SCANNED ON 8/27/2010

[* 1]

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

PRESENT: Coin Justice PART 4

INDEX NO. 400982/10

MOTION DATE 6/22/10

MOTION SEQ. NO. 001

MOTION CAL. NO.

v.

The following papers, numbered 1 to 31 were read on this motion to/for Article 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits	1-15
Answering Affidavits — Exhibits	16-31
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER + judgment

FOR THE FOLLOWING REASON(S):

Dated: 8/26/10

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

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

----------X

In the Matter of the Application of
MARIA PENA,

Petitioner,

Index No. 400902/10

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

Decision, Order and Judgment

-against-

THE NEW YORK HOUSING AUTHORITY,

Respondent.

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

Petitioner Maria Pena, proceeding pro se, brings this Article 78 proceeding by order to show cause seeking to annul the determination of the New York City Housing Authority ("NYCHA") not to open a default judgment entered against her, which terminated her tenancy, and seeking a stay of a holdover proceeding pending against her in the Landlord/Tenant Housing Part of the Civil Court of the City of New York in Bronx County. For the reasons discussed below, the petition is denied and the stay on NYCHA v. Maria M. Pena, Index Number 806641/2009 (the "Holdover Proceeding") is lifted.

Petitioner is the tenant of record of Apartment 2A at 2815 Dewey Avenue, Bronx, New York (the "Apartment") in a complex owned and operated by NYCHA known as the Throggs Neck Houses ("Throggs Neck"). In an undated letter[1], a housing manger from Throggs Neck notified petitioner that NYCHA was considering terminating her lease, because she failed to allow the

[1] All notifications discussed herein, unless otherwise indicated, were addressed to the Apartment.

Apartment to be inspected. The letter informed petitioner that she could meet with the housing manager on May 16, 2005 to discuss the matter. Petitioner failed to respond or appear at the meeting. By a second undated letter, petitioner was scheduled for a second meeting on September 20, 2005. Petitioner failed to respond or appear at that meeting and her records were transferred to the Operations Services Tenancy Administration Division. In 2006, NYCHA notified petitioner by letter that a hearing would be held on March 22, 2006, to consider the termination of her tenancy. The letter charged that petitioner failed to allow NYCHA to inspect her apartment on September 20, 2005 and November 14, 2005. On March 22, 2006, petitioner and NYCHA entered into a signed stipulation adjourning the hearing to April 25, 2006. Petitioner also alleges that on March 22, 2006, she scheduled an appointment with NYCHA to have her apartment inspected and "the case ended there." In its answer, respondent does not dispute this version of the events. However, by letter dated April 28, 2006, NYCHA notified petitioner that the hearing would be adjourned for another month to May 25, 2006.

On May 25, 2006, petitioner failed to appear for the hearing. As a result, on or about May 26, 2006, Hearing Officer Ester Tomici Hines issued a decision and disposition upon petitioner's default. The decision and disposition sustained the charges against petitioner and recommended termination of her tenancy. On June 14, 2006, NYCHA approved the decision and disposition.

Petitioner continued to occupy the Apartment and, on June 29, 2007, applied to NYCHA for a new hearing using a "Request to the Hearing Officer for a New Hearing" form. The

form instructed petitioner that in order to be granted a new hearing, petitioner must complete the form within a "reasonable time" after her default and show "good cause." To show good cause, petitioner was required to present "a reasonable excuse to explain why [she] missed [her] hearing . . . AND . . . a good defense why [she] think[s] [NYCHA's] charges against [her] are not true, or the problem has been corrected, or otherwise explain why [her] tenancy should not be terminated." (Emphasis in original). On the application, petitioner explained that she went to NYCHA's main office in Manhattan, met with a Teresa Valentine, and scheduled a date for NYCHA to inspect the Apartment. She also explained that "every time I get a notification for inspection[,] housing has access to my apartment." On July 25, 2007, by letter, NYCHA granted the application to open the default.

By letter dated July 30, 2007, the housing manager from Throggs Neck informed petitioner that her lease was in jeopardy of termination due to chronic rent delinquency. The letter requested that petitioner appear for a meeting with the housing manager on August 7, 2007. Petitioner failed to appear at the meeting and, by letter dated August 7, 2007, the housing manager scheduled a second meeting for August 14, 2007.

