[* 1]

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

PRESENT: ALICE SCHLESINGER PART IA PART 16

Justice

Index Number : 401585/2010
CANTRES, GLADYS
VS.
NEW YORK CITY HOUSING
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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 proceeding is granted and the proceeding is remitted to respondent for a new hearing consistent with the terms of this decision.

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: MAY 17 2011

ALICE SCHLESINGER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

----------x

In the Matter of the Application of
GLADYS CANTRES,

Petitioner,

Index No. 401585/10
Motion Seq. No. 001

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

- against -

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

----------x

SCHLESINGER, J.:

This case presents the all too common scenario where a public housing tenant, suffering from mental illness and unrepresented by counsel, has failed to adequately explain to the Hearing Officer mitigating circumstances related to the charges against her, and the Hearing Officer has elected to terminate the tenancy without inquiring beyond the cursory set of facts presented by the agency. The tenant, petitioner Gladys Cantres, now asks this Court via this Article 78 proceeding to vacate the April 22, 2010 Hearing Officer's determination and reinstate her tenancy. Respondent New York City Housing Authority (NYCHA) opposes.

Background Facts

Since February 2001, Gladys Cantres has been a tenant living with her two young adult children in apartment 2B at 855 Hunts Point Avenue in the Bronx, a building owned and operated by respondent New York City Housing Authority (NYCHA). Her file indicates a blemish-free tenancy, that is, until October 10, 2009. In the early morning hours of that day, a search warrant of her apartment was executed

by, among others, Police Officer Joshua Perez. Officer Perez later testified as the sole NYCHA witness at a hearing to terminate the Cantres tenancy for nondesirability. He stated that the warrant, admitted into evidence at the hearing, was based on two controlled buys of heroin at the premises, but no details of those buys were ever presented at the hearing or specified in the warrant (Exh J). Nor, even more significantly, was anyone ever prosecuted for these alleged sales, despite the fact that Officer Perez in answer to a question at the hearing said that he believed the seller was James Murphy.

Murphy, a boyfriend of Gladys Cantres, was at the premises on that October 10 morning along with Carmen Burgos, the daughter of Ms. Cantres. Officer Perez testified that he had recovered at that time some marijuana, he believed from the bedroom night stand, and some envelopes of heroin, he believed by the window sill. Lab tests entered into evidence confirmed an aggregate weight of marijuana equal to about ½ an ounce and heroin equal to 0.003 ounces (Exh N).

All three individuals in the apartment when the warrant was executed — Murphy, Cantres, and her daughter Burgos — were charged with possession of a controlled substance. Burgos pled guilty on March 9, 2010 to the violation of disorderly conduct with a one year conditional discharge. On that same day Murphy, the alleged two-time heroin seller with a minor record for petit larceny and an arrest for public possession of marijuana, was allowed to plead to the misdemeanor of possession of a controlled substance in the seventh degree. Like Burgos, Murphy received a sentence of a one year conditional discharge but also with a license suspension of six months. (The type of license was not specified).

Months earlier and well before the hearing was held, on December 1, 2009, all charges against petitioner Cantres had been dismissed. However, this fact was never brought out at the hearing. Nor, significantly, did the Hearing Officer ever inquire into the status of the criminal charges filed against Ms. Cantres. Rather, this fact was established at oral argument before this Court on December 17, 2010, when Ms. Cantres produced a December 17, 2010 letter from Philip W. Coleman, Esq. of the Law Offices of Coleman & Andrews, LLC to NYCHA. In the letter Mr. Coleman indicated that he had represented Ms. Cantres in a false arrest civil action against the City of New York relating to her arrest on October 10, 2009 in the apartment. Attached to his letter was a copy of the certificate of disposition indicating that the case had been dismissed with a direction that "the arrest and prosecution shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status occupied before the arrest and prosecution." Mr. Coleman further indicated in his letter to NYCHA that no basis existed for NYCHA to evict Ms. Cantres in light of this disposition.

