

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

2011 NY Slip Op 31364(U)

May 20, 2011

Supreme Court, New York County

Docket Number: 402853/10

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE  
*J.S.C.*

PART 5

Index Number : 402853/2010  
**FLOWERS, NAKIA**  
VS.  
**NYC HOUSING AUTHORITY**  
SEQUENCE NUMBER : 001  
ARTICLE 78  
  
CAL # 36

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

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

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

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

this motion to/for article 78

PAPERS NUMBERED

1  
2, 3  
4

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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: 5/20/11

BJ  
BARBARA JAFFE *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 : PART 5

-----X  
In the Matter of the Application of NAKIA FLOWERS,

Index No. 402853/10

Petitioner,

Motion Date: 3/22/11  
Motion Seq. No.: 001

-against-

**DECISION & JUDGMENT**

NEW YORK CITY HOUSING AUTHORITY,

Respondent.  
-----X

**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).

BARBARA JAFFE, JSC:

**For petitioner self-represented:**  
Nakia Flowers  
765 Stanley Ave. Apt. 10A  
Brooklyn, NY 11207  
347-368-7906

**For respondent:**  
Nancy M. Harnett, Esq.  
Sonya M. Kaloyanides, GC  
New York City Housing Authority  
250 Broadway, 9<sup>th</sup> Fl.  
New York, NY 10007  
212-776-5010

By amended notice of petition dated October 6, 2010, petitioner brings this Article 78 proceeding seeking to reverse respondent's determination dated September 15, 2010 upholding the termination of her tenancy. Respondent opposes the petition.

I. BACKGROUND

By lease dated June 10, 2004, petitioner rented an apartment in respondent's Boulevard Houses development. Petitioner was required to pay rent on the first day of each month, and her lease permitted respondent to terminate her tenancy if she failed to pay her rent. (Verified Answer, dated Dec. 30, 2010 [Ans.], Exh. A). Respondent's procedures also permit it to terminate a tenancy based on a tenant's chronic delinquency in the payment of rent, defined as a tenant's repeated failure or refusal to pay rent when due. (*Id.*, Exh. B).

By letter dated March 12, 2008, petitioner was advised that respondent was considering the termination of her lease and that she could discuss the issue with respondent on March 19, 2008. (*Id.*, Exh. D). Petitioner failed to respond to the letter and respondent scheduled another appointment for March 26, 2008. (*Id.*, Exh. E).

By notice dated July 3, 2008, respondent advised petitioner that it had scheduled a hearing to be held on August 1, 2008 to determine whether her tenancy should be terminated based on her failure to pay rent on time or not at all between April 2007 and March 2008. (*Id.*, Exh. G). The notice also reflects that between 2007 and 2008, three eviction proceedings had been instituted against petitioner and a warrant of eviction issued. (*Id.*).

By decision dated August 4, 2008, respondent's hearing officer sustained the charges against petitioner after she failed to appear for the August 1 hearing. (*Id.*, Exh. H). On September 8, 2008, petitioner requested a new hearing, denying that she had received notice of the hearing and alleging that her rent was paid in full and up to date. (*Id.*). By letter dated October 22, 2008, respondent vacated petitioner's default. (*Id.*).

By letter dated November 13, 2008, respondent scheduled a hearing for December 12, 2008 based on charges that petitioner was chronically delinquent in the payment of her rent between October 2007 and September 2008 by failing to pay rent when it was due. (*Id.*, Exh. I).

By letters dated February 11, 2009, April 8, 2009, July 13, 2009, and September 29, 2009, respondent repeatedly amended its charges to allege that petitioner had failed to pay her rent when due or at all between January 2008 and May 2009 and repeatedly adjourned the hearing. (*Id.*).

On October 22, 2009, petitioner failed to appear for the last scheduled hearing, and by

decision dated that day, respondent's hearing officer sustained the charges against her. (*Id.*, Exh. K). By determination dated November 4, 2009, respondent upheld the hearing officer's decision and terminated petitioner's tenancy. (*Id.*).