On March 10, 2008, NYCHA notified petitioner that her hearing would be scheduled for April 10, 2008. NYCHA added charges of rent delinquency to her previous charges relating to her failure to have the Apartment inspected. According to petitioner's rent ledger attached to the letter, petitioner was late on her rent from December 2006 through May 2007; was late on rent for July 2007 and August 2007; and, as of November 27, 2007, still owed rent for September 2007 to

November 2007. On April 15, 2008, NYCHA sent another letter to petitioner, which adjourned the hearing to May 1, 2008 and added further rent delinquency charges. According to the rent ledger attached to the letter, petitioner ultimately paid rent for September 2007 to November 2007 in late February 2008; was late on her rent from December 2007 through February 2008; and, as of April 10, 2008, still owed rent for March and April 2008.

Petitioner failed to appear at the May 1, 2008 hearing (the "May Hearing"). On May 2, 2008, Hearing Officer Hines, upon petitioner's default, sustained the charges against petitioner and recommended termination of her tenancy. On May 14, 2008, NYCHA approved of the decision and disposition.

Petitioner remained in occupancy of the Apartment and, on November 23, 2009, submitted another application for a new hearing. The application again notified petitioner that she was required complete the form within a "reasonable time"; to show a reasonable excuse for the default; and to demonstrate that her defense had merit or otherwise show "good cause." On the application, petitioner wrote that she did not receive an "appointment for the [hearing date], don't remember." To demonstrate good cause, petitioner explained that the "rent was paid, I never got noticed [*sic*], I also was told that since I had a court case they could not proceed with the case at 250 Broadway. I found out about this decision on 11/19/09 by my housing manager." Annexed to the application was a further note explaining that "rent has not been paid," because public assistance would not pay her rent until NYCHA lowered it. Petitioner believed that NYCHA should lower her rent due to a disability she suffered in June 2009.

On December 1, 2009, Donna Schletter, a manager of NYCHA's Housing Litigation area, submitted an affidavit in opposition to petitioner's application. Ms. Schletter maintained that petitioner's request to open the default, submitted nineteen (19) months after the default, "exceeds what can be considered a reasonable amount of time[.]" Ms. Schletter further contended that petitioner's explanation for her default was not excusable since petitioner was properly notified of the hearing. Ms. Schletter asserted that petitioner owed or was late on rent well before June 2009 and therefore had no merit to her defense. Ms. Schletter further asserted that petitioner was acting in bad faith by allowing the rent arrears to mount for months before paying the arrears in a lump sum. Attached to the affidavit in opposition was an affidavit of mailing from Maribel Cesario, a secretary with NYCHA's Tenant Administrative Hearings Division. Ms. Cesario explained that she places all hearing notices into a windowed envelope, so that the address at the top of the letter is visible through the envelope. She then sends the letters with the United States Postal Service via certified mail and keeps a computerized log for all notices. Ms. Cesario asserted that, after reviewing the log, she confirmed that a hearing notice was sent to petitioner on April 15, 2008 and was not returned as undelivered.

On December 7, 2009, Hearing Officer Hines issued a decision denying petitioner's application to open her default. Hearing Officer Hines set forth that petitioner's nineteen month delay in seeking to reopen her "second default" was "far beyond a reasonable time period." Hearing Officer Hines discredited petitioner's contention that she did not receive notice, finding that Ms. Ceasario's affidavit "provides sufficient proof of proper notification[.]" Hearing Officer Hines also discredited petitioner's defense to not paying her rent noting that petitioner submitted no evidence

of a state agency's commitment to pay her rent or her own ability to pay the rent. On December 14, 2009, NYCHA sent petitioner a "30 Day Notice to Vacate," informing petitioner that pursuant to Hearing Officer Hines' May 2, 2008 decision and disposition, she had thirty (30) days to vacate the Apartment. Sometime in 2009, NYCHA initiated the Holdover Proceeding against petitioner.

Petitioner brought this petition, by order to show cause, on or about April 6, 2010. Petitioner also sought a temporary restraining order staying the Holdover Proceeding, which was granted on April 7, 2010. Petitioner argues that NYCHA violated its own rules and regulations and acted arbitrarily. She asserts that she was not given the opportunity to speak with a housing manager about the charges against her before having her tenancy terminated. At oral argument, petitioner argued that she did not receive any of the various notices from NYCHA. In support of this argument, attached to her petition, is an envelope addressed to petitioner, but with a different address than the Apartment. The misaddressed envelope contains pieces of various correspondence to petitioner from NYCHA. The envelope does not contain copies of notices previously discussed. Respondent argues that the termination of petitioner's tenancy was proper upon her two defaults. Respondent further argues that NYCHA's decision to deny petitioner's application to reopen her default was rational and supported by the record.

