

**Matter of Alejandro v New York City Hous. Auth.**

2009 NY Slip Op 31806(U)

August 10, 2009

Supreme Court, New York County

Docket Number: 400052/09

Judge: Paul G. Feinman

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

HON. PAUL G. FEINMAN

PRESENT.

PART 12

Justice

Index Number : 400052/2009

ALEJANDRO, TANYA

VS.

NEW YORK CITY HOUSING AUTHORITY

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 400052-09

MOTION DATE 8/6/09

MOTION SEQ. NO. #001

MOTION CAL. NO. 3

\_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

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

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

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

*see attached*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

PETITION IS DECIDED IN ACCORDANCE WITH THE ANNEXED DECISION ORDER AND JUDGMENT.

FILED

AUG 12 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 8/10/09

*8/10/09*

*[Signature]*

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

*Transfer to App. Div., 1st Dept.*

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

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

-----X  
In the Matter of the Application of  
TANYA ALEJANDRO,  
Petitioner,

Index Number        400052/09  
Mot. Submit Date    5/6/09  
Mot. Seq. No.        001  
Cal. No.             3

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

**DECISION & ORDER**

-against-

NEW YORK CITY HOUSING AUTHORITY,  
Respondent.

-----X

**For the Petitioner:**

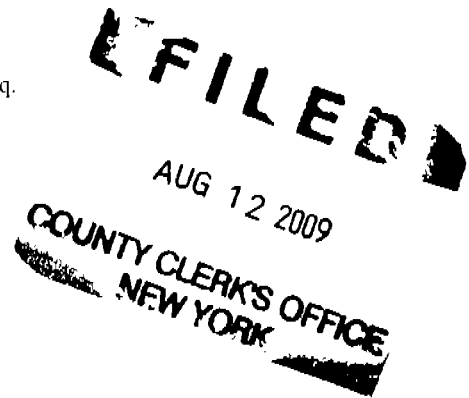
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**For the Respondent:**

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Acting General Counsel  
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Papers considered in review of this petition pursuant to Article 78:

Papers	Numbered
Notice of Petition and Petition	1
Verified Answer	2
Respondent's Memorandum of Law in Support	3



**PAUL G. FEINMAN, J.:**

Petitioner Tanya Alejandro, tenant of an apartment owned by respondent New York City Housing Authority (NYCHA), brings this Article 78 proceeding seeking to annul respondent's September 10, 2008, determination 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***

According to the verified answer, upon learning that the New York City Police Department (NYPD) had twice executed search warrants in petitioner's apartment for drug-related reasons, the manager of the NYCHA development in which petitioner lives informed her, by letters dated December 14, 2007 and January 4, 2008, that termination of her lease was being considered and proposed that they meet to discuss the situation. (Verified Answer ¶ 18; Ex. D, Dec. 14, 2007, Jan. 4, 2008 Letters to Petitioner). When petitioner failed to appear or seek rescheduling, management sent a third letter, undated, informing petitioner that her record would be forwarded to another department for a hearing. (Verified Answer, Ex. E).

By notice dated May 13, 2008, petitioner was informed by the NYCHA law department that a hearing would be held on June 12, 2008, concerning the charges against her (Verified Answer Ex. F, Notice and Specifications). As set forth in the document, the general charges against petitioner were (1) non-desirability, (2) breach of rules and regulations, and (3) chronic rent delinquency.<sup>1</sup> More specifically, as to the claim of non-desirability, the document among other things alleged that petitioner, either alone or in concert with unauthorized occupants or guests identified as her sister, her husband, and her sister's boyfriend, unlawfully possessed and sold or attempted to sell crack cocaine and marijuana, possessed drug paraphernalia, a handgun, ammunition, and cash. (*Id.* at ¶¶ 1-6). In support of the breach of rules and regulations charge, it was claimed that petitioner violated certain provisions of her lease by allowing her husband, her sister, and her sister's boyfriend, and live in the apartment without obtaining prior written

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<sup>1</sup> The rent delinquency charge was not upheld by the Hearing Officer and is not an issue in this petition (see, Verified Answer, Ex. T, Housing Authority Decision, Aug. 25, 2008, at 3 [C.H.O. Hines]).

consent from management as required (*Id.* at ¶ 7). She also failed to stop other persons in the apartment from engaging in illegal or undesirable activity. (*Id.* at ¶ 8).

