

Price v New York City Hous. Auth.

2007 NY Slip Op 31162(U)

May 7, 2007

Supreme Court, New York County

Docket Number: 0400423/2007

Judge: Eileen A. Rakower

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SCANNED ON 5/11/2007

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

EILEEN A. RAKOWER
J.S.C.

PRESENT: _____
Justice

PART Part 5

Index Number : 400423/2007

PRICE, DENISE

INDEX NO. _____

vs

HOUSING AUTHORITY

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

ARTICLE 78

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ motion to/for _____

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

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

3, 4

Replying Affidavits _____

5 + 6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

MAY 11 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 7, 2007



EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT, STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
DENISE PRICE,

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

Index No.
400423/07

-against-
THE NEW YORK CITY HOUSING
AUTHORITY and TINO HERNANDEZ
as Chairman and Member,
Respondents.

Decision
And Order

-----X
EILEEN A. RAKOWER, J.S.C.

FILED
MAY 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

Petitioner and her children moved into the Lincoln Houses, apartment 9C, 1960 Park Avenue, (the apartment) in May, 1999. The Respondents, Tino Hernandez and the New York City Housing Authority (Housing) commenced a non-payment proceeding in March, 2006. Housing claimed that Petitioner, who had already agreed to certain "probation" conditions regarding her rent payment, failed to meet her rent obligations and was in arrears for rent dating back to August, 2005. Housing notified Petitioner by both certified and regular that there would be a hearing regarding the charges against her and her possible eviction on May 25, 2006. Petitioner did not call or appear for the scheduled hearing. The Hearing Officer found her in default and adopted Housing's recommendation that Petitioner's tenancy be terminated due to her chronic non-payment and her violation of the conditions of her Housing probation. In August, 2006, Petitioner filed a request for a new hearing in the tenancy termination proceeding, stating that she missed the hearing because she was "unaware of appointment until received letter about termination. Spoke to the housing manager on that day he installed window guards in my apartment." Additionally, Petitioner states that her tenancy should not be terminated because she was "in the process of working with Charitable organizations to bring rent current." In October, 2006, the Hearing Officer rejected her application, finding that Petitioner failed to establish an excusable default or a meritorious defense. In January, 2007, by counsel, Petitioner requested a new hearing but, to date, the Hearing officer has not responded to the letter. Thereafter, Petitioner commenced this Article 78 proceeding, seeking an order from

the Court 1) annulling and vacating the default judgment and re-opening the administrative hearing, 2) annulling and vacating the Hearing Officer's determination refusing to vacate the default judgment and granting Petitioner a new hearing, 3) deeming the Hearing Officer's failure to reply to Petitioner's January, 2007 request for a new hearing a denial of her request and granting her a new hearing, 4) attorney's fees and 5) costs and disbursements. Housing opposes Petitioner's application.

The judicial review of an administrative determination is limited to the grounds invoked by the agency. (*Lindemann v. American Horse Shows Assn.*, 222 A.D.2d 248 [1st Dept. 1995]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. V. Glasser*, 30 N.Y.2d 269 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222 [1974]).

Petitioner argues that she was unaware of the hearing on the charges pending against her because she went to stay with her mother in April, 2006, due to a bedbug infestation in the apartment. Petitioner argues that she has exhausted her administrative remedies because Housing has not responded to her January, 2007, letter requesting reconsideration of the decision to deny her a new hearing and further appeal to Housing would be futile. Petitioner urges the Court to revisit the underlying reasons for the her rent arrears and the default judgment rather than limiting its review to the Hearing Officer's decision not to vacate that determination and afford her a new hearing.

Housing argues that it properly notified Petitioner about the hearing and she was well aware of both her obligations and Housing's procedures because this was the fourth time in her seven year tenancy that she was the subject of a rent delinquency hearing. Housing states that, as a matter of law, the Court's review is limited to whether the Hearing Officer acted properly in denying the application to vacate the default finding and whether that denial was arbitrary and capricious.

There are two threshold issues here: 1) whether Plaintiff exhausted her

administrative remedies and 2) whether she was properly served with notice of the hearing. Regarding the exhaustion of remedies, after equivocation, Housing asserts that its “procedures make no provision for repetitive applications to vacate.” The Hearing Officer denied Plaintiff’s application to vacate the default decision on October 6, 2006. Therefore, Plaintiff has exhausted her administrative remedies and a proceeding pursuant to CPLR Article 78 is appropriate at this juncture. Regarding proper service, Housing has provided two sworn affidavits which state the office procedures that are followed in the regular course of business regarding certified and regular mail to notify tenants about impending hearings. Plaintiff’s bald assertion that she was unaware of the appointment is insufficient to rebut the presumption of regularity that is associated with the “evidence of routine mailing procedures.” (*Bennissim v. Calogero*, 19 A.D.3d 135 [1st Dept. 2005]).

In *Matter of Yarbough v. Franco* (95 N.Y.2d 342, 2000), the Court of Appeals has held that while “Petitioner’s default here effectively terminated her tenancy, any challenge to that default is unreviewable absent an application to the [Housing] Authority to vacate it. A request to vacate a default affords the defaulting party an opportunity to develop a factual record setting forth the reasons for non-appearance and any meritorious defenses that would justify re-opening the default.” (*Id.* at 347). It is, therefore, the application to vacate which contains the defaulting party’s excuse and potential defense, and Housing’s response to that application, which constitutes the record that a reviewing Court must examine. (*Id.*)

Housing’s “Request to the Hearing Officer for a New Hearing ♦ Tenancy Termination Proceeding” form states that a new hearing will be scheduled if requested within a reasonable time after the tenant failed to appear and if “good cause” is shown. The form states that to show good cause, a tenant must provide both a “reasonable excuse” to explain why she missed the hearing and “give a good defense why you think the Housing Authority’s charges against you are not true, or the problem has been corrected, or otherwise explain why your tenancy should not be terminated.”

Plaintiff’s stated reason for missing her hearing was she “was unaware of appointment until received letter about termination. Spoke to housing manager on that day he installed window guards in my apartment.” Additionally, Plaintiff stated that her tenancy should not be terminated because she was “in the process of working with Charitable organizations to bring rent current.”

Plaintiff works and earns approximately \$32,000 a year. Her chronic rent delinquency dates back to June, 1999, one month after she moved into the apartment. This is the fourth time that Housing has moved to terminate her tenancy due to her nonpayment of rent. The other hearings resulted in Plaintiff agreeing to certain "probation" conditions, which it is alleged, she violated.

The question before this Court is whether Housing's denial of Plaintiff's request for a new hearing regarding the termination of her tenancy was arbitrary and capricious or an abuse of power. Plaintiff has not provided either a reasonable excuse for not attending the hearing or a defense. The Court finds that there was a rational basis for Housing's decision to deny Petitioner's request for a new hearing and its decision was not arbitrary, capricious or an abuse of power. (*Matter of Pell v. Board of Education, supra*). Therefore, this petition must be denied.

Wherefore it is hereby

ORDERED that Petitioner's application for an order of the Court annulling and vacating Housing's decision to deny her a new hearing regarding the default judgment is denied.

All other requested relief is denied

This constitutes the decision and order of the Court.

DATED: May 7, 2007



EILEEN A. RAKOWER, J.S.C.

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