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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Index Number : 401203/2012
JONES, TIFFANY
vs.
RHEA, JOHN
SEQUENCE NUMBER : 002
AMEND

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 _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion ~~is~~ to amend the petition is granted and the motion to dismiss is denied in accordance with the accompanying memorandum decision

FILED
APR 10 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: APR 02 2013

ALICE SCHLESINGER, 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

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In the Matter of the Application of
TIFFANY JONES,

Petitioner,

Index No. 401203/12
Mot. Seq. Nos. 001 & 002

For an Order Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

JOHN RHEA, as Chairperson of the New York City Housing Authority, and THE NEW YORK CITY HOUSING AUTHORITY,

Respondents.

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SCHLESINGER, J.:

Petitioner Tiffany Jones commenced this Article 78 proceeding seeking to annul the decision by the New York City Housing Authority (NYCHA) declining to vacate the termination of her mother's tenancy on default and further declining to allow Ms. Jones to apply for remaining family member status. NYCHA moved to dismiss the petition. Ms. Jones opposed the motion and requested leave to amend the petition. By letter dated October 26, 2012, counsel for NYCHA indicated that the agency took "no position" on petitioner's motion for leave to amend, and counsel then confirmed that NYCHA opted to have its cross-motion to dismiss apply to the amended petition. As leave to amend is freely granted pursuant to CPLR §3025(b) absent prejudice, the Court will accept the amended petition in the form attached to the moving papers and will consider those papers here.

Background Facts

Petitioner Tiffany Jones is the daughter of Melissa Jones, the prior tenant of record in Apartment 5D at 428 Columbia Street, in a NYCHA public housing

development known as Red Hook West Houses and located in the Red Hook section of Brooklyn. Melissa Jones commenced her tenancy in or before 2003 (NYCHA motion, Exh A). At that time, Tiffany was about 18 years old and was listed as a member of her mother's household, along with her two brothers, authorized to occupy the apartment; in 2007 Tiffany gave birth to her own son Jason, who joined the household with NYCHA's knowledge and consent (Exh B).[1]

In the Fall of 2009, Melissa Jones went to North Carolina with her two sons after the boys were stabbed near the apartment and to care for Tiffany's ailing grandfather. Tiffany asserts that her mother did not advise her of any plans to relocate when she left, and she continued to reside in the apartment with limited contact with her mother. At or about that time, NYCHA sent to Melissa a notice dated September 15, 2009 advising her that it would seek to terminate the tenancy for non-verifiable income and chronic rent delinquency based on the tenant's failure to submit the household income affidavit that was due in 2009 and her failure to timely pay the rent in 2008 and 2009 (Exh F). By notice dated March 31, 2010, the charges were amended regarding the rent delinquency issue to limit the period from April 2009 through March of 2010 when the rent was routinely paid late, and a hearing was scheduled for May 6, 2010 (Exh G).

In or about April of 2010, Tiffany received that notice or a similar one addressed to her mother from the management office at the development advising Melissa Jones that proceedings were being commenced to terminate her tenancy. When Tiffany went to the office, the housing manager purportedly insisted that he would only speak with

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[1] In her original petition (at ¶7), Tiffany indicates that she now lives in the apartment with her "children," but the number of children is unclear.

the tenant of record. Tiffany allegedly indicated that her mother was then living in North Carolina and that she, Tiffany, wished to take over the lease as a remaining family member as she had been living in the apartment with her mother for several years before the mother left. In fact, she had been a member of Melissa's household listed in the NYCHA records at the time the tenancy commenced. When the manager allegedly indicated in response that a hearing would be scheduled regarding the termination of tenancy charges at which Melissa was required to appear, Tiffany advised her mother and understood that she would take care of everything.

However, no one appeared at the hearing on May 6, and NYCHA Hearing Officer Desiree V. Miller issued a decision dated May 7, 2010 sustaining the charges on default and terminating the tenancy (Exh H). Tiffany apparently received and forwarded that decision to her mother, who came to New York on May 25, 2010, stayed with family members at a different location, and applied in writing to vacate the default (Exh I). Specifically, she indicated that she had not been in New York at the time and had not known that her daughter Tiffany could not attend the hearing in her place. She explained that she had "moved her sons" to the South and that she also had a father in the South who needed her help. As to the charges, she stated that the "problems are still being resolved and should be completed by June 6th, 2010." She indicated that public assistance would pay the rent and that she had submitted copies of her pay stubs as proof of her income, albeit late, and that she had since lost her job.

