

Matter of Devins v City of New York Hous. Auth.

2010 NY Slip Op 32897(U)

October 8, 2010

Supreme Court, New York County

Docket Number: 402427/09

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.
Justice

PART 11

Deneiro, Stephanie B

INDEX NO. 402427109

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

- v -

NYC Housing Authority

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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 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: October 8, 2010

[Signature]
HON. JOAN A. MADDEN ^{LSG}

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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
STEPHANIE G. DEVINS,

INDEX NO. 402427/09

Petitioner,

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules

-against-

NEW YORK CITY HOUSING AUTHORITY;

Respondent.

-----X

JOAN A. MADDEN, J.:

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).

In this Article 78 proceeding, pro se petitioner Stephanie
G. Devins seeks a judgment annulling the determination of the
respondent, New York City Housing Authority (the "Housing
Authority"), which terminated her tenancy on the grounds of
harassment and threat, and chronic rent delinquency. Respondent
opposes the petition.

BACKGROUND

On December 5, 2001, petitioner and non-party Harry Halsey,
petitioner's nephew, signed a lease as co-tenants for apartment
4B at 34-50 24th Street, Long Island City, New York, which is
located in a Housing Authority development known as Ravenswood
Houses. It is undisputed that Halsey vacated the apartment in
October 2006 and subsequently received a transfer to another
Housing Authority apartment. It is also undisputed that
petitioner has not paid rent since August 2007.

On or about November 19, 2008, the Housing Authority served petitioner with a Corrected Notice and an Amended/Supplemental Specification of Charges, which charged her with non-desirability, breach of rules and regulations and chronic rent delinquency. The specifications state as follows:

Non-Desirability in that:

1. During 2006, you Stephanie Devins, tenant of record, inside of your New York City Housing Authority ("Authority") apartment:

- a) made threatening, abusive or alarming remarks relating to your former co-tenant in his presence;
- b) otherwise engaged in harassing conduct against your former co-tenant.

Breach of Rules and Regulations in that:

2. During 2006, in violation of Paragraphs 12(e), 12(q) and 12^o of your Authority Resident Lease Agreement, you Stephanie Devins, tenant of record, failed to refrain from illegal, immoral or disorderly activity on or in the vicinity of Authority premises.

Chronic Rent Delinquency in that:

3) You Stephanie Devins, tenant of record, have repeatedly failed to pay your rent when due as indicated in the attached Chronic Rent Delinquency Specification of Charges.

The notice included a schedule of outstanding rent payments for 13 months from November 2007 through November 2008. The notice also advised that a hearing on the charges would be held on December 23, 2008. The hearing was adjourned to January 30, 2009, and again to March 26, 2009.

On March 26, 2009, the parties appeared for the hearing, and petitioner's attorney requested a short adjournment to review the file properly, as he had just been assigned to the case. The Hearing Officer granted an adjournment to April 7, 2009. The

Housing Authority presented the testimony of Jerrold Rosenstein, Assistant Manager to Ravenswood Houses, and Harry Halsey, petitioner's former co-tenant. Petitioner was represented by counsel and testified on her on behalf. Each party submitted documents.

Specifically as to the charge of non-desirability based on threat and harassment, petitioner testified that in May 2006, she secured temporary and non-temporary orders of protection against Halsey, after he purportedly struck her in the face with his fist. Petitioner claimed that Halsey wanted the apartment for himself and his girlfriend, and the altercation arose when Halsey accused petitioner of tampering with his girlfriend's mail. Petitioner called the police and filed a Domestic Violence Incident Report. According to petitioner, she did not press charges against Halsey because once he vacated the apartment, the problem was resolved.

Halsey testified that the May 2006 incident "never took place" and that he "never laid a hand on his relative." He also testified that in August 2006, he secured a temporary order of protection against petitioner, after she purportedly told him to leave the apartment, and he purportedly overheard her on the telephone tell a friend to come over and "murder" or "handle" Halsey the "street way." Halsey left the apartment, went to the nearby police precinct and filed a Domestic Violence Incident

Report, which lists the offenses as verbal abuse and harassment. In his statement of allegations annexed to the incident report, Halsey indicated that the incident occurred at 11:38 p.m. on August 7, 2007. The charges against petitioner were eventually dismissed and the record sealed. Later in 2006, the Housing Authority gave Halsey an "intimidated victim transfer" to an apartment in another Housing Authority development.

