

<b>Matter of Wells v New York City Hous. Auth.</b>
2011 NY Slip Op 31963(U)
June 8, 2011
Sup Ct, NY County
Docket Number: 403457/10
Judge: Barbara Jaffe
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

BARBARA JAFFE  
J.S.C.

PRESENT.

PART 5

Index Number : 403457/2010

WELLS, SECUNDA

vs

NEW YORK CITY HOUSING

Sequence Number : 001

ARTICLE 78

CAL # 110

INDEX NO. 403457/110  
MOTION DATE 5/3/11  
MOTION SEQ. NO. 001  
MOTION CAL. NO. 110

The following papers, numbered 1 to 3 were read on this motion to/for reversal of administrative determination

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2,3

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: 7/8/11  
JUL 08 2011

[Signature]  
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:  
SECUNDA WELLS,

Petitioner,

Index No. 403457/10

Motion Date: 5/3/11  
Motion Seq. No.: 001  
Motion Cal. No.: 110

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

**DECISION & JUDGMENT**

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

-----X  
BARBARA JAFFE, JSC:

**For petitioner:**  
Secunda Wells, self-represented  
450 East 169<sup>th</sup> Street, Apt. 1C  
Bronx, NY 10456  
347-348-7832

**For respondent:**  
Byron S. Menegakis, Esq.  
Sonya M. Kaloyanides, Esq.  
General Counsel  
New York City Housing Authority  
250 Broadway, 9<sup>th</sup> Floor  
New York, NY 10007  
212-776-5180

**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).

By notice of petition dated December 8, 2010, petitioner brings this Article 78 proceeding seeking an order reversing respondent's termination of her tenancy for non-desirability.

Respondent opposes.

**I. BACKGROUND**

Respondent New York City Housing Authority was created by the New York Legislature to, *inter alia*, build and operate low-income apartments in New York City. (Verified Ans.).

Respondent is required by federal and state law to provide safe, decent, and sanitary housing to public housing tenants. (*Id.*). Pursuant to 42 USC § 1437d(1)(6), leases must include the

following provision:

[A]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control, shall be cause for termination of tenancy.

Regulations promulgated by the United States Department of Housing and Urban Development also require that respondent's leases contain provisions obligating tenants to assure that neither they nor any member or guest of their households engage in "[a]ny drug-related criminal activity on or off the premises" and providing that drug-related activity constitutes grounds for the termination of a tenancy. (*Id.*).

Respondent's Termination of Tenancy Procedures provide that a tenancy may be terminated for, *inter alia*, "non-desirability," which includes a tenant's conduct or behavior constituting "a danger to the health and safety of the tenant's neighbors," or breach of respondent rules and regulations. (*Id.*, Exh. B). Once termination proceedings are commenced, "[t]he project manager or his representative will interview the tenant in order to discuss the problem which may lead to termination of tenancy, seek to ascertain the facts involved, and when appropriate, seek to assist the tenant by securing outside help." (*Id.*). If, after the interview, the manager believes termination is appropriate, she must submit her recommendation to the Tenancy Administrator, who then makes his own recommendation to respondent's Law Department. (*Id.*). The Law Department may then prepare administrative charges against the tenant, apprising her of her right to a hearing, to appear at the hearing with an attorney, and to present evidence and examine witnesses during the hearing. (*Id.*). Upon conclusion of the hearing, the hearing officer must prepare a written decision, which is subject to review by respondent's Board. (*Id.*).

By lease dated November 20, 2008, petitioner agreed that in exchange for residing in apartment 1C at 450 East 169<sup>th</sup> Street, Bronx, New York, neither she nor any member or guest would engage in “[a]ny criminal activity that threatens the health, safety, or right to peaceful enjoyment of the [d]evelopment by other residents or by the [l]andlord’s employees” or “[a]ny violent or drug-related criminal activity on or off the [l]eased [p]remises or the [d]evelopment,” and that respondent may terminate the lease for “violation of [its] material terms.” (*Id.*, Exh. A).

On November 6, 2009, New York City Police Department Detective Visar Marku searched petitioner’s apartment pursuant to a warrant issued upon proof of secured drug buys from petitioner and her brother, a member of her household. (*Id.*, Exhs. E, G, M). The search yielded two ounces of marijuana split among 37 small plastic bags and two larger bags, \$419.00 in cash, all of which were found in a safe in petitioner’s bedroom, and codeine pills, which were found on petitioner’s night stand. (*Id.*). Marku arrested petitioner, who pleaded guilty to disorderly conduct and was sentenced to two days of community service. (*Id.*, Exh. E).