Ms. Cantres also submitted to this Court during oral argument the December 8, 2010 official Closing Statement that Mr. Coleman had submitted to the Office of Court Administration confirming that the false arrest action had been settled in favor of Ms. Cantres for the sum of $2500.00. Although these documents post-date the hearing, the criminal charges against Ms. Cantres had been dismissed well before the hearing and that fact was Ms. Cantres was undeniably relevant to the Hearing Officer's determination of NYCHA's request to terminate the tenancy.

After NYCHA rested, the Hearing Officer swore in Ms. Cantres and then simply asked her: "What would you like me to know?" Ms. Cantres then stated quite

emphatically that Mr. Murphy did not live with her, that she was simply "seeing" him, and that she did not know he was using drugs. Regarding the claim that Mr. Murphy was selling drugs from the apartment, Ms. Cantres insisted that she was unaware of any such conduct, that she did not permit or even condone it, and that Mr. Murphy had already confirmed in another proceeding that he lived elsewhere:

> If he was doing it [i.e., selling drugs], he was doing [it] outside not in my house because I didn't allow that in my house. And I have proof that he went to court because they told him he can't come back to my house. They gave him this piece of paper, which had this address.

Ms. Cantres then presented, and the Hearing Officer accepted into evidence, a Stipulation of Settlement in a Bronx Supreme Court action before Justice Diane Lebedeff entitled *The City of New York v The Land and Building Known as 855 Hunts Point Avenue, the New York City Housing Authority, and John and Jane Doe,* Index No. 250049/2010 (Exh Q). It appears from the Stipulation, dated January 10, 2010, a date about three months before the hearing, that the City had commenced an action to enjoin a public nuisance at the apartment following the October 2009 drug-related arrests at the Cantres apartment. The Stipulation (at ¶1) referred to James Murphy as a "visitor" at the apartment, a word that had been written in place of the word "lessee" on the pre-printed stipulation form. In ¶3, the Stipulation enjoined the "criminal sale and/or possession of heroin or for any other activity in violation of Article 220 of the New York Penal Law." Paragraph 4, providing for unannounced inspections, had been stricken. Paragraph 5 of the form had been modified to provide that, in the event of a violation of the Stipulation, James Murphy "will immediately vacate the subject premises and will not be permitted inside the subject premises for any reason without further judicial

intervention." Counsel for the City had stricken out that portion of the pre-printed paragraph requiring that the tenant also vacate the apartment upon any breach of the Stipulation. Following his signature, Mr. Murphy crossed out the address for the Cantres apartment and wrote his own address as "1979 Walton Avenue 5D, Bronx, NY 10452."

While Ms. Cantres offered the Stipulation as proof that Murphy had another address and did not reside in her apartment, NYCHA counsel suggested that, at best, it constituted proof as of January 2010 and not as of the date of the arrest. As a defendant in that Bronx action, NYCHA knew, or should have known, about the Stipulation before the NYCHA hearing, yet counsel not only failed to bring it to the attention of the Hearing Officer, but continued to argue against it. Nevertheless, the document did support the assertion by Ms. Cantres that Murphy was not living in the apartment, nor even staying there, as of the date of the NYCHA hearing. Indeed, as Ms. Cantres emphatically declared again: "But in the back it states his address. He doesn't live in my apartment." The Hearing Officer reluctantly agreed, stating: "Well, it looks like this from a settlement." Nevertheless, in her decision she completely discounted it, stating that: "Even if James Murphy had an alternative address, his use of the apartment for his own purposes shows that he resided there." (Exh R).

The Hearing Officer then questioned Ms. Cantres, referring first to the testimony of Officer Perez that he had the "impression" that Murphy was "at least in part living with you." Ms. Cantres again denied that claim, stating "Not in part living with me because he would come like Friday stay with me Saturday and Sunday and then he would leave. ... That was it." After confirming that the two shared the back bedroom during those times, the Hearing Officer inquired whether Ms. Cantres had seen the heroin on the

windowsill or the marijuana on the night stand. Ms. Cantres insisted that she "didn't know" and that anything found was a small amount for Murphy's "personal use." The Hearing Officer continued to press, and Ms. Cantres remained firm in her testimony, explaining:

> No, I didn't see it because he sleeps on that side where the windowsill is at. So I didn't know that was there. When they came in that's why I started crying because I didn't know. I didn't know. And I am a sick person I have diabetes I have bipolar depression and I take pills and once I take my pills at 8:30 I go to sleep. So like I said whatever he was doing he wasn't doing it from my house. As far as I was concerned and my kids.

