

Matter of Lowery v Rhea
2012 NY Slip Op 31008(U)
April 12, 2012
Sup Ct, New York County
Docket Number: 400919/2011
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN
J.S.C.

PART 12

JUANITA LOWERY

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

400919/2011

001

NYCHA

E-FILED

The following papers, numbered 1 to 10 were read on this motion to/for Article 78

Papers

Papers Numbered

Notice of Motion/Order to Show Cause - Affidavits - Exhibits

Answering Affidavits - Exhibits

Reply Affidavits

Cross-Motion: Yes No

see attached

previously decided

Upon the foregoing papers, It is ordered that this ~~motion is~~

**RECORD IS DEPOSITED IN ACCORDANCE WITH
THE ANNEXED DECISION, ORDER AND 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: 4/12/12

PAF
J.S.C.

Check One:

FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X

In the Matter of the Application of
JUANITA LOWERY,

Petitioner,

Index Number 400919/2011

Mot. Seq. No. 001

For Judgment Pursuant to Article 78 of the
Civil Practice Law & Rules,

-against-

JOHN RHEA, as Chairperson of the New York City
Housing Authority, NEW YORK CITY HOUSING
AUTHORITY, and FIRST ATLANTIC TERMINAL
HOUSING CORP.,

Respondents.

DECISION, ORDER & JUDGMENT

-----X

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Papers considered in review of this petition to reverse and annul, and cross motion to dismiss:

Papers	Numbered
Order to Show Cause, Ver. Petition, Exhibits, Affirmations	1, 2
Memorandum of Law in Support	3
Notice of Cross Motion, Affirmation, Exhibits	4
Affirmation (in Opposition by First Atlantic Terminal)	5
Affirmation in Opposition and in Further Support of Motion	6
Supplemental Order Restoring Petition	
Verified Answer & Memorandum of Law	7, 8
NYCHA Applicant Appeals Unit decision 11/22/2011	9
Stipulation of Parties 12/14 2011	10
Transcript of Oral Argument 12/14/2011	11

PAUL G. FEINMAN, J.:

Procedural History and Facts

In this Article 78 proceeding, by previous decision and order dated September 1, 2011,

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 1418).

this court held the petition in abeyance, denied the respondent New York City Housing Authority's (NYCHA or Housing Authority) cross motion to dismiss, and directed it to serve and file its answer. The branch of the petition seeking a preliminary stay as to any actions taken by co-respondent Atlantic Terminal Housing Corp., relating to a pending nonpayment proceeding commenced against petitioner in Kings County Civil Court's Housing Court, was also granted. NYCHA has filed and served its verified answer. Also, in the interim, petitioner appeared at an appeal hearing before the NYCHA Applicant Appeals Unit which, on November 22, 2011, issued its written determination sustaining the Housing Authority's determination that petitioner is ineligible for Section 8 benefits.

The matter has been restored to the court's calendar for decision on the remaining branches of the petition, which seek pursuant to CPLR 7803 (3) to reverse and annul the determination by NYCHA to deny petitioner Section 8 housing benefits, and attorney's fees and costs. By so-ordered stipulation signed on December 14, 2011, the parties agreed that the notice of petition and petition have been amended to state that petitioner sought annulment and reversal of the November 22, 2011 determination denying her application for a Section 8 voucher, and that the court will determine the petition based on this amendment.

The reader is presumed to be familiar with the underlying facts as set forth in the decision of September 1, 2011. A brief review of the proceeding follows, as originally set forth in the court's September 1, 2011 decision.

Petitioner is a 65-year-old disabled tenant who has lived in the same apartment since 1976 when the building was operating as a Mitchell-Lama cooperative with a mortgage subsidized by the federal Housing and Urban Development agency (HUD) (Ver. Pet. ¶¶ 1-2).

