

Matter of Delgado v New York City Hous. Auth.

2012 NY Slip Op 32909(U)

November 9, 2012

Supreme Court, New York County

Docket Number: 401511/12

Judge: Alexander W. Hunter Jr

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JP
Justice

PART 33

Index Number : 401511/2012
DELGADO, HILDA E.
VS.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 23, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). <u>1-10</u>
Answering Affidavits — Exhibits _____	No(s). <u>11-23</u>
Replying Affidavits _____	No(s). _____

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


See memorandum decision & judgment annexed hereto

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

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: 11/9/12


_____, J.S.C.
ALEXANDER W. HUNTER JP

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X
In the Matter of the Application of
Hilda E. Delgado,

Index No. 401511/12

Petitioner,

Decision and Judgment

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

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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

UNFILED JUDGMENT
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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, dated February 29, 2012, is denied and the petition is dismissed.

Petitioner asserts that respondent's determination denying her application to open the decision terminating her tenancy by default should be reversed because she had an excuse for not attending the New York City Housing Authority ("NYCHA") hearing on February 8, 2012. In this Article 78 action, petitioner alleges that she did not attend the hearing because she did not have carfare and was sick. Previously, in her application to open her default, petitioner stated that her excuse for missing the hearing was because she was at the public assistance office resolving a problem with her back rent. petitioner further alleges that she is trying to get a One Shot Deal, she will receive income pending her Social Security Income application, and that an organization called Homebase may be able to pay the full arrears if her tenancy is reinstated.

In support of her petition, petitioner submits NYCHA's determination terminating her tenancy by default, dated February 29, 2012; NYCHA request for a new hearing, dated February 9, 2012; medical records, admit date December 19, 2011; public assistance records, dated from June and July 2012; record for One Shot Deal, dated April 26, 2012; NYCHA 30 day notice to vacate, dated May 4, 2012; Social Security Income application summary, dated June 7, 2012; and a letter from Homebase, dated June 20, 2012.

Respondent opposes the motion and submits a verified answer stating that until petitioner's tenancy was terminated, she was the tenant of record at apartment 3E at 363 Dumont Avenue in NYCHA's Brownsville development. A copy of the lease is annexed to the verified answer. Respondent contends that under 24 C.F.R. §966.4(1)(2)(i)(A), NYCHA may terminate a

tenancy for serious or repeated violations of material terms of the lease, such as a failure to make payments due under the lease. The lease also provides that NYCHA may terminate petitioner's tenancy based on her failure to make payments due under the lease. In petitioner's application to open the default, she admits to rent arrears by referring to a problem with public assistance not making payments on her behalf.

Development management contacted petitioner on three separate occasions to discuss her chronic rent delinquency, in letters dated September 1, 2011, October 3, 2011, and October 24, 2011. Finally on January 4, 2012, NYCHA sent petitioner a notice recommending that her tenancy be terminated because she had not made any rent payments for the seven months between April 2011 and October 2011, and advising her of a hearing scheduled for February 8, 2012. As petitioner did not appear at this hearing, the Hearing Officer issued a decision sustaining the charges on default on February 13, 2012.

On February 9, 2012, petitioner applied to reopen her default. NYCHA opposed petitioner's application, arguing that petitioner failed to establish an excusable default because she did not supply documentation of any conflicting appointment at the public assistance office, and even if she had provided such proof, she failed to send a representative to the hearing to request an adjournment. Petitioner knew the consequences of failing to appear as she had defaulted in a prior proceeding. Moreover, petitioner failed to state a meritorious defense as she continued to be chronically late in the payment of rent and failed to present a viable plan to become and remain current with rent. On March 6, 2012, the Hearing Officer denied petitioner's application to open her default on the grounds that petitioner had established neither an excusable default nor a meritorious defense.

Respondent contends that because petitioner defaulted, the only issue before the court is whether the Hearing Officer's decision denying petitioner's request to reopen her default is rational. Respondent contends that the Hearing Officer rationally denied petitioner's request to vacate her default because petitioner did not establish a reasonable excuse for her default. Petitioner has inconsistent claims for why she did not appear, and moreover these excuses are unavailing because she does not explain her failure to send a representative or request an adjournment.