Expressing her incredulity, the Hearing Officer continued to press Ms. Cantres, but Ms. Cantres did not waiver in her testimony that Murphy did not live in her apartment and that she was wholly unaware that he had brought drugs into the apartment.

Neither the Hearing Officer nor NYCHA counsel asked Ms. Cantres a single question about the medical issues to which she had testified, even though both her bipolar depression and medication causing her to fall asleep at 8:30 p.m. are facts relevant to issues such as Ms. Cantres' alleged knowledge of Murphy's alleged unlawful activity at the apartment. Ms. Cantres brought to the oral argument before this Court documentary evidence of her condition. Specifically, she brought a letter from Edwin L. Cueva, M.D., her treating physician at Urban Health Plan, Inc. in the Bronx. In the letter, dated June 8, 2010, the doctor stated as follows:

> I am writing this letter on behalf of Ms. Gladys Cantres who is currently receiving psychiatric treatment at Urban Health Plan (Behavioral Unit). Ms. Cantres is under treatment for symptoms of Bipolar Disorder, depressed and in a combination of seroquel, clonazepam and wellbutrin XL with moderate results. Ms. Cantres psychiatric symptoms remain prevalent due to on going personal stressors and her functioning is severely limited which prevent her to engage

> in any gainful activities. Ms. Cantres medical problems interfere even more with her daily functioning making her prognosis of recovery poor. She will require life time treatment for her medical and psychiatric conditions.

The hearing concluded with the Hearing Officer explaining that Ms. Cantres would receive a written decision and had the right to appeal. Ms. Cantres inquired about her right to counsel, and the Hearing Officer responded that she would hold the matter in abeyance for ten days should Ms. Cantres obtain a lawyer who wished to submit something on her behalf. Instead, the Hearing Officer should have advised Ms. Cantres of her right to request an adjournment to obtain counsel at the beginning of the hearing, when legal representation would have been more meaningful.

Hearing Officer Joan Pannell issued her two-page decision on April 22, 2010 (Exh R). She began by indicating that the charge was "non-desirability in that on 10/10/09 she [Cantres] and/or Carmen Burgos, authorized occupant, and/or James Murphy, unauthorized occupant, possessed heroin and marijuana, recovered during execution of a search warrant, in that Tenant permitted illegal drug activity, in that on 10/6/09 James Murphy possessed marijuana, and in that on 6/8/07 James Murphy stole property." After summarizing the evidence detailed above, the Hearing Officer then stated her Findings and Conclusions as follows:

> The charges are sustained, except that alleging marijuana possession by James Murphy on 10/6/09, which was not proved. Even if James Murphy had an alternative address, his use of the apartment for his own purposes shows that he resided there. It is not credible that Tenant did not see the contraband on the night stand and the window sill, even if that was not her side of the bed, unless she willfully overlooked it, which is not a defense. NYCHA has the right and the obligation to seek termination of those tenancies where the apartment is used for drug activity, and is entitled to its requested disposition.

This Article 78 proceeding ensued.

Discussion

In determining the nondesirability charges against Ms. Cantres, the Hearing Officer was charged with considering two central issues; that is, was James Murphy actually living in the Cantres apartment, and was there reason to believe that Ms. Cantres knew about Murphy's drug possession or the claimed sales. In reviewing the Hearing Officer's determination, this Court must inquire pursuant to CPLR §7803(3) whether the Hearing Officer's determination was "made in violation of lawful procedure [or] affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure of mode of penalty or discipline imposed."

