Rivera v Russ
2020 NY Slip Op 34032(U)
December 8, 2020
Supreme Court, New York County
Docket Number: 451317/2020
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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ELSA RIVERA

Plaintiff,

- v -

GREGORY RUSS,

Defendant.

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INDEX NO. 451317/2020

MOTION DATE 12/26/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Elsa Rivera (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that counsel for Respondent New York City Housing Authority shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.

MEMORANDUM DECISION

In this Article 78 proceeding, petitioner Elsa Rivera (Rivera) seeks an order to overturn a determination by the respondent New York City Housing Authority (NYCHA) and its chair, Gregory Russ, as arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

FACTS

Rivera is the tenant of record of apartment 16H in a residential apartment building located at 1505 Park Avenue in the County, City and State of New York (the building). *See* verified petition, ¶ 4. The building is part of the DeWitt Clinton Houses development, a NYCHA-operated public housing development. *Id.*

Rivera's tenancy commenced on February 1, 2001 pursuant to the terms of a lease, subparagraph 12 (r) of which required Rivera:

> "To assure that [she], 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 [NYCHA's] employees, or
> (ii) Any violent or drug-related criminal activity on or off the Leased Premises or the Development, or
> (iii) Any activity, on or off the Leased Premises or the Development, that results in a felony conviction; . . ."

See verified answer, exhibit A.

In 2014, Rivera's brother, William Camacho (Camacho), was arrested for the unlawful possession, sale, or attempted sale of heroin, which police recovered while executing a search warrant in apartment 16H. *Id.*; ¶ 41. On June 20, 2014, Rivera executed a stipulation with NYCHA in which she agreed to permanently exclude Camacho from apartment 16H, and to subject her tenancy to a one-year probationary period in exchange for NYCHA's agreement to permit her tenancy to continue. *Id.*, ¶ 42; exhibit D.

Despite this, NYCHA investigators discovered Camacho inside apartment 16H in May 2017. *See* verified answer ¶ 43. They commenced an investigation after police executed another search warrant for the unit, and again found heroin in a bedroom which Camacho was using there. *Id.* NYCHA's investigation resulted in the filing of charges and specifications against Rivera for violating the 2014 stipulation, which were resolved in a "determination of status" order, dated December 6, 2018, which subjected Rivera's tenancy to another one-year probationary period, and continued Camacho's permanent exclusion from apartment 16H with the clarification that he was also prohibited from visiting there. *Id.*, ¶ 43; exhibit E.

On March 14, 2019, NYCHA investigators again discovered Camacho inside apartment 16H, which he had entered with a key that Rivera had given him. *See* verified answer ¶ 44. In the wake of the investigation, NYCHA again filed charges and specifications against Rivera for violating the 2014 stipulation, and the matter was scheduled for a hearing. *Id.*, ¶¶ 44-46; exhibits F-K. The hearing was eventually held on September 20, 2019, on which date Rivera was represented by counsel, and both parties [i.e., Rivera and NYCHA] presented testimony and documentary evidence. *Id.*, ¶¶ 47-53; exhibits L-Q. On December 27, 2019, a NYCHA Hearing Officer (HO) issued a determination that found, in pertinent part, as follows:

> "The charges are essentially admitted and supported by the evidence and are sustained.
>
> "At Tenant's tenancy termination hearing on charges of violation of exclusion which concluded 6/18, Tenant told the Hearing Officer that Camacho had been in her apartment to care for the dog, that she had not understood that he was excluded, and that she had made other arrangements for care for the dog and to ensure that the exclusion stipulation would be complied with in the future. The Hearing Officer's decision relied upon this assurance.
>
> "At the instant hearing, Tenant provided no such assurance that she will comply with the stipulation. Rather, she will allow Camacho to retain his keys.
>
> "Counsel errs in arguing that Tenant is not responsible for an exclusion violation which occurs when she is not present. No logic or precedent supports such an interpretation, which would render ineffective the permanent exclusion system.

> "William Camacho was previously permanently excluded in an effort to preserve the tenancy while also protecting the welfare of the tenant community. That measure proved insufficient. Tenant allows the offender to retain his keys and did not at the instant hearing describe any plan to address emergencies which would not require his presence. The appropriate disposition now is termination."

