

Matter of Matos v Hernandez

2009 NY Slip Op 31275(U)

June 3, 2009

Supreme Court, New York County

Docket Number: 402704/08

Judge: Walter B. Tolub

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

PRESENT: **WALTER B. TOLUB**
Justice

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Index Number : 402704/2008
MATOS, JUANITA
vs.
HERNANDEZ, TINO
SEQUENCE NUMBER : # 001
ARTICLE 78

INDEXED: 402704/08
MOTION DATE: _____
MOTION SET NO: 100
MOTION SET NO: _____

were read on this motion to/for _____

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

UNFILED JUDGMENT

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

Dated: 6/2/09

WALTER B. TOLUB
Justice

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

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

together for the last 10 years. On or about August 21, 2007 respondent Housing Authority commenced a termination of tenancy proceeding against petitioner for non-desirability and breach of lease. The proceeding was based on charges that her son, Mr. Hernandez, struck his minor son (who has lived in the apartment since his birth), destroyed part of a vehicle in the vicinity of the housing premises, and was in possession of ammunition designed for use in a firearm. A hearing was held before the Housing Authority's hearing officer at which Mr. Hernandez testified that he has sole custody of his six-year-old son and that he was unable to work regularly because he spends his days attending to the needs of his mother, the household (cooking, cleaning, doing the laundry, etc.) and his son, who suffers from severe asthma, attention deficit disorder, and heart disease (see transcript, pp 167- 170). Petitioner testified that she had three surgical procedures on her left knee and four on her left shoulder (*id.*, p 105) and that she suffers from numerous medical conditions (*id.*, pp 104-110) which have been diagnosed as thoracic and lumbar radiculopathy (a disorder of the nerves of the spine and back), osteoarthritis, reflux disease and depression.

At the conclusion of the hearing, the hearing officer dismissed the first charge against Mr. Hernandez (striking his son) but sustained the second and third charges (stripping a vehicle in the vicinity of the housing premises and unauthorized possession of ammunition) and issued a determination that petitioner's eligibility for continued tenancy would be conditioned on the permanent exclusion of Mr. Hernandez from her apartment (see petition, exhibit K). On July 9, 2008 the Housing Authority approved the hearing officer's determination (*id.*, exhibit L). Petitioner responded with this Article 78 proceeding.

Petitioner contends that respondent's determination was arbitrary and capricious and

failed to comply with federal HUD regulations, the Housing Authority's own procedures and due process because the hearing officer concluded that Mr. Hernandez could no longer live with his mother without stating any facts to support his conclusion. Petitioner then argues that this penalty is disproportionately harsh and constitutes an abuse of discretion because the hearing officer failed to weigh mitigating factors such as the resulting hardship to petitioner and her grandson, the fact that Mr. Hernandez is an active and well respected member of the community, and the fact that petitioner and her son have lived together in public housing for approximately 20 years during which time they had an unblemished record of compliance with NYCHA rules and regulations.

In opposition, the Housing Authority contends that its determination to condition petitioner's continued tenancy on the permanent exclusion of her son is supported by substantial evidence¹ and that the sanction is appropriate given the charges against Mr. Hernandez which were sustained.

The Housing Authority's finding that petitioner's son was an undesirable resident was not arbitrary and capricious. On May 13, 2006 Mr. Hernandez was arrested for possession of a loaded firearm and a knife (see transcript, exhibit 2). He pled guilty to unlawful possession of ammunition (an unclassified misdemeanor) and was sentenced to 30 days imprisonment (*id.*). On May 29, 2007 Mr. Hernandez was arrested for removing speakers from a car (see transcript, exhibit 1). He pled guilty to auto stripping in the 3d degree (a class A misdemeanor) and was sentenced to 30 days imprisonment to run concurrently with time served for his prior sentence

¹ Petitioner did not raise the substantial evidence question (see CPLR 7803[4]) and the Housing Authority does not claim that this matter should be transferred to the Appellate Division (see CPLR 7804[g]).

(*id.*). Given Mr. Hernandez's criminal record, respondent's determination of undesirability was rationally based and will not be disturbed (see *Colton v Berman*, 21 NY2d 322, 329 [1967]).

Petitioner argues that the Housing Authority failed to fully consider the undisputed mitigating facts which were before it. However, the hearing officer's decision indicated that he did consider the factors cited by petitioner including the length of her tenancy and various ailments.

Here, the penalty imposed on petitioner is not excessive. For a reviewing court to overturn a penalty imposed by an administrative agency, the punishment must be so disproportionate to the offense as to be shocking to one's sense of fairness (*Pell v. Board of Education*, 34 NY2d 222, 237 [1974]). Respect and weight are to be accorded to 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 (*Ahsaf v. Nyquist*, 37 NY2d 182, 184 [1975]).

Here, sanctions which permanently exclude and remove a dangerous member of the household while preserving the tenancy for the tenant and the rest of the family do not shock the court's sense of fairness nor shock the conscious.. "[T]here is nothing unreasonable about asking a tenant of public housing, in the interest of protecting her neighbors, to agree that a family member who is a proven danger to others not be permitted to reside in or visit the apartment" (*Romero v. Martinez*, 280 AD2d 58, 63 [1st Dept 2001]; see also *McLurkin v. Hernandez*, 44 AD3d 496 [1st Dept 2007]; *Stafford v. Hernandez*, 52 AD3d 304 [1st Dept 2008]). Furthermore, the Housing Authority's exclusion of those who pose a danger has a deterrent effect.

In view of the above, the court finds the penalty of conditional exclusion not to be unduly


harsh (*Robinson v Martinez*, 308 AD2d 355 [1st Dept 2003]; *Powell v Franco*, 257 AD2d 509 [1st Dept 1999]; *Milton v Christian*, 99 AD2d 984 [1st Dept 1984]).

Accordingly, it is hereby

ORDERED and ADJUDGED that petitioner's application is denied.

This constitutes the decision and judgment of the court.

DATED: 6/3/09.



Walter B. Tolub J.S.C.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 2109).