On June 10, 2010, Hearing Officer Miller granted the application without any opposition from NYCHA and advised Ms. Jones to expect notice of a new hearing date (Exh J). By notice dated August 4, 2010, NYCHA advised Melissa of a new hearing

date of September 14, 2010 regarding the termination of tenancy charges (Exh K). NYCHA sent another notice thereafter adjourning the matter to November 4, 2010 (Exh L).

In her papers to this Court (amended petition, ¶21), Tiffany has acknowledged receipt of the notice from NYCHA scheduling the termination of tenancy hearing for November 4, 2010. She states that she went to the office and explained that her mother had moved out of the apartment and that she wished to remain. Tiffany was allegedly advised again that Melissa Jones needed to appear at the hearing. She was not given any papers or information regarding her request for RFM status at that time.

Neither Melissa nor Tiffany appeared at the hearing (Exh M). By decision dated November 5, 2010, NYCHA Hearing Officer Arlene Ambert for the second time sustained the charges on default and terminated the tenancy (Exh N). The Board notified Melissa on November 17, 2010 that it had approved that decision (Exh O).

Tiffany claims in her petition that she understood all along (obviously mistakenly) that her mother had taken care of everything. However, she presumably learned otherwise when she received a petition for nonpayment of rent in June of 2010 returnable at the Red Hook Community Justice Center. Tiffany appeared there and signed a stipulation agreeing to pay rent arrears. She then went to the New York City Human Resources Administration (HRA) to obtain a grant (Tenant motion, Exh C). In the Fall, HRA allegedly began sending NYCHA some of the rent. Tiffany followed up in Housing Court, but she did not appear at the termination of tenancy hearing in November, as indicated above.

Thereafter, in May 2011, Tiffany was served with a holdover petition based on the November 2010 termination of the tenancy. She allegedly went to the management

office in an attempt to vacate the default decision and assert her rights as a remaining family member (RFM).[2] However, she was purportedly told that only the tenant of record (her mother, Melissa Jones) could apply to vacate the default and that RFM rights were not available once the tenancy had been terminated. NYCHA further advised Tiffany that she could not assert RFM rights even if the tenancy had not been terminated because her mother Melissa had not formally surrendered her rights to the apartment. Also, rent was outstanding at the time, NYCHA said.

In April 2012, Tiffany, acting for the first time with the assistance of counsel, formally asked NYCHA to vacate the default decision in a letter from counsel (Exh P). Counsel indicated in the letter that Tiffany was seeking to vacate the termination of the tenancy which had been entered against her mother on default, that Tiffany herself had never been sent notice of the hearing, and that Ms. Jones had defenses to the chronic rent delinquency charges. She further explained that after Melissa had vacated her first default, she decided to permanently vacate the apartment.

Attached to counsel's letter was a March 20, 2012 notarized statement from the tenant of record Melissa Jones. There Melissa stated that she had moved to the South in September of 2009 with the intent to return but later decided to vacate the apartment, leaving her adult daughter Tiffany there "in charge of the apartment." She further

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[2] NYCHA claims here that neither Melissa nor Tiffany took any action after the November 2010 termination of tenancy until April 2012. While the tenant has provided some of NYCHA's records (Exh J), they do not cover that time period. The records do show, however, that Tiffany was in the management office in July 2009 to give information about her public assistance and that her mother Melissa had missed various appointments that Fall, suggesting her absence from the apartment.

indicated that about a year earlier "I submitted a letter to 250 Broadway indicating some of this information. In addition the local housing office was aware of such."[3]

Tiffany also submitted an Affidavit in Support of Application to Vacate Default as part of counsel's April 2012 submission. There she stated that she had not appeared at the hearing because the notice of the termination of tenancy proceedings was addressed to her mother and it was not until she received the Holdover Petition that she received notice. Regarding the merits, she explained that she was unaware of rent arrears until that time and then went to public assistance, but she was unable to get a grant because she did not have a lease in her name. She further states that she contacted NYCHA "several times" to assert her rights as a remaining family member, but that no meeting was ever scheduled so that she could proceed.

NYCHA opposed counsel's April 2012 request to vacate the termination of the tenancy. The Hearing Officer denied the request in a letter from hearing Officer Arlene Ambert dated May 3, 2012 (Exh R), stating that:

> In response to your letter/papers dated April 16, 2012, please note that there is no evidence that your client, Tiffany Jones was a co-lessee at the time the tenancy was terminated by reason of the Tenant's default in appearance, nor that she subsequently successfully succeeded to the lease as a remaining family member grievant. Therefore, she is without standing to request that the decision and determination entered by reason of the Tenant's default be vacated. The determination remains unchanged and any appeal should therefore be made at the appropriate judicial forum.