Id., ¶ 54; exhibit R. On February 14, 2020, NYCHA issued another "determination of status" letter that adopted the HO's determination, and terminated Rivera's tenancy. *Id.*, ¶ 55; exhibit S.

Rivera thereafter commenced this Article 78 proceeding on June 1, 2020 to challenge NYCHA's termination of her tenancy. *See* verified petition. NYCHA filed an answer on September 22, 2020. *See* verified answer. This matter is now fully submitted (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 230-231 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302, 302 (1st Dept 1996). A determination will only be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of the . . . facts . . .." *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983), citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232.

Here, NYCHA asserts that there was a rational basis for the HO's determination because there was substantial evidence in the administrative record to support it. *See* respondent's mem

of law at 4-7. NYCHA specifically refers to the documentary evidence embodied in: 1) the 2014 investigation report and the 2014 specifications and charges that were based on that report; 2) the 2014 stipulation in which Rivera agreed to permanently exclude Camacho from apartment 16H and to a one-year probationary period for her tenancy; 3) the 2017 investigation report and the 2017 specifications and charges that were based on that report; 4) the 2018 determination of status order that specified that Camacho's permanent exclusion from apartment 16H included a prohibition against visits and also imposed another one-year probationary period on Rivera's tenancy; 5) the 2019 investigation report and the 2019 specifications and charges that were based on that report; 6) the testimony of NYCHA's investigator that she had observed Camacho entering unit 16H with a set of keys that he claimed Rivera had given him; and 7) Rivera's own testimony, which included admissions that (a) she understood that Camacho had been permanently excluded from her apartment since 2014, but (b) that she had nevertheless provided him with keys to the unit and intended to let him keep them. *Id.*; *see* verified answer, exhibits A-S. NYCHA asserts that the HO was justified to conclude from this evidence that Rivera had knowingly violated her agreement to permanently exclude Camacho from apartment 16H. *Id.* NYCHA also asserts that the HO was justified to disregard Rivera's evidence that Camacho maintained a separate personal address in the Bronx because of the evidence that Rivera had given him the means to enter apartment 16H at will despite his permanent exclusion. *Id.* The court notes that the HO's report acknowledged all of the foregoing evidence. *See* verified answer, exhibit R. The court concludes that said evidence was sufficiently "substantial" to provide a rational basis to support the HO's determination. *See Matter of Pell*, 34 NY2d at 230-

231. Rivera nevertheless raises three arguments that assert that NYCHA's decision to terminate her tenancy was an arbitrary and capricious act.[1] *See* petitioner's mem of law at 6-16.

The first of these asserts that "it was arbitrary and capricious to terminate [her] tenancy based on actions taken by nonresident adults without [her] knowledge and consent." *Id.* at 6-9. She cites three older decisions by the Appellate Division, First Department, to support the proposition that "where a permanently excluded person is present in a NYCHA apartment without the knowledge and consent of the tenant, it is arbitrary and capricious to terminate the tenancy on the basis of that violation of permanent exclusion." *Id*. at 6; *see Matter of Hagan v Franco*, 272 AD2d 143 (1st Dept 2001); *Matter of Holiday v Franco*, 268 AD2d 138 (1st Dept 2000); *Matter of Cardona v Franco*, 267 AD2d 53 (1st Dept 1999). NYCHA responds Rivera's cited cases are all factually inapposite, since their holdings were premised on findings of "no knowledge or consent" by the tenants of record to the visits by the excluded parties to their apartments. *See* respondent's mem of law at 6-7, 18-19. NYCHA argues that the dispositive fact in this case is that Rivera "had given unfettered access to the apartment to Camacho, whom she allowed to keep his own set of keys." *Id.* The court finds NYCHA's reasoning persuasive. In *Matter of Romero v Martinez* (280 AD2d 58 [2001]), the First Department observed that:

> "If a family member presents a threat to the tenant's neighbors when he resides there, he is no less of a threat when he comes to visit. While the tenant cannot be answerable for the conduct of her emancipated child, or for his decisions regarding where to go, *she may be held responsible for her own decision to permit the miscreant to enter and stay in the apartment*. Accordingly, although it may be unfair to construe such an exclusion agreement as violated by a visit which occurred without the tenant's knowledge, *there is no practical or policy-based reason why the tenant should not be bound by the visitation exclusion under appropriate circumstances*."

