

Matter of Coleman v Rhea

2012 NY Slip Op 30192(U)

January 25, 2012

Supreme Court, New York County

Docket Number: 401619/11

Judge: Eileen A. Rakower

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) 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

PRESENT: RAKOWER
Justice

PART 15

Index Number : 401619/2011
COLEMAN, WANDA
vs.
RHEA, JOHN B.
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

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

1, 2

3, 4

5

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: 1/25/12



HON. EILEEN A. RAKOWER

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 15

-----X
In the Matter of the Application of
WANDA COLEMAN,

Index No.
401619/11

Petitioner,

**DECISION
and ORDER**

-against-

JOHN B. RHEA, as Chairperson and Member of the New
York City Housing Authority, and THE NEW YORK
CITY HOUSING AUTHORITY,

Mot. Seq.
001

Respondents.
-----X

HON. EILEEN A. RAKOWER:

Petitioner Wanda Coleman ("Petitioner") brings this Article 78 Petition to challenge the February 23, 2011 determination by the New York City Housing Authority ("NYCHA") which, after a hearing, terminated Petitioner's tenancy. Petitioner was the tenant of Apartment 1C in 233 Sands Street in Kings County. The court notes at the outset that Petitioners have not raised a claim that NYCHA's determination was unsupported by substantial evidence in the record, and thus transfer to the Appellate Division pursuant to CPLR 7804(g) is not required (*see Hernandez v NYCHA*, 2011 NY Slip Op 32947U, *9 [Sup. Ct., N.Y. Co. 2011]) (citing cases).

On April 7, 2009, Petitioner received a notice from a NYCHA Housing Manager advising her that termination of her lease was being considered because of "BREACH OF RULES AND REGULATIONS: CHRONIC RENT DELINQUENT." The notice stated that the Housing Managers had scheduled an appointment to discuss the issue. A similar notice was sent on April 15, 2009, which scheduled a meeting for April 22, 2009. After Petitioner failed to respond to either notice, the Housing Manager sent a notice advising Petitioner that her file was being forwarded to the Applications and Tenancy Administration Department for potential termination. The notice further advised that she would receive notice of a hearing at which she could defend against any charges brought.

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).

On December 3, 2009, Petitioner received a notice that termination of her tenancy was being considered on the basis of "Breach of Rules and Regulations-Non Desirability" after NYCHA became aware of the January 7, 2009 arrest of her son Tyrone Coleman ("Tyrone"), an authorized occupant of Petitioner's apartment. Tyrone was arrested in a neighboring NYCHA apartment on the premises and charged with possession of crack-cocaine, weapons and drug paraphernalia. Petitioner subsequently spoke with the Housing Manager, and was later advised that her file was being forwarded to the Applications and Tenancy Administration Department for appropriate action.

On or about December 18, 2009, NYCHA served Petitioner with a notice and specification of charges advising Petitioner that she was being charged with non-desirability, breach of NYCHA rules and regulations, and chronic rent delinquency; and that a hearing would be held on January 29, 2010. On December 21, 2009, NYCHA served Petitioner with amended charges.

The hearing was held on January 29, 2010, May 6, 2010, and December 3, 2010 before Hearing Officer Arlene Ambert. NYCHA offered into evidence Petitioner's NYCHA lease; a copy of Petitioner's income affidavit, which included Tyrone as an occupant of the apartment; a copy of a May 6, 2010 rent ledger; and a Certificate of Disposition indicating that Tyrone was convicted of Criminal Possession of a Controlled Substance in the Third Degree - a class B felony - with respect to his January 7, 2009 arrest. NYCHA subsequently submitted into evidence a copy of Petitioner's rent ledger as of December 3, 2010, which indicated that Petitioner owed a current balance of \$1,431.00 (Petitioner's monthly rent was \$283). Hearing Officer Ambert admitted the December 2010 rent ledger into evidence over the objection of Petitioner's counsel, who argued that the ledger constituted new charges without proper notice.

Tyrone testified in Petitioner's defense. He denied being involved in any drug-related activity in Apartment 2E, and stated that although he pled guilty to the drug charges, he was in fact innocent of the charges, and took a guilty plea with a promise of a probationary sentence in order to avoid potential incarceration.

Petitioner also testified in her own defense. She testified that, to her knowledge, there have never been any weapons or drugs inside her apartment. She further stated that has checked her apartment for drugs, and that if she ever found drugs in the apartment, she would kick Tyrone out. With respect to the chronic rent delinquency charges, Petitioner testified that she received \$283.00 in Public

Assistance per month to pay her rent. However, without explanation, NYCHA increased her rent to \$300.00, and then \$400.00. Petitioner testified that NYCHA corrected this error in December 2009, and she received a credit for the discrepancy. Petitioner also submitted a February 2, 2010 stipulation from Housing Court which states: "Case discontinued. Rent paid through 2/10. Legal fees are waived." After the hearing, Petitioner also submitted an affidavit in order to respond to her alleged current rent delinquency. In her affidavit, Petitioner stated that in or around August 2010, Public Assistance "erroneously closed [her] case." Since that time, Petitioner attempted to have her case reopened by "attemp[ing] to schedule doctor's appointments with the Public Assistance medical staff to show that [she is] unable to engage in the WEP [Work Experience Program] program due to [her] disability." Petitioner further affirmed that in November 2010, she applied for a "one shot" rent grant to pay off the arrears which accrued after her case was closed. As of the date of her affidavit, December 13, 2010, Petitioner was awaiting a decision from the New York City Human Resources Administration ("HRA").

