

**Matter of Guerra v New York City Hous. Auth.**

2010 NY Slip Op 31938(U)

July 15, 2010

Supreme Court, New York County

Docket Number: 0402835/2009

Judge: Joan A. Madden

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

HON. JOAN A. MADDEN

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

PART 11

Index Number : 402835/2009

GUERRA, ANA

vs

NEW YORK CITY HSG AUTHORITY

Sequence Number : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

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

MOTION SEQ. NO. \_\_\_\_\_

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~~

*Article 78 petition is determined 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: July 15, 2010

HON. JOAN A. MADDEN *s.c.*

J.S.C.

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 11

-----X  
In the Matter of the Application of ANA GUERRA,

Index No.: 402835/09

Petitioner,

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

-against-

NEW YORK CITY HOUSING AUTHORITY

Respondent.

**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).*

-----X  
JOAN A. MADDEN, J.:

In this Article 78 proceeding, Ana Guerra, petitioner, seeks to vacate the decision of respondent New York City Housing Authority (Housing Authority), which terminated her tenancy at 195 Continental Place, Apt. 2A, in Staten Island, New York.

The tenancy was terminated following the September 19, 2008 arrest of Jairo Montero (Montero), petitioner's son, at her apartment building. At the time of his arrest, Montero was found with crack cocaine. After a search was conducted of petitioner's apartment, the police department confiscated several items found in a room occupied by Montero, which included a bulletproof vest, ammunition and nine zip lock bags of crack cocaine.

As a result of this incident, petitioner was in violation of the Housing Authority's October 27, 2004 determination, which conditioned her tenancy on the permanent exclusion of Montero.

The October 27, 2004 determination was made after the Housing Authority held a hearing, following Montero's June 19, 2003 arrest for possessing a loaded firearm at the apartment building. Montero plead guilty to criminal possession of a weapon in the third degree and was sentenced to five years probation. Thereafter, petitioner's tenancy became contingent upon the permanent exclusion of Montero.

The decision to terminate petitioner's tenancy was made by the Housing Authority after a hearing was conducted on May 14, 2009, by Hearing Officer Ester Tomicic Hines. At the hearing, both parties presented sworn testimony and other evidence. After reviewing the evidence and testimony, the hearing officer sustained the charges of non-desirability and the violation of the Housing Authority's determination requiring Montero's permanent exclusion. On July 22, 2009, the Housing Authority approved the hearing officer's decision and terminated petitioner's tenancy.

On November 9, 2009, petitioner commenced the instant Article 78 proceeding. Petitioner's pro se petition states that the "court should reverse" the Housing Authority's decision terminating her tenancy "because I am a single parent, I work very hard to support my kids, and I feel that I am responsible for the other 4 children that housing [sic] is trying to evict, so I'm trying to fight for my apartment so my children can have a roof over their head." She also states that her children are "sickly," especially Montero. At the hearing, petitioner testified that Montero, who is schizophrenic, only came to her apartment after he was found homeless and under the influence of drugs and alcohol, and that she was taking care of him at the time of his arrest.

Respondent opposes the petition, arguing that the termination of petitioner's tenancy was not "unduly harsh," as petitioner's children are all over age 18, and the Housing Authority already afforded her a "mitigated sanction" in 2004 when she was permitted to preserve her tenancy on condition that Montero be permanently excluded from the apartment. The Housing Authority also argues that based on Montero's presence in the apartment in September 2008, with crack-cocaine, ammunition and a bullet proof vest, petitioner has shown an "unwillingness" to exclude him from the apartment, and her continued tenancy "presents a danger to her neighbors."

"In the context of a CPLR article 78 proceeding, it is well settled that judicial review is limited to a determination of whether the administrative action was arbitrary and capricious or lacks a reasonable basis. Where such a rational basis exists, an administrative agency's construction and interpretation of its own regulations and of the statute under which it functions are entitled to great deference." Matter of Arif v New York City Taxi & Limousine Commission, 3 AD3d 345, 346 (1<sup>st</sup> Dept 2004) (citations omitted). The court's "review of an administrative penalty is limited to whether the measure or mode of penalty or discipline imposed constitutes an abuse of discretion as a matter of law." Kelly v. Safir, 96 NY2d 32, 38 (2001). "[A] penalty must be upheld unless it is 'so disproportionate to the offense as to be shocking to one's sense of fairness,' thus constituting an abuse of discretion as a matter of law." Id (quoting Pell v. Board of Education of Union Free School District No. 1, 34 NY2d 222, 237 [1974]).

