

**Matter of Stewart v Lancaster**

2008 NY Slip Op 30704(U)

February 27, 2008

Supreme Court, Nassau County

Docket Number: 0091-07/

Judge: Ute W. Lally

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## MEMORANDUM

ENTERED

IN

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SUPREME COURT, STATE OF NEW YORK  
 In the Matter of the Application of  
 JANET STEWART,

By LAILLY, J.  
 IAS/TRIAL PART 6

Petitioner(s),

NASSAU COUNTY  
 INDEX NO. 20091/2007  
 MOTION DATE: 1/7/08  
 MOTION SEQ: 1  
 X X X

- against -

EDWARD LANCASTER, as Executive Director  
 of the Freeport Housing Authority and  
 THE FREEPORT HOUSING AUTHORITY,

Respondent(s).

NASSAU/SUFFOLK LAWYERS SERV.  
 Attorney for Petitioner  
 One Helen Keller Way  
 Hempstead, NY 11550

WHITE, CERRITO  
 Attorney for Respondent  
 58 Hilton Avenue  
 Hempstead, NY 11550

This motion for an order pursuant to CPLR 6301 granting petitioner an order enjoining the respondents and their agents, assigns, successors in interest and/or anyone acting on its behalf from taking any action to remove her and her family from their apartment at 36 Albany Avenue, Apt. 2B, Freeport, N.Y., or from proceeding with the summary proceeding Freeport Housing Authority v Janet Stewart and Shaniqua Stewart (SP 004785/07) now pending in First District Court, Nassau County; an order pursuant to CPLR 602(b) consolidating that proceeding with this one; and, this Petition pursuant to Article 78 of the CPLR for, *inter alia*, a judgment annulling the determination of respondent Edward Lancaster, as Executive Director of the Freeport Housing Authority, dated July 9, 2007 which found that petitioner Stewart violated her lease by allowing a non-family person to reside at her apartment, is determined as provided herein.

In this hybrid proceeding pursuant to CPLR Article 78, the petitioner seeks, *inter alia*, review of the respondent Freeport Housing Authority's determination after an informal hearing that she violated her lease by permitting an unauthorized person to live in her apartment.

The pertinent facts are as follows:

The petitioner and her two children live in federally subsidized housing at 36 Albany Avenue, Apt. 2B in Freeport, which is owned and operated by the respondent Freeport Housing Authority. The petitioner's lease provides that the household composition for the duration of the lease from July 1, 2006 to June 30, 2007 would

be herself and her two children. Ms. Stewart's lease provides that:

"[t]he dwelling units are for the exclusive use and occupancy of the resident and his/her household. . . Resident agrees that no other resident, ("members of the household authorized to reside in the unit in accordance with the Lease"), shall live in the dwelling unit without permission of the PHA and that violation of this agreement shall be considered a serious violation and grounds for termination of this Lease."

On or about October 25, 2006, the petitioner received a Notice of Lease Termination from the Freeport Housing Authority advising her that she was in violation of her lease and that it was being terminated. More specifically, she was charged with allowing "an unauthorized male friend or relative to reside in the apartment." The notice advised the petitioner that she could request a hearing to contest the determination, however, it did not advise her that she could request that a record be made of that hearing.

A hearing was held on December 8, 2006. No record was made. Key card activity logs with attached video snap-shots for every person entering 36 Albany Avenue with Ms. Stewart's key card from August 1, 2006 to October 18, 2006, showed James Stewart, the father of Ms. Stewart's children, repeatedly entering 36 Albany Avenue with Ms. Stewart's key card. At the hearing, the petitioner testified that only she and her two children lived in the subject premises. She testified that James Stewart did not live in the subject premises during the period of August 1, 2006-October 18, 2006, nor has he ever lived at the subject premises, however she testified that he does continue to visit the subject premises occasionally to see his children.

