SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER PART IA PART 16

Justice

Index Number : 401203/2012
JONES, TIFFANY
vs.
RHEA, JOHN
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~~ Article 78 petition is granted to the extent provided in the accompanying memorandum decision.

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: FEB 03 2014

Alice Schlesinger, J.S.C.

ALICE SCHLESINGER

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

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In the Matter of the Application of
TIFFANY JONES,

Petitioner,

Index No. 401203/12
Mot. Seq. No. 001

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

JOHN RHEA, as Chairperson of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Respondents.

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SCHLESINGER, J.:

This case is another unfortunate example of how the hypertechnical application of rules by a housing agency can lead to a result that is contrary to the spirit of the law, illogical, and unjust. *See, Murphy v New York State Division of Housing and Community Renewal,* 21 NY3d 649 (2013).

Respondent New York City Housing Authority (NYCHA) seeks here to entrap petitioner Tiffany Jones in the proverbial "Catch-22" situation, claiming that Ms. Jones had no right to apply to succeed to the tenancy of her mother, the tenant of record, either before the tenant formally surrendered her rights or after the tenancy was terminated. The facts suggest that Ms. Jones made repeated efforts to assert her rights throughout the period in question, but rather than assist her by explaining in a timely fashion the steps needed for technical compliance with the rules during the alleged narrow window of opportunity, NYCHA kept the family going in circles in various administrative and judicial proceedings relating to rent while declining to discuss with Ms. Jones the real issues relating to succession. Not until late in the game — on a date

that NYCHA now claims was too late — did the agency advise petitioner of the procedure she needed to follow to assert her rights as a remaining family member. Based on the unique and compelling facts presented here, the result obtained cannot stand, as NYCHA's hypertechnical approach will lead to the eviction of a long-term authorized member of the household and her two young children for reasons effectively beyond her control.

Discussion

Petitioner Tiffany Jones commenced this Article 78 proceeding to annul the decision by NYCHA declining to vacate the termination of her mother's tenancy on default and further declining to allow Ms. Jones to apply for remaining family member status. By decision dated April 2, 2013, this Court denied NYCHA's motion to dismiss the Amended Petition and set a schedule for an Answer by NYCHA and a Reply by Ms. Jones. Those papers have now been filed, and this decision determines the Article 78 proceeding on the merits. The facts are set forth in detail in the April 2 decision but will be repeated here as necessary.

First and foremost, it cannot be overemphasized that petitioner Tiffany Jones has been an authorized member of the household, occupying the apartment with NYCHA's knowledge and consent since the inception of the tenancy in 2003, when she was 18 years old (Answer, Exh B). In addition to listing Tiffany and her mother Melissa Jones as the tenant of record, NYCHA listed Melissa's two sons Jordan and Christopher on the original Family Composition record; at the time, the boys were 5 and 13 years old, respectively. NYCHA added Tiffany's first child to the household composition when he was born in 2007 (Exh B).

In June of 2009 when her eldest son Christopher was about 19, Melissa Jones advised NYCHA that her son was moving out (Pet. Reply, Exh C). NYCHA noted that fact in its records and adjusted the rent to $118.00 monthly based on the income verified for the remaining members of the household. NYCHA records also show that the tenant made two substantial rent payments that month toward arrears. The following month, the records show that the rent was increased when Tiffany reported a change in her public benefits. (Exh C).

At or about the time that Christopher moved out, Melissa went with him and her youngest son to North Carolina, where Melissa's ailing father lived. Despite NYCHA's specific notation in its records on June 9, 2009 that the household income had been verified, and despite the notations confirming Christopher's departure and Tiffany's continued occupancy with receipt of public benefits, and despite Melissa's payment of more than $1100.00 toward rent arrears, NYCHA sent Melissa a Notice dated September 15, 2009 by certified mail scheduling a hearing for November 13, 2009 (Answer, Exh G). The Notice charged the tenant with failure to verify income by February 2009 (a charge already cured, as confirmed by NYCHA's own records) and failure to verify household composition (also apparently cured based on the specific notations made in NYCHA's June and July 2009 records about family composition). The Notice further charged the tenant with chronic delinquency in the payment of rent. Significantly, though, the only rent outstanding as of September 15 was part of the September rent.

