

<b>Matter of Perez v Rhea</b>
2010 NY Slip Op 30763(U)
March 31, 2010
Supreme Court, New York County
Docket Number: 110920/2009
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: PAUL G. FEINMAN  
*Justice*

PART 12

1/m/o Jacqueline Perez

INDEX NO. 110920/09

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -

NYCHA

The following papers, numbered 1 to \_\_\_\_\_ 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

4-5

6

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**PETITION IS DENIED 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: 3/31/2010

PHF

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  
COUNTY OF NEW YORK

-----X

IN THE MATTER OF THE APPLICATION OF JACQUELINE  
PEREZ,

Petitioner,

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

DECISION AND  
JUDGMENT

Index Number  
110920/2009

-against-

JOHN B. RHEA, as Chairman of the New York City  
Housing Authority,

Respondent.

-----X

Hon. Paul Feinman, J.:

Petitioner seeks a judgment, pursuant to CPLR Article 78, reversing and annulling respondent's final determination, dated June 24, 2009, made after an administrative hearing, terminating petitioner's public housing tenancy.

Petitioner alleges that respondent failed to comply with its own termination procedures in several respects: failing to send her a call-in letter advising her that her tenancy may be terminated and inviting her to discuss the matter with a housing manager; failing to seek assistance for her from an outside agency that could help resolve the problems leading to the termination; failing to allow her a chance to correct the adverse conditions. Alternatively, petitioner asserts that even if respondent sent her the call-in letter, it should have considered the interview adjourned because she and respondent's housing manager had agreed to a repayment schedule. Petitioner urges that under respondent's procedures, termination procedures may not be commenced, during this adjournment. Finally, petitioner argues that eviction is an excessive penalty.

Petitioner has not met her burden of establishing that respondent's decision was arbitrary and capricious. She has not demonstrated that the measure of punishment was so disproportionate to the offense, in light of all the circumstances, that it was shocking to the court's sense of fairness (see *Matter of Pell v. Board of Education*, 221 NY2d 222, 231-233). Therefore, the determination is confirmed, the petition denied and the proceeding dismissed.

Petitioner has been a tenant at respondent's public housing facility, under two leases with respondent, dated 1993 and renewed in 1994. Respondent, as a public housing authority, receives federal funding. The United States Department of Housing and Urban Development (HUD) regulates that funding and establishes regulations that govern public housing authorities must adhere to.

HUD regulations mandate that public housing authorities regularly monitor tenants' income and family composition (24 CFR § 960.253). Tenants must supply this information yearly.(24 CFR§ 960.259(a). The housing authority must make appropriate rent adjustments based on family composition and income (24 CFR § 960.257 (a)).

Federal regulations authorize a public housing authority to terminate a tenancy for repeated violations of material lease provisions or other good cause. (24 CFR§§ 966.4(1) (2) (i) and (iii).

If respondent makes a preliminary finding that a tenancy may be subject to termination, its procedures call for giving the tenant an opportunity to discuss the problem with a housing facility's manager. If the manager, following the discussion, finds that termination is appropriate, he or she will refer the matter for preparation of charges. Following the referral, respondent mails the tenant a notice of charges stating the charges and the date for an evidentiary hearing. The notice informs the tenant that he or she has the right to be represented by an attorney or any other person, and the rights to cross examine adverse witness and to present evidence and testimony.

Some time in 2005, respondent learned that respondent had been receiving employment income since 1999. Because petitioner did not disclose this income, she paid rent of \$27,144 less than what she was obligated to pay.

On November 22, 2005, the housing manager sent petitioner a letter stating that, "This is to advise you that termination of your lease is being considered because of Breach of Rules and Regulations, Misrepresentation/concealed income." The letter informed petitioner that she was to meet with the assistant manager on November 29, 2005 at 8:30 AM. or at another date and time convenient to her. This letter is the call-in letter that respondent must send to tenants whose tenancy may be terminated.

Petitioner did not respond to the November 22nd letter. Although she did not raise a failure to send the letter as an issue during her administrative hearing, petitioner raises that issue on this proceeding. In any event, on November 29, 2005, respondent sent petitioner another letter "urging [her] to appear for an interview to discuss possible termination of [her] lease." The housing manager re-scheduled the interview for December 12, 2005 at 8:30 AM. The letter cautioned petitioner that the interview would be her final opportunity "...to discuss this matter and give your side of the story..." The letter informed petitioner that a decision about her tenancy depended on the interview results, as well as a review of the entire record. Finally, the letter stated that if petitioner did not appear at the interview, "...it will be necessary to forward your record to the Central Office of the Housing Authority with a recommendation that legal action to terminate your lease will be

started." Again, petitioner did not keep the appointment or respond to the letter. And again, petitioner does not acknowledge receiving the communication.

