

**Matter of Thomas v Rhea**

2010 NY Slip Op 33327(U)

November 19, 2010

Supreme Court, New York County

Docket Number: 400722/10

Judge: Alexander W. Hunter Jr

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

PRESENT: ALEXANDER W. HUNTER JR.

PART 33

Justice

Index Number : 400722/2010

**THOMAS, MARY**

vs.

**RHEA, JOHN B.**

SEQUENCE NUMBER : 001

ARTICLE 78

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

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

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

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-8

9-26

27-29

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

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Upon the foregoing papers, it is ordered that this motion

MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

*See memorandum decision and judgment annexed hereto.*

**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: 11/19/10

**ALEXANDER W. HUNTER JR.** 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 33**

-----X  
In the Matter of the Application of Mary Thomas,

Index No.: 400722/10

Petitioner,

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

-against-

John B. Rhea, as Chairperson and Member of  
Board of the New York City Housing Authority  
and the Members of the Board of the New York  
City Housing Authority,

*This judgment has not been filed with the County Clerk  
and notice of entry has not been given. To  
obtain entry, counsel for the petitioner must  
appear in person at the County Clerk's Office (Room  
1419).*

Respondents.

-----X  
**HON. ALEXANDER W. HUNTER, JR.**

The application by pro se petitioner for an order pursuant to C.P.L.R. Article 78, vacating and annulling respondents' administrative determination dated February 4, 2009 which terminated petitioner's tenancy, is denied and the petition is dismissed.

Petitioner asserts that she has resided alone at the premises known as the Frederick Douglass Houses at 860 Columbus Avenue, Apartment 19-H for approximately seven (7) years. She is disabled and suffers from depression and psychotic episodes. By notice dated July 20, 2008, respondents sent petitioner a notice of their intention to terminate her tenancy and a specification of charges. The specified charges were based upon petitioner's alleged violation of probation imposed upon her in 2004, unlawfully assuming the identity of another person and violating the residential lease agreement. An administrative hearing commenced on September 24, 2009.

Petitioner claims that she has no recollection of admitting or denying any of respondents' charges at the hearing. Respondents presented documents at the hearing to establish their charges of misrepresentation. The documents were statements from banks and credit card accounts. Additionally, respondents presented the person whose name had been used by petitioner to obtain lines of credit and accounts and said person indicated that she did not authorize those accounts. No other evidence was offered to establish or support the other charges against petitioner nor did respondents present any documentation of probation from any prior proceeding against petitioner.

Petitioner, in her defense, stated that she was not aware of any of the incidents until the commencement of the hearing process. She believed that an acquaintance may have been responsible for obtaining the accounts and offered what information she had for that person. Moreover, petitioner admitted that some of the property denoted on a Sears department store bill had been obtained by her as a secondary card holder. Petitioner did not open the bills since they were not addressed to her. Petitioner further claims that if she had been asked, she would have testified to receiving mail for numerous other people in her mailbox, addressed to her address,

people that she did not know or who were authorized to use her address. In addition, if she had been asked, she would have testified that she was under psychiatric care at St. Luke's Roosevelt Hospital Center.

By decision dated November 2, 2009, the hearing officer found that petitioner's admission and respondents' evidence showed that petitioner was a source of danger to her neighbors. The hearing officer also concluded that probation had not effectively modified the tenant's conduct but did not cite to any evidence of any terms of such a probation. As such, petitioner contends that the administrative hearing was affected by errors of law and was conducted in a manner that was arbitrary and capricious. Moreover, the charges were not supported by the evidence. Additionally, the evidence presented failed to establish the severity of any allegation sufficient to justify the relief granted by the hearing officer and the proceeding should be remanded for a hearing *de novo*.

Petitioner further argues that there was an absence of substantial evidence showing that petitioner knew of or was aware of any identify theft. Furthermore, the hearing officer failed to consider the extent of petitioner's disability due to the absence of any evidence offered by respondents to show that she was capable of self-representation. Accordingly, respondents' administrative determination of February 4, 2009 should be vacated and annulled.