After several adjournments during which a guardian *ad litem* was appointed to represent petitioner, the hearing was conducted on August 7, 2007 before a Housing Authority Hearing Officer. (Verified Answer Ex. G, Hearing Transcript at 27). The guardian *ad litem* on behalf of petitioner entered a general denial of the charges. (Verified Answer, Ex. G, Hearing Trans. at 29). The Housing Authority produced evidence and testimony in support its claims of petitioner's non-desirability and breach of rules and regulations. It first pointed to several provisions of petitioner's lease agreement setting forth her obligations as a tenant including to "act in a manner which will not disturb other residents' peaceful enjoyment of their accommodations and will be conducive to maintaining the project in a decent, safe and sanitary condition"; to "assure that the Tenant, any member of the household, a guest, or another person under the Tenant's control, shall not engage in ... criminal activity that threatens the health, safety, or right to peaceful enjoyment of the Development by other residents or by the Landlord's employees," and to "assure that the Tenant, any member of the household, a guest, or another person under the Tenant's control, shall not engage in ... violent or drug-related criminal activity on or off the Leased Premises or the Development...." (Verified Answer, Ex. A, Lease at ¶ 12 [q], [r] [i] and [ii]).

The Housing Authority called as a witness one of the NYPD narcotics investigators who was part of the team that executed search warrants at petitioner's apartment on March 15, 2006 and May 9, 2006. (Verified Answer, Ex. G, Hearing Transcript at 37, *et seq.*). The detective testified that the first search warrant was executed after the police had conducted multiple controlled buys using confidential informants inside petitioner's apartment. (Hearing Trans. at

39). This resulted in the arrest of petitioner's sister, petitioner's then husband, and the sister's boyfriend, who were all charged with criminal possession of a controlled substance and unlawful possession of marijuana (Verified Answer, Ex. M, Bronx County Criminal Complaint). The Housing Authority also introduced the NYPD Property Clerk's Invoices, dated March 15, 2006, which indicate that during the search of petitioner's apartment police recovered 35 ziplock bags of crack cocaine, seven ziplock bags of marijuana, drug paraphernalia, and \$463.00 in cash. (Verified Answer, Ex. K, NYPD Property Clerk's Invoices). An NYPD Substance Analysis Report showing positive test results of these materials for cocaine and marijuana was also provided. (Verified Answer, Ex. I, NYPD Substance Analysis Report).

The Housing Authority also produced evidence and testimony related to the execution of a second search warrant at petitioner's premises on May 9, 2006 where, in addition to cash and illegal drugs, police recovered a .357 caliber handgun and ammunition. (Verified Answer, Ex. N, NYPD Property Clerk's Invoices). During the execution of this search warrant, petitioner, her sister, and the boyfriend were arrested and charged with criminal possession of a controlled substance, criminally using drug paraphernalia, criminal possession of a weapon, unlawful possession of marijuana, and endangering the welfare of a child. (Verified Answer, Ex. Q, Bronx County Criminal Complaint). The NYPD Property Clerk's Invoices and NYPD Substance Analysis Report pertaining to the arrests from this search warrant (Verified Answer, Ex. N, O), were produced for the hearing, as well as an NYPD Firearm Examination Report, dated May 11, 2006, showing that the firearm and ammunition tested operable. (Verified Answer, Ex. P).

