

**Smith v New York City Hous. Auth.**

2010 NY Slip Op 32437(U)

August 6, 2010

Sup Ct, NY County

Docket Number: 401277/10

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ PART 13  
*Justice*

ROSLYN SMITH, INDEX NO. 401277/10  
MOTION DATE 06-03-2010  
- v - MOTION SEQ. NO. 1  
NEW YORK CITY HOUSING AUTHORITY, MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 2 were read on this petition to/for Art. 78

Notice of Motion/ Order to Show Cause 1  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_  
**UNFILED JUDGMENT**  
PAPERS NUMBERED 1  
*This judgment has not been entered by the County Clerk  
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  
1400)*

Cross-Motion: Yes  No

Upon the foregoing papers, it is ordered and adjudged that this Article 78 petition is denied and the proceeding is dismissed.

Petitioner resides at 211-G West 151<sup>st</sup>. Street, Apt. 3B ( Harlem River Houses) which is managed by the Respondent New York City Housing Authority. Respondent brought charges against Petitioner for defrauding the Authority by filing false instruments from about 1982 to 2002; misrepresenting her income in her Income Verification Affidavit by failing to report her husband's income; filing false family composition affidavits by failing to report her husband lived with her. Petitioner's failure to report her husband's income resulted in an underpayment of rent in the amount of approximately \$31,951.00 [see answer exhibit KK].

Petitioner's saga began when in April 2002 her husband, Garrise Brown, wrote a letter to the office of the Inspector General to inform them that he had been an unauthorized occupant in all of petitioner's apartments, without reporting his employment income. The office of the Inspector General investigated the allegations in Mr. Brown's complaint and found substantial evidence to substantiate them. The investigation uncovered that Mr. Brown listed Petitioner's address in his W-2 forms and with his employers, their Marriage Certificate stated that they lived together and listed Petitioner's address, he filed income tax returns with petitioner's address and they even filed joint tax returns listing Mr. Brown as head of household. Complaint reports filed with the New York City Police Department provided further proof that Mr. Brown resided in Petitioner's apartment.

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

Following this investigation NYCHA filed formal charges against Petitioner. The file was assigned to Hearing Officer Julius Briller who held administrative hearings on February 17 and March 17, 2005. At the hearing Petitioner appeared Pro-se. NYCHA presented overwhelming evidence that Mr. Brown resided in petitioner's apartment. The hearing officer determined that "proof that [Mr. Brown] lived with her proffered by the Authority permit a trier of fact to reach the ultimate conclusion that tenant did defraud [ NYCHA ] of rent moneys that it was entitled by law to collect." The Hearing Officer recommended termination of her tenancy. [ See answer KK]. The Housing Authority's Board approved that determination on April 20, 2005 [ see answer LL].

Following the Board's determination Petitioner brought an Article 78 Petition which was heard by the Hon. Rolando T. Acosta. Justice Acosta denied and dismissed the petition by written decision dated March 6, 2006. He found " in the instant proceeding, it cannot be said that NYCHA's determination was arbitrary and capricious, and an unreasonable exercise of that agency's discretion. It is undisputed that petitioner was married to Garrise Brown from 1988 to 2004, during that period, there were four separate domestic disturbance incident complaint reports, two of which support NYCHA's claim that Brown was living as an unauthorized tenant in petitioner's apartment. For example, a complaint report Dated December 18, 1992 indicated that there was a verbal altercation between petitioner and Brown as a result of petitioner becoming upset that Brown was "staying out all night and not coming home." Another Incident Report on June 17, 2002 state the reason for the domestic disturbance was Brown's refusal to let petitioner leave the apartment....NYCHA'S decision was also based in part on Brown's W-2 wage and tax statements for the years of 1999,2000 and 2001 which listed his address as petitioner's current address.... A fraud investigator with NYCHA's office of the Inspector General received a statement on December 30, 2002 from Brown's employer at the time declaring that Brown was listed as residing in two of petitioner's apartments including her current address.... Petitioner offered no explanation as to how Brown obtained her income information and tax documents for submission if he were not allowed to live with her... She did not provide NYCHA, although invited to do so prior to any hearing on the matter, with any reasons for failing to act against Brown for lack of child support payment for their two children... Finally petitioner neglected to offer any type of documents whatsoever to contradict the documentary evidence of Garrise Brown's unauthorized occupancy...Petitioner offered no evidence to refute the W-2 tax records of Brown, and the police complaints made by petitioner herself which listed brown as living with her... Garrise Brown admitted in a subsequent letter written to petitioner that his letter to NYCHA was a result of him being very very upset at seeing petitioner with her new "guy friend"... although Brown's letter was the engine driving NYCHA's proceeding, it was not the only evidence....there was ample evidence in the record to support NYCHA's determination."[ see answer exhibit NN ].

Justice Acosta's decision was unanimously affirmed by the Appellate Division First Department. The Appellate Court found "Petitioner's course of conduct had the effect of concealing her husband's income from respondent, thereby producing a substantially lower rent. The agency submitted ample documentation that both petitioner and her husband had indicated to the police, his employer, to tax authorities and to others during that period that the husband's address was the same as petitioner's." [ see answer PP ]

Petitioner now brings this new Article 78 Petition to have the agency's denial of her request for a hearing de novo based on "new evidence" and upon re-hearing to annul the final determination terminating her tenancy. Petitioner submits as new evidence an affidavit from Garrise Brown wherein he recants his prior statements to the Inspector General investigators. In his new sworn affidavit Mr. Brown states he never resided with Petitioner during the time he was married to her; he used her address for employment and income tax purposes without her consent and knowledge; and he wrote the letter in 2002 out of spite. [see petition exhibit H ].