According to NYCHA records (Pet. Reply, Exh C), the management office sent the tenant a letter in early November asking the tenant Melissa Jones to come to the office on November 9, about a week before the scheduled hearing. The tenant did not

appear at the office. Another letter was purportedly sent asking the tenant to come to the office on November 19, about a week after the original hearing date. Again, the tenant did not appear. The records do not indicate that any effort was made to telephone the tenant or otherwise contact the family to ascertain why the tenant was not responding to the letters.

Perhaps because Melissa had not responded to its letters, NYCHA adjourned the hearing from November 13, 2009 to May 6, 2010 and amended the charges by Notice dated March 31, 2010 and mailed to Melissa by certified mail (Answer, Exh H). Chronic delinquency was again asserted, but again the record showed that the only rent outstanding at the time was for the month the Notice was sent. Further, the notations in NYCHA's records are extremely sparse for that period of time, and they end completely in February of 2010, even though both administrative and judicial proceedings took place after that time. Thus, while NYCHA's counsel belittles as incredulous claims by Tiffany that she went to the housing management office on various occasions to explain that her mother was not in the apartment and to address the issues herself, NYCHA's inadequate record keeping undermines its attempt to refute Tiffany's claims.

In fact, the evidence supports Tiffany's assertions that she went to the office to address the issues but was told that only her mother could appear. Unfortunately, Tiffany had difficulty obtaining the cooperation of her mother, who had remained in North Carolina. Thus, when Melissa failed to appear at the May 6, 2010 hearing, NYCHA terminated the tenancy on default (Answer, Exh I). When Melissa applied a few weeks later to vacate that default, she explained that she was not in New York and that she had moved her sons to the South (Exh J). What is more, and quite significantly, she

confirmed in that same document that Tiffany had been attempting to address the issues with Melissa's apparent consent. Specifically, she stated that: "I did not know my daughter who is 24 years old and on the lease could not attend in my place."

Although the application to vacate the default was granted without opposition from NYCHA (Exh K), NYCHA made no effort to advise the tenant or her daughter of the procedures to follow so that Tiffany could assert her rights as a remaining family member and actually have her name placed on the lease as the tenant of record. Instead, NYCHA merely sent a Notice to Melissa dated August 5, 2010, again by certified mail, that scheduled another hearing for September 14, 2010, based on chronic rent delinquency (Exh L). For the first time, the charges showed that rent was outstanding for a few months. After some rent was paid, the charges were amended to reflect that fact, and the hearing was adjourned to November 4 by Notice sent to Melissa by certified mail on October 8 (Exh M).

Again, NYCHA made no effort to address the issues in a real and practical way by advising Tiffany of the steps she needed to take to formally assert her claim as a remaining family member. Instead, in the midst of sending charges and amended charges for an administrative hearing on chronic delinquency, NYCHA sued the tenant in Housing Court for nonpayment of rent. Tiffany appeared and answered; Melissa did not appear (Petition, Exh B). On June 30, 2010, NYCHA counsel signed a stipulation with Tiffany Jones providing for rent payments and repairs; again, Tiffany appeared but Melissa did not (Exh C). The Housing Court case continued for months in a similar fashion, with Tiffany working with the Department of Social Services to arrange for the payment of arrears, but those efforts were stymied by the fact that the lease was still in the name of Melissa, rather than Tiffany. (Tenant Reply, Exh G-H).

It was not until August of 2011 — after two years of back and forth — that NYCHA finally advised Tiffany of the procedure she needed to follow to assert her rights as a remaining family member. Specifically, NYCHA Interview records from August 24, 2011 state that: "L&T case adjourned to 9/21/11 for Tiffany Jones, daughter of head of household to submit intent to vacate and lease cancellation for the mother." (Petition, Exh G). The referenced L&T case was a holdover proceeding commenced in May of 2011 to evict the family after the tenancy was terminated based on Melissa's failure to appear at the November 4, 2010 chronic rent delinquency hearing at NYCHA's administrative offices.

