

Smalls v Morales

2010 NY Slip Op 30052(U)

January 8, 2010

Supreme Court, New York County

Docket Number: 400576/09

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 400576/2009

SMALLS, DEBRA

VS.

MORALES, RICARDO ELIAS

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3

4-5

6-7

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 *is decided by the annexed order and ~~subject~~ decision and order*

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

FILED

JAN 13 2010

NEW YORK COUNTY CLERK'S OFFICE

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NYS SUPREME COURT - CIVIL

SMALLS

Dated: 1-8-10

JS

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
DEBRA SMALLS,

Petitioner,

Index No.: 400576/09

-against-

DECISION and ORDER

RICARDO ELIAS MORALES, as Chairman
and Member of the New York City
Housing Authority, and THE NEW YORK
CITY HOUSING AUTHORITY,

Respondents.
-----X

FILED
JAN 13 2010
NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.:

Pursuant to CPLR Article 78, petitioner, Debra Smalls (Smalls), challenges the determination of Respondents, Ricardo Elias Morales (Morales) and the New York City Housing Authority (NYCHA), to terminate her tenancy rights to 337 East 112th Street, Apartment 2C, in New York City (Apartment). Smalls claims that Respondents failed to follow their own guidelines and that their decision was an abuse of discretion. This petition is granted to the extent of the remand directed below.

FACTS

Smalls has resided at the Apartment for eleven years, and is on Supplemental Security Income (SSI). In 2002, two members of Smalls's household and two unauthorized occupants of the Apartment possessed and used weapons and sold controlled substances (Answer, Ex. D). NYCHA initiated a termination proceeding. On March 29, 2006, Smalls signed a stipulation of

settlement in the termination proceeding in which she agreed to three years probation conditioned on the exclusion of certain individuals from her apartment (Petition, Ex. D). She appears to have complied with the stipulation.

On June 17, 2008, Smalls and Victoria Aliheukwa (Aliheukwa), an NYCHA employee, had a short but heated argument. The police were called, but no arrests followed. Smalls later apologized. Nevertheless, the NYCHA initiated a new termination proceeding in which Smalls was charged with violating the 2006 probation, associating with arrested individuals, and the encounter with Aliheukwa. Smalls appeared pro se. In her January 28, 2009 decision, the Hearing Officer determined that, not only was Smalls not persuasive, but, in her demeanor, she presented herself so unfavorably that, although the charges regarding others were not sustained, the Hearing Officer held that her conduct, "in light of her probationary status, clearly demonstrates that the tenancy is non-desirable and poses a serious risk of danger to others" (Petition, Ex. A, p.7). Smalls appealed unsuccessfully, and the ruling was adopted by the Housing Authority's Board on February 11, 2009. This petition followed.

DISCUSSION

A court may set aside a determination by an administrative agency if the measure of punishment or discipline

imposed is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness (*Matter of Pell v. Board of Educ.*, 34 NY2d 222, 233 [1994]).

Smalls argues that terminating her tenancy because of a single argument is disproportionate to her offense. Respondents contend that, in light of all the circumstances, Smalls's termination is consistent with her offense.

The Hearing Officer found that Smalls's "conduct on June 17, 2008, violated the probationary status placed upon the tenancy; and further served to negatively impact a Housing Authority employee" (Petition, Ex. A, at 6). However, Smalls's probation was based on her vicarious fault for the bad acts of four individuals, not her own misconduct, and was contingent upon the permanent exclusion of those individuals from the Apartment (Petition, Ex. D). There is no evidence that these individuals have re-entered the Apartment. Because Smalls complied with and maintained the express requirements of the probation, the Housing Officer's reliance upon her probationary status as evidence of her non-desirability is tenuous.

Aside from the probationary violation, the NYCHA decision to terminate Smalls's tenancy rests on the existence of a single verbal confrontation with an NYCHA employee in which nobody was harmed. This has been held to be insufficient, on its

own, to support termination of a tenancy (see *Peoples v. NYCHA*, 281 AD2d 259 [1st Dept, 2001]).

Smalls further argues that the NYCHA violated her due process rights by failing to comply with Revised GM-3742 of the NYCHA guidelines, which sets forth procedures for assessing the mental competence of tenants who may be subject to tenancy termination proceedings, and that her actions on July 17, 2008, were caused by her mental disability. Respondents counter that NYCHA did not know that Smalls received SSI for a mental disability because her tenant file did not contain an SSI award letter containing the reasons for her collection of SSI (Answer, ¶28).

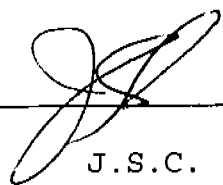
Notably, the documents provided by Smalls are in the name of Viola Smalls at her address, not Debra. Nevertheless, while Respondents have sufficiently established that they were not aware of the nature of Smalls's SSI disability, Smalls has now submitted evidence which may warrant a fresh look at the matter under the cited regulation.

Accordingly, it is hereby

ORDERED that the petition is granted only to the extent that the matter is remanded for the reason set forth above.

Dated: January 8 , 2010

ENTER:



J.S.C.

JANE S. SOLOMON

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