

Felipe v New York City Housing Authority
2012 NY Slip Op 32199(U)
August 17, 2012
Sup Ct, New York County
Docket Number: 400603/12
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: BARBARA JAFFE *Jaffe*
J.S.C. *Justice*

PART 5

Index Number : 400603/2012
FELIPE, MARLENE
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78 *Cal. #46*

INDEX NO. _____
MOTION DATE 6/19/12
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1</u>
Answering Affidavits — Exhibits _____	No(s). <u>2, 3</u>
Replying Affidavits _____	No(s). _____

Upon the foregoing papers, it is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ~~ORDER~~ JUDGMENT**

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).

NYS SUPREME COURT
document has been E-Filed

AUG 20 2012

Document No. _____

Dated: 8/17/12
AUG 17 2012

[Signature]
_____, J.S.C.
BARBARA JAFFE
J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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
MARLENE FELIPE,

Petitioner,

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

Index No. 400603/12

Argued: 6/19/12
Motion Seq. No.: 001
Motion Cal. No.: 46

DECISION & JUDGMENT

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent

-----X
BARBARA JAFFE, JSC:

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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).-----X

For petitioner:

Marlene Felipe, self-represented
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For respondent:

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Kelly D. Macneal
Acting General Counsel
New York City Housing Authority
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By notice of petition dated March 8, 2012, petitioner brings this Article 78 proceeding
seeking an order annulling and vacating respondent's termination of her tenancy. Respondent
opposes.

I. BACKGROUND

Respondent New York City Housing Authority (NYCHA) was created by the New York
legislature to, *inter alia*, build and operate low-income apartments in New York City. (Verified
Ans.). Federal and state law endows NYCHA with the authority to promulgate and enforce
standards for tenancy. (*Id.*).

To ensure that an individual is financially eligible for public housing, respondent requires
that he or she submit annual income verification. (*Id.*, Exh. D). Failure to provide satisfactory

verification constitutes grounds for terminating the tenancy, as do chronic rent payment delinquencies and breaches of respondent's rules and regulations. (*Id.*, Exh. B).

On October 13, 2006, petitioner executed an occupancy agreement for apartment 3F at 5210 Broadway, Bronx, New York, a housing development owned and operated by respondent. (*Id.*, Exh. A). Her occupancy agreement provides, as relevant here, that she must pay rent on the first day of each month, that her rent will be redetermined annually in accordance with her income and in compliance with respondent's guidelines, and that she is prohibited from installing an air conditioner in the apartment absent respondent's prior written consent. (*Id.*).

Between January of 2010 and May of 2011, petitioner failed to pay her monthly rent timely, or at all, and also failed to provide respondent with her annual income verification materials. (*Id.*, Exh. F). Although respondent repeatedly sent her correspondence requesting that she appear for an interview to discuss her delinquency, petitioner never appeared, and on May 26, 2011, respondent preferred charges against her for chronic rent payment delinquency. (*Id.*, Exh. G). On November 30, 2011, respondent amended the charges to reflect her continued delinquency, failure to provide verification of her income, and unauthorized installation of an air conditioner in her apartment, specifying January 3, 2012 as the hearing date. (*Id.*, Exh. H).

On January 3, 2012, petitioner failed to appear at the hearing. (*Id.*, Exh. I). By decision and disposition dated January 5, 2012, absent any controverting evidence, the hearing officer sustained the charges. (*Id.*).

Sometime before January 13, 2012, respondent commenced a non-payment proceeding against petitioner in the Civil Court of the City of New York, Housing Part. (*Id.*, Exh. O). By stipulation dated January 13, 2012, petitioner agreed to pay respondent all outstanding rent due

by February 27, 2012, and respondent agreed that the issuance of a warrant of eviction would be stayed until this date. (*Id.*). By judgment of that date, respondent was awarded possession of the subject apartment. (*Id.*).

On January 30, 2012, petitioner requested a new hearing, explaining her failure to appear and providing a defense to the charges as follows:

I was not aware of the appointment on 1/3/12. Due to letter being placed in another persons mailbox. Neighbor stated she had letter for a while but didnt have a chance to get it to me and apologized. I immediately called.

I have always provided my job information to the Marble Hill housing office and their has never been any illegal appliances placed in my apt. The A/C have been there for years.

(*Id.*, Exh. K).

On February 3, 2012, respondent opposed petitioner's request, denying that petitioner offered a reasonable excuse for her default or a meritorious defense, as its affidavit of mailing reflects that the amended charges were sent to petitioner by regular and certified mail on December 1, 2011, and petitioner owed \$6,007.08 in outstanding rent, a large portion of which was owed due to her failure to submit income verification. (*Id.*, Exh. L).

