

Matter of Campbell v Hernandez

2007 NY Slip Op 30520(U)

March 28, 2007

Supreme Court, New York County

Docket Number: 0405102/2006

Judge: Judith J. Gische

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

Supreme court of the State of New York
County of New York: IAS 10

In the matter of the Application of

LASHWAN CAMPBELL,

Petitioner,

DECISION/ORDER

-against-

Index # 405102/06

TINO HERNANDEZ, as Chair of the
New York City Housing Authority, and the
NEW YORK CITY HOUSING AUTHORITY,
Respondents.

Mot. Seq. # 001

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

Hon. Gische, J.:

Pursuant to CPLR sec. 2219(a) the following papers were considered in
connection with this petition:

PAPERS	NUMBERED
Notice of Petition, Petition, exhibits.....	1
Answer, Exhibits.....	2
Reply Affd.....	3
AK affirm.....	4

Upon the foregoing papers the decision and order of the court is as
follows:

Petitioner is a tenant in public housing run by respondent New York City
Housing Authority ("NYCHA"). In this Article 78 proceeding petitioner is
challenging NYCHA's April 18, 2006 determination which denied his application
to excuse a default in appearing at a February 2, 2006 hearing regarding the
termination of his tenancy. As a result of petitioner's default, NYCHA determined
that petitioner was ineligible for continued occupancy on the grounds of "non-

desirability, chronic delinquency in the payment of rent, non-verifiable income, breach of rules and regulations, violation of rule 7 and violation of paragraphs 5, 12(b) of 12(c) of [the] Authority Resident Lease Agreement..." NYHCHA terminated petitioner's tenancy, paving the way for a summary dispossession proceeding.

For the reasons set forth below the petition is denied.

The standard for evaluating NYCHA's determination is whether it was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious. CPLR § 7803[3]. In order for petitioner to prevail in this case the court would have to find that the action taken was without sound basis in reason and without regard to the facts. The question for the court is whether the agency determination has a rational basis. Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222 (1974). Where, as here, NYCHA terminates a tenancy based upon default, the final determination subject to Article 78 review is the decision denying the application to vacate the default. Yarbough v. Franco, 95 NY2d 342 (2000). Moreover the record on review is the information presented to the hearing officer. Petitioner is not allowed to supplement the record with such other and further information that should have been made to NYCHA at the time of the original application.

A NYHCA hearing officer may open up a default when an application is made within a reasonable time and good cause is shown therefore. To show good cause the tenant must provide a reasonable excuse to explain the non-

appearance and provide a meritorious defense to the charges. These standards are set forth in the NYCHA Termination of Tenancy Procedures.

The circumstances underlying this petition are as follows:

On October 18, 2004 petitioner and Mr. Pena, an unauthorized occupant of the apartment, were arrested after a search warrant was executed in the subject apartment. At that time the police recovered crack cocaine, three loaded firearms and one pellet gun. Petitioner plead guilty to four counts of criminal possession of a weapon in the 4th degree and was sentenced to nine months incarceration. In 2004 petitioner stopped paying rent. In 2005 petitioner failed to submit annual recertification materials.

NYCHA then began its termination proceedings. After petitioner failed to attend meetings with management about his situation, a formal Notice specifying the charges was sent to petitioner by both regular and certified mail. The specific charges set forth in the notice were that petitioner had violated the lease and rules of tenancy because he: [1] possessed crack cocaine in the apartment on October 18, 2004; [2] possessed a loaded 9 millimeter semi automatic handgun in the apartment on October 18, 2004; [3] allowed Pena, a unauthorized occupant, to possess cocaine and possess an loaded handgun in the apartment on October 18, 2004; [4] had been chronically delinquent in the payment of rent and [5] failed to submit the annual recertification materials.

Petitioner failed to appear on the hearing date on September 27, 2005 which was set forth in the notice. A determination was made on default to terminate petitioner's tenancy.

On September 29, 2005 Petitioner applied to excuse the default. That application was granted and the matter was re-opened for petitioner to be heard on the merits of his defenses against the termination of his tenancy.

On January 10, 2006 NYCHA sent a notice to petitioner scheduling the new hearing for February 2, 2006. The notice was sent by both certified and regular mail. Petitioner failed to appear on February 2, 2006. NYCHA made a second determination on default that petitioner had violated his lease and the terms and conditions of his tenancy. It provided for the termination of petitioner's tenancy.

On February 10, 2006 petitioner applied to re-open the hearing a second time. His application claimed that he did not receive the notice of hearing in time to attend the hearing. He has proof from the post office that he did not pick up the certified mailing until February 10, 2006. As to the meritorious defense he claimed "a mistake was made in my judgment of friends. And today I have followed he rules and I am law –binding [sic] and paiding [sic] rent on time and working for the city park department and I'm in full training at such time for building mant.."

In opposition to the application NYCHA produced proof that the Notice of Hearing had been mailed on January 11, 2006 by both regular and certified mail. There was proof that the regular mailing had been addressed to petitioner at the apartment and it had not been returned to NYCHA.

On this record the NYCHA hearing officer did not act arbitrarily or capriciously in holding that petitioner had failed to satisfy his burden of proving

excusable default or meritorious defense sufficient to warrant vacating his second default in appearing for a hearing scheduled regarding the termination of his tenancy.

Although petitioner had proof that he did not pick up the certified mailing until February 10, 2006; there is insufficient proof that he was not notified to pick up the certified mail in a timely manner and there is no proof whatsoever that he did not receive the timely made regular mailing. In light of the indisputable evidence of timely mailing and petitioner's continued defaults in this matter, the hearing officer was justified in his skepticism about petitioner's claim that he did not know about the certified letter before the February 2, 2006 hearing date.

More persuasive is the fact that petitioner did not raise any meritorious defense. He has never denied that he was arrested and plead guilty to weapons possession based on loaded weapons recovered from the apartment; he does not deny that he was chronically delinquent in rent and he does not deny that he had unauthorized occupants in the apartment and that did not properly recertify so that NYCHA could determine the household income and set a proper rent. All of these un-refuted facts justify the termination of petitioner's tenancy. Contrary to petitioner's claim, there is no argument to be made that termination is too severe a penalty for serious these lease transgressions.

Petitioner's defense essentially is that he has turned his life around. Even were all his claims true, his is a discretionary and not a legal defense to the termination of petitioner's tenancy. It was not an abuse of discretion for NYCHA

to determine on his application that it would not entertain such a discretionary defense in view of the un-refuted serious record of lease and rule violations.

Petitioner has not shown that the procedures followed in connection with the termination of his tenancy violated any provisions of the United States Constitution. Nor is his argument that he did not know the charges against him a basis for the requested relief. Not only does it appear that in moving to vacate his first default that he must have had notice of the charges, but the method of informing petitioner of the charges was reasonably calculated to give him notice and an opportunity to be heard. That is sufficient to pass constitutional muster without determining whether he actually knew about the charges or not.

Matthews v. Eldridge, 424 US 319 (1976).

According the court denies the petition in its entirety. Any requested relief not otherwise expressly granted herein is denied. This constitutes the decision and order of the court.

Dated: New York, New York
March 28, 2007

FILED
APR 04 2007
NEW YORK
COUNTY CLERK'S OFFICE
SO ORDERED



J.G. J.S.C.