

**Matter of Mathews v Hernandez**

2009 NY Slip Op 31535(U)

July 10, 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:

JUSTICE SHIRLEY WERNER KORNREICH

PART 54

In re Jeannette Mathews

INDEX NO.

401300/08

MOTION DATE

6/24/09

MOTION SEQ. NO.

03

MOTION CAL. NO.

NyCHA

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits \_\_\_\_\_

2

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

is decided in accordance with the amended decision order & judgment.

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:

7/10/09

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: 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,

-against-

**DECISION and  
ORDER**

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

Respondents,  
141B)

**UNFILED JUDGMENT**  
This Judgment has not been entered by the County Clerk  
in the absence 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).-----X

KORNREICH, SHIRLEY WERNER, J.:

Petitioner brings this motion seeking leave to reargue this court's denial of her Article 78  
petition. CPLR §2221(d).<sup>1</sup> Respondent opposes. For the reasons which follow, leave to reargue  
is granted.

*Background*

Petitioner, the tenant of record of apartment 4C, located at 198 Bond Street, Brooklyn,  
NY (the apartment), presently resides in the apartment with her four grandsons. She signed the  
most recent lease for the apartment in 2001. Her lease obligates her to assure that all members of  
her household and guests do not engage in any "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." Lease, §12. As a result of this clause, petitioner's son Fleming and her

<sup>1</sup> Familiarity with the court's previous decision is presumed.

daughter Sekina were excluded from the apartment and the grounds of the Development for drug related offense.

Subsequently in 2002, NYCHA brought tenancy termination charges against petitioner after learning that Sekina, in 2001 and again in 2002, had possessed a crack pipe on the roof of one of the buildings in the Development. Petitioner entered into a stipulation on October 17, 2002 (2002 Stipulation), wherein 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. 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." 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." 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 be 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." 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 discovered Sekina inside. As a result of this incident and the arrest of petitioner's son Fleming, NYCHA commenced termination proceedings. Petitioner appeared at two hearings related to the termination. 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 allowed Sekina to enter. She acknowledged that she permitted Sekina to remain in the apartment, despite knowing that her daughter was excluded. She further 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 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 was satisfied that petitioner had since informed her eleven year old grandson that Sekina was excluded from the apartment and that her grandson understood. Therefore, the hearing officer imposed only a one year probationary period.

The decision was reviewed by the NYCHA Board at two meetings. On January 16, 2008, the Board found the hearing officer's decision contrary to its termination of tenancy procedures, overruled the one year probationary period and terminated petitioner's tenancy.

Petitioner commenced an Article 78 proceeding seeking an annulment of NYCHA's determination, alleging, *inter alia*, that NYCHA did not have the authority to overrule the hearing officer. Petitioner also sought an order to compel NYCHA to either enforce the hearing officer's December disposition or to review the hearing officer's decision in a proper manner. Finally, petitioner sought attorney's fees pursuant to 42 U.S.C. § 1988 and CPLR Article 86. Upon receipt of respondents' answer, petitioner moved to amend her petition to reflect certain information she learned from respondents' answer and to include an allegation that respondents' determination shocked the conscience. This court dismissed the Article 78 motion and denied the motion to amend as moot.

*Motion for ReArgument*

A motion for reargument is not a vehicle for an unsuccessful party to rehash its previous argument, but rather, is designed to afford the court an opportunity to correct an opinion where facts were overlooked or misapprehended or law misapplied. CPLR § 2221(d)(2); *Foley v Roche*, 68 AD2d 558, 567 (2d Dept 1979). It is neither an opportunity to raise new facts nor posit new legal arguments. *Id.*; *DeSoignes v Cornasek House Tenants' Corp.*, 21 AD3d 715 (1st Dept 2005).

Stated briefly, this court had previously found that petitioner's behavior was such as to warrant the termination of her tenancy. See *Mathews v N.Y. City Hous. Auth.*, No. 401300/08, slip. op. at 8-9 (N.Y. Sup. Ct. Apr. 28, 2009). Petitioner now argues that the court overlooked petitioner's argument that NYCHA lacked authority to review and overturn the decision of the hearing officer. Petitioner had argued in her original petition and brief that NYCHA's authority to overturn a hearing officer's decision was limited to certain circumstances not present in the instant case. Pet. ¶¶ 50-54; Pet's Reply Mem. 5-11. Petitioner further argues that this court misapprehended the meaning of Paragraph 15 of Termination Procedures, which this court relied on in its decision. See *Mathews*, No. 401300/08, slip. op. at 9. Petitioner had advanced its theory as to the meaning of paragraph 15 in its original brief. Pet's Reply Mem. 7.

*Applicable Law.*

In an Article 78 proceeding, a court can overturn an agency decision upon finding that the agency proceeded "without or in excess of jurisdiction." CPLR § 7802(2). Moreover, a court reviewing an agency decision can only judge judicial review of an agency's action is limited to the grounds invoked by the agency when it issued its administrative determination. *Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758-59 (1991); see *Rizzo v N.Y. State Div. of Hous. & Comty. Renewal*, 16 AD3d 72, 73 (1st Dept 2005). Legal

theories raised for the first time in an Article 78 proceeding, cannot be used to justify the determination. *Id.*

A public housing authority that receives federal money must institute an administrative grievance procedure that complies with regulations issued by the federal Department of Housing and Urban Development. 42 U.S.C. § 1437d(k) (Supp. 2009). Federal regulations give a tenant of public housing the right to a hearing before the housing authority can terminate his tenancy. 24 C.F.R. § 966.55 (2009). The hearing officer's determination is binding on the housing authority. 24 C.F.R. § 966.57(b). It can be overturned only if the tenant's grievance is not legitimate or the hearing officer's decision is "contrary to applicable Federal, State or local law, HUD regulations or requirements of the annual contributions contract between HUD and the [public housing authority]." *Id.*

#### *Scope of NYCHA's Review*

Respondent overturned the hearing officer's determination on two grounds-- that it was contrary to Paragraph 15 of the NYCHA Termination Procedures and that it was an abuse of discretion. Neither meets the standard for reversal.

