[* 1]

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

PRESENT: Joan B. Lobis Justice PART 6

Index Number : 402113/2009
JACKSON, NOLWANDLE
VS.
RHEA, JOHN B.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO.
MOTION DATE 12/21/09
MOTION SEQ. NO.
MOTION CAL. NO.

n this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-13
Answering Affidavits — Exhibits	14-29; Exhibit: 3
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

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).

PETITION
~~MOTION~~ DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER & JUDGMENT

Dated: 3/11/10

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 ☐ REFERENCE

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

----------X

In the Matter of the Application of
NOLWANDLE JACKSON,

Petitioner,

Index No. 402700/08

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

Decision, Order and Judgment

-against-

JOHN B. RHEA, as Acting Chairperson and Member of The New York City Housing Authority,

Respondent.

----------X

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

Petitioner, Nowandle Jackson, brings this Article 78 proceeding, seeking, inter alia, to annul the determination of the New York City Housing Authority ("NYCHA") to terminate her tenancy. The final determination is set forth in an "override memorandum" that was issued by NYCHA's Board, dated April 22, 2009, which overturned a March 23, 2009 determination by Hearing Officer Joan Pannell. For the reasons discussed below, the petition is granted, in part, and denied, in part.

Petitioner, a single mother and recovering drug addict, has lived in Apartment 1F at1075 University Avenue in Bronx County, New York in a complex known as Highbridge Gardens (the "Apartment") for nearly 19 years. At the time her tenancy was terminated, she was living with her 22 year old son in the Apartment. The Apartment is operated and maintained by NYCHA.

In December 2006, the manager of Highbridge Gardens informed petitioner by letter

that NYCHA was considering terminating her tenancy for rent delinquency. In April 2007, NYCHA informed petitioner that it was going to hold a termination hearing based on petitioner's failure to pay rent from October 2006 to December 2006. In July 2007, NYCHA served petitioner with an amended notice, alleging that petitioner failed to pay rent from October 2006 to July 2007. The hearing was scheduled for August 21, 2007. Petitioner failed to appear for the hearing and a default was entered against petitioner, terminating her tenancy. In September 2007, petitioner submitted an application to have her default vacated, which was granted. The default was reopened in August 2008 and the hearing was scheduled for September 18, 2008. At that time, NYCHA added charges that petitioner had failed to pay rent from July 2007 to May 2008.

In September 2008, Allen, a friend of petitioner's deceased brother, inquired with petitioner about staying at the Apartment for a few weeks. Petitioner agreed to allow Allen to stay and offered him one of her four bedrooms. On October 8, 2008, at approximately 2:00 p.m., the New York City Police Department executed a search warrant at the Apartment, found drug paraphernalia among other items, and arrested petitioner and her son. On November 11, 2008, the Housing Manager of Highbridge Gardens sent petitioner a letter alerting her that the termination of her lease was being considered on non-desirability grounds. She was notified to appear for an appointment in the Management Office on November 18, 2008. According to an interview record, petitioner met with the Housing Manager on November 14, 2008. She told the Manager that no drugs were found in her Apartment during the police search. On November 14, NYCHA sent petitioner an amended notice of rent delinquency charges. According to the notice, petitioner paid all rent due to NYCHA from September 2007 until August 2008. She paid all rent due from

September 2007 to February 2008 on May 20, 2008; all rent due from March 2008 to June 2008 on June 24, 2008; all rent due for July 2008 on July 2 and 17; and all rent due for August 1, 2008 on August 2 and 18. On December 16, 2008, NYCHA served petitioner with notice that it was going to hold a termination hearing alleging non-desirability grounds and that petitioner violated NYCHA rules and regulations. The notice further alleged that petitioner, alone, or in concert with her son possessed, sold, or attempted to sell "a controlled substance, to wit, 'crack' cocaine, heroin, and marijuana, a quantity of which was recovered during the execution of a search warrant" and possessed, alone or in concert with her son, "a tazer [sic] stun gun and drug paraphernalia, or other property reflecting illegal drug activity . . . all recovered during the execution of a search warrant." The hearing was scheduled on January 15, 2009. On December 16, petitioner and NYCHA agreed to consolidate the hearing for chronic rent delinquency with the non-desirability hearing and set January 15 as the date of the hearing. The hearing was later adjourned to January 22, 2009. Petitioner did not appear and a default judgment was entered against her, terminating her tenancy. On January 29, 2009 petitioner asked that the case be restored. On February 17, 2009, her application was granted and a hearing was scheduled for March 10, 2009.

