SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

IN THE MATTER OF THE APPLICATION OF
MARY ENCARNACION GRANT,

Petitioner,

FOR A JUDGMENT PURSUANT TO ARTICLE 78
OF THE CIVIL PRACTICE LAW AND RULES

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

INDEX NO. 106199/11

MOTION SEQ. NO. 001

The following papers, numbered 1-6 were considered on this Article 78:

PAPERS	NUMBERED
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits (Reply, Sur-Reply, Opposition to Reply & Sur-Reply)	4, 5, 6
Cross-Motion: [ ] Yes [X] No	

Upon the foregoing papers, it is ordered that this Article 78 is decided as indicated below.

Petitioner Mary Encarnacion Grant seeks an order pursuant to Article 78 of the CPLR, reversing respondent New York City Housing Authority's (NYCHA) determination, dated April 19, 2011, sustaining the charges of non-desirability and breach of rules and terminating petitioner's tenancy. Petitioner asserts that the decision was an abuse of discretion as to the measure of the penalty imposed.

NYCHA, in opposition, states that the determination to terminate petitioner's tenancy was in accordance with NYCHA's policies and procedures, as well as the applicable law, and is rationally based. For the reasons stated below, the petition is granted.

BACKGROUND

Petitioner currently resides in 710 Croes Avenue, Apartment 1H, Bronx, NY 10473 (Subject

Apartment) with her five children, and has resided there for 23 years. The Subject Apartment is located at Sack-Wern Houses, a public housing development owned and operated by NYCHA. In October 2010, officer Frank Marousek from the New York City Police Department, accompanied a parole officer to the Subject Apartment and observed marijuana in plain view, after obtaining permission to enter from two of petitioner's children, Andrae Encarnacion and Shakira Encarnacion-Gallishaw. A search warrant was obtained to further search the premises, and police officer Marousek also recovered a firearm. As a result of the search, Andrae Encarnacion, Shakira Encarnacion-Gallishaw, Paul Massey (Massey), and Remington Thomas (Thomas) were arrested. Massey and Thomas were present in the Subject Apartment at the time of the search and both allegedly gave petitioner's address as their own.

Thereafter, NYCHA was notified that arrests were made to members of petitioner's household and others in the Subject Apartment. NYCHA alleges that letters were sent to petitioner requesting she attend a meeting to discuss the matter. Petitioner, however, denies receiving these letters. In March 2011, charges, including non-desirability and breach of rules and regulations, were preferred against petitioner after she allegedly failed to meet with NYCHA. It is undisputed that petitioner did receive the specification of charges and notice of hearing.

An administrative hearing was held on April 6, 2011, conducted before hearing officer Joan Pannell of NYCHA, wherein petitioner appeared *pro se* and NYCHA appeared by counsel. Following the hearing, the hearing officer rendered a decision on April 19, 2011 (Decision), which sustained the charges of non-desirability and breach of rules, and recommended termination of petitioner's tenancy. Thereafter, petitioner commenced this Article 78 proceeding.

DISCUSSION

Judicial review of an administrative determination is limited to whether the "determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or

an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed". CPLR 7803 (3). The court has the power to remit a matter to the agency where "further agency action is necessary to cure deficiencies in the record". *Matter of Police Benevolent Assoc. of the New York State Troopers v Vacco*, 253 AD2d 920, 921 (3d Dep't 1998), *lv denied* 92 NY2d 818 (1998). *See also*, *Matter of Montauk Improvement, Inc. v Proccacino*, 41 NY2d 913, 914 (1977). Additionally, a court may determine that an agency determination is shocking to one's sense of fairness and disproportionate to the offense such that a lesser penalty is warranted. *See Matter of Palmer v Rhea*, 78 AD3d 526, 526 (1st Dep't 2010). *See also*, *Matter of James v New York City Housing Authority*, 186 AD2d 498, 500 (1st Dep't 1992).

