SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

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In the Matter of the Application of
CARMEN MATIAS,

Petitioner,

- against-

Index No. 401522/2013
Motion Seq. No.: 001

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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The following papers, numbered 1 - 7 were considered on this Article 78 proceeding:

PAPERS	**NUMBERED**
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits ___ **Answering Affidavits — Exhibits** ___(& Memorandum of Law)_____	**1, 2** **3**
Replying Affidavits (& Letter From Brownsville Partnership, dated May 13, 2014)[1]	**4**
Interim Orders dated Jan. 14, 2014; Apr. 16, 2014; and Jun. 3, 2014	**5, 6, 7**
Cross-Motion: [ ] Yes [X] No	_____

Upon the foregoing papers, it is ordered that this Article 78 petition is granted, as indicated below.

Petitioner Carmen Matias, a senior citizen, who has been a resident for over 30 years of the Howard Houses, a public housing development owned and operated by respondent, appears *pro se*, seeking an order pursuant to Article 78 of the CPLR reversing respondent New York City Housing Authority's (NYCHA) determination, dated August 6, 2013, which denied her application to vacate respondent's decision to terminate her tenancy after her default in appearance at an administrative hearing on charges of chronic rent delinquency. Petitioner has been treated regularly for mental illness since March 2013 at Brownsville Partnership, an organization that helps community residents find solutions to pressing challenges, and has also been participating in a bereavement support group through the same organization. Letter from Bryan Woll, Brownsville Partnership Program Coordinator (May 13, 2014).

The court notes that petitioner's papers, submitted without assistance of counsel, are somewhat confusing. In her verified petition, petitioner requests that this court reverse

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1It is noted that the date on the letter from Brownsville Partnership, actually dated May 13, 2015, is incorrect as to the year, which should be 2014.

respondent's determination dated July 8, 2013, which corresponds to the 30 day notice to vacate issued by respondent, dated the same date, and is attached to petitioner's verified petition as exhibit A. However, also attached to petitioner's verified petition is her Statement in Support of Petition, in which she requests that this court "vacate [respondent's] judgment against [her] and allow [her] the opportunity to appear at [a] hearing in [her] own defense before a [hearing officer]." Verified Petition, Statement in Support of Petition at 1. In her statement, petitioner claims this court should vacate respondent's decision because she "had an excusable default for [not appearing at the] hearing, and . . . [a] meritorious defense for the Chronic Rent Delinquency charges against [her]." *Id.*

Given that petitioner appears to be requesting vacatur of respondent's decision to terminate her tenancy after her second default in appearance at an administrative hearing, the court deems that petitioner is requesting that this court reverse respondent's determination, dated August 6, 2013, which denied her application to vacate respondent's decision to terminate her tenancy upon her default in appearance, and not the 30 day notice to vacate issued by respondent, dated July 8, 2013, as *pro se* petitioner requests in the verified petition. Significantly, respondent's opposition papers also treat petitioner's application as one which seeks to vacate respondent's Aug. 6, 2013 determination; thus, there is no prejudice to respondent.

BACKGROUND

Petitioner, a senior citizen, has been a resident of the Howard Houses, a public housing development owned and operated by respondent for over 30 years. *See* Verified Answer, ¶ 6; Verified Petition, Statement in Support of Petition at 1. Petitioner is being treated for mental issues from Brownsville Partnership, where she meets regularly with her mental health coordinator and participates in a bereavement support group. Letter from Bryan Woll, Brownsville Partnership Program Coordinator (May 13, 2014). Petitioner's tenancy was terminated based upon her second default in appearance at an administrative hearing on charges

of chronic rent delinquency. *See* Verified Answer, ¶ 21. Petitioner applied to open her second default, claiming that she failed to appear because she was informed by a representative for the respondent, that if she paid the rent arrears of $947.00, she would not have to come to "the meeting on May 27, 2013." Verified Answer, Exh. T, Tenant's Request to the Hearing Officer for a New Hearing, ¶ E. Petitioner also claimed, in her defense, that she paid the money she owed, which was $947.00. *Id.* at ¶ F.

