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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PETER H. MOULTON SUPREME COURT JUSTICE
Justice

PART 408

Index Number : 402770/2011
RIVERA, AWILDA
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

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 Verified Petition _____ No(s). 1

~~Answering Affidavits~~ — Exhibits + Memorandum _____ No(s). 2

Replying Affidavits _____ No(s). 3

Sur-reply Affirmation No(s). 4

Upon the foregoing papers, it is ordered that this ~~motion is~~ Petition is

decided per attached

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

Dated: 10/8/12

HON. PETER H. MOULTON
SUPREME COURT JUSTICE, 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 40 B

- -X

In the Matter of the Application of AWILDA RIVERA,

Index No. 402770/11

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 brings this Article 78 proceeding to vacate the decision of hearing officer Joan Pannell ("Pannell") dated July 21, 2011, which denied petitioner's application to vacate her default in failing to appear on the adjourned date of a chronic rent delinquency hearing, despite her previous two appearances. Pannell denied petitioner's application in light of her "not having explained her delay for over a year in so doing, or her failure to pay rent since 12/2010."

Background

By notice dated January 14, 2010, respondent New York City Housing Authority ("NYCHA" or "respondent") advised petitioner of the hearing date of February 10, 2010 regarding potential termination of her tenancy for chronic rent delinquency. The

charges attached to the notice reflected that petitioner paid her rent between two weeks to approximately two months after the due date. By letter dated April 2, 2010, the hearing was adjourned to May 11, 2010 and the charges were amended to reflect further late payments, and that as of February 12, 2010 no rent had been received for September-February 2010.

The tenant appeared at the hearing on May 11, 2010 and signed a stipulation of adjournment to June 29, 2010. On June 29, 2010 she appeared again at the hearing and signed another stipulation of adjournment to July 27, 2010.[1] An inquest was held after petitioner failed to appear on July 27, 2010. The Ledger Card submitted at the inquest indicated that petitioner had four children, "temp" employment, a ten year tenancy, and owed $837.00 in rent, at $163.00 per month. By decision dated August 2, 2010, Pannell stated "charges are sustained. The record contains no mitigating circumstances." It would be unlikely, of course, for the record to contain any evidence of mitigating circumstances when petitioner did not appear.

By Determination of Status letter dated August 18, 2010, respondent approved the hearing officer's decision, and terminated petitioner's tenancy.

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[1]The reasons for the adjournments are not explained.

One day later, on August 19, 2010, petitioner was evicted in connection with a previously filed nonpayment proceeding. However, by Decision and Order dated August 23, 2010, Housing Court Judge Sabrina B. Kraus restored petitioner to possession, and directed that NYCHA accept Department of Social Services checks covering all arrears through the date of restoration, leaving a rent credit for September, 2010.[2] Judge Kraus' decision indicated that the parties agreed that $1,267.80 was owed through August 2010. She directed respondent to accept $1,500.00 in Department of Social Services checks, leaving petitioner with a credit towards September 2010 rent.

On July 14, 2011, nearly one year later, petitioner moved to reopen the default. She filled out a form entitled New York City Housing Authority Office of Impartial Hearings Request to the Hearing Officer for a New Hearing (the "Form"). Petitioner indicated on the Form that "I did came for 2010 but I didn't get a letter to come this year" and listed the defense "rent is go to be pay today."

[2]In support of her petition, petitioner states that "I received my apartment back on August 23, 2010 But wasn't notified of another missed appointment on July 27, 2010." The court requested additional briefing on whether NYCHA's termination of petitioner's tenancy was affected by the fact that petitioner "received [her] apartment back on August 23, 2010."

Respondent submitted an affidavit in opposition to petitioner's application. Respondent maintained that because the application was made nearly one year after the default, it "exceeds what can be considered a reasonable amount of time." Respondent also argued that petitioner "failed to establish an excusable default since her excuse is unintelligible." Further, respondent argued that petitioner continued to be chronically late, citing rent allegedly owed from November 2010. Respondent omitted any mention of the fact that Housing Court Judge Sabrina B. Kraus had ordered petitioner restored to possession of the apartment on August 23, 2010.

