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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11
Justice

Index Number : 400264/2009
LATONI, MARIE
VS.
NEW YORK CITY HOUSING AUTHORITY
SEQUENCE NUMBER : # 001
ARTICLE 78

INDEX NO. 400264-09
MOTION DATE
MOTION SEQ. NO. #001
MOTION CAL. NO.

were read on this motion to/for

	PAPERS NUMBERED
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~~ Article 78 proceeding is determined in accordance with the annexed decision, order and 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: December 30, 2009

J.S.C.

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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In the Matter of the Application of MARIA LATONI,

INDEX NO. 400264/09

Petitioner,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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JOAN A. MADDEN, J.:

In this Article 78 proceeding, petitioner Marie Latoni challenges the determination of respondent New York City Housing Authority (NYCHA) terminating her tenancy on the grounds of non-desirability, violation of permanent exclusion, and breach of the rules and regulations. Petitioner is the tenant of apartment 12G at the Riis Houses, a public housing project located at 90 Avenue D in Manhattan, which is operated by NYCHA. Petitioner has resided in the subject apartment since 1983; her seven-year old son, 12-year old daughter and an adult son also occupy the apartment.

On or about May 23, 2008, NYCHA served petitioner with a notice that a recommendation had been made to terminate her tenancy for the reasons stated in the specification of charges, and a hearing on those charges was scheduled for July 2, 2008. By letter dated June 25, 2008, NYCHA notified petitioner "that the New York City Housing Authority's Office of the Secretary, in consultation with the New York State Office of Court Administration, appoints Alfredo Irizarry as the guardian ad litem for Maria Latoni to assist in defending against

the Housing Authority's charges concerning the tenancy."[1] On or about July 30, 2008, NYCHA served petitioner with amended or supplemented charges, and a notice that the hearing was re-scheduled for August 21, 2008. On August 21, 2008, petitioner appeared for the hearing with the guardian ad litem ("GAL") Alfredo Irizarry. At no time either before or during the hearing, did the hearing officer explain to petitioner that she had a right to be represented by an attorney, or inquire as to whether she was prepared to proceed without an attorney and to be represented solely by the GAL, who was not an attorney.

The hearing officer began by asking the GAL "do you want to enter a plea of a general denial, or admission to any of the charges?" The GAL responded that "we're not denying any of the charges." When the hearing officer specifically asked the GAL if he was "admitting all the charges," the GAL replied "yes." The hearing officer then directed NYCHA's attorney to begin, explaining that he "need[ed] to make a record." NYCHA offered a number of documents in to evidence, and produced one witness, New York City Police Detective Matthew Regina, who executed two search warrants at petitioner's apartment.

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[1]The record includes a NYCHA Social Services Department "Mental Competence Evaluation Request," dated June 11, 2008, which states that "we cannot determine that the tenant/resident [Marie Latoni] is competent and recommend the appointment of a court referred GAL." The document states that on "her most recent Occupant's Affidavit of Income . . . the tenant declared that she has a mental disability." As to her "mental health history," the document states that "Tenant reported having an extensive history of mental illness and had three psychiatric hospitalizations. Tenant reported that she attended St. Vincents, mental health clinic 1X monthly." The "mental status examination" portion of the document states that "Tenant's insight was inappropriate and her judgment was poor," and the "assessment" states that tenant "continuously expressed poor judgment, particularly when she discussed her son 'having the right to possess marijuana inside her apartment.' She did not seem to fully comprehend the severity of the concerns and how they would/could affect her tenancy. For these reasons, it would be difficult to determine Ms. Latoni competent, therefore I am recommending the appointment of a Guardian Ad Litem."

The GAL did not object to any of the police officer's testimony or any of documents NYCHA introduced into evidence, and did not cross-examine Detective Regina. The GAL called one witness to testify on petitioner's behalf, a Child Protective Service worker from the Administration for Children's Services ("ACS"), who had been working with petitioner only for a few weeks, since the end of July, 2008. The GAL also introduced several documents into evidence, including a July 22, 2008 temporary order of protection against Carmen Betancourt, a April 30, 2008 letter from Bodega Familia to NYCHA requesting a "safety transfer for her family," and a 1993 letter from a psychiatrist treating petitioner. The GAL did not call petitioner to testify on her own behalf and the transcript of the hearing indicates that most of time when petitioner tried to speak up during the hearing, her comments were recorded as "inaudible," and the hearing officer made no effort to have her speak more clearly so that she could be heard.

By a decision dated September 12, 2008, the hearing officer issued a disposition of termination. The hearing officer sustained two (charges 1 and 2) of the five charges as to non-desirability, the two charges of breach of the rules and regulations (charges 7 and 8) and the one charge as to violation of permanent exclusion (charge 6), and dismissed the charge as to chronic rent delinquency (charge 9). On October 2, 2008, NYCHA issued a Determination of Status, approving the hearing officer's decision and disposition "finding the tenant ineligible for continued occupancy" and that the "tenancy shall therefore be terminated."