Petitioner appeared without counsel at the March 10 hearing. NYCHA called Police Officer James Kruger as its witness. Officer Kruger testified that sometime before the search warrant was executed, an undercover officer purchased drugs from the Apartment on more than one occasion from a male seller. He further testified that on the date of the search the police recovered a Taser stun gun and ammunition. The police also recovered three glass pipes containing crack cocaine residue, a marijuana cigarette, a metal spoon with heroin, a ziplock bag containing two smaller ziplock bags containing crack cocaine residue, a razor blade containing crack cocaine residue, and

a straw containing crack cocaine residue. All of these items were in petitioner's bedroom. Officer Kruger testified that petitioner was arrested and charged with criminal use of drug paraphernalia, criminal possession of a weapon, criminal possession of a controlled substance, and multiple possession of marijuana. Her son was also arrested. Allen, who, according to Officer Kruger, was the target of the warrant, was not at the Apartment at the time of the search warrant was executed. Petitioner pled guilty to disorderly conduct and was sentenced to three days of community service.

Petitioner testified that the Taser gun was found outside by her children. She further testified that the ammunition belonged to her. She admitted that she was a drug user, but denied dealing drugs. Petitioner believed that Allen was selling the drugs. She further testified that she had been drug free for nine months. Petitioner admitting to owing about $400 in rent and was willing to pay half of it on the date of the hearing.

On March 29, 2009, Hearing Officer Pannell issued a decision. Hearing Officer Pannell concluded that Allen was the person dealing drugs from the Apartment, but that the items found in petitioner's room indicated that she was still using drugs. Hearing Officer Pannell sustained the non-desirability charges and the chronic rent delinquency charges. She recommended probation and referred petitioner to Social Services. On April 22, 2009, NYCHA issued a decision overturning the March 29 decision. The Board recognized that it could only review "whether the decision of the Hearing Officer is contrary to any applicable federal, state, or local law, HUD [Housing and Urban Development] regulations, . . . or violates [] Authority procedures by reason of procedural irregularity." The Board stated that federal regulations mandate that NYCHA apartments be drug free and that tenants are held to strict liability standard when it comes to drug activity in their

apartments. The Board further stated that New York "courts have made clear that termination of tenancy is an appropriate penalty where a tenant engages in illegal drug activity in his or her public housing apartment." The Board also cited In re Scott v. Peeksill Housin. Auth. to support the proposition that chronic rent delinquency mandated a termination of tenancy. The Board terminated petitioner's tenancy.

Petitioner argues that NYCHA's Board cannot overturn the hearing officer's imposition of the penalty in this case, without violating its own rules and regulations; that the penalty imposed shocks the conscience; and that the penalty imposed violates federal and state civil rights laws. Petitioner does not dispute the factual determinations made by the hearing officer.

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. In re 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). When NYCHA fails to follow its own guidelines and procedures, its decision must be annulled. Padilla v. Martinez, 300 A.D.2d. 96, 97 (1st Dep't 2002); see generally Frick v. Bahou, 56 N.Y.2d 777 (1982).

NYCHA failed to follow its own guidelines and procedures. The Board may overturn a decision by a hearing officer, but, in pertinent part, "such review is limited to whether the decision is contrary to applicable federal, state, or local law, HUD regulations . . .., or violates . . . Authority

procedures by reason of procedural irregularity." Termination of Tenancy Procedures ¶ 11 (Rev. August 1997). Hearing Officer Pannell's decision was authorized by NYCHA's own termination procedures and HUD regulations, and was not contrary to federal or state law.

