

Matter of Ocasio v New York City Hous. Auth.
2007 NY Slip Op 32449(U)
August 1, 2007
Supreme Court, Queens County
Docket Number: 0009840/2007
Judge: James P. Dollard
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Short Form Judgement

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JAMES P. DOLLARD
Justice

IA Part 5

Matter of Application of x
CARMEN OCASIO

Index
Number 9840 2007

- against -

Motion
Date May 29, 2007

NEW YORK CITY HOUSING AUTHORITY

Motion
Cal. Number 13

Motion Seq. No. 1

x

The following papers numbered 1 to 8 read on this Article 78 proceeding by petitioner Carmen Ocasio, pro se, for a judgment granting permanent stay permitting her to remain in her apartment and placing her on a one-year probation period, and overturning the Civil Court decision of January 19, 2007.

	<u>Papers Numbered</u>
Notice of Petition-Petition-Exhibits	1-4
Verified Answer- Affidavits - Exhibits (1-22).....	5-8
Memorandum of Law	

Upon the foregoing papers it is ordered that this Article 78 proceeding is determined as follows:

Petitioner pro se, Carmen Ocasio is the tenant of record at 433 Beach 40th Street, Apartment 4E, Far Rockaway, New York. The apartment is located in the Beach 41st Street Houses development, which is operated by respondent New York City Housing Authority (Housing Authority). The New York City Police Department conducted a series of controlled drug buys in said apartment and thereafter executed a search warrant on April 29, 2005. The police recovered 27 baggies containing marijuana that were inside an empty infant formula can and a glass scale from a kitchen cabinet; 10 baggies containing marijuana in a glass jar on the living room table; 101 small clear Ziplock bags from a dresser in Ms. Ocasio's bedroom; a shotgun, gun case and ammunition; and \$5,270.00 in cash.

Petitioner and her two adult children, Albert and Thalia, who resided with her, were arrested. On April 30, 2005, petitioner pleaded guilty to disorderly conduct, and was sentenced to a one-year conditional discharge.

On April 12, 2006 the Housing Authority sent petitioner a notice and specification of charges, which alleged that petitioner individually, or in concert with Albert and Thalia had possessed, sold or attempted to sell a controlled substance, had possessed 37 baggies containing marijuana, a scale, 101 clear Ziplock baggies, a shotgun, gun case and ammunition, and over \$5,000.00 in cash, and other property reflecting illegal drug activity in her apartment. The Housing Authority also alleged that petitioner failed to ensure that Albert and Thalia refrained from engaging in criminal drug activity in the apartment. It was further alleged that Albert Ocasio had trespassed on private Housing Authority property on March 16, 2006. Petitioner was notified of a hearing date and of her right to be represented at counsel. The June 21, 2006 hearing was adjourned so that Ms. Ocasio could obtain counsel and she was given a list of legal organizations and private law firms that may have been willing to represent her. At the July 13, 2006 hearing, Ms. Ocasio stated that she was unable to obtain counsel and that she would represent herself. The Housing Authority's witness, Police Officer Thomas Cappolla, had participated in the execution of the search warrant and testified as to the items recovered. He stated that since Ms. Ocasio had a valid gun permit for the shotgun, no charges were filed regarding the shotgun, gun case and ammunition. Ms. Ocasio admitted to the possession of 37 baggies containing marijuana, and stated that she smoked three to four bags a day; that she purchased 40 bags as she received a discount; that she has used marijuana since she was 10 years old; and acknowledged that her son could have sold marijuana in the apartment. She claimed that the Ziplock bags found in her bedroom were used to store jewelry, and that the \$5,270.00 in cash belonged to her daughter, who had received a tax refund. Ms. Ocasio also stated that she suffers from depression and anxiety and was receiving medical treatment for these disorders. The hearing was adjourned so that Ms. Ocasio could be evaluated by a Housing Authority clinical social worker. At the September 25, 2006 hearing, evidence was admitted regarding the social worker's evaluation, who found that although Ms. Ocasio did suffer from depression and anxiety and was taking prescription medication for these disorders, she was competent and understood the administrative proceedings. Ms. Ocasio was afforded an opportunity to provide any further evidence in support of her defense, but she offered no additional evidence.

The Hearing Officer, in a decision dated October 19, 2006, sustained the charges against Ms. Ocasio, except those pertaining to the shotgun, gun case and ammunition, and found that Ms. Ocasio

had acknowledged possession of a quantity of marijuana, which in addition to her own use, may have been used or sold by her son, Albert. The Hearing Officer found that the claim that the more than \$5,000.00 in cash found in the apartment to have been from a tax refund was not credible. She determined that the tenant either knew or had sufficient opportunity to be aware of illegal drug activity in the apartment, beyond her personal drug use, and that even if the facts were consistent with personal drug use, such use was extensive and not trivial and violated the Housing Authority's zero tolerance policy. The Hearing Officer's recommendation that petitioner's tenancy be terminated was adopted on November 6, 2006 by the Housing Authority's Board who issued a Determination of Status of Continued Occupancy whereby Ms. Ocasio's tenancy was terminated. The Housing Authority mailed this final determination to Ms. Ocasio on November 21, 2006.