Here, the Housing Authority's determination to terminate petitioner's tenancy was not an abuse of discretion. The hearing officer had a rational basis for the decision based on the

undisputed evidence showing that Montero was occupying a room in petitioner's apartment in violation of the Housing Authority's October 27, 2004 exclusionary order. The hearing officer specifically found that during the "brief period of time from August to September 2008, when the tenant admitted Jairo was staying in the apartment, Jairo brought crack cocaine, ammunition and a bullet proof vest into the tenant's apartment." The hearing officer acknowledged that while petitioner

had every right to try to assist her son who is a mentally ill drug abuser, she did not have the right to allow him back into her home, even for a brief period, and by doing so she severely jeopardized her tenancy. This tribunal recognizes the hardship to the petitioner and her family that will result from the termination of her tenancy. However, she was previously given an opportunity to save her tenancy by excluding her son from the apartment. The determination made by the Hearing Officer in 2004 preserved the tenancy while protecting the resident community from Jairo Montero's non-desirable conduct. It is apparent that permanent exclusion was not a sufficient sanction or deterrent and NYCHA is entitled to their requested disposition.

The court concludes that under the circumstances presented, the penalty of terminating petitioner's tenancy was not excessive. The undisputed evidence at the hearing established that petitioner did not adhere to the Housing Authority's 2004 determination which required Montero's permanent exclusion from the apartment. Even though termination is a harsh penalty, the First Department Appellate Division has upheld as reasonable, the Housing Authority's termination of the tenancy of a tenant who has violated a condition of permanent exclusion. See Lockett v. New York City Housing Authority, 56 AD3d 280 (1<sup>st</sup> Dept 2008); Folks v. New York City Housing Authority, 27 AD3d 270 (1<sup>st</sup> Dept), lv app den 7 NY3d 709 (2006); Romero v. Martinez, 280 AD2d 58 (1<sup>st</sup> Dept), lv app den 96 NY2d 721 (2001); Serrano v. Popolizio, 183 AD2d 430 (1<sup>st</sup> Dept 1992). As the First Department explained in Romero, "[i]f a family member

presents a threat to the tenant's neighbors when he resides there, he is no less of a threat when he comes to visit. While the tenant cannot be answerable for the conduct of her emancipated child . . . she may be held responsible for her own decision to permit [the emancipated child] to enter and stay in the apartment." Romero v. Martinez, *supra* at 63. In Robinson v. Martinez, 308 AD2d 355 (1<sup>st</sup> Dept 2003), the First Department found that the Housing Authority's termination of the petitioner's tenancy was excessive and "shockingly disproportionate," but the facts in that case are clearly distinguishable from the facts in the instant proceeding. In Romero, the court found that the tenant "came forward with a compelling reasons for permitting her son to return to her apartment for one night [tenant explained that her son was seriously ill, and she permitted him to spend one night at the apartment to make sure he got to an important doctor's appointment at a nearby hospital clinic the next day], and his return did not in any way compromise the health or safety of other Housing Authority tenants." Id at 356.

Although this court is sympathetic to petitioner's desire to care for and provide a home for her children, the court notes that petitioner's children are all over 18 years of age. Here, given the circumstances surrounding Montero's arrest, the court is constrained to find that the penalty of terminating her tenancy is not "so disproportionate to the offense as to be shocking to one's sense of fairness," thus constituting an abuse of discretion as a matter of law." Kelly v. Safir, *supra*.

To the extent petitioner attaches to her petition a letter from Montero's doctor and documents concerning her other children, such documents were not produced at the hearing and, therefore, cannot be considered by this court. See Matter of Torres v New York City Housing

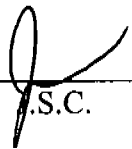
Authority, 40 AD3d 328, 330 (1<sup>st</sup> Dept 2007). In any event, the documents would not alter the foregoing conclusions.

Accordingly, it is

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed.

DATED: July 15, 2010

ENTER:

  
\_\_\_\_\_  
J.S.C.

**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 1412).**