

Matter of Kinard v New York City Hous. Auth.

2009 NY Slip Op 32584(U)

October 30, 2009

Supreme Court, New York County

Docket Number: 401041/09

Judge: Joan B. Lobis

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Joan B. Lohis

PART 6

Index Number : 401041/2009
KINARD, CHEMAINE
vs
NYC HOUSING AUTHORITY
Sequence Number : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE 9/21/09
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

_____ were read on this motion to/for _____

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

PAPERS NUMBERED
1-3
4-12 ; 13

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*petition decided in accordance with
accompanying 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: 10/30/09

JBL
J.S.C.

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):

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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 401041).

In the Matter of the Application of
CHEMAINE & DOUGLAS KINARD,

Petitioners,

Index No. 401041/09

-against-

Decision, Order and Judgment

NEW YORK CITY HOUSING AUTHORITY,

Respondents.

-----X
JOAN B. LOBIS, J.S.C.:

Petitioners Chemaine and Douglas Kinard, proceeding *pro se*, bring this Article 78 proceeding, seeking to annul the determination by respondent the New York City Housing Authority ("NYCHA" or the "Authority") to terminate their tenancy. The final determination is set forth in a "Determination of Status" that was issued by the NYCHA on March 19, 2009, which approved a March 4, 2009 decision by Hearing Office Joan Pannell.

Petitioners are husband and wife, who reside at 2936 Avenue W, Apt. 1A, Brooklyn, New York (the "Apartment"), pursuant to a resident lease agreement dated April 27, 2001; the building is owned and operated by the NYCHA. On May 20, 2008, petitioners were notified by letter that the Authority was considering terminating their lease. The charges against petitioners were set forth in a notice dated July 17, 2008 (the "July 2008 Notice"). The July 2008 Notice charged petitioners with a violation of their probation and a separate charge of non-desirability. Petitioners were accused of possessing or selling narcotics (to wit, crack cocaine) and possessing drug paraphernalia on two separate occasions, January 9 and April 9, 2008. The July 2008 Notice sets forth that the drugs and paraphernalia were recovered during the execution of search warrants

on the aforementioned dates. The probationary period on petitioners' tenancy stemmed from an earlier proceeding which also involved allegations relating to crack cocaine. The earlier proceeding had been resolved by a stipulation entered into by Ms. Kinard and the Authority which set forth the terms of the five-year probationary period.

After two adjournments to allow petitioners the opportunity to seek representation, an administrative hearing was held on March 18, 2009. Testimony was given by Police Officer Sherwin Ifimm, Police Officer Lawrence Dunbar, Chemaine Campell-Kinard, and Douglas Kinard. In addition, a number of documents were admitted into the record, which included three New York Police Department ("NYPD") Property Clerk vouchers for property removed from the Apartment during a search conducted pursuant to a search warrant; a certified arrest record for petitioners for April 9, 2008; and, an NYPD laboratory controlled substances analysis report. In her decision, Hearing Office Parnell, after discussing the testimony, sustained all of the charges, except for possession of drug paraphernalia on April 9, 2008. Her dispositional finding was for termination. The Authority approved the decision and disposition. It is this determination that petitioners challenge.

In their verified petition, the Kinards seek reversal on the grounds that they were unrepresented, the officers were biased against them, Ms. Kinard has serious health issues, and they have not been charged with any criminal activity. Their claim for bias stems from the fact that petitioners filed a complaint with the Civilian Complaint Review Board ("CCRB"), charging police

* 4]
misconduct on January 9, 2008, at the subject premises.¹ The fact of the complaint to the CCRB and some of Ms. Kinard's health concerns were mentioned during petitioners' testimony.

As to the first basis for reversal, the NYCHA rightfully argues that the Authority has no obligation to provide counsel at its administrative hearings. In re Folks v. New York City Hous. Auth., 27 A.D.3d 270, 271 (1st Dep't 2006); In re Smalls v. New York City Hous. Auth., 25 A.D.3d 478, 479 (1st Dep't 2006). In examining petitioners' other claims, the allegations will be considered as challenging the Authority's determination pursuant to C.P.L.R. § 7804(3), on the grounds that the 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," and pursuant to C.P.L.R. § 7804(4), that the determination was not supported by substantial evidence. As pro se litigants, the court must construe petitioners' pleadings liberally. Pezhman v. City of New York, 29 A.D.3d 164, 168 (1st Dep't 2006), citing Rosen v. Raum, 164 A.D.2d 809, 811 (1st Dep't 1990).

Initially, while the Authority addresses the issue of substantial evidence in its memorandum of law, no request to transfer the case to the Appellate Division was made. Generally, when a determination is made from a hearing, and a claim of "substantial evidence" is raised, pursuant to C.P.L.R. § 7803(4), the matter must be transferred to the Appellate Division. But, if no issues are raised involving substantial evidence, a transfer is not required. Duboff Elec. Inc. v.

¹ Petitioners attached documents from the CCRB, dated January 24, 2008 and April 16, 2008, indicating that Mr. Kinard did not cooperate in the CCRB investigation.

Goldin, 95 A.D.2d 666, 667 (1st Dep't 1983); Mays-Watt v. Hernandez, 196 Misc. 2d 56, 58 (Sup. Ct. Bronx Co. 2003). Here, petitioners' pleadings do not raise any factual issues. Although the petition raises certain claims about the events leading up to the charges, by not challenging the fact that drugs were found at their premises, their previous probation, and the subsequent plea by Mr. Kinard to a misdemeanor count of criminal possession of a controlled substance, none of the facts relied on by the hearing officer are disputed. Petitioners have not raised issues that must be reviewed under this standard.

The petition will be construed as challenging the conduct on the grounds specified in § 7804(3). The court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id.

There is no basis to conclude that the decision was made in violation of lawful procedure or was affected by an error of law. The Authority is not required to provide representation, and petitioners were given time to procure representation. Petitioners were given adequate notice of the charges and given an opportunity to cross-examine the witnesses, as well as present witnesses of their own. Nor can it be said that the determination was arbitrary and

capricious, or an abuse of discretion, as the hearing officer was best able to assess the credibility of the witnesses, and the fact that drugs and drug paraphernalia were recovered from the premises was not contradicted or denied. The decision to terminate the tenancy was also permissible. Since drug-related activity, regardless of whether the tenant knew of the activity, constitutes a sufficient basis to terminate the tenancy of a resident in public housing (Dep't of Hous. v. Rucker, 535 U.S. 125, 130 [2002]), it was not arbitrary and capricious, or an abuse of discretion, for the Authority to terminate petitioners' tenancy.

The petition is denied and the proceeding is dismissed. This constitutes the decision, order, and judgment of the court.

Dated: October 30, 2009



JOAN B. LOBIS, 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 141B).