In his determination dated July 9, 2007, the respondent hearing officer found that Ms. Jackson allowed James A. Stewart to reside at her apartment in violation of her lease. The hearing officer's determination was based upon the key access activity log which showed Mr. Stewart entering the petitioner's apartment over 300 times over the 79-day period from August 1, 2006 to October 18, 2006, as well as two Domestic Incident Reports; one dated March 7, 2006, which was generated by the Freeport Police Department in which James A. Stewart gave Ms. Stewart's address as his residence; and, another dated July 6, 2005, which was also generated by the Freeport Police Department, in which the petitioner stated in her victim statement that James Stewart must "leave and find somewhere else to live." Although they were considered by the hearing officer, these two Domestic Incident Reports were not put into evidence at the hearing. The hearing officer rejected the petitioner's position that Mr. Stewart was only frequenting her apartment as reflected on the key card activity log to assist her

in her recuperation from breast reduction surgery. The hearing officer found that "[t]he standard of care for [her] procedure dictates two to three days of post-surgical bed rest, and three to four weeks of avoidance of heavy lifting or pushing [and] [t]he number of times James A. Stewart entered [the petitioner's] dwelling unit, the intervals between his entrances, and the numerous late night entering and re-entering, is consistent with living there, and not with visiting to help someone infirmed."

On or about July 18, 2007, Ms. Stewart was notified that in accordance with the Freeport Housing Authority's July 9, 2007 determination, her lease was terminated effective August 31, 2007.

The Freeport Housing Authority commenced a summary proceeding in First District court on September 10, 2007 to terminate the petitioner's lease. This Article 78 proceeding ensued. In this proceeding, the petitioner challenges the Freeport Housing Authority's determination that she is in violation of her lease pursuant to Section 306(1) of the State Administrative Procedure Act as not supported by substantial evidence. The petitioner further maintains that the hearing officer improperly imposed the burden of proof on her in violation of Section 306(1) of the State Administrative Procedure Act; that the Freeport Housing Authority deprived her of her right to a fair hearing in violation of Sections 302(3) and 306(2) of the State Administrative Procedure Act as well as her due process rights under the New York State and United States Constitutions by considering the Domestic Incident reports which were not presented at the hearing; that the Freeport Housing Authority deprived her of her rights under Section 302(1), (2) of the State Administrative Procedure Act because a complete record of the hearing was not made; and, she challenges the hearing officer's determination as violative of Section 307(1) of the State Administrative Procedure Act for failing to rule upon each proposed finding of fact she submitted. Petitioner also challenges the notices of termination as violative of 24 CFR § 966.4 (e)(3)(ii) and Public Housing Law § 3156-c for failing to adequately specify the grounds for the lease's termination and she challenges the termination of her lease as a disproportionately severe penalty. Lastly, she alleges that in terminating her lease, the Freeport Housing Authority has violated 42 USC § 1983.

CPLR 7801(1) provides that "[a] proceeding under [that] article shall not be used to challenge a determination which is not final or can be adequately reviewed by appeal to a court or some other body or officer . . . ." 24 CFR Section 966.57(c) provides:

"[a] decision by the hearing officer, hearing panel, or Board of Commissioners in favor of the PHA or which denies the relief requested by the complainant in whole or in part shall not constitute a waiver, nor affect in any manner whatever, any rights the complainant

may have to a trial *de novo* or judicial review in any judicial proceedings, which may thereafter be brought in the matter (emphasis added)."

An agency's determination is only subject to review under Article 78 of the CPLR if it is final. An agency's determination is final if it is "definitive;" it causes "actual concrete injury;" and, "no further . . . proceedings might alleviate or avoid the injury" (Essex County v Zagata, 91 NY2d 447, 454).

Jurisdiction pursuant to Article 78 of the CPLR is lacking here. The application of 24 CFR § 966.57(c) to the Freeport Housing Authority's determination renders it nonfinal. Before her lease can be terminated, Ms. Stewart is entitled to a trial *de novo* as to whether she violated her lease [See, Jones v Chester Housing Authority, 1993 WL 332068 (E.D. Pa. 1993), aff'd, 30 F.3d 1486 (3<sup>rd</sup> Cir. [Pa.] 1994); Housing Authority of St. Louis County v Lovejoy, 762 S.W.2d 843 (Mo. App. E.D. 1988)].

In any event, Ms. Stewart's claims that the hearing process was violative of the State Administrative Procedure Act fails. The State Administrative Procedure Act only applies to proceedings set forth at Section 102 of the State Administrative Procedure Act and the Freeport Housing Authority is not an agency to which the State Administrative Procedure Act applies since none of its members are appointed by the Governor. State Administrative Procedure Act § 102(1).