Respondents oppose petitioner's application and offer specific facts that led up to the termination of petitioner's tenancy. Respondents contend that petitioner unlawfully used the identity of another resident to obtain goods and services. Respondents assert that on September 15, 2004, petitioner stipulated to a five-year probationary period to preserve her tenancy and resolve prior administrative charges in a termination of tenancy case against her. Said stipulation resolved charges of non-desirability and breach of rules and regulations which stemmed from petitioner robbing and assaulting a food delivery person on Housing Authority property. Pursuant to the terms of that stipulation, petitioner agreed not to commit any act which would constitute grounds for termination of her tenancy.

Respondents argue that as a public housing program funded by the federal government, they are authorized to terminate or restrict the tenancies of tenants whose criminal activity threatens the right to peaceful enjoyment of the premises by other tenants. The federal regulations are incorporated into the terms and conditions of the Housing Authority's resident lease agreement. A tenant facing termination is provided the opportunity to discuss the problem with the manager of the development and if the manager believes termination of tenancy is the appropriate course of action, the manager refers the case for the preparation of written administrative charges. Tenants are then entitled to a hearing on those charges before an impartial hearing officer. The Housing Authority advises tenants of their right to appear with an attorney or other representative.

In or around February of 2009, Douglass Houses' management received a report showing that petitioner had been arrested for identity theft after using the identity of Clara Ponce, another resident of Douglass Houses, to open a Verizon telephone service account and a Sears credit card.

Respondents contend that even though they were not obligated to do so, due to the fact that petitioner was already on probation, the Housing Manager of the housing development

informed petitioner that she was considering recommending the termination of petitioner's lease for nondesirability and breach of the rules and regulations in connection with petitioner's alleged theft of her neighbor's identity. Petitioner was asked to meet with the Housing Manager. Petitioner failed to appear for the scheduled appointment. The Housing Manager then sent petitioner another letter urging her to attend an appointment arranged for March 24, 2009. Petitioner appeared at the meeting and did not deny Ms. Ponce's complaint that petitioner had used her identity without permission to open a Verizon account and Sears credit card account. Petitioner was then informed that the matter would be referred for a hearing.

In the notice regarding the hearing and specification of charges, petitioner was advised that she could be represented by counsel. The hearing was scheduled for August 6, 2009 and was adjourned so that petitioner could have an opportunity to retain counsel. The Housing Authority provided petitioner with a list of attorneys and agencies which might be able to represent her. The hearing was then held on September 24, 2009 and October 27, 2009. Petitioner appeared pro se and requested another adjournment so that she could attempt to obtain representation. The Housing Authority opposed the request for an adjournment since petitioner had been informed several times that she could have legal representation. Moreover, respondents' witness, Clara Ponce, who now lived in Florida, had come to testify at the hearing and had no future plans to return to New York. The hearing officer permitted Ms. Ponce's testimony but adjourned the matter with respect to testimony of other witnesses to allow petitioner to continue to attempt to obtain legal representation.

At the hearing, the charges against the petitioner were read into the record by the hearing officer and petitioner was asked to admit or deny the charges. Petitioner admitted to unlawfully assuming the identity of another Housing Authority tenant by using that resident's personal identifying information to obtain goods, money or services. She also admitted that she violated the probation agreed to in the 2004 stipulation. Respondent also submitted into evidence the October 27, 2004 Determination of Status and the 2004 stipulation imposing the five (5) year probationary period.

Ms. Ponce testified that after receiving credit cards in her name for which she never applied, she called the police and filed a report. Photocopies of the two credit cards received by Ms. Ponce were submitted into evidence. Ms. Ponce also testified that she received approximately twenty (20) other credit card bills, letters from credit companies and letters from Verizon addressed to Clara Ponce at petitioner's address, 860 Columbus Avenue, Apartment 19H, New York, New York. After Ms. Ponce testified, the hearing was adjourned to October 27, 2009 to permit petitioner time to obtain representation. However, on October 27, 2009, petitioner was accompanied to the hearing by her 19 year old daughter and requested another adjournment to obtain representation. When the hearing officer observed that petitioner made very little effort to obtain legal representation, even though petitioner had been provided with a list of legal services on August 6, 2009, the hearing officer denied the request for an adjournment.

The hearing proceeded and respondents submitted two additional documents into evidence. The first document was petitioner's arrest report dated June 16, 2009, indicating that petitioner pled guilty to petit larceny and was sentenced to 10 days of community service and a conditional discharge. The second document was a certificate of disposition.

