

Supreme Court, New York County

Docket Number: 402276/04

Judge: Lewis Bart Stone

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

PRESENT: STONE  
Justice

PART 50s

GATES, WENDA

INDEX NO. 402276/04

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

MOTION SEQ. NO. 1

MOTION CAL. NO. \_\_\_\_\_

- v -  
TINO HERNANDEZ, ET AL

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

*is decided in accordance with attached Decision & Order.*

**FILED**  
NOV 19 2004  
COUNTY CLERK'S OFFICE

Dated: 15 Nov 04 [Signature]  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 50S

.....	x	
In the Matter of the Application of	:	
GWENDA GATES,	:	<u>Decision and Order</u>
	:	Ind. No. 402276/04
Petitioner,	:	
	:	
For a Judgment Pursuant to Article 78	:	
of the C.P.L.R. and §3001 of the C.P.L.R.	:	
-against-	:	
TINO HERNANDEZ, as the Chairman of the	:	
NEW YORK CITY HOUSING AUTHORITY,	:	
	:	
Respondent.	:	
.....	x	

Hon. Lewis Bart Stone, J.:

Petitioner, Gwenda Gates ("Gates"), a resident of Apartment 2F at 738 Stanley Avenue, Brooklyn, New York (the "Apartment") which is owned and operated by the New York City Housing Authority ("NYCHA"), commenced this proceeding under Civil Practice Law and Rules ("CPLR") Article 78 and under CPLR §3001, against Respondent, Tino Hernandez, as Chairman of NYCHA, to challenge certain policies, proceedings and practices of NYCHA, and to compel NYCHA to establish "specific criteria and definitions of non-desirability and clear guidelines and criteria" for deciding to terminate, transfer or continue the tenancies of certain tenants. The petition also seeks to dismiss charges now pending against Gates at a NYCHA hearing terminate her tenancy.

FILED  
NOV 14 2004

Following a disturbance in her apartment allegedly caused by Roy King ("King"), her onetime and allegedly current boyfriend, the NYCHA gave notice to Gates that it would commence a proceeding to terminate her public housing tenancy on three grounds, viz; 1) that

Gates never obtained permission for King to live in her apartment; 2) that King had committed violent acts in the apartment and 3) Gates refused to exclude him from the building. Prior to the adjourned date for the hearing on these charges, Gates commenced this proceeding to forestall NYCHA from proceeding, asserting various constitutional grounds. This Court initially stayed the NYCHA hearing for a fixed period to consider Gates' assertions. Having subsequently considered the submissions of the parties, the Court did not extend the stay after such period and the stay has expired.

To bring this dispute into context, it is necessary to review in general the structure under which NYCHA terminates tenancies for misconduct.

Because multiple dwellings such as the project in which the Apartment is located are densely populated, unacceptable behavior of tenants can have a serious impact on the ability of other tenants to be secure in and enjoy their homes. To prevent disruptive tenants from adversely affecting the other tenants in its projects, NYCHA has developed a series of criteria relating to tenant behavior and conditions the continuation of a tenant's tenancy on adherence to these rules. Serious violence and material criminal activity by a tenant or a member of a tenant's household in a tenant's apartment are generally proscribed and their occurrence will support a tenancy termination. See IIUD v. Rucker, 525 US 125 (2002).

A second issue arises where the proscribed behavior is not that of the tenant but that of a family member, a guest or invitee of a tenant. Where the tenant aids, abets or indulges such a person in the performance of such behavior, such non-tenant's behavior will be ascribed to the tenant and will constitute grounds for termination of the tenancy. Recognizing that it may be unfair to penalize a tenant for behavior over which the tenant has neither control nor notice,

NYCHA does not remove a tenant who takes appropriate steps to exclude a misbehaving family member invitee or guest, as soon as the tenant has or should have had notice of the misbehavior.

These rules are enforced through a series of procedures, commencing with informal steps through formal hearings on notice and after an opportunity to be heard, before an administrative tribunal, with the findings of such tribunal submitted to the commissioner for review, before the tenancy may be ordered, terminated. Once a tenancy is terminated, NYCHA is free to bring a proceeding in a court of appropriate jurisdiction.

