

<b>Matter of Vazquez v New York City Hous. Auth.</b>
2007 NY Slip Op 31506(U)
May 29, 2007
Supreme Court, New York County
Docket Number: 0113892/2006
Judge: Shirley W. Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KORNREICH  
Justice

PART 54

VAZQUEZ, ANITA

INDEX NO.

113892/06

MOTION DATE

- v -

N.Y.C. HOUSING AUTHORITY

MOTION SEQ. NO.

01

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for Article 78

PAPERS NUMBERED

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

1

Answering Affidavits -- Exhibits

2, 3

Replying Affidavits

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

JUN 05 2007

NEW YORK COUNTY CLERKS OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION AND ORDER.**

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

Dated: 5/29/2007

SHIRLEY WERNER KORNREICH  
J.S.C.

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 54

-----X  
In the Matter of the Application of  
ANITA VAZQUEZ,

Petitioner,

Index No.: 113892/06

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

**DECISION  
and  
ORDER**

-against-

NEW YORK CITY HOUSING AUTHORITY  
(ROBERT FULTON HOUSES),

**FILED**  
JUN 05 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

Respondent.

-----X  
KORNREICH, SHIRLEY WERNER, J.:

This is a special proceeding pursuant to Article 78, brought by order to show cause.

Petitioner Anita Vazquez was a tenant at the Robert Fulton Houses ("RFH"), in New York City, a public housing development of respondent New York City Housing Authority ("NYCHA"). She now seeks to annul a determination of respondent NYCHA, which terminated her tenancy at RFH. Respondent NYCHA has answered and opposes the petition.

I. ***Factual Background***

According to the petition, Ms. Vazquez was a tenant of the RFH, a NYCHA development. Her tenancy was terminated when NYCHA found out that Ms. Vazquez had stolen certain monies from an elderly woman, also a NYCHA tenant though not at RFH. Specifically, Ms. Vazquez pleaded guilty to the crime of grand larceny in the third degree, a class D felony, on January 25, 2006. As part of her plea, Ms. Vazquez admitted that she stole \$8,501.50 from the elderly woman and agreed to make restitution within six months in order to avoid jail time. Plea

of Guilty Transcript, *People v. Anita Vazquez*, Ind. No. 7096-04.

Under her lease, Ms. Vazquez was obligated to “not engage in . . . [a]ny activity, on or off the Lease Premises or the Development, that results in a felony conviction.” Lease, para. 12 (r) (iii). The Lease also required that tenants pay rent on time and that any material violations of the lease could result in its termination. Additionally, NYCHA’s “Termination of Tenancy Procedures” provide that “non-desirability” is a ground for terminating a tenancy. “Non-desirability” is defined as, *inter alia*:

conduct or behavior of the tenant . . . which constitutes: . . . conduct on or in the vicinity of the Authority premises which is in the nature of a sex or morals offense [or] a source of danger to the peaceful occupation of other tenants.

Delinquent rent payments also serve as a ground for termination.

According to NYCHA, “as of November 2003, Petitioner had not paid rent on time for a single month from November 2002 through September 2003, and had failed to pay her rent for October 2003.” As per its procedures, after attempting to contact petitioner, who failed to respond, NYCHA charged her with “chronic rent delinquency” and scheduled a February 4, 2005 hearing. Ms. Vazquez did not appear, and the hearing officer terminated her tenancy.

Thereafter, in April 2004, Ms. Vazquez applied to open her default, and NYCHA began the process of scheduling a new hearing. Meantime, RFH management learned of Ms. Vazquez’s criminal charge from a newspaper article, which indicated that Ms. Vazquez had stolen money from the bank account of a 74-year old woman. In a September 13, 2004 letter, NYCHA informed Ms. Vazquez “that termination of [her] lease is being considered because of Nondsirability,” and offered her a chance to discuss the matter with the Housing Manager.

Independently, Ms. Vazquez contacted the Housing Manager to discuss her September 2004 rent, which was late. At that time, the Housing Manager asked about the criminal matter and plaintiff claimed innocence. The Housing Manager then informed Ms. Vazquez that she was going to recommend that the pre-existing termination-of-tenancy proceeding be amended to include the nondesirability charge and that she “can bring an att[orne]y to the hearing.”

A hearing was held before hearing officer Joan Pannell on January 20, 2005. At that time the hearing officer advised petitioner of her right to obtain counsel and Ms. Vazquez answered “yes” when asked if she would “proceed to represent [her]self.” After petitioner and NYCHA gave some testimony and introduced some evidence, the hearing was adjourned to allow petitioner to “straighten out” her public assistance and for NYCHA to get more information on the criminal charges. On March 16, 2005, the hearing resumed and the hearing officer asked Ms. Vazquez about the criminal allegations against her. Ms. Vazquez denied any wrongdoing, claiming that she “didn’t steal [the elderly woman’s] money.” The hearing officer then adjourned the hearing again, to allow for the criminal proceeding to wrap up. On April 18, 2006, the third hearing date, the hearing officer acknowledged that the parties had convened on March 21, 2006 but noted that no recording had been made “because all [they] did was adjourn the matter, because [petitioner] said her attorney . . . who is Legal Aid, or Legal Services . . . was then on vacation.” That attorney, Mr. Lu, was contacted by NYCHA’s attorney by telephone and was given notice of the March 21 hearing date. However, Mr. Lu did not respond to the phone call and did not appear at the March 21 hearing. On that date, Ms. Vazquez stated that she had not heard from Mr. Lu. In response, the hearing officer determined that there was “no reason to

suppose [Mr. Lu was] taking [petitioner's] case then, since he hasn't been in contact" and then proceeded with the hearing. Ms. Vazquez did not object.