Respondent opposed petitioner's application to re-open the second default, arguing that petitioner failed to establish an excusable default because she had defaulted once before and she signed a stipulation stating that she owed $581 in rent arrears, in addition to the $947 payment she had already made in March 2013. Verified Answer at 7, ¶ 23; Verified Answer, Exh. U, Affirmation in Opposition of NYCHA's Counsel, Stefanie Jones, to Tenant's Application to Re-Open 2nd Default of an Administrative Hearing. Specifically, respondent maintained that petitioner's assertion that she believed the $947 payment excused her from appearing at the hearing was not credible or reasonable. Verified Answer at 7, ¶ 23. Respondent also argued that petitioner did not state a meritorious defense because she continued to be delinquent in paying her rent, had not made any payments since she signed the last stipulation of adjournment in April 2013, owed $1,453 in rent arrears, and had not achieved a zero balance since January 2010. *Id.* at 7-8, ¶ 23; Verified Answer, Exh. U, Affirmation in Opposition of NYCHA's Counsel, Stefanie Jones, to Tenant's Application to Re-Open 2nd Default of an Administrative Hearing. On August 6, 2013, respondent denied petitioner's application to vacate petitioner's second default. Verified Answer, Exh. V, NYCHA's Final Determination. Thereafter, petitioner timely commenced this Article 78 proceeding seeking to annul respondent's decision to deny petitioner's application to re-open her default, which resulted in the termination of her over 30 year tenancy.

In the instant proceeding, petitioner maintains that she failed to appear at the hearing on May 22, 2013, because she misunderstood respondent's representative, Ms. Nurun Bulbul, whom

she met with on April 9, 2013. Verified Petition, Statement in Support of Petition at 1. Petitioner claims that Ms. Bulbul told her that if she made the payments towards her rental arrears, which petitioner paid using money she received from the New York City Human Resources Administration (HRA) on March 25, 2013, then petitioner would not have to return for another meeting with Ms. Bulbul. *Id.* Petitioner further maintains that Ms. Bulbul said she would call her to inform her as to whether or not she needed to attend the "in-person meeting" on May 22, 2013, however, petitioner never heard from Ms. Bulbul since their last meeting on April 9, 2013. *Id.* Petitioner contends that she believed she had done what respondent had asked her to do because she had paid off the arrears for the months listed in the latest amended/ supplemented charges (provided in a letter dated February 27, 2013), for unpaid rent until February 2013. *Id.* Petitioner states that she never received any additional correspondence from respondent amending or supplementing the chronic rent delinquency charges following the February 27, 2013 letter. *Id.* Petitioner asserts that the rental arrears following such amended charges, for March and April of 2013, were never included in a specification of charges, and that she was working on getting assistance to pay rent for those months, including applying for cash assistance from the Brownsville Partnership and other agencies and making payments on her own. *Id.* Since she had paid her arrears as charged, and was working on paying off the most recently incurred rent for March and April of 2013, petitioner believed she had complied with what was requested of her. *Id.*

Petitioner also argues that respondent's decision to terminate her over 30 year tenancy is unfair and unnecessarily harsh, as she has tried to always stay current in her rent and that she initially fell behind on her rent relatively recently in her long multi-decade tenancy, in the fall of 2012, because she was working to pay off loans and, later, after paying off the majority of her arrears in the spring of 2013, fell behind in her rent because she needed to financially support her elderly mother who resides in Florida and needed urgent care for several weeks in April and May

of 2013, requiring her to travel to Florida to care for her, which prevented her from paying her rent. *Id.* at 1-2. Petitioner asserts that she has taken affirmative actions to become current with her rent, including her application for, and receipt of, a one shot deal from HRA, as well as working with other agencies such as Brownsville Partnership and Homebase to secure financial assistance to cover the remainder of her arrears. *Id.* at 2. Petitioner further asserts that she has nowhere else to live. Verified Petition at 1, ¶ 3.

Respondent argues that: (1) the issue in this proceeding is whether the hearing officer properly denied petitioner's request to open her second default; (2) petitioner failed to establish a reasonable excuse for her failure to appear and failed to state a meritorious defense to the charges; (3) petitioner waived claims she failed to raise in her application to open her second default because judicial review is limited to the record adduced before the agency; and (4) petitioner has failed to state a cause of action upon which relief may be granted.

Notably, respondent argues that petitioner did not establish a reasonable excuse for her default because petitioner's alleged misunderstanding, that she was not obligated to appear at her hearing since she paid $947.00, contradicts with the express terms in the stipulation of adjournment that petitioner signed at the meeting with respondent's representative on April 9, 2013, in which petitioner acknowledged that: she still owed $581 in rental arrears, she would appear at the hearing on May 22, 2013, the stipulation would be the only notice she would receive of the hearing date, her failure to appear would result in a default, and she may be evicted as a result of any default. Respondent's Memorandum of Law at 7; *see* Verified Answer at 7, ¶ 23; *see also* Verified Answer, Exh. Q, April 9, 2013 Stipulation of Adjournment. Further, respondent argues that petitioner's alleged misunderstanding is not credible since petitioner's $947 payment had already been credited to her account on March 26, 2013, two weeks before petitioner signed the stipulation stating she owed $581 in outstanding rent. *See* Verified Answer at 7, ¶ 23; *see also* Respondent's Memorandum of Law at 7.