Under NYCHA's Termination of Tenancy Procedures, paragraph 10, in the hearing officer's decision following a hearing, he or she "may make any of the following dispositions: (a) Termination of tenancy; (b) Probation; (c) Eligible subject to permanent exclusion of one or more persons in the household; (d) Eligible; (e) Eligible subject to referral to Social Services." Probation is appropriate where "[t]here is reason to believe that the conduct or condition which led to the charge of non-desirability may not recur or may have been cured, or that the tenant is taking or is prepared to take steps to correct or cure such conduct or condition." Id. at ¶ 14(a). There are only two circumstances in which a disposition is mandatory. According to Paragraph 13 of the termination procedures, "[w]here the offender or offenders has (have) been removed from the household, it is *mandatory that the disposition* be: 'eligible'; 'probation'; 'eligible subject to permanent exclusion of one or more persons in the household.'" (emphasis added). According to 24 CFR §966.4 (l)(5)(i)(A), the housing authority "*must immediately terminate* the tenancy if [it] determines that any member of the household has ever been convicted of drug-related criminal activity for manufacture or production of methamphetamine on the premises of federally assisted housing." (emphasis added). The drafters of NYCHA's termination procedures and HUD regulations clearly made dispositions mandatory in some situations, which suggests that there are no other circumstances that warrant a mandatory disposition. See McKinney's Cons. Laws of N.Y. Book 1, § 240; Russelo v. U.S., 464 U.S. 16, 23 (1983); In re Concerio v. Marks, 360 F.Supp. 454,

457 (D.C.N.Y. 1973). Therefore, Hearing Officer Pannell acted within, and not contrary to, HUD's regulations and NYCHA's guidelines by imposing a penalty of probation. Furthermore, the hearing officer did not act contrary to federal or state law. The Board's reliance on HUD v. Rucker is misplaced. The Supreme Court wrote:

> The statute does not *require* the eviction of any tenant who violated the lease provision. Instead, it entrusts that decision to the local public housing authorities, who are in the best position to take account of, among other things, the degree to which the housing project suffers from "rampant drug-related or violent crime," "the seriousness of the offending action," and "the extent to which the leaseholder has ... taken all reasonable steps to prevent or mitigate the offending action[.]" It is not "absurd" that a local housing authority may sometimes evict a tenant who had no knowledge of the drug-related activity.

(emphasis in original) 535 U.S. 125, 133-34 (2002) (citations omitted). Termination may be an appropriate penalty, but it is not a mandated penalty. See also 24 CFR § 966.4 (l)(2) ("[the housing authority] *may* terminate the tenancy for [drug crime]") (emphasis added). Similarly, the New York court cases cited by the Board do not indicate that termination of tenancy is mandated for drug activity. Nor does the Court of Appeals' two phrase decision in In re Scott v. Peeksill Hous. Auth. ("[o]rder affirmed, without costs; no opinion") mandate termination of tenancy for rent delinquency. 28 N.Y.2d 610, 611 (1971). Furthermore, petitioner has made considerable effort to repay her debts owed.

In light of this determination, this court need not address the issues raised in the petition concerning violations of federal and state civil rights laws. Petitioner is not entitled to attorneys' fees. The plain language of 42 U.S.C. § 1988 allows attorneys' fees only in actions

brought pursuant to specifically named federal civil rights statutes. See also North Carolina DOT v. Crest Street Community Council, Inc., 479 U.S. 6, 12 (1986). The relief afforded to petitioner in this decision does not involve any of the civil rights statutes listed.

The petition is granted to the extent that respondent's decision to terminate petitioner's tenancy is reversed. Respondent is directed to restore petitioner's eligibility for public housing and refer petitioner to social services as determined by Hearing Officer Joan Pannell. The remainder of the relief sought in the petition is denied. This constitutes the decision, order, and judgment of the court

Dated: March 31, 2010

JOAN B. LOBIS, J.S.C.