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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Alexander W. Hunter, Jr. Justice

PART 33

Index Number : 400778/2011

GUZMAN, ELIZABETH

VS.

NYC HOUSING AUTHORITY

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

otion to/for _____

No(s). 1-6

No(s). 7-25

No(s). _____

Upon the foregoing papers, it is ordered that this motion is

See memorandum decision 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)

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

Dated: 5/6/11

_____, J.S.C.

1. CHECK ONE: ..... ☑ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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In the Matter of the Application of Elizabeth Elizabeth Guzman,

Index No.: 400778/11

Petitioner,

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

-against-

New York City Housing Authority,

Respondent.

----------X

HON. ALEXANDER W. HUNTER, JR.

The application by pro se petitioner for an order pursuant to C.P.L.R. Article 78, reversing respondent's determination to terminate petitioner's tenancy, dated February 7, 2011, 2010, is denied and the petition is dismissed.

Petitioner asserts that respondent's determination should be reversed and that this court should have mercy on her because she has two (2) young daughters aged 8 and 13 who have no fault in what their three (3) older siblings ages 21, 23 and 24 have done. Petitioner states in her affidavit that her older children have "brought down" her family by getting into trouble in the streets and making the police raid her apartment and arrest her in front of her two younger daughters. She further admits that she was fearful that her older children would harm her so she let them stay in the apartment. Moreover, she lost her job after the police raided her apartment. She claims that she is working part-time "on-off" through an agency and is in the process of getting her rent paid through public assistance. She requests that this court give her another chance to start over and asserts that when the police raided her apartment, "nothing substantial was ever found and every case has been dismissed." (Affidavit, para. 3).

Respondent opposes the motion and submits a verified answer stating that the Housing Authority terminated petitioner's tenancy because, among other things, she: violated probation; unlawfully possessed, sold or attempted to sell cocaine and marijuana, alone or in concert with others, in her apartment; violated a 2009 permanent exclusion agreement in which she agreed to permanently exclude her son, Michael Pineyro from her apartment, on multiple occasions; failed to ensure that other individuals in her apartment refrain from illegal activity; and chronically failed to pay her rent between November 2009 and November 2010.

Respondent contends that because petitioner defaulted, the only issue before this court is whether the hearing officer's denial of petitioner's request to open her default was rational. Respondent argues that pursuant to the Housing Authority's Termination of Tenancy Procedures, if the tenant fails to appear at the hearing, the hearing officer shall note the default upon the record and shall make his/her written decision on the record before him/her. Once petitioner defaulted by failing to appear for the hearing, the hearing officer considered the charges against her and, in the absence of any controverting evidence, found that the Housing Authority had

sustained the charges terminating petitioner's tenancy. Thus, the determination to terminate petitioner's tenancy is not reviewable at this time and the issue before this court is whether the hearing officer properly denied petitioner's application to open her default.

The Housing Authority's Termination procedures state that if a tenant fails to appear at the hearing and the hearing officer makes his/her written decision on the record before him/her, "Upon application of the tenant made within a reasonable time after his/her default in appearance, the Hearing Officer may, for good cause shown, open such default and set a new hearing date." (Respondent's Exhibit B, p. 2, para. 8). Good cause for setting aside a default under the Housing Authority's termination procedures requires the tenant to establish both a reasonable excuse for the default and a meritorious defense. Courts have upheld terminations of tenancy on default when tenants have failed to establish good cause.

Respondent asserts that the hearing officer properly denied petitioner's request to vacate her default because petitioner did not establish a reasonable excuse for her failure to appear at the administrative hearing involving the termination of her tenancy and she failed to state a meritorious defense to the charges against her tenancy. The excuse petitioner offered for failing to appear for the hearing was that she "came down with the flu" and she did not feel well. However, she failed to submit any documentation to support her claim, such as a doctor's note, nor did she call the Housing Authority to re-schedule the hearing or send a representative in her place to seek an adjournment.

