

Matter of McIntosh v New York City Hous. Auth.

2010 NY Slip Op 30213(U)

January 26, 2010

Supreme Court, New York County

Docket Number: 402254/09

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis

PART 6

Index Number : 402254/2009
 MCINTOSH, MELODY
 vs.
 NYC HOUSING AUTHORITY
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____
 MOTION DATE 11/16/09
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3
X-mot. 4-5; 6-22

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~~ ^{petition} is decided in accordance
 with accompanying decision, order, and judgment

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

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 147B).

Dated: 1/26/10

[Signature]
 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
NEW YORK COUNTY: IAS PART 6

-----X
In the Matter of the Application of

MELODY MCINTOSH,

Petitioner,

Index No. 402254/09

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

Decision, Order and Judgment

-against-

New York City Housing Authority;
HPD, 100 Gold Street,

UNFILED JUDGMENT
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To obtain entry, counsel or authorized representative of
respondent must appear in person at the Judgment Clerk's Desk (Room
141B) -----X

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

Petitioner, Melody McIntosh, proceeding pro se, brings this Article 78 proceeding seeking to annul the determination by respondent, the New York City Department of Housing Preservation and Development ("HPD"), to terminate her rent subsidy, which she received pursuant to Section 8 of the United States Housing Act of 1937 (42 U.S.C. § 1437f), commonly referred to as a "Section 8" subsidy.

At the outset, an issue arises as to the proper named respondent. Apparently, the pro se petitioner was provided with a pre-printed court form, which sets forth in the typed caption that the respondent is the New York City Housing Authority ("NYCHA"). NYCHA has absolutely nothing to do with petitioner's Section 8 subsidy or her tenancy. The only proper respondent is HPD. The cross motion by NYCHA to dismiss is granted. While the caption of the petition does not name HPD as a respondent, the caption of the Notice of Petition and the Request for Judicial

Intervention name HPD. Since HPD responded on the merits and did not raise any jurisdictional defenses, the court turns to the merits of petitioner's claims.

Since on or about May 15, 2002, petitioner has resided at 2311 Southern Boulevard, in apartment number 1602 (the "Apartment"). The initial application for her Section 8 voucher, dated February 1, 2002, was made on behalf of four individuals who comprised the household: petitioner; her daughter, Effie McIntosh; and petitioner's two sons, Steven McIntosh and Corey Davidson. The voucher for a two-bedroom apartment was issued on February 1, 2002 (the "Voucher"). The Voucher sets forth the rules for the Section 8 program. Under the section titled "Obligations of the Family," the Voucher warns that the family must abide by the rules of the Section 8 program. Under the rules, in pertinent part, the family must not:

- 2. Commit any serious or repeated violation of the lease.

* * *

- 5. Sublease or let the unit or assign the lease or transfer the unit.

In or about February 2007, HPD learned that an individual named Ida Jenkins and her son were residing in petitioner's apartment. Ms. Jenkins apparently provided the information to HPD as a result of an altercation between petitioner and Ms. Jenkins. On October 19, 2006, the police were called and a Domestic Incident Report was issued. According to HPD's investigation, Ms. Jenkins stated that she had been paying \$250 a month in rent to petitioner, but that petitioner had demanded more rent. Ms. Jenkins and petitioner got into a physical altercation. Both Ms. Jenkins and petitioner suffered minor injuries. The statement that Ms. Jenkins signed for the police alleges

that Ms. Jenkins learned that petitioner "was back on crack again." Neither Ms. Jenkins nor petitioner were arrested and charges were not brought against either of them.

Ms. Jenkins provided the landlord with receipts, signed by petitioner, showing that petitioner accepted money in exchange for allowing Ms. Jenkins and Ms. Jenkins' son to stay in the Apartment. As a result of the investigation by the Program Integrity and Compliance Unit ("PICU") of HPD, a memorandum was prepared which recommended that petitioner's Section 8 subsidy be terminated.

HPD issued a "Notice of Section 8 Rent Subsidy Termination," dated February 21, 2007 (the "Notice"), which provided that the subsidy would be terminated effective March 31, 2007, on the ground of unauthorized sublease. According to the face of the Notice, the decision could be appealed at an informal hearing before an HPD staff member. Petitioner requested an informal hearing to contest the termination of her Section 8 subsidy.

By notice dated May 6, 2008, petitioner was advised that the hearing was scheduled for August 19, 2008. She was advised that she had a right to appear with an attorney or another representative, and that she was permitted to review the documents in her file. An Informal Hearing was held on August 19 to determine whether or not to uphold HPD's determination to terminate petitioner's Section 8 subsidy. HPD was represented by Jonathan Eilbert, a Hearing Representative. In addition, Carlos Herrera, Director of the PICU, testified on behalf of HPD. Petitioner appeared pro se and did not bring any witnesses or enter any exhibits into evidence.