In addition, respondent argues that petitioner has provided new excuses for her default in this proceeding, including the claim that respondent's representative, Ms. Bulbul, promised to call her as to whether she needed to appear at the hearing in May 2013 and failed to do so, which were not previously provided in her application to open the default, and should, thus, be deemed waived. Verified Answer at 8, ¶ 25. Respondent argues that petitioner admitted, by signing the stipulation of adjournment, that she received notice of the hearing date on May 22, 2013, especially given that the stipulation expressly informed petitioner that it was the only notice she would receive of the hearing date, that she must appear on May 22, 2013, and that the hearing officer would enter a default decision if she did not appear and she could be evicted as a result. *See* Respondent's Memorandum of Law at 10. Further, respondent contends that, as this was petitioner's second default, petitioner was familiar with the administrative process and was aware her absence on the hearing date would result in her default. *Id.* As such, respondent maintains that petitioner should have contacted Ms. Bulbul if she was unsure whether to appear at the hearing, or was otherwise confused about the clear language in the stipulation because the stipulation listed Ms. Bulbul's phone number. *Id.* at 11. Thus, in the absence of any evidence or claim from petitioner of having taken affirmative steps to contact Ms. Bulbul for confirmation of her obligation to appear at the May 2013 hearing, respondent contends that the hearing officer rationally concluded that petitioner failed to establish a reasonable excuse for her default. *Id.*

Respondent also argues that petitioner failed to state a meritorious defense to the charges of chronic rent delinquency in her application to open the default, as petitioner was incorrect in her statement that she paid the money she owed, which was $947.00, insofar as she continued to accrue rent arrears since the $947 payment was posted to her account on March 26, 2013, as she had not made any payments thereafter. *Id.* at 11-12. Furthermore, respondent contends that, even if petitioner had paid the entirety of her rent arrears before she applied to open her default, the hearing officer's determination in finding that petitioner failed to state a meritorious defense

was rationally based and should be upheld since petitioner's record shows a repeated failure or refusal to pay rent, which constitutes grounds for the determination. *Id.* at 12.

At a conference before the court in this matter, petitioner indicated that she has difficulty understanding, and is regularly receiving mental health counseling from Brownsville Partnership, as she had difficulty coping since her husband passed away. In her reply papers, petitioner submitted a letter from Brownsville Partnership substantiating her claim, confirming that she had been meeting regularly since March 2013 with Bryan Woll, Brownsville Partnership's Program Coordinator and petitioner's assigned advocate. In addition, the letter confirms that petitioner has been regularly seeing Brownsville Partnership's Mental Health Coordinator, Kristel Thompson Bush, since March 2013 for mental health counseling and has also been participating in a bereavement support group at Brownsville Partnership.

DISCUSSION

Judicial review of an administrative determination is limited to whether the "determination 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). The Court of Appeals explained the "arbitrary and capricious" standard in *Matter of Pell v Bd. of Educ.*, 34 NY2d 222, 231 (1974), as follows:

> "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.' (1 N.Y. Jur., Administrative Law, § 184, p. 609). Arbitrary action is without sound basis in reason and is generally taken without regard to the facts."

Additionally, a court may determine that an agency determination is shocking to one's sense of fairness and disproportionate to the offense such that a lesser penalty is warranted. *See Matter of Palmer v Rhea*, 78 AD3d 526, 526 (1st Dept 2010); *see also Matter of James v New York City*

Hous. Auth., 186 AD2d 498, 499-500 (1st Dept 1992). Moreover, the Appellate Division, First Department, has stated that "[t]he forfeiture of public housing accommodations is a drastic penalty because, for many of its residents, it constitutes a tenancy of last resort." *Matter of Wise v Morales*, 85 AD3d 571, 572 (1st Dept 2011) (internal quotations omitted).

The issue in this Article 78 proceeding is whether respondent's determination to deny petitioner's application to vacate her second default and the resulting decision to terminate petitioner's over 30 year tenancy based on charges of chronic rent delinquency was, based upon the within facts, arbitrary and capricious and an abuse of discretion.

New York City Housing Authority Termination of Tenancy Procedures ¶ 8 provides that a hearing officer may open a default and set a new hearing date upon application of the tenant, if it is made within a reasonable time after the default in appearance and for a good cause shown. Verified Answer, Exh. B, NYCHA Termination of Tenancy Procedures at 2, ¶ 8. In order to show "good cause," petitioner must establish a reasonable excuse for the default and a meritorious defense. *Matter of Daniels v Popolizio*, 171 AD2d 596, 597 (1st Dept 1991); *see also Matter of Peña v New York City Hous. Auth.*, 91 AD3d 581, 582 (1st Dept 2012).