During the years the building was part of Mitchell-Lama, petitioner received a HUD project-based rental subsidy established by the Housing and Community Development Act of 1974 to make such housing units affordable to very low income tenants (Ver. Pct. ¶ 41). The building's "landlord" is First Atlantic Terminal. In about 2005, First Atlantic Terminal pre-paid its HUD mortgage which terminated the building's participation in the Mitchell-Lama program. However, the tenants then became entitled to apply for "enhanced" Section 8 vouchers administered by NYCHA pursuant to 42 USC § 1437f (t). Section 8 housing assistance is a federal program administered in New York City by several agencies including NYCHA, through which the government provides rent subsidies to lower-income families to enable them to rent privately owned housing (Cross Mot. Kramer Aff. ¶ 3)

A previous Article 78 petition was brought by petitioner after her application for Section 8 was deemed to have been denied, and her petition was granted to the extent that the denial was annulled and NYCHA was directed to complete the full application process.¹ More than a year after the decision was issued, petitioner moved to compel NYCHA to comply with the court's decision; this was settled in 2010 with the Housing Authority agreeing to process her application retroactive to the date that First Atlantic Terminal left the Mitchell-Lama program.² Petitioner submitted the required documentation to NYCHA in December 2010. The documents concerned her pension and Workers' Compensation income, Social Security benefits, documentation

¹ *Lowery v Hernandez*, 400355/2008 (Sup Ct New York County, Braun, J.).

² According to NYCHA, although petitioner submitted a new application in February 2008 and appeared for her eligibility interview, she did not provide all the necessary documentation; over the course of the next year and a half, NYCHA periodically sent letter requests to petitioner requesting the additional information and documentation at issue (Ver. Ans. ¶ 51, citing ex. E [letters dated from May 30, 2008 to February 17, 2010]). The Housing Authority contends that contrary to petitioner's statement that NYCHA refused to process her application until she moved to compel, it had continued to attempt to process her application (Ver. Ans. ¶ 53).

concerning her grandson's income, and the documents she had submitted annually to her landlord, First Atlantic, showing her household composition.

The Housing Authority denied her application for Section 8 benefits on February 10, 2011. The Housing Authority found "[m]isrepresentation[s]" in the annual submissions to First Atlantic Terminal that it collected for HUD concerning her full income for the years 2005 and 2010, as well as discrepancies in the amount of income reported as earned by her grandson, and his Social Security number (Ver. Pet. Ex. I [Denial; "Basis of Ineligibility, Section 8"]).³ The Housing Authority concluded that petitioner "is ineligible because she committed fraud or another corrupt or criminal act in connection with a governmental housing program, or misrepresented information affecting eligibility, preferences for admission, family composition, income, or allowance." Her ineligibility is "indefinite" (*id.*).

Petitioner was granted an appeal, the hearing of which occurred before the NYCHA Applicant Appeals Unit on November 21, 2011. Petitioner appeared with her attorney, and the Housing Authority appeared with its attorney. According to the written decision, the hearing officer reviewed the many documents proffered by NYCHA. He noted that while petitioner did not submit any documents, she reported her various sources in income, namely Workers' Compensation, Social Security disability benefits since 2005, and a pension since March 2007 from the New York State Nurses Association. It was pointed out to petitioner that the contents of the earlier annual forms left out certain sources of income, but that by signing the documents she had validated the representations made in the forms, although they were incorrect. Upon

³ The documents are attached as exhibit II of the verified complaint (forms signed by petitioner for First Atlantic Terminal, dated 05/01/05, 09/01/06; 07/01/07; 07/01/08; 03/01/09; and 7/01/10).

questioning, she stated that she did not herself fill out the "HUD" forms, but that a representative from the landlord fills them out and she then signs them, not necessarily in the presence of the representative, and without reading them (Appeal pp. 5-6). Petitioner stated she did not know "where" the Social Security number for her grandson came from, and stated that she had provided her grandson's Social Security card to the Housing Authority in order to verify the correct number. Her attorney argued that it was unclear how NYCHA was calculating the amount to be charged for her monthly rent but that she had not received any benefits to which she was not entitled (Appeal pp. 5-6). Finally, petitioner explained that she takes several different medications for medical conditions and that the side effects can make her sleepy or groggy at times, and her judgment when reading and filling out forms could be impaired (Appeal p. 6).

On November 22, 2011, the Hearing Officer sustained the determination that petitioner was ineligible for Section 8 benefits, based on petitioner's failure to submit "sufficient objective evidence to prove she did not misrepresent information affecting eligibility preferences for admission, family composition, or income." (Appeal p. 6). The matter has now been restored to the this court's calendar for a determination on the merits of the petition.