On December 13, 2005, respondent sent petitioner a letter stating that it was sending her entire tenancy record to its Operations Services Tenancy Administration Division, and that charges against her could be made. The letter also informed her that before it made a final decision about terminating her lease, it would offer her the opportunity to appear at a hearing at which an attorney or any other person could represent or assist her.

Prior to serving petitioner with charges, respondent referred the matter to its Office of Inspector General for investigation. On July 6, 2006, respondent wrote to petitioner, inviting her to meet with the Inspector General. Although petitioner does not allege that she attended the meeting, she notes that the letter did not inform her of a right to counsel. She also alleges that she had a telephone conversation and an informal meeting with respondent's investigators at which she acknowledged her income, but was never told that her tenancy could be terminated.

Following the Inspector General's investigation, petitioner was arrested for failing to report her income, "...thereby causing [respondent] to be defrauded of \$27,144." ( Penal Law §155.36, grand larceny, third degree and Penal Law § 176.36, offering a false instrument for filing , third degree).

On July 25, 2008, the People agreed to allow petitioner to plead guilty to petit larceny, a misdemeanor (Penal Law § 155.25). The court sentenced petitioner to a conditional discharge and restitution of \$20,000 in monthly payments. At the time of the plea, petitioner had begun making the payments and a balance of \$14,900 remained.

Following the plea, on August 22, 2008, the Inspector General's office completed its investigation and informed respondent that it could begin appropriate administrative proceedings.

Although it was not required to give petitioner another chance for an interview, it allowed her to appear for one on August 19, 2008. Respondent's employee discussed the guilty plea and restitution agreement with petitioner, but informed her that her file had been forwarded for termination action and that a hearing was being scheduled.

On November 24, 2008, respondent sent petitioner written notice that a recommendation had been made to terminate her tenancy because of her failure to reveal her employment income from 1999 to 2005 and her resulting rent underpayment during those six years. The notice informed her that the hearing would take place on December 12, 2008 and that petitioner could be represented.

At the hearing, respondent's representative introduced petitioner's income affidavits from 1999 to 2005, her employment and rent records for those years and the certificate of disposition showing her conviction and sentence.

Respondent's investigator testified that he examined petitioner's employment records and income affidavits. Based on these data, he calculated the \$27,000 difference between the

amount of rent petitioner paid and the amount she owed because of the income concealment. Under cross-examination, the investigator conceded that petitioner's restitution payments were current. He also acknowledged that neither petitioner nor her family had committed any new offenses or lease violations.

Petitioner testified that she has been living in her apartment for over sixteen years and that her three children, ages nineteen, sixteen and six, reside with her. She noted that her sixteen year old child has dyslexia and speech and emotional problems. Petitioner added that she is seeking a larger apartment but cannot find an affordable one.

Petitioner testified that while she reported her employment and income "to welfare", she did not reveal it to respondent even though she knew that her rent was based on her income.

Petitioner did not introduce any documents at the hearing. Nor did she raise the issue that respondent failed to comply with its own termination procedures.

The hearing officer rendered a decision on June 9, 2009. After considering all of the exhibits and testimony, the hearing officer found that petitioner did not demonstrate a lack of intent to defraud respondent, as she failed to provide an explanation for her failure to report the income. The hearing officer found that petitioner's family problems, including her child's disabilities, was not a sufficient mitigating circumstance. Concluding, she held that, "An individual who through misrepresentation obtains from the taxpaying public a greater subsidy than that to which she is entitled, is not eligible for tenancy. The only appropriate remedy is termination."

On June 24, 2009, respondent approved the hearing officer's decision and disposition and terminated petitioner's tenancy.

Although petitioner challenges an administrative determination that was made after an evidentiary hearing required by law, petitioner does not raise any substantial evidence questions. Rather, she only raises issues of law and challenges the penalty as excessive. Therefore, the court will not transfer this proceeding to the Appellate Division. ( CPLR §7804(g); *Matter of Kerney v. Hernandez*, 60 AD3rd 544)

Petitioner now challenges respondent's alleged failures to comply with its own termination procedures. However, the court's power to review an administrative determination is limited to the facts and record before the administrative agency. (*Matter of Featherstone v. Franco*, 95 NY2d 550, 554) By failing, at the hearing, to raise the questions of whether respondent failed to provide the required written notices and otherwise ignored its own procedures, respondent failed to preserve her arguments for judicial review. ( *Matter of Torres v. New York City Housing Authority*, 40 AD3rd 328)

Petitioner also submits documents that she failed to submit to respondent either before or at the hearing. These documents (exhibits J to O) , all dated after the June 9, 2009 hearing are statements from schools and a certificate from the Children's Aid Society. The court may not consider this material. ( *Matter of West Village Tenants' Association v. New York City Board of Standards and Appeals*, 302 AD2d 230)

In any event, even if the court were to consider petitioner's newly raised arguments on this proceeding, those arguments would fail on the merits.

