

Vega v New York City Hous. Auth.

2012 NY Slip Op 30498(U)

February 27, 2012

Supreme Court, New York County

Docket Number: 400120/11

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

NANCY VEGA

INDEX NO. 400120/11

MOTION DATE 01-18-2012

- v -

MOTION SEQ. NO. 1

NEW YORK CITY HOUSING AUTHORITY,

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this petition to/for Art. 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits cross motion

3-4,5

Replying Affidavits _____

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, It is ordered and adjudged that the Article 78 petition is granted, the cross- motion is denied, the Hearing Officer's determination is annulled and the proceeding is remanded to respondent for reconsideration and imposition of a lesser penalty.

Petitioner has resided for the past 19 years with her two children at 55 East 99th Street Apt. 12G (Carver Houses) which is managed by the Respondent New York City Housing Authority. The apartment had been originally leased to her husband Daniel Vega but he moved out, leaving the apartment to petitioner and his children, whom he visits occasionally.

Two search warrants were executed in the apartment, one dated October 26, 2007 and the other January 3, 2008, causing Respondent to file charges against Petitioner for Undesirability, in that Petitioner along with Daniel Vega (1) "on November 1, 2007 did unlawfully possess, sell or attempt to sell a controlled substance, to wit, 'heroin' a quantity of which was recovered during execution of a search warrant;(2) "On or about January 11, 2008 did unlawfully possess, sell or attempt to sell a controlled substance, a quantity of which was recovered during the execution of a search warrant"; (3) "On or about October 21, 2006 on project grounds or in the immediate vicinity thereof said Daniel Vega did unlawfully possess a controlled substance", and breaching NYCHA rules and regulations in that petitioner "(4) permitted unauthorized occupant Daniel Vega to take up residence in your authority apartment without obtaining prior written consent of your development housing manager; (5) failed to refrain from or failed to cause individuals on the premises with your consent, to refrain from illegal or other activity" [see Answer Exhibits A through F].

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):

On April 30, 2010 the charges were amended to add a charge of possessing and selling a controlled substance on February 27, 2009. [see Answer Exhibit K].

The warrant dated October 26, 2007 was executed on November 1, 2007 and the police recovered "one glassine of heroin from the person of Daniel Vega. The warrant dated January 3, 2008 was executed on January 11, 2008 and the police recovered \$166 in United States Currency, one(1) straw with residue, one (1) finger of a plastic glove with residue and one (1) small mug with residue. The residue in the straw was tested and found to be heroin, the residue in the glove finger was not analyzed and the mug residue was a non controlled substance. These items were recovered from the person of Daniel Vega. The only contraband recovered in petitioner's apartment was recovered from the person of Daniel Vega. There were no scales, empty vials or glassines, large amounts of money or other drug paraphernalia recovered. During the execution of this warrant all persons in the apartment, including petitioner's children, were arrested. [see Answer Exhibit R].

Petitioner pled guilty at arraignments to possession of a controlled substance, a misdemeanor, and was sentenced to time served. It should be noted that there was no Indicia that this apartment was being used for the purposes of engaging in illegal activity. [see Answer Exhibit M and Q]

on February 27, 2009 Petitioner was arrested and charged with criminal sale of a controlled substance in the third degree, a class B felony. On April 6, 2010 she pled guilty to the crime of Criminal Sale of a controlled substance in the third degree and was at liberty, pending sentencing, at the time of the administrative hearing. However, on November 17, 2010, as evidenced by certificate of disposition number 20710 the criminal case was "dismissed and sealed, the arrest was deemed a nullity and [Petitioner] was restored to the status occupied before the arrest and prosecution." [see Answer Exhibit J and Petition Exhibit B]

An Administrative Hearing was held before the Hon. Ester Tomlinic-Hines on April 30, 2010, June 9, 2010 and July 20, 2010. At the Hearing Respondent presented documentary evidence of the warrants, their execution, the contraband recovered and the disposition of the charges. There were no witnesses presented by Respondent. Petitioner presented one witness and also presented documentary evidence to show that she had been a drug user but is on her way to recovery, that she has been a good tenant and neighbor and deserves a second chance and to show that Daniel Vega does not reside with her in the subject apartment. At the time of the hearing only her arrest and conviction for sale of a controlled substance was before the Administrative Judge. [see Exhibits S and U]

Hearing Officer Tominic - Hines sustained charges 1 through 3 and 6 and recommended termination of the tenancy. In her decision she stated " the evidence presented by NYCHA demonstrates that the tenant and Daniel Vega as a guest of the subject apartment have been associated with illegal drug related activities from 2007- 2009. The fact that the tenant may have been a drug user and sold illegal narcotics to support her drug habit does not mitigate her responsibility for the drug related conduct which creates a danger to the community and significantly diminishes the living standards of all other law abiding residents."