By letters dated December 15 and 18, 2009, respondent’s manager asked that petitioner meet with the management office in connection to the possible termination of her lease for non-desirability. (*Id.*, Exh. C). When she failed to appear, a third letter was sent advising her that her case was being forwarded to the Tenancy Administration Department for review. (*Id.*).

On or about March 15, 2010, respondent served petitioner with a notice and specification of charges alleging that she and her brother unlawfully possessed and sold marijuana, conduct constituting non-desirability and a breach of the rules and regulations, and providing that a hearing on these charges would be held on April 14, 2010. (*Id.*, Exh. D). On April 14, 2010, the parties agreed to adjourn the hearing to May 26, 2010, and by stipulation dated May 26, 2010, the

hearing was adjourned to July 7, 2010. (*Id.*, Exh. E).

Petitioner, who appeared with counsel, and Detective Marku, testified. (*Id.*). According to petitioner, she and her brother smoke marijuana, the marijuana seized had been purchased two or three days before, that she keeps the marijuana under lock and key because her brother is “a thief,” she has sold neither marijuana nor pills, the pills found on her night stand were codeine prescribed to her, and she pleaded guilty to disorderly conduct, a violation. (*Id.*). Marku testified as to the controlled buys and his execution of the search warrant. (*Id.*).

By written decision dated August 5, 2010, the hearing officer found Marku credible, and that petitioner “was aware that the safe contained marijuana and packaging and [that] the evidence established that the safe was located in her bedroom, and under [t]enant’s dominion and control.” (*Id.*). Although she determined that there was insufficient evidence to show that petitioner was selling codeine, she concluded that the marijuana and money found during execution of the search warrant and Marku’s testimony about the controlled buys established that petitioner possessed the marijuana for sale or distribution and that her unlawful possession of the marijuana “endangers other residents.” The hearing officer thus sustained the charges against petitioner and terminated her tenancy. (*Id.*, Exh. M).

On December 30, 2009, the Board adopted the hearing officer’s decision and issued a Determination of Status terminating petitioner’s tenancy. (*Id.*, Exh. N).

Petitioner commenced this action with service of her petition on December 13, 2010. (Pet.). Annexed to her petition is evidence which was not offered at the hearing: photographs of a prescription bottle label showing that she was prescribed acetaminophen with codeine, medical records reflecting that she sought medical treatment for back pain, and Administration for

Children's Services records, reflecting that she cared for two children between July 1, 2010 and October 12, 2010. (*Id.*, Exhs. B, C, D, E).

## II. CONTENTIONS

Petitioner alleges that she was wrongfully accused of selling controlled substances, relying on the photographs and records annexed to her petition to show that she possessed the marijuana and codeine for personal medical use to alleviate back pain. (Pet.). She also claims that she and her brother apportioned the marijuana into small bags to ensure that they did not exhaust their supply too quickly, not to sell it. (*Id.*). She references her past employment in childcare, arguing that she could not have been selling drugs, as she would not have exposed children to such activities. (*Id.*).

In opposition, respondent argues that petitioner has waived these arguments, having failed to raise them during the hearing, and maintains that Respondent's determination should not be disturbed, as it was supported by substantial evidence and is not so disproportionate to petitioner's offense as to shock the conscience. (Respondent's Mem. of Law).

## III. ANALYSIS

### A. Waiver

In an Article 78 proceeding, a court may not consider arguments or evidence not presented during the administrative hearing. (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [1<sup>st</sup> Dept 2007]; *Matter of Patrick v Hernandez*, 309 AD2d 566, 566 [1<sup>st</sup> Dept 2003]). "To authorize a petitioner to raise [ ] issues for the first time in an [A]rticle 78 proceeding . . . would deprive the administrative agency of the opportunity 'to

\* 7]  
prepare a record reflective of its expertise and judgment' . . . and would render judicial review meaningless." (*Yarbough*, 95 NY2d at 347).

