

Matter of Lowery v Rhea
2011 NY Slip Op 32868(U)
September 1, 2011
Supreme Court, New York County
Docket Number: 400919/2011
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Feinman **PAUL G. FEINMAN**
Justice

PART 12

~~000~~

JUANITA Lowery
- v -
NYCHA

INDEX NO. 400919/11
MOTION DATE 5-10-11
MOTION SEQ. NO. 001
MOTION CAL. NO. 65

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION AND CROSS MOTION(S) ARE DECIDED
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.**

Petition held in abeyance.

FILED

SEP 02 2011

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Dated: 9/1/2011 6⁴⁸ PM SMH
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: CIVIL TERM PART 12

-----X

In the Matter of the Application of
JUANITA LOWERY,

Petitioner,

Index Number 400919/2011
Mot. Seq. No. 011

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

-against-

JOHN RHEA, as Chairperson of the New York City
Housing Authority, NEW YORK CITY HOUSING
AUTHORITY, and FIRST ATLANTIC TERMINAL
HOUSING CORP.,

Respondents.

DECISION AND ORDER

-----X

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Papers considered in review of this petition to reverse and annul, and cross motion to dismiss:

Papers	Numbered
Order to Show Cause, Ver. Petition, Exhibits, Affirmations	1, 2
Memorandum of Law in Support	3
Notice of Cross Motion, Affirmation, Exhibits	4
Affirmation (in Opposition by First Atlantic Terminal)	5
Affirmation in Opposition and in Further Support of Motion	6

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PAUL G. FEINMAN, J.:

In this Article 78 proceeding commenced by order to show cause, petitioner seeks an order pursuant to CPLR 7803 (3) that reverses and annuls the February 10, 2011 determination by respondent New York City Housing Authority (NYCHA) denying her Section 8 housing benefits, orders NYCHA to issue a Section 8 voucher retroactively, permanently enjoins First

Atlantic Terminal Housing Corp. from litigating its non-payment proceeding against her in Kings County, and awards costs and disbursements as against NYCHA pursuant to CPLR 8001. She also seeks preliminary injunctive relief barring First Atlantic from proceeding in Housing Court while this matter is pending. NYCHA cross-moves to dismiss the petition on the ground that it is premature. First Atlantic opposes any injunctive relief barring it from moving forward with its eviction proceeding.

Upon signing the order to show cause on April 11, 20011, the court granted a temporary restraining order on the condition that petitioner continue to timely pay her allocated portion of the monthly rent. Now, for the reasons which follow, the petition is held in abeyance, the petitioner is granted preliminary injunctive relief, and the cross motion to dismiss the petition is denied.

Background

According to the verified petition, petitioner is a 64-year-old disabled tenant¹ who has lived in the same apartment since 1976 when the building was operating as a Mitchell-Lama cooperative with a HUD-subsidized mortgage (Ver. Pet. ¶¶ 1-2). The “landlord” of the building is respondent First Atlantic Terminal (Saketkhou Aff. ¶ 3). During the years the building was part of Mitchell-Lama, petitioner received a HUD project-based rental subsidy established by the Housing and Community Development Act of 1974 to make such housing units affordable to very low income tenants (Ver. Pet. ¶ 41).

First Atlantic Terminal pre-paid its HUD mortgage, terminating the building’s

¹According to two letters from two doctors written in March 2011, petitioner is under treatment for a psychiatric condition and suffers from many chronic physical conditions (Ver. Pet. Ex. A, C [letters by medical doctors]).

participation in the Mitchell-Lama program and entitling the building's tenants to become eligible for "enhanced" Section 8 vouchers administered by NYCHA pursuant to 42 USC § 1437f(t) (Ver. Pet. ¶ 41). This occurred apparently in about 2005. First Atlantic continues to receive interest reduction payments under Section 236 (e) (2) of the National Housing Act, in exchange for agreeing to maintain the building as affordable low-income housing (Ver. Pet. ¶ 40).