Analysis

In an Article 78 proceeding, judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]). The test of whether a decision is arbitrary or capricious is "determined largely by whether a particular

action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.” (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). The burden is “squarely on the petitioner” (*Matter of Che Lin Tsao v Kelly*, 28 AD3d 320, 321 [1st Dept. 2006] [pertaining to the merits of the case]).

Petitioner argues that NYCHA’s determination is arbitrary and capricious, affected by error of law, and an abuse of discretion (CPLR 7803 [3]). She brings this petition to reverse and annul NYCHA’s determination denying her a Section 8 voucher, to order NYCHA to issue her a Section 8 voucher retroactive to the month when the building was first removed from the Mitchell-Lama program, for an award of costs and disbursements, and a stay of the nonpayment proceeding commenced by First Atlantic Terminal pending receipt of retroactive payment of the Section 8 voucher.

The petition contends that NYCHA’s decision to deny petitioner Section 8 benefits is arbitrary and irrational given that it does not dispute the accuracy of the information she has provided as part of her application for enhanced Section 8 benefits (Ver. Pet. ¶ 58). As to the records kept by First Atlantic, the petition notes that “regardless of the accuracy,” it is undisputed that petitioner “obtained no subsidy or benefit as a result of any inaccuracy.” (Ver. Pet. ¶ 58). It further argues that the information kept by First Atlantic is “complete[ly] irrelevant to” her application for Section 8 benefits, that the “information [] collected by First Atlantic and potentially reported to HUD [was] part of its agreement with HUD to receive interest reduction payments after it left the project-based subsidy program” (Ver. Pet. ¶ 58). It contends that the information collected by First Atlantic Terminal “was not used to calculate any form of government housing subsidy or benefits” (Ver. Pet. ¶ 56). It also points out that she has not been

investigated, arrested, charged, or convicted of any crime regarding housing subsidies (Ver. Pct. ¶ 58).

NYCHA argues in sum that because Section 8 participants are required to pay 30 percent of their household income for rent, and the validity of the program is dependent on the NYCHA's ability to accurately assess the household income so as to avoid issuing larger subsidies than warranted, petitioner's history of under-reporting her income to another government agency make her disclosures intrinsically unreliable. It contends that misrepresentations by themselves warrant a finding of ineligibility. It argues that applicants have no "right or entitlement" to Section 8 assistance, and such assistance will only be made available after a "number of requirements" are met (Ver. Ans. ¶ 42, citing 24 CFR § 982.202 [c]). First, NYCHA must determine whether an applicant is eligible for Section 8 assistance, and to do that, the applicant must provide information regarding, "among other things, their income, family composition, and citizenship status." (Ver. Ans. ¶ 42, citing 24 CFR § 982.201 [a], [b], [c]). NYCHA must then contact a landlord participating in the Section 8 program, determine whether the proposed rent is reasonable, conduct an inspection of the apartment to ensure housing quality standards, and then approve the Section 8 lease between the landlord and the participant, after which NYCHA then enters into a contract with the landlord providing that the Housing Authority will pay the landlord, from funds allocated through HUD, monthly rent subsidy payments comprising the difference between the total rent for the apartment and the amount of rent paid by the Section 8 participant (Ver. Ans. ¶ 39, 43, 44, citing 24 CFR § 982.305 [a]; 305 [c] [2]; 401 [a] [3]).

Thus, in the instant case, NYCHA was only able to commence the full process in

December 2010 when petitioner's counsel provided "certain income and family composition documents and information" that had been requested (Ver. Ans. ¶ 53). As described by NYCHA, the documentation provided in 2010 differed from the information she had reported between 2005 and 2009 on the HUD forms submitted to First Atlantic Terminal as part of its record-keeping to show compliance in maintaining "all low-income affordability restrictions" (Ver. Ans. ¶ 54). While she reported receiving bi-weekly Workers' Compensation benefits totaling \$14,560, from 2005 - 2010 (Ver. Ans. ¶ 55), her Social Security income was not reported for the years 2005 through 2009, totaling nearly \$90,000 (Ver. Ans. ¶¶ 55, 56). Nor were her pension benefits of \$118.49 a month, first received in 2007, reported (Ver. Ans. ¶ 56). In 2009, petitioner also reported income earned by her grandson totaling \$19,773 (Ver. Ans. ¶ 55), but did not report his income in the years 2005 through 2008 (Ver. Ans. ¶ 57). For 2010, the form indicates that her grandson was unemployed, however, NYCHA provides a letter dated January 21, 2010, indicating that he had been employed at a bowling alley as of October 2009 (Ver. Ans. ¶ 57; ex. L). There was also the discrepancy in her grandson's Social Security number between the number provided on the HUD forms and the form provided in 2010 (Ver. Ans. ¶ 57).