Respondent further asserts that petitioner does not have a meritorious defense to the charges against her as she admitted in her application to vacate the default entered against her that the charges are true but that she did not know her kids "were doing these things" and she was now willing to remove them from her apartment. (Respondent's Exhibit M). The hearing officer did not find this to be a meritorious defense to the charges. Respondent contends that petitioner's claim that she was unaware of the drug activity in her apartment is irrelevant as courts have held that a Housing Authority's determination terminating a petitioner's tenancy did not depend on whether petitioner knew that drugs were being stored and sold from her apartment. **Satterwhite v. Hernandez, 16 A.D.3d 131 (1st Dept. 2005).**

In addition, respondent asserts that petitioner's claim that she is now willing to exclude her adult children from her apartment lacks credibility as petitioner previously settled charges against her by agreeing to exclude her son, Michael, from her apartment but then she immediately violated that agreement. Moreover, in terms of the merits, petitioner failed to address the chronic rent delinquency charges. The hearing officer found that petitioner failed to set forth a meritorious defense to the charges that she owed over $2,686.80 at the time she submitted the request and now owes over $3,098 in arrears, representing over fifteen (15) months' rent. Therefore, her petition should be dismissed.

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 NYCHA's hearing officer's denial of petitioner's application to open her default. 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 (1st Dept. 1985); Matter of Sullivan County Harness Racing Assoc., Inc. v. Robert A. Glasser, 30 N.Y.2d 269 (1972).

In the case at bar, petitioner defaulted by failing to appear for the hearing with respect to the charges against her tenancy. Respondent is correct that this court is limited to reviewing the denial of petitioner's application to open her default and not the underlying determination made by the hearing officer. See, Yarbough v. Franco, 264 A.D.2d 740 (2nd Dept. 1999), where the court found that petitioner was not entitled to CPLR article 78 review of the determination that was entered upon her default, after she failed to appear for the hearing with respect to the termination of her tenancy and the hearing officer found that the charges against the petitioner were sustained.

This court finds that the hearing officer rationally denied petitioner's application to open her default. In order to set aside a default in a termination of tenancy hearing, the defaulting party must, within a reasonable time after the default, demonstrate good cause. In Cherry v. New York City Housing Authority, 67 A.D.3d 438 (1st Dept. 2009), the court held that, "...the application court properly refused to annul respondent's refusal to open petitioner's default in appearing at the termination-of-tenancy hearing since, as petitioner concedes, she failed to provide a reasonable excuse for the default and documentation supporting her defense..." Id. at 439; see also, Velasquez v. New York City Housing Authority, 23 A.D.3d 313 (1st Dept. 2005).

In the case at bar, petitioner's excuse for her default was that she was sick with the flu. However, she did not contact respondent to re-schedule the hearing and provided no documentation to support her claim that she had the flu. Therefore, the hearing officer correctly found that petitioner failed to provide a reasonable excuse for her default.

In terms of a meritorious defense, petitioner actually admitted in her application to vacate the default against her, that the charges against her were true. She claims she did not know what her oldest children were doing and agreed to exclude them permanently from her apartment. However, in Satterwhite v. Hernandez, supra, the court found that the determination terminating petitioner's tenancy did not depend on whether petitioner knew that drugs were being stored in and sold from her apartment. In addition, petitioner already entered into a stipulation with respondent wherein she agreed to exclude her eldest son from her apartment. However, she violated that stipulation and freely admits to letting him and her other eldest children stay in her apartment. Therefore, her assertion that she will now permanently exclude her eldest children from her apartment is unavailing.

With respect to petitioner's request that this court have mercy on her and her two minor daughters, in Satterwhite v. Hernandez, Id., the court ruled that even though termination of tenancy would be a hardship to the petitioner and her two minor children, "...we do not find that the penalty of termination shocks the conscience..." (citations omitted). Id.; see also, Featherstone v. Franco, 95 N.Y.2d 550 (2000).

Finally, petitioner failed to state a meritorious defense to her chronic rent delinquency charges in her request to vacate the default. In her application in support of the instant motion, petitioner claims that she is in the process of getting her rent paid through public assistance. She never raised that defense in her initial application before respondent's hearing officer. Moreover, she failed to annex any documentation with her moving papers to show that public assistance

will help pay her arrears or her monthly rent. Courts have frequently upheld a hearing officer's decision not to vacate a default where petitioner owed a substantial amount of rent. (Respondent's Exhibit P).

Accordingly, since petitioner has failed to show that she has a reasonable excuse for her default or a meritorious defense, the hearing officer's decision denying petitioner's application to open her default was not irrational. 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: May 6, 2011

J.S.C.