

Matter of Chisolm v New York City Hous. Auth.

2014 NY Slip Op 30848(U)

March 31, 2014

Supreme Court, New York County

Docket Number: 402110/13

Judge: Cynthia S. Kern

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

Index Number : 402110/2013
 CHISOLM, TYANNA
 vs
 NYC HOUSING AUTHORITY
 Sequence Number : 001
 ARTICLE 78

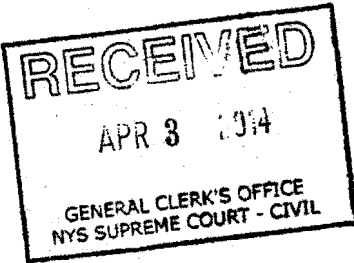
PART _____
 INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on and motion is made 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

is decided in accordance with the annexed decision.



FILED
 APR 04 2014
 NEW YORK
 COUNTY CLERK'S OFFICE

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

Dated: 3/31/14 _____, 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 55

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

TYANNA CHISOLM,

Petitioner,

Index No. 402110/13

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

DECISION/ORDER

-against-

FILED

NEW YORK CITY HOUSING AUTHORITY,

APR 04 2014

Respondent.

NEW YORK

COUNTY CLERK'S OFFICE

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for
: _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>3</u>

Petitioner Tyanna Chisolm brings the instant proceeding pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to challenge respondent New York City Housing Authority's ("NYCHA") termination of her tenancy. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Petitioner is the tenant of Apartment 1C (the "apartment") in the building located at 305 East 153rd Street, Bronx, New York, also known as the Melrose Houses, a NYCHA-owned housing development. In March 2008, NYCHA served petitioner with a Notice and Specification of Charges on the grounds of non-desirability, breach of rules and

regulations, and chronic rent delinquency, alleging, *inter alia*, that (1) on or about January 31, 2007, petitioner and her former boyfriend, Donal Paris ("Paris"), an unauthorized occupant of petitioner's household, possessed and sold crack cocaine and marijuana in the apartment, which the police recovered during the execution of a search warrant; (2) petitioner and Paris unlawfully possessed drug paraphernalia in the apartment on that date; and (3) on or about October 5, 2007, petitioner and Paris unlawfully possessed and sold marijuana in the apartment, which the police recovered during the execution of the search warrant. The notice advised petitioner of an upcoming hearing and her right to appear at the hearing with counsel or a representative of her choice.

By stipulation dated August 20, 2008, petitioner admitted the charges and agreed to permanently exclude Paris from the apartment and to subject her tenancy to a three-year probationary period in exchange for the preservation of her tenancy. Specifically, petitioner agreed "she will not permit [Paris] to reside in or visit [petitioner] at the subject apartment or any other [NYCHA] apartment or premises in which [petitioner] may subsequently reside." Petitioner also agreed to inform Paris "that under no circumstances shall a person permanently excluded, or whose continued absence is required, be allowed entry into the apartment and if such person is found in the apartment, for whatever reason, the tenancy shall be terminated." NYCHA approved the stipulation on September 10, 2008.

On or about January 29, 2013, NYCHA investigators discovered Paris in petitioner's apartment in violation of the stipulation. NYCHA informed petitioner that it was considering terminating her lease and offered her the opportunity to discuss the matter. Petitioner met with NYCHA management on February 21, 2013 and admitted that she knew she had agreed to permanently exclude Paris from her apartment but claimed that he was only at her apartment to pick up some work gloves she had obtained for him. In April 2013, NYCHA served petitioner with a

4] Notice and Specification of charges alleging that petitioner violated the permanent exclusion stipulation by permitting Paris into her apartment. The notice further informed petitioner that the determination may result in her eviction and advised her of her hearing date of May 23, 2013 and that she was entitled to be represented by counsel or other representative of her choice. The hearing was later rescheduled to September 6, 2013.