Petitioner testified that the August 7, 2006 incident did not take place, since she was at work during the day, went to a concert that night and did not return to the apartment until "12-1 o'clock the following morning." To support her assertion that she was not at home at the time of the alleged incident, petitioner produced records as to use of her MetroCard, which indicate that it was used to enter the Winthrop Street subway station in Brooklyn on August 7, 2006 at 10:06 p.m.

As to the charge of chronic rent delinquency, Ravenswood Assistant Manager Jerrold Rosenstein testified that petitioner had not paid rent since August 2007, and that as of April 28, 2009, she owed \$11,131.62. Rosenstein also testified as to a stipulation in a non-payment proceeding in Queens Housing Court, signed by petitioner and dated January 28, 2008; the stipulation stated that petitioner owed \$3,506.55 in rent through January 31, 2008. Rosenstein further testified that billing statements are automatically sent to tenants by a "lock box office," and that he

obtained copies of the February and March 2009 statements addressed to petitioner, which he personally placed under her door.

On direct examination, petitioner's attorney asked her the reason she has not paid rent since August 2007, and she responded that the Housing Authority has "listed" her as a "move out" since Halsey transferred to another apartment, and she has not received any rent statements since October 2006. When asked about any other reasons, petitioner replied that the management office "changed" her lock in January 2007, she was on disability from October 2007 to January 2008, and she was terminated from her job with the Housing Authority in July 2008. She testified that she sent in her annual income certification papers in 2007, and she was "re-budgeted" in July 2007, but when she submitted her "annual review" in July 2008, it was "never processed." Petitioner also testified that "I've been telling them [Housing Authority management] for the past two years that I've been willing to pay my rent if I would just get my monthly rent statement."

Petitioner introduced into evidence copies of two letters addressed to Mr. Perry, the Housing Manager for Ravenswood Houses. One letter dated December 2006 begins by requesting a "grievance for remaining family member," goes on to say that her co-tenant Harry Halsey has been out of the apartment since

* 7]

September 2006 and she has not received a rent statement since October 2006. Petitioner writes that she is requesting "new leases be signed and Harry's named be removed from my tenant records." The letter is date-stamped "received Jan 29 2007 Ravenswood Houses." In the second letter dated October 19, 2007,¹ petitioner states that she "is writing once again to try to resolve this issue with my tenancy," and that she is "not working and I need my rent to be adjusted according to my income which is contributions from my fiancée of \$125 per week." She also requested a meeting with Mr. Perry, "because I'm not able to get any assistance because you still have Harry Halsey as residing in my household and including his income as part of my household income."

On cross-examination, petitioner was questioned about her claim that she was not receiving rent statements and whether she still should have been aware the rent was due every month. Petitioner responded that she did not know how much she was supposed to pay, since she was on disability and then terminated from her job, and had asked for her rent to be re-budgeted according to her income.

¹The Housing Authority objected to this letter because it was not in petitioner's tenant file. Petitioner testified that she sent the letter to the Housing Authority by certified mail, return receipt requested, and produced a copy of the green card acknowledging receipt by the Housing Authority. The Housing Authority continued to object, and the Hearing Officer admitted the letter into evidence, stating "for what it's worth."

On May 22, 2009, Hearing Officer Joan Pannell issued a decision sustaining the charges, concluding that "[e]ither the harassment and threat or the chronic rent delinquency would be a sufficient basis to grant NYCHA its requested relief." The decision discusses the testimony and other evidence presented by each side, and makes the following findings:

The testimony of the Assistant Manager [Rosenstein] and of Harry Halsey was credible; that of Tenant [petitioner], considered with her demeanor, was not. Tenant and Harry Halsey may well have had a dispute in 5/06; they also had a dispute on 8/7/06 at about midnight (Tenant's MTA log shows that her last trip on 8/7/06 began at 10:06 p.m., sufficient time to arrive home by midnight). It is credible that Tenant, referring to the dispute, told another person on the telephone that "Someone was going to get killed," and that, in Halsey's words as written for the police, "She asked her friend 'Pete' to come over and handle this problem, making reference to me being the problem. She said he's gonna have to murder him." Then Tenant insisted that Halsey immediately leave the apartment, without his keys (Halsey's domestic incident report, Exhibit 6). He did immediately leave, without his keys. Evidently, Halsey took Tenant's threat seriously.