In January 2007, the Housing Authority commenced a holdover proceeding in Civil Court, Queens County, in order to evict Ms. Ocasio, Albert and Thalia from the subject apartment. On February 22, 2007, Ms. Ocasio entered into a so-ordered stipulation, whereby she agreed to vacate the apartment by August 31, 2007.

On March 6, 2006, Ms. Ocasio attempted to commence an Article 78 proceeding in this court under Index Number 5793/07, by way of an order to show cause, emergency affidavit and petition. The court declined to sign the order to show cause, as the matter was not an emergency, and indicated that Ms. Ocasio could commence a new Article 78 proceeding. On April 13, 2007, Ms. Ocasio attempted to serve the Housing Authority with a notice of petition and petition, using the same index number. Those pleadings were never filed with the court and the matter did not appear on the court's calendar.

On April 17, 2007, petitioner obtained a new index number and commenced this proceeding. The petition does not set forth any basis for reversing the Housing Authority's determination to terminate Ms. Ocasio's tenancy. Rather, petitioner asserts that at the time she entered into the so-ordered stipulation she was not offered probation, that she has been a tenant for at least 25 years and never had any previous problems, that she is 51 ½ years old, suffers from mental illness, receives SSI of \$646.00 a month and is unable to find affordable housing, and is presently in a drug and mental health rehabilitation program, and will continue to attend that program. Petitioner has submitted a letter from The Zucker Hillside Hospital which states that she has been in a rehabilitation program since December 18, 2006 and sets forth a diagnosis of her mental health and substance abuse, her treatment and progress. Petitioner has also submitted a notarized statement from her son, Albert Ocasio, who states that he has been living

with his father in Connecticut since November 1, 2006.

An Article 78 proceeding against a public body or officer must be commenced within four months after the determination to be reviewed becomes final and binding (CPLR § 217[1]; Matter of Carter v State, Executive Dept., Div. of Parole, 95 NY2d 267 [2000]). An administrative action is not final and binding within the contemplation of CPLR § 217(1) until it has its impact upon petitioner (Matter of Edmead v McGuire, 67 NY2d 714 [1986]). Any ambiguity created by the agency itself as to the final and binding nature of its determination must be resolved against the agency (Matter of Carter v State, Executive Dept., Div. of Parole, supra; see also Mundy v Nassau County Civil Service Commission, 44 NY2d 352 [1978]). Under this formulation, in Housing Authority termination cases, the statute of limitations does not begin to run until the petitioner receives notice of the determination to terminate (Northern v Hernandez, 17 AD3d 285 [2005]; Bludson v Popolizio, 166 AD2d 346 [1990]; Williams v N.Y. City Hous. Auth., 8 Misc 3d 1009A [2005]). Here, the Housing Authority has submitted an affidavit by a person with personal knowledge as to the agency's mailing practices, and the mailing of the notice of termination of tenancy to Ms. Ocasio on November 21, 2006, thereby creating a rebuttable presumption of proper delivery and receipt (see Northern v Hernandez, supra). Petitioner does not deny receipt of the notice, nor does she assert that it was received later than November 26, 2006 [measuring the time to include five days for mailing, pursuant to CPLR 2013[b][3]]. Therefore, at the latest, petitioner was required to commence this Article 78 proceeding no later than March 26, 2007. Since this proceeding was commenced on April 17, 2007, it is untimely, and, thus, barred by the statute of limitations.

The court further finds that petitioner has failed to set forth any basis for vacating the Housing Authority's determination to terminate her tenancy. It is noted that the documents now offered by Ms. Ocasio were not presented at the hearings before the Housing Authority, as she did not enter the drug treatment program until two months after the hearings concluded, and her son had not vacated the apartment until after the hearings concluded. These documents, thus, are not part of the administrative record and cannot be considered in this proceeding for judicial review. The court further notes that as the decision to terminate the petitioner's tenancy was based upon her own conduct, and not just that of her son, the Housing Authority was not obliged to offer her probation (see Satterwhite v Hernandez, 16 AD3d 131, 131-132 [2005]).

To the extent that Ms. Ocasio seeks to vacate the February 22, 2007, so-ordered stipulation entered into in Civil Court, this court lacks jurisdiction to vacate or modify an order of the

Civil Court. The so-ordered stipulation executed by Ms. Ocasio on February 22, 2007 constitutes an order of the Civil Court, and the Supreme Court does not sit as an appellate court to review the decisions and orders of the Civil Court. Rather, Ms. Ocasio was required to timely move to vacate that order in the Civil Court, or appeal that order in the Appellate Term.

Accordingly, the request to permanently stay the termination of petitioner's tenancy and/or to offer her a one-year period of probation is denied, and the petition is dismissed.

This constitutes the judgment of the court.

Dated: August 1, 2007
