

**Hernandez v New York City Hous. Auth.**

2014 NY Slip Op 31418(U)

May 29, 2014

Sup Ct, New York County

Docket Number: 100822/13

Judge: Joan B. Lobis

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. JOAN B. LOBIS  
*Justice*

PART 6

ARACELLY HERNANDEZ,

INDEX NO. 100822/2013

Petitioner,

MOTION DATE 03/4/14

- v -

MOTION SEQ. NO. 001

NEW YORK CITY HOUSING AUTHORITY,

MOTION CAL. NO.

Respondent.

The following papers were read on this Article 78 petition.

Notice of Petition/ Order to Show Cause – Affidavits – Exhibits  
Answering Affidavits – Exhibits  
Replying Affidavits

PAPERS NUMBERED

1-6  
7-24 (x-mot), 26-27(answ)  
25

**THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION <sup>AWEL</sup> & 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).

Dated: May 29, 2014

  
JOAN B. LOBIS, J.S.C.

- 1. CHECK ONE: .....
- 2. CHECK AS APPROPRIATE:.....MOTION IS
- 3. CHECK IF APPROPRIATE: .....

- CASE DISPOSED       NON-FINAL DISPOSITION
- GRANTED     DENIED     GRANTED IN PART     OTHER
- SETTLE ORDER     SUBMIT ORDER     DO NOT POST
- FIDUCIARY APPOINTMENT     REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
In the Matter of the Application of  
ARACELLY Y. HERNANDEZ,

Petitioner,

Index No. 100822/13

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

-against-

**Decision, Order and  
Judgment**

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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JOAN B. LOBIS, J.S.C.:

**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).

Aracelly Y. Hernandez proceeds pro se and petitions this Court pursuant to Article 78 for relief. She is challenging the decision by the Respondent, New York City Housing Authority (NYCHA), terminating her tenancy. Respondent NYCHA opposes the petition. For the reasons discussed below, the petition is granted.

For twenty-two years, Aracelly Y. Hernandez has lived in an apartment here in Manhattan at 74 West 103rd Street in the public housing complex known as Frederick Douglass Houses. She lived there with her son, Mark A. Hernandez, who was born on February 26, 1989, and who was also an authorized occupant, until Ms. Hernandez agreed in September 2008 to have him permanently excluded.

Problems began just after the boy turned sixteen. On March 14, 2006, Mark "a) engaged in disorderly conduct; or b) resisted arrest." Approximately six months later, on September 4, 2006, the

teenager “a) directed threatening or abusive remarks toward an individual known to this agency; or b) shoved and pushed that said individual.” That same month, Anthony Hernandez (“Mr. Hernandez”) moved in with Ms. Hernandez and Mark, but he was an unauthorized occupant.

These incidents were set forth in a stipulation that Ms. Aracelly signed with NYCHA on May 17, 2007, (“2007 Stipulation”) to resolve administrative charges brought in Case No. 3956/07, and which settlement was approved on June 6, 2007. Mark’s misbehavior was characterized as constituting non-desirability. The mother’s failure to prevent her sixteen-year-old’s misbehavior and allowing Anthony Hernandez to move in with her and Mark were charged as breaches of rules and regulations. The notice of charges in that case further claimed that the conduct violated Ms. Hernandez’s probation agreed to in an earlier administrative proceeding, Case No. 894/05, approved on February 8, 2007.<sup>1</sup> In resolving the charges relating to her teenager’s misbehavior and the unauthorized presence of Mr. Hernandez since the second instance of Mark’s misconduct, Ms. Hernandez agreed to probation for three years. She further represented that Mr. Hernandez now resided in the Bronx, and she agreed to obtain written consent from the Housing Manager before allowing any additional person to live with her and Mark.<sup>2</sup>

Problems continued. In July 2008, NYCHA charged Ms. Hernandez with violating her three-year probation agreed to in the 2007 Stipulation. The notice alleged that on April 30, 2008, Mark,

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<sup>1</sup>While not necessary for the disposition of this matter, it is unclear how Mark’s 2006 misconduct would have violated probation that began in early 2007.

<sup>2</sup>Respondent’s Verified Answer at paragraph 19 incorrectly states that Ms. Hernandez represented in the 2007 Stipulation that her teenage son, Mark Hernandez, did not reside with her.

then age 19, possessed crack cocaine with intent to sell it on or in the immediate vicinity of NYCHA grounds. As a result, on August 20, 2008, Ms. Hernandez agreed to permanently exclude her teenage son and to be subject to an additional year of probation, to run to June 5, 2011, consecutive to the three-year probation that she agreed to in the 2007 Stipulation, which would end on June 5, 2010 ("2008 Stipulation").