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In a decision dated April 6, 2009, Hearing Officer Edinger found that petitioner improperly sublet a room in the Apartment to two persons unauthorized to live in the premises. The Hearing Officer upheld HPD's determination to terminate petitioner's Section 8 subsidy. The decision sets forth that the effective date of termination was May 31, 2009. Petitioner brought this proceeding on or about August 5, 2009.

In an Article 78 proceeding, 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. C.P.L.R. § 7803(3); In re Pell v. Bd. 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. An administrative determination—even if not arbitrary and capacious—may be set aside if the punishment or penalty imposed "is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." Id. (internal quotations and citations omitted).

Petitioner asserts that she was only "showing concern for a friend," who told petitioner that she needed a place to stay for two to three months while awaiting entry to another apartment. Petitioner apologizes for what she did, and claims that she needs her Section 8 subsidy to maintain the Apartment. Petitioner states that she is willing to repay any money due.

* 6]

Although inartfully pleaded, the pro se petition appears to make a distinction between trying to help out a friend and actually subleasing the Apartment. Petitioner testified that Ms. Jenkins and her son slept on an airbed in the living room. To the extent that petitioner seems to classify Ms. Jenkins as a roommate, rather than a subtenant, the distinction is irrelevant here. A sublease is a “transfer by a tenant of . . . part of his estate or interest in the whole, or in a part, of the leased premises.” BLE Realty Holding Corp. v. Kasher, 299 A.D.2d 87, 94 n.4 (1st Dep’t 2002), quoting 1 Dolan, Rasch’s New York Landlord & Tenant—Summary Proceedings, § 9.2 (4th ed. 1998). Even if Ms. Jenkins and her son were petitioner’s roommates, and not subtenants, petitioner still allowed two unauthorized individuals to reside in the Apartment without seeking approval from HPD. Her failure to seek and obtain permission prior to allowing non-family members to occupy the Apartment warranted the charge of a violation of the rules governing Section 8 assistance. 24 C.F.R. § 982.551(h)(2); 24 C.F.R. § 982.552(c)(1).

HPD’s request to transfer this matter to the Appellate Division is denied. Contrary to respondent’s assertion, there is no issue of substantial evidence. There was sufficient evidence to find that petitioner violated the rules governing her Section 8 subsidy, and she conceded this fact at the hearing. This court finds, however, that the penalty of termination of the Section 8 subsidy is disproportionate to the offense so as to be shocking to one’s sense of fairness.

The evidence revealed that petitioner received \$400 from Ms. Jenkins from September 2, 2006 through October 15, 2006. The period of the purported sublease was of relatively short duration. Petitioner testified that Ms. Jenkins and her son resided in petitioner’s Apartment

[* 7]

for approximately three months. In circumstances where a tenant has allowed an unauthorized occupant to reside in an apartment for far lengthier stays, or where a tenant has received income that was unreported, courts have found that the penalty of termination of a Section 8 subsidy is disproportionate to the offense. See In re Sicardo v. Smith, 49 A.D.3d 761, 762 (2d Dep't 2008) (finding tenant's failure to disclose that her former husband was residing in the apartment with her and the children warranted a penalty of something less than termination of the Section 8 subsidy). See also In re Williams v. Donovan, 60 A.D.3d 594 (1st Dep't 2009) (penalty of termination of Section 8 subsidy for tenant who resided in apartment for 28 years is disproportionate to offense of failure to report adult son's income); In re Gray v. Donovan, 58 A.D.3d 488 (1st Dept 2009) (penalty of termination of Section 8 subsidy for tenant who resided in apartment for thirty years is disproportionate to offense of failure to report children's income).

Petitioner testified during the hearing that Ms. Jenkins "was living in the building with someone on the fourth floor." Petitioner further testified that Ms. Jenkins and the person she was living with were "having problems," and that she needed a place to put her things, and for her and her son to stay. This testimony was not explored further; there is no information as to how long Ms. Jenkins had been residing in the building, or whether there had been permission for her to reside in another unit. The allegations by Ms. Jenkins to the police that petitioner allegedly used drugs were not a basis for the termination of petitioner's Section 8 subsidy; indeed, the hearing Officer commented that the drugs were "irrelevant." Nor was the altercation between Ms. Jenkins and petitioner the basis of the termination. The sole basis for the termination was that petitioner allowed Ms. Jenkins and her son to stay in the Apartment for approximately three months without receiving permission.

Petitioner has offered to repay any money due, and to be placed on probation. These and other lesser penalties were not considered by the Hearing Officer. Accordingly, this matter is remitted to HPD to consider a lesser penalty, other than termination of the Section 8 subsidy. The petition is granted only to the extent that the matter is remanded to the agency to consider an appropriate lesser penalty, other than termination of the subsidy. This constitutes the decision, order, and judgment of the court.

Dated: January 26, 2010



JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT

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