

**Matter of Birmingham v New York City Hous.
Auth. Hearing Off.**

2007 NY Slip Op 30283(U)

March 19, 2007

Supreme Court, New York County

Docket Number: 0403897

Judge: Nicholas Figueroa

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publication.

PRESENT: FIGUEROA
Justice

PART 46

BIRMINGHAM, JAY

INDEX NO. 403897/06

MOTION DATE _____

N.Y.C. HOUSING AUTHORITY,
E T A C.

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

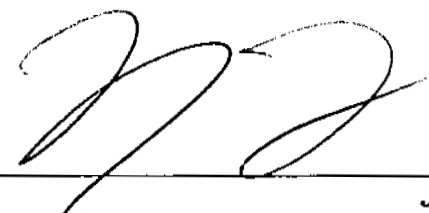
Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

SEE ACCOMPANYING DECISION AND JUDGMENT.

UNFILED JUDGMENT
 His judgment has not been filed with the County Clerk
 and notice of entry cannot be given to the person. To
 obtain entry, counsel must appear in person at the
 County Clerk's office (Room 41B).

Dated: March 19, 2007



 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 46

In the Matter of the Application of
JAY BIRMINGHAM,

Index No. 403897/06

Petitioner,

**DECISION AND
JUDGMENT**

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

- against -

NEW YORK CITY HOUSING AUTHORITY
HEARING OFFICE, ELLIOTT-CHELSEA HOUSES,

Respondents.

Nicholas Figueroa, J.:

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be mailed based hereon. To
obtain entry, counsel or the petitioner must
appear in person at the County Clerk's Desk (Room
118)

Petitioner seeks a judgment, pursuant to CPLR Article 78, to reverse and annul respondent's final determination denying his application to vacate his default in appearing at an administrative hearing. Following that hearing, respondent terminated petitioner's public housing tenancy. Although petitioner names The New York City Housing Authority and Elliot-Chelsea Houses as respondents, these entities may not be sued separately from the New York City Housing Authority; therefore, the court will treat the latter entity as the respondent.

Respondent, in a May 1, 2002 Notice and Specification of Charges, informed petitioner that it intended to terminate his tenancy because he allowed unauthorized occupants to reside in his apartment and possess narcotics and a loaded firearm; and, because he had been chronically delinquent in paying his rent for a twelve-month period.

After failing to attend a hearing on the charges, petitioner petitioned to vacate his default and entered into a November, 2003 stipulation in which he admitted the charges, agreed to permanently

exclude the unauthorized occupants from residing in or visiting his apartment, and consented to a five year period of probation.

On January 21, 2005, police, executed a search warrant for petitioner's apartment and found crack cocaine that petitioner and three other persons had been selling from the location. One of the persons arrested was an individual petitioner promised to exclude under the November, 2003 stipulation.

In February, 2005, respondent interviewed petitioner about his arrest. During the interview, petitioner stated that the charges were no longer pending. Respondent informed petitioner, both orally and in writing, that the matter would be referred to its Central Office for termination proceedings.

On June 1, 2005, respondent notified petitioner that he violated his lease and his probation by possessing crack in his apartment and allowing unauthorized persons to reside in and use the apartment for illegal drug use.

Respondent appeared at the hearing on July 8, 2005 and requested an adjournment so that he could obtain an attorney. The hearing was adjourned to August 16, 2005.

On August 4, 2005, the police executed another search warrant in petitioner's apartment. Petitioner was not present; however, police arrested seven other persons there.

Petitioner failed to appear for the August 17, 2005 hearing and the hearing officer recommended termination of the tenancy, on default. Respondent adopted the hearing officer's recommendation on September 7, 2005 and issued its determination terminating his tenancy.

Respondent alleges that subsequent to the termination, on August 28, 2005, police observed petitioner enter a building on the housing complex grounds and then swallowing crack. He was arrested for trespassing, criminal tampering, and obstructing governmental administration.

Respondent began the eviction process by serving petitioner with a Thirty-Day Notice To Vacate on September 26, 2005. It served petitioner with a holdover Notice of Petition and Petition on November 7, 2005.

Petitioner appeared in Civil Court on the petition's return date, November 18, 2005. He requested an adjournment so that he could consult an attorney and to take steps to vacate his hearing default.