Here, petitioner promptly sought to vacate her default at the hearing, asserting that she was informed by a representative of NYCHA that her appearance was not required if she paid $947. Additionally, she asserts a defense that she paid the money that was owed, which was $947, as stated in the last amended charges, and the rent for March or April 2013 was never included in a specification of charges.

Petitioner explains that, at the time of her meeting with Ms. Bulbul, she had not received formal amended charges listing additional rental arrears that were owed by petitioner after she had made the lump sum payment of $947 to become current in her rent. Indeed, there is only a handwritten notation on the stipulation that indicates, "owe: $581.60 as of 4/9/13." Verified Answer, Exh. Q, April 9, 2013 Stipulation of Adjournment. As for the additional accumulated

rental arrears for March and April of 2013, amounting to $581, as indicated in the signed stipulation of adjournment dated April 9, 2013, petitioner did not understand that such arrears would form the basis for the continuation of the termination of tenancy proceeding against her. Petitioner further asserts that she was working to pay off such current arrears at the time of her April 9th meeting with Ms. Bulbul. Accordingly, it is a reasonable excuse that petitioner believed respondent's representative when she was informed that her appearance was not required if she paid what was owed in the amount of $947, and it is a meritorious defense that she had paid what was owed as far as the charges that had been brought against her.

Furthermore, under the within facts, which include an over 30 year tenancy of a senior citizen, in which there may be mental issues at play, and a relatively small sum at issue, the penalty of termination of petitioner's tenancy based on a mere unintended default is unnecessarily harsh, disproportionate to the offense of failing to appear at the scheduled hearing and, "in light of all the circumstances, . . . shocking to one's sense of fairness." *Matter of Pell v Bd. of Educ.*, 34 NY2d at 327. The amount owed is only $ 1,453. Verified Answer, Exh. U. As stated, petitioner, who is a senior citizen, has spent over 30 years as a NYCHA tenant, paying her rent without a problem for the majority of her multi-decade tenancy. She began having difficulty paying her rent timely in 2012, as a result of her good faith efforts to pay back loans and eliminate her personal debt. Petitioner actively sought help from community organizations, including Brownsville Partnership, to secure financial assistance to become current in her rent. Due to unforeseeable circumstances in spring of 2013, petitioner needed to travel to Florida to care for her sick elderly mother, which caused her to fall behind on her rent. Under the circumstances, and in view of the strong public policy favoring resolution of cases on the merits (*see Chevalier v. 368 E. 148th St. Assoc., LLC*, 80 AD3d 411, 413-414 [1st Dept 2011]), and the policy disfavoring forfeiture of leases (*see Sharp v Norwood*, 223 AD2d 6, 11 [1st Dept 1996], *affd* 89 NY2d 1068 [1997]; *see also Village Center for Care v Sligo Realty and Service Corp.*, 95

AD3d 219, 222 [1st Dept 2012]), particularly when it concerns public housing accommodations, which is a tenancy of last resort (*Matter of Wise v Morales*, 85 AD3d 571 [1st Dept 2011]), respondent's determination, denying petitioner's application to vacate its decision to terminate her tenancy after her default in appearance at an administrative hearing was arbitrary and capricious and an abuse of discretion, and thus must be annulled.

As indicated, significantly, it has been brought to this court's attention that *pro se* petitioner, who is a senior citizen, has been regularly receiving mental health counseling services, which may explain petitioner's confusion. Letter from Bryan Woll, Brownsville Partnership Program Coordinator (May 13, 2014). Petitioner, who was not represented by counsel, did not deny that she signed the stipulation of adjournment at the meeting with respondent's representative on April 9, 2013. Rather, petitioner explains that she misunderstood respondent's representative, Ms. Bulbul, as stating that petitioner would not have to return for another "in-person meeting" on May 22, 2013, as she believed she had paid the money she owed toward her rental arrears, as they appeared in the last amended charges she received from respondent. Verified Petition, Statement in Support of Petition at 1. Thus, it seems clear that, based on her submissions, petitioner was confused and did not even understand that a hearing was scheduled for May 22, 2013, as opposed to a mere "meeting," as she describes continuously in her petition. Nevertheless, petitioner contends that she believed she did not need to appear at the "meeting" on May 22, 2013, not that she was confused about what she was obligated to do. Thus, contrary to respondent's argument that petitioner should have taken affirmative steps to contact respondent for confirmation of her obligation to appear at the May 22, 2013 hearing, it is reasonable that petitioner would not have done so, especially as she is undergoing mental health counseling which may explain her confusion and clouded judgment.