Contrary to petitioner's argument, respondent sent two letters to petitioner in November, 2005, telling her to attend an interview to discuss her possible lease termination. These are the call-in letter and follow-up letter petitioner asserts she did not receive. Notably, petitioner does not argue that respondent did not send the letters; rather, she merely makes the conclusory, unsupported, allegation that she did not receive them. Because petitioner did not raise this argument at the hearing, when the hearing officer could have made a factual inquiry and determination, the court has no basis to determine the merits of petitioner's claim of non-receipt.

Also contrary to petitioner's argument, respondent's Management Manual does not require the call-in letter to give a tenant notice that a lawyer or other representative may be present at an interview. The Manual only reads that, "First Call-In Letter, Form 040.185 shall be used to call the tenant to the office for an interview. The letter must be addressed to the tenant of record. At the interview, the tenant may be accompanied by someone, such as an attorney, to assist him/her." Respondent used the correct form for the letter and petitioner does not assert that the required form contains legally insufficient language. Nor does she cite any legal authority mandating a notification of right to counsel in the call-in letter.

Petitioner now asserts that the first call-in letter was not necessary because she had an informal meeting with the housing manager and agreed to comply with the repayment plan. This argument thus waives petitioner's argument that a call-in letter was necessary. In any event, as the record shows that respondent sent the letters, petitioner's argument is without merit. (*Matter of Jackson v. Hernandez*, 63AD3rd 64,66)

Petitioner incorrectly argues that management must "seek to assist the tenant", particularly by referring the tenant to an outside agency, in order to alleviate the condition giving rise to the potential termination. Petitioner mischaracterizes the referral procedure as mandatory. She claims that respondent's Management Manual reads that the Housing Manager, after interviewing the tenant, "...must try and correct the conditions before they reach a stage where there is no alternative but termination proceedings." However, the correct wording is that after the interview, the manager may, "when appropriate, seek to assist the tenant by securing outside help. Thus, seeking outside assistance for the tenant is not mandatory; rather, when appropriate, it is a discretionary option.

Petitioner has not demonstrated that referral was appropriate in this case. Fraud, particularly submitting false income affidavits over a six year period, is not a curable offense. (see *Wong v. Gouvernor Gardens Housing Corporation*, 308 AD 2d 301, 305; *Matter of waterside redevelopment company v. Department of Housing Preservation Development of the City of New York*, 270 AD2d 87, 88) Petitioner's income concealment had already occurred over a six year period by the time respondent discovered it. Petitioner fails to show how referral to an outside agency could have prevented or remedied something that

had already occurred. Therefore, she fails to show that respondent acted arbitrarily and capriciously by not making a referral.

There is no merit to petitioner's argument that respondent should have adjourned any termination proceedings after an informal meeting at which petitioner discussed her guilty plea and repayment agreement. Notably, there is nothing in the record to show that respondent, at that meeting, agreed to forego termination. The adjournment may be granted when the tenant agrees to cure his or her breach. Management Manual Ch. VII (IV) (C) (1). Again, because petitioner committed fraud, she could not cure her breach. *Matter of Wong v. Gouvernor Gardens Housing Corporation, id.* at 305. Moreover, petitioner failed to appear for an interview after respondent sent the call-in letter. The fact that she obtained an informal interview, that respondent was not required to give, following her default in appearing for an interview, should not give her a right she is not entitled to. Therefore, respondent did not abuse its discretion by not adjourning termination proceedings.

Termination is not an excessive penalty under the facts of this case. Federal regulations contemplate termination when a tenant fraudulently conceals income. Termination is appropriate when the tenant conceals a large amount of income over an extended period causing a substantial rent underpayment, even if a child is part of the household. (see *Matter of Smith v. New York City Housing Authority*, 40 AD3rd 235; see also *Matter of Davis v. New York City Department of Housing Preservation and Development*, 58 AD3rd 418, 419, *dicta*). The penalty in this case was not so disproportionate to petitioner's offense that it shocks the court's sense of fairness.

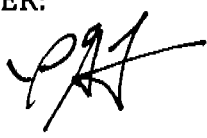
Accordingly, it is

ADJUDGED that the determination is confirmed, the petition denied and the proceeding dismissed.

This constitutes the decision and judgment of the court.

Dated: March 31, 2010

ENTER:



JSC

**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 1415).