Just before the three-year probation period agreed to in the 2007 Stipulation expired, on May 27, 2010, Mark Hernandez was found in his mother's apartment by NYCHA inspectors. He explained to them that he had arrived there in the early hours of that morning, at 6 a.m., before his mother left for work and that he was supposed to let in NYCHA employees that were coming that day to perform required repairs to his mother's bathroom.

Within days of the inspectors' visit, the project's housing manager, Juan Bello, sent Ms. Hernandez a standard form letter dated June 4, 2010, advising her that NYCHA was considering terminating her lease because of the permanent exclusion violation, which the letter advised was a breach of NYCHA rules and regulations. The letter made no reference to any violation of probation or other problem, such as delinquency of rent. It proposed that Ms. Hernandez meet to discuss the issue, on June 9, at 9:30 a.m., five days from the date of the letter. On June 9, 2010, Mr. Bello sent a further standard form letter stating that since Ms. Hernandez had not yet replied to his June 4 letter, he would give her a "final opportunity" to meet on June 16, 2010, at 9:40 a.m. He warned that if she failed to appear, he would forward her record to the Central Office with a recommendation to terminate her lease.

Ms. Hernandez replied to Mr. Bello on June 17, 2010. She apologized for missing the June 16th appointment. She wrote that she had been ill and had just missed five days of work. She also apologized for her rent delinquency and represented that she believed that the rent was "now current." She did not mention the permanent exclusion violation. She offered to reschedule their meeting if Mr. Bello still needed to see her. Alternatively she offered to meet with the project housing assistant.

Mr. Bello did not reschedule the meeting. Instead, in a letter dated June 24, 2010, he informed Ms. Hernandez that he had forwarded her record to the Office of the Tenancy Administrator for a hearing on whether to terminate her lease. He indicated that she would be contacted further regarding the hearing details.

On July 13, 2010, NYCHA issued a notice of charges to terminate Ms. Hernandez's tenancy. These included the violation of permanent exclusion based on Mark's presence at the apartment on May 27, 2010, which Mr. Bello's interview notice had referenced. But the notice also included for the first time additional charges of chronic rent delinquency and violation of probation, claiming that the rent delinquency and the violation of permanent exclusion violated her probation agreed to in the 2007 Stipulation. The charges erroneously indicated that the 2007 Stipulation had involved a "one year period of probation."

A brief hearing was held on October 26, 2010. The attorney for NYCHA began those proceedings by having the hearing officer change the language in the specification of charges to refer to a "three year period of probation." Ms. Hernandez appeared without counsel or witnesses. She offered

a notarized letter from her son, Mark, indicating that he was living in Yonkers, New York. The agency conceded that Ms. Hernandez had become current on her rent.

On November 4, 2010, the hearing officer recommended termination of Ms. Hernandez's tenancy. The disposition noted that Ms. Hernandez had frequently been late in payment of her rent. Notwithstanding her son's alternate address, permanent exclusion prohibits "any visits" to the apartment. Lastly, the hearing officer concluded that in light of Ms. Hernandez's admission of Mark on May 27, 2010, "to give access to NYCHA employees for repairs required in the apartment," probation was insufficient "incentive" to allow Ms. Hernandez to "embrace her tenancy obligations." On November 17, 2010, NYCHA issued a determination of status adopting the hearing officer's recommendation to terminate Ms. Hernandez's tenancy.

On May 24, 2013, Ms. Hernandez was served with a notice to vacate her apartment. On June 5, 2013, she filed her petition before this Court seeking to reverse the determination to terminate her tenancy. Among other things, she swore that the project's Housing Manager, Juan Bello, had authorized her son Mark's presence at the apartment to let in workers to perform the required repairs on her bathroom since he was the only person she could get to open the door for her while she was at work. NYCHA cross-moved to dismiss the petition as untimely. This Court in a decision and order dated August 19, 2013, found that the action was timely and ordered Respondent to answer the petition. This Court subsequently denied NYCHA's motion to renew and reargue that determination in a decision dated October 21, 2013.