According to NYCHA, the amounts not reported by petitioner for the year 2009 would have "exceeded the threshold for a low-income family, a requirement for occupancy pursuant to the HUD interest reduction payment program" (Ver. Ans. ¶ 58). Thus, had petitioner been admitted to the Section 8 program in 2005, her subsidy would have subsequently been terminated because her tenant share would have exceeded the rent at least in that year (Ver. Ans. ¶ 59). NYCHA's answer includes several affirmative defenses, including that any claim for retroactive subsidy payments is barred by res judicata and collateral estoppel, based on the 2008 court

decision (Ver. Ans. ¶¶ 63-67).

Where a tenant has been found guilty of misrepresenting or concealing income from NYCHA, termination of the tenancy has been held to be an appropriate penalty (*Matter of Bland v New York City Hous. Auth.*, 72 AD3d 528 [1st Dept 2010] [does not shock the conscience to terminate public housing lease of tenant and her son after Housing Authority discovers that tenant failed to report employment income on occupancy affidavits for five years resulting in a substantial underpayment of rent, she had pleaded guilty to a misdemeanor charge arising out of the conduct, and admitted the factual basis for the charges at the administrative hearing while asking for probation]; *Matter of Smith v New York City Hous. Auth.*, 40 AD3d 235 [1st Dept 2007], *lv denied* 9 NY3d 816 [2007] [termination of lease issued to tenant and her 15-year-old son does not shock the conscience where tenant did not report her husband's co-occupancy of the apartment for 13 years, concealing his income and thus producing a substantially lower rent]). However, where there exist mitigating circumstances, such as a long-term tenancy, a previously unblemished tenancy record, homelessness in the event of termination, and payment of restitution, termination of the lease may shock one's sense of fairness (*see Matter of Wise v Morales*, 85 AD3d 571 [1st Dept 2011], *lv denied* ___ NY3d ___, 2012 NY Slip Op. 64814 [2012] [termination of lease of 25-year tenant with three minor children, one of whom is disabled, is shocking to the conscience where tenant failed to report employment income on her affidavits of income]; *Matter of Perez v Rhea*, 87 AD3d 476 [1st Dept 2011], *lv granted* ___ NY3d ___, 2012 NY Slip Op 68599 [2012] [reversing trial court and remanding to agency, finding that although 37 year old tenant with three children, one 17 and with learning disabilities and one 7 with learning disabilities and emotional problems, had under-reported her employment

income and pled guilty to petit larceny, because she had been a nearly lifetime resident of NYCHA housing and had an otherwise unblemished record, and she was repaying the amounts owed to NYCHA, termination of her lease would shock the conscience as it likely result in homelessness for the family]; *Matter of Davis v New York City Dept. of Hous. Preserv. & Dev.*, 58 AD3d 418 [1st Dept 2009] [remand to agency where termination of lease based on tenant's intentional failure to disclose son's SSI benefits, which had no effect on the amount of rent subsidy, is shocking to the conscience since it likely result in homelessness of 25-year tenant with three minor children one of whom is disabled]; *Matter of Gray v Donovan*, 58 AD3d 488 [1st Dept 2009] [remanding to agency for determination of lesser penalty where termination of tenancy based on failure to report earned income of tenant's two adult children would likely result in homelessness of the tenant and her 13-year-old son, and is shocking to the conscience; no indication of the impact the non-disclosure had on the amount of tenant's housing subsidy]).

Here, respondent argues that it is not terminating petitioner's tenancy, but only finding her unqualified for Section 8 benefits based not on the total of her current annual income, but because she did not properly report all of her income in the past. Respondent thus argues that the "shock-the-conscience" standard does not apply, since its determination to deny her a benefit is not an eviction. The court finds this argument unpersuasive.