Ms. Stewart's challenge to the adequacy of the notice provided by the Freeport Housing Authority is similarly unavailing. "A recipient of public assistance must be given timely and adequate notice detailing the reasons for a proposed termination and effective opportunity to defend the charges" [Chase v Binghamton Housing Authority, 91 AD2d 1147, citing Goldberg v Kelly, 397 U.S. 254 (U.S. N.Y. 1970)]. "Low-rent housing is . . . an interest to which due process rights apply" [ Chase v Binghamton Housing Authority, supra, citing Escalera v New York City Housing Auth., 425 F.2d 853 (2<sup>nd</sup> Cir. 1970), cert. den. 400 U.S. 853 (1970); Matter of Hines v New York City Housing Auth., 67 AD2d 1000]. Accordingly, "[s]pecific grounds constituting the basis for termination of a public housing authority tenancy must be stated in the written eviction notice." Chase v Binghamton Housing Authority, supra; citing Public Housing Law § 156-c. Here, the notice provided the petitioner was adequate since it notified her what provision of the lease she was alleged to be in violation of. Moreover, this notice was sufficient: by pursuing the grievance procedure, the petitioner had an opportunity "to discover the specifics of the charges, refute, confront and cross-examine witnesses and be represented by counsel" (Hall v Municipal Housing Authority for City of Yonkers, 57 AD2d 894, 895, mot. for lv. to app. den., 42 NY2d 805, app. disp. 42 NY2d 973).

As for the petitioner's challenge to the severity of the penalty imposed, i.e., her lease termination, in view of the complete lack of finality and her right to a trial *de novo*, that claim also fails.

Lastly, the petitioner's claim pursuant to 42 U.S.C. § 1983 fails. Recovery pursuant to that statute may be had where a party has denied the complainant a federal, constitutional or statutory right under color of state law (Adickes v S.H. Kress & Co., 398 U.S. 144, 151). The petitioner alleges that she has been deprived of her leasehold. "The touchstones of due process are notice and an opportunity to be heard" [Vialez v New York City Housing Authority, 783 F.Supp. 109, 113 (S.D.N.Y. 1991), citing Mullane v Central Hanover Bank and Trust Co., 339 U.S. 306 (1950); Rockland Medilabs, Inc. v Perales, 719 F.Supp. 1191, 1199 (S.D.N.Y. 1989)]. "[A]n unauthorized property deprivation under color of state law does not give rise to a § 1983 constitutional claim where the state provides a post-deprivation remedy adequate to meet the due process requirements of the Constitution" [Vialez v New York City Housing Authority, supra, at p. 113, citing Parratt v Taylor, 451 U.S. 527, 543 (1981); overruled in part on other grounds, Daniels v Williams, 474 U.S. 327 (1986); Barrett v United States, 651 F.Supp. 615, 620 (S.D.N.Y. 1986)]. "[W]here a plaintiff alleges deprivation of property in violation of the due process clause, the federal court's initial inquiry must be whether the state has provided adequate remedies to redress such unlawful acts. If so, there will be no claim before the federal court, whether or not the plaintiff took advantage of the state procedure" [Vialez v New York City Housing Authority, supra, at p. 113-114, citing Rosa R. v Connelly, 889 F.2d 435, 438-439 (2d Cir. 1989), cert. denied, 496 U.S. 941 (1990); Campo v New York City Employees' Retirement System, 843 F.2d 96, 101 (2d Cir. 1988), cert. denied 488 U.S. 889 (1988), Alfaro Motors, Inc. v Ward, 814 F.2d 883, 888 (2d Cir. 1987); Giglio v Dunn, 732 F.2d 1133, 1135 (2d Cir.), cert. denied, 469 U.S. 932 (1984)]. Assuming, *arguendo*, that the petitioner's due process rights were violated in the hearing process, she has a full and complete opportunity to relitigate the termination of her leasehold, thereby obviating any violation of 42 U.S.C. § 1983.

The petitioner's motion is denied and the petition is dismissed. The stay of the proceeding Freeport Housing Authority v Janet Stewart and Shaniqua Stewart (SP 004785/07) pending in District Court, First District is vacated.

Settle order and judgment on notice.

Dated: FEB 27 2008

**ENTERED** *actual*

MAR 03 2008

J.S.C.

stewart

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**