

Matter of Smith v New York City Hous. Auth.

2011 NY Slip Op 32545(U)

September 23, 2011

Supreme Court, New York County

Docket Number: 103549/2011

Judge: Alexander W. Hunter Jr

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

PRESENT: ALEXANDER W. HUNTER JR.

PART 33

Index Number : 103549/2011
SMITH, PANNETTE
VS.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-10

FILED 29
30

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

SEP 29 2011

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

NEW YORK
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*See memorandum decision
and judgment annexed hereto.*

PAPERS RECEIVED
SEP 29 2011
ORDER SECTION - RM 119A

Dated: September 23, 2011

AWH

ALEXANDER W. HUNTER JR. 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 33**

-----X
In the Matter of the Application of Pannette Smith, Index No.: 103549/11

Petitioner,

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

Decision and Judgment

-against-

FILED

New York City Housing Authority,

SEP 29 2011

Respondent.

-----X
HON. ALEXANDER W. HUNTER, JR.

**NEW YORK
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The application by pro se petitioner for an order pursuant to C.P.L.R. Article 78, reversing respondent's determination to terminate her tenancy, is denied and the petition is dismissed.

Petitioner asserts that respondent's determination should be reversed because she inadvertently defaulted in appearing at the hearing held before a hearing officer of the New York City Housing Authority (NYCHA). She alleges that she was unaware of the hearing date because she never received notification from NYCHA. Furthermore, she indicates that her continuous defaults in rent payments from November 2009 through January 2010 were a result of her uninterrupted absence from home due to the illness of her sister's husband. Additionally, petitioner alleges that while she was out of town, she had no opportunity to retrieve her mail nor did she receive any notice that a hearing was scheduled before NYCHA.

Petitioner claims that at the time the hearing was scheduled she was under extreme emotional stress and was overwhelmed by distractions including caring for her sister's family and the sudden death of her friend. Petitioner further indicates that while she intended to comply with the terms of the 2009 stipulation of settlement, she was unable to fulfill these obligations because her sister was in desperate need of financial services to tend to her family and ailing husband. Petitioner maintains that despite her current probationary terms and failure to attend the hearing before NYCHA, she should be provided with the opportunity to be heard. She claims that she did establish a reasonable excuse for failing to appear at the hearing, in what she considers to be a timely manner, and she stated a meritorious defense to the charges against her.

In support of her motion, petitioner submits a copy of a letter from her sister, Ruth Smith, and the obituary of Ms. Smith's husband, Kelley David Saunders Sr. Additionally, a copy of the obituary of Nisha Navedo was submitted, along with a letter

from petitioner's job, a letter from the petitioner's daughters' school, food receipts, letters from two charities and copies of the petitioner's last three (3) rent payments.

Respondent opposes the motion and submits a verified answer stating that until NYCHA terminated petitioner's tenancy on default, for chronic rent delinquency and violation of probation, she was the tenant of record at 70 East 115th Street, Apartment 10J, an apartment located in Taft Houses, in New York County, a public housing development owned and operated by NYCHA. A copy of the lease is annexed to the verified answer as Exhibit A.

Respondent contends that pursuant to federal law, NYCHA has the authority to terminate a tenancy for serious or repeated violations of specific terms of a lease pursuant to 42 U.S.C. § 1437(c)(4)(B), which was designed to create "procedures...to assure the prompt payment and collection of rents and prompt process of evictions in the case of nonpayment of rent." Since petitioner herein violated material terms of the lease, specifically, by failing to make payments due under the lease, NYCHA maintains the option of pursuing further action. In accordance with NYCHA regulations, once an individual fails to make payments due under the lease, NYCHA has the authority to terminate a tenant's tenancy. As such, NYCHA must follow proper procedures regarding timeliness, notice and affording the tenant an opportunity for an impartial hearing.

Under termination procedures, NYCHA provides tenants the opportunity to discuss the issue with management. If management finds that termination of tenancy is appropriate, management then refers the matter for the preparation of charges. Thereafter, the tenant is mailed a written notice of the charges setting forth the specific date for a full evidentiary hearing to be held before an impartial hearing officer. The tenant is notified of her right to appear at the hearing with an attorney or other representative, to confront and cross-examine witnesses against her and to present witnesses in her defense. Upon the conclusion of the hearing, the impartial hearing officer prepares a written decision which is subject to review and approval by NYCHA's Board.

If a circumstance arises in which the tenant fails to appear for the hearing, the hearing officer will note that default and render a decision based on the facts in the record. However, in certain instances, the tenant is permitted to forgo the right to an administrative hearing and thereby stipulate to a probationary period. Upon stipulation, NYCHA's Board assumes the conditions surrounding the tenant's probationary tenancy. However, if the development manager finds that the tenant violated any conditions of probation, NYCHA's manager again submits the tenant's file for preparation of charges and NYCHA mails the tenant notice of the charges. Here, the tenant is no longer entitled to an interview with NYCHA's manager but the tenant may still be afforded a hearing before a hearing officer. Upon conclusion of the hearing, an officer prepares a written decision, which is, again, subject to review and approval by NYCHA's Board.

Where a hearing officer renders a decision after a default and the tenant, within a reasonable time after the default, applies for another hearing, the officer may set a new date provided the tenant shows "good cause." Good cause is met only when the tenant (1) establishes a reasonable excuse for failing to appear at the hearing; and (2) the tenant states a meritorious defense to the charges against her.

In February 2009, NYCHA sent petitioner a letter informing her that she had two (2) opportunities to discuss her chronic rent delinquency with the Housing Manager. Additionally, petitioner was sent a letter stating that NYCHA management would forward her tenant folder for preparation of charges. Thereafter, on July 30, 2009, NYCHA filed charges against petitioner declaring that petitioner had been chronically delinquent on rent payments, as she failed to timely pay her rent eleven (11) times in twelve (12) months; she was late on rent payments on nine (9) occasions and she failed to pay any rent on two (2) occasions.

