

Matter of Wilkerson v New York City Hous. Auth.

2011 NY Slip Op 31903(U)

July 11, 2011

Sup Ct, NY County

Docket Number: 400204/11

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lolis

PART 6

Index Number : 400204/2011
 WILKERSON, KUTINA D.
 vs.
 NEW YORK CITY HOUSING
 SEQUENCE NUMBER : 001
 ARTICLE 78

INDEX NO. _____
 MOTION DATE 5/10/11
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

Settled
 Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

PAPERS NUMBERED
1-10
11-32

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this *petition* ~~motion~~ *is denied*

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).

Pobtion
 THIS MOTION IS DECIDED IN ACCORDANCE
 WITH THE ACCOMPANYING MEMORANDUM DECISION
Order and Judgment

Dated: 7/10/11

[Signature] 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
NEW YORK COUNTY: IAS PART 6

-----X
In the Matter of the Application of
KUTINA D. WILKERSON,

Petitioners,

Index No. 400204/11

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

Decision, Order, and Judgment

- against -

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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appear in person at the Judgment Clerk's Desk (Room
141B).

-----X
JOAN B. LOBIS, J.S.C.:

Petitioner Kutina D. Wilkerson, proceeding *pro se*, bring this proceeding under Article 78 of the C.P.L.R., seeking to annul the determination of the New York City Housing Authority ("NYCHA") not to open a default judgment entered against her, which terminated her tenancy.

From 2005 until the termination of her tenancy in or about January 2011, petitioner was the tenant of record of 130 East 115th Street, Apt 11C, an apartment owned and operated by NYCHA. Petitioner lives with her two minor children. By notice dated October 19, 2009, NYCHA informed petitioner that it was considering terminating her tenancy due to her chronic delinquency in paying rent and notified her that a hearing would be held on November 12, 2009. Pursuant to these charges, on or about November 12, 2009, petitioner and NYCHA entered into a stipulation of settlement. The stipulation set forth that petitioner, *inter alia*, would be put on probation for one year and would have to pay her rent by the fifth business day of each month.

According to NYCHA's records, petitioner did not pay the rent for the month of November 2009 until mid-December 2009. Rent for December 2009 through February 2010 was not paid until February 19, 2010. The rent for March 2010 was paid in mid-May 2010 and rent for April 2010 and May 2010 were not paid as of June 9, 2010. As a result, by notice dated July 29, 2010, NYCHA informed petitioner that a hearing would be held on September 1, 2010 to consider new charges of chronic delinquency in the payment of rent and violation of probation. On September 1, 2010, petitioner and a NYCHA representative agreed, by written stipulation, to adjourn the hearing until December 8, 2010.

Petitioner failed to appear at the hearing and, upon her default, Hearing Officer Ester Tomici Hines issued a decision and disposition dated December 9, 2010, wherein she sustained the charges and recommended termination of petitioner's tenancy. Less than a week after her default, on December 14, 2010, petitioner applied to NYCHA for a new hearing. In order to be granted a new hearing, petitioner was required to demonstrate "a reasonable excuse to explain why [she] missed [her] hearing . . . AND . . . a good defense why [she] think[s] [NYCHA's] charges against [her] are not true, or the problem has been corrected, or otherwise explain why [her] tenancy should not be terminated." (Emphasis in original). Petitioner set forth that she misplaced the paperwork that contained the date of the hearing, and thought that the hearing was scheduled for the week of December 13, 2010 not the week of December 6, 2010. As to her defense of the charges, petitioner maintained that she was unemployed. Petitioner promised that by January 31, 2011, all rent would be paid in full through February 2011. On January 4, 2011, Donna Schletter, an administrative staff analyst with NYCHA, submitted an affidavit in opposition to petitioner's application. Ms. Schletter

contended that petitioner's default was not excusable, because it was the result of petitioner's own mistake. Ms. Schletter asserted that petitioner had not provided a meritorious defense because, as of the date of the affidavit, she owed \$3,214 in outstanding rent, representing rent from July 2010 through January 2011 (rent delinquency for this time period was not mentioned in the July 29, 2010 notice and no subsequent notices are in the record). Ms. Schletter further set forth that petitioner violated her probation "instantaneously" and had been chronically delinquent in her rent since November 2009.

On January 20, 2011, Hearing Officer Tines denied petitioner's application to open her default. She found that petitioner's excuse that she misplaced the notice was not a "sufficient or cognizable" explanation for missing the hearing. Hearing Officer Tines further found that petitioner failed to offer a meritorious defense to the charges and that she still owes rent from July 2010 through January 2011.

In this petition, petitioner now asserts that she missed the hearing because she and her two children were sick. Petitioner maintains that she tried to pay her rent but that she could not afford to make the payments on time. Petitioner submits a letter from an assistant personnel director from Harlem Hospital Center that sets forth that petitioner has been employed there since April 28, 2008 and that her current salary is \$18,109.00. In opposition, NYCHA argues that it rationally found that petitioner did not have a reasonable excuse for her default nor a meritorious defense to the charges of chronic rent delinquency. NYCHA sets forth that petitioner's claim that she misplaced the document containing the date of hearing is unavailing because petitioner had notice of the

hearing date, agreed to that date, and by her own fault missed the hearing. NYCHA further argues that the court cannot credit petitioner's newly raised excuse of illness. As to NYCHA's finding that petitioner's defense was not meritorious, it argues that such finding was rational because petitioner, inter alia, admitted delinquency when seeking to vacate her default, vaguely stated that she was unemployed (an excuse, NYCHA argues, that is inconsistent with the letter from Harlem Hospital Center), and demonstrated a "repeated failure or refusal to pay" rent.

The court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it was arbitrary or capricious, or whether it was affected by an error of law. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). A determination is considered arbitrary and capricious when it is made "without sound basis in reason or regard to the facts." In re Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009), citing Pell, 34 N.Y.2d at 231. If the agency's determination is rationally supported, the court must sustain the determination "even if the court concludes that it would have reached a different result than the one reached by the agency." Peckham, 12 N.Y.3d at 431 (citation omitted).

Hearing Officer Hines' rejection of petitioner's excuse for missing the hearing was irrational (see Caso v. Manmall, Inc., 68 A.D.3d 470, 471 [1st Dep't 2009]), especially since petitioner moved almost immediately to vacate the default and her previous participation in the both the 2009 and 2010 termination proceedings suggest that her default "was inadvertent, unintentional and an isolated incident devoid of any pattern of dilatory behavior." Spyropoulos v. Hirsh, 21 A.D.3d 818 (1st Dep't 2005) (citations omitted). Nevertheless, it cannot be said that it was

arbitrary, capricious, or otherwise irrational for Hearing Officer Hines to determine that petitioner had not offered a meritorious defense to the charges that her rent was chronically late. Although Hearing Officer Tines considered charges that were not specified against petitioner, namely the failure to pay rent from July 2010 to January 2011, it cannot be said that it was irrational for her to use this period of non-payment as further evidence that petitioner had repeatedly failed to pay rent on time. Furthermore, petitioner admitted that she was not paying her rent on time and was, therefore, in violation of the probation. The court is constrained by case law that sets forth that chronic rent delinquency and a violation of probation are grounds for termination. See Davis v. Hernandez, 13 A.D.3d 90, 91 (1st Dep't 2004). The court further notes that petitioner's alleged excuse for not paying her rent on time, unemployment, is contradicted by her own supporting evidence in this Article 78 proceeding as well as the income affidavits attached to NYCHA's opposition papers. Accordingly, it is hereby,

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

Dated: July // , 2011



JOAN B. LOBIS, J.S.C.

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