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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

BARBARA JAFFE
J.S.C. Jaffe

PRESENT: PART 5

Index Number : 401025/2011

HERNANDEZ, JORGE

vs

NYC HOUSING AUTHORITY

Sequence Number : 001

- ARTICLE 78

INDEX NO. 401025/11

MOTION DATE 3/9/11

MOTION SEQ. NO. 001

T CAL # 72

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2, 3

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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).

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

Dated: 10/27/11
OCT 27 2011

_____, J.S.C.
BARBARA JAFFE
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 : PART 5

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In the Matter of the Application of

JORGE P. HERNANDEZ and GLADYS HERNANDEZ,

Petitioners,

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

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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Index No. 401025/11

Argued: 8/9/11
Motion Seq. No.: 001
Calendar No.: 72

DECISION & JUDGMENT

BARBARA JAFFE, JSC:

For petitioners:
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Gladys Hernandez, self-represented
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For respondent:
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By notice of petition dated April 15, 2011, petitioners bring this Article 78 proceeding seeking an order annulling and reversing respondent's decision to terminate their tenancy. Respondent opposes.

I. BACKGROUND

The purpose of the United States Housing Act of 1937 is to, *inter alia*, "remedy the unsafe housing conditions and the acute shortage of decent and safe dwellings for low-income families." (42 USC § 1437[a][1][1]). The Act authorizes the United States Department of

Housing and Urban Development to "assist public housing agencies (PHAs) with the development and operation of low-income housing projects. . . ." (24 CFR 941.101[a]).

Respondent New York City Housing Authority (NYCHA), a PHA, was created by the New York legislature to build and operate low-income housing in New York City. (Verified Ans.). Federal law provides that NYCHA may terminate a tenancy for repeated or serious violations of the lease's material terms or for other good cause, including "discovery of material false statements or fraud by the tenant in connection with an application for assistance or with reexamination of income." (24 CFR 966.4[l][2][i], [iii][C]).

In its Termination of Tenancy Procedures, NYCHA sets forth the grounds on which it may terminate a tenancy, the steps it must take to do so, and the ways in which a tenant may defend himself or herself during termination proceedings. (Verified Ans., Exh. B). Specifically, a tenancy may be terminated for, *inter alia*, "[t]he willful misstatement to or concealment from [NYCHA] by the tenant of any material fact bearing or relating to any determinant of the tenant's eligibility for admission or continued occupancy or bearing upon or relating to the rent to be paid by the tenant." (*Id.*). Once termination proceedings are commenced, "[t]he project manager or his representative will interview the tenant in order to discuss the problem which may lead to termination of tenancy, seek to ascertain the facts involved, and when appropriate, seek to assist the tenant by securing outside help." (*Id.*). If, after the interview, the manager believes termination is appropriate, he must submit his recommendation to the Tenancy Administrator, who makes his or her own recommendation to NYCHA's Law Department. (*Id.*). The Law Department may then prepare administrative charges against the tenant, apprising him of his right to a hearing, to appear at the hearing with counsel, and present evidence and examine witnesses.

(*Id.*). Upon conclusion of the hearing, the hearing officer must prepare a written decision, which is subject to review by NYCHA's Board. (*Id.*).

On February 27, 2001, petitioners and NYCHA executed a lease for apartment 6C of the Queensbridge South Houses, 41-10 Vernon Boulevard, Queens, New York, which provides in pertinent part that the tenant must furnish the landlord with complete and accurate information regarding his household income. (*Id.*, Exh. A).

By memorandum dated July 17, 2006, NYCHA's Acting Inspector General informed the director of management for the Queensbridge South Houses that NYCHA's Office of Inspector General (OIG) conducted an investigation of petitioner Jorge Hernandez and determined from a New York City VENDEX questionnaire that he had owned a "cleaning and janitorial services company . . . that contracted with New York City and the Port Authority of New York/New Jersey" since 1988, and that he had failed to report income from this company to NYCHA. (*Id.*, Exh. D). Building management was then directed to recalculate petitioners' rent from the period of February of 1996 to November of 2004. (*Id.*).

By memorandum dated August 21, 2006, a building manager informed the director of management that petitioners' rent recalculation demonstrates that they owe NYCHA $20,244. (*Id.*, Exh. F).

Sometime thereafter, the OIG arrested Mr. Hernandez, and on December 13, 2007, the Queens County District Attorney's Office charged him with grand larceny in the third degree, falsifying business records in the first degree, and offering a false instrument for filing in the first degree. (*Id.*, Exh. G).

On February 1, 2010, Mr. Hernandez pleaded guilty to petit larceny, and during his plea

allocution and sentencing hearing, admitted to stealing money from NYCHA and the Social Security Administration between October 1, 1994 and October 29, 2003 and November 1, 1996 and December 31, 2005, respectively, and was thereafter sentenced to a discharge conditioned on his signing of a repayment agreement with NYCHA. (*Id.*, Exhs. G, I).

On March 1, 2010, Mr. Hernandez and NYCHA signed a stipulation whereby they agreed that he owed NYCHA $22,145, that he would pay that sum in monthly $50 installments, and that the stipulation "is without prejudice to [NYCHA's] taking any further action with regard to [Mr.] Hernandez, including [its] pursuit of termination of tenancy proceedings." (*Id.*, Exh. I).

By letter dated March 4, 2010, NYCHA informed petitioners that termination of their tenancy was being considered and that a meeting was scheduled for March 8, 2010 during which they would have an opportunity to discuss the matter. (*Id.*, Exh. L). Mr. Hernandez attended the meeting, and by letter dated March 10, 2010, NYCHA notified petitioners that it forwarded their tenancy record to the Applications and Tenancy Administration Department and that a hearing would be held before a final determination as to their tenancy is made. (*Id.*, Exh. N).

On April 27, 2010, NYCHA preferred charges against petitioners, alleging that they failed to submit complete, accurate information as to their income between October of 1994 and October of 2003, notified them that a hearing on the charges was scheduled for May 26, 2010, and advised them that they could be represented by counsel at the hearing. (*Id.*, Exh. O).
On May 26, 2010, the parties appeared before a hearing officer and agreed to adjourn the hearing to June 18, 2010 so that petitioners could retain counsel. (*Id.*, Exhs. Q, P). On June 18, 2010, the parties again appeared before the hearing officer, and after Mr. Hernandez stated that his wife, petitioner Gladys Hernandez, suffers from anxiety and depression, they agreed to adjourn the

hearing to July 28, 2010 so that a social worker could determine whether Mrs. Hernandez would require a guardian ad litem at the hearing. (*Id.*).

On July 25, 2010, a social worker evaluated both petitioners and determined that they did not require guardians ad litem during the hearing. (*Id.*, Exh. R).

The hearing was adjourned a third time to November 16, 2010. (*Id.*, Exh. Q). That day, the parties appeared before the hearing officer, and Mr. Hernandez requested another adjournment so he could retain counsel. NYCHA objected to the request, and the hearing officer denied it, as petitioners had already had five months to secure representation, and stated that she would wait two weeks to issue her decision so, in the event that they retained counsel, he or she could request that the matter be reopened. (*Id.*). She also entered a general denial of the charges on petitioners' behalf. (*Id.*).

NYCHA offered Mr. Hernandez's certificate of diposition; the transcript of his sentencing hearing; the VENDEX report for his business; his business earning report from the New York City Comptroller's Office; petitioners' federal tax returns from 1995 to 2004, which reflect that Mr. Hernandez earned business income; the OIG's recalculation of their rent, which reflects that they owed NYCHA $22,145; the February 27, 2001 lease; and petitioners' affidavits of income they provided to NYCHA for the period of October of 1994 to October of 2003, which do not reflect Mr. Hernandez's business income. (*Id.*, Exh. Q). Emily Bizzarro, an OIG investigator, and Yolanda Dublin, a NYCHA Housing Assistant, testified for NYCHA, laying foundations for the documents it offered. (*Id.*).

Mr. Hernandez testified on petitioners' behalf, denying that they had lied about their income, as they provided NYCHA with their Social Security award letters, and alleging that

NYCHA could have determined whether they earned more income than they reported, as it has "easy access" to City records. (*Id.*). He also admitted that their federal income tax returns do not accurately reflect his income, as they do not set forth his business expenses, and alleged that City had failed to pay his business in full. (*Id.*).

Mrs. Hernandez also denied that they had lied about their income, as they reported their income to the Social Security Administration every year. (*Id.*).

On December 3, 2010, the hearing officer issued her written decision, sustaining the charges against petitioners on the grounds that "petitioners provided no information which might show that they did report business income" and that Mr. Hernandez's guilty plea is *res judicata*. (*Id.*, Exh. W). She determined that termination was the "only appropriate disposition," as those who defraud the tax-paying public are not eligible for tenancy. (*Id.*).

On December 15, 2010, NYCHA issued a "Determination of Status" providing that it approved the hearing officer's decision. (*Id.*, Exh. X).

II. CONTENTIONS

Petitioners assert that they never lied regarding Mr. Hernandez's business income, as City did not pay his company in full for the services it rendered, and their federal income tax returns do not accurately reflect their business expenses. (Pet.). Additionally, they contend that NYCHA should not be able to terminate their tenancy on the basis of events that occurred so far in the past, and in any event, that it has failed to properly maintain the apartment, that they are disabled, that Mr. Hernandez never pleaded guilty to stealing money from NYCHA, and that he has complied with the stipulation in remitting monthly payments to NYCHA. (*Id.*).

In opposition, respondent argues that petitioners are collaterally estopped from claiming

that Mr. Hernandez did not conceal business income from NYCHA, as he pleaded guilty to same, and it asserts that the hearing officer's decision is supported by substantial evidence. (Respondent's Mem. of Law). Moreover, it contends that petitioners waived their arguments as to NYCHA's alleged failure to maintain the apartment, as they failed to raise them at the hearing, and even if they had, they have failed to demonstrate how these circumstances, as well as their disabilities, justify their failure to report Mr. Hernandez's business income. (*Id.*). And respondent observes that it is inapposite that petitioner's actions occurred in the past, as the doctrine of laches does not apply to government agencies, and it claims that termination of their tenancy is not so disproportionate to their offense as to shock one's sense of fairness. (*Id.*).

III. ANALYSIS

A. Laches

"Laches is an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 816 [2003]). Laches cannot be invoked against a governmental body discharging its statutory duties (*Matter of Kenton Assocs., Ltd. v Div. of Hous. & Community Renewal*, 225 AD2d 349, 350 [1st Dept 1996]) or acting in its governmental capacity to "enforce a public right or protect a public interest" (*State of New York by Vacco v Astro Shuttle Arcades, Inc.*, 221 AD2d 198, 198 [1st Dept 1995]).

Here, NYCHA was acting in its governmental capacity in initiating termination of tenancy proceedings against petitioners, and in doing so, it was protecting the public interest in the promotion of decent, low-cost public housing for families who financially qualify for it. (42 USC § 1437[a]). And, even if NYCHA was not acting in its governmental capacity to

protect a public interest, petitioners have not demonstrated how they were prejudiced by its delay in investigating their income and/or in preferring charges against them, as they fail to explain how they would have been better able to defend themselves against termination of tenancy proceedings or how their circumstances have changed such that they would have experienced less hardship upon termination had NYCHA acted more quickly. (*Cf. Matter of Turnage v Hernandez*, 14 Misc 3d 1225[A], 2006 NY Slip Op 52559[U] [Sup Ct, Kings County 2006] [laches did not bar NYCHA's termination of tenancy proceedings where tenant-petitioner failed to demonstrate how he was prejudiced by NYCHA's delay between notifying him of possibility of termination and its commencement of termination proceedings]).

B. Substantial evidence and collateral estoppel

When an administrative determination is made following a hearing required by law, and a claim of substantial evidence is raised, "the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata[, and] [i]f the determination of the other objections does not terminate the proceeding," the matter must be transferred to the Appellate Division. (CPLR 7803[4], 7804[g]; Siegel, NY Prac § 568 [4th ed]). However, if no issues are raised involving substantial evidence, a transfer need not follow. (*Matter of Kinard v New York City Hous. Auth.*, 2009 WL 3780701, 2009 NY Slip Op 32584[U] [Sup Ct, New York County 2009]; *Matter of Rolon v New York City Hous. Auth.*, 23 Misc 3d 1114[A], 2009 NY Slip Op 50751[U] [Sup Ct, New York County 2009]).

"A criminal conviction, whether by plea or after trial, is conclusive proof of its underlying facts in a subsequent civil action and collaterally estops a party from relitigating the issue."

(*Grayes v DiStasio*, 166 AD2d 261, 262 [1st Dept 1990]; *see Launders v Steinberg*, 39 AD3d 57, 64 [1st Dept 2007]).

Here, although respondent argues that the hearing officer's determination is supported by substantial evidence, neither party seeks a transfer to the Appellate Division, nor do the facts reflect an issue of substantial evidence. Moreover, even if plaintiff were to seek such a transfer, he would be estopped from doing so, having pleaded guilty to petit larceny and admitted to stealing money from NYCHA. (*See, eg, Matter of Gregory v New York City Hous. Auth.*, 2010 WL 2754110, 2010 NY Slip Op 31684[U] [Sup Ct, New York County 2010] [even though petitioner did not raise issue of substantial evidence, he would be collaterally estopped from doing so, as NYCHA terminated his tenancy on basis of police's recovery of loaded weapon from apartment, and he pleaded guilty to criminal possession of weapon in fourth degree]). And, neither party argues that the informal hearing was required by law or the Constitution. (*See Matter of Duncan v Klein*, 38 AD3d 380 [1st Dept 2007] [substantial evidence standard not applicable; disciplinary conference not conducted pursuant to constitution or statute]). Consequently, I review the proceeding to discern whether the determination reached is arbitrary and capricious.

C. Waiver

In an Article 78 proceeding, a court may not consider arguments or evidence not presented during the administrative hearing. (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [1st Dept 2007]; *Matter of Patrick v Hernandez*, 309 AD2d 566, 566 [1st Dept 2003]). "To authorize a petitioner to raise [ ] issues for the first time in

an [A]rticle 78 proceeding . . . would deprive the administrative agency of the opportunity 'to prepare a record reflective of its expertise and judgment' . . . . and would render judicial review meaningless." (*Yarbough*, 95 NY2d at 347).

Here, as petitioners did not advance their arguments regarding NYCHA's failure to maintain their apartment during the hearing, they are waived. (*See Torres,* 40 AD3d at 330 [where petitioner's claim of succession to deceased sister's tenancy was denied on basis on one-year rule, and she failed to argue during hearing that she received no notice of rule, such an argument could not be considered in Article 78 proceeding]). And, even if they had, having failed to provide any proof of the conditions they now complain of or explain why they believed the conditions justified concealing the business income, and given the ample record evidence demonstrating that Mr. Hernandez earned income which he failed to disclose to NYCHA (*see infra*, III.E.), the conditions of the apartment provide no grounds upon which to vacate the decision.

D. Arbitrary and capricious

Judicial review of an administrative agency's decision is limited to whether the decision "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]). In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assocs.*, 225

AD2d 349). Moreover, the determination of an administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency's determination is supported by the record." (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *affd* 11 NY3d 859 [2008]).

Here, the decision to terminate petitioners' tenancy was based on Mr. Hernandez's certificate of disposition, which reflects that he pleaded guilty to petit larceny; the transcript of his plea allocution and sentencing hearing reflecting his admission to stealing money from NYCHA; a VENDEX report for his company reflecting that it contracted with the City and the Port Authority; his company's earnings report; the repayment stipulation; the OIG's rent recalculation showing that petitioners owed NYCHA $22,145; and petitioners' federal tax returns and income affidavits, which show that they did not disclose Mr. Hernandez's business income to NYCHA. Petitioners' assertion that Mr. Hernandez did not plead guilty to stealing money from NYCHA is belied by both his plea allocution and the stipulation, and although it may be true that their federal income tax returns do not accurately reflect their business expenses, that he earned very little from his business because City failed to fully pay him, and that NYCHA could have determined from City records that he earned more than he reported, they provide no evidence demonstrating that they did not earn business income or that they earned less than is reflected on their tax returns during the years in question, and they explain neither why they failed to report the business income in their income affidavits nor why they believe that their submission of Social Security Award letters constitutes the functional equivalent of reporting.

Consequently, the hearing officer's decision is supported by the record, and has not been shown to be either arbitrary or capricious. (*See Matter of Bland v New York City Hous. Auth.*, 72 AD3d 528 [1st Dept 2010] [where NYCHA terminated petitioner's tenancy for failing to report employment income for five years, evidence that petitioner pleaded guilty to misdemeanor charge arising out of same and petitioner's admission supported hearing officer's determination as to administrative charges]; *cf. Matter of Smith v New York City Hous. Auth.*, 40 AD3d 235 [1st Dept 2007] [hearing officer's decision finding that petitioner's husband was an unauthorized occupant and terminating her tenancy neither arbitrary nor capricious, as evidence demonstrated that petitioner and her husband indicated to police, employers, and tax authority that they lived at same address yet petitioner failed to disclose husband's income to NYCHA]).

E. Proportionality of penalty

The standard for reviewing a penalty imposed after an administrative hearing is whether the punishment imposed "is so disproportionate to the offense, in the light of all the circumstances, as to be shocking to one's sense of fairness." (*Matter of Pell,* 34 NY2d at 233).

Where a tenant has been found guilty of misrepresenting or concealing his income from NYCHA, termination of his tenancy has been held to be an appropriate penalty. (*Matter of Bland*, 72 AD3d 528; *Matter of Parker v New York City Hous. Auth.*, 73 AD3d 632 [1st Dept 2010]; *Matter of Smith*, 40 AD3d 235). However, where there exist mitigating circumstances, such as a long-term tenancy, a previously unblemished tenancy record, homelessness in the event of termination, and payment of restitution, this penalty may shock one's sense of fairness. (*Matter of Wise v Morales,* 85 AD3d 571 [1st Dept 2011]; *Matter of Perez v Rhea*, 87 AD3d 476 [1st Dept 2011]; *Matter of Davis v New York City Dept. of Hous. Preserv. & Dev.*, 58 AD3d 418 [1st Dept

2009]; *Matter of Gray v Donovan*, 58 AD3d 488 [1st Dept 2009]).

Here, petitioners did not testify at the hearing that they will be homeless if terminated from public housing nor do they assert it now, and they do not specify the nature of their disabilities or the hardship they will experience upon termination. Although termination of their tenancy may constitute a hardship, and although Mr. Hernandez has complied with the stipulation by making monthly payments to NYCHA, these circumstances do not sufficiently mitigate their failure, for more than nine years, to disclose that he owned a business and earned income from it such that a termination is disproportionate or shocking to one's sense of fairness.

IV. CONCLUSION

Accordingly, it is hereby

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

ENTER:

Barbara Jaffe, JSC

DATED: October 27, 2011
New York, New York

BARBARA JAFFE
J.S.C.

OCT 27 2011

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).