\* 7]

In its response, notwithstanding the Court's prior orders, NYCHA claims that the action is untimely.<sup>3</sup> It further claims that the determination was rational, that Ms. Hernandez has waived any claims that she failed to raise during the hearing, and that she fails to state a cause of action. Following oral argument, in response to an interim decision and order dated March 4, 2014, NYCHA further addressed in writing legal issues raised at argument. This decision, order and judgment now follows.

In an Article 78 proceeding, a court reviews an administrative action to determine, among other things, whether an agency's decision violates lawful procedures, is arbitrary or capricious, or is affected by an error of law. E.g., Pell v. Bd. of Educ., 34 N.Y.2d 222, 231 (1974); Roberts v. Gavin, 96 A.D.3d 669, 671 (1st Dep't 2012). Where an agency fails to comply with its own internal procedures, this Court reviews whether the determination was "made in violation of lawful procedure." E.g., Blaize v. Klein, 68 A.D.3d 759, 761 (2d Dep't 2009). "[A]n agency's rules and regulations promulgated pursuant to statutory authority are binding upon it as well as the individuals affected by the rule or regulation." Lehman v. Bd. of Educ., 82 A.D.2d 832, 834 (2d Dep't 1981). If a rule or regulation affects an individual's "substantial rights," it "may not be waived by the agency." Id. "An adverse agency determination must be reversed when the relevant agency does not comply with either a mandatory provision, or one that was 'intended to be strictly enforced.'" 68 A.D.3d at 761 (quoting Syquia v. Bd. of Educ., 80 N.Y.2d 531, 536 (1992)).

This Court finds that NYCHA has failed to comply with its own internal procedures in

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<sup>3</sup>Respondent does not argue the merits of that claim, and, in a footnote, acknowledges this Court's prior rulings on the issue.

\* 8]

terminating Ms. Hernandez's tenancy. Those procedures are set forth at Exhibit B to Respondent's Verified Answer, New York City Housing Authority Termination of Tenancy Procedures ("Termination Procedures"). As that document makes plain, the Termination Procedures, which grew out of litigation alleging due process violations, see Escalera v. New York Housing Authority, 924 F. Supp. 1323, 1326 (S.D.N.Y. 1996), are intended to give tenants notice and an opportunity to defend themselves in termination proceedings.

Grounds for termination of tenancy are numerous. In this action, Ms. Hernandez's termination of tenancy began with Mr. Bello's notice dated June 4, 2010, of her breach of rules and regulations in violating the permanent exclusion condition. Under the Termination Procedures, these breaches are defined broadly at paragraph 1B as "[t]he violation by the tenant . . . of any applicable rule, regulation or resolution of the Authority."

The Termination Procedures build in opportunities for the Agency to informally resolve potential problems with tenants that may lead to termination of their tenancy. See, e.g., Escalera, 924 F. Supp. at 1328. For example, the Termination Procedures expressly provide at paragraph 1B that for breaches of rules and regulations, "[t]he tenant will be given an opportunity to cure the breach." In addition, the Termination Procedures at paragraph 2 require a Project Manager Interview: "The project manager or his representative will interview the tenant in order to discuss the problem which may lead to termination of tenancy, seek to ascertain the facts involved, and, when appropriate, seek to assist the tenant by securing outside help."

\* 9]

Ms. Hernandez's case is a textbook example of the worthiness of those provisions in NYCHA's Termination Procedures, which incorporate informal dispute resolution. Cf. Garner v. Tuckahoe Housing Authority, 81 A.D.2d 915, 918-19 (2d Dep't 1981)(annulling determination terminating tenancy where agency failed to conduct thorough investigation and consultation as required by its policy statement); see also Brown v. Popolizio, 166 A.D.2d 44, 55 (1st Dep't 1991)(NYCHA failed to follow procedures requiring interview prior to imposing maximum penalty of termination of tenancy).

The record shows that none of these steps adopted by NYCHA to informally resolve Ms. Hernandez's matter were invoked. Mr. Bello never interviewed Ms. Hernandez to discuss the permanent exclusion violation, even when she explained her delay in responding to his notice and offered to make herself available. NYCHA's own papers show confusion arising over the scope of the problem: Mr. Bello's notice of June 4, 2010, only cited Ms. Hernandez's breach of NYCHA's rules and regulations in violating the permanent exclusion condition contained in the 2007 Stipulation, while Ms. Hernandez's response refers to rent delinquency.

