

**Matter of Mathews v Hernandez**

2009 NY Slip Op 30967(U)

April 28, 2009

Supreme Court, New York County

Docket Number: 401300/08

Judge: Shirley Werner Kornreich

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

PRESENT: SHIRLEY WERNER KORNREICH  
Justice

PART 54

MATHEWS, JEANETTE

INDEX NO. 401300/08

- v -  
TINO HERNANDEZ,  
ETAL.

MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...  
Answering Affidavits – Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED
<u>1</u>
<u>2, 3</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance  
with the annexed decision/order/judgment

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

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

Dated: \_\_\_\_\_

4/28/09

SHIRLEY WERNER KORNREICH  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

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

-----X

In the matter of the Application of

JEANETTE MATHEWS,

Petitioner,

Index No.: 401300/08

for a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules

**DECISION and  
ORDER**

- against -

TINO HERNANDEZ, as Acting Chairperson  
of the New York City Housing Authority, and  
THE NEW YORK CITY HOUSING AUTHORITY

Respondents.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be served on any person. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

-----X

**KORNREICH, SHIRLEY WERNER, J.:**

Motion sequences 001 and 002 are consolidated for disposition.

Petitioner Jeanette Mathews, a tenant of a New York City Housing Authority (NYCHA) apartment, brings this Article 78 proceeding (motion sequence 001), seeking a judgment: (a) reversing and annulling NYCHA's determination to terminate her tenancy; (b) enjoining NYCHA from taking any further action to enforce its determination; (c) reinstating petitioner's tenancy; and (d) directing NYCHA to enforce the hearing officer's disposition of probation. Petitioner also seeks to amend the petition to add claims in response to NYCHA's reply papers (motion sequence 002). Respondents oppose.

*I. Background*

*A. NYCHA*

NYCHA is a corporate governmental entity created to build and operate low-income housing in New York City. 24 CFR §960.202(a). Since the federal government funds and

regulates public housing, NYCHA must annually certify to the Department of Housing and Urban Development (HUD) that it has admitted individuals and families in compliance with HUD regulations and the United States Housing Act (Housing Act). *Id.* at §960.257. HUD mandates that NYCHA regularly monitor the composition and income of each family that has been admitted into public housing. *Id.* Tenant families have corresponding obligations to request NYCHA's approval before adding any family members as occupants of a unit and supply any information necessary when NYCHA conducts examinations of family income and composition. *Id.* §966.(a)(1)(v) & §960.259(a)(2).

The Housing Act provides that:

any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of the tenancy[.]

42 USC §1437(l)(6). Pursuant to this provision, NYCHA may evict tenants who, *inter alia*, engage in criminal activity; fail to prevent household members or guests from engaging in criminal activity; fail to report all unit occupants; and allow unauthorized occupants to reside in or enter their apartment. 24 CFR §966.4(f) & (l)(1) & (2).

The termination of a tenancy must accord with NYCHA's Termination of Tenancy Procedures (TTP). These procedures must adhere to the due process requirements set forth in *Escalera v. NYCHA*, 425 F.2d 853 (2d Cir. 1970) *Tyson v. NYCHA*, 369 F. Supp. 513 (S.D.N.Y. 1974), and *Randolph v. NYCHA*, No. 74 iv. 1856 (S.D.N.Y. 1976). Thus, to terminate a tenancy, the procedures first call for the project manager of the tenant's residence to interview the tenant and attempt to resolve the issue. TTP §2. If there is no resolution, management then informs the tenant that her file will be forwarded to the central office for further review. *Id.*, at §3. Formal

charges are prepared and mailed to the tenant setting forth a date for an evidentiary hearing to be held before an impartial hearing officer. *Id.* at §4. The notice of charges informs the tenant of her rights to have an attorney or other representative present, to offer witnesses and documents in her defense, as well as the right to confront and cross-examine any witnesses who testifies against her. NYCHA Mgmt. Manual, Chapt. VII, §IV(C)(4). After the hearing, the hearing officer issues a written decision which is subject to final review and approval by NYCHA's Board. TTP §§9-11.