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). A determination is considered arbitrary when

it is made "without sound basis in reason or regard to the facts." In re Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009), citing Pell, 34 N.Y.2d at 231. If the agency's determination is rationally supported, the court must sustain the determination "even if the court concludes that it would have reached a different result than the one reached by the agency." Peckham, 12 N.Y.3d at 431 (citation omitted). The court cannot "weigh the evidence, choose between conflicting proof, or substitute its assessment of the evidence or witness credibility for that of the administrative factfinder." In re Porter v. New York City Hous. Auth., 42 A.D.3d 314 (1st Dep't 2007) (citations omitted).

According to NYCHA's termination of tenancy procedures and clearly indicated on the default applications, a defaulting tenant must make an application to reopen the default "within a reasonable time after his/her default in appearance [and upon the application] the Hearing Officer may, for good cause shown, open such default and set a new hearing date." NYCHA Termination of Tenancy Procedures ¶ 8. A notice of hearing must be served on the tenant either personally or by "certified mail, postpaid, and addressed to his/her apartment in the project." Id. at ¶ 4.

While NYCHA's policy of limiting the time in which a tenant can open a default does not apply when the tenant establishes that service was improper (see In re Yarbough v. Franco, 264 A.D.2d 740, 741 [2d Dep't 1999]; In re Bludson v. Popolizio, 166 A.D.2d 346, 347 [1st Dep't 1990]), it was not irrational for Hearing Officer Hines to reject petitioner's claim of lack of service. Hearing Officer Hines' reliance on the affidavit of Ms. Ceasario as evidence that petitioner was properly notified of the May Hearing was not irrational, because it is well recognized in New York that proof of a regular mailing practice gives rise to a rebuttable presumption of delivery. See e.g.,

In re Cruz v. Wing, 276 A.D.2d 307 (1st Dep't 2000). In order to rebut this presumption, there must be more than "a claim of no receipt[;] there must be a showing that a routine office practice was not followed or was so careless that it would be unreasonable to assume that notice was mailed." Nassau Ins. Co. v. Murray, 46 N.Y.2d 828, 830 (1978). It cannot be said that Hearing Officer Hines' refusal to credit petitioner's mere denial of notice was irrational or unsupported by the evidence. Furthermore, petitioner's argument that NYCHA was not properly notifying her is undermined by her acknowledgment of receipt of NYCHA's inspection request notices, her personal consent to a hearing date in 2006, and her assertions on her default application that she "was told that since [she] had a court case, [NYCHA] could not proceed with the case at 250 Broadway."

It was not irrational for Hearing Officer Hines to conclude that petitioner did not have a reasonable excuse for her repeated failure to pay rent on time. Nor was it irrational for Hearing Officer Hines to conclude that petitioner's contention that public assistance was willing to pay rent due after June 2009 if her rent was lowered was unsubstantiated. Furthermore, even if the excuse is credited, it does not account for the chronic nonpayment of rent prior to June 2009. Although it was irrational for Hearing Officer Hines to deem petitioner's default a "second default" since NYCHA does not dispute that petitioner resolved the charges against her related to her failure to have the Apartment inspected on March 22, 2006 nor even mention that charge in the decision to not open the default, the court is constrained by petitioner's failure to overcome the presumption of proper mailing and the fact that Hearing Officer Hines' other determinations were not irrational.

As to Hearing Officer Hines' imposition of the penalty of tenancy termination, the court is constrained by NYCHA's rules that consider chronic late payment of rent grounds for termination, and First Department case law that suggests that termination of tenancy is not arbitrary and capricious when a tenant defaults on a hearing. See In re Cherry v. New York City Hous. Auth., 67 A.D.3d 438, 439 (1st Dep't 2009) (citation omitted).

Accordingly, it is

ORDERED that the stay on NYCHA v. Maria M. Pena, Index Number 806641/2009 in Landlord/Tenant Housing Part of the Civil Court of the City of New York in Bronx County is lifted; and it is further

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

Dated: August 25, 2010

JOAN B. LOBIS, 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 141B).