The record for submission of documentary evidence was closed on December 17, 2010.

By decision dated February 7, 2011, Hearing Officer Ambert sustained the charges against Petitioner and recommended termination of her tenancy. With respect to Tyrone's arrest on drug charges and subsequent guilty plea, Ambert discredited Tyrone's testimony, finding that his denial of drug activity in the NYCHA building was self-serving, and was precluded by his conviction. She further found that Petitioner's asserted ignorance of her son's illegal activity on NYCHA premises "[did] not absolve her of her tenancy obligations."

Ambert further concluded that NYCHA demonstrated Petitioner's chronic rent delinquency, as evidenced by the rent ledgers produced by NYCHA.

Ambert's decision was approved by the NYCHA board on February 23, 2011, and this Article 78 proceeding ensued. Petitioner argues that NYCHA's decision to terminate her tenancy must be overturned for several reasons. With respect to her alleged chronic rent delinquency, Petitioner alleges that the delinquency was actually caused by NYCHA's miscalculation of rent in 2009. Petitioner further argues that NYCHA failed to establish a chronic rent delinquency under applicable law. Lastly with regard to her rent delinquency

charges, Petitioner claims that NYCHA's wrongfully relied on her current rent delinquency without providing an amended notice of charges.

Petitioner further claims that the penalty of termination of her tenancy shocks the conscience because of Petitioner's long-standing tenancy and the needs of her daughter; because Petitioner's rent delinquency was minor and caused by factors beyond her control; and because of Petitioner's poor health.

Petitioner also argues that Tyrone's exclusion from the apartment based upon a single conviction was improper, and that Tyrone's exclusion would have the effect of punishing his family members who rely upon him.

In addition to her challenges to the February 23, 2011 decision to terminate her tenancy, Petitioner argues that NYCHA revived Petitioner's tenancy by prosecuting a non-payment proceeding after terminating her tenancy. Petitioner annexes a copy of NYCHA's non-payment petition, dated September 21, 2010. On March 15, 2011, the parties signed a stipulation of settlement which provided, *inter alia*: "Prior judgment is vacated, rent is paid through 2/28/11. Case is discontinued." Petitioner also annexes a letter dated April 11, 2011 letter from NYCHA indicating that Petitioner had failed to pay her rent, and scheduling a meeting with management office. The letter adds: "If the rent delinquency continues it can lead to termination of your tenancy." Petitioner also submits a Rent Resolution and In-House Probation Agreement dated April 13, 2011, wherein Petitioner agreed to pay past due rent, and to be placed on in-house probation. Petitioner further notes that she is also identified as a tenant on this form.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency's determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

The United States Housing Act and federal regulations promulgated by the U.S. Department of Housing and Urban Development ("HUD") establish eligibility parameters for public housing and require public housing agencies such as NYCHA to contain certain provisions in their leases. With respect to criminal activity and drug activity, U.S.C. §1437d(1)(6) provides that

Each public housing agency shall utilize leases which ... provide that any 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

24 C.F.R. §966.4(f) further provides that public housing leases shall contain lease provisions requiring tenants:

(4) To abide by necessary and reasonable regulations promulgated by the PHA for the benefit and well-being of the housing project and the tenants which shall be posted in the project office and incorporated by reference in the lease;

(11) To act, and cause household members or guests to act, in a manner which will not disturb other residents' peaceful enjoyment of their accommodations and will be conducive to maintaining the project in a decent, safe and sanitary condition; [and]

(12) (i) To assure that no tenant, member of the tenant's household, or guest engages in:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or

(B) Any drug-related criminal activity on or off the premises;

(ii) To assure that no other person under the tenant's control engages in:

(A) Any criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other residents; or

(B) Any drug-related criminal activity on the premises;

In accordance with federal requirements, Paragraph 12 of Petitioner's NYCHA Resident Lease Agreement provides, *inter alia*, that

It shall be the Tenant's obligations:

q. To act, and cause other persons who are in the Leased Premises with the consent of the Tenant to act, in a manner that will not disturb other residents' peaceful enjoyment of thier accommodations and will be conducive to maintaining the Development in a decent, safe and sanitary condition;

r. To assure that the Tenant, any member of the household, a guest, or another person under Tenant's control, shall not engage in::

(i) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the Development by other residents or by the Landlord's employees, or

(ii) Any violent or drug-related criminal activity on or off the Leased Premises or the Development, or

(iii) Any activity, on or off the Leased Premises or the Development, that results in a felony conviction.