Petitioner appeared at the hearing without counsel and stated that she intended to represent herself. NYCHA submitted into evidence petitioner's lease, the determination of status, the stipulation conditioning petitioner's tenancy on her permanent exclusion of Paris and the underlying charges. At the hearing, NYCHA Investigator Natalie Joseph Jean ("Investigator Jean") testified that she performs apartment inspections in order to determine if excluded individuals are present and authenticated the report describing her visit to petitioner's apartment on January 29, 2013. Specifically, Investigator Jean testified that on that date, she knocked on petitioner's door and that when petitioner answered, an individual matching the arrest photograph and description of Paris stepped out of the apartment and began to walk away. Investigator Jean further testified that she called out Paris' name and the individual stopped walking and admitted that he was Paris although he claimed that he did not have any identification on his person. Petitioner testified that "[p]retty much everything [Investigator Jean] said is what happened." Specifically, petitioner testified that Paris had left his work gloves at his residence and that he knew petitioner kept work gloves in her apartment so he came to her apartment to retrieve them because her apartment was closer to his workplace than his own residence. Petitioner further testified that she was aware that Paris "wasn't supposed to enter [her] premises" but that he had knocked on her door as she was leaving for work and when she answered the door, "[Paris] stepped in, the door closed behind him, and then the investigators knocked on the door."

In a Decision and Disposition dated October 3, 2013, the Hearing Officer sustained the charge and terminated petitioner's tenancy on the ground that the charge was supported by the record and that petitioner was not credible. Specifically, the Hearing Officer found

That Paris happened to come to [petitioner's] apartment and to push into the apartment at the very moment she was stepping out the door, followed near simultaneously by the arrival of the investigators, suggests that this was not an isolated incident when Paris happened to have forgotten his gloves and stopped by for that sole reason...

The exclusion was intended to settle charges that [petitioner] and Paris possessed narcotics and paraphernalia discovered during the execution of a search warrant on two occasions. The disposition of permanent exclusion was fashioned to preserve a tenancy by excluding a person who presented a hazard to the community. Where that relief is of no avail, termination of tenancy will occur.

NYCHA then adopted the Hearing Officer's decision. Petitioner then commenced the instant Article 78 proceeding seeking to challenge the termination of her tenancy.

As an initial matter, this petition need not be transferred to the Appellate Division pursuant to CPLR § 7804(g) as it does not raise an issue of substantial evidence. Rather, this court must determine the merits of the petition as it admits the factual basis of the charges against petitioner but merely challenges the penalty imposed. *See Matter of Kerney v. Hernandez*, 60 A.D.3d 544 (1st Dept 2009)("[a]s the subject petition only sought review of the penalty imposed, and did not raise issues of substantial evidence, Supreme Court properly addressed the issues, rather than transferring the matter to this Court"); *see also Panek v. Bennet*, 38 A.D.3d 1251 (4th Dept 2007)(concluding that lower court erred in transferring the petition to the Appellate Division where sole issue raised by petitioner was whether penalty of termination shocked sense of fairness). Here, petitioner has admitted she violated the stipulation to permanently exclude Paris from her apartment. Her petition merely urges this court to vacate the termination of her tenancy because she made a mistake, she is a

long-time tenant and the penalty of termination is unfair as it would greatly affect her life.

When reviewing a penalty imposed by an administrative agency, a court may only set such penalty aside if it is “so disproportionate to the offense as to be shocking to one’s sense of fairness.” *Pell v. Board of Educ.*, 34 N.Y.2d 222, 233 (1974). “The question is not whether [the reviewing court] might have imposed another or different penalty, but whether the agency charged with...responsibility reasonably acted within the scope of its power.” *Id.* at 238. It is well-settled that a reviewing court “lacks any discretionary authority or interest of justice jurisdiction” to substitute its preferred result for a rational agency determination. *Perez v. Rhea*, 20 N.Y.3d 399, 405 (2013). In assessing whether a penalty imposed by an administrative agency is “shocking to one’s sense of fairness,” a court must consider (1) whether “the sanctions reflect the standards of society to be applied to the offense involved”; (2) the “harm or risk of harm to the agency or institution”; (3) the “[harm or risk of harm] to the public generally visited or threatened by the derelictions of the individual [subject to the penalty]”; and (4) “the prospect of deterrence of the individual or of others in like situations.” *Pell*, 34 N.Y.2d at 234-35.

