

<b>Matter of Ruiz v Rhea</b>
2010 NY Slip Op 31680(U)
June 28, 2010
Supreme Court, New York County
Docket Number: 400028/10
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: \_\_\_\_\_  
J.S.C.  
Justice

PART 10

\_\_\_\_\_  
Larena Ruiz  
- v -  
John Rhea, NYCHA  
\_\_\_\_\_

INDEX NO. 400028/10  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

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
_____
_____
_____

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 1415).

*motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.*

JUN 28 2010

Dated: \_\_\_\_\_

\_\_\_\_\_  
HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

**UNFILED JUDGMENT**

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

In the Matter of the Application of  
LARENA RUIZ,

Petitioner,

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

-against-

JOHN RHEA, as Chairman of the New York  
City Housing Authority, and THE NEW YORK  
CITY HOUSING AUTHORITY,

Respondents.

**Decision/Order**

Index No.: 400028/10  
Seq. No. : 001

**Present:**

Hon. Judith J. Gische  
J.S.C.

*Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):*

<b>Papers</b>	<b>Numbered</b>
Pet's OSC, exhs . . . . .	1
NYCHA Verified Answer, exhs . . . . .	2

*Upon the foregoing papers, the decision and order of the court is as follows:*

This is an Article 78 petition brought by Larena Ruiz ("petitioner") seeking judicial review of the determination by respondent, the New York City Housing Authority ("NYCHA"), dated December 16, 2009 ("determination"). The determination terminated petitioner's right to reside at 1043 Myrtle Avenue, Apartment 1B, Brooklyn, New York, a building owned and operated by NYCHA, located within the "Sumner Houses." Petitioner seeks a judgment reversing and annulling NYCHA's determination on the grounds that she is entitled to a hearing and should have been heard regarding her

claim that she has the right to remain in the apartment as a tenant.

### **Background and Factual Allegations**

Petitioner moved to the Sumner Houses on February 1, 2001, with her father Ruben Ruiz, Sr. ("Ruben"), older brother Ruben Ruiz, Jr. ("Ruben Jr."), and younger brother, Rene/Alejandro Nolasco ("Rene"). Ruben signed the NYCHA Resident Lease Agreement and was listed as the tenant of record. Petitioner, Ruben Jr., and Rene were identified, on NYCHA's affidavit of income form by name, and as "persons living in the apartment."

Petitioner states that in February 2007, her father left for Mexico permanently and has not returned. Ruiz Jr., left the apartment approximately four years ago and has been living on his own. At the time her father and older brother left, petitioner was approximately 17 years old and her younger brother, Rene, was approximately 13 years old. Petitioner states that she has remained in the apartment continuously with Rene and the rent is paid directly to NYCHA by DSS/HRA from her welfare shelter payments. The rent calculation for the apartment as of August 1, 2008 is based solely on petitioner's welfare payments.

Petitioner argues that she repeatedly notified the management office at Sumner Houses that her father had moved out of the apartment and left her behind as a remaining family member to take care of her younger brother. She contends she has tenancy rights because she is a successor to her father's tenancy. According to petitioner, the management office told her it was okay to continue filling out the annual review as though her father was still in the household. Respondent's log of interviews

with petitioner state on April 20, 2009, "[Ruben] is currently out of the country, his anticipated return date is unknown" and on July 10, 2009, "[Ruben] is currently out of the country and they do not know when he will return."

In May 2009, Ruben Jr. was arrested for unlawfully possessing crack cocaine on housing property grounds with the intent to sell. In a letter dated July 29, 2009, NYCHA notified Ruben that, due to his son's criminal activity, the lease for the apartment would be terminated based on those charges and that a hearing on the charges would be held on August 25, 2009.

Ruben did not appear at the hearing and the hearing officer entered a default disposition of termination of tenancy, which was later upheld by Respondent on September 16, 2009. Petitioner contends, and it is unrefuted, that she went to the hearing on August 25, 2009 and asked to be heard. She was denied, however, the opportunity to speak, contest the allegation, offer any evidence, or request an adjournment so that she could apply for what is known as a remaining-family-member grievance.