According to the verified petition, after the building left the Mitchell-Lama program, petitioner should have, but did not receive, unlike the other building tenants, a Section 8 voucher through NYCHA (Ver. Pet. ¶ 4). Section 8 housing assistance is a federal program administered in New York City by several agencies including NYCHA, through which the government provides rent subsidies to lower-income families to enable them to rent privately owned housing (Cross Mot. Kramer Aff. ¶ 3). Petitioner pursued and ultimately won an Article 78 proceeding in 2009 that annulled NYCHA's denial of her application seeking a voucher (Ver. Pet. ¶ 4, citing *Lowery v Hernandez*, 400355/2008 [Sup Ct New York County], Braun, J.).² More than a year after the decision was issued, petitioner moved to compel NYCHA to comply with the court's decision; this was resolved by the agency agreeing in 2010 to process her application retroactive to the date that First Atlantic Terminal left the Mitchell-Lama program (Ver. Pet. ¶ 4).

Meanwhile, in 2007, First Atlantic Terminal commenced a nonpayment summary proceeding in Kings County Housing Court against petitioner who, in the absence of Section 8 subsidy payments, could not afford to pay and was not paying each month's total rent due (Ver.

²The determination by NYCHA that the application was "dead," for reasons explained in the previous proceeding, was deemed to be a "denial" by the court in its decision, order, and judgment, signed on June 4, 2009 (Mot. Ex. E [Transcript of court's oral decision on record 6/4/09, p. 12]).

Pet. ¶ 59).³ The nonpayment proceeding was stayed by the Supreme Court Justice who heard the Article 78 proceeding pending its determination; once NYCHA agreed to begin processing her application, the Housing Court proceeding was repeatedly adjourned on consent based on the assumption that NYCHA would soon retroactively reimburse the subsidies due to First Atlantic Terminal (*id.* ¶ 60).

As part of the settlement agreement reached between petitioner and NYCHA resolving her motion to compel, petitioner submitted to NYCHA the required documentation in December 2010, consisting of documents concerning her pension and worker's compensation income, Social Security benefits, documentation concerning her grandson's income, and the documents she submitted annually to her landlord, First Atlantic, showing her household composition (Ver. Pet. ¶ 52; Ex. F, G, H). On February 10, 2011, her application for Section 8 benefits was denied by NYCHA because her family did "not meet the standards for admission to Section 8 Housing" (Ver. Pet. Ex. I [Denial]).⁴ The denial summarized the issues as concerning "[m]isrepresentation[s]" of her full income and the employment income and the social security number of her grandson (*id.* p. 2). A separate document also dated February 10, 2011, sets forth a more detailed description of various discrepancies and omissions noted between her application to NYCHA and the documents submitted by petitioner to First Atlantic Terminal between 2005 and 2010 "in connection with the Mitchell-Lama program" (Ver. Pet. Ex. I ["Basis of

³*First Atlantic Term. Hsg. Corp. v Lowery*, L&T 82929/2007 (Civ Ct, Kings County).

⁴The February 10, 2011 NYCHA denial forms indicate that petitioner has a right to request within 90 days, an informal hearing before a hearing officer who would issue a written decision (Ver. Pet. Ex. I [Denial, p. 2]).

Ineligibility, Section 8").⁵ The conclusion is that petitioner "is ineligible because she committed fraud or another corrupt or criminal act in connection with a governmental housing program, or misrepresented information affecting eligibility, preferences for admission, family composition, income, or allowance."

The Instant Petition

Petitioner brings this petition to reverse and annul NYCHA's determination denying her a Section 8 voucher. The petition contends that the information petitioner submitted in connection with her Section 8 application is accurate (Ver. Pet. ¶ 6). It argues that NYCHA's decision is arbitrary and irrational given that it does not dispute the accuracy of the information she provided as part of her application for enhanced Section 8 benefits (Ver. Pet. ¶ 58). It also points out that she has not been investigated, arrested, charged, or convicted of any crime regarding housing subsidies (*id.*). As to the records kept by First Atlantic, the petition notes that "regardless of the accuracy," it is undisputed that she "obtained no subsidy or benefit as a result of any inaccuracy." (*id.*). It further argues that the information kept by First Atlantic is "complete[ly] irrelevant to" her application for Section 8 benefits (*id.*). It contends that the "information was merely collected by First Atlantic and potentially reported to HUD as part of its agreement with HUD to receive interest reduction payments after it left the project-based subsidy program" (*id.*). The petition also argues that the information collected by First Atlantic Terminal "was not used to calculate any form of government housing subsidy or benefits" (Ver. Pet. ¶ 56).