On April 14, 2008 petitioner requested by letter that NYCHA reconsider and annul its administrative decision. On May 6, 2008 that request for reconsideration was denied. On June 25, 2008 Petitioner wrote to NYCHA'S board requesting the same relief. That request was denied on April 27, 2009. Petitioner filed the instant Article 78 petition on May 13, 2010. [see petition exhibits B, C, D, E ].

"... A proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner..."[C.P.L.R. § 217(1)]. This abbreviated time frame is said to serve public policy by freeing government operations from the "cloud" of potential litigation [Best Payphones, Inc., v. Department of Information, Technology and Communications of City of New York, 5 N.Y. 3d 30, 832 N. E. 2d 38, 799 N.Y.S. 2d 182 (2005)]. An administrative determination becomes "final and binding" triggering the four month statute of limitations for commencing an Article 78 proceeding, when the petitioner seeking review has been aggrieved by it. [Rocco v. Kelly, 20 A.D. 3d 364, 799 N.Y.S. 2d 469 [App. Div. 1<sup>st</sup>. 2005]; Yarbough v. Franco, 95 N.Y. 2d 342, 740 N.E. 2d 224, 717 N.Y.S. 2d 79 [ 2000]. The four month limitations period for Article 78 review runs from petitioner's receipt of the adverse determination [ Yarbough v. Franco, 95 N.Y. 2d 342, 740 N.E. 2d 224, 717 N.Y.S. 2d 79 [supra].

NYCHA's determination became final and binding on receipt of the April 27, 2009 response. Petitioner was aggrieved the moment his grievance was denied by NYCHA on April 27, 2009. Petitioner was in receipt of a "final and binding" determination triggering the four month statute of limitations at least as of June 4, 2009. The Article 78 Petition seeking review was filed on May 13, 2010 well beyond the four month statute [see CPLR 217(1)], and is untimely. Petitioner's claim is time barred [Walton v. New York State Dept. Of Correctional Services, 8 N.Y. 3d

186, 863 N.E. 2d 1001, 831 N.Y.S. 2d 749 (2007)]. The short period of limitations cannot be circumvented [In re Long Island Power Authority Rate Payer Litigation, 47 A.D. 3d 899, 850 N.Y.S. 2d 609 (App. Div. 2<sup>nd</sup>. Dept. 2008)].

An occupant in a public housing project can be evicted for concealing or under reporting income received during the tenancy( *Newton, v. Municipal Housing Authority for the City of Yonkers*, 47 A.D. 2d 522, 363 N.Y.S. 2d 28 [ App. Div. 2<sup>nd</sup>. Dept. 1975]). Following this rationale the penalty of termination of a long term tenancy has been found not to “shock the conscience” where the tenant concealed her husband’s income from the housing authority, thereby producing a substantially lower rent ( *Smith v. New York City Housing Authority*, 40 A.D. 3d 235, 835 N.Y.S. 2d 131 [App. Div. 1<sup>st</sup>. Dept. 2007]; *Parker v. New York City Housing Authority*, 73 A.D. 3d 632 [App. Div. 1<sup>st</sup>. Dept. 2010]), or where a section 8 rent subsidy is terminated for tenant’s failure to accurately report his household income in his application for rental assistance and subsequent recertification applications ( *Graceffo v. City of New York*, 71 A.D. 3d 603, 898 N.Y.S. 2d 27 [App. Div. 1<sup>st</sup>. Dept. 2010]).

The Garrise Brown Affidavit proffered by petitioner is not new evidence and would have no impact on the final determination. Upon review of Hearing Officer Briller’s determination, Justice Acosta took note of Mr. Brown’s admission to writing the letter to the Inspector General out of Spite; however as Justice Acosta previously found and the Appellate Division Affirmed “ Mr. Brown may have been the engine driving the proceeding, but there was ample evidence submitted to demonstrate that Mr. Brown’s address was the same as the petitioner.” Petitioner was afforded a full opportunity at the administrative hearing to present evidence, her failure to do so, not only at that hearing but also at every related proceeding does not transform this affidavit into “ new evidence”. Similarly Petitioner is estopped from relitigating issues that have been previously litigated in the administrative proceeding [ *Ryan v. New York Telephone*, 62 NY 2d 494, 467 N.E. 2d 487, 478 NYS 2d 823].

Petitioner has filed this petition untimely, the Hearing Officer’s decision was supported by ample documentation that Petitioner and Mr. Brown resided together. Justice Acosta dismissed Petitioner’s prior petition and the Appellate Division affirmed. Mr. Brown’s affidavit cannot be considered new evidence as the court was aware he had filed the complaint against petitioner out of spite. Petitioner had a full opportunity to present this evidence and failed to do so. Finally, petitioner is estopped from relitigating issues that have been previously litigated at the administrative proceeding, in Supreme Court and at the Appellate Division.

Accordingly, it is the decision and order of this court that the petition is denied and the proceeding is dismissed. The Landlord Tenant proceeding under index L & T Number 019327/06 is transferred and referred back to housing court Part E for a further determination.

Accordingly, it is ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED, that the Landlord Tenant proceeding under index number L&T 019327/06 is transferred to Housing Court Part E for further determination; and it is further

ORDERED, that all stays in the Housing Court proceeding are lifted.

This constitutes the decision and judgment of this court.

Dated: August 6, 2010

MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION  
Check if appropriate:     DO NOT POST                       REFERENCE

MANUEL J. MENDEZ  
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).