

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

DEBRA BROWN,

Petitioner,

v.

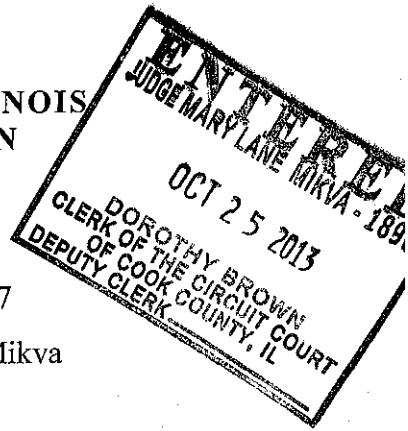
CHICAGO HOUSING AUTHORITY,

Respondent.

No. 13 CH 14267

Judge Mary L. Mikva

Calendar 6



ORDER AND OPINION

This cause comes on Petitioner Debra Brown's Petition for Certiorari, challenging the Chicago Housing Authority's decision to terminate her housing voucher. For the reasons that follow, the CHA decision is reversed and remanded for further consideration by the CHA.

Background

The facts based upon the administrative record are as follows. Debra Brown, her two adult daughters, and five-year old grandson lived at 10229 South Eberhart Avenue, Chicago, Illinois from October 14, 2009 to February 18, 2011.

On May 2, 2010 a storm caused flooding in the basement of the apartment. The basement flooded again on May 11, 2010. Brown began to complain of mold, mildew, and a strong odor emanating from the basement. Leaks in the roof caused water to drip into Brown's bedroom, her daughter's room, and the living room.

Brown wrote James Sowerby, the landlord, a letter on May 11 complaining of the damage and asking him to make repairs. After no repairs were made, Brown paid a repairman to patch a hole in the basement floor and withheld \$155 from her rent that month to cover the cost of the repair.

On August 18, 2010 Brown sent Sowerby another letter asking him to repair the unit. That same month Brown withheld all of her portion of the rent, \$550, and she continued to withhold that amount until she left the unit in February 2011. From August to February, the unit failed three CHA inspections.

Sowerby filed a joint forcible action on October 8, 2010 seeking possession of the unit for Brown's failure to pay rent. Brown filed affirmative defenses and counterclaims alleging that

Sowerby failed to maintain the unit. The parties reached a settlement agreement on December 28, 2010, resulting in an agreed court Order of Possession, dismissing with prejudice both Sowerby's claims and Brown's counterclaims and defenses. Under the settlement agreement, Brown agreed to vacate the unit pursuant to the Order of Possession on or before January 31, 2011. Brown filed two motions to extend the move-out date; both were denied. Brown and her family moved out on February 18, 2011, and they now reside in another CHA assisted unit.

CHA sent Brown a notice of intent to terminate her voucher benefits on April 9, 2012. The notice cited two grounds for termination. The first violation was for failing to provide CHA notice that Sowerby had filed an eviction action under 24 C.F.R. § 982.552(c)(2)(i). The second violation was based on eviction for serious lease violations, relative to the nonpayment of rent under 24 C.F.R. § 982.552(b)(2). Brown requested a hearing and an "Informal Hearing" was held on March 14, 2013. On April 9, 2013, the Hearing Officer issued a final administrative decision, upholding termination of benefits.

The Hearing Officer issued a thorough opinion. The Hearing Officer first found that "Ms. Brown failed to provide the CHA with a copy of an owner-eviction notice." Brown had testified that she delivered the owner eviction notice to the CHA at their satellite office on 88th and Ashland. Yet she could not remember the day or month she delivered it, and the CHA had no record of her doing so. The Hearing Officer found her testimony "not credible" on this issue.

Regarding the second violation, the hearing officer found both that Brown's failure to pay rent constituted a serious lease violation, and that the agreed order of possession was a "legal eviction order." On this basis, the Hearing Officer viewed this as a situation in which the CHA "must terminate program assistance for a family evicted from housing for serious violation of the lease" under Section 982.552(b)(2).

Brown argued that she should not be liable for her non-payment of rent because she was properly withholding rent under the doctrine of Implied Warranty of Habitability ("IWOH"). The Hearing Officer dismissed the IWOH defense as "problematic" because Brown "was not withholding rent based on any calculation involving a loss of value on the unit. Brown simply stopped paying rent." Brown testified at the hearing that she did not have the value of the unit on her mind when withholding rent; she also testified to \$35,000 in losses that were entirely based on damage to her personal property. The Hearing Officer also noted that Brown requested to stay

the order of possession twice, and that action undermined Brown's claims that the unit was uninhabitable.

Although the Hearing Officer viewed this as a "must" terminate situation under Section 982.552(b)(2), the Hearing Officer also considered the violations under Section 982.552(c)(2)(i), which does not mandate termination. But she determined that alternatives to termination were not warranted.

Brown filed a timely petition for review.

Discussion

On administrative review, the administrative agency's factual findings are given discretion. A reviewing court may not make a contrary factual finding unless it is against the manifest weight of the evidence. *Gumma v. White*, 345 Ill. App. 3d 610, 615 (1st Dist. 2003). A factual finding is against the manifest weight of the evidence if the opposite conclusion is clearly evident. *Cinkus v. Vill. of Stickney Mun. Officers Electoral Bd.*, 228 Ill. 2d 200, 210 (2008). Questions of law are reviewed de novo. *Id.* at 210.