Petitioner made a statement in her defense, arguing that she is not a problem tenant and that she is up-to-date on her rent. She also explained on cross-examination that a friend who was staying with her temporarily, opened a Sears credit card account with petitioner as a secondary card holder. She used the credit card and did not pay any bills for the credit card because she believed her friend was taking care of the bills to help her out. Petitioner stated that she was arrested for using the Sears credit card and because she did not think that her friend, who had since moved out of the apartment, would come to her defense, she pled guilty. Petitioner also testified that her friend set up a Verizon account for petitioner's apartment and she believed her friend was paying the Verizon bill.

The hearing officer sustained all the charges against petitioner and decided that termination of petitioner's tenancy was appropriate. The Housing Authority's Board then adopted the hearing officer's decision to terminate petitioner's tenancy.

Respondents contend that the hearing officer's determination was supported by substantial evidence and that petitioner's criminal conviction for petit larceny estops her from relitigating her misconduct. Respondent further contends that where evidence conflicts, the reviewing court must rely on the credibility determinations made by the hearing officer. Therefore, even though petitioner testified at the hearing that it was her friend who used Ms. Ponce's identity, this court should defer to the hearing officer's credibility assessment.

Respondents further argue that petitioner violated her probation and that contrary to petitioner's assertions, the 2004 stipulation was entered into evidence as the Housing Authority's first exhibit.

Respondents contend that the Housing Authority's determination to terminate petitioner's tenancy is consistent with the law and proportionate to the offenses. The penalty of termination does not shock the conscience and courts have upheld the Housing Authority's denial of housing based on fraudulent or criminal conduct that could pose a risk to other tenants. Moreover, petitioner's assertion that she is disabled is not a mitigating factor because she failed to raise that argument at the administrative hearing and it is, therefore, waived. It was not until the Article 78 petition was filed that petitioner claimed to have a disability. Accordingly, the motion should be denied.

In Matter of Edwin A. Pell v. Board of Education of Union Free School District, 34 N.Y.2d 222, the Court of Appeals reiterated, "It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion [citations omitted]." Thus, this court's role is limited to the determination of whether or not there was a rational basis for the final determination made by NYCHA. This court cannot, "...substitute its own judgment for that of the agency. Even though the court might have decided differently were it in the agency's position, the court may not upset the agency's determination in the absence of a finding, not supported by this record, that the determination had no rational basis [citations omitted]." See, Matter of Mid-State Management Corp. v. New York City Conciliation and Appeals Board, 112 A.D.2d 72 (1<sup>st</sup> Dept. 1985); Matter of Sullivan County Harness Racing Assoc., Inc. v. Robert A. Glasser, 30 N.Y.2d 269 (1972).

This court finds that petitioner has not demonstrated that respondents' determination to

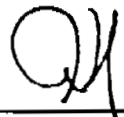
terminate her residency was not supported by substantial evidence. Moreover, the termination of petitioner's tenancy is a sanction that must be upheld unless it shocks the judicial conscience and thus constitutes an abuse of discretion as a matter of law. Termination of petitioner's tenancy herein does not shock the conscience. Courts have upheld a Housing Authority's denial of housing based on fraudulent or criminal conduct that could pose a risk to other tenants. Falson v. New York City Housing Authority, 283 A.D.2d 353 (1<sup>st</sup> Dept. 2001). In the case at bar, petitioner was already on probation since 2004 for the assault and robbery of a food delivery person when she committed the petit larceny against another tenant. Accordingly, this court finds that termination of her tenancy does not shock our sense of fairness. Harris v. Hernandez, 30 A.D.3d 269 (1<sup>st</sup> Dept. 2006); Featherstone v. Franco, 95 N.Y.2d 550 (2000).

Finally, petitioner's allegation that the hearing officer failed to consider whether or not she was capable of self-representation due to her disability is without merit as there was no indication that she informed the hearing officer that she suffered from any disability. Petitioner was given ample time to obtain legal representation and was provided with a list of attorneys and legal agencies. However, she failed to avail herself of the opportunity to obtain legal representation. Since there was no way the hearing officer or respondents could have known that petitioner suffered from a mental disability, they were not obligated to provide her with representation.

Accordingly, it is hereby,

ADJUDGED, that the petition is denied and the proceeding is dismissed, without costs and disbursements to the respondent, New York City Housing Authority.

Dated: November 19, 2010



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).