

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

2010 NY Slip Op 33675(U)

December 14, 2010

Sup Ct, New York County

Docket Number: 401742-10

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE  
*Justice*

PART 10

Index Number : 401742/2010

LATONI, MARIE

vs

NYC HOUSING AUTHORITY

Sequence Number : 001

ARTICLE 78

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

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

MOTION SEQ. NO. 001

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

The following papers, numbered \_\_\_\_\_, is 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

*(This judgment has been entered in the County Clerk's Office and notice of entry can be obtained from the County Clerk's Office. To obtain entry, counsel must appear in person at the Judgment Clerk's Desk (Room 141B).*

*Petition transferred to Appellate Division, First Department, as per decision and order attached hereto.*

Dated: Dec 14, 2010

J. Gische  
HON. JUDITH J. GISCHE *J.S.C.*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 10**

-----X

*In the matter of the application of*  
**MARIA LATONI,**  
Petitioner

**DECISION/ ORDER**  
Index No.: 401742-10  
Seq. No.: 001

**-against-**

**PRESENT:**  
Hon. Judith J. Gische  
J.S.C.

**NEW YORK CITY HOUSING AUTHORITY,**  
Respondent.

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of  
(these) motion(s):

*As judge, I have reviewed the papers filed by the County Clerk  
and notice of entry of judgment based thereon. To  
obtain entry of judgment, the representative must  
appear in person at the Judgment Clerk's Desk (Room  
1415).*

<b>Papers</b>	<b>Numbered</b>
Verif Pet w/exhs, poor person application . . . . .	1,2
Verif Answer . . . . .	3
Reply . . . . .	4

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*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is an Article 78 proceeding brought by petitioner Marie Latoni ("petitioner") who seeks judicial review of the June 9, 2010 determination by respondent the New York City Housing Authority ("NYCHA") that terminated her tenancy in Apt. 12G at 90 Avenue D in Manhattan. The building is a part of the Riis Houses, a complex owned and operated by NYCHA. Petitioner seeks a judgment annulling NYCHA's determination on the grounds that it is not supported by substantial evidence that petitioner intentionally and knowingly violated the terms of a stipulation she entered into in 2006 ("stipulation"). NYCHA has filed its verified answer and seeks an order denying the petition and

dismissing this proceeding on the basis that the evidence substantiated the charges against petitioner and warranted her termination as a (CPLR § 7804 [h]).

### **BACKGROUND AND FACTUAL ALLEGATIONS**

Petitioner, who has a diagnosed mental disability, has resided in her apartment within the Riis Houses for 25 years. She is a single parent of two adult sons and also has two younger children, ages twelve and nine.

Pursuant to her stipulation with NYCHA, petitioner agreed to exclude Victor Alvarez ("Alvarez") the younger children's father, from the apartment. The stipulation was to settle a prior action against her brought in 2006 involving charges that he was selling heroin from or in the vicinity of petitioner's apartment (Case No. 443/06). The stipulation allowed petitioner to remain in occupancy, provided the exclusion continued for so long as she was a tenant in the Riis Houses.

In 2008, the police executed two search of petitioner's apartment pursuant to a warrant. When the second warrant was executed, petitioner, Alvarez and petitioner's adult son, Shaun Martinez ("Martinez") were arrested and charged. Martinez was charged with possession of marijuana. Methadone was also found in the apartment along with \$4,200 in cash and correspondence addressed to Alvarez at the apartment. Other charges against the petitioner and Alvarez were endangerment of the welfare of a child.

NYCHA notified petitioner of administrative charges against her, seeking the termination of her tenancy based upon her allowing unauthorized occupants to sell drugs in her apartment, tampering with evidence, child endangerment, violation of the exclusion stipulation, and also chronic rent delinquency. Since petitioner had identified herself as suffering from a mental disability, a guardian ad litem was designated for her.

At the testimonial hearing on March 12, 2010, with the guardian ad litem present, petitioner notified the panel that she had retained a lawyer. The hearing was adjourned and on the adjourn date (April 23, 2010), petitioner and her attorney objected to the appointment of the guardian ad litem. The guardian remained in court while the hearing was held.