As noted, the Hearing Officer did a thorough job of reviewing the evidence, and wrote a lengthy and thoughtful opinion. However, the Court is remanding this case to the CHA for further consideration because the Opinion rests on the incorrect legal premise that Brown was "evicted" from her housing for nonpayment of rent and because it appears that the Hearing Officer failed to give adequate consideration to Brown's IWOH defense.

The primary problem with the termination decision is that the Hearing Officer incorrectly viewed the agreed Order of Possession as an order of eviction that mandated termination of Brown's voucher. The Hearing Officer repeatedly noted that, in her view, Brown had been "evicted" for nonpayment of rent. Indeed, in the conclusion of her Opinion, the Hearing Officer noted that "the CHA administrative plan does not mince words on this—the Public Housing Authority *must* terminate assistance if a participant is evicted for serious and repeated violations of the lease." (Informal Hearing Decision Letter at 20).

Section 982.552(b)(2) provides that the CHA "must terminate program assistance for a family evicted from housing assisted under the program for serious violation of the lease." The CHA Policy further provides:

A family will be considered evicted if the family moves after a legal eviction order has been issued, whether or not physical enforcement of the order was

necessary. If the family moves after the owner has given the family an eviction notice for serious or repeated lease violations by before a legal eviction order has been issued, termination of assistance is not mandatory. However, the CHA will determine whether the family has committed serious or repeated violations of the lease based on available evidence and may terminate assistance or take any of the alternative measures described in Section 12-II.C.

The Hearing Officer's determination that Brown was evicted is a threshold issue because HUD regulations mandate termination of benefits after an eviction under Section 982.552(b)(2). There was an Order of Possession entered in Brown's eviction case; that judgment, however, was an agreed order under a settlement agreement. The Hearing Officer's conclusion that "the Circuit Court of Cook County issued a legal eviction order against Brown" is simply incorrect. Sowerby filed a joint forcible action seeking possession for back rent on October 8, 2010; Brown filed counterclaims and affirmative defenses. Both were dismissed with prejudice under an agreed order that was the result of a settlement agreement on December 28, 2010. The Hearing Officer relied on the facts that eviction proceedings were filed against Brown and that Brown agreed to leave, concluding that Brown was "evicted."

The question of what constitutes an eviction is a question of law that this Court reviews *de novo*. The Hearing Officer erred in determining that the agreed order was an eviction order. There was no court-ordered eviction. Brown left in compliance with a settlement agreement. Because there was no eviction, this case is not a *must* terminate situation under Section 982.552(b)(2). Thus, a primary basis upon which the Hearing Officer rendered her final administrative decision is incorrect as a matter of law.

While a termination decision can be upheld under Section 982.552(c)(1), which allows but does not require CHA to terminate assistance for a serious lease violation in the absence of an eviction order, the Court will not affirm on this basis for two reasons. First and foremost, the Court is concerned that the decision of the Hearing Officer to uphold the termination of benefits was influenced by her incorrect legal conclusion that Brown had been evicted and that, therefore, this was a situation in which the CHA had no choice but to terminate assistance.

In addition, the Court has concerns that the Hearing Officer improperly rejected Brown's IWOH defense, based on Brown's subjective concerns regarding her damaged personal property. Brown's failure to pay rent for at least five months is undisputed. However, nonpayment of rent would not be a serious or repeated lease violation if Brown had a legitimate IWOH defense. Therefore, the question is whether Brown was entitled to withhold her rent because of the

landlord's repeated violations of the IWOH. The Hearing Officer rejected this defense on the basis that Brown was not withholding rent based on any calculation that Brown had made involving a loss of value of the unit. That decision, however, focused on Brown's intent when she withheld the rent. Specifically, the Hearing Officer relied on Brown's testimony "that she suffered over \$35,000 worth of damages to her belongings multiple times in the hearing" and did not, in her own testimony, link her failure to pay rent to a devaluation of the unit. The Hearing Officer correctly noted that it is impermissible to withhold rent based upon damage to a tenant's personal property. However, if the evidence supports a reasonable correlation between the rent withheld and the devaluation of the unit, the Hearing Officer should have considered this defense and whether it was supported by the evidence.

In *Glasoe v. Trinkle*, 107 Ill. 2d 1 (1985), the Illinois Supreme Court clarified the IWOH defense originally laid out in *Jack Spring v. Little*, 50 Ill. 2d 351 (1972). As the Court made clear:

[N]ot every defect or inconvenience will be deemed to constitute a breach of the covenant of habitability. The condition complained of must be such as to truly render the premises uninhabitable in the eyes of a reasonable person.

Glasoe, 107 Ill. 2d at 16.

The Court recognized that proving the extent to which a breach of the covenant of habitability has reduced the value of the rental premises is not an exact science and might be shown either by a percentage reduction in use or a difference in value. In either case:

The tenant is liable only for the fair rental value of the defective premises during the period of the breach of the implied warranty and is entitled to an abatement of rent in excess of that amount. If the full rent has been paid for a period for which the tenant is entitled to an abatement, damages may be awarded in his favor in that amount.

Id. at 22.

Here, Brown withheld one-third of the total rent for the unit—her entire rent portion. At the administrative