If the tenancy termination proceeding is based solely on the conduct of a third party, the tenant may avoid eviction if she can demonstrate, through the introduction of credible evidence, that the offender has permanently left her apartment prior to the date of the hearing. *Id.* at §6. Subsequently, if the hearing officer determines that the tenant has not committed any misconduct warranting termination and has permanently removed the offending party or parties from the household prior to the hearing, the hearing officer may place the tenant on administrative probation and permanently exclude any other offending party. *Id.* at §§14-16. However, if the tenant has herself committed any misconduct which warrants termination, then her tenancy may be terminated. *Id.* at §§01(A)-(G).

*B. This Case*

Petitioner is the tenant of record of apartment 4C located at 198 Bond Street, Apt. 4C, Brooklyn, NY (the "apartment"). She has resided in the apartment since 1974 and lives there with four of her grandsons, who are aged between eleven and nineteen. Petitioner signed the most recent lease for the apartment in 2001. On her last income statement, she listed herself and her four grandsons as the only occupants of the apartment. Petitioner's lease states, *inter alia*, that:

[i]t shall be the Tenant's obligations . . . [t]o assure that the Tenant, any member of the household; a guest, or another person under the Tenant's control, shall not engage in: (I) [a]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the Development by other residents or by the Landlord's employees, or (ii) [a]ny violent or drug-related criminal activity on or off the Leased Premises or the Development, or (iii) [a]ny activity, on or off the Leased Premises or the Development, that results in a felony conviction.

Lease, §12.

By letter dated September 7, 2007, NYCHA notified petitioner that a recommendation had been made to terminate her tenancy. The notice listed eight charges as the basis for termination. Four charges related to the petitioner's son Fleming, who had recently been arrested on the grounds of her apartment building, in possession of cocaine. Upon his arrest, petitioner's son claimed to police that he resided in petitioner's apartment. However, he had been prohibited from the apartment since 1993, when he had been arrested under similar circumstances. The remaining charges related to the alleged presence in the apartment of petitioner's daughter Sekina who had also been excluded from petitioner's apartment for drug offenses.

In 2002, NYCHA had initially brought tenancy termination charges against petitioner after learning that Sekina, no longer an authorized member of petitioner's household, had, in 2001 and again in 2002, possessed a crack pipe on the roof of one of the buildings in petitioner's development. Rather than proceeding with a hearing on these charges, petitioner entered into a stipulation on October 17, 2002 (2002 Stipulation). Pursuant to this stipulation, NYCHA withdrew the tenancy termination charges in exchange for petitioner's commitment to ensure that Sekina would not reside in or visit the apartment as a condition of petitioner's continued eligibility for public housing. In this stipulation, petitioner specifically agreed that "under no circumstances shall a person permanently excluded, or whose continued absence is required, be

allowed entry into the apartment and if such person is found in the apartment, for whatever reason, the tenancy shall be terminated.” *See* 2002 Stipulation, Ans, Exh 12., para. 10.

Petitioner also agreed to a one-year period of probation and to inform all of her family members that Sekina was not permitted to enter the apartment.

In 2004, NYCHA once more brought tenancy termination charges against petitioner after Sekina was discovered inside the apartment with petitioner. Petitioner entered into a second stipulation on August 26, 2004 (2004 Stipulation). By the terms of this stipulation, petitioner again agreed to ensure that Sekina would never reside in or enter the apartment as a condition of her continued eligibility for public housing. Petitioner also agreed to be subject to a three-year period of probation and that she “shall inform all members of [her] household of the terms and conditions set forth in this stipulation.” *See* 2004 Stipulation, Ans, Exh 15., para. 6. A condition of both the 2002 and 2004 stipulations, required petitioner to permit NYCHA investigators to conduct unannounced visits of her apartment between certain hours, to ensure her compliance.

In 2007, NYCHA, for a third time, brought tenancy termination charges against petitioner after Sekina was discovered inside the apartment with petitioner. Following a hearing, in which petitioner admitted violating the 2002 and 2004 Stipulations, her tenancy was continued on condition that Sekina was excluded from the apartment. A one year probationary period was imposed (2007 Probation). The hearing officer concluded that petitioner “must yet come to understand that if Sekina is ever again found in her home her lease will be terminated.” 2007 Probation Hearing, Ans, Exh 18. Also in 2007, petitioner’s son Fleming was arrested on the grounds of her apartment building in possession of cocaine and claimed that he resided in petitioner’s apartment. At a subsequent NYCHA hearing, petitioner acknowledged that she was aware of Fleming’s arrest but claimed that he did not reside in her apartment.