Petitioner thereafter commenced this Article 78 proceeding by filing a *pro se* petition; she subsequently retained counsel who submitted a verified reply to NYCHA's answer and a memorandum of law. Petitioner contends that she was denied a full and fair hearing, that the hearing officer's conclusions are not supported by substantial evidence, and that the penalty of

terminating her tenancy is disproportionate to the offense. Specifically, as to the right to a fair hearing, petitioner asserts that the hearing officer ignored her, "erroneously treated" the GAL as an attorney representing her interests to the exclusion of petitioner being permitted to speak, and failed to allow petitioner to be heard and defend herself when she attempted to counter the statements of her legally "incompetent representation by a person who is not an attorney."

"While an indigent tenant does not have a constitutional right to assigned counsel, a private citizen may not be deprived of continued tenancy in a public housing project, without affording him or her adequate procedural safeguards." Brown v. Popolizio, 166 AD2d 44, 54 (1st Dept 1991)(citing Escalera v. New York City Housing Authority, 425 F2d 853 [2nd Cir], cert denied, 400 US 853 [1990]). "Due process requires an opportunity to confront and cross-examine adverse witnesses." Id. To that effect, NYCHA's Termination of Tenancy Procedures, require that the hearing officer "shall be liberal in granting reasonable adjournments requested by the tenant . . . for good cause shown, to assure that there be no doubt that the tenant is afforded every due process right." Id.

Here, the hearing officer's failure to apprise petitioner of her right to counsel and the right to request a reasonable adjournment to obtain counsel, was arbitrary and capricious, in light of NYCHA's clear and express policy as quoted above as to the liberal granting of reasonable adjournments requested by the tenant "to assure that there be no doubt that the tenant is afforded every due process right." Id. Moreover, once the hearing began, it was clear the GAL was not acting to protect petitioner's interests when he responded that petitioner was admitting all the charges. At that point, the hearing officer seem surprised, but rather than question petitioner directly as to whether she understood and agreed with what the GAL was doing, he simply

directed NYCHA's counsel to "make a record." The hearing officer never even acknowledged petitioner's right to seek legal representation, but merely assumed without inquiry that petitioner was satisfied with having the GAL represent her.

Petitioner submits a sworn statement that she did not wish the GAL "to represent me, yet Mr. Irizarry was permitted to speak on my behalf at the hearing at which I was present, to call me his client and act as if he was an attorney, while I was never once permitted to speak – despite attempting to be heard several times." Petitioner also states that the hearing officer "asked Mr. Irizarry, rather than myself, whether he was admitting guilt or a denial of the charges against me" and "[w]ithout my knowledge or consent, and while I had continuously denied all charges, Mr. Irizarry pled guilty on my behalf" and the hearing officer "never asked for my confirmation and ignored me every single time I spoke and objected to the charges and allegations."

As the hearing continued, the GAL sat back and capitulated to NYCHA's case, as he never once objected during NYCHA's questioning of Detective Regina or the introduction of NYCHA's documents, and did not cross-examine Detective Regina. The GAL presented the testimony of a witness from ACS who had been working with petitioner for just a few weeks, and relied on an outdated psychiatrist's letter from 15 years ago. The GAL did not call petitioner as a witness, and as a result, she was not given an opportunity to present evidence refuting the detective's testimony or in mitigation of the charges against her. Petitioner details the defenses she would have provided if given the chance, including her assertion that "all charges against Mr. Alvarez, my son Shaun Martinez and myself related to the arrests in my apartment resulting from the search warrants were dismissed."

Under these circumstances, the hearing officer's failure to advise petitioner of her right to

counsel and to make sure that she understood that the GAL was not an attorney, coupled with the GAL's actions in failing to protect petitioner's interests and permit her to testify "were tantamount to arbitrary and capricious behavior which effectively eviscerated petitioner's due process right to confront and cross-examine the opposing witnesses and to present evidence in support of her cause." Id at 54. Moreover, the GAL's acquiescence to the proceedings is apparent from the record and essentially rendered the hearing one-sided. See id. The petition is therefore granted to the extent of annulling NYCHA's determination terminating petitioner's tenancy, and remitting the matter to NYCHA for a *de novo* hearing. Id.

Petitioner's further objections raising questions of substantial evidence, are matters for the Appellate Division. See CPLR 7802 (g); Brooks v. Wagner Houses, 1 AD3d 284 (1st Dept 2003). However, in light of this court's determination annulling NYCHA's decision and remitting the matter for a new hearing, the substantial evidence questions are rendered moot. For the same reason, any issue as to the harshness of the penalty is also moot.

Accordingly it is hereby

ORDERED AND ADJUDGED that the petition is granted to the extent that the determination of respondent New York City Housing Authority terminating petitioner's tenancy is annulled, and the matter is remitted to respondent New York City Housing Authority for a *de novo* hearing.

This constitutes the decision, order and judgment of the court.

DATED: December 30, 2009 ENTER:

J.S.C.