

**Pacheco v New York City Hous. Auth.**

2011 NY Slip Op 31961(U)

June 30, 2011

Sup Ct, NY County

Docket Number: 402649/10

Judge: Martin Schoenfeld

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

PRESENT: Schornfeld

PART 28

Index Number : 402649/2010  
**PACHECO, MARIA**  
 VS.  
**NYC HOUSING AUTHORITY**  
 SEQUENCE NUMBER : 001  
 ARTICLE 78

INDEX NO. \_\_\_\_\_  
 MOTION DATE \_\_\_\_\_  
 MOTION SEQ. NO. \_\_\_\_\_  
 MOTION CAL. NO. \_\_\_\_\_

this motion to/for Art 78

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 denied in accordance with the accompanying memorandum decision pursuant to Art 78 (PLR)*

**FILED**

JUL 06 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 6/30/11

[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  
COUNTY OF NEW YORK: IAS PART 28

----- X  
MARIA PACHECO,

Petitioner,

Index No.  
402649/10

-against-

**FILED**

NEW YORK CITY HOUSING AUTHORITY,

JUL 06 2011

Respondent.

NEW YORK  
COUNTY CLERK'S OFFICE

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**Schoenfeld, J.:**

In this Article 78 proceeding, Petitioner Maria Pacheco ("Pacheco"), appearing *pro se*, seeks an Order which would: (1) require Respondent New York City Housing Authority ("Respondent") to reverse its decision to immediately terminate her housing on the ground that it was arbitrary and capricious or an abuse of discretion; and (2) permit her to remain in her New York City Housing Authority apartment on probation.

Pacheco has resided in NYCHA housing, subject to a lease, at 510 East 156<sup>th</sup> Street, Apartment 11E, Bronx, New York at least since 2004. On February 19, 2004, Vangelo Mendez and his brother Gabriel Pacheco, both authorized members of Pacheco's household at the time, committed robbery at or in the immediate vicinity of Pacheco's development.<sup>1</sup> Upon learning of the incident, the manager of the development asked Petitioner to visit the management office to discuss the matter. On May 12, 2004, Pacheco, accompanied by Yvette Torres, a Family Advocate from the Bronx Children's Psychiatric Center, met with the manager who explained

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<sup>1</sup> This fact is contained in the NYCHA Specification of Charges against Pacheco and she admits the Specifications in the stipulation she signed on September 30, 2004.

that the matter would be forwarded to the Tenancy Administrator for review and preparation of administrative charges.

By notice and specification of charges dated August 10, 2004, the Housing Authority charged Petitioner with non-desirability and violation of a three-year probationary period in 2003 in resolution of previous non-desirability charges. On September 30, 2004, Pacheco stipulated to permanently exclude Vangelo Mendez and Gabriel Pacheco from her apartment in resolution of the new charges.

The stipulation provided that Pacheco would allow Housing Authority investigators to make unscheduled visits to her apartment to confirm her compliance with her agreement to exclude Mendez and Pacheco and would advise all family members of her responsibilities under the stipulation. Pacheco signed the stipulation and on October 20, 2004, the Housing Authority's Board approved the stipulation in a Determination of Status for Continued Occupancy. The stipulation set forth a new two-year probation period to commence on October 17, 2006, upon the expiration of the three-year probation imposed upon Pacheco's tenancy in October 2003.

On January 4, 2010, NYCHA sent an investigator from the Special Investigations Unit and found Vangelo Mendez inside Pacheco's apartment. Pacheco was also present in the apartment.

On April 15, 2010, a hearing was held on the sole charge against Pacheco, "Violation of Permanent Exclusion," in that she violated the terms of the settlement, which required permanent exclusion of Vangelo Mendez from the apartment leased to Pacheco. Pacheco admitted the charge. Based on statements by Pacheco concerning her confusion at the hearing, the Hearing Officer directed that Pacheco be evaluated by the NYCHA Social Services Department for a

determination of whether she needed a guardian ad litem and adjourned the hearing on that basis.

On May 25<sup>th</sup>, 2010, the hearing resumed and the report of NYCHA Social Services Department was submitted. The report concluded that after evaluation, Pacheco did not require a guardian ad litem and that she is competent. Pacheco proceeded unrepresented at the hearing.

The only witness, Robert Kennedy, is a NYCIIA investigator who visited Pacheco's apartment on January 4, 2010 at 10:50 a.m. to perform an unannounced investigation for excluded persons. He testified that he knocked on the door and a woman answered who identified herself as Maria Pacheco. The inspector told her who he was and his purpose for the visit. Upon entering the apartment, he found a man who identified himself as Vangelo Mendez washing his face in the bathroom. Vangelo told the inspector that he arrived at the apartment at 9:30 that morning and he was let into the apartment by his brother, Adam. He said that Pacheco was not home when he arrived and he came over to visit. He was dressed in street clothes and he told the investigator that he lived in Pennsylvania. Mr. Kennedy explained to both Mendez and Pacheco that the Mendez's presence was a violation of the Permanent Exclusion Agreement. Pacheco refused to testify.