In her petition, which she drafted inartfully on her own, Ms. Cantres insists — as she did at the hearing — that Mr. Murphy did not live in her apartment and that she was wholly unaware that he had brought drugs into the apartment when he visited her at the time of his arrest or at any time whatsoever. While the numerous grammatical errors in the petition reveal that Ms. Cantres has a very limited education, the firmness of her point is clear. In response, NYCHA counsel argues that the Hearing Officer's determination is rationally based on appropriate determinations of witness credibility and is supported by substantial evidence. Counsel further argues that the penalty of termination of the tenancy is reasonable in light of the policy to protect public housing tenants from unlawful drug activity.[1]

---

[1] NYCHA counsel does not request that this proceeding be transferred to the Appellate Division based on substantial evidence. In any event, such a transfer is not

With respect to the first issue noted above, the only evidence adduced at the hearing to support the Hearing Officer's determination that Murphy was actually living in the Cantres apartment, rather than visiting, was vague testimony from Officer Perez about having found in the apartment some "male clothes" and two pieces of mail addressed to Murphy from the New York State Department of Finance and the New York State Higher Education Service Corps. Ms. Cantres countered that evidence with her own clear testimony that Murphy only visited the apartment on weekends and did not even have a set of keys, and her explanation that she allowed Murphy to have important mail sent to her apartment because he had been having difficulty receiving mail. Further, while Murphy's Arrest Report lists the apartment address as the location of the arrest, it also indicates that Murphy is not a NYCHA resident (Exh K). And the Stipulation submitted by Ms. Cantres in the nuisance action commenced by the City explicitly referred to Murphy as a "visitor", listed an alternative address for him, and included no sanctions of any nature against Ms. Cantres or the tenancy.

In light of the conflicting evidence on this all-important issue, the Hearing Officer should have done more to bring out the facts. While the self-represented tenant did her best to anser questions, she indisputably lacked the understanding or ability to cross-examine the Police Office to bring out, for example, whether the clothes consisted of

---

appropriate where, as here, "other objections as could terminate the proceeding" must first be addressed by this Court. CPLR§7804 (g); *Robinson v Finkel,* 194 Misc. 2d 55, 63-64, *aff'd sub nom Robinson v Martinez*, 308 AD2d 355 (1st Dep't 2003)(Supreme Court determined claims of error of law and violation of hearing procedures, despite respondent's request for a transfer to the Appellate Division based on substantial evidence); *Vaughn v Orlando*, 79 AD3d 1048 (2nd Dep't 2010)(Supreme Court should have disposed of due process issues before transferring the proceeding to the Appellate Division based on substantial evidence).

anything more than Murphy's pants and shirt presumably removed before he went to sleep the night before. Since the warrant was executed at about 6:00 a.m., Murphy may well have been asleep when the police arrived. The Hearing Officer made no attempt to explain to Ms. Cantres what issues were relevant to her determination or to ask questions herself to explore the Officer's testimony and reveal critical facts.

With respect to the issue of the tenant's knowledge of Murphy's alleged drug activity, the Hearing Officer completely overlooked at the hearing and in her decision two highly significant issues; that is, the tenant's testimony about her serious medical condition and the disposition of the tenant's arrest. As detailed above, Ms. Cantres explained to the Hearing Officer that she suffers from bipolar depression and takes medication that causes her to fall asleep at 8:30 p.m. The Hearing Officer rejected as incredible the testimony by Ms. Cantres that she did not see or know about any drugs that Murphy had brought into the apartment, yet no inquiry was made as to the tenant's medical condition, despite its relevance to the credibility of her testimony and to her ability to observe her surroundings. It could well have been that Murphy did not place the drugs in plain view until after the tenant was sound asleep. Also relevant, yet left unexplored, was the tenant's testimony that due to her asthma and the presence of an oxygen tank in the apartment, no smoking of any nature was permitted in her apartment.

Equally significant yet wholly unexplored was the status of the tenant's arrest. As indicated above, not only were all criminal charges against Ms. Cantres dismissed, but the City of New York settled her false arrest claim by paying her $2500. The criminal charges had been dismissed months before the hearing, yet NYCHA offered no

evidence of that fact and the Hearing Officer did not even ask a single question. And while the disposition of the false arrest civil action occurred after the hearing, the events were ongoing at the time of the hearing and may well have come to light had the Hearing Officer inquired about Ms. Cantres' criminal case. Although these facts were highly relevant to the Hearing Officer's determination, the Hearing Officer wholly failed to explore the issues.