Respondent claims, *inter alia*, that succession rights are afforded to a remaining-family-member when a tenancy has been terminated and that petitioner does not have standing to challenge the determination to terminate the lease. Respondent alleges that only the tenant of record is authorized to defend against termination charges and the "tenant" is distinguished from "any person occupying the premises of the tenant." Thus, respondent contends that, pursuant to 53 FR 33216, at 33246-47, only petitioner's father is entitled to notice of the hearing and to prepare an appropriate defense to termination of tenancy proceedings.

## Discussion

In an Article 78 proceeding, the applicable standard of review is whether the administrative decision: was made in violation of lawful procedure; affected by an error of law; or arbitrary or capricious or an abuse of discretion, including whether the penalty imposed was an abuse of discretion. CPLR § 7803 (3). An agency abuses its exercise of discretion if it lacks a rational basis in its administrative orders. " The proper test is whether there is a rational basis for the administrative orders, the review not being of determinations made after quasi-judicial hearings required by statute or law." Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 (1974) (emphasis removed); *see also* Matter of Colton v. Berman, 21 N.Y.2d 322, 329 (1967).

24 C.F.R. § 966.52 sets forth the grievance procedures and requirements for public housing. The statute states that each public housing authority ("PHA") shall "adopt a grievance procedure affording each tenant an opportunity for a hearing on a grievance." The statute defines grievance as "any dispute which a tenant may have with respect to PHA action or failure to act in accordance with the individual tenant's lease or PHA regulations which adversely affect the individual tenant's rights, duties, welfare or status." 24 C.F.R. § 966.53. The statute further states that, in accordance with due process, the tenant is required to adequate notice; the right to be represented by counsel; the "opportunity for the tenant to refute the evidence presented by the PHA including the right to confront and cross-examine witnesses and to present any affirmative legal or equitable defense which the tenant may have;" and the right to receive a decision on the merits. 24 C.F.R. § 966.53.

The statute defines tenant, as follows:

(f) Tenant shall mean the adult person (or persons) (other than a live-in aide):

(1) Who resides in the unit, and who executed the lease with the PHA as lessee of the dwelling unit, or, if no such person now resides in the unit,

(2) Who resides in the unit, and who is the remaining head of household of the tenant family residing in the dwelling unit.

(emphasis added) 24 C.F.R. § 966.53.

Petitioner falls under the statutory definition of "tenant." Even though Ruben, the patriarch of the family, executed the lease, it is undisputed that he no longer physically resides in the apartment. When he moved out, he left petitioner as the sole remaining head of household, where she resided with her minor brother. Petitioner is entitled to due process under the statute, affording her the opportunity to be heard at a hearing. (C.f. Turnage v. Hernandez, 836 N.Y.S.2d 495 (2006) (grandson could not establish that NYCHA knew about his residency one year before his grandmother's death, and therefore he did not meet the one year residency requirement for remaining-family-member status).

Petitioner was a known occupant paying rent, she falls under the statutory definition of "tenant" and is therefore entitled to be heard. Additionally, the sole basis asserted by the hearing officer in its decision and disposition to terminate petitioner's tenancy was: "having considered the charges herein, and in the absence of any controverting evidence, I hereby find that such charges are sustained." Accordingly, the petition is granted and the decision annulled. This matter is remanded back to NYCHA

with a direction that petitioner can be heard on the issues regarding her rights, if any, as a tenant and the termination of the lease.

### Conclusion

In accordance herewith, it is hereby:

**ORDERED AND ADJUDGED** that the petition is granted and the decision of the New York City Housing Authority is annulled; and it is further


**ORDERED** that the matter is remanded back to the New York City Housing Authority with a direction that petitioner can be heard on the issues regarding her rights, if any, as a tenant and the termination of the lease; and it is further

**ORDERED** that any requested relief not addressed expressly by the court has nonetheless been considered and is hereby denied; and it is further

**ORDERED** that this shall constitute the decision and order of the Court.

Dated: New York, New York  
June 28, 2010

SO ORDERED:

  
\_\_\_\_\_  
HON. JUDITH J. GISCHE, J.S.C.

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