

<b>Matter of Avila v Rhea</b>
2010 NY Slip Op 31231(U)
May 18, 2010
Supreme Court, New York County
Docket Number: 402755/09
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **HON. EILEEN A. RAKOWER**

PART 15

Index Number : 402755/2009  
**TABITHA LEON AVILA**  
vs.  
**RHEA, JOHN**  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-4

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

**UNFILED JUDGMENT**  
This Judgment has not been entered by the County Clerk. To enter notice of entry cannot be served based hereon. To obtain entry of judgment, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

Dated: 5/18/10

  
**HON. EILEEN A. RAKOWER**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 15

-----X  
In the Matter of the Application of  
TABITHA LEON AVILA,

Index No.  
402755/09

Petitioner,

DECISION  
and ORDER

- against -

Mot. Seq.  
001

JOHN B. RHEA, as Chairperson and Member of the New  
York City Housing Authority and THE MEMBERS OF  
THE BOARD OF THE NEW YORK CITY HOUSING  
AUTHORITY, and NEW YORK CITY HOUSING  
AUTHORITY,

Respondents.

**UNFILED JUDGMENT**  
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obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1418)

-----X  
HON. EILEEN A. RAKOWER:

Petitioner Tabitha Leon Avila ("Petitioner"), brings this Article 78 proceeding seeking to annul the decision of Respondent Board of the New York City Housing Authority ("NYCHA Board"), made after an administrative hearing, to terminate Petitioner's tenancy in a residential building unit owned and operated by NYCHA.

According to the Verified Petition, Petitioner has resided in the subject NYCHA apartment her entire life - a total of 32 years. There, she cares for her five children - two of whom are her biological children, while the other three are her relatives' children and were legally adopted by Petitioner when their parents were unable to care for them.

By Notice and Specifications of Charges dated April 7, 2009, NYCHA charged Petitioner with non-desirability, breach of NYCHA rules and regulations, and chronic rent delinquency. The charges of non-desirability and breach of rules and regulations pertained to allegations that (1) Petitioner, alone or in concert with Rosalind Garcia (an authorized occupant of the apartment), and Bernard and Jacqueline Garcia (Petitioner's mother and uncle, who were unauthorized

occupants or guests), unlawfully possessed, sold, or attempted to sell heroin; and (2) Petitioner permitted illegal drug activity in her apartment.

Petitioner appeared *pro se* at her administrative hearing on May 6, 2009, which was presided over by Hearing Officer Joan Pannell. Detective Jeffrey Carroll of the New York City Police Department ("NYPD") gave testimony as to the circumstances surrounding the execution of the search warrant which culminated in the subject charges. Detective Carroll testified that the NYPD received information that heroin was being sold from Petitioner's apartment. This information was corroborated by "well over 10" controlled drug purchases from the apartment over the course of approximately one year. Detective Carroll testified that Bernard and Jacqueline Garcia were identified by confidential informants as the individuals selling heroin from the apartment.

On March 27, 2008 at around 4:30 p.m., Detective Carroll executed a search warrant for the subject apartment. At that time, Detective Carroll arrested Bernard and Jacqueline Garcia, who told him that they resided in the subject apartment. Detective Carroll testified that he also arrested Rosalind Garcia and possibly one or two other individuals. Petitioner was not in the apartment when he executed the search warrant. Detective Carroll further testified that, pursuant to the search warrant, he recovered, among other things, \$173 and \$170 from the persons of Bernard and Jacqueline, respectively, and 11 decks of what subsequent testing revealed to be heroin. The heroin was recovered from a room which Jacqueline identified as her bedroom. Bernard and Jacqueline subsequently pled guilty to criminal charges resulting from their arrests.

Petitioner testified in her own defense. Petitioner denied having any awareness of drug activity taking place in her apartment. She further denied that Bernard and Jacqueline lived in the apartment, and testified that they were visitors, and that the room Jacqueline identified as her own was in fact Petitioner's daughter's room. Petitioner admitted that she was aware that her mother had a history of drug use, and testified that Jacqueline had told Petitioner that she was in a methadone clinic receiving treatment. Petitioner also submitted letters from her employer and a neighbor vouching for Petitioner's good character and responsible parenting.

With respect to the charges of chronic rent delinquency, Petitioner testified that she had some trouble making timely payment of rent due to the fact that she is a single mother, and her employer had recently reduced her hours.