Respondent further argues that placing the blame on public assistance is not a meritorious defense that excuses non-payment. Petitioner was aware that her failure to appear could result in a default termination because she had previously defaulted in a prior termination-of-tenancy proceeding. In addition, petitioner's argument that Homebase might pay her arrears if her tenancy is restored is unavailing because petitioner waived reliance on this argument by failing to raise it in her application to open her default. Moreover, it is an inadequate defense to a history of chronic rent delinquency, and a promise to pay arrears does not constitute a meritorious defense.

It is well settled that a determination is arbitrary and capricious when it is made “without sound basis in reason and is generally taken without regard to the facts.” See Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 (1974). “Even though the court might have decided differently were it in the agency’s position, the court may not upset the agency’s determination in the absence of a finding, not supported by this record, that the determination had no rational basis.” Matter of Mid-State Mgt. Corp. v. New York City Conciliation and Appeals Bd., 112 A.D.2d 72, 76 (1st Dept. 1985). The court may only review the denial of the petitioner’s application to open her default, not the underlying determination. Matter of Yarbough, 264 A.D.2d 740. Therefore, this court’s role is limited to whether or not NYCHA’s final determination was made without a rational basis.

The Hearing Officer’s determination to deny the request to open the default was not arbitrary, capricious, or irrational. “Respondent’s determination that petitioner failed to apply to open her default within a reasonable time, give a reasonable excuse for missing her hearing, and set forth a meritorious defense to the charges against her, has a rational basis.” Pena v. New York City Hous. Auth., 91 A.D.3d 581, 582 (1st Dept. 2012). “NYCHA has been repeatedly upheld by the courts in requiring a tenant to establish both an excusable default and a meritorious defense in seeking to vacate a default.” Gooden v. Rhea, 2012 N.Y. Slip Op. 32537(U); see Matter of Yarbough, 264 A.D.2d 740.

Petitioner did not establish a reasonable excuse for her default. Petitioner does not deny that she received notice of the hearing date. Petitioner waived her argument that the default should be excused because she did not have carfare and was ill because she failed to assert this claim in her application to open her default. Even if it is considered, the medical record provided by petitioner is from a physical exam conducted approximately two months before the hearing. Matter of Featherstone v. Frano, 95 N.Y.2d 550 (2000); Matter of Torres v. New York City Hous. Auth., 40 A.D.3d 328, (1st Dept. 2007). The court will not address petitioner’s other inconsistent allegation that she was in a public assistance office at the time of the hearing because she did not raise this excuse in the instant action, and in any event, she previously failed to submit documentation supporting her defense. Matter of Cherry v. New York City Hous. Auth., 67 A.D.3d 438 (1st Dept. 2009); Perez v. Fisher, 62 A.D.3d 1104 (3rd Dept. 2009).

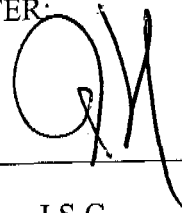
Petitioner did not establish a meritorious defense for her default. Petitioner admits to rent arrears and places the blame on public assistance for not making payments on her behalf. Chronic rent delinquency provides rational grounds for the determination, notwithstanding a claim that public assistance was untimely in paying rent. Errors or delays by government agencies in making payments on a tenant’s behalf do not excuse non-payment. Zimmerman v. New York City Hous. Auth., 84 A.D.3d 526 (1st Dept. 2011). In addition, petitioner waived reliance on the claim that she will be able to pay off her arrears if her tenancy is restored because she did not raise this argument in her application to open her default, and regardless, a promise to pay arrears is an inadequate defense in the face of a history of chronic rent delinquency. Matter of Featherstone, 95 N.Y.2d 550; New York City Hous. Auth. v. McClinton, 711 N.Y.S.2d 293 (1st Dept. 2000); Scott v. Peekskill Hous. Auth., 28 N.Y.2d 610 (1971).

Accordingly, it is hereby,

ADJUDGED, that the petition is denied and the proceeding is dismissed, without costs and disbursements to respondent New York City Housing Authority.

Dated: November 9, 2012

ENTER:

A handwritten signature in black ink, consisting of a large, stylized 'Q' followed by a vertical line and a diagonal stroke.

J.S.C.

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