

Matter of Gordon v Rhea
2011 NY Slip Op 31960(U)
June 9, 2011
Sup Ct, NY County
Docket Number: 401028/10
Judge: Martin Schoenfeld
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SCANNED ON 6/10/2011

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

PRESENT: Schoenfeld

PART 28

Index Number : 401028/2010
GORDON, HARRIET
VS.
JOHN B. RHEA
SEQUENCE NUMBER : 001
ARTICLE 78

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

this motion to/for _____

PAPERS NUMBERED
1-3
4-5

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 *is decided in accordance with the accompanying memorandum 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).

Dated: June 9, 2011 _____ JK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

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

-----x
In the Matter of the Application of
HARRIET GORDON

Petitioner,

**MEMORANDUM DECISION
AND JUDGMENT**

For A Judgment Pursuant to Article 78
Of the Civil Practice Law and Rules

-against-

Index No.: 401028/10

JOHN B. RHEA as Chairman of the New York
City Housing Authority and the
NEW YORK CITY HOUSING AUTHORITY

Respondents.

UNFILED JUDGMENT

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obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

-----x
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For Respondent:
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HON. MARTIN SCHOENFELD, J.:

Petitioner Harriet Gordon brings this Article 78 action seeking a judgment annulling Respondents, John B. Rhea and New York City Housing Authority's (NYCHA) (referred to hereinafter as Respondents) determination to terminate Petitioner's Section 8 tenancy. In the alternative, Petitioner asks the court to substitute a lesser penalty and to reinstate Petitioner's tenancy subject to this penalty.

For the reasons set forth below, the court vacates the penalty of termination and remands the case for the imposition of a lesser penalty.

BACKGROUND

Ms. Gordon is a senior citizen who relies on Social Security payments for her expenses. She has been a NYCHA resident for over 15 years and has resided in her current apartment for over 8 years. Ms. Gordon lived with her two adult sons during the time of the underlying proceeding, the elder of whom, according to Petitioner's papers, has recently passed away.

NYCHA charges Ms. Gordon with chronic rent delinquency going back to 2006. On April 20, 2007, NYCHA sent a letter to Ms. Gordon concerning this chronic rent delinquency, indicating that termination of her lease was being considered and arranging an appointment with the management office as per its Termination of Tenancy Procedures. Ms. Gordon met with the management office on April 27th. At that time, Ms. Gordon indicated that she felt her rent was too high and stated that her sons were not contributing. She said she did not want to ask them to help and that she planned to pay for the rent out of her social security check. NYCHA's procedures require that prior to commencement of proceedings to terminate a tenancy the tenant's project manager interview the tenant to discuss the problem, "seek to ascertain the facts involved, and, when appropriate, seek to assist tenant by securing outside help." NYCHA Termination of Tenancy Procedures ¶ 2. Nevertheless, the housing management did not inquire further or seek outside help but instead recommended termination of Ms. Gordon's lease.

On November 13, 2007, NYCHA brought charges against Ms. Gordon for failure to pay rent when due from July 1, 2006 to June 1, 2007. The case was adjourned several times and NYCHA amended its charges each time to update the amounts still not paid. During this time, it appears Ms. Gordon was paying rent, although it was often late and never enough to bring her rent payments up-to-date. On April 22, 2008, instead of proceeding to a hearing, Ms. Gordon, at

that time *pro se*, signed a stipulation in which she admitted the charges of rent delinquency, subjected her tenancy to a two year probation, and promised to pay rent by the 5th business day of each month. This stipulation was adopted by the housing authority board on May 6, 2008.

According to NYCHA, Ms. Gordon soon violated this stipulation and on August 5, 2008, NYCHA brought charges against Ms. Gordon for chronic rent delinquency and violation of the stipulation. During the next year, there was one default decision, which was later reopened, and several adjournments.¹ At some point during this time, Ms. Gordon retained counsel.

On September 25, 2009, Ms. Gordon appeared before hearing officer Joan Pannell for an administrative hearing. At that time, she owed more than \$10,000 in back rent which included all rent from September 2008 to August 2009 and a carry over amount of \$305.81.