NYCHA argues that the federal and state law requires NYCHA to provide safe, decent, and sanitary housing. NYCHA further argues that federal and state laws regulations are incorporated into the terms of the leases. Specifically, petitioner's lease, pursuant to 42 U.S.C. § 1437d(l)(6) and 24 CFR § 966.4(f)(12), states that:

> "It shall be the Tenant's obligations: ...(r) To assure that the Tenant, any member of the household, a guest, or another person under the Tenant's control, shall not engage in:
> (i) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the Development by other residents or by the Landlord's employees, or
> (ii) Any violent or drug-related criminal activity on or off the Leased Premises or the Development".

NYCHA Resident Lease Agreement, p. 6, ¶ 12(r). At the hearing, NYCHA submitted the lease as evidence, along with the first page of petitioner's affidavit of income to show authorized members of petitioner's household. Additionally, police officer Marousek testified as to the illegal narcotics, firearm, and arrests made. NYCHA states that its determination was rational.

Petitioner argues that a lesser penalty should be imposed as she "was not home when the search took place...[and that she] can not [sic] be everywhere all the time." Verified Petition, p. 1. Petitioner, *pro se* at the hearing, did not submit any documentary evidence, but she and her daughter, Shakira

Encarnacion-Gallishaw, testified on her behalf. Petitioner's daughter testified that her brother, Andrae Encarnacion, admitted the marijuana was his, but she did not know about the oxycodone pills or the firearm. Likewise, petitioner testified that she did not know to whom the firearm belonged or how it got into the Subject Apartment. Petitioner also admitted that she could only control what happens in the apartment when she is there.

The Appellate Division, First Department, has stated that "[t]he forfeiture of public housing accommodations is a drastic penalty because, for many of its residents, it constitutes a tenancy of last resort". *In re Perez v Rhea*, 87 AD3d 476, 479 (1st Dep't 2011)(internal citations omitted). To that end, the First Department has held that the punishment of termination, even where the tenant physically confronted and accosted a housing authority representative, is drastically disproportionate to the offense, given the tenant's long, unblemished tenancy. *See Peoples v NYCHA*, 281 AD2d 259, 260 (1st Dep't 2001). Furthermore, where the tenant "was involved in one isolated incident, has no other violations and has not presented any other problems to the Housing Authority", termination has been held to shock one's sense of fairness. *Spand v Franco*, 242 AD2d 210, 210-211 (1st Dep't 1997).

Applying these principles here, the Decision is drastically disproportionate to the offense. While it is uncontested that illegal drugs and a firearm was found in the Subject Apartment, petitioner states that she is "doing everything possible for [her older children] to leave [her] home. But everything take[s] time." Petition, p. 1. Furthermore, petitioner, a single mother of 5 children, 2 of which are minors, has been living in the Subject Apartment for 23 years. The record reveals that petitioner was not present during the search, was not charged with any crime, and was not arrested. Aside from this one incident, there are no allegations or evidence that petitioner had any problems with NYCHA in the long history of her 23 year tenancy. While the procedures cited by NYCHA to terminate a tenancy, permit termination for non-desirability, such termination is not mandatory. *See* Termination of Tenancy

Procedures, pp. 2-3. Given petitioner's unblemished record, long-time residency in the Subject Apartment for over 20 years, and petitioner's minor children, whom she is supporting, the Decision shocks the conscience and must be vacated.

Accordingly, it is

ORDERED that the petition is granted to the extent that the hearing decision, dated April 19, 2011, terminating petitioner's tenancy, is vacated; and it is further

ORDERED that this application is remanded to the New York City Housing Authority for imposition of a lesser penalty in accordance with this decision; and it is further

ORDERED that within 30 days of entry of this order, petitioner shall serve a copy upon respondent New York City Housing Authority with notice of entry.

Dated: 10/11/12

DORIS LING-COHAN, J.S.C.

Check one: **[X] FINAL DISPOSITION** **[ ] NON-FINAL DISPOSITION**

Check if Appropriate: **[ ] DO NOT POST**

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