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[3] The "letter" presumably was the May 2010 application to vacate her default, as no other writing has been produced by either party here.

Tiffany then commenced this Article 78 proceeding, asserting that NYCHA had violated its rules and acted in an arbitrary and capricious manner by not allowing Tiffany Jones to assert her RFM rights. NYCHA cross-moved to dismiss pursuant to CPLR §3211(a)(7) and §3211(a)(3) for failure to state a claim and lack of standing inasmuch as petitioner cannot assert succession rights in light of the termination of the tenancy and outstanding rent arrears and because only the tenant of record Melissa Jones had standing to challenge the termination of the tenancy. As indicated earlier, petitioner has opposed the motion.

Discussion

Insofar as it appears from the papers submitted to the Court as of this date, had NYCHA allowed Tiffany Jones to apply for remaining family member (RFM) status before the tenancy of her mother was terminated, Ms. Jones may well have qualified on the merits. According to Section XII of the NYCHA Manual (Exh D to NYCHA motion), an individual is eligible to acquire RFM status if she "lawfully enters the apartment **and** is in continuous occupancy of the apartment" (emphasis in original). It is undisputed, and is in fact documented in NYCHA's own records, that Ms. Jones lawfully entered the apartment as the daughter of the original tenant of record and an authorized member of the household, and she continually occupied the apartment with her mother for at least six years until her mother moved out in or about 2009. Ms. Jones remained in the apartment with her young child(ren) after her mother and two brothers had relocated down South, with the rent being paid by public assistance, at least in part.[4]

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[4] According to the Manual, Ms. Jones must also pass a criminal background check and not be otherwise an undesirable tenant. The Court has no evidence to suggest any issue along those lines.

While that point is noteworthy, the merits of the case are not before the Court at this time. Rather, the Court must now determine the motion by NYCHA to dismiss for failure to state a cause of action pursuant to CPLR §3211(a)(7) and for lack of standing pursuant to CPLR §3211(a)(3). NYCHA claims that the petition fails to state a cause of action because Tiffany Jones cannot succeed to a terminated tenancy, nor seek RFM status while use and occupancy is outstanding. As to the second ground, NYCHA contends that Ms. Jones has no standing to vacate the decision terminating her mother's tenancy on default.

The law governing judicial review on a motion to dismiss is well-established. "In the context of a motion to dismiss for failure to state a cause of action, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide a plaintiff the benefit of every possible inference." *Trustees of the Plumbers Local Union No. 1 Additional Sec. Benefit Fund v City of New York,* 73 AD3d 530, 530-31 (1st Dep't 2010), *citing Goshen v Mutual Life Ins. Co. of N.Y.,* 98 NY2d 314, 326 (2002). Ms. Jones asserts here that she attempted to assert her RFM rights on multiple occasions while her mother's tenancy was still viable. Accepting that allegation as true as we must on a motion to dismiss, the Housing Manager was required to provide to Ms. Jones "Form 040.342 (Important Notice — Remaining Family Member Claim) which advises the claimant of his/her right to initiate a grievance proceeding." (See NYCHA Management Manual, Chapter IV, subdivision IV, subsection J, cited in counsel's moving papers at ¶31).

Although NYCHA's interview records do not confirm a conversation between Ms. Jones and the Housing Manager about RFM rights, they do confirm that Ms. Jones was

in contact with the office and that NYCHA was aware that the tenant of record, Melissa Jones, was not appearing in the office, suggesting her absence from the apartment. What is more, Tiffany Jones appeared in the Housing Court proceeding commenced by NYCHA when the tenancy was viable, in place of her mother, in an attempt to secure her rights to the apartment.

As detailed above in the discussion of the facts, Melissa Jones defaulted at her chronic rent delinquency hearing scheduled for May 6, 2010, and the tenancy was terminated by decision dated May 7. Melissa Jones applied on May 25, 2010 to vacate that default, and the application was granted by decision dated June 10, 2010. It was precisely at that time that NYCHA sued the tenant Melissa Jones for nonpayment of rent. Tiffany Jones filed an answer to the nonpayment petition on June 9, 2010 and appeared in Housing Court in place of her mother on June 30, 2010 and entered into a Stipulation for the payment of rent. Significantly, the Stipulation also included a provision for access to the apartment on July 21, 2010 when NYCHA was to inspect the apartment and begin necessary repairs. (See Exh B and C to petitioner's motion). NYCHA presumably was able to observe who was occupying the apartment at that time — Tiffany and her child(ren).