Tenant failed to show that she has ever verified the change in household income or composition with management. It is not credible that she has received no rent statements. She failed even to allege an attempt to pay rent since 8/07.

On June 3, 2009, the Housing Authority issued a Determination of Status stating that it "approves the Hearing Officer's decision and disposition in this proceeding finding the tenant ineligible for continued occupancy. The tenancy shall therefore be terminated."

Petitioner pro se thereafter commenced this Article 78 proceeding, seeking to annul the Housing Authority's determination on numerous grounds, some of which include the following: 1) the Hearing officer's decision is arbitrary, capricious and an abuse of discretion, as petitioner had informed Management that her income had changed and she was not receiving rent statements, and Management ignored her requests to adjust her rent according to her income; 2) the Hearing Officer found petitioner not credible and ignored petitioner's evidence; 3) the Housing Authority did not follow its own rules and regulations; 4) the Housing Authority violated its termination of tenancy procedures and as a result petitioner was denied her due process right to be informed that a breach of the rules and regulations occurred; and 5) the hearing officer should have recommended probation rather than termination. In addition to annulling the Housing Authority's decision, petitioner seeks an order directing the Housing Authority to process her 2007 and 2008 annual income verifications to reflect her unemployment and reduced household income.

DISCUSSION

"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." Matter of Arif v New York City Taxi &

Limousine Commn., 3 AD3d 345, 346 (1st Dept 2004). The court may not substitute its judgment for that of the agency, see Rudin Management Co., Inc. v. New York State Division of Housing & Community Renewal, 215 AD2d 243 (1st Dept 1995), and the court's consideration is confined to those issues properly raised in the administrative proceedings, see Matter of Torres v New York City Housing Authority, 40 AD3d 328, 330 (1st Dept 2007).

Here, petitioner challenges the Housing Authority's determination to terminate her tenancy on the grounds of either chronic rent delinquency, or threat and harassment. Many of petitioner's objections pertain to the hearing officer's determination as to the credibility of the witnesses. In an Article 78 proceeding, however, the court "may not weigh the evidence, choose between conflicting proof, or substitute its assessment of the evidence or witness credibility for that of the administrative factfinder." Matter of Porter v New York City Housing Authority, 42 AD3d 314, 314 (1st Dept 2007); accord Carson v. New York City Housing Authority, 25 AD3d 462 (1st Dept 2006).

Petitioner also argues that the Housing Authority violated its rules and regulations and denied her due process by not initially calling her in to discuss the rent delinquencies before notifying her of the hearing and the specifications of the charges. Petitioner also claims that the Housing Authority did

not follow its own procedures when it "commenced an alleged termination" against her in June 2005. Petitioner did not raise either of these issues during the administrative proceedings, and therefore, they cannot properly be considered for the first time by this court. See Matter of Torres v New York City Housing Authority, supra.

Even the issue regarding the initial meeting with the manager had been raised below, the record sufficiently establishes that the Housing Authority complied with its Termination of Tenancy Procedures. Those procedures require the "project manager or his representative [to] interview the tenant in order to discuss the problem which may lead to termination of tenancy, seek to ascertain the facts involved, and, when appropriate, seek to assist the tenant by securing outside help." After that, "[i]f remedial action by the Manager fails, or if the Manager believes that termination of tenancy is the appropriate course of action, he shall submit the entire file, together with his/her written recommendations and the reason therefor, to the Tenancy Administration for review and appropriate action."

In its verified answer, the Housing Authority asserts that on May 8, 2007, management notified petitioner that it was considering terminating her tenancy for chronic rent delinquency and offered to discuss the problem with her; when petitioner failed to appear on the appointed date, the Housing Authority

sent her another letter on May 21, 2007, giving her a second opportunity to discuss the problem; when she again failed to appear, management sent petitioner a notice that the record of her tenancy was being forwarded for review and preparation of charges. In support of the foregoing assertions, the Housing Authority submits a redacted page from a log book, which lists petitioner and Halsey as the "tenant" and next to their names, three dates have been entered, 5/8/07, 5/21/07, and 6/8/07, respectively, in the columns entitled "1st call in letter," "2nd call in letter" and "Notice to Tenant of Mgr's Recommendation." Another column entitled "type of case," lists the letters "CRD," which presumably stands for "chronic rent delinquency."