The Hearing Officer also appeared to dismiss out of hand the Stipulation presented by Ms. Cantres in the City's suit against Murphy and NYCHA where Murphy had confirmed an alternate address and agreed not to come to the apartment. Murphy and Cantres had apparently been honoring the Stipulation excluding Murphy from the apartment for several months before the hearing was held. Even though NYCHA offered no evidence to the contrary, the Hearing Officer neither addressed the import of these facts, nor discussed in her decision why she would not simply exclude Murphy from the apartment and allow Ms. Cantres and her two children to remain as the City had done in the nuisance action (where NYCHA was also a named defendant).

NYCHA cannot seriously dispute that the hearing had to be conducted in accordance with due process of law and that all relevant issues, including those detailed above, should have been fully explored. Indeed, the First Department recently held in *Detres v New York City Housing Authority,* 63 AD3d 442, 443 (2009), that the tenant's medical condition warranted further consideration, holding that: "As a result of the Hearing Officer's failure to question petitioner, who represented herself pro se, about her medical issues and their ramifications, petitioner was not afforded a full opportunity to be heard ... (*see Matter of Hall v Municipal Hous. Auth. for City of*

Yonkers, 57 AD2d 894, 894-895 [1977], *lv denied* 42 NY2d 805 [1977], *appeal dismissed* 42 NY2d 973 [1977][due process affords public housing tenants the right of opportunity to be heard])."

In accordance with *Detres*, the Hearing Officer here should have inquired further into Ms. Cantres' medical condition and its ramifications affecting issues such as knowledge, credibility, and the reasonableness of any penalty. Instead, the Hearing Officer simply rejected as incredible the testimony by Cantres that she was wholly unaware of Murphy's possession of any drugs in the apartment because she had gone to sleep early the night before, as usual, after she had taken her medication. In addition, while the Hearing Officer did accept into evidence the City Stipulation confirming an alternate address for Murphy, she gave it no weight at the urging of NYCHA counsel.

Ms. Cantres did not receive a fair hearing. I make this finding because the Hearing Officer never explained the charges or the relevant issues to Ms. Cantres and never informed her of her right to call witnesses or produce other corroborative evidence. Nor did she explain how to proceed to cross-examine Officer Perez or herself ask questions to reveal additional relevant facts. If these things had been done, and it was critical here in light of the tenant's status as an unrepresented, psychiatrically compromised person, the result may well have been different. I further find that the Hearing Officer's decision was arbitrary and capricious, particularly with respect to the finding that Murphy's limited use of the apartment proves that he was living there.

These errors mandate that the proceeding be remitted to NYCHA for a new hearing before another impartial Hearing Officer. At a minimum, the Hearing Officer

should explore at the hearing and address in the decision the issues addressed above as mitigating factors entitling the tenant, who herself had an unblemished record, to a lesser penalty such as the exclusion of Murphy from the household. The decision to terminate the tenancy and remove Ms. Cantres and her children from public housing in light of her severe psychiatric illness and the favorable disposition of the arrest and Bronx stipulation is shocking to the conscience and cannot be accepted by this Court. *See, Matos v Hernandez*, 257 AD2d 509 (1st Dep't 2010)(vacating penalty of permanent exclusion of tenant's adult son from the household as shocking to the judicial conscience, where the son was the primary care giver for the elderly disabled tenant and his own young son in the apartment and no finding was made that he posed a threat to the NYCHA community, despite his conviction of two misdemeanors); *Powell v Franco,* 257 AD2d 509 (1st Dep't 1999), *lv denied* 94 NY2d 753(vacating as excessive the penalty of exclusion of son from the household based on his arrest for drug possession, when the plea was to disorderly conduct and the tenant's record was otherwise unblemished).

Accordingly, it is hereby

ADJUDGED that the petition is granted, the April 22, 2010 decision of NYCHA Hearing Officer Joan Pannell is vacated, and this matter is remitted to respondent for a new hearing consistent with the terms of this decision.

Dated: May 17, 2011

MAY 17 2011

J.S.C.
ALICE SCHLESINGER

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).