| Matter of Day v New York City Hous. Auth. |
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| 2013 NY Slip Op 30054(U) |
| January 11, 2013 |
| Sup Ct, New York County |
| Docket Number: 401002/12 |
| Judge: Peter H. Moulton |
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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S)

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

HON. PETER H. MOULTON SUPREME COURT JUSTICE PRESENT: Justice Index Number: 401002/2012 DAY, SHAWNTE INDEX NO. MOTION DATE NYC HOUSING AUTHORITY MOTION SEQ. NO. _____ SEQUENCE NUMBER: 001 ARTICLE 78 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 ___ Upon the foregoing papers, it is ordered that this motion is per attacked 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) HON, FETER H. MOULTON SUPREME MORPHATIDE DEPOSITION 1. CHECK ONE: CASE DISPOSED 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER SUBMIT ORDER ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT REFERENCE [* 2]

SUPREME COURT OF THE STATE OF NEW YORK COUNTY OF NEW YORK: PART 40 B

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In the Matter of the Application of Index No. 401002/12 SHAWNTE DAY,

Petitioner,

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

-against-

NEW YORK CITY HOUSING AUTHORITY,

she applied for a "one shot deal."

Respondent.

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

Petitioner, a single mother with three children, brings this Article 78 proceeding to vacate the decision of hearing officer Arlene Ambert ("Ambert") dated January 24, 2012, which denied petitioner's January 4, 2012 application to vacate her default in failing to appear at a chronic rent delinquency hearing. In her January 4, 2012 application, petitioner contends that she did not appear at the hearing on September 23, 2011 because she did not receive notice of the hearing date. She also acknowledges that her rent is not "up to date" and as her defense, states that

Background

By affidavit sworn to on January 18, 2012, respondent opposed petitioner's application to vacate her default. In opposition, respondent stated that "this is the Applicant's 2^{nd} default with

[* 3]

respect the this proceeding"; that petitioner "failed to establish an excusable default since she failed to establish that she was not properly notified" and that petitioner "continues to be chronically late in the payment of rent and therefore has no meritorious defense. She presently owes \$3,726 in outstanding rent . . . for the months of June 2011 through January 2012."

Respondent criticizes petitioner's "running up arrears and then applying for assistance [as] an acceptable way to pay her rent."

Ambert fully 2012 decision, adopts In January respondent's reasoning. Ambert concludes that petitioner failed to establish an excusable default in light of NYCHA's affidavit of mailing of the notice by both certified and regular mail. rent due in the amended Specification of Charges (from July 1, June 2011) was paid prior to Ambert's decision. 2010 Nevertheless, she found that petitioner failed to present a meritorious defense "in light of the Tenant's egregious rent payment history" and lack of "a viable plan to become current with the rent and remain current with future payments."

Discussion

NYCHA's good cause requirement is similar to the "excusable default" requirement for vacating a judicial proceeding under CPLR

Although outside of the scope of review, those arrears were subsequently paid. However, as of July 2012, petitioner was a few months behind in rent.

[* 4]

§ 5015 and requires the party to demonstrate both 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).

The court is constrained to deny the petition, although the result is unduly harsh. Ambert's improperly focused petitioner's failure to pay rent for a period of time subsequent to that specified in the amended Specification of Charges (see Matter of Butler v Christian, 88 AD2d 952 [2d Dept 1982]) [petitioner was deprived of due process because the hearing chronic rent delinquency hearing in a reached determination based on tenant's failure to pay rent outside of the period that was specified in the charges]). As to that period, petitioner had previously alleged a meritorious defense.2

However, Ambert's decision not to reopen petitioner's default, because petitioner did not establish an excusable

²In moving to vacate her prior default, which was granted, petitioner cited a loss of employment. Accordingly, for the period specified in the amended Specification of Charges, petitioner alleged a meritorious defense.

[* 5]

default, is not arbitrary and capricious. NYCHA submitted evidence that a notice was mailed by both certified and regular mail one month prior to the hearing. It is not arbitrary and capricious for the hearing officer to reject petitioner's statement that she did not receive either form of mailing, absent any explanation as to how that could be the case. Although this court may have reached a different conclusion, it is not arbitrary and capricious for Ambert to have implicitly concluded that petitioner ignored the notice - - with harsh consequences.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding is dismissed.

This Constitutes the Decision and Judgment of the Court.

Dated: January 11, 2013

ENTER:

MIL.S.C.

HON. PETER !TON