

**Matter of Johnson v New York City Hous. Auth.**

2012 NY Slip Op 32887(U)

November 28, 2012

Sup Ct, NY County

Docket Number: 400395/12

Judge: Peter H. Moulton

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. PETER H. MOULTON  
Justice

PART 48B

Johnson

INDEX NO. 400395/12

-v-

MOTION DATE \_\_\_\_\_

NYC Housing Authority

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 granted as decided

as attached

**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: 11/28/12

Peter H. Moulton, J.S.C.  
HON. PETER H. MOULTON

- 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 40 B

-----X

In the Matter of the Application of  
STACEY JOHNSON,

Index No. 400395/12

Petitioner,

For a Judgment Pursuant to Article 78  
of the Civil Practice Law and Rules

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

-----X

PETER H. MOULTON, J.S.C.:

Petitioner, a full time college student, brings this Article 78 proceeding to vacate the decision of hearing officer Arlene Ambert ("Ambert") dated January 12, 2012, which denied petitioner's December 23, 2011 application to vacate her default in failing to appear at a chronic rent delinquency hearing.<sup>1</sup> Petitioner contends that she did not appear at the hearing on November 22, 2011 because she was taking her final exams at Monroe College.<sup>2</sup>

<sup>1</sup>The hearing date was unilaterally rescheduled by respondent at least five times, for unspecified reasons.

<sup>2</sup>By Determination of Status letter dated December 14, 2011, respondent approved Ambert's November 29, 2011 decision recommending termination of tenancy in light of petitioner's default on November 22, 2011.

**UNFILED JUDGMENT**

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### Background

By affidavit sworn to on January 6, 2012, respondent opposed petitioner's application to vacate her default. In opposition, respondent stated that "this is the Applicant's 2<sup>nd</sup> default with respect the this proceeding"; that petitioner "failed to establish an excusable default since she failed to comply with the requirement to provide documentation in support of a reason for not attending the hearing . . . and failed to send a representative to the hearing and failed to request an adjournment"; and that respondent "presently owes \$854 in outstanding rent which represents 2.1 months at the rate of \$409 for the months of November 2011 through January 2012."

Respondent based the amount owed on a ledger which it submitted to Ambert, reflecting a balance of \$4,498.60 as rent owed through December, 2011. However, respondent did not submit a housing court stipulation, dated December 7, 2011, which provided that petitioner owed a total of \$3,016.16 as rent owed through December, 2011--\$1,482.44 less than the amount indicated in the ledger.<sup>3</sup> The stipulation provided that petitioner agreed to pay \$2,660 by December 8, 2011 and \$356.00 by December 30, 2011, and

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<sup>3</sup>The stipulation is attached to both petitioner's and respondent's papers in this proceeding and is referenced in the affidavit of respondent's employee, Joy Zackary, submitted in opposition to the Petition.

the ledger indicates that respondent posted payments of \$2,660 on December 21, 2011 and \$325.00 on December 27, 2011.<sup>4</sup>

In her January 2012 decision, Ambert fully adopts respondent's reasoning. Ambert acknowledges petitioner's explanation of excusable default, indicated on the New York City Housing Authority Office of Impartial Hearings form (the "Form"). Ambert nevertheless concludes that petitioner failed to establish an excusable default because petitioner did not submit documentary evidence that she was taking final college exams on November 22, 2011 and failed "to call to request and [sic] adjournment or to arrange to have a representative call or appear on her behalf to request an adjournment." Ambert never states that petitioner's excuse was incredible. Ambert further faults petitioner because "[t]his is not the first time that the Tenant's failure to appear has resulted on an administrative default." However, Ambert had previously vacated petitioner's prior default, in light of proof that petitioner had a New York City Department of Human Resources Administration Bureau of Eligibility Verification appointment on the same day.

Ambert acknowledges petitioner's meritorious defense, asserted in the Form, stating "My rent is paid. I do not owe any back rent. I am also being charged for a washing machine that I do

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<sup>4</sup>The payments may have been made earlier than when they were actually posted.

not have. An access was set up for Friday Dec. 16, 2011 and no one showed up." However, Ambert concludes, based on respondent's ledger, that petitioner did not raise a meritorious defense because she had not been current for at least a year, excluding the washing machine charges, and owed over two months rent for the period November through January, 2012. Ambert gave no weight to the fact that the ledger reflects payments of \$2,985 in December, 2011.

#### Discussion

In opposition to the petition, respondent cites to New York City Housing Authority Termination of Tenancy Procedures, which provide that:

If the tenant fails to answer or appear at the hearing the Hearing Officer shall note the default upon the record and shall make his/her decision on the record before him. Upon application of the tenant made within a reasonable time after his/her default in appearance, the Hearing Officer may, for good cause shown, open such default and set a new hearing date.

(Ex B ¶ 8).

NYCHA's good cause requirement is similar to the "excusable default" requirement for vacating a judicial proceeding under CPLR § 5015 and requires the party to demonstrate an excusable default and a meritorious defense (see *Matter of Daniels v Popolizio*, 171 AD2d 596 [1st Dept 1991]; see also *Gore v New York City Hous. Auth.*, 300 AD2d 541 [2d Dept 2002]). The hearing officer's decision, regarding whether the tenant established excusable

default and a meritorious defense, must be upheld unless it is irrational or arbitrary and capricious (*Matter of Daniels*, 171 AD2d 596, *supra*).