On February 9, 2012, the hearing officer denied petitioner's request on the grounds that respondent's affidavit of mailing constitutes sufficient proof of service and that petitioner offered no explanation for her chronic rent payment delinquency. (*Id.*, Exh. M).

II. CONTENTIONS

Petitioner asserts that she is in the process of obtaining a "one-shot deal" with respondent, that she has made some payments toward her arrears, that she failed to pay her rent because she experienced financial hardship after she lost a part-time job and her mother and sister passed

away, and that she is willing to pay her current rent. (Ver. Pet.).

In opposition, respondent observes that petitioner's application, if granted, would constitute a collateral attack on the Housing Part's judgment, and in any event, that petitioner failed to provide a reasonable excuse for her failure to appear and a meritorious defense to the rent payment delinquency charges. (Resp.'s Mem. of Law). Moreover, it contends that petitioner's explanation for her failure to pay rent may not be considered as she failed to assert it at the administrative level, and that her recent payment of a portion of her arrears and her current willingness to pay her rent do not excuse her past delinquency. (*Id.*).

III ANALYSIS

A. Collateral attack

"A collateral attack upon a prior judgment is an attempt to avoid, defeat, or evade a judicial decree, or deny its force or effect If the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack on the judgment is collateral." (73 NY Jur 2d Judgments § 280). Absent a showing that the court that issued the prior judgment lacked jurisdiction, the judgment may not be collaterally attacked. (73 NY Jur 2d Judgments § 273).

As the Housing Part has jurisdiction over non-payment proceedings (New York City Civil Court Act § 110[a][5]), the instant proceeding constitutes an impermissible collateral attack on its January 13, 2012 judgment (*see Matter of Cherry v New York City Hous. Auth.*, 67 AD3d 438 [1st Dept 2009] [where judgment of Housing Part awarded possession of petitioner's apartment to NYCHA, Article 78 seeking vacatur of default judgment terminating tenancy could not be

maintained as it would nullify judgment of possession]; *Matter of Bobian v New York City Hous. Auth.*, 55 AD3d 396 [1st Dept 2008][same]).

B. Vacatur of default

Even if the instant proceeding did not constitute an impermissible collateral attack on the January 13 judgment, my review is nonetheless limited to whether respondent properly denied petitioner's application to vacate its default. (*Yarbough v Franco*, 95 NY2d 342 [2000]). In order to establish entitlement to vacatur of the default, petitioner must demonstrate both a reasonable excuse for the default and a meritorious defense to the underlying charges. (*Matter of Cherry*, 67 AD3d 438).

Mere denial of receipt of a notice or other pleading is insufficient to controvert evidence of service and does not constitute a reasonable excuse for default. (*Baez v Ende Realty Corp.*, 78 AD3d 576 [1st Dept 2010]; *Bryant v New York City Hous. Auth.*, 69 AD3d 488 [1st Dept 2010]; *Coyle v Mayer Realty Corp.*, 54 AD3d 713 [2d Dept 2008]). Here, as respondent provided an affidavit of service reflecting that the notice was mailed to petitioner twice, petitioner's bare assertion that she never received it and that she learned that it had been placed in an unnamed neighbor's mailbox who then failed to give it to her, while unfortunate, does not rebut the presumption of proper service.

Moreover, petitioner offers no explanation for her repeated failure to pay rent in her January request. She has thus failed to provide a meritorious defense to the chronic rent payment delinquency charges. To the extent that she now attempts to explain her delinquency by asserting that she experienced financial hardship when she lost her job and her mother and sister passed away, this explanation is unavailing as I cannot consider arguments that were not presented at the

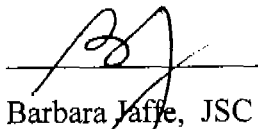
administrative level. (*See Matter of Evans v New York City*, 94 AD3d 885 [2d Dept 2012] [where NYCHA denied petitioner's application to vacate default judgment terminating his tenancy for chronic rent payment delinquency, trial court erred in considering evidence beyond administrative record in determining that he had demonstrated meritorious defense]). As are her assertions that she has paid some of the arrears, is negotiating a deal with respondent, and is willing to pay her current rent, as they do not address her past delinquency. (*Cf. Zimmerman v New York City Hous. Auth.*, 84 AD3d 526 [1st Dept 2011] [termination of tenancy for, *inter alia*, chronic non-payment of rent proper notwithstanding that petitioner "substantially caught up with the payment of arrears in rent"])).

IV. CONCLUSION

Accordingly, it is hereby

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

ENTER:


Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: August 17, 2012
New York, New York

AUG 17 2012

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