

Matter of Nicholson v New York City Hous. Auth.

2012 NY Slip Op 32955(U)

December 13, 2012

Sup Ct, New York County

Docket Number: 400422/12

Judge: Barbara Jaffe

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SCANNED ON 12/17/2012

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

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

PART 5

Index Number : 400422/2012
NICHOLSON, STANLEY
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78 CALL: 1261

INDEX NO. _____
MOTION DATE 7/31/12
MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for Article 78 review

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2, 3

Replying Affidavits _____ | No(s). _____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ~~RE~~ 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).

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

Dated: 12/13/12
DEC 13 2012

BARBARA JAFFE, J.S.C.
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

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK : PART 5

-----X
 In the Matter of the Application of

Index No. 400422/12

STANLEY NICHOLSON,
 Petitioner,

Argued: 7/31/12
 Motion Seq. No.: 001
 Calendar No.: 61

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

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

-----X
 BARBARA JAFFE, JSC:

For petitioners:

Stanley Nicholson, self-represented
 295 Cozine Avenue, Apt. 4A
 Brooklyn, NY 11207
 347-342-7724

For respondent:

Corina L. Leske, Of Counsel
 Kelly D. Macneal
 Acting General Counsel
 250 Broadway, 9th Fl.
 New York, NY 10007

By notice of petition dated February 3, 2011, petitioner brings this Article 78 proceeding seeking an order vacating and reversing respondent New York City Housing Authority's (NYCHA) determination terminating his tenancy. Respondent opposes.

I. BACKGROUND

Petitioner is the tenant of record of apartment 4A at 295 Cozine Avenue in Brooklyn, a NYCHA-owned apartment building. (Ver. Ans., Exh. A). His lease provides, in pertinent part, that he is obligated to pay his rent on the first day of each month and that NYCHA may terminate his lease if he fails to do so. (*Id.*). NYCHA's Termination of Tenancy Procedures also provide that a tenancy may be terminated for "chronic delinquency in the payment of rent[,] [t]he repeated failure or refusal of the tenant to pay rent when due." (*Id.*, Exh. B).

On March 13, 2009, petitioner was charged with chronic delinquency in the payment of rent for failing to pay his rent timely between December 2007 and July 2008 and for failing to pay any rent between August 2008 and November 2008, and he was notified that a hearing on the charges was scheduled for April 3, 2009. (*Id.*, Exh. F). The charges were subsequently amended to reflect his untimely payment of rent between May and August 2008 and his failure to pay rent between September 2008 and April 2009; the hearing was adjourned to August 4, 2009. (*Id.*, Exh. G).

Petitioner failed to appear for the hearing, and on August 5, 2009, the hearing officer found him in default and ordered his tenancy terminated. (*Id.*, Exh. H). On August 26, 2009, NYCHA approved the hearing officer's determination. (*Id.*, Exh. I).

Immediately thereafter, petitioner requested a new hearing date, claiming that he did not know that the hearing had been scheduled for August 4, and defending against the charges as follows:

I just had surgery on my right foot and its (sic) finally healing. I won an (sic) fair hearing decision to help pay the back rent. I have to open a bank [account] so they can send my rent money direct before they can send the back rent.

On August 28, 2009, NYCHA opposed petitioner's request, asserting that he had established neither a reasonable excuse for his failure to appear nor a meritorious defense to the charges, alleging its possession of proof that the amended charges and notice were mailed to him, that its records reflect that he owes \$5,738.20 in back rent, and claiming that he offers no documentation of his surgery or the fair hearing. (*Id.*, Exh. K). Annexed to the opposition is an affidavit from a NYCHA employee dated August 28, 2009 reflecting that she prepared the amended specification of charges and notice of the hearing for mailing by both regular and

certified mail, that NYCHA's records reflect that the envelopes were mailed to petitioner on July 2, 2009, and that neither envelope was returned to NYCHA as undeliverable. (*Id.*) Also annexed to the opposition is a NYCHA printout dated August 28, 2009 reflecting petitioner's \$5,738.20 in arrears. (*Id.*)

On October 2, 2009, a hearing officer denied petitioner's request for a new hearing, finding that NYCHA's affidavit of mailing constituted sufficient evidence of its timely mailing of the charges and notice, and that petitioner failed to set forth a meritorious defense in light of NYCHA's proof of his back rent and absent documentation of the fair hearing. (*Id.*, Exh. L).