On November 23, 2009, petitioner requested a new hearing, stating that she missed the October 22 hearing due to financial problems. She also claimed that public assistance had paid all of her overdue rent and that she was no longer on public assistance and would be paying her rent from her child's SSI payments, and that she would pay her rent on time. (*Id.*, Exh. L). Respondent opposed petitioner's request, observing that the matter had already been adjourned several times and that petitioner had defaulted once before, and argued that petitioner had no meritorious defense as she owed rent from October to December 2009 and did not indicate how she would pay the overdue amount. (*Id.*).

By decision dated December 18, 2009, respondent denied petitioner's application, finding that she had not established an excusable default as she could have requested an adjournment, nor a meritorious defense as she owed rent and did not submit a plan to become current. (*Id.*).

Petitioner then commenced an Article 78 proceeding, which was settled by stipulation dated May 21, 2010, in which respondent agreed to vacate its November 2009 determination terminating petitioner's tenancy and schedule a new hearing on the charges against her. (*Id.*, Exh. N). On June 16, 2010, respondent approved the stipulation. (*Id.*).

By letter dated July 29, 2010, Respondent scheduled the hearing for September 1, 2010, and annexed its charges against her, which reflect that petitioner had paid her rent untimely between July 2009 and February 2010 and had paid no rent between March and July 2010. (*Id.*, Exh. O).

On September 1, 2010, the hearing was held and petitioner admitted that she had been chronically delinquent in paying her rent. Respondent offered evidence showing that petitioner currently owed \$2,279.16 in rent and a housing assistant testified that petitioner had given several explanations for failing to pay rent, including the loss of her employment and the discontinuance of her public assistance benefits. Although petitioner was given an opportunity to give a statement or explanation in her defense, she declined to do so. (*Id.*, Exh. P).

By decision dated September 2, 2010, the hearing officer sustained the charges against petitioner, finding that petitioner had failed to honor her obligation to pay rent timely, and imposed the penalty of termination of petitioner's tenancy, observing that:

Although [petitioner] may have offered explanations to [the housing assistant] for her inability to pay her rent in a timely fashion, no evidence was presented establishing that [petitioner] has a viable plan for become current with rent and to continue to make future rent payments in a timely fashion. Absent such crucial evidence, there is nothing in the record to support a mitigated sanction.

(*Id.*, Exh. T).

By determination dated September 15, 2010, respondent approved the hearing officer's decision and terminated petitioner's tenancy. (*Id.*, Exh. U).

## II. CONTENTIONS

Petitioner alleges that she is a single parent with a disabled child and is herself suffering from a crippling disorder. She denies owing the amount claimed to be overdue and maintains that she unsuccessfully applied for public assistance to help her pay her rent and is currently awaiting a fair hearing. Petitioner also contends that her apartment failed an inspection. (Verified Petition, dated Oct. 5, 2010). Petitioner annexes New York City Civil Court stipulation dated June 29, 2010, which reflects that she owed \$1,352.16 in rent as of June 30, 2010,

representing rent due from June 2009 to June 2010, that execution of the warrant of eviction would be stayed if petitioner paid the amount due by July 29, 2010, and that respondent would inspect and repair petitioner's apartment. She submits a hospital record indicating that in May 2010 she was diagnosed with a back condition. Petitioner also accuses respondent's housing assistant of verbally and sexually harassing her. (*Id.*).

Respondent argues that its determination was rational and based on the evidence and petitioner's admission that she had been chronically delinquent in paying rent, that petitioner's allegations in her petition may not be considered here as she did not raise them at the hearing, and that termination of her tenancy is not shocking to the conscience in light of her repeated and admitted failure to pay her rent timely. (Memo. of Law, dated Dec. 30, 2010).

In reply, petitioner contends that her rent arrears have been or will be paid by public assistance as she had a fair hearing on December 17, 2010 and received a notice on January 3, 2011 stating that public assistance would pay her arrears. She also contends that respondent overcharged her and lost her payments. (Reply Affidavit, dated Jan. 19, 2011).