Furthermore, the Housing Authority pointed to a third search warrant executed at petitioner's apartment on January 18, 2008. The Housing Authority produced a Criminal Complaint from Bronx Supreme Court dated January 19, 2008, showing that petitioner was

arrested the previous day with two other individuals for criminal possession and unlawful possession of marijuana. (Verified Answer, Ex. S). The complaint states that police found petitioner alone in the front bedroom where they also collected a bag of a “dried green leafy substance with a distinctive odor.” (*Id.*) Two other defendants were found in the rear bedroom along with twenty-one bags containing of the same substance on top of a chair, two large bags of the substance on the window sill, and 50 empty clear and 100 stamped with “Superman” ziplock bags inside the rear bedroom dresser drawer. (*Id.*)

With regard to the breach of rules and regulations claim, the Housing Authority first submitted copies of petitioner’s most recent lease. (Verified Answer, Ex. A, Lease). Under the lease agreement, petitioner and her three children were the only individuals authorized to occupy the apartment. (Lease at ¶ 5 [b]). Furthermore, the lease obligates petitioner, “[n]ot to provide accommodations for boarders or lodgers.” (Lease at ¶ 12 [b]). To ensure compliance with this limitation, the lease requires petitioner to furnish upon request of the Housing Authority sufficient information describing the income, identity and composition of the tenant’s household. (Lease at ¶ 7). The Housing Authority submitted copies of petitioner’s most recent filings in response to these requirements, an Affidavit of Income and a Tenant Data Summary, which list petitioner and her three children as the sole occupants of the apartment. (Verified Answer, Ex. B). However, the Housing Authority pointed to certain of the evidence obtained from the search warrant executions, showing that the police found the boyfriend’s checkbook with petitioner’s address on the checks, numerous letters and bills addressed to him, the sister, and the petitioner’s husband, all at petitioner’s apartment, and two sets of keys to the front door of petitioner’s apartment, one of which was in the husband’s pocket. (Verified Answer, Ex. N, NYPD Property Clerk’s Invoices).

At the hearing, petitioner offered testimony in her defense (Verified Answer Ex. G, Transcript at 72 *et seq.*).<sup>2</sup> As related to the Housing Authority's charges of non-desirability based on alleged illegal conduct occurring in petitioner's apartment, petitioner testified that she was not aware that the three other adults were possibly selling drugs or that anyone possessed a firearm in the apartment because in 2006 she was "in bed rest" and her bedroom and the bathroom across the hall were the only parts of the apartment where she ever went. (Verified Answer, Ex. G, Trans. at 102). Petitioner testified that she was pregnant and preparing to undergo her fourth C-section and had been told by her doctor not to get out of bed. (*Id.* at 80). Regarding the January 18, 2008, search warrant execution, petitioner testified that she was unaware that a guest staying with her that weekend possessed marijuana because she was again "on full bed rest" in preparation for her fifth c-section taking place in February of 2008. (*Id.* at 104). She testified this guest did not sell drugs and those he possessed were for his personal use, noting he "smokes a lot" of marijuana. (*Id.* at 102). Petitioner stated that she was aware that he smoked marijuana in her apartment but emphasized that he did not sell drugs and she "didn't like it." (*Id.* at 85). Her testimony and evidence later submitted to the Hearing Officer showed that there was hope that a plea could be arranged and the charges dropped against her as to that incident (Verified Answer, Ex. S, Aug. 14, 2009 Letter to Hearing Officer).

Regarding the Housing Authority's charges that petitioner breached certain rules and regulations by allowing unauthorized individuals to reside in the apartment, petitioner concedes that she permitted her sister, sister's boyfriend, and her sister's six-year-old daughter to stay in

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<sup>2</sup> During the hearing, petitioner's guardian *ad litem* first testified on behalf of petitioner, periodically consulting petitioner on certain questions. Then, petitioner testified herself. For purposes of this decision, all such testimony will be referred to as petitioner's.