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).[3]

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[3]Respondent further notes that NYCHA's Termination of Tenancy Procedures defines "chronic delinquency in the payment of rent" as the "repeated failure or refusal to pay rent when due" (*id.* ¶ 1 [D]). Repeated failure or refusal is defined in the NYCHA

NYCHA's requirement that the application to reopen a default must be made within a reasonable time "guards against unnecessary and dilatory applications" (*Matter of Yarbough v Francis*, 95 NY2d 342 [2000]). 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*).

Pannell's decision not to reopen petitioner's default was not rationally based because she failed to consider the the appropriate standard of review, i.e., whether petitioner demonstrated excusable default and a meritorious defense. Although respondent argues that the hearing officer correctly refused to reopen petitioner's default because petitioner did not raise an excusable default, Pannell only considered petitioner's delay in moving to reopen the default. Further, although the

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Management Manual Termination of Tenancy, Chapter IV, as the failure to pay rent within the month due "at least three times during any 12 months period" (Ex C, page 4).

hearing officer faults petitioner for moving to vacate the default one year later, respondent submitted no proof to Pannell that petitioner was served with either Pannell's August 2, 2010 decision or the August 18, 2010 Determination of Status letter.[4] Accordingly, Pannell's conclusion, that petitioner did not move to reopen her default within a reasonable amount of time, is irrational and not supported by the record.

Even if Pannell implicitly found that petitioner failed to establish an excusable default and a meritorious defense, the decision is still not rationally based. There is no evidence that petitioner's default was intentional, as opposed to the being the product of confusion *(see Matter of Detres v New York City Hous. Auth.*, 65 AD3d 442 [1st Dept 2009] [further consideration and investigation by the agency was warranted where record reflected that the tenant was confused]). In filling out the Form, petitioner indicated that "I did came for 2010 but I didn't get a letter to come this year." While the stipulation petitioner signed on June 29, 2010 reflected the next hearing date at which she failed to appear, petitioner did in fact appear for the

[4]The hearing officer was also apparently unaware that petitioner had been restored to the apartment nearly one year earlier by order of Housing Court Judge Sabrina B. Kraus. Disclosure of these facts might have provided Pannell with an explanation for petitioner's delay.

hearing on two prior occasions. It is not rational to fault a tenant for merely being confused.

Moreover, even if Pannell implicitly decided that petitioner did not raise a meritorious defense, Pannell acted arbitrarily in considering petitioner's failure to pay rent since December 2010, 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 compounded the problem by failing to consider that rent was paid in full for the period at issue. 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 the "Defense" that "the problems have been corrected."

It is also troubling that the hearing officer was not informed that Judge Sabrina B. Kraus restored petitioner to possession and directed NYCHA to accept all rent due for the period in question. A tenant can be restored to possession in appropriate circumstances based on good cause shown (*see Harvey 1390 LLC v Bodenheim*, 96 AD3d 664 [1st Dept 2012]). The judge's

order was apparently not appealed and/or if it was, it was not reversed. This fact cannot be considered by this Court because it was not presented to the agency for consideration (*see Yarbough v Francis*, 95 NY2d 342, *supra*; *Matter of Evans v New York City*, 94 AD3d 885 (2d Dept 2102]). However, it was not considered because NYCHA did not reveal it, and petitioner did not know enough to assert it. Had this fact been known, the hearing officer may have reached a different conclusion.[5]

Accordingly, it is

ADJUDGED that the petition is granted; and it is further

ADJUDGED that the hearing officer's decision dated July 21, 2011 denying petitioner's application to vacate her default in failing to appear at a hearing on July 27, 2010 is vacated; and it is further

ADJUDGED that petitioner's default in appearing at a hearing on July 27, 2010 is vacated; and it is further

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

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[5]Although outside the purview of this decision, it is questionable whether NYCHA could evict petitioner in a holdover proceeding based upon its August 18, 2010 termination of petitioner's tenancy in light of Judge Kraus' August 23, 2010 Decision and Order restoring petitioner's tenancy.

as to the new hearing date.

This Constitutes the Decision, Order and Judgment of the Court.

Dated: October 8, 2012

ENTER:

J.S.C.

HON. PETER H. MOULTON
SUPREME COURT JUSTICE