Because tenants of NYCHA housing have deeply subsidized rents for apartments of a quality and value far above that available to them in the market, resulting in a high demand and long waiting list for NYCHA apartments, such tenants are loath to surrender their apartment and accordingly, actions by NYCHA to terminate a tenant's lease have led to much litigation. The cases establish in detail how the termination process is to work, both in establishing what constitutes substantive grounds for termination and regulating the procedures required to terminate a tenancy.

The present "state of the art" procedures followed by NYCHA in their proceedings are based upon a class action settlement in a federal lawsuit. See Escalera v. New York City Housing Authority, 425 F.2d 853 (2d Cir. 1970); Tyson-Randolph v. NYCHA, 74 Civ. 1856 (SDNY 1975). The stipulation of settlement in such cases has established forth in detail procedures and criteria to be used and applied in cases where NYCHA wishes to terminate a tenancy for non-desirability, especially as it relates to the acts or behavior of non-tenant relatives or invitees of a tenant.

Gates, in this proceeding, does not challenge in concept that NYCHA may terminate a

tenant for “undesirability,” but challenges instead the present “specific criteria and definitions of non-desirability” in the context of her case and whether NYCHA uses appropriate guidelines and criteria for deciding which tenancies NYCHA seeks to terminate. Gates also claims that NYCHA has, in a , claiming the choice of tenants whose tenancy the NYCHA selects to terminate is made *inter alia* on a racially biased basis in the context of her case.

Gates’ first assertion is based on her claim that she is a “battered woman,” and that accordingly, the usual procedures applied by NYCHA to evict undesirable tenants cannot be applied to her. NYCHA, on the other hand, counters that, even if Gates is a battered woman, she cannot escape her obligations to act to avoid violence in her apartment.

The record shows that Gates has been a victim of domestic violence inflicted by King. Although Gates alleges she is also a “battered woman,” such assertion has not yet otherwise been established as in the record. A “battered woman” is a female victim of domestic violence who has been so adversely impacted by her battering that she is unable to extricate herself from the relationship or respond appropriately. Gates alleges she is such a victim, and thus being incapable of action, must be excused from certain consequences to which a non-battered woman might be subject. In this case, Gates seeks to be excused from taking those steps, which a non-battered woman in similar circumstances would be required to take, to exclude King from the apartment, as a condition of avoiding the termination of her tenancy. Not only does the record not establish that Gates is a battered woman, it does not establish, even if she were, her ability or capacity or lack thereof, to take action to exclude King from the apartment.

Gates also asserts that NYCHA’s decision to proceed against her was made in a racially biased manner in that she is African American and that Gates’ counsel “has made legal inquiry

practitioners in all of the branch offices in the five boroughs in the City of New York that handle Authority victim proceedings,” and that “[n]one of the practitioners contacted reported cases of eviction proceedings brought against white female victims of domestic violence, for incidences of domestic violence, however the inquiry yielded multiple instances where the tenancies of minority women were terminated for non-desirability and breach of Authority rules and regulations after having suffered domestic violence assaults.”

The Court will first address this second contention. Clearly, NYCIIA cannot use race as a basis upon which to make decisions to evict. The courts have the obligation to consider such a claim carefully, and to make searching inquiry into an appropriate allegation of discrimination. Yet, the Court should not countenance an improper invocation of a charge of race discrimination to prevent or delay the orderly functioning of government procedures. In reading the presentation of Gates’ counsel, this Court was struck by the equivocal and imperfect phrasing and presentation of the discrimination claim, especially in view of the care and quality of the remainder of counsel’s submission in this matter.

Neither Counsel’s statement on its face nor any other material Gates submitted in support offers statistics as to how many practitioners were actually contacted and whether they represented a fair and statistically meaningful cross section of eviction cases, or whether the practitioners contacted handled cases in projects where there were a significant number of white victims of domestic violence. Similarly, no information on the relative number of black or white tenants has been presented, or any indication as to the relative prevalence of domestic violence in the two groups.

Finally, the comparison made is linguistically a comparison of apples and oranges,

comparing “eviction proceeding, brought against white female victims of domestic violence for incidents of domestic violence” against “minority women who were terminated for non-desirability and breach of authority rules and regulation after having suffered domestic violence assaults.” The allegations are themselves insufficient for this Court to proceed further on this issue in this case.