When Tiffany thereafter commenced this Article 78 proceeding, acting for the first time with the assistance of counsel, NYCHA asserted that its August 2011 advice to Tiffany to obtain from her mother a completed Intent to Vacate form was given too late for it to make a difference. Thus, NYCHA claims, Tiffany cannot now assert her rights as a remaining family member because the tenancy has already been terminated, and she could not assert those rights earlier, while Melissa's tenancy was still technically active because Melissa had not completed a particular form that NYCHA had never even provided.

The highly technical arguments asserted by NYCHA's counsel in response to the Amended Petition must fail. In her three causes of action, petitioner asserts that NYCHA violated its own policies and federal regulations, and acted in a manner that was arbitrary and capricious, by failing to allow Tiffany Jones to proceed with a remaining family member grievance. As noted above, it is undisputed that Tiffany Jones was at all times an authorized member of the household, residing in the apartment with the full knowledge and consent of NYCHA.

In her first cause of action, petitioner cites various NYCHA policies that support her claim. Specifically, NYCHA Management Manual, Chapter IV, subd. IV, subs. J, provides that if a question exists whether a remaining family member qualifies for a lease, "the manager shall not offer the claimant a lease but shall provide him/her with Form 040.342 (Important Notice — Remaining Family Member Claim) which advised the claimant of his/her right to initiate a grievance proceeding." It is undisputed that NYCHA failed to provide such a form to Tiffany.

In her second cause of action, petitioner cites various federal regulations that support her claim. Specifically, she cites, among other things, to 24 CFR Sec. 966.53(f), which provides that "the remaining head of household of the tenant family residing in the dwelling unit" is entitled to access the grievance process to assert remaining family member rights. Tiffany remained as the head of the household after her mother Melissa, the tenant of record, went to North Carolina with her two sons.

In her third cause of action, petitioner addresses the issue of use and occupancy. Specifically, while acknowledging that the NYCHA Management Manual does state that a person commencing a remaining family member grievance must "continue to pay use and occupancy," counsel insists that federal regulations do not permit NYCHA to deny an individual access to the grievance procedure based upon outstanding use and occupancy, particularly where, as here, Tiffany has paid some use and occupancy and is working diligently to have public assistance pay the balance.

NYCHA in its opposition papers contends that "Petitioner's argument lacks merit because it is based on new factual assertions that are incredible." (Memo of Law, p 4). However, unlike the cases cited by NYCHA, there was no sworn testimony here, and it

is not counsel's place to assess the credibility of petitioner's assertions. What is more, the examples counsel gives are unpersuasive.

For example, counsel (at p 5) challenges petitioner's assertion that she received a notice in March or April of 2010, insisting that NYCHA would have had no reason to send a notice then. In fact, while petitioner may not have described the notice in the precise detail desired by counsel, NYCHA's own Answer provides as an exhibit a Notice dated March 31, 2010 (Exh H). Equally unavailing is NYCHA's attempt to discredit the tenant's assertion that she spoke to a male employee in the Management Office when, as noted above, Management's records are so incomplete that they are incompetent to serve as proof to the contrary.

Operating as if with blinders, NYCHA attacks petitioner's claim that she attempted to inform Management that her mother had vacated, reiterating (at p 7) that "Melissa never submitted a Notice of Intent to Vacate." This Court agrees with petitioner that it is arbitrary to insist on a particular form of proof — the Notice of Intent to Vacate — when NYCHA did not advise the family of the need to file the form, or even of its existence, until 2011, after which NYCHA claimed it was too late to submit the form.

Equally unavailing in NYCHA's claim that Melissa "represented to the Housing Authority in May 2010 that she still intended to assert her interests in the apartment." A careful reading of the document submitted by Melissa on May 25, 2010 reveals that she was attempting to assert rights to the apartment, but for Tiffany. There Melissa explains that she was "not in NY," and she gives the details about moving with her sons to the South. Suggesting that she wished to leave Tiffany in charge, she added: "I did not know my daughter who is 24 years old and on the lease could not attend in my place."