According to Ms. Gordon's testimony at the hearing, her most recent difficulties paying rent stemmed from her apartment being flooded with sewage on three occasions: February and June, 2008 and February 2009. As a result of these floods, which consisted of water and feces streaming from her bathroom sink and bathtub faucets into the rest of the apartment, she and her sons lost clothes, shoes, and furniture. They used clothes and shoes to soak up the water and bale it out, ruining much of their personal possessions.² Housing officials who helped clean up after the flood disposed of many of the damaged items. Ms. Gordon was forced to stay out of the apartment for an unspecified amount of time and was unable to eat at home for several weeks because of the odor. She had to buy new clothes and shoes and eat out, which because of her

¹During this time NYCHA also pursued a concurrent Housing Court action against Ms. Gordon for the rent arrears.

²Apparently Ms. Gordon presented photographic evidence of the flooding and damage to her apartment at the hearing. These photographs, however, were not made part of the record.

fixed income, made it difficult for her to pay rent on time.³

In addition, in June or July 2009 there was a separate leak in the kitchen which required that the cabinets be pulled down and that the sink be removed. For approximately four weeks while the sink was removed, Ms. Gordon was forced again to eat meals out. Although she asked to be transferred to another apartment, NYCHA denied the request because of her rent arrears.

Ms. Gordon testified that she has nowhere else to go if she were to be evicted. She said she was willing to pay rent and that her situation since 2007, when the original charges were brought against her, had changed because her younger son was now able to help her with rent payments. Her other son was suffering from a brain tumor and had only been released from the hospital a few weeks prior to the hearing. Nevertheless, she believed at the time that he might be able to contribute with disability payments as well. He later passed away, however.

Ms. Gordon stated that she could not pay the entire balance of rent owed at the time of the hearing. Ms. Gordon's counsel, however, indicated that she had an application pending for emergency rental assistance. Prior to closing of the record on November 2nd, counsel submitted a Summary Argument and Brief which included copies of checks, most of which Ms. Gordon had apparently received from New York City's Department of Social Service, Emergency Public Assistance Account, which appeared to be enough to pay her back rent. Ms. Gordon's attorney also submitted evidence that Ms. Gordon had set up an automatic pay schedule with her bank to henceforth pay rent on time.

³When asked why Ms. Gordon had not put in a claim for her damaged items with NYCHA, as she had after a 2005 flood, she indicated that she was told by housing officials to bring a small claims court case for these expenses, but when she attempted to do so, she was told small claims was not the correct venue.

[* 6]

On November 4, 2009, the Hearing Officer issued a written opinion finding against Ms. Gordon. Although the Hearing Officer found that because of the flooding and leaks in the apartment Ms. Gordon's damages "may well be significant," she declined to take them into consideration. She found that, *inter alia*, the proper venue for "habitability issues" is housing court, that *res judicata* prohibited her from considering such issues, and that Ms. Gordon's credibility as to the extent of the damages was in doubt. By letter dated December 9, 2009, NYCHA approved the Housing Officer's decision, noting that Ms. Gordon's "tenancy shall be terminated."

Ms. Gordon now brings this Article 78 petition challenging NYCHA's decision.

DISCUSSION

Judicial review of an Article 78 proceeding is limited to whether an administrative determination is "arbitrary and capricious, or lacks a rational basis." *Chelrae Estates, Inc. v. State Division of Housing and Community Renewal*, 225 AD2d 387, 389 (1st Dept. 1996) (citing *Pell v. Board of Education of Union Free School District*, 34 N.Y.2d 222, 230-31 (1974)). A decision is arbitrary and capricious if it is "without sound basis in reason and [is] generally taken without regard to the facts." *Pell*, 34 N.Y.2d at 231. A court "may not substitute its judgment for that of" the administrative body. *Id.* at 232 (citations omitted). Nevertheless, where the facts support the administrative determination yet the penalty is "so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness" the court may vacate the penalty and remand the case for imposition of a lesser penalty. *Id.* at 327 (internal citations and quotations omitted). Courts look to the mitigating circumstances of the petitioner in making this determination. *Peoples v. New York City Housing Authority*, 281 A.D.2d 259, 260

