

**Matter of Lopez v New York City Hous. Auth.**

2013 NY Slip Op 30776(U)

April 18, 2013

Supreme Court, New York County

Docket Number: 401491/2012

Judge: Louis B. York

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

PRESENT: LOUIS R. YORK  
Justice

PART 2

Index Number : 401491/2012  
LOPEZ, MARIA  
vs.  
NYC HOUSING AUTHORITY  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_  
Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

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

**MOTION IS DECIDED TO ADVISE JUSTICE  
WITH ACCOMPANYING MEMORANDUM DECISION**

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: 4/10/13

Louis R. York, J.S.C.  
LOUIS R. YORK

- 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 2

-----X

In the Matter of the Application of  
MARIA LOPEZ,

*Petitioner,*

Index No. 401491/12

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

DECISION AND  
ORDER

NEW YORK CITY HOUSING AUTHORITY,

*Respondent.*

-----X

**LOUIS B. YORK, J.:**

This Article 78 proceeding resulted from a termination of Petitioner's tenancy by Respondent New York City Housing Authority (NYCHA) due to a violation of the parties' October 24, 1997 Permanent Exclusion Agreement. On or about May 6, 1995 Jose Lopez, Petitioner's son, who was an authorized occupant of the household, attempted to kill another person on or near the Housing Authority grounds and unlawfully possessed a deadly weapon. After a jury trial, Jose was convicted of first-degree assault. This incident was a violation of NYCHA's rules, described below, and Respondent had the right to terminate the tenancy of Petitioner at that time. Instead, Petitioner and Respondent entered into a Permanent Exclusion Agreement in which Petitioner agreed to never permit Jose Lopez to return to her household. Under the agreement, a violation of this term would result in eviction of Petitioner. (Resp't V.A.

Ex. C ¶ (1)(c).)

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Petitioner has been on probation with respect to her tenancy since entering into the agreement on October 24, 1997. On August 5, 2011, Housing Authority investigators found Jose inside Petitioner's apartment with his siblings Luisa and Angel. Luisa attempted to conceal the identity of her brother but ultimately admitted that the man in the apartment was Jose.

Based on the violation, the NYCHA charged Petitioner with violation of the Permanent Exclusion Agreement. Petitioner represented herself at the NYCHA administrative hearing, where she admitted that Jose was at her apartment on August 5, 2011. However, she claimed, among other things, that she thought the exclusion applied only when Jose was incarcerated, that her daughter Luisa was unaware of the Exclusion Agreement, and that she was not home when the incident occurred. The hearing officer sustained all of the charges against Petitioner and ordered the termination of Petitioner's tenancy on May 10, 2012 in a five-page written decision. Petitioner seeks to require Respondent to reverse its decision to terminate her tenancy on the grounds that it was contrary to law, arbitrary and capricious, an abuse of discretion, and in violation of petitioner's due process rights. For the reasons stated below, the Court denies the Petition and dismisses the proceeding.

In New York, courts cannot interfere with the discretion of administrative tribunals unless "there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious." *Pell v. Board of Education*, 34 N.Y.2d 222, 231, 356 N.Y.S.2d 833, 839 (1974). A decision is arbitrary and capricious if the tribunal fails to examine relevant data and articulate a satisfactory explanation for its action including a rational connection between facts found and choice made. *Id.* For the reasons discussed below, Respondent's decision to terminate Petitioner's tenancy was not arbitrary and capricious.

As Respondent argues, it had authority from the Code of Federal Regulations (“CFR”) to terminate her tenancy. In particular, 24 C.F.R. § 966.4(5)(ii)(A) mandates that the lease “*must* provide that any criminal activity by a covered person that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents...is grounds for termination of tenancy (emphasis added).” *See Bond v. Howard Houses*, 89 A.D.3d 730, 731, 931 N.Y.S.2d 911, 912 (2<sup>nd</sup> Dept. 2011) (applying this provision to NYCHA tenancy). As Respondent states, its lease with Petitioner prohibits tenants, members of the tenant’s household, guests, or other persons from engaging in “criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other residents” and requires tenants to act in a manner “conducive to maintaining the project in a decent, safe and sanitary condition.” (Resp’t V.A. ¶ 20.) This clause required Respondent to make sure no member of her household participated in illegal activities that would jeopardize the safety and welfare of others. Respondent had the authority to terminate the tenancy of Petitioner because it had this clause in its lease and because Jose did engage in violent criminal activity.