Tiffany appeared thereafter in Housing Court on various occasions in August, September and October of 2010, while the tenancy was still viable. (Exhs D, E and F). It was during this same period of time that NYCHA sent to Melissa Jones a notice dated August 4, 2010 advising her of a new hearing on the chronic rent delinquency charges, scheduled for September 14 with an adjournment to November 4. Clearly, via the various court proceedings, NYCHA had to know that Tiffany was living in the apartment,

that Melissa was not appearing, and that Tiffany was fighting in court to preserve her residence. Had NYCHA given Tiffany the notice to apply for RFM status during that time, the application would have been submitted before her mother's second default on November 4, and NYCHA would have no argument today that Tiffany cannot succeed to a terminated tenancy. In that regard, NYCHA's citation here to *McLaughlin v Hernandez*, 16 AD3d 344 (1st Dep't 2005) is misplaced; that case is distinguishable because the petitioner made no attempt to assert her RFM rights until ***after*** the tenancy had been terminated. Here, Ms. Jones alleges that she made those efforts, and the allegations must be accepted as true on this motion.

Equally unavailing in NYCHA's argument that the petition fails to state a cause of action because an individual has no right to have an RFM grievance processed while use and occupancy is outstanding. While that proposition of law may be a viable one, the necessary facts have not been established as a matter of law so as to entitle NYCHA to the dismissal of the petition on that ground.

On the contrary, the amended rent delinquency charges which were the subject of the hearing showed that while the rent was often paid late, it was typically paid by the end of the month; the March 31, 2010 notice shows that only the March 2010 rent had not been paid "as of 3/15/10." (NYCHA motion, Exh G). Further, as demonstrated above, Tiffany Jones was receiving public assistance and was working diligently to arrange for full payment of the rent; she asserts that her efforts were hindered by NYCHA's failure to process her RFM grievance so she could obtain a lease in her own name to show to the Human Resources Administration. Thus, this Court cannot find that NYCHA is entitled to the dismissal of this proceeding on that ground as a matter of law.

NYCHA's final argument is that Tiffany Jones lacks standing to vacate the November 5, 2010 decision terminating Melissa's tenancy on default. First and foremost again, if NYCHA had permitted Tiffany to file for RFM status in the spring or summer of 2010 while she was appearing regularly in Housing Court, the decision terminating the tenancy on Melissa's default presumably would not have been issued.

Even if that were not the case, however, Melissa did submit a notarized statement requesting that her default be vacated and that her daughter be permitted to remain in the apartment. That statement was attached to counsel's April 16, 2012 letter to NYCHA (NYCHA motion, Exh P). In the May 3, 2012 decision denying that request, it appears that Hearing Officer Ambert simply ignored the statement from Melissa Jones, as it is not mentioned anywhere in the decision quoted above. Finally, as noted earlier, NYCHA was on actual notice that Tiffany was living in the apartment as she was regularly appearing in court, attempting to preserve the tenancy before the November default occurred. Under these circumstances, NYCHA has failed to meet its burden on a motion to dismiss for lack of standing.

As NYCHA's motion to dismiss is being denied, the proceeding shall continue. Pursuant to CPLR §3211(f), NYCHA is entitled to file an Answer to the Amended Petition, which shall be accompanied by the full Administrative Record as required by CPLR Article 78, and a decision on the merits will be rendered after all the issues have been fully briefed.

Accordingly, it is hereby

ORDERED that petitioner's motion to serve and file an Amended Petition is granted, and petitioner shall service NYCHA's counsel and file with the County Clerk a

copy of the Amended Petition in the form attached to the moving papers and any Memorandum of Law in Support of the Amended Petition, along with a copy of this decision with Notice of Entry, within twenty (20) days of the entry of this decision; and it is further

ORDERED that NYCHA shall serve and file with the Clerk in Room 222 an Answer to the Amended Petition, along with a copy of the Administrative Record and any Memorandum of Law, within twenty (20) days of his receipt of the Amended Petition; and petitioner shall serve and file in Room 222 a courtesy copy of the Amended Petition and Memorandum of Law and any Reply papers within ten (10) days of receipt of NYCHA's Answer. Any party wishing further oral argument shall state their request on the front page of their papers.

Dated: April 2, 2013

APR 0 2 2013

J.S.C.

ALICE SCHLESINGER

FILED

APR 10 2013

NEW YORK
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