In addition, it appears from the papers and from the conference before this court with *pro se* petitioner and counsel for respondent, that the appointment of a guardian *ad litem* is warranted

under the circumstances to safeguard petitioner, an individual who may suffer from mental or psychological disabilities. Petitioner has exhibited to the court that she is confused and lacks understanding, and her present condition impedes her ability to represent herself and to protect her rights, warranting the appointment of a guardian *ad litem*. Significantly, NYCHA has enumerated "policies designed to afford tenants who it suspects are mentally disabled 'adequate procedural safeguards and reasonable accommodation of their mental disabilities.'" *Matter of Padilla v Martinez*, 300 AD2d 96, 99 (1st Dept 2002), quoting *Blatch v Franco*, 1998 US Dist LEXIS 7717, *4, 1998 WL 265132, *1 (SD NY, May 26, 1998, No. 97 Civ 3918[DC]). Courts have remanded where petitioner was incapable of representing herself. *See e.g. Matter of Padilla v Martinez*, 300 AD2d 96 (1st Dept 2002) (annulling determination and remanding for a new administrative hearing where petitioner was incapable of representing herself adequately and NYCHA failed to follow its own policies and procedures designed to protect mentally incompetent tenants who are faced with termination proceedings); *see also Blatch v Hernandez*, 2008 US Dist LEXIS 92984, 2008 WL 4826178 (SD NY, Nov. 3, 2008, No. 97 Civ 3918[LTS][HBP]) (approving NYCHA settlement, which required, *inter alia*, NYCHA to follow certain specific procedures for assessing the mental competence of those who may be subject to a termination of tenancy hearing and for appointment of a guardian *ad litem* in connection with such proceedings). "The hearing officer should [err] on the side of caution by appointing a Guardian," even where social services evaluated the petitioner and had determined he was competent and in no need of a guardian *ad litem*. *Davis v New York Hous. Auth.*, 30 Misc 3d 1202(A), 2010 NY Slip Op 52242(U), *4 (Sup Ct, NY County 2010).

Unfortunately, a failing of the court process is that there is no list from which this court can appoint to act as petitioner's guardian *ad litem* or as her attorney in this Article 78. This court is confronted with cases on a regular basis in which elderly, physically/psychiatrically-challenged individuals are facing devastating consequences, without such litigants having legal

representation. While the CPLR provides for a guardian *ad litem* appointment procedure (CPLR 1202), there is no list of available and trained guardians *ad litem*; nor funds to pay for such guardians. Legal Services providers are stretched to the limit and usually not available for referrals. Governor Andrew Cuomo has appointed a task force to examine this systemic problem and, hopefully, a solution will be at hand.[2]

Based on the above, this proceeding is remanded to NYCHA for a new hearing where petitioner shall be afforded the assistance of a guardian *ad litem* by NYCHA, in accordance with its policies and procedures. *See Blatch v Hernandez*, 2008 US Dist LEXIS 92984, *14-15, 2008 WL 4826178, *4 (SD NY, Nov. 3, 2008, No. 97 Civ 3918[LTS][HBP]) (approving settlement agreement that bars NYCHA from conducting a termination of tenancy hearing with residents who are incompetent without representation by a guardian *ad litem* at NYCHA's expense); *Padilla*, 300 AD2d at 101-102 (annulling NYCHA's determination and remanding for a new hearing, as NYCHA was required to first refer tenant, who may be mentally disabled, to social services for an evaluation); *Davis*, 2010 NY Slip Op 52242(U), *4 ("[T]he Hearing Officer's determination is annulled and the matter is remanded to NYCHA for a new hearing where petitioner shall be afforded the assistance of a Guardian.").

DECISION

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted, her default below vacated, and this proceeding is remanded for a new hearing and appointment of a guardian *ad litem*; and it is further

ORDERED that, within 30 days of entry of this order, petitioner Carmen Matias shall serve upon respondent New York City Housing Authority a copy of this decision and

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2Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces Statewide Partnership to Improve Access to Legal Services for Vulnerable New Yorkers (Sept. 12, 2012), available at http://www.governor.ny.gov/news/governor-cuomo-announces-statewide-partnership-improve-access-legal-services-vulnerable-new.

judgment with notice of entry.[3]

This constitutes the decision and judgment of this court.

Dated: _____ **_____**
_____ DORIS LING-COHAN, J.S.C.

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3Petitioner may go to the Office of the Self-Represented, Room 116, 60 Centre Street, New York, New York, for assistance on this, and should bring a copy of this decision with her.