### III. ANALYSIS

The only questions that may be raised in a proceeding to challenge action or inaction by a state or local government agency are, in pertinent part, whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . . (CPLR 7801, 7803[3]). In reviewing an administrative agency's determination as to whether it is arbitrary and capricious, the test is whether the determination "is without sound basis in reason and is generally taken without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck*,

*Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of E.W. Tompkins Co., Inc. v State Univ. of New York*, 61 AD3d 1248, 1250 [3d Dept 2009], *lv denied* 13 NY3d 701; *Matter of Mankarios v New York City Taxi and Limousine Commn.*, 49 AD3d 316, 317 [1<sup>st</sup> Dept 2008]; *Matter of Soho Alliance v New York State Liq. Auth.*, 32 AD3d 363, 363 [1<sup>st</sup> Dept 2006]; *Matter of Kenton Assocs., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1<sup>st</sup> Dept 1996]). If the court determines that the administrative determination has a rational basis, the court's inquiry is complete; it may not substitute its judgment for that of the administrative agency. (*Paramount Communications, Inc. v Gibraltar Cas. Co.*, 90 NY2d 507 [1997]).

Absent any dispute that petitioner repeatedly failed to pay her rent timely between 2007 and 2010, respondent's determination was rational and neither arbitrary nor capricious, and the termination of petitioner's tenancy is not shocking to the conscience. (*See Zimmerman v New York City Hous. Auth.*, 2011 WL 1796315, 2011 NY Slip Op 03969 [1<sup>st</sup> Dept] [petitioner's chronic rent delinquency provided grounds for respondent's termination of tenancy, notwithstanding petitioner's claim that public assistance untimely paid his rent]; *Davis v Hernandez*, 13 AD3d 90 [1<sup>st</sup> Dept 2004] [affirming denial of petitioner's application to annul Respondent determination terminating tenancy based on chronic rent delinquency]).

While petitioner advances allegations concerning the charges against her, she was given an opportunity to present a defense or make a statement at the hearing, but declined to do so, and is thus precluded from raising all of the issues set forth herein. (*Yarbough v Franco*, 95 NY2d 342 [2000] [judicial review of administrative proceedings confined to facts and record before agency]; *see Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328 [1<sup>st</sup> Dept 2007] [court could not consider evidence raised for first time in article 78 proceeding]). She also failed to

submit any evidence concerning her claim that public assistance has now paid or will pay all of her overdue rent.

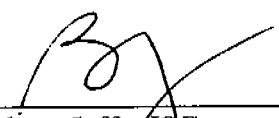
Moreover, in light of the issuance by the New York City Civil Court of a judgment of possession and warrant of eviction in favor of respondent against petitioner, I have no authority to grant petitioner the relief requested. (See *Cherry v New York City Hous. Auth.*, 67 AD3d 438 [1<sup>st</sup> Dept 2009] [article 78 proceeding could not be maintained as result petitioner ultimately sought, restoration of her tenancy, would nullify judgment of Civil Court awarding possession of apartment to respondent]; *Bobian v New York City Hous. Auth.*, 55 AD3d 396 [1<sup>st</sup> Dept 2008] [reversing Supreme Court's decision granting petitioner's application to annul respondent's determination terminating petitioner's tenancy based on chronic rent delinquency to extent of remanding matter to respondent for it to impose lesser penalty; as respondent had already obtained judgment of possession and warrant of eviction in Civil Court, "Supreme Court exceeded its authority by effectively nullifying Civil Court's judgment and warrant, which were not subject to collateral attack in Supreme Court absent a showing, not made here, that Civil Court lacked jurisdiction to award possession to (respondent) or order petitioner's eviction"]).

IV. CONCLUSION

Accordingly, it is hereby

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

ENTER:

  
Barbara Jaffe, JSC

DATED: May 20, 2011  
New York, New York

**UNFILED JUDGMENT**  
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