With respect to the timely payment of rent, 24 C.F.R. §966.4(l)(2)(i)(A) provides that a public housing agency may terminate a tenancy based upon “[s]erious or repeated violation of material terms of the lease, such as the ... [f]ailure to make payments due under the lease.” Paragraph 12(s) of Petitioner’s lease provides that the tenant is required to “pay all rent, additional rent, charges and security deposits provided herein on the first day of the month such sum becomes due, or otherwise as directed by or consented to by the Landlord.” Chapter IV, Section III(B)(4) of NYCHA’s Management Manual provides that “Chronic Delinquency in the Payment of Rent” constitutes grounds for termination of tenancy. That subsection defines chronic rent delinquency as “[t]he tenant’s repeated failure or refusal to pay rent within the month due, at least three times during any 12 month period Rent need not be in arrears at the time the action is instituted if the record clearly shows repeated failure or refusal to pay.”

Paragraph 19 of the lease provides that NYCHA may terminate the lease for “violation of material terms of the Lease, such as failure to make payments due under the Lease or failure to fulfill any of the Tenant’s obligations set forth in Paragraph 12 hereof.”

Based upon its review of the record, the court finds that NYCHA’s determination was rationally based, and was thus entitled to deference. With respect to the non-desirability charges, exclusion of Tyrone from the apartment was clearly appropriate where he pled guilty to Criminal Possession of a Controlled Substance, a class B felony. “A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts in a subsequent civil action and collaterally estops a party from relitigating the issue” (*Grayes v. DiStasio*, 166 A.D.2d 261, 262-63 [1st Dept. 1990]). Inasmuch as Tyrone is conclusively established as having engaged in drug activity on NYCHA premises, his exclusion from the apartment was appropriate pursuant to applicable federal laws and regulations, and pursuant to Petitioner’s lease.

As noted by Hearing Officer Ambert, Petitioner’s asserted ignorance of Tyrone’s drug activity did not absolve her obligation as a NYCHA tenant to ensure that members of her household refrain from drug activity on NYCHA premises (*see Satterwhite v. Hernandez*, 16 A.D.3d 131, 132 [1st Dept. 2005]) (*citing Dept. of Hous. & Urban Dev. v Rucker*, 535 U.S. 125[2002]). Accordingly, termination of her tenancy on this ground was rational.

Moreover, in addition to Tyrone's arrest and felony conviction for drug activity on NYCHA grounds, the court finds that NYCHA rationally sustained the charge of chronic rent delinquency against Petitioner. As noted by Hearing Officer Ambert, "even *after* the Tenant's rent was re-calculated and a credit was applied to her account in December 2009 ..., the Tenant continued to carry a balance through at least May 2010" Further, Hearing Officer Ambert properly considered the updated rent ledger (*see Wilkerson v New York City Hous. Auth.*, 2011 NY Slip Op 31903U [Sup. Ct., N.Y. Co. 2011]) ("Although [the Hearing Officer] considered charges that were not specified against petitioner, namely the failure to pay rent from July 2010 to January 2011, it cannot be said that it was irrational for her to use this period of non-payment as further evidence that petitioner had repeatedly failed to pay rent on time."). Hearing Officer Ambert also properly rejected Petitioner's contention that her failure to pay rent was beyond her control, noting, "the fact remains ... it is ultimately the responsibility of the Tenant to ensure timely and complete rent payments." (*see Zimmerman v New York City Hous. Auth.*, 84 A.D.3d 526 [1st Dept. 2011]) ("while petitioner substantially caught up with the payment of arrears in rent, his chronic delinquency also provided grounds for the determination, notwithstanding his claim that public assistance was untimely in paying his rent").

Nor does the court find the penalty of termination shocking to one's sense of fairness. "Termination of tenancy as a penalty for chronic rent delinquency is not so disproportionate to the offense as to be shocking to one's sense of fairness" (*Lettsome v New York City Hous. Auth.*, 2011 NY Slip Op 30804U, *7 [Sup. Ct., N.Y. Co. 2011 (citing cases); *see also Matter of Johnson v Rhea*, 2010 NY Slip Op 31765U, *7 [Sup. Ct., N.Y. Co. 2010] ("NYCHA should not be made to shelter a tenant who consistently meets her rent obligations with late payments, if at all.")).

Lastly, the court rejects Petitioner's argument that NYCHA revived Petitioner's tenancy. There is nothing in the March 15, 2011 stipulation which evinces an intention on the part of NYCHA to revive Petitioner's tenancy (*see Ansonia Associates v. Pearlstein*, 122 Misc. 2d 566, 567-68 [Civ. Ct., N.Y. Co. 1984]).

Wherefore it is hereby

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

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: January 25, 2012



EILEEN A. RAKOWER, J.S.C.

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).