On July 20, 2007, pursuant to the 2002 and 2004 Stipulations, NYCHA investigators made an unannounced visit to petitioner's apartment. NYCHA alleges that petitioner answered the door of the apartment, and the investigators again discovered Sekina inside.

NYCHA decided to terminate petitioner's tenancy. Petitioner appeared at two hearings related to the termination of her tenancy. At a hearing on December 10, 2007, petitioner claimed that, although she opened the door when the NYCHA investigators visited her apartment, her eleven year old grandson had previously opened the door and allowed Sekina to enter. She acknowledged that she permitted Sekina to remain in the apartment, despite knowing that her daughter was excluded. She also admitted that she had failed to inform all of her family members, including her eleven year old grandson, that her daughter was prohibited from the apartment.

On December 19, 2007, the hearing officer issued a decision finding the evidence insufficient to sustain the charges related to petitioner's son but sustaining the charges related to petitioner's daughter, Sekina. Nonetheless, the hearing officer found credible petitioner's testimony that Sekina was allowed to enter the apartment to visit her sick son. The hearing officer also was satisfied that petitioner had since informed her eleven year old grandson that Sekina was excluded from the apartment and that he understood. Therefore, the hearing officer imposed only a one year probationary period.

NYCHA alleges that on December 21, 2007, petitioner was sent a copy of the hearing officer's decision. It asserts that it included with the decision a notice, which stated that the decision was under review by the NYCHA Board (Notice of Review). Petitioner denies receipt of the Notice of Review. NYCHA further alleges that in January 2008, the members of its Board reviewed petitioner's case at two meetings. At the January 16, 2008 meeting, the Board found

the hearing officer's decision was contrary to its termination of tenancy procedures, overruled the one year probationary period and terminated petitioner's tenancy.

Petitioner acknowledges that on February 8, 2008, she received a copy of NYCHA's determination to terminate her tenancy, which stated that upon review of the record, petitioner was found to be ineligible for continued occupancy and that her tenancy would be terminated (Determination of Status), but denies receipt of an explanation for the termination. NYCHA asserts that it included a written statement, which set forth NYCHA's bases for reversing the hearing officer's decision (Override Memorandum), with the Determination of Status. On April 23, 2008, petitioner received a 30 Day Notice to Vacate. This petition followed.

In its opposition papers, an employee from NYCHA's hearing office submits an affidavit in which he attests to preparing the hearing officer's decision, enclosing the Notice of Review with it, both dated December 19, 2007, and mailing them to petitioner on December 21, 2007. He states that he placed these items in an envelope and took them to NYCHA's Mail Center, where he "waited while the envelope was stamped and then placed it in a United States Mail Box." Estrella Aff, para. 3. Further, he avers that "[i]t is the Hearing Office's regular business practice to prepare hearing officers' decisions and notices of review for mailing by first-class mail the same week the hearing officers render those decisions." *Id.*

Moreover, an employee from NYCHA's Application and Tenancy Administration Department (ATAD) submits an affidavit in which she attests to preparing the Determination of Status with the Override Memorandum enclosed and mailing them to petitioner. She states that, "[o]n February 6, 2008, following ATAD's regular business practice, I placed one copy each of the Determination of Status and the [O]verride [M]emorandum for [petitioner], each dated January 16, 2008, in a 'window' envelope." Arias Aff., para. 3. Further, she states that she then

placed the envelope containing the two documents in an outbox, where it awaited pick-up from NYCHA's Mail Center employees. *Id.*, para. 4. The Administrative Manager of NYCHA's Mail Center also submits an affidavit in which he attests to the Mail Center's role in collecting and sending mail from NYCHA's ATAD. He states that the "regular practice is that ATAD's mail [is] delivered to the exclusive control of the USPS [ ] within one business day of when Mail Center employees have picked up the outgoing mail from ATAD." Younger Aff., para. 4.