In its decision dated May 31, 2006 (the "NYCHA Decision"), Joan Pannell, the Hearing Officer, found that "in stealing money from the bank account of a vulnerable older person, Tenant [Vazquez] acted with malice aforethought and evinced patent non-desirability." Thereafter, on June 29, 2006, Ms. Vazquez was served by NYCHA with a "30 Day Notice to Vacate" based on the NYCHA Decision, and on June 21, 2006 she received a "Determination of Status for Continued Occupancy," which found that she was "ineligible for continued occupancy on the grounds of Non-Desirability, Breach of Rules and Regulations, Violation of 7(d), 6(b) and 6(c) of [her] Authority Resident Lease Agreement, [and] Chronic Delinquency in the Payment of Rent[.]"

Ms. Vazquez claims that the NYCHA Decision should be annulled since it was not reasonably based; grossly disproportionate to her offense, *viz.*, grand larceny in the third degree; and rendered despite petitioner's unfulfilled request for "an adjournment in order to obtain counsel" at the underlying NYCHA hearing—a request that she claims was denied in a "deliberate" attempt to hinder her rights. Ms. Vazquez has not offered any further facts to support that claim. Further, Ms. Vazquez claims that the criminal acts "occurred off the respondent's housing premise."

## II. *Conclusions of Law*

Article 78 provides that:

The only questions that may be raised in a proceeding under [it] are . . . whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of

jurisdiction; or . . . whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed[.]

CPLR 7803 (2), (4). The court's review of an administrative decision is limited to an assessment of whether it is arbitrary and capricious: "whether there is a rational basis for the administrative determination without disturbing underlying factual determinations[.]" *Heintz v. Brown*, 80 N.Y.2d 998, 1001 (1992). An action is arbitrary where it has no sound basis in reason and is taken without regard to the facts. *Id.* Only the evidence and arguments raised before the agency at the time of the administrative determination will be considered. *HLV Assocs. v. Aponte*, 223 A.D.2d 362, 363 (1st Dept. 1996).

Initially, petitioner's argument that the hearing officer "relied largely on an unrecorded hearing in which petitioner was unrepresented by an attorney despite her pray for counsel," is refuted by the documentary evidence submitted by respondent. To the contrary, the hearing transcript reflects that petitioner originally opted to proceed without counsel. Then, when the matter was later adjourned to allow her to obtain counsel, she did not obtain counsel and the hearing proceeded. Moreover, the one, unrecorded hearing date merely involved an adjournment. Thus, the court need not address this conclusory argument, which is wholly contradicted by the evidence.

Addressing petitioner's argument that the NYCHA determination was arbitrary and capricious, the court finds that contention to be similarly without merit. "[R]espect and weight are to be accorded the determination made by the agency charged with responsibility for fixing the penalty or discipline because of the special capability, competence and experience of that

agency and in consequence of the confidence in it implicit in the legislative grant of authority and responsibility to it.” *Ahsaf v. Nyquist*, 37 N.Y.2d 182, 184 (1975).

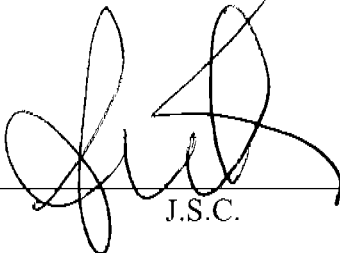
Here, pursuant to her lease with NYCHA, petitioner was prohibited from engaging in activity—on or off the RFH premises—that resulted in a felony conviction. *See McFarlane v. N.Y. City Hous. Auth.*, 9 A.D.3d 289, 291 (1st Dept. 2004) (finding that lease, as well as NYCHA’s Management Manual, “formed a contract between the tenant and the [Housing] Authority”). As she admitted in her guilty plea, Ms. Vazquez did engage in such prohibited behavior and the hearing officer considered petitioner’s behavior/guilty plea in the criminal action against her when rendering the underlying determination. *Cf. Grayes v. DiStasio*, 166 A.D.2d 261, 262-263 (1st Dept. 1990) (“criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts in a subsequent civil action and collaterally estops a party from relitigating the issue”). These facts present a rational basis upon which the hearing officer may have rendered her determination. Further, considering Ms. Vazquez’s conviction, the termination of her lease does not “shock the judicial conscience.” *See Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000) (sanction by administrative agency “must be upheld unless it shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law”).

Although, at oral argument, the parties assured the court that they were not arguing that the underlying determination was not supported by substantial evidence, their papers belie these statements. Indeed, the briefs of both petitioner and respondent contain extensive arguments directed to the issue of substantial evidence. Therefore, the court transfers this matter to the Appellate Division, First Department, for further proceedings. *See Hammerl v. Mavis*, 41 A.D.2d 724 (1st Dept. 1973) *citing* CPLR 7804(g), *aff’d* 34 N.Y.2d 579 (1974). Accordingly, it is

ORDERED that the application by petitioner seeking to vacate and annul a determination by respondent is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR 7804(g); and it is further

ORDERED that the Clerk is directed to transfer the file to the Appellate Division, First Department, upon service of a copy of this order with notice of entry.

Date: May 29, 2007  
New York, New York

ENTER:  
  
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J.S.C.

**FILED**  
JUN 05 2007  
NEW YORK  
COUNTY CLERK'S OFFICE