

Matter of Hernandez v New York City Hous. Auth.

2009 NY Slip Op 31795(U)

August 10, 2009

Supreme Court, New York County

Docket Number: 113674/2008

Judge: Paul G. Feinman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. PAUL GEORGE FEINMAN PART 12

Justice

Hernandez J.

- v -

NYCHA

INDEX NO. 113674/08
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____.

Notice of Motion/Petition — Affidavits — Exhibits _____
Answering Affidavits — Exhibits (Memo) _____
Notice of Cross-Motion — Affidavits — Exhibits _____
Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED
1
[Signature]

Cross-Motion: Yes No

Upon the foregoing papers, It is ORDERED that this motion

NOTION IS DECIDED IN ACCORDANCE WITH THE ANNOUNCED DECISION, ORDER AND JUDGMENT.

Transfer to Appellate Division, 1st Dept.

FILED

AUG 11 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 8/10/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 DO NOT POST REFERENCE
 Preliminary Conference _____
 Compliance Conference _____

Transfer to App. Div. 1st Dept.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

In the Matter of the Application of
JACQUELINE HERNANDEZ,
Petitioner,

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

against

NEW YORK CITY HOUSING AUTHORITY,
Respondent.

-----X

Index No. 113674/2008
Mot. Submit Date 5/27/2009
Mot. Seq. No. 001
Cal. No. 4

**DECISION, ORDER, AND
JUDGMENT**

For the Petitioner:

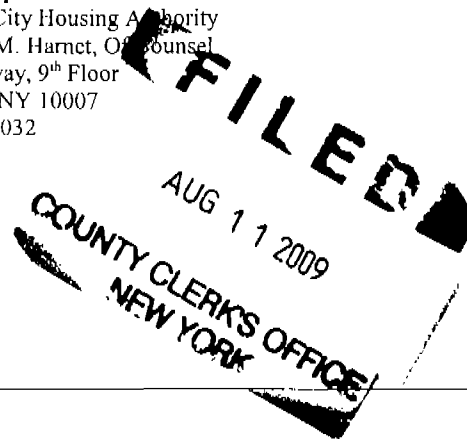
Jacqueline Hernandez, *pro se*
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(646) 208-2390

For the Respondent:

New York City Housing Authority
By: Nancy M. Harnet, Of Counsel
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Papers considered in review of this motion for Article 78 relief:

Papers	Numbered
Notice of Petition and Attachments	1
Verified Answer and Attached Exhibits	2
Respondent's Memorandum of Law	3
Reply Affidavit and Attachments	4



PAUL G. FEINMAN, J.:

Petitioner Jacqueline Hernandez, proceeding *pro se*, is a tenant in an apartment owned by respondent New York City Housing Authority (NYCHA). She brings this Article 78 proceeding seeking to annul a June 18, 2008, determination by respondent to terminate her tenancy. For the reasons which follow, the petition denied as concerns its arguments that the determination was arbitrary and capricious, and is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR 7804(g), as to the arguments that the determination made as a result of a hearing was not supported by substantial evidence.

Background

Petitioner is a resident in an apartment owned and operated by respondent New York City Housing Authority (NYCHA). Following the February 2, 2007 execution of a warrant by the New York City Police Department to search petitioner's apartment, and the subsequent recovery of crack-cocaine, marijuana, paraphernalia and related items (Ver. Ans. Ex. E), respondent commenced termination proceedings against her. Initially, the housing manager attempted by letter to schedule a meeting with petitioner to discuss the possible termination of her tenancy, and after petitioner twice failed to appear, a letter was sent explaining that her records had been forwarded to a different department for review (Ver. Ans. Ex. G, I). On November 26, 2007, NYCHA notified petitioner of the charges against her and her hearing date (Ver. Ans. ¶ 23, Ex. J, Notice of Charges). According to the notice, she was charged with non-desirability in that she, two of her daughters, and an unrelated man, were found to possess drugs with the intent to sell; that she along with others acted in a manner injurious to a child; and that petitioner's daughter stole property and possessed that property (Ex. J, Notice of Charges ¶¶ 1-4). She was also charged with breaching rules and regulations by permitting an unauthorized occupant to reside in the apartment and failing to refrain or cause others on the premises to refrain from illegal activity. (Ex. J, Notice of Charges ¶¶ 5, 6). She was also charged with chronic rent delinquency for repeatedly failing to pay rent when due. (*Id.* ¶ 7).

The hearing, which was adjourned several times in order for petitioner to secure an attorney, was commenced on February 21, 2008, although petitioner had not found legal representation, and after some testimony was adjourned until April 17, 2008, at which time petitioner remained unrepresented. (Ver. Ans. Ex. K, Hearing Transcript, at 4, 8). Some evidence was introduced and the matter was again adjourned until May 28, 2008, at which time petitioner presented her case and supporting exhibits (Hearing Transcript at 50 et seq.). The

transcript shows that the hearing officer questioned petitioner regarding her unsuccessful attempts to find an attorney, and offered suggestions which apparently proved fruitless (Hearing Transcript at 6-8; 40-43; 51-52).

The transcript shows that respondent produced a copy of petitioner's lease and New York City Housing Authority Occupant's Affidavit of Income, dated May 8, 2006, showing that the only authorized occupants of petitioner's apartment in 2006 were petitioner, petitioner's three daughters and three grandchildren. Respondent produced a detective who testified about the search warrant obtained after the police had received three 911 calls about drugs being sold from that location which lead to controlled buys at the location, "which were positive." (Hearing Transcript at 12). He testified that four individuals were arrested and charged, and that two of the individuals were petitioner's daughters (Hearing Transcript at 22). The detective testified concerning the drugs and other items recovered (Hearing Transcript at 17-20). Respondent presented other evidence, including additional testimony of the detective, to support its other charges against petitioner.