Following the testimonial hearing, the hearing officer recommended that petitioner's tenancy be terminated for a number of reasons. The hearing officer did not find petitioner's testimony credible that her children had let Alvarez into her apartment, not realizing he was not allowed to visit. He also did not believe this was an isolated incident, based upon the overwhelming evidence. He did note, however, that once Alvarez was arrested, there were no further incidents of police action related to the apartment. On the other hand, he also noted that Alvarez was due to be released soon (August 2010) and that petitioner, by her own admission, had little control over his conduct. Thus, according to the hearing officer, the credible evidence demonstrated that the tenant was "unable or unwilling to prevent Victor Alvarez from entering the subject apartment."

Although he found mitigating circumstances present, he found them "insufficient to salvage the tenancy."

Petitioner argues that throughout her tenure, she has been a model tenant and "never been in any trouble." She contends that she is a victim, not the criminal, and that it is Alvarez who causes problems every time he is released from jail. She provides documentary proof of an old restraining order against Alvarez and more recent proof that she contacted Safe Horizons for help. She has also contacted various advocacy groups who are working with her. She denies having any personal involvement in the drug sales

and points out that her older son was only staying with her for a week or two because she was being threatened by another tenant.

### DISCUSSION

“Judicial review of an administrative determination made as the result of a hearing required by law is limited to whether that determination is supported by substantial evidence (see Matter of Silberfarb v. Board of Coop. Educ. Servs., 60 N.Y.2d 979, 981 [1983]; Whitten v. Martinez, 24 A.D.3d 285 [1<sup>st</sup> dept 2005]).” (Verdell v. Lincoln Amsterdam House, Inc., 27 A.D.3d 388, 390 (1<sup>st</sup> dept 2006).

Article 78 “prohibits the Supreme Court from reaching the issue of whether an agency determination is supported by substantial evidence and requires that such petitions be transferred to the Appellate Division . . . .” (Verdell v. Lincoln Amsterdam House, Inc., supra at 390 [*internal citations omitted*]). Petitioner is not only challenging the determination by NYCHA as being against the weight of the evidence presented and adduced at the hearing, she is also challenging the penalty imposed as being unduly harsh so as to shock the conscience. Based upon the foregoing, this proceeding must be transferred to the Appellate Division, First Department in accordance with CPLR §§ 7803 (4) and 7804 (g) because there is a substantial evidence issue (Al Turi Landfill v. N.Y. State Dep’t of Env. Conserv., 98 NY2d 758, 760 [2002]; Carson v. New York City Housing Authority, 25 A.D.3d 462 [1<sup>st</sup> Dept 2006]; Matter of Porter v New York City Hous. Auth., 42 AD3d 314 [1<sup>st</sup> Dept 2007]). There is also an issue of whether the penalty imposed – termination of tenancy– is unduly harsh (Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222 [1974]).

Although CPLR 7804 (g) authorizes the Supreme Court to decide any issues that would terminate this proceeding, there are mixed questions of law and fact in this case and petitioner has raised issues of substantial evidence that mandate the transfer of this petition to the Appellate Division (Santiago v. East Midtown Plaza Housing Co., Inc., 59 A.D.3d 174 [1<sup>st</sup> Dept 2009]).

**Conclusion**

Based upon the foregoing,

IT IS HEREBY

ORDERED, DECLARED AND ADJUDGED that the petition seeking the vacatur and annulment of respondent's decision to terminate her tenancy is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR § 7804 (g). This proceeding involves an issue as to whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant of law, is, on the entire record, supported by substantial evidence [CPLR 7803 (4); CPLR 7804 (g)]; and it is further

ORDERED that the Clerk of the Court is directed to transfer the file to the Appellate Division, First Department, upon service of a copy of this Order with Notice of Entry; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this shall constitute the decision, order and Judgment of the court.

Dated: New York, New York  
December 14, 2010

So Ordered:

Hon. Judith J. Gische, J.S.C.

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk and notice of entry cannot be entered based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 1101) on the 5th floor of the County Clerk's Office, 100 Nassau Street, New York, NY 10038.