

Matter of Clyde v New York Hous. Auth.

2013 NY Slip Op 30175(U)

January 25, 2013

Supreme Court, New York County

Docket Number: 401689/2012

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. ARLENE P. BLUTH

PRESENT: _____
Justice

PART 4

Index Number : 401689/2012
CLYDE, ELYON
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

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

The following papers, numbered 1 to 2, were read on this motion to/for Art. 78
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1
^{Pet}
^{Cross motion}
Answering Affidavits — Exhibits _____ No(s). 2
Replying Affidavits _____ No(s). _____

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

~~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).

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

1.25.13

Dated: _____

_____, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: CROSS 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 NY
COUNTY OF NEW YORK: PART 4**

Index No.: 401689/12

**In the Matter of the Application of
Elyon Clyde**

**DECISION, ORDER
AND JUDGMENT**

Petitioner,

Present: HON. ARLENE P. BLUTH

-against-

New York City Housing Authority,

Respondent.

Petitioner, who is self-represented, commenced this Article 78 proceeding to challenge respondent New York City Housing Authority's ("NYCHA") determination dated March 28, 2012 which approved the hearing officer's decision to dismiss petitioner's remaining family member grievance. NYCHA cross-moves to dismiss the petition pursuant to CPLR §3211(a)(1) on the grounds that the claim is barred by documentary evidence, specifically, the Civil Court judgment which awarded possession of the subject apartment to NYCHA, and because the petition fails to state a cause of action. For the reasons set forth below, NYCHA's cross-motion is granted, the petition is denied and the proceeding is dismissed.

Petitioner's mother, the tenant of record of apartment #5G at 280 Madison Street in Manhattan, died on December 23, 2008. Thereafter, petitioner sought to succeed to his mother's lease as a remaining-family member. By letter dated May 3, 2010 NYCHA notified petitioner that he needed to be current in the payment of use and occupancy to initiate such a grievance, and he must pay use and occupancy during the pendency of the grievance until it is resolved (exh G to cross-motion). Both the Property Manager and the Borough Manager denied petitioner's grievance because petitioner did not show that he had resided in the apartment with his mother

with NYCHA's written permission (see exh H). Additionally, in the September 28, 2010 District Grievance Summary in which she dismissed the grievance, the Borough Manager noted that petitioner was not current with use and occupancy.

By letter dated October 6, 2010, petitioner requested a hearing (exh I); he also commenced an Article 78 proceeding (Index No. 400726/11) challenging the District Office's determination and seeking a hearing. In settlement of that proceeding, NYCHA granted petitioner a remaining-family member hearing and specifically informed him, once again, that he must be current with use and occupancy to proceed with the hearing (exh J). A November hearing date was set; prior to that date NYCHA's Social Services Department conducted a mental competency evaluation, and a guardian ad litem was subsequently appointed for petitioner.

At the November 23, 2011 hearing petitioner was advised again that he needed to be current with use and occupancy in order to proceed with his remaining-family member grievance but he claimed that he did not know how much to pay; the hearing officer granted petitioner's application for an adjournment until February 4, 2012. On that date, NYCHA moved to dismiss the grievance based on petitioner's continued failure to pay use and occupancy despite having informed him on numerous occasions that this was a prerequisite to holding the hearing. In opposition, petitioner claimed that he was told conflicting information by an unspecified person at an unspecified time about his obligation to pay use and occupancy; petitioner's guardian ad litem asserted that petitioner attempted to pay use and occupancy but that he became confused.

By decision dated March 6, 2012, the hearing officer granted NYCHA's motion, finding that petitioner owed 20 months of use and occupancy, and dismissed the grievance on this ground. By Determination of Status dated March 28, 2012, NYCHA's Board approved the hearing

[* 4]
officer's dismissal (both documents annexed as exh R).

Meanwhile, NYCHA had commenced a holdover proceeding against petitioner in 2009 which was settled by the parties pursuant to a so-ordered stipulation wherein Mr. Clyde agreed to vacate the premises within six months and pay use and occupancy while he remained. NYCHA did not execute upon that judgment, but rather waited until the then-pending administrative hearing was resolved. Almost three years later, after the Board rendered its final determination on March 28, 2012, the summary proceeding was restored to the housing court's calendar. Petitioner commenced this Article 78 proceeding by notice of petition dated July 30, 2012. By decision and order dated August 10, 2012, Housing Court Judge Saunders ruled that petitioner's eviction could proceed after August 31, 2012; she specifically noted that petitioner had not obtained a stay of the housing court proceeding from Supreme Court (exh S).

In support of his application to reverse NYCHA's March 28, 2012 determination, petitioner claims that (1) his request for a one-shot deal is "still being processed by welfare", (2) he made a use and occupancy payment back in the sum of \$675.00 in December 2011, and (3) he has tried to pay his use and occupancy but NYCHA has refused to accept his payments (pet., para. 3). Significantly, he does not deny that he is not current with use and occupancy.

In support of its cross-motion, NYCHA asserts that this Court cannot collaterally attack the Housing Court's direction to permit the execution of the warrant of eviction; to do so would constitute error, citing *Cherry v New York City Hous. Auth.*, 67 AD3d 438, 438 (1st Dept 2009) (Article 78 proceeding cannot be maintained because the result petitioner ultimately seeks-- restoration of her tenancy--would nullify a judgment of the Civil Court which awarded possession of the apartment to NYCHA). This Court agrees. Petitioner should have addressed any claims

concerning Judge Saunders's order or his claims to possession to the Housing Court or to the Appellate Term; he apparently did not. It is now beyond the authority of this Court to grant petitioner relief.

Alternatively, NYCHA asserts that this proceeding should be dismissed because petitioner does not state a cause of action in that he does not dispute that he failed to remain current in the payment of use and occupancy during the pendency of the grievance. NYCHA's rules (NYCHA's Management Manual, ch VII, § IV [E] [1] [c] [2]) require that use and occupancy be up-to-date as a condition precedent to pursuing a remaining family member status grievance (also set forth in the grievance procedures instructions annexed as exhibit D to cross-motion). As petitioner does not dispute that he owed use and occupancy, it was rational and reasonable for the hearing officer to dismiss the grievance, and that determination was not an abuse of NYCHA's discretion. *See Hawthorne v New York City Hous. Auth.*, 81 AD3d 420, 420-21 (1st Dept 2011) (NYCHA's rules require continued payment of use and occupancy as a condition precedent to commencement of a grievance on entitlement to status as a remaining family member; petitioner's acknowledgment that he owed use and occupancy provided grounds for NYCHA's determination).

Accordingly, it is ORDERED and ADJUDGED that the cross-motion to dismiss the petition is granted and the proceeding is dismissed. Any stays issued by this Court are hereby vacated.

This is the Decision, Order and Judgment of the Court.

Dated: January 25, 2013
New York, New York



HON. ARLENE P. BLUTH, JSC