Petitioner presented her evidence on May 28, 2008, with the hearing officer asking questions to guide her testimony (Hearing Transcript at 53). She denied that there were drugs being sold in her apartment, and explained that one of the men arrested was her son-in-law who lived upstairs and against whom there was a "vendetta" by the police and NYCHA (Hearing Transcript at 53-55). She offered testimony that her two oldest daughters had moved out of the apartment (Hearing Transcript at 57-59). She questioned the conclusion by respondent that she did not live in the apartment (Hearing Transcript at 59-60). At the end of all the testimony, the hearing officer closed with an explanation of how to appeal an unfavorable decision to the Supreme Court (Hearing Transcript at 62).

The hearing officer issued her decision June 6, 2008 (Ver. Answer, Ex. Q). She sustained most of the charges brought by NYCHA and ruled that it was entitled to terminate petitioner's tenancy. By notice dated June 18, 2008, NYCHA approved the hearing officer's decision and disposition, and directed that petitioner's tenancy be terminated. (Ver. Ans., Ex. S, Determination of Status).

Petitioner timely commenced her petition pursuant to CPLR Article 78, seeking an order reversing NYCHA's determination to terminate her tenancy. Among her other arguments, she offers certain documentary proof to rebut certain of the findings by the hearing officer, argues that the hearing officer erroneously did not take into consideration that the charges arising from the execution of the search warrant on February 2, 2008 against her daughters had been dismissed, claims negligence in the handling of her paperwork by NYCHA by pointing to instances where she was told to submit documents that she had already provided, and offers more to show the vendetta against her son-in-law.

Respondent submitted its verified answer, including affirmative defenses that its determination was consistent with rational policy to protect public housing residents; waiver; comports with the standards of proof applicable in civil and criminal proceedings, and failure to state a cause of action (Ver. Ans. ¶¶ 35-38). It describes its function as a public housing authority created by the New York State legislature to provide safe, decent, and sanitary housing for low-income families in the City of New York, and that it is vested with the power to make and enforce standards regarding eligibility of the occupants of its apartments. (Ver. Answer at 2, citing N.Y. Pub. Hous. Law §§ 2, 3 [2], 37 [1] [w], 156, and 401). It notes that in order to receive federal funding, NYCHA must comply with the United States Housing Act and the federal rules and regulations promulgated by the United States Department of Housing and

Urban Development. (Ver. Ans. at 2, citing 42 U.S.C. § 1437 et. seq.). It therefore imposes these requirements upon the occupants of its apartments by incorporating these standards into its tenants lease agreements, including petitioner's lease agreement signed March 8, 2001. (Ver. Ans., Ex. A, Lease). It includes a copy of petitioner's lease, which requires prior written authorization before additional occupants are allowed to reside in the apartment (Lease ¶ 5 [b]), and obligates petitioner as a tenant to not provide accommodations for boarders, and requires her to ensure that no one under her control will engage in "drug-related criminal activity" (Lease ¶ 12 [r]). Respondent also notes that pursuant to its Termination of Tenancy Procedures, before a tenancy may be terminated, a hearing must be conducted before a Hearing Officer. (Ver. Ans. at 18, Ex. C, Termination Procedures ¶ 6).

Article 78: Scope of Supreme Court Judicial Review

The scope of judicial review of an administrative determination under Article 78 is strictly limited to the resolution of the specific questions found in CPLR 7803. Pursuant to CPLR 7803 (3), the question is "whether a determination was made in violation of lawful procedure, was affected 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." It is well settled that judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]). An arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Matter of Pell*, at 232). Here, to the extent that petitioner argues that the agency irrationally and

arbitrarily found against her, and that there was a “vendetta” against her son-in-law who was one of those arrested in her apartment, she does not establish her claim. The test of whether a decision is arbitrary or capricious is “determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.” (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). Here, it cannot be found that NYCHA’s decision was irrational, given its mandate to ensure the safety of its tenants. Accordingly, the branch of the petition brought pursuant to CPLR 7803 (3) is dismissed.

However, the petition also raises the question provided for by CPLR 7803 (4), which is “whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.” Where a matter involves a “substantial evidence” question, the Supreme Court must transfer the entire proceeding to the appellate division for resolution of all issues(see, *G & G Shops, Inc v New York City Loft Bd.*, 193 AD2d 405 [1st Dept 1993]; CPLR 7804 [g]). It is therefore

ORDERED that the branch of the petition brought pursuant to CPLR 7803 (3) seeking to vacate and annul the determination by respondent of June 18, 2008, to terminate petitioner’s tenancy, is denied and dismissed, and it is further

ORDERED that the branch of the petition brought pursuant to CPLR 7803 (4) seeking to vacate and annul the determination by respondent of June 18, 2008, as unsupported by substantial evidence at the administrative hearing, is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR 7804(g) and the Clerk of the Court is directed to transfer the file to the Appellate Division, First Department, upon service of a copy of this order with notice of entry; and it is further

ORDERED that the stay issued by this court on May 6, 2009 in the Housing Court matter entitled *NYCHA -St. Nicholas Houses v Jackqueline Hernandez*, 10506/2009, shall be deemed dissolved 30 days after entry of this decision and order and any application for a continued stay should be made to the Appellate Division, First Department.

This is the decision and order of the court. The court has mailed courtesy copies to petitioner and defendant.

Dated: August 10, 2009
New York, New York



J.S.C.

HON. PAUL G. FEINMAN

FILED
AUG 11 2009
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NEW YORK