Ambert's decision not to reopen petitioner's default was arbitrary and capricious and irrational. The Form specifies, in relevant part, that to establish good cause, a tenant must:

Give a reasonable excuse to explain why you missed your hearing. (Attach documents such as doctor's note, court paper, employer's letter, etc.) AND . . . [g]ive a good defense why you think the Housing Authority's charges against you are not true, or the problem has been corrected, or otherwise explain why your tenancy should not be terminated (Examples may include: The rent was paid on time; I lost my job; The family member was wrongly accused, or did not live in the apartment; I verified my income; or The charges are not true because [give reason] etc.).

Ambert found a lack of excusable default because petitioner did not submit documentary proof, or call to request an adjournment or send a representative to the hearing to do so. However, there is no "requirement" that documentation be provided to demonstrate a reasonable excuse for the default, and petitioner's statements alone, if credible, may suffice. Therefore, findings of lack of excusable default have been upheld where the tenant's statements alone are either contradicted by evidence or unworthy of belief (see e.g., *Matter of Daniels*, 171 AD2d 596, *supra* [tenant's claim that he was at a welfare recertification appointment, instead of a termination hearing in

connection with his drug arrest was rejected where respondent produced evidence that there was no such appointment scheduled]; *Matter of Velasquez v Hernandez*, 23 AD3d 313 [1st Dept 2005] [tenant's claim that she did not attend a termination hearing because she did not get notice because she had no mailbox key was rejected given that she had used the same excuse a year earlier in vacating her default and failed to explain how she was able to receive other mailings from respondent, including the decision vacating her prior default]). Ambert, who did not find that petitioner's excuse was incredible, arbitrarily found a lack of excusable default based on a non-existent "requirement" that documents must be submitted to support a tenant's statements. Moreover, she irrationally faulted petitioner for failing to adjourn the hearing, or have someone appear on her behalf to do so when the Form does not request this information, and only asks for "a reasonable excuse".<sup>5</sup> Ambert also arbitrarily faulted petitioner for a previous default, which Ambert herself had vacated.

Ambert's conclusion that petitioner failed to raise a meritorious defense is also arbitrary and irrational. Ambert

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<sup>5</sup>In response to Ambert's decision, petitioner explains that she did try to call to adjourn the hearing, but no one answered the phone. Respondent cites the well established case law that evidence cannot be considered for the first time by the court, where it is not initially presented to the agency below. However, because that information was not requested on the Form, a "Catch 22" situation results.



improperly focused on petitioner's failure to pay rent for a period of time which was not the subject the original or amended charges (see *Matter of Butler v Christian*, 88 AD2d 952 [2d Dept 1982]) [petitioner was deprived of due process because the hearing officer in a chronic rent delinquency hearing reached his determination based on tenant's failure to pay rent outside of the period that was specified in the charges]). She further failed to consider that petitioner paid all rent for the period at issue (through August 2011, according to the amended Specification of Charges). Whether a problem has been cured is an accepted defense (see *Matter of Vazquez v New York City Hous. Auth. (Robert Fulton Houses)*, 57 AD3d 360 [1st Dept 2008] [hearing officer found that the tenant cured her chronic rent delinquency by the time of the decision]). The Form itself indicates that "a good defense" includes that "the problems have been corrected."

Ambert further arbitrarily concluded that petitioner failed to present a meritorious defense because the "defense presented by the Tenant was inaccurate." Ambert reached this conclusion because petitioner had stated in the Form that "my rent is paid" but Ambert found that two months of rent was still due through January, 2012. It is irrational to conclude that petitioner failed to present a meritorious defense merely because her

statement may have been inaccurate, where there is no indication that the statement was made in bad faith.<sup>6</sup>

In sum, when taken as a whole or in part, Ambert's decision is arbitrary and irrational. Petitioner should be given her day in court. Petitioner never explained why she did not pay rent on a timely basis during the year at issue. While respondent concludes that petitioner's failure to do so translates into a lack of a meritorious defense, the Form does not state that a tenant must list all defenses. Rather, it provides that "a good defense" should be indicated. Petitioner focused on "a good defense" i.e., that "the problem has been corrected" and should not be deprived of the opportunity to present any other defenses that she might have at the hearing.

Accordingly, it is

ADJUDGED that the petition is granted and petitioner's default in appearing at a hearing on November 22, 2011 is vacated; and it is further

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<sup>6</sup>In support of her Petition, petitioner states that "I was told by Ms. Zachary that all I had to pay was \$2,600.00 plus \$356.00 (dec. rent) to bring my balance to zero." Respondent counters that this explanation cannot be considered here because it was not raised with the agency. It is troubling that Ambert was unaware that petitioner believed, apparently correctly, that her rent was paid in full through December, 2011, as a result of the fact that respondent provided only the ledger, not the housing court stipulation, reflecting a contrary, and lesser amount due.

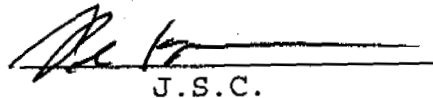
ADJUDGED that in light of the above, Ambert's decisions dated January 12, 2012 and November 29, 2011, and respondent's decision dated December 14, 2011 are vacated; and it is further

ORDERED that the matter is remanded for a new hearing on whether petitioner's tenancy should be terminated based on chronic rent delinquency, with the requisite notice to be mailed to petitioner as to the new hearing date.

**This Constitutes the Order and Judgment of the Court.**

Dated: November 28, 2012

ENTER:



J.S.C.

**HON. PETER H. MOULTON**

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