Petitioner who is 65, has lived in the same apartment since 1976 and there is no evidence that she has ever been anything other than a model tenant before this incident. There has been no criminal proceeding. She has no employment income and appears unlikely to ever again have any employment income. Her grandson, as stated at the appeals hearing, is now unemployed and no longer lives with her (Appeal p. 5). It has been established that her total income is based on

Social Security, Workers' Compensation benefits, and her meager pension of \$118.49 a month. Based on the March 14, 2011 letter from petitioner's doctor of 25 years, petitioner has several chronic and potentially serious physical conditions and, based on her psychiatrist's letter of March 16, 2011, she has a diagnosis of Bipolar Disorder- Type 2, compliant with medication (Ver. Pet. ex C [Briggs MD letter]; ex. B [Pcloquen MD letter]).

Clearly, without Section 8 benefits, petitioner will lose her apartment as she will not be able to pay the standard monthly rent. She stands to lose the apartment anyway, given the existence of the nonpayment proceeding, currently stayed. Thus, even though the Housing Authority would not have terminated her tenancy, its decision, if left undisturbed, achieves the same result. Moreover, the denial will be based not on her current very modest income figures, which appear not to be in dispute, but past oversights, misrepresentations, inaccuracies, or however they are defined. It seems beyond peradventure to this court that without a Section 8 subsidy, the petitioner, a senior citizen suffering physical and emotional ills of sufficient magnitude to warrant her leaving the workforce, will lose the apartment she has lived in for more than 30 years and become homeless⁴ and a burden on the City's public shelter system. This is no less shocking to the conscience than directly terminating her lease.

Respondent offers no evidence that, barring the discrepancies in the 2005-2009 affidavits, petitioner would be ineligible for Section 8 benefits. As stated in *Matter of Perez*, when "the circumstances underlying the charges against a tenant no longer exist, eviction of the tenant constitutes a disproportionate penalty" (87 AD3d at 479). Applying the *Perez* analysis here, because petitioner's current financial status is not at issue, and appears to meet the initial criteria

⁴Weisberg Aff. in Opp. to Cross Motion and in Further Support of Petitioner's Motion ¶ 6.

for processing an application for Section 8 benefits, it is shocking that the Housing Authority has not seen fit to craft a lesser penalty that would allow petitioner to remain in her home, perhaps a monetary sanction or a probationary period, or something other than finding her indefinitely eligible for Section 8 benefits. As noted by so many courts, to lose one's public housing accommodation is a "drastic penalty" since for many, "it constitutes a tenancy of last resort" (*Matter of Holiday v. Franco* 268 AD2d 138, 142 [1st Dept 2000]). That is no less true in the Section 8 context when the tenant is disqualified from a public benefits program resulting in homelessness.

Accordingly, the petition is granted only to the extent that the matter is remanded to the Housing Authority to consider why processing petitioner's current application for Section 8 benefits should not be based on her current application materials, and that a penalty of lesser severity than denial of the benefits be imposed to address her past failings. The branch of her petition seeks to compel NYCCHA to provide Section 8 benefits retroactively was previously denied in the earlier petition commenced in 2008, and may not be re-litigated here. The branch of her petition seeking costs and fees is denied.

It is

ORDERED and ADJUDGED that the petition is granted to the extent that the matter is remanded to the New York City Housing Authority to for reconsideration in accordance with this decision, order and judgment; and it is further


ORDERED that the remaining branches of petitioner's motion not previously addressed are hereby denied; and it is further

ORDERED that the respondent First Atlantic Terminal Housing Corp., its agents,

servants, employees and all other persons acting under the jurisdiction, supervision and/or direction of First Atlantic, directly or through any attorney, agent, servant, employee or other person under the supervision or control of respondent or otherwise, are enjoined and restrained from litigating in any manner the non-payment proceeding currently pending in Kings County Housing Court, *First Atlantic Term. Hsg. Corp. v Lowery*, Index. No. 82929/2007, until 60 days after the issuance of a final determination by the Housing Authority of the issues hereby remanded for reconsideration; and it is further

ORDERED that the above injunction is conditioned on petitioner continuing to pay her portion of the monthly rent to the respondent First Atlantic Terminal in a timely fashion.

Dated: April 12, 2012
New York, New York



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).