This statement should have, at a minimum, triggered an explanation by NYCHA as to the procedures needed to designate Tiffany as the leaseholder.

Relying heavily on *McLaughlin v Hernandez,* 16 AD3d 344 (1st Dep't 2005), NYCHA next insists that petitioner cannot succeed to a terminated tenancy. As noted by petitioner's counsel in reply and as confirmed by the lower court's decision, *McLaughlin* is readily distinguishable on the facts (Slip Op. August 11, 2004, Index No. 403780/03, Cahn, J). As in the case here, petitioner was an authorized member of the tenant household, and she remained in the apartment after the tenant of record vacated without formally notifying NYCHA. However, in sharp contrast to the facts here, the tenancy was terminated and the petitioner was actually evicted from the apartment before she attempted to file a remaining family member grievance. By that time, NYCHA had already offered the apartment to another family.

That situation is far different than the situation here, where the petitioner has continuously occupied the apartment while attempting to assert her right to a lease in her own name. While Tiffany may not have proceeded in the precise manner preferred by NYCHA, her efforts were consistent, even including appearing in Housing Court on her own and signing a Stipulation for the payment of rent. Further, as discussed above, the charges on which the termination of tenancy were based were specious; family income had been verified, and the tenant was not truly in arrears when the charges were first made. It was only during repeated adjournments by NYCHA that rent arrears accrued.

What is more, NYCHA's argument misses the point; that is, had NYCHA given petitioner timely access to the grievance procedure and notice of the requirements, Tiffany would have asserted those rights before the tenancy was terminated. Indeed, as

noted by petitioner in Reply, the First Department has recently confirmed that NYCHA has an obligation to provide sufficient information to a tenant or occupant so that the individual is given an opportunity to be heard on the material issues "at a meaningful time and in a meaningful manner." *Matter of Gutierrez v Rhea,* 105 AD3d 481, 486 (1st Dep't 2013).

In *Gutierrez*, petitioner Carlos Gutierrez sought to succeed to the tenancy of his late mother Amparo Gutierrez. Before the tenant of record died, she sought to have her son added to the lease. NYCHA found the son ineligible based on his criminal background, but it failed to notify the tenant of that fact in a timely fashion so that she could provide evidence of his rehabilitation. Because of that failure, the Appellate Division annulled NYCHA's denial of the application by Carlos and remanded the case to NYCHA for consideration of the available evidence. That principle and that result apply here.

Wholly without merit is NYCHA's next claim here that petitioner lacks standing to challenge the determination terminating Melissa's tenancy because Melissa herself failed to do so. While acknowledging receipt of Melissa's notarized March 20, 2012 letter, NYCHA again quibbles with the wording, contending that it makes no direct mention of a request to vacate her default so as to allow Tiffany to succeed to the apartment as a remaining family member.

NYCHA's reading of the letter is strained, to say the least. Melissa alludes to her default, explaining in her letter that she moved to the South in September of 2009 with the intent to return, but "then decided to remain in the south" to raise her younger children. Melissa was explaining why she had defaulted and was asking that the default be excused.

Melissa then confirmed that she wished Tiffany to remain as the leaseholder, and she insisted that she had communicated that fact to NYCHA Management. What is more, the letter suggested that Melissa was under the impression that Tiffany was 'on the lease" and had a right to remain, as she had always been an authorized member of the household. Specifically, she stated that: "My adult daughter Tiffany Jones still remained on the lease and I have left her in charge of the apartment. Approximately one year ago (if not longer) I submitted a letter to 250 Broadway [NYCHA] indicating some of this information. In addition the local housing office was aware of such."