## II. *Conclusions of Law*

A court reviewing an Article 78 proceeding must judge the propriety of an agency action solely on the reasons cited by the administrative body. *See Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). Moreover, in reviewing an administrative penalty, the court has no discretionary or interest of justice jurisdiction but is limited to an abuse of discretion standard and must uphold the penalty "unless it is 'so disproportionate to the offense as to be shocking to one's sense of fairness.'" *Kelly v. Safir*, 96 N.Y.2d 32, 38 (2001) citing *Featherstone v Franco*, 95 N.Y.2d 550, 554 (2000). In sum, only the following questions may be raised in an Article 78 proceeding: "[w]hether a determination was made in violation of lawful procedure, was effected 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.

Petitioner argues that the NYCHA Board's termination of her tenancy was contrary to law, arbitrary, capricious and a denial of due process. NYCHA, however, contends that it is within its authority to terminate a tenancy for violation of an agreement to exclude an offending party from an apartment. *See Gilmore v Hernandez*, 40 A.D.3d 410, 411 (1st Dept. 2007); *Romero v. Martinez*, 280 A.D.2d 58 (1st Dept. 2001). Specifically, NYCHA argues that it was an

abuse of the hearing officer's discretion to impose only a one year term of probation because that decision was contrary to its termination of tenancy procedures. It argues that pursuant to NYCHA's termination of tenancy procedures, grounds to terminate a tenancy include non-desirability, which is defined, *inter alia*, as "conduct or behavior of the tenant or any person occupying the premises of the tenant which constitutes . . . a danger to the health and safety of the tenant's neighbors." *Gibson v. Blackburne*, 201 A.D.2d 379 (1st Dept. 1994). Also, it points to paragraph 15 of the procedures, which provides that:

[w]here a specific condition of probation is the continued absence of an offending family member, the family undertakes to do anything it reasonably can to keep the offending member away from the project premises. If the offending member returns to the premises during the period of probation, the burden is on the tenant family to show that they had done all they could to keep him from returning.

NYCHA contends that petitioner failed to meet this burden. The court agrees.

Petitioner admitted at the December 10, 2007 hearing that she failed to inform all of her family members that Sekina was excluded from the apartment and once Sekina was in the apartment, failed to exclude her. Moreover, this was the fourth occasion when NYCHA found Sekina in the apartment, in violation of previous stipulations and in violation of three previous periods of probation. Violation of the latest stipulation, standing alone, was sufficient ground to terminate petitioner's tenancy. *See Wooten v. Finkle*, 285 A.D.2d 407, 408 (1st Dept. 2001). Consequently, the Board could appropriately find that it was an abuse of discretion by the hearing officer to place petitioner on probation for a fourth time. Moreover, given the history of this matter and the safety of the other tenants, termination of petitioner's tenancy is not an abuse of discretion and does not shock the court's sense of fairness. *See id.*; *Romero, supra*.

Finally, petitioner argues that she did not receive the Notice of Review or a written

statement explaining NYCHA's bases for its determination. This argument, too, is of no avail.

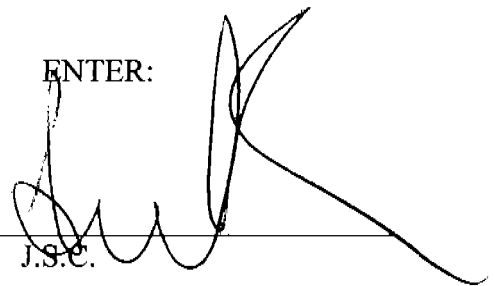
As NYCHA contends, a mere denial of receipt of a mailing is insufficient to rebut the presumption of mail's delivery. *See Rodriguez v. Wing*, 251 A.D.2d 335,336 (2d Dept. 1998)("As a general rule of evidence, proof that an item was properly mailed gives rise to a rebuttable presumption that the item was received by the addressee."); *see also Northern v. Hernandez*, 17 A.D.3d 285. 286 (1st Dept. 2005). The affidavits of the NYCHA employees created a rebuttable presumption of proper receipt of their mailings which was not overcome by petitioner's conclusory denial of receipt. Accordingly, it is

ORDERED and ADJUDGED that the application by petitioner seeking to reverse and annul the determination by NYCHA is denied with prejudice, the proceeding is dismissed and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that petitioner's motion for leave to amend the petition is denied.as moot.

Dated: April 28, 2009  
New York, NY

ENTER:

  
\_\_\_\_\_  
J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be served here. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).