[* 7]

(1st Dept. 2001) (penalty of termination vacated as shocking the conscience where tenant whose apartment was “in constant need of repair” “physically confronted and accosted” a NYCHA representative); *Johnson v. New York City Housing Authority*, 266 A.D.2d 102 (1st Dept. 1999) (in light of mitigating circumstances of tenant including reliance on public assistance and large family, penalty of termination of tenancy shocked the court’s conscience despite the fact that substantial evidence supported that petitioner violated her stipulation); *see also Robinson v. Martinez*, 308 A.D.2d 355, 356 (1st Dept. 2003).

Here, the decision that Ms. Gordon was in violation of her stipulation and had chronically paid her rent late is rationally based on the evidence. Nevertheless, the penalty of termination of tenancy from her Section 8 housing for these offenses is so disproportionate as to shock this Court’s sense of fairness.

Ms. Gordon, now a senior citizen, has spent the majority of her over 15 years as a NYCHA tenant paying her rent without a problem. When she began having trouble paying her rent on time, she explained to a housing official that she had a limited income and that her adult sons were not contributing to the rent. Despite NYCHA procedures, housing officials made no attempt to assist her “to seek outside help” to address this problem but instead merely recommended termination of tenancy. Additionally, through no fault of her own, Ms. Gordon’s apartment flooded with sewage three times over a year and a half, resulting in loss of possessions, odor that made living in the apartment difficult, and consequently led to unexpected expenses which strained her limited income. Moreover, at the same time that her son was diagnosed with a brain tumor, leaks in the pipes made the kitchen in the apartment unusable for several weeks. Yet, NYCHA would not allow Ms. Gordon to transfer apartments because she

owed rent.

The court also notes that for most of this time Ms. Gordon was dealing with NYCHA *pro se*. Once she obtained counsel, the record suggests she began putting together a plan to pay her rent on time, which included having her younger son agree to help with the rent and applying for emergency rent assistance. Although the hearing officer did not acknowledge the fact, this assistance came through before the administrative record was closed. Ms. Gordon submitted copies of checks showing that she was able to pay her rent arrears. The Court also notes that if her tenancy were to be terminated Ms. Gordon has said she would have nowhere else to go, making it likely she would end up seeking additional government assistance to obtain new housing.

In light of these mitigating circumstances, the Court grants Ms. Gordon's Article 78 petition to the extent that it vacates the penalty of termination of tenancy and remands the case for a lesser penalty. *See Peoples*, 281 A.D.2d at 260; *Davis v. New York City Dept. Of Housing Preservation*, 58 A.D.3d 418, 419 (2009) (penalty of termination of tenancy "shockingly disproportionate" where "it will likely lead to homelessness" for long-time tenant and minor children); *Johnson v. New York city Housing Authority*, 266 A.D.2d 102 (1st Dept. 1999); *Robinson v. Martinez*, 308 A.D.2d 355, 356 (1st Dept. 2003); *Sicardo v. Smith*, 49 A.D.3d 761, 762 (2nd Dept. 2008); *Riggins v. Lannert*, 18 A.D.3d 560, 562 (2d Dept. 2005); *Ottley v. New York City Housing Authority*, 2011 N.Y.S.2d 854, 858-59 (Kings County 2011) (finding that although NYCHA "was technically entitled to terminate" tenancy for violation of stipulation, penalty of termination was disproportionate where hearing officer failed to give sufficient weight to mitigating circumstances).

In accordance with the foregoing, it is

ORDERED and ADJUDGED that the Petition is granted insofar as the penalty of termination of tenancy imposed by Respondents on Petitioner be vacated; and it is further

ORDERED AND ADJUDGED that the case be remanded for imposition of a lesser penalty.

This constitutes the decision and judgment of this Court.



J.S.C.

Dated: New York, New York
 June 9, 2011

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).