To the extent Melissa's letter was at all unclear, it was accompanied by an affidavit from Tiffany and a letter from petitioner's counsel addressed to the NYCHA Hearing Officer. Those documents made clear in no uncertain terms that the tenant was seeking to vacate the default and have Tiffany process a remaining family member grievance. NYCHA's counsel cannot seriously dispute that, when taken as a whole, the documents suffice to establish standing. The Hearing Officer's May 3, 2012 denial of the application on that ground (Answer, Exh J) was arbitrary and capricious and erroneous.

NYCHA's third and final point is also unpersuasive. This Court is well aware of First Department authority, such as *Garcia v Franco,* 248 AD2d 263 (1998), confirming the validity of NYCHA's requirement that a remaining family member grievant continue to pay use and occupancy. But the record here establishes that petitioner was making every effort to fulfill that obligation.

First, as detailed above, the amount of rent due on the first two hearing dates was less than one month. Had the NYCHA provided Tiffany with the required forms at

that time, she would have had a right to proceed, as no rent was outstanding. Second, Tiffany did appear in Housing Court when arrears accrued, and she signed a stipulation resolving the nonpayment proceeding by setting a schedule to pay rent. She has attached to her Reply papers her own affidavit and documentation that counsel obtained from the Human Resources Administration confirming that arrears accrued because certain rent checks had gotten lost in transit, but those checks are in the process of being replaced. Therefore, contrary to NYCHA's claim and its reliance on *Hawthorne v NYCHA,* 81 AD3d 420 (1st Dep't 2011), a remand for a hearing is anything but futile; on the contrary, every indication is that petitioner is arranging for the payment of use and occupancy in full.[1]

In a recent decision by the Court of Appeals, *Murphy v New York State Division of Housing and Community Renewal,* 21 NY3d 649 (2013), Chief Judge Lippman examined a remaining family member claim in the context of Mitchell-Lama housing. While the regulations that govern Mitchell-Lama are different than those applicable to NYCHA, they are comparable in that they are both forms of subsidized housing with similar policy goals. Judge Lippman described that goal, explaining that succession rights "serve the important remedial purpose of preventing dislocation of long-term residents due to the vacatur of the head of household .... Succession is in the spirt of the statutory scheme, whose goal is to facilitate the availability of affordable housing for low-income residents and to temper the harsh consequences of the death or departure

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[1] Also, while the Court is aware that one cannot claim estoppel against a governmental agency, it is nevertheless unfair, and contrary to the spirit of the regulations, for NYCHA to undermine petitioner's efforts to obtain public rent benefits by refusing to allow her to proceed with a grievance, while simultaneously claiming that she has no right to a grievance because she has not paid the rent.

of a tenant for their 'traditional' and 'non-traditional family members ..." 21 NY3d at 653. Thus, Judge Lippman rejected the decision of the housing agency to deny succession rights to an adult son based on the mother's "technical non-compliance" with the rule requiring the filing of an annual income affidavit form, where other adequate proof existed that the son qualified as a remaining family member and he had no control over his mother's actions.

Murphy could not be more apt. As in that case, substantial proof exists here that Tiffany Jones qualifies as a remaining family member. While it is true that her mother is in "technical non-compliance" with NYCHA rules in that she failed to file a Notice of Intent to Vacate the apartment while her tenancy was still viable, other proof exists — and has been offered — that Melissa had that intent and wished to have her adult daughter Tiffany remain in the apartment. Further, NYCHA never gave Melissa or Tiffany any form to complete, nor even advised them of the requirement until it was purportedly too late.

Under these particular circumstances, this Court finds that NYCHA's May 3, 2012 decision declining to vacate Melissa's default and further declining to allow Tiffany to file a remaining family member grievance is arbitrary and capricious and contrary to the spirit of the statutory scheme. Therefore, that decision is annulled, the tenant's default if vacated, and the matter is remanded to NYCHA for the processing of a remaining family member grievance.

Accordingly, it is hereby

ADJUDGED that the Article 78 petition is granted to the extent provided herein; and it is further

ORDERED that the matter is remanded to respondent for further processing consistent with the terms of this decision.

Dated: February 3, 2014

FEB 03 2014

J.S.C.

ALICE SCHLESINGER

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).