At a hearing on this petition, Gates’ counsel further explained that the allegation was based on inquiry with other legal providers which has “come back with some four or five cases” and that his “office had a previous one, four or five years ago - - and all of the victims of domestic violence were Hispanic or black.” This, it asserted “suggests that perhaps there is an intentional discriminatory policy which would violate the [equal] protection laws of the 14<sup>th</sup> Amendment.”

At the hearing, NYCHA presented its statistics that of the entire New York City public housing population, 5.8% of the heads of household are white and 4.7% of the residents are white. Thus, assuming domestic violence has an equal distribution of incidence between white and non-white NYCHA tenants, there would be about 19 instances of non-white victims of domestic violence for each white victim of domestic violence. Accordingly, the six cases cited, even if sampled correctly, cannot by itself establish any meaningful statistical indication of racial discrimination. Gates admits that she had no direct knowledge or other basis to charge racial discrimination on these evictions. This assertion is therefore so devoid of a basis as to verge on the frivolous, and be a playing of the “race card” to delay and obstruct the proper management of NYCHA properties. The Court therefore rejects this assertion of Gates.

Turning to Gates’ first contention, the Court notes that the procedure under which

NYCHA's action to terminate Gates' tenancy is progressing conforms with the "Procedures for the Termination of Tenancy" as set forth as Exhibit A to a stipulation of settlement in a Federal class action against NYCHA brought by its tenants, which stipulation was entered as a judgment in such case by the United States District Court for the Southern District of New York. See Escalera, supra. As a class action settlement, Escalera binds NYCHA all present and future tenants of NYCHA. The notice given by NYCHA to Gates to commence the proceeding against her tracks the forms expressly prescribed in Exhibit B to the ordered stipulation. The form, however, leaves a blank for the specified charges, expecting that NYCHA will expressly set forth charges in an appropriate manner. In this case, the specified charges were recited to be:

**NON-DESIRABILITY IN THAT:**

1. On or about October 25, 2003, Roy King, an unauthorized occupant of your New York City Housing Authority ("Authority") apartment, assaulted you in your apartment, to wit: Roy King cut your hand with a knife causing physical injury, pain and suffering.

**BREACH OF RULES AND REGULATIONS IN THAT:**

2. In violation of Paragraphs 12(e), 12(q) and 12(r) of your Authority Resident Lease Agreement, you, Gwenda Gates, tenant of record, failed to cause an unauthorized occupant of your apartment to refrain from illegal, immoral or disorderly activity on Authority premises.

3. In violation of Paragraph 5 and/or 12(b) of your Authority Resident Lease Agreement, you, Gwenda Gates, tenant of record, have permitted an unauthorized occupant, Roy King, to take up residence in your Authority apartment since about October 2003, without obtaining prior written consent of your Development's Housing Manager, as required.

There are two separable procedural issues, first, whether the process itself was subject to constitutional infirmities and second, whether the specification of charges was constitutionally infirm.

The process is appropriate. NYCHA is merely following the procedure it is required to

follow under the Federal consent order. No decision of this Court could change the consent Order as only the a class action court has jurisdiction to do so. Further any order of this Court which would require NYCHA to change its procedure would subject NYCHA to conflicting mandates. Accordingly, this Court may not fault on NYCHA on the procedures taken by it against Gates in this proceeding. The only way to challenge such procedures, would be for Gates to apply to the Federal Court which issued the consent Order for a modification thereof. The Court has considered the specificity of the charges as set forth in the NYCHA notice to Gates. No vagueness exists; they are clear and well stated.

#### Procedural Analysis

Gates had moved pursuant to CPLR Article 78 and CPLR §3001 for an order “declaring that NYCHA’s policy of terminating tenants who are victims of alleged domestic violence is applied in an “arbitrary and capricious manner” and deprives Gates and other tenants similarly situated of their rights under the United States and New York Constitution. Gates contends that this motion is a “hybrid” Article 78 proceeding (See Herman Affirmation in Support of a Preliminary Injunction, ¶ 9), in which Gates seeks a “declaration” that NYCHA’s practices unconstitutional termination procedures against tenant victims of domestic violence.