Instead of proceeding with the scheduled hearing, petitioner settled the delinquency charges in a stipulation of settlement on September 3, 2009, wherein petitioner agreed to subject her tenancy to a one year probationary period and a promise to pay her rent no later than the fifth business day of each month. In the 2009 stipulation, petitioner agreed that NYCHA could seek to terminate her tenancy for violation of probation under the termination procedures if she failed to comply with the terms and conditions. Petitioner's one year probation began on September 21, 2009 and would have ended on September 21, 2010.

Petitioner violated the 2009 stipulation by paying partial rent in October 2009, and failing to pay rent in November 2009, December 2009, and January 2010. Accordingly, in a notice dated March 5, 2010, NYCHA brought charges against petitioner for (1) chronic rent delinquency; and (2) violation of probation. Petitioner was advised in the notice that she had a scheduled hearing before NYCHA on April 14, 2010 at 10:45 AM. However, petitioner failed to appear at the scheduled administrative hearing. As such, pursuant to NYCHA regulations and guidelines, the hearing officer rendered a decision sustaining the charges on default and recommending termination of petitioner's tenancy. Thereafter, NYCHA's Board adopted the hearing officer's recommendation and a termination of petitioner's tenancy was issued on April 29, 2010.

On May 9, 2010, petitioner erroneously submitted a request to open her default to the development management office of Taft Houses, rather than the Office of Impartial Hearings. The Office of Impartial Hearings did not receive the request. It was not until several months later, in December 2010, that petitioner sought to open her April 14, 2010 default, via a request to the Office of Impartial Hearings. Petitioner argued that her failure to appear was a result of extreme emotional distress caused by caring for her sister's family. Furthermore, petitioner submits that she failed to appear for the hearing because she was in the hospital visiting her ailing brother-in-law, who passed away on April 16, 2010, and she was additionally distracted by the death of her best friend on April 15, 2010. Moreover, as a defense, petitioner asserted that she was seeking help from Catholic Charities to pay her outstanding balance.

On January 5, 2011, NYCHA opposed petitioner's application to re-open her default by arguing that since petitioner waited eight months before moving to vacate her default, she exceeded the "reasonable time requirement" set forth in the Termination of Tenancy procedures. NYCHA argued that petitioner "failed to establish an excusable default" because prior to the hearing, she did not submit documentation regarding her absence, nor did she request an adjournment or send a representative in her place. Furthermore, NYCHA argued that petitioner "did not state a meritorious defense," as petitioner continued to evade her rent payment obligations, thereby owing NYCHA \$2,371.79.

The hearing officer denied petitioner's application to open her default in a decision dated January 10, 2011. The hearing officer rejected petitioner's excuse for failing to appear at the hearing since she did not give details explaining her inability to communicate her whereabouts to the hearing officer. Furthermore, the hearing officer rejected petitioner's defense by stating, "petitioner did not state a meritorious defense because petitioner continued to be delinquent in paying her rent." (Respondent's Exhibit A, p. 9). Therefore, since NYCHA followed proper termination procedures, it appropriately exercised its lawful discretion to terminate the tenancy of petitioner, who was on probation and was delinquent in rent payments on multiple occasions.

Pursuant to C.P.L.R. Section 7801, judicial review of administrative determinations in Article 78 proceedings is limited to evaluation of whether that determination is consistent with lawful procedures, whether it is arbitrary or capricious, and whether it is a reasonable exercise of an agency's discretion. Furthermore, it has been established that an administrative determination must be upheld in an Article 78 proceeding unless the sanction "...shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law..." (citations omitted). Matter of Featherstone v. Franco, 95 N.Y.2d 550 (2000).

In Matter of Edwin A. Pell v. Board of Education of Union Free School District, 34 N.Y.2d 222 (1974), the Court of Appeals determined that "it is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion" (citations omitted). Therefore, the role of this court is strictly limited to determining whether or not there was a rational basis for the final decision made by the NYCHA. "Upon a conclusion that it would decide a case in a manner differently, a court is precluded from substituting its judgment for that of the agency to which the Legislature has given specific power to determine the issues before it, unless there is no rational basis for the agency's determination." I.G. Second Generation Partners L.P., et al. v. New York State Division of Housing and Community Renewal, 34 A.D.3d 379 (1st Dept. 2006); see, Matter of Mid-State Mgt. Corp. v. New York City Conciliation & Appeals Bd., 112 A.D.2d 72 (1st Dept. 1985).

In the case at bar, petitioner was charged with chronic delinquency in the payment of her rent and in violation of her lease and her probation pursuant to a settlement with NYCHA. Petitioner was notified of her violations and timely notified of a hearing to be

held before a hearing officer. Thereafter, petitioner failed to appear at the hearing and the hearing officer determined that there was sufficient evidence and reasonable grounds for termination of the tenancy.

In, Yarbough v. Franco, 95 N.Y.2d 342 (2000), the Court of Appeals stated, "By seeking to vacate the default, petitioner was simply availing herself of the Authority's own invitation under its procedures to present new facts supporting her reasons for the default and to proffer a meritorious defense." Id. at 348. Moreover, paragraph 8, of NYCHA's procedures allows a tenant to apply, "within a reasonable time after his default in appearance" to open the default. This "reasonable time" limitation guards against excessive and dilatory applications. Id. In the case at bar, petitioner did not apply to vacate the default within a reasonable time.

Accordingly, it is hereby,

ADJUDGED, that the petition is denied and the proceeding is dismissed, without costs and disbursements to respondent, NYCHA

Dated: September 23, 2011

J.S.C.
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