NYCHA'S Board approved the hearing officer's decision on September 22, 2010 [Answer Exhibit W]. Following service of NYCHA's Board determination Petitioner timely filed this Article 78 Petition to review and reverse the Hearing Officer's determination. [see CPLR§217 (1)].

An occupant in a public housing project can be evicted for violating the terms of the lease by possessing or having his household guest possess illegal controlled substances either on or off the premises. Judicial review of these administrative proceedings is limited to determining whether there exists "substantial evidence" to support the determination (Walker v. Franco, 275 A.D. 2d 627, 713 N.Y.S. 2d 164 [1st. Dept. 2000]). Substantial evidence has been found to exist where Marlhuana was found in an apartment together, with an electronic digital scale (Willock v. Schenectady Municipal Housing Authority, 271 A.D. 2d 818, 706 N.Y. S. 2d 503 [3rd. . Dept. 2000]); where during a search warrant of petitioner's apartment 151 vials of crack cocaine, packaged and ready for sale, a beeper, and a number of plastic bags and empty vials were thrown from a window of the apartment and after entering the apartment the police discovered clear plastic vials with various tops, several cell phones and a triple-beam scale (Walker v. Franco, 275 A.D. 2d 627, 713 N.Y.S. 2d 164 [1st. Dept. 2000] Supra); Where, upon execution of a search warrant, police recover a bag containing heroin residue on petitioner's bedroom dresser along with a second bag containing 50 to 100 clear zip lock bags (In re Cruz, 282 A.D. 2d 230, 722 N.Y.S. 2d 548 [1st. Dept. 2001]); where there is testimony from a police Officer that an Informant bought crack cocaine from petitioner's son and he found drugs and drug paraphernalia inside the apartment as well as a loaded gun in a safe that was in plain view (Harris v. Hernandez, 30 A.D. 3d 269, 817 N.Y.S. 2d 55 [1st. Dept. 2006]); where petitioner knowingly permits the possession and sale of drugs on the premises (Kerney v. Hernandez, 60 A.D. 3d 544, 874 N.Y.S. 2d 804 [1st. Dept. 2009]); where there is testimony from a police officer that he observed petitioner sell prescription drugs near the housing development (Maldonado v. New York City Housing Authority, 63 A.D. 3d 568, 880 N.Y.S. 2d 487 [1st. Dept. 2009]).

However, despite a finding of substantial evidence the penalty of termination of tenancy has been found to be disproportionate to the offense where the offender has been removed from the household by the time of the hearing (see Cheek v. Hernandez - Pinero, 198 A.D. 2d 106, 603 N.Y.S. 2d 831 [1st. Dept. 1993]” penalty of termination of tenancy in public housing project found disproportionate to offense and lesser penalty had to be imposed, where it was undisputed that tenant removed offenders by the time of hearing on termination petition and did not participate in any of the undesirable acts.”; Matter of Blanco v. Popolizio, 190 A.D. 2d 554, 593 N.Y.S. 2d 504; Matter of Brown v. Popolizio, 166 A.D. 2d 44, 569 N.Y.S. 2d 615, “ NYCHA termination of tenancy procedures does not permit termination of the tenancy where the offender has been removed from the household.”); and where the tenant has had an unblemished record of compliance with housing rules despite being convicted of two misdemeanors (Matos v. Hernandez, 79 A.D. 3d 466, 912 N.Y.S. 2d 49 [1st. Dept. 2010]” permanent exclusion of resident convicted of two misdemeanors, but without criminal record, and with unblemished record of compliance with housing authority rules for twenty three (23) years he had lived in public housing shocks court’s conscience, determination of hearing officer annulled and matter remanded for imposition of lesser penalty”).

Until these incidents Petitioner had an unblemished record of compliance with Housing Authority rules, during the execution of the warrants she was not found to be in possession of any controlled substance - these were all recovered from the person of Daniel Vega - there was no indicia of illegal drug activity taking place within the premises (no scales, empty vials, glassines, large amounts of money or weapons recovered), Daniel Vega is not a resident of the apartment and has been removed. Her plea of guilty to Possession of a controlled substance in the third degree was vacated, the case dismissed and her arrest annulled. Under these circumstances the penalty of tenancy termination, which will render petitioner and her children homeless with all of the consequences that homelessness entails , shocks this court’s conscience. The matter should be remanded to respondent to consider the change in circumstances following the vacatur, dismissal and annulment of her arrest and conviction (see Matos v. Hernandez, 79 A.D. 3d 466, Supra).

Accordingly, it is the decision and order of this court that the petition is granted, the cross - motion is denied, the hearing officer’s determination is annulled and the matter is remanded to respondent for reconsideration given a change in circumstances regarding her conviction and for imposition of a lesser penalty.

Accordingly, it is ORDERED and ADJUDGED that the petition is granted the hearing officer's determination is annulled and the matter is remanded to respondent for reconsideration and imposition of a lesser penalty.

This constitutes the decision, judgment and order of this court.

ENTER:

Dated: February 27, 2012

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

UNFILED JUDGMENT

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