the apartment until they could find a place of their own (*Id.* at 74). Petitioner also concedes that she never sought or obtained written permission from Housing Authority management for her sister, her sister's boyfriend, or her husband to live in the apartment as required. (*Id.* at 95). She testified that after the first search warrant was executed and the drug activity was revealed, because petitioner worried about her young niece, she gave her sister 30 days to find a new apartment or go to a shelter on the condition that her sister and her sister's boyfriend swore that they would not bring any illegal activities into the apartment. (*Id.* at 106). After the second search warrant was executed at the apartment on May 9, petitioner claims she again told her sister that she had to leave the apartment and move to a shelter. (*Id.* at 85). Petitioner testified that her sister subsequently moved into a shelter and then into another apartment with her boyfriend, and thus neither of them currently reside with petitioner. (*Id.* at 91). In addition, petitioner claims that her now ex-husband has not lived in the apartment since November 2007 when petitioner kicked him out following a domestic violence incident where he allegedly tried to kill her. (*Id.* at 92). Petitioner admits that the man arrested with her at her apartment in January of 2008 was her guest at the time, but claims he was staying only that weekend and did not live there. (*Id.* at 101). Thus, petitioner asserts that no unauthorized individuals reside at the apartment and she is now the sole occupant of the apartment, her children having been removed. (*Id.*).

The Hearing Officer issued a decision on September 10, 2008 approving the Housing Authority's determination to terminate petitioner's tenancy (Verified Answer, Ex. T, Housing Authority Decision, dated Aug. 25, 2008). The decision stated that "the credible testimony and evidence presented at this hearing show that the tenant relinquished control of her apartment during the period that the two search warrants were executed in the subject apartment." (*Id.* at 3).

Even acknowledging petitioner's health difficulties, the Hearing Officer declared petitioner to have been on notice that illegal activities were taking place in her apartment after the first search warrant was executed but that she failed to take reasonable steps to exclude individuals from her apartment and allowed them to continue to reside as unauthorized occupants. (*Id.*) The Hearing Officer noted that "[a]s a leascholder the tenant is required to have dominion and control of her apartment and has an obligation to ensure that all members of her household and guests do not engage in any illegal or drug related activities in the subject premises." (*Id.* at 4). In conclusion, the Hearing Officer declared that "courts support a disposition of termination for the drug related acts of occupants or guest even where the tenant claims they are innocent and did not know about the drug related activities." (*Id.* citing *Department of Housing and Urban Development v Rucker*, 535 US 125 [2002]).

Petitioner timely filed a Notice of Petition and Verified Petition pursuant to Article 78 of the CPLR requesting that this court reverse respondent's September 10, 2008 determination. In support of this request, petitioner generally denies the allegations relied upon by Housing Authority in determining to terminate her tenancy, and sets forth three specific arguments. In her first argument, petitioner asserts that all charges stemming from her past arrests will be dismissed. (Verified Petition at 1). Second, she avers that the individuals who have been convicted with any crimes associated with her apartment no longer reside there. (*Id.*). Third, noting that she was "on [her] 4<sup>th</sup> surgery and was on bed rest at the time," petitioner argues that she was not aware of any wrongdoing and should not be held responsible for the actions of people that she could not control. (*Id.*).

### ***Discussion***

CPLR 7803 sets statutory constraints to the nature of judicial review of a decision made

by an administrative agency such as the Housing Authority by expressly identifying what questions may be presented before a court in an Article 78 proceeding. Inasmuch as the instant proceeding was filed using a form provided by the pro se office at 60 Centre Street, the court will afford the petitioner the benefit of the doubt and assume that it raises a challenge both pursuant to CPLR 7803 (3) *and* (4).

Under CPLR 7803 (3), the relevant question here is “[w]hether a determination was made in violation of lawful procedure, was affected by 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..” “In deciding whether an agency’s determination was arbitrary, capricious, or an abuse of discretion, courts are limited to an assessment of whether a rational basis exists for the administrative determination, ‘without disturbing underlying factual determinations.’” (*Gill v Hernandez*, 22 Misc 3d 390, 394 [Sup Ct NY County 2008] citing *Heintz v Brown*, 80 NY2d 998, 1001 [1992]).