⁵It is noted that the documents apparently referenced in the NYCHA denial, attached to the Verified Petition as Exhibit H, concern the period of time after the building was removed from the Mitchell-Lama program (Ver. Pet. Ex. H [forms signed by petitioner for First Atlantic Terminal, dated 05/01/05, 09/01/06; 07/01/07; 07/01/08; 03/01/09; and 7/01/10]).

The petition also seeks to stay First Atlantic Terminal from resuming the litigation of its nonpayment proceeding in Kings County Housing Court, which is opposed by the landlord. The landlord contends that as of May 2011, petitioner owes \$46,997.05 in rent arrears (Saketkhou Aff. ¶¶ 5, 8). As noted above, in signing the order to show cause on April 11, 2011, this court temporarily stayed the summary proceeding on the condition that petitioner continues to pay her portion of the monthly rent due.

Cross Motion to Dismiss

NYCHA cross-moves to dismiss on the ground that petitioner has not exhausted her administrative remedies and the petition is therefore premature (CPLR 7801 [1]). Its attorney contends that upon information and belief, as of May 5, 2011, petitioner had not requested a hearing, but that she still had time to seek a hearing and should be required to do so (Cross Mot. Kramer Aff. ¶¶ 13, 16).

Petitioner argues that exhaustion of administrative remedies is not always necessary, noting that the Court of Appeals held in *Watergate II Apts. v Buffalo Sewer Auth.*, that the requirement need not be followed when, for example, pursuit of administrative remedies would cause irreparable injury (46 NY2d 52, 57 [1978]). She argues in essence that she is caught between the immediacy of the nonpayment proceeding in which First Atlantic Terminal will undoubtedly prevail, given her rent arrears, and the bureaucratic operations of NYCHA which apparently lacks resources to expeditiously process Section 8 applications and requests for hearings (Weisberg Aff. in Opp. ¶ 2, citing among others, *Watergate II Apts.*, *supra*; *Wendling v 136 E. 64th St. Assocs.*, 128 AD2d 419 [1st Dept 1987] [irreparable harm if plaintiff were dispossessed and the apartment sold pending a final disposition of the action]; *Matter of Uswij v*

Robins, 133 AD2d 695, 698 [2d Dept. 1987] [“faced with imminent eviction, it would have been futile for the petitioner to pursue the agency’s application process and await its determination”). Her attorney points out that in fact petitioner *has timely sought* a review of the decision, and provides a copy of the request along with proof that the document was received by NYCHA on April 7, 2011 (Weisberg Aff. ¶ Ex. A [Request; Proof of Service]). He further indicates that as of May 19, 2011, her request for an informal hearing has not yet been scheduled (Weisberg Aff. in Opp. ¶ 6).

Ordinarily, the court would agree with respondent NYCHA that the petitioner should exhaust her administrative remedies before turning to the court for relief. However, based on the unique facts of this case, with the particular history between this tenant and this agency, which has required her litigation in the supreme court just to compel a ruling on her application for Section 8 benefits, the court finds that the petitioner was justified to assume that the administrative process would be futile in avoiding irreparable injury to her (eviction from her long term tenancy). Faced with the Hobson’s choice of either losing her home of 30 years through eviction, or waiting and waiting for the NYCHA administrative appellate process to be completed before the summary nonpayment proceeding was concluded, bringing this petition to annul and reverse was justified under the circumstances of this case.

The court notes that if the informal hearing has been scheduled or even held while this motion has been sub judice, any findings of the hearing officer can be incorporated into NYCHA’s answer. In any event, the cross motion to dismiss as premature is, based on the circumstances presented, denied. Accordingly, both NYCHA and the landlord are directed to file and serve answers to the petition, which is held in abeyance pending their receipt.