With respect to petitioner's allegation that the Housing Authority "commenced an alleged termination of tenancy" against her in June 2005, regardless of any steps or procedures the Housing Authority may have taken in 2005 to terminate petitioner's tenancy, the Housing Authority cannot now be estopped from discharging its statutory duties and invoking its regulations to determine that grounds exist for terminating petitioner's tenancy. See Matter of Schorr v. New York City Department of Housing Preservation & Development, 10 NY3d 776 (2008); Taylor v. New York State Division of Housing & Community Renewal, 73 AD3d 634 (1st Dept 2010).

Petitioner further argues that the penalty of termination is

too harsh, and that probation is more appropriate. Courts in New York, however, have upheld the Housing Authority's imposition of the penalty of terminating a petitioner's tenancy for chronic rent delinquency.² See Davis v Hernandez, 13 AD3d 90 (1st Dept 2004); Moise v. Christian, 97 AD2d 536 (2nd Dept 1983); Haggerty v. New York City Housing Authority, 69 AD2d 862 (2nd Dept), appeal dismissed 47 NY2d 1011 (1979). Notably, at the hearing and in this proceeding, petitioner has consistently asserted that she had not paid her rent because she has not received rent statements. At the hearing, petitioner testified that she's been "telling" Housing Authority management for two years that "I've been willing to pay my rent if I would just get my monthly rent statement." Petitioner, however, points to no statute, regulation or procedure, which relieves a Housing Authority tenant of the lease obligation to pay rent if she does not receive a monthly rent statement. To the contrary, paragraph 1 of the Housing Authority lease expressly provides that the rent is "due and payable the first day of each month or at such other day each month as the Landlord may decide." Thus, in the absence

²Under the Housing Authority's Termination of Tenancy Procedures, "chronic delinquency in the payment of rent" constitutes grounds for terminating the tenancy, and is defined as "[t]he tenant's repeated failure or refusal to pay rent within the month due, at least three times during any 12 month period. . . . Rent need not be in arrears at the time the action is instituted if the record clearly shows repeated failure or refusal to pay." See NYCHA Management Manual, Termination of Tenancy, Chapter VII.

of a reasonable excuse or explanation for petitioner not making any rent payments since August 2007, it cannot be said that the penalty of termination is "so disproportionate to the offense as to be shocking to one's sense of fairness." Kelly v. Safir, 96 NY2d 32, 38 (2001).

The petition also seeks an order directing the Housing Authority to process petitioner's 2007 and 2008 annual income verifications to reflect her unemployment and reduced household income. At the hearing, however, petitioner admitted that the Housing Authority "re-budgeted me in July 2007" after she submitted her annual income certification papers in July 2007. While petitioner asserts that she submitted income documentation in 2008 which the Housing Authority did not respond to, she has not produced copies of those documents, and the Housing Authority has no record of any papers submitted in 2008.

In any event, when the parties appeared for oral argument, counsel for the Housing offered on at least three separate occasions, to enter into a stipulation with petitioner to resolve the issue as to re-calculation of her rent. Specifically, the Housing Authority agreed to "reassess" petitioner's rent for the years 2007 through 2009, provided petitioner "submits the necessary documents." Petitioner refused to sign the stipulation, even after this court reminded her that she explicitly requested in her petition, as a form of relief, that

the Housing Authority recalculate her rent. Under these circumstances, petitioner is not entitled to an order directing the Housing Authority to recalculate her rent.

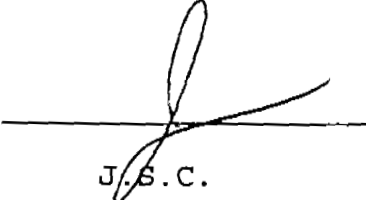
The court has considered the remaining issues raised in the petition and finds that they are insufficient to warrant Article 78 relief.³

Accordingly, it is

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

DATED: October 8, 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 141B).

³The court has not considered the post-argument papers submitted by petitioner on March 29, 2010.