Here, petitioner neither advanced any of her present arguments nor presented any of the documents on which she now relies at the hearing. Therefore, they are waived. (*See Torres*, 40 AD3d at 330 [where petitioner's claim of succession to deceased sister's tenancy was denied on basis on one-year rule, and she failed to argue during hearing that she received no notice of rule, such an argument could not be considered in Article 78 proceeding]; *Matter of Citylights at Queens Landing v New York City Dept. of Envtl. Protection*, 62 AD3d 871, 872 [2d Dept 2009] [trial court properly declined to hear argument raised for first time in Article 78 proceeding and supported by evidence submitted for first time in reply papers]; *Matter of Weinreb Mgt. v New York State Div. of Hous. & Community Renewal*, 24 AD3d 269, 270 [1<sup>st</sup> Dept 2005] [petitioner's evidence submitted for first time in Article 78 proceeding not considered]; *Rodriguez v Lloyd*, 233 AD2d 120 [1<sup>st</sup> Dept 1996] [same]).

#### B. Substantial evidence

When an administrative determination is made following a hearing required by law, and a claim of substantial evidence is raised, the matter must be transferred to the Appellate Division. (CPLR 7803[4], 7804[g]; Siegel, NY Prac § 568 [4<sup>th</sup> ed]). However, if no issues are raised involving substantial evidence, a transfer need not follow. (*Matter of Kinard v New York State Hous. Auth.*, 2009 WO 3780701, 2009 NY Slip Op 32584[U] [Sup Ct, New York County]; *Matter of Rolon v New York State Hous. Auth.*, 23 Misc 3d 1114[A], 2009 NY Slip Op 50751[U] [Sup Ct, New York County]).

Here, although respondent argues that the hearing officer's determination is supported by substantial evidence, neither party seeks a transfer to the Appellate Division, nor do the facts

warrant it. Moreover, neither party has argued that the informal hearing was required by law or the constitution. (*See Duncan v Klein*, 38 AD3d 380 [1<sup>st</sup> Dept 2007] [substantial evidence standard not applicable; disciplinary conference not conducted pursuant to constitution or statute]). Consequently, I review the proceeding to discern whether the determination reached is arbitrary and capricious.

### C. Arbitrary and capricious

Judicial review of an administrative agency's decision is limited to whether the decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." (CPLR 7803[3]). In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in reason and . . . 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 Kenton Assoc., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1<sup>st</sup> Dept 1996]). Moreover, the determination of an administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1<sup>st</sup> Dept 2007], *aff'd* 11 NY3d 859 [2008]).

Here, the decision to terminate petitioner's tenancy was rationally based on applicable

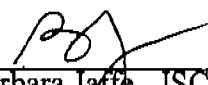
federal and state law permitting respondent to terminate a tenancy for illegal drug activity, petitioner's lease, respondent's Termination of Tenancy Procedures, documentary evidence of petitioner's possession of marijuana and marijuana packaging materials, and the hearing officer's conclusion that Marku's testimony was credible. Although petitioner may have possessed the marijuana solely for her personal use, the hearing officer's determination may not be disturbed, as it is supported by Marku's testimony and does not shock the conscience. (See *Matter of Kerney v Hernandez*, 60 AD3d 544 [1<sup>st</sup> Dept 2009] [termination of petitioner's tenancy for non-desirability "supported by substantial evidence that petitioner knowingly permitted possession and sale of drugs on the premises" and does not shock conscience]; *Harris v Hernandez*, 30 AD3d 269 [1<sup>st</sup> Dept 2006] [termination of petitioner's tenancy on basis of non-desirability rationally supported by evidence of controlled buys of illegal drugs from petitioner, execution of search warrant on basis of controlled buys, and discovery of illegal drugs and paraphernalia in apartment and does not shock conscience]; *Satterwhite v Hernandez*, 16 AD3d 131 [1<sup>st</sup> Dept 2005] [termination of petitioner's tenancy on basis of non-desirability rationally supported by evidence of drugs and ammunition in apartment and does not shock conscience; hearing officer's decision to discredit petitioner's claim of ignorance entitled to deference]).

IV. CONCLUSION

Accordingly, it is hereby

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

ENTER:

  
 \_\_\_\_\_  
 Barbara Jaffe, JSC  
**BARBARA JAFFE**  
 J.S.C.

DATED: July 8, 2011  
 New York, New York  
**JUL 08 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).