In a Decision dated May 20, 2009, Hearing Officer Pannell made the following findings of fact:

The charges are sustained. However, Tenant credibly testified that she was unaware of the drug activity of her mother and uncle. Apparently the police knew that the sellers were active in the late afternoon, because that is when they scheduled the execution of the search warrant, when Tenant was not at home.

Based on these findings, Hearing Officer Pannell imposed a sanction of one year probation against Petitioner, and the permanent exclusion of Jacqueline and Bernard from her apartment.

However, on July 1, 2009, the NYCHA Board overturned the disposition of Hearing Officer Pannell, and instead terminated Petitioner's tenancy. The NYCHA Board found that Hearing Officer Pannell's determination was "contrary to federal and state law," reasoning that,

[i]n view of her knowledge of her mother's and uncle's history of drug use, the Tenant must have known that by allowing them to have regular and frequent access to her apartment she was creating a substantial risk that illegal drug activity would take place in the apartment.

In light of the foregoing, the NYCHA Board found that the imposition of the lighter sanction of probation was "not consistent with the penalties imposed in other cases and undermines the deterrent effect of termination on others whose disregard of the obligations of their tenancy promotes serious criminal activity."

Petitioner commenced the instant Article 78 proceeding, alleging that the NYCHA Board's decision to terminate her tenancy was without basis in law, as it ran contrary to state and federal law, as well as NYCHA's own Termination of Tenancy Procedures.

CPLR §7803 provides that judicial review over agencies such as NYCHA is limited to whether a challenged determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion. It is well settled that the "[j]udicial review of an administrative

determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]).

This Court has previously observed that

the Housing Authority agreed and the Federal District Court ordered that qualified hearing officers would make specific written findings of fact on all issues raised at a termination hearing, and make a determination of the tenant's eligibility status; that such findings and determination would be based solely on evidence presented at the hearing; that such evidence would constitute the 'record'; that review of the hearing officer's decision by members of the Housing Authority would be based upon this record, and that the hearing officer's decision would be binding on members of the Housing Authority unless it was contrary to law.... These provisions are incorporated virtually verbatim in paragraphs 9 and 11 of [NYCHA's termination] procedures.

(*Robinson v. Finkel*, 194 Misc.2d 55, 69 [Sup. Ct. N.Y. Co. 2002]).

Here, the Court finds that the NYCHA Board overturned Hearing Officer Pannell's Decision in contravention of its own rules, requiring annulment of the Board's decision to terminate Petitioner's tenancy (*see Robinson v. Martinez*, 308 A.D.2d 355 [1st Dept. 2003]) (Article 78 petition challenging termination of tenancy "was properly granted by Supreme Court since the record fails to demonstrate that the Housing Authority, in reaching its determination, followed its own Termination of Tenancy Procedures, adopted to assure compliance with federal due process requirements."). Pursuant to NYCHA's Termination of Tenancy Procedures, the NYCHA Board lacks the authority to disturb the decision of the presiding Hearing Officer unless that decision is contrary to law.

While the First Department has held that termination of tenancy is an appropriate sanction, notwithstanding a tenant's ignorance of drug activity taking place in his or her apartment (*see Satterwhite v. Hernandez*, 16 A.D.3d 131, 131-32 [1st Dept. 2005]) (*citing Rucker v. Dept. of Hous. & Urban Dev.*, 535 U.S. 125 [2002]), this does not stand for the proposition that termination is required (*see Yancey v. New York City Hous. Auth.*, 2009 NY Slip Op 29041, [Sup. Ct. N.Y. Co. 2009]) (annulling termination where disposition was based on Hearing Officer's mistaken belief that termination was mandated by *Rucker* and NYCHA's Termination of Tenancy Procedures). To the contrary, the sanction imposed by Hearing Officer Pannell is expressly authorized by Section 10 of NYCHA's Termination of Tenancy Procedures. Thus, it cannot be said that the Decision is contrary to law, and, accordingly, the decision is binding on the NYCHA Board.

Wherefore it is hereby

ORDERED and ADJUDGED that the Petition is granted and the NYCHA Board's July 1, 2009 decision terminating Petitioner's tenancy is annulled; and it is further

ORDERED that the matter is remanded to the NYCHA Board for further action in a manner consistent with foregoing Decision and Order; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

Dated: May 18, 2010



EILEEN A. RAKOWER, J.S.C.

**UNFILED JUDGMENT**

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