Aside from the Federal Regulation and lease clause, the following facts also supported Respondent’s decision. Jose was convicted of assault in the first degree and served approximately 15 years in prison. Petitioner entered into the Permanent Exclusion Agreement as a result of this assault. Respondent had authority to terminate Petitioner’s tenancy due to the Permanent Exclusion Agreement. The agreement required the permanent exclusion of Jose from Petitioner’s apartment. Petitioner violated the agreement on August 5, 2011 when investigators found Jose inside her apartment. Jose was just recently released from prison when the investigators found him at Respondent’s apartment. In addition, at the hearing, Petitioner admitted to the charges of violation of probation and violation of her Permanent Exclusion

Agreement. Respondent examined the relevant data at the administrative hearing and articulated a satisfactory explanation for its action.

An administrative penalty may be set aside as a gross abuse of discretion if the punishment is "so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." *Pell*, 34 N.Y.2d at 233, 356 N.Y.S.2d at 841. Petitioner alleges the penalty of eviction in her case was disproportionate to the offense and should be considered "shocking to one's sense of fairness." While the penalty here is harsh, under these circumstances it is not "shocking to one's sense of fairness." As Respondent argues, Appellate courts have upheld determinations to terminate a tenancy based on similar facts as were presented in this case. *See Gibbs v. New York City Hous. Auth.*, 82 A.D.3d 412, 413, 918 N.Y.S.2d 42, 43 (1<sup>st</sup> Dept. 2011) (upholding a termination of tenancy because son engaged in serious criminal activity); *Folks v. New York City Hous. Auth.*, 27 A.D.3d 270, 271, 812 N.Y.S.2d 46, 47 (1<sup>st</sup> Dept. 2006) (upholding a termination and pointing to the significance of the serious criminal activity). Jose engaged in violent activity, which resulted in a jury convicting him of first-degree assault, which is a felony and is considered serious criminal activity.

Petitioner argues that the termination in this case is disproportionate because the Hearing Officer failed to consider mitigating factors such as the possibility of homelessness and Petitioner's health. However, Respondent did consider these factors in its five-page decision and was not required to do so.<sup>1</sup> Terminations of tenancy have been upheld even if homelessness

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<sup>1</sup> 24 C.F.R. § 966.4(5)(vii)(B) ("[T]he PHA *may* consider all circumstances relevant to a particular case...") (emphasis added).

While the Court is sympathetic to the fact that Petitioner suffers from health issues and may be rendered homeless upon ejection, it "has no discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed." *Wooten v. Finkle*, 285 A.D.2d 407, 409, 728 N.Y.S.2d 152, 154 (1<sup>st</sup> Dept. 2001). In addition, as Respondent argues, the "failure of Respondent to enforce applicable rules and permanent exclusion agreements undermines respect for the Housing Authority's policies and the obligations of tenants and is unfair to law-abiding tenants." (Resp't Mem. at 22.) Therefore, the Court finds that the punishment is not disproportionate to the offence and does not shock the Court's sense of fairness.

The Court has considered Petitioner's remaining arguments and finds them to be without merit.

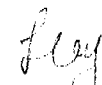
### Conclusion

Accordingly it is

ORDERED and ADJUDGED that ~~the~~ Article 78 proceeding to vacate the decision of respondent terminating petitioner's tenancy is denied.

Dated: 4/10/13

ENTER:

  
\_\_\_\_\_  
Louis B. York, J.S

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