[1] At this juncture, the court notes that Rivera's reply papers merely restate the arguments in her original memorandum of law without adding anything of substance.

280 AD2d at 63 (emphasis added). Here, "appropriate circumstances" plainly exist because Rivera's consent to Camacho's visits to apartment 16H may be inferred from the fact that she gave him keys to the unit which she wanted him to keep. The court therefore agrees that Rivera's cited case law is inapposite, and rejects Rivera's "knowledge and consent" argument.[2]

Next, Rivera argues that "the [HO] acted in violation of lawful procedure by failing to consider mitigating evidence weighing against termination of [Rivera's] tenancy." *See* petitioner's mem of law at 9-12. Counsel particularly asserts that "the [HO] failed to even mention, let alone analyze, any mitigating circumstances regarding Ms. Rivera's age, disabilities, or length of tenancy in the Findings and Conclusions of her decision to terminate the tenancy, even though evidence on all three points was admitted at the hearing." *Id.* at 10-11. However, this assertion is belied by the text of the HO's determination, which plainly recites that Rivera was "age 64, [and] a 30-year resident," and which plainly states that the HO received and reviewed "Tenant's medical records." *See* verified answer, exhibit R. Counsel's real argument appears to be with the weight that the HO accorded to Rivera's personal circumstances when deciding upon the penalty of termination. However, as will be discussed below, that argument is unavailing. In any case, the court rejects Rivera's "mitigating circumstances" argument as unfounded.

Finally, Rivera argues that "the severe penalty of termination is so disproportionate to the de minimis violation here as to shock the conscience." *See* petitioner's mem of law at 12-16.

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[2] The court further notes that, in cases where a tenant fails to establish absence of knowledge or consent to an excluded person's visit, the First Department routinely upholds NYCHA termination decisions. *See e.g.*, *Matter of Curry v New York City Hous. Auth.*, 161 AD3d 578 (1st Dept 2018); *Matter of Hernandez v New York City Hous. Auth.*, 135 AD3d 643 (1st Dept 2016); *Matter of Cruz v New York City Hous. Auth.*, 106 AD3d 631 (1st Dept 2013); *Matter of Gilmore v Hernandez*, 40 AD3d 410 (1st Dept 2007).

Counsel makes the assertion that "termination is the most severe penalty a NYCHA Hearing Officer can select," so "this Court should remand the case to NYCHA for imposition of a lesser penalty." *Id.* at 12-13. However, the Court of Appeals in *Matter of Perez v Rhea* (20 NY3d 399 [2013]) rejected the "implicit assumption" that the termination of a tenancy in public housing "is a 'drastic penalty' . . . that, by default, is excessive." 20 NY3d at 404. Further, the First Department routinely holds that termination of a NYCHA tenancy due to a tenant's violation of a "no visits" provision in a permanent exclusion stipulation does not shock the conscience. *See e.g. Matter of Curry v New York City Hous. Auth.*, 161 AD3d at 578; *Matter of Hernandez v New York City Hous. Auth.*, 135 AD3d at 643; *Matter of Horne v New York City Hous. Auth.*, 113 AD3d 575 (1st Dept 2014); *Matter of Pagan v Rhea*, 122 AD3d 543 (1st Dept 2014); *Matter of Harris v Hernandez*, 72 AD3d 450 (1st Dept 2010). This body of case law completely contradicts counsel's assertion that "the mitigating circumstances of Ms. Rivera's age, disabilities, and length of tenancy" compel the finding that the penalty of termination is so severe as to "shock the conscience." It does not, as a matter of law, and counsel has not identified any special circumstances which would make termination shocking in Rivera's particular case. Therefore, the court rejects Rivera's "severe penalty" argument as unsustained.

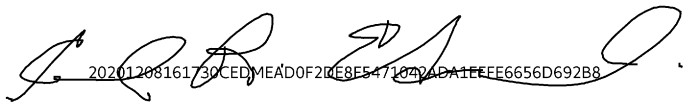
Accordingly, the court concludes that Rivera's Article 78 petition should be denied as meritless, and that this proceeding should be dismissed.

CONCLUSION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioner Elsa Rivera (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that counsel for Respondent New York City Housing Authority shall serve a copy of this order along with notice of entry on all parties within twenty (20) days.



12/8/2020
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE