

**Matter of Johnson v Rhea**

2010 NY Slip Op 31765(U)

June 29, 2010

Supreme Court, New York County

Docket Number: 118275/2009

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD  
Justice

PART 61

In the Matter of the Application of  
CHERYL JOHNSON,

INDEX NO. 118276/2009

Petitioner,

MOTION DATE March 19, 2010

-against-

MOTION SEQ. NO. 001

JOHN B. RHEA, as CHAIRMAN OF THE  
NEW YORK CITY HOUSING AUTHORITY,

MOTION CAL. NO. 55

Respondent

The following papers, numbered 1 to 4, were read, and in petition pursuant to CPLR article 78

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-2

Answering Affidavits — Exhibits

3-4

Replying Affidavits

Cross-Motion:  Yes  No

Upon the foregoing papers, the petition pursuant to article 78 of the Civil Practice Law and Rules is decided in accordance with the accompanying decision and judgment.

Dated: 6/29/10

  
O. PETER SHERWOOD, J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61**

-----X  
**In the Matter of the Application of**

**CHERYL JOHNSON,**

**Petitioner,**

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

**-against-**

**JOHN B. RHEA, as CHAIRMAN OF THE NEW  
YORK CITY HOUSING AUTHORITY,**

**Respondent.**

-----X  
**O. PETER SHERWOOD, J.:**

Petitioner Cheryl Johnson (“petitioner”), a tenant of a New York City Housing Authority (“NYCHA” or “respondent”) apartment, brings this CPLR Article 78 proceeding seeking a judgment reversing and annulling as arbitrary and capricious and an abuse of discretion NYCHA’s determination, dated September 2, 2009, which upheld a decision to terminate her tenancy on the grounds of chronic rent delinquency, and remanding the matter to respondent for imposition of a lesser penalty. Respondent opposes the petition. For the reasons that follow, the petition is denied and the proceeding is dismissed.

***Background***

Petitioner was the tenant of record of apartment #7D at a housing project located at 1770 Story Avenue, in the Bronx (“the apartment”), which is operated by NYCHA (Resp. Exhibit “A”), for approximately 36 years until her tenancy was terminated in September 2009. Petitioner most recently lived there with her minor grandson (Petition ¶¶ 1, 11).

On June 14, 2006, the NYCHA preferred charges against petitioner for failure to timely pay her rent for more than 15 months, which notice was later amended to include ongoing rent delinquency charges (Resp’s Exhibit “F”). The matter was resolved by stipulation of settlement which required that petitioner timely pay her rent by the 5<sup>th</sup> of every month, neither she nor any

of tenancy under NYCHA's Termination of Tenancy Procedures, and her tenancy would be subject to a two-year period of probation (Answer, ¶ 35, Ex. "G").

Notwithstanding the stipulation of settlement, petitioner continued to pay her rent late. On February 15, 2007, the NYCHA sent petitioner a letter advising her that it was considering terminating her tenancy and inviting her to meet with management on February 27, 2006, at 10:00 a.m. to discuss the matter (Answer, ¶ 36, Ex. "H"). Petitioner apparently failed to appear for that scheduled meeting. By letter dated August 27, 2007, the NYCHA advised petitioner that the entire record of her tenancy was being forwarded to the Office of the Tenancy Administrator and that prior to a final determination being made concerning termination of her lease, petitioner would be offered an opportunity to appear at a hearing to which she could be accompanied by an attorney or any other person or persons whom she wished to represent her (Resp's Exhibit "I").

By notice dated November 26, 2007, the NYCHA preferred charges against petitioner for violation of her 2006 probation by her continuing failure to timely pay her rent by the 5<sup>th</sup> of the month (Resp's Exhibit "J") and advised her that a hearing was scheduled on January 11, 2008, at 10:30 a.m. (*Id.*). The NYCHA also notified petitioner by letter dated December 3, 2007, that it was considering terminating her tenancy due to the improper installation of air conditioners and offered her an appointment on December 12, 2007, to discuss the matter with the manager (Answer ¶ 38, Ex. "K"). Petitioner did not appear at the scheduled appointment or contact the Housing Manager regarding the air conditioners (Answer ¶ 38). The charges were later amended to include ongoing rent delinquency, breach of housing rules by installing two air conditioners without the Housing Manager's approval, and improper installation of the air conditioners (Answer, ¶ 39, Ex. "L").

After a number of adjournments, a hearing commenced before an Administrative Hearing Officer Ester Tomicic Hines (the "Hearing Officer") on April 17, 2009, at which petitioner appeared with counsel and the NYCHA appeared by counsel and with two Housing Assistants (Answer, ¶ 40, Ex. "M"). At that time, petitioner's counsel advised the Hearing Officer that petitioner had tendered the sum of \$1,200.00 toward payment of rent arrears of \$2245.00 (Ex. "M", 4/17/09 Hearing Transcript ["Tr."], p. 7) and she requested an adjournment to allow petitioner to become current on

the rent and enroll through her employment in NYCHA's automatic payment program (Tr. at pp. 4-7).<sup>1</sup> The hearing was adjourned.

A hearing on the charges continued on July 31, 2009, at which petitioner appeared with counsel and the NYCHA appeared by counsel and with Housing Assistants Dehlia Hussey and Kim Baughcty. Petitioner's counsel admitted that petitioner was chronically late in payment of rent in violation of the probation placed on her tenancy in 2006 (Tr. pp. 24-25). Housing Assistant Hussey testified that at the time of the hearing petitioner owed rent of \$749.00, which was due no later than July 5, 2009 (Tr.34). She further testified that the NYCHA's rules require that prior to installing an air conditioner, tenants must sign a document and have the air conditioner properly installed with brackets to insure that it does not fall out (Tr. pp. 34-35). She received notice from NYCHA's technical services department that petitioner's two air conditioners were missing brackets, which Ms. Hussey confirmed by personal inspection (Tr. pp. 35-40).

Petitioner, who was 58 years old at the time of the hearing, testified that she had a history of alcoholism and budgeting problems, both of which lead to her difficulty in paying her rent timely and which she began addressing in February 2009 by attending Al-Anon and Debtor's Anonymous meetings (Tr. pp. 44-46). Petitioner stated that she stopped drinking in 1981, but her efforts to handle her problems on her own failed (Tr. pp. 44-45). Since 2002, she has had primary responsibility for her 14-year-old grandson, both financially and emotionally (Tr. pp. 47-48). Petitioner testified further that she was under the care of a physician who was going to refer her to a psychiatric social worker (Tr. pp. 48-49). Petitioner stated that she was an employee of the New York State Unified Court System for almost 30 years and was presently assigned to the Housing Part of the Civil Court, Bronx County, earning approximately \$40,000 annually (Tr. pp. 51-52). She testified that she was addressing her problems as evidenced by her improved ability to pay her rent timely. However, petitioner advised the Hearing Officer that she considered timely rent to be paying half the rent by the 15<sup>th</sup> of the month, even though the lease itself required payment in full on the 1<sup>st</sup> of every month and the stipulation of settlement required petitioner to pay monthly rent no later than the 5<sup>th</sup> of the month (Tr. pp.53-58). She expressed a willingness to participate in NYCHA's

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<sup>1</sup>Petitioner is a New York State Supreme Court employee with approximately 30 years of service (Petition, ¶ 12; Tr. pp. 4-5).

automatic payment program, but apparently it required the tenant to first be current on the rent (Tr. pp. 54-55).

In a decision dated August 18, 2009, the Hearing Officer sustained the charges. In her findings and conclusions the Hearing Officer stated, in pertinent part, as follows:

The tenant was provided with an opportunity to correct her egregious rent payment record and has been unable to do so. The tenant was placed on probation in 2006 for chronic rent delinquency and has failed to comply with the terms of the agreement which provided her with an opportunity to preserve the tenancy. The tenant has been employed steadily for thirty years with a current annual income of \$44,867.00 according to her 2008 W-2, the tenant also receives a monthly contribution of \$180.00 for her grandchild. It is unfortunate the tenant did not seek assistance for her debt problems sooner so that she would not find herself in this predicament. Although the tenant joined a debt support group it should be noted that the rent arrears are not resolved and the tenant owed one months rent on the final hearing date.

In addition to the chronic rent delinquency the tenant has refused to comply with NYCHA's repeated requests to secure her two air conditioners. The absence of brackets to secure the units poses a safety hazard to residents and employees who walk on the grounds of the development and could be severely injured if the units fall from the window. The tenant's lack of compliance with this simple leasehold obligation certainly has nothing to do with her debt issues but demonstrates a lack of regard for compliance with NYCHA's tenancy rules.

The tenant's longstanding residency and recent participation in support groups is insufficient to mitigate the disposition in this matter based on the tenant's repeated failure to comply with the probationary agreement, pay her rent on a timely basis and comply with NYCHA's air conditioner requirements. Clearly probation is not a sufficient deterrent to motivate compliance with these basic tenancy obligations and therefore NYCHA is entitled to their requested disposition.

(Petition, Ex. "B"; Answer Ex. "S"). In a determination dated September 2, 2009, the NYCHA adopted the Hearing Officer's decision and disposition finding petitioner ineligible for continued occupancy and terminating her tenancy (Petition, Ex. "A"; Answer, Ex. "T").

Petitioner thereafter commenced this proceeding pursuant to CPLR article 78 to vacate the NYCHA determination claiming that the Hearing Officer arbitrarily and capriciously ignored petitioner's mitigating circumstances in sustaining the charges of chronic rent delinquency. In her petition, petitioner contends that the penalty of termination is disproportionate to the offense and that the Hearing Officer should have extended petitioner's probationary period as it is likely that if the termination of tenancy is sustained she, together with her grandson, will become homeless.

The NYCHA interposes an answer in which it alleges that despite her assurances, petitioner continues to pay rent late, if at all (Answer, ¶ 49). Although petitioner enrolled in the automatic payment program, her first automatic payment was returned for insufficient funds (*id.*, Ex. "U"). It contends that NYCHA's determination to terminate petitioner's tenancy is supported by substantial evidence in the record and is neither arbitrary nor capricious.

#### *Discussion*

At the outset, the court notes that neither party has requested that this proceeding be transferred to the Appellate Division pursuant to CPLR § 7804 (g) on the ground that an issue of substantial evidence is presented. Nor does the petition raise an issue of substantial evidence as a basis for vacating the respondent's determination. Accordingly, the court concludes that a justiciable controversy is presented for review here.

The court's role in reviewing an administrative decision is limited, with the standard of review being whether the administrative determination was made in violation of a lawful procedure, was effected by an error of law or was arbitrary and capricious and without a rational basis in the administrative record (*see*, CPLR 7803; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 231 [1974]). The court may not conduct a *de novo* review of the facts and circumstances or substitute its judgment for that of the administrative agency (*see*, *Greystone Management Corp. v Conciliation and Appeals Bd.*, 94 AD2d 614, 616 [1<sup>st</sup> Dept 1983], *affd.* 62 NY2d 763 [1984]). Moreover, where the administrative determination requires an evaluation of the facts within an area of the administrative body's expertise, the determination must be accorded great weight and judicial deference (*see*, *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 335, 363 [1987]). In addition, "[i]t is the settled rule that judicial review of an administrative determination is limited to the grounds invoked by the agency" (*Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758 [1991]).

Application of these principles to the case before the court leads to the inexorable conclusion that NYCHA's decision to terminate petitioner's tenancy after numerous instances of rent delinquency and her continuing failure to comply with NYCHA's requirements concerning her air conditioners was neither arbitrary nor capricious. Petitioner admits that she has been chronically delinquent in her rent payments, including at the time of the hearing. She could not provide a commitment as to when she could begin paying her rent timely. Indeed, petitioner expressed her opinion as to what constituted timely payment of rent, which opinion did not comport with either the terms of her lease or the mandates of the stipulation of settlement. Contrary to petitioner's contention, the Hearing Officer fully addressed petitioner's efforts to address her ongoing problems concerning budgeting and certain emotional and/or psychological issues before determining that such efforts were too late and did not sufficiently mitigate her chronic delinquency in rent payments. Thus, the evidence adduced at the hearing provides a rational basis for NYCHA's determination.

Moreover, there was no unduly harsh exercise of discretion as to "shock one's sense of fairness" and constitute an abuse of discretion as a matter of law (*see, Matter of Pell*, 34 NY2d at 237). Petitioner was given numerous opportunities to cure her rent delinquencies and seemed to bring her rent current only when again facing the termination of her tenancy. The NYCHA should not be made to shelter a tenant who consistently meets her rent obligations with late payments, if at all. Such an undisputed and habitual pattern of delinquency, which was not cured even during the probationary period, provides ample support for NYCHA's determination. Petitioner's promise of changed behavior is belied by the fact that at the time of this petition she continues to be delinquent in the payment of rent.

**Conclusion**

Based upon the foregoing discussion, it is

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

This constitutes the decision, order and judgment of the court.

DATED: 6/29/10

ENTER,  
County Clerk  
Person To  
Representative must  
appear in person at the Judgment Clerk's Desk (Room 141B).  
PETER WOOD  
J.S.C.