Paragraph 15 provides:

The Authority may set forth, in addition to the duration of probation . . . other specific conditions to probation, such as the continued absence of an offending family member from the project grounds, the continued treatment of a drug addict, etc. Where 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.

In the Override Memorandum, the NYCHA Board found that petitioner had not done all she could have done to exclude Sekina and, thus, failed to meet her burden of proof. The Board

ruled that petitioner's failure to carry her burden of proof automatically required termination and the hearing officer's decision to the contrary violated Paragraph 15.

However, petitioner correctly argues that a tenant's failure to meet the paragraph 15 burden is merely the proof required of the tenant to demonstrate that she complied with the conditions of her probation. If she fails in this showing, then the hearing officer must find that she violated her probationary period of tenancy. Here, the hearing officer did just that.

Nowhere do the Termination Procedures indicate that violations of specific conditions of probation are treated differently than violations of the general condition of probation. See Pet. Ex. I ¶ 17 ("In the event that in the opinion of the Manager . . . the tenant has violated *any* condition of probation . . .") (emphasis added). The Termination Procedures leave it to the discretion of the hearing officer to either terminate the tenancy, continue the probation unchanged or add a further period of probation on such terms as may be appropriate, upon finding that the tenant violated *any* condition of probation. Pet. Ex. I ¶ 18.

In the instant case, the hearing officer imposed an additional year of probation, as authorized by Paragraph 18 of the Termination Procedures. While it is true that the utmost deference is due to an agency's interpretation of its own regulations, the court is not bound by an interpretation that conflicts with the plain meaning of the regulation. *Visiting Nurse Serv. of N.Y. Home Care v N.Y. State Dep't of Health*, 5 NY3d 499, 506 (2005). Consequently, the hearing officer's determination did not run afoul of Paragraph 15 and cannot form the basis for the Board's reversal.

Nor can abuse of discretion justify the Board decision. The Board found petitioner's repeated violations of the conditions of her probation and considerations of fairness to the other residents of Gowanus Houses and those on the waiting list to *become* residents of Gowanus

Houses made leniency in this case “clear error.” At oral argument, respondent conceded that the NYCHA Board does not have the power to overturn the hearing officer’s determination for abuse of discretion. Any other rationales offered by respondent were not invoked during administrative proceedings and cannot be considered by the court. *See Scherbyn*, 77 NY2d 758-59.

#### *Attorney’s Fees*

The remaining issues deal with petitioner’s request for attorney’s fees pursuant to Article 86 of the CPLR. New York law provides for an award of attorney’s fees to the prevailing non-state party in a civil action against the state. CPLR § 8601(a). However, NYCHA is a public corporation. N.Y. Pub. Hous. Law § 3(2) (McKinney 1989). The definition of “state” for purposes of Article 86 does not include public corporations. *Apollon v Giuliani*, 246 AD2d 130, 135 (1st Dept. 1998). Certain entities can be considered part of the state despite being formally independent of it. *Id.* But, where the agency action at issue did not have its origin in and was not caused by the state of New York, the agency ought not to be considered part of the state for the purposes of Article 86. *Id.* (denying Article 86 attorney’s fees in action against CUNY relating to New York City’s obligation to fund community colleges). The institution of probation for public housing tenants and the sanctions that attend its violation has no origin in New York law. *See* N.Y. Pub. Hous. Law § 156 (only requiring authority to remove tenants for income-related reasons). Consequently, NYCHA’s actions were not generated in any way by the State of New York, and so respondents are not considered part of the state for purposes of Article 86.

Petitioner also claims attorney’s fees under 42 U.S.C. § 1988 (2003). This statute gives the court discretion to award attorney’s fees to the prevailing party in an action brought to

enforce a variety of federal civil rights statues. The instant action was brought pursuant to Article 78 of the CPLR, not a federal statute. Consequently, § 1988 does not apply.

Accordingly it is

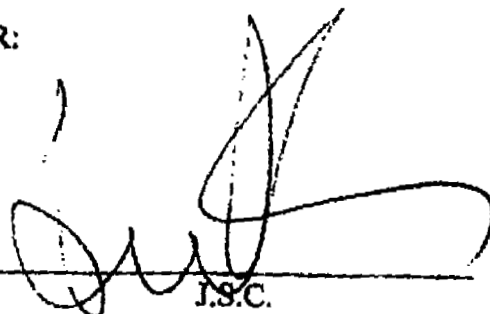
ORDERED that petitioner's motion for re-argument is granted, and it is further

ORDERED and ADJUDGED that upon reargument, the petition is granted and respondents' termination of petitioner's tenancy is annulled, and review of the hearing officer's December 19, 2007 decision is remanded to NYCHA for a determination consistent with this decision, and it is further

ORDERED that petitioner's request for attorney's fees is denied; and it is further

ORDERED that petitioner's motion to amend her petition is denied as moot.

ENTER:

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

Date: July 10, 2009  
New York, New York

**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).