“A rational or reasonable basis for the agency’s determination exists if there is evidence in the record to supports its conclusion.” (*Gill*, 22 Misc at 394, citing *Sewell v New York*, 182 AD2d 469, 473 [1<sup>st</sup> Dept 1992]). In other words, “where from the evidence either of two conflicting inferences may drawn, the duty of weighing the evidence and making the choice rests solcly upon the administrative agency.” (*Lohmann v Members of the Bd. of the N.Y. City Hous. Auth.*, 291 AD2d 288 [1<sup>st</sup> Dept 2002]). In this analysis, judicial review is limited solely to the grounds invoked by the agency. (see, *Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]). Judicial review of an administrative determination is so deferential that courts have said the administrative determination “must be upheld unless it ‘shocks the

judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law.” (*Mayes v Hernandez*, 17 Misc 3d 1140[A], 2007 NY Slip Op 52351[U], \*4 [Sup. Ct. NY County 2007] citing *Featherstone v Franco*, 95 NY2d 550, 554 [2000]).

Here, the lease agreement clearly sets forth standards to which petitioner as a tenant is required to adhere, and respondent provided copious evidence of petitioner’s repeated failure to abide by the lease’s terms. Illegal drugs, a firearm, and ammunition were found in her apartment while several children were living there. (See, *Gibson v Blackburne*, 201 AD2d 379, 380 [1<sup>st</sup> Dept 1994] [holding that use of a tenant’s apartment to facilitate drug activity, especially when a weapon is present, represents a danger to the health and safety of the other tenants living in the same housing community]). A claim of non-desirability may be based upon the conduct of either the tenant or another person occupying tenant’s apartment, including conduct involving the sale of drugs inside the apartment by an unauthorized occupant. (*Blanco v Popolizio*, 190 AD2d 554 [1<sup>st</sup> Dept 1993]). Non-desirability has been held to not depend on whether petitioner knew that drugs were being stored and sold from her apartment. (*Satterwhite v Hernandez*, 16 AD3d 131, 131 [1<sup>st</sup> Dept 2005]; see *Woody v Franco*, 260 AD2d 186 [1<sup>st</sup> Dept 1999] [determination of non-desirability based upon sale of drugs inside tenant’s apartment by her son upheld despite her claim that she was unaware drugs were being sold and irrespective of whether or not her son had permanently left the apartment]). In addition, a Housing Authority decision to terminate a lease has been upheld where the tenant allowed an unauthorized occupant to reside in the apartment. (*Glover v Finkel*, 278 AD2d 14 [1<sup>st</sup> Dept 2000]).

It is not for this court to substitute what it might have done were it the trier of fact in the first instance. The court’s role is limited to determining whether there is any reasonable basis to

support NYCHA's determination and action. Here, although petitioner testified that she has turned a new leaf and seeks to abide by the rules, it cannot be found that NYCHA lacks a rational basis for determining that petitioner's tenancy should be terminated. It does not shock the judicial conscience that the Housing Authority determined that petitioner's tenancy should be terminated.. Therefore, branch of the petition which can be read as being brought pursuant to CPLR 7803(3) must be denied.

However, the petition also must be read as raising 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 "shall first dispose of such other objections as could terminate the proceeding" and "[i]f the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division ..." CPLR 7804(g). As the court's resolution of the CPLR 7803(3) challenge has not terminated the proceeding, it must transfer the entire proceeding to the appellate division after for resolution of all remaining issues(see, *G & G Shops, Inc v New York City Loft Bd.*, 193 AD2d 405 [1<sup>st</sup> 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 September 10, 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 September 10, 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

This constitutes the decision and order of the court.

Dated: August 10, 2009  
New York, New York



J.S.C.

**HON. PAUL G. FEENAN**

**FILED**  
AUG 12 2009  
COUNTY CLERK'S OFFICE  
NEW YORK