In a June 9, 2010 decision, the hearing officer concluded that Pacheco's tenancy should be terminated. The decision notes the following:

Tenant, as a condition of her continued tenancy with NYCHA, was required by the exclusionary agreement in Case No. 8948/04, to prevent Mendez from ever residing in or visiting the apartment, which she failed to do on January 4, 2010. In addition, the record reveals that a previous violation of the exclusionary agreement was issued on January 10, 2005. Evidence that Tenant was absent from the apartment when Mendez arrived was insufficient as a defense or mitigating circumstance, particularly since Tenant was present while Mendez

remained in the apartment in violation of the agreement. The condition of permanent exclusion has not been an effective means to preserve the tenancy, nor has probation.

In her petition, Pacheco makes two arguments. First, she argues that although she signed the agreement to exclude her son from the apartment, the stipulation should not be binding because she is illiterate and although she was provided an interpreter, she was not told about “any probation opportunity.” She avers that she signed the stipulation under pressure and her anxiety interferes with her cognitive skills. She further argues that “she is not aware of the circumstances If [sic] her son shows up to her residence.

In opposition, Respondent argues that the hearing officer was entitled to rely upon Kennedy’s testimony and terminating Pacheco’s tenancy, as a result, is consistent with the law. Finally, Respondent argues that the Pacheco’s arguments that she should be relieved of her obligations under the stipulation are time barred and without merit.

### **Discussion**

As a preliminary matter, Pacheco’s arguments challenging the validity of the stipulation are time barred and improperly raised for the first time in this proceeding. *See* CPLR 217(1); *Folks v. New York City Housing Authority*, 27 A.D.3d 270, 271 (1<sup>st</sup> Dept. 2006). Pacheco’s claim that the stipulation was unfair or based on a misrepresentation was not raised at the hearing and therefore “may not be judicially reviewed.” *See Salgado v. Franco*, 290 A.D.2d 272 (1<sup>st</sup> Dept. 2002).

It is established in New York that the courts cannot interfere with the exercise of discretion by an administrative tribunal unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious. *Pell v. Board of Educ.*, 34

N.Y.2d 222, 231 (1974). The arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts. *Pell*, 34 N.Y.2d at 231.

Yet, an administrative penalty may also be set aside as a gross abuse of discretion if the punishment is “so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one’s sense of fairness.” *Romero v. Martinez*, 280 A.D.2d 58, 64 (1<sup>st</sup> Dept. 2001) quoting *Pell v. Board of Educ.*, 34 N.Y.2d at 233.

Here, Respondent’s finding that Pacheco violated the stipulation is supported by the evidence presented by Respondent at the hearing. Respondent’s witness, Mr. Kennedy, testified, and it was uncontested, that he entered Pacheco’s apartment, after she opened the door for him, and observed Vangelo Mendez, Pacheco’s excluded son, inside the bathroom. It is settled that Vangelo Mendez’s presence was prohibited. However, Mr. Kennedy’s testimony did not include the duration of Mendez’s visit or how he came to be in Pacheco’s apartment.

In light of the circumstances set forth in the papers, the penalty of termination does not shock the conscience of this Court. Even if she did not admit Mendez into her apartment, she was in the apartment while he was there and therefore had knowledge of his presence. This case is consequently not analogous to those cases where the courts found the penalty unsustainable.

The evidence here was not merely that the prohibited family member was present for a brief visit without the knowledge and consent of petitioner. Thus, this matter is unlike *Holiday v. Franco*, 268 A.D.2d 138 (1<sup>st</sup> Dept. 2000)(where there was no proof that the excluded person was in the apartment with petitioner/tenant’s knowledge and consent, the petitioner lived in the

apartment with her disabled daughter and had an unblemished record as a tenant for at least 20 years, the Court found that the tenant's expulsion "shocked the conscience") and *Hagan v. Franco*, 272 A.D.2d 143 (1<sup>st</sup> Dept. 2000)(where the investigator testified that he did not recall petitioner/tenant being in the apartment when he discovered the excluded person therein and petitioner testified that she was not aware that the excluded person was in the apartment until she got the hearing notice, the Court consequently held that, in light of this proof and the tenant's unblemished record, her expulsion was arbitrary and capricious). Moreover, Pacheco is not caring for disabled children, foster children, or grandchildren; her children are all grown. See *Martinez v. Franco*, 272 A.D.2d 234 (1<sup>st</sup> Dept. 2000); *Johnson v. New York City Housing Authority*, 266 A.D.2d 102 (1<sup>st</sup> Dept. 1999). Further, in view of the seriousness of the criminal activity of the excluded individuals, the Court is not shocked by the penalty of termination. See *Folks v. New York City Housing Authority*, 27 A.D.3d 270 (1<sup>st</sup> Dept 2006).

Finally, respondent's papers indicate a previous violation and a previous probation period. A NYCHA form states that a previous violation of permanent exclusion was issued to Pacheco on January 10, 2005. The June 9, 2010 decision notes that previous violation. The subject stipulation indicates without detail that a three-year period of probation had been imposed on Pacheco's tenancy on October 17, 2003. This Court therefore cannot find that Pacheco has an otherwise unblemished record. See *Hagan*, 272 A.D.2d at 144.

In accordance with the foregoing, this Court is constrained to deny Maria Pacheco's Article 78 petition and dismisses this proceeding.

Dated: New York, New York  
June 30, 2011

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J.S.C.

**FILED**

JUL 06 2011

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