NYCHA did not present Ms. Hernandez with any opportunity to cure the breach of Mark's presence in the apartment on the day it was to conduct needed repairs in the unit. An interview, for example, might have allowed Mr. Bello as the project's housing manager to assist Ms. Hernandez in addressing her need to have someone to allow repair persons to enter her apartment while she was at work. See Robinson v. Finkel, 194 Misc.2d 55, 66 (N.Y. S. Ct. 2002) (had NYCHA's project manager interviewed petitioner, investigated issues and sought to assist, termination proceedings may not have been initiated at all).

NYCHA's Termination Procedures forego these informal dispute resolution mechanisms where a tenant is on probation. Id. ¶ 17. In those instances of violations "during the term of probation," a tenant's record is simply forwarded to the Law Department for a hearing on termination of tenancy. Id. Should the violation be established, the hearing officer may recommend immediate termination of tenancy, continuation of probation, or recommend probation "for an additional prescribed period not to exceed a year . . ." Id. ¶ 18. In this case, however, during the initial stage of the Termination Procedures, prior to formal charges, neither party referenced Ms. Hernandez's violation of any probation. See id. ¶ 2.

This Court finds, however, as a matter of law that Ms. Hernandez was not on probation at the time the triggering event occurred in this case leading to termination of her tenancy, when Mark was found at Ms. Hernandez's apartment on May 27, 2010. NYCHA's Termination Procedures at paragraph 14 cap probation in relevant part at one year: "where any substantial charge of non-desirability has been proven, a tenant may be given probation for a specified term not to exceed a year when . . . [t]here is reason to believe that the conduct or condition which led to the charge of non-desirability may not recur or may have been cured, or that the tenant is taking or is prepared to take steps to correct or cure such conduct or condition." Termination Procedures at paragraph 15 also refer to probation "which shall be for not more than one year . . ."

This cap does not apply to cases where the hearing officer has rendered a disposition of "eligible subject to permanent exclusion." Termination Procedures Paragraph 14. There has been no disposition of that status in this case, however. The 2007 Stipulation resolved issues of Anthony Hernandez's unauthorized occupancy and sixteen-year-old Mark's two incidents of non-drug related

misconduct, which were charged as non-desirability. Were NYCHA to have complied with its own Termination Procedures, the 2007 Stipulation would not have encompassed a three-year probation, and Ms. Hernandez's probation would have ended in June 2008, well before the May 2010 event leading to the termination of her tenancy. See Lehman, 82 A.D.2d at 834 (agency may not waive rule that affects individual's substantial rights). By the same token, the 2008 Stipulation would not have incorporated that ultra vires provision contained in the 2007 Stipulation in tacking on an additional year's probation consecutive to the illegal three-year probation. Id.


This Court may act where terms of a stipulation of settlement offend public policy. See, e.g., Mitchell v. N.Y. Hosp., 61 N.Y.2d 208, 214 (1984). In this case, NYCHA has circumvented the Termination Procedures to impose harsher penalties on Ms. Hernandez, who was unrepresented, than could have been imposed were the matter to have proceeded to hearing. See, e.g., Robinson, 194 Misc.2d at 71 (stipulations by unrepresented tenants contravene the purpose of the Termination Procedures to provide public housing tenants with due process before their tenancy may be terminated by state action). Since this Court finds Ms. Hernandez was not properly on probation at the time that her son was found in her apartment, she was entitled to a Project Manager Interview, which was not done in this case. Accordingly, the determination terminating her tenancy is annulled based on NYCHA's violation of its own internal procedures.

This Court further notes that the Termination Procedures at paragraph 11 require that members of the Authority in reviewing a hearing officer's recommendation "shall consider and rely only upon the Record." The Record is defined in paragraph 9 as consisting of the "Hearing Officer's decision together with the testimony, documents and physical evidence admitted into evidence at the hearing." The

transcript of the hearing attached as part of Petitioner's Record shows that it was transcribed on June 21, 2013, more than two and one half years after the Board adopted the hearing officer's recommendation to terminate Petitioner's tenancy in this case. NYCHA's failure to properly review Ms. Hernandez's Record before adopting the hearing officer's recommendation in 2010 provides a further basis to grant the petition for violation of lawful procedure. 68 A.D.3d at 761 (adverse agency determination must be reversed where agency fails to comply with mandatory provision). Accordingly it is

ADJUDGED that the petition is granted, and the determination terminating Aracelly Hernandez's tenancy is annulled.

Dated: May 29, 2014

  
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JOAN E. LOBIS, J.S.C.

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