In the instant proceeding, the petition must be denied as this court finds that the penalty imposed by NYCHA was not so disproportionate to petitioner’s offense as to be shocking to one’s sense of fairness. As an initial matter, NYCHA rationally terminated petitioner’s tenancy on the ground that petitioner failed to comply with the stipulation she signed which required her to permanently exclude Paris from her apartment. Terminations of tenancies pursuant to such exclusion agreements have routinely been upheld by the Appellate Division to support NYCHA’s efforts to provide a safe living environment for its tenants. *See Cruz v. New York City Hous. Auth.*, 106 A.D.3d 631 (1st Dept 2013)(upholding termination of tenancy “for violation of the permanent exclusion stipulation in which [petitioner] agreed to permanently exclude her son from the subject

* 7]

apartment”). Additionally, terminations of tenancies for failure to abide by exclusion stipulations are generally upheld as they not considered shocking to one’s sense of fairness. *See Lemmitt v. Morales*, 94 A.D.3d 447 (1st Dept 2012)(finding that “the penalty [of termination] imposed does not shock our sense of fairness” where police found the excluded individual in petitioner’s apartment); *see also Gibbs v. New York City Hous. Auth.*, 82 A.D.3d 412 (1st Dept 2011)(finding that “[t]he penalty of termination does not shock our sense of fairness, particularly in view of the son’s serious criminal activity and the stipulation’s clear provision that his presence in the apartment would result in termination of petitioner’s tenancy.”)

Here, the court finds that petitioner’s termination for failure to abide by the exclusion stipulation must be upheld as it is not shocking to one’s sense of fairness. As an initial matter, petitioner’s termination is not shocking to one’s sense of fairness because it “reflect[s] the standards of society to be applied to the offense involved.” *Pell*, 34 N.Y.2d at 234. A tenant who signs a permanent exclusion agreement should “be held responsible for her own decision to permit the miscreant to enter and stay in the apartment” because “[u]ltimately, stipulations, like contracts generally, should not be set aside or modified absent a showing of fraud, collusion, mistake, or the like.” *Romero v. Martinez*, 280 A.D.2d 58, 63-64 (1st Dept 2001). Here, petitioner has not asserted that she did not sign the stipulation or that she signed the stipulation under duress. Rather, she contends that her decision to allow Paris into the apartment was a mistake and that her tenancy should not be terminated. Additionally, petitioner’s termination is not shocking to one’s sense of fairness because there is a significant risk of harm to the other tenants posed by petitioner’s continued tenancy as the other residents should not be placed at risk because of petitioner’s and Paris’ drug-related activity. *See Cruz*, 106 A.D.3d at 631 (“[t]he other residents of the development should not be placed at risk by the criminal activities of petitioner’s son,” who was supposed to be

excluded from the apartment); *see also Dougall v. Rhea*, 106 A.D.3d 434 (1st Dept 2013) (“[t]he penalty of termination of petitioner’s tenancy does not shock the conscience because her drug-related activity endangered her neighbors and the community.”) Finally, petitioner’s termination is not shocking to one’s sense of fairness because it may serve to deter other irresponsible tenants from disavowing stipulations made to preserve their tenancies. *See Perez*, 20 N.Y.3d at 405 (“[t]he deterrent value of eviction...is clearly significant and supports the purposes of the limited supply of publicly-supported housing.”)

Accordingly, the petition is denied in its entirety. This constitutes the decision and order of the court.

Dated: 3/31/14

Enter: JK
J.S.C.

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APR 04 2014
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