The Civil Court adjourned the proceeding to December 21, 2005; however, petitioner was arrested on December 10, 2005 for criminal sale of a controlled substance. He was indicted and pleaded guilty to criminal sale of a controlled substance in the fourth degree. Petitioner remains incarcerated.

Petitioner has not paid use and occupancy on the apartment since his incarceration. On February 10, 2006, the police executed another search warrant at petitioner's apartment and arrested four persons for drug possession with intent to sell.

On June 27, 2006, approximately eight months after the default, petitioner, who was incarcerated on Rikers Island, wrote to the hearing officer and requested that he vacate the default. Respondent opposed the application because petitioner failed to provide both an excuse for his non-appearance at the hearing and a meritorious defense to the charges of drug use and unauthorized occupants in the apartment.

The hearing officer denied petitioner's application on October 23, 2006, finding that petitioner failed to establish a reasonable excuse for his default and a meritorious defense to the charges.

On August 9, 2006, The New York City Department of Corrections brought petitioner to Civil Court. Petitioner entered into a stipulation consenting to a final judgment of possession in favor of respondent; however, the stipulation was to be null and void if the instant Article 78

proceeding were successful.

Petitioner has failed to demonstrate both a reasonable excuse for filing at the hearing and a meritorious defense to the charges that formed the basis for terminating his tenancy. Therefore, this proceeding must be dismissed.

The standard of review in an Article 78 proceeding is whether the administrative determination was arbitrary and capricious. The court must confirm it if it is rationally based on the facts in the record (see *Pell v. Board of Education*, 34 NY2d 222, 231; see also *Montgomery v. New York City Housing Authority*, 56 AD2d 778). Moreover, an agency's interpretation of its own rules is entitled to great deference; if its interpretation of its rules is rational, it should be upheld (see *31171 Owners v. New York City Department of Housing Preservation and Development*, 190 AD2d 441, citing *Matter of Howard v. Wyman*, 28 NY2d 434, 438).

Under the applicable standard of review, respondent's decision to deny petitioner's application to vacate his default was rationally based on the facts.

Respondent's Termination Procedures, paragraph 8, contain a provision governing vacatur of defaults. The provision reads that:

“If the tenant fails to answer or appear at the Hearing the Hearing Officer shall note the default upon the record and make his/her written decision on the record before him. Upon application of the tenant made within a reasonable time after his/her default in appearance, the Hearing Officer may, for good cause shown, open such default and set a new hearing date.”

Petitioner's unexplained failure to appear at the hearing and his unexplained failure to attempt to vacate the default for eight months preclude any showing of excuse. Nor did petitioner's alleged inability to obtain counsel provide a basis for vacatur, as he alone is responsible for obtaining an attorney (see *Matter of Brown v. Lavine*, 37 NY2d 317; *Matter of Folks v. New York City Housing Authority*, 27 AD3d 270, 271). The hearing officer properly exercised his discretion, under

respondent's rules, in denying the vacatur application as untimely (see *Matter of Daniels v. Popolizio*, 171 AD2d 596, 597).

Moreover, in order to establish good cause under respondent's rules governing default vacatur, a person challenging a default must demonstrate a meritorious defense to the charges (*Matter of Daniels v. Popolizio*, *id.* at 571).

Petitioner has not controverted the finding that he permitted unauthorized persons to occupy his apartment and engage in criminal activity. This violation is a sufficient basis for eviction (*Matter of Folks v. New York City Housing Authority*, *id.* at 271).

Petitioner's criminal conviction conclusively establishes that he was engaged in criminal narcotics activity at his apartment. This illegal activity violates the Department of Housing and Urban Development regulations governing who may be a tenant in a federally subsidized public housing authority apartment (24 CFR §§966.4(f)(11) & (12)), and is a basis for eviction (see *Department of Housing and Urban Development v. Rucker*, 535 US 125).

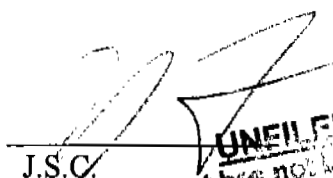
Accordingly, it is

ADJUDGED that the petition is denied and the proceeding dismissed.

This constitutes the decision and judgment of the court.

Dated: March 19, 2007

ENTER

J.S.C. 
UNFILED JUDGMENT
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and notice of entry cannot be given based hereon. To
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