Preliminary Injunction

Petitioner also moves this court for a preliminary injunction barring First Atlantic Terminal from proceeding in its Kings County Housing Court litigation. Among the purposes of a preliminary injunction are maintaining the status quo and preventing irreparable injury to a party (*see, e.g., Ma v Lien*, 198 AD2d 186 [1st Dept 1993], *lv dismissed* 83 NY2d 847 [1994]). The party seeking injunctive relief must demonstrate a likelihood of success on the merits, that she will suffer irreparable injury if the relief is not granted, and that the equities balance in her favor (*Aetna Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]).

Petitioner argues that she will ultimately succeed on the merits as she has lived in the same building for more than 30 years, most of them as a Mitchell-Lama tenant and has always been eligible for the enhanced Section 8 voucher accorded to all the tenants in her building when it was taken out of the Mitchell-Lama program and thereafter. As already discussed above, she sufficiently shows irreparable injury will occur in that without a stay of the nonpayment proceeding, she will ultimately be evicted and become homeless.

First Atlantic Terminal does not contest the plaintiff's proof of either of these prongs. Rather it argues that the balance of the equities tips in its favor and that the summary proceeding to terminate disabled tenant's 30-year tenancy should be proceeding without affording the tenant the process due her in this court. The court notes that in *Matter of Perez v Rhea*, ___ AD3d ___, 2011 NY Slip Op 06322 (1st Dept. 2011), the First Department recently held that notwithstanding the tenant's criminal conviction of an intentional defrauding of NYCHA, and notwithstanding an undisturbed finding by the agency hearing officer of an intent to defraud, forfeiture of the long-term tenancy was not warranted due the mitigating circumstances of her children's dyslexia and

attention deficit disorder.

While the issues presented here are not precisely the same, the tenant at bar has *not* been convicted of a crime, has a 30-year tenancy, and is herself the one with disabilities. Thus, she should, at the very least, be able to present her claim to this court that she has been placed in a bureaucratic Catch-22 without fear of immediate eviction. While First Atlantic correctly points out that arrears have been accumulating for five years, and that the summary proceeding is four years old at this point, the fault is not with the tenant petitioner, but rather with the respondent NYCHA. Certainly, as an additional respondent in the earlier proceeding, it could have moved to compel NYCHA to act in accordance with the final judgment, without waiting for the tenant to seek relief. Here, the equities balance in petitioner's favor and she is entitled to a stay of the landlord-tenant proceeding in Kings County Housing Court pending final determination of the instant petition. While First Atlantic Terminal is allegedly owed a considerable sum in subsidized rent payments, its interest is balanced against petitioner's age, physical and mental condition, and that she will suffer the loss of her home of 30 years with resulting serious impact on her life and health.

The granting of a preliminary injunction requires the court to assess, within its sound discretion, the amount of an undertaking to be given by petitioner, the purpose of which is to reimburse the respondent for damages sustained if it is ultimately determined that the injunction was erroneously granted (*Griffin v 70 Portman Rd. Realty, Inc.*, 47 AD3d 883, 884 [2d Dept 2008]; *Scotto v Mei*, 219 AD2d 181, 185 [1st Dept 1996]; CPLR 6312 [b]). Here, it is appropriate to require that petitioner post an undertaking in the amount of \$3,500.00.

It is therefore

ORDERED that the petition is held in abeyance, the cross motion to dismiss is denied and the respondents are directed to file and serve an answer to the petition in accordance with the CPLR; it is further

ORDERED that upon the filing of the answers and any accompanying memoranda of law, the instant petition shall be restored to the Part 12 motion calendar; and it is further

ORDERED that the petitioner's motion for a preliminary injunction is granted and respondent First Atlantic Terminal Housing Corp., its agents, servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of First Atlantic, are enjoined and restrained, during the pendency of this proceeding, directly or through any attorney, agent, servant, employee or other person under the supervision or control of respondent or otherwise, from litigating in any manner the non-payment proceeding currently pending in Kings County Housing Court, *First Atlantic Term. Hsg. Corp. v Lowery*, Index. No. 82929/2007, pending a final disposition of the within Article 78 proceeding; and it is further

ORDERED that the undertaking required by Article 63 is fixed in the sum of \$3,500.00 and the continuation of the preliminary injunction is also conditioned on petitioner continuing to pay her portion of the monthly rent to the respondent First Atlantic Terminal in a timely fashion.

Dated: September 1, 2011 648m
New York, New York



J.S.C.

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