CPLR Article 78 special proceedings afford litigants a method with which to resolve disputes quickly. Article 78 proceedings supercede the common law writs of mandamus, prohibition and certiorari to review, replacing all three of them in a uniform device for challenging the activities of an administrative agency. Gates states that she is “in no way requesting a writ of prohibition,” but is seeking a preliminary injunction under CPLR §6301, and

is also seeking declaratory judgment under CPLR §3001. NYCHA contends that Gates, by using the special proceeding mechanism, is seeking prohibition, which they contend is an improper remedy here.

CPLR §3001 provides that the “Supreme Court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed.” A declaratory judgment is one that seeks to have the Court establish and promulgate the rights of the parties on a particular subject matter.

However, if a plaintiff is using a declaratory action to test the validity of the propriety of the proceedings under a statute, the plaintiff must ordinarily pursue administrative challenge before going to court. The doctrine of “exhaustion of remedies,” as a precondition to judicial action, should be made under Article 78 proceeding rather than a declaratory action. (See Seigel, New York Practice §437, p. 708, 3d Ed. 1999). Therefore, although called a motion for declaratory relief, this Court has no jurisdiction because Gates has not exhausted her remedies through the administrative process. Pirro v. Angiollio, 88 NY2d 351 (1996); Town of Huntington v. DHCR, 82 NY2d 783 (1993); Gelston v. DHCR, 177 Misc.2d 431, 434 (Sup. Ct. Queens Co., 1998) (Milano, J.); Seabrook v. Johnson, 173 Misc.2d 15, 18 (Sup. Ct. Bronx Co. 1997) (Giamboi, J.).

By claiming that NYCHA’s termination proceedings against domestic violence tenant-victims are conducted in an “arbitrary and capricious manner,” Gates ostensibly invokes CPLR §7803(3), which requires that there be a “determination” which has been applied in this improper manner. However, there has been no determination, and therefore this Court lacks jurisdiction

over the matter pursuant to this statute as well. Gates may not use an Article 78 proceeding to challenge a non-final determination; she must first exhaust her administrative remedies. CPLR §7801(1). When and if NYCHA issues a determination on Gates' tenancy, if that determination is adverse to her, Gates may seek review of such determination by an Article 78 proceeding. Until NYCHA has issued a determination, this proceeding is not ripe for review.

Although adamantly denied, Gates is also ostensibly seeking to "prohibit" NYCHA from proceeding against Gates as well as any other alleged tenant-victims of domestic violence. Gates avoids calling the action a "writ of prohibition" to evade the strict rule of New York law that "prohibition does not issue where the grievance can be redressed by ordinary proceedings at law or in equity such as by appeal, motion, or other ordinary applications." Matter of Dondi, 40 NY2d 8, 14; In Re Doble v. Kaplan, 15 NY2d 606 (1964).

Gates has failed to show that "no adequate remedy at law exists to redress any potential errors of law by appeal or judicial review." CPLR §7803(2). See also Rush v. Mordue, 68 NY2d 348 (1986). Thus, before this Court can address her grievance, a hearing must be held before a hearing officer, where the burden is on NYCHA to present witnesses. These witnesses may be cross-examined by Gates. After considering the evidence the hearing officer must make findings of facts and recommendations to the Housing Authority. Once reviewed, any number of resolutions are possible, and if adverse to Gates, they may be appealed pursuant to Article 78. Gates cannot avoid an Article 78 proceeding by simply stating that the administrative procedure would affect her rights because she is a battered woman. The record to date, other than her assertion, does not show she has been so determined. In fact, she seems to argue that the assault against her was a unique experience. The factual predicate for an Article 78 review must be

found either in the record of the administrative proceeding or determination. Allowing such an assertion, so that review may be had under Article 78, on whether such exclusion was permissible under the standards to be applied in an administrative proceeding, would result in a back door nullification of the rule requiring the Court to rule on the record before it.

Petitioner's motion is denied.

Dated: November 10, 2004

New York, New York



Lewis Bart Stone

Justice of the Supreme Court.

FILED  
NOV 19 2004  
CLERK OF THE COURT  
JUDICIAL BRANCH