By affidavit dated June 1, 2012, a NYCHA employee states that on October 2, 2009, she placed NYCHA's denial of petitioner's request for a new hearing in a box labeled "outgoing mail," that NYCHA Mail Center employees picked up the box daily for mailing, and that the "United States Postal Service did not return the decision undelivered or unclaimed." (*Id.*, Exh. Holley Affid.). By affidavit of the same date, a NYCHA Mail Center employee states that it was the Mail Center's practice to pick up letters from the outgoing mail box, ready them for mailing, and place them in receptacles for retrieval by the United States Postal Service. (*Id.*, Exh. Younger Affid.).

On February 22, 2012, petitioner commenced the instant proceeding.

II. CONTENTIONS

Petitioner asserts that he was unaware of the August 4, 2012 hearing, that he was experiencing health and marital problems during that time, that he obtained a one-shot deal and was told that the case was closed after he paid his rent, that he overheard a NYCHA employee say that it would be better for NYCHA if his tenancy were terminated than if he were permitted

to stay and pay his arrears, and that he has nowhere to go if his tenancy is terminated. (Ver. Pet.).

In opposition, respondent observes that as the instant proceeding was commenced more than two and one-half years after NYCHA terminated petitioners' tenancy, it is untimely. (Ver. Ans.). In any event, although it admits that petitioner has paid all but \$625.80 of his back rent, it asserts that the hearing officer's determination is neither arbitrary nor capricious as petitioner offered neither a reasonable excuse for his default nor a meritorious defense to the charges. (*Id.*).

III. ANALYSIS

A. Statute of limitations

Pursuant to CPLR 217(1), an Article 78 proceeding must be commenced within four months after the challenged determination becomes final and binding on petitioner. As more than two and one-half years elapsed between NYCHA's termination of petitioner's tenancy and the commencement of the instant proceeding, it is untimely.

B. Vacatur of default

Even if the instant proceeding were timely commenced, my review would be 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 Quinones v New York City Hous. Auth.*, ___ AD3d ___, 2012 NY Slip Op 6732 [1st Dept Oct. 9, 2012]; *Matter of Cherry v New York City Hous. Auth.*, 67 AD3d 438 [1st Dept 2010]).

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

[* 6]
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 amended charges and notice of the hearing were mailed to petitioner and not returned to NYCHA as undeliverable, petitioner's bare assertion that he was unaware of the August 4 hearing does not rebut the presumption of proper service and does not excuse his default.

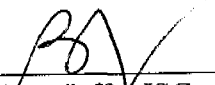
Moreover, as petitioner offers no proof of the fair hearing, and as NYCHA's records reflect that he owed over \$5,000 in back rent at the time of his default, the hearing officer's determination that he failed to demonstrate a meritorious defense to the charges is neither arbitrary nor capricious. Although he now asserts, and NYCHA concedes, that he has paid most of his arrears, that a NYCHA employee wanted his tenancy terminated, and that he will experience hardship if he loses his apartment, as the scope of my review is limited to record adduced before the hearing officer (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [1st Dept 2007]; *Matter of Patrick v Hernandez*, 309 AD2d 566, 566 [1st Dept 2003]), and as he failed to include these claims in his request for a new hearing, there is no legal basis for vacatur of the hearing officer's determination. Even if petitioner's payment of his arrears could be considered, a tenancy may be terminated for rent delinquency notwithstanding the tenant's subsequent payment of his or her arrears. (*Matter of Zimmerman v New York City Hous. Auth.*, 84 AD3d 526 [1st Dept 2011]).

IV. CONCLUSION

According, it is hereby

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

ENTER:



Barbara Jaffe, JSC

DATED: December 13, 2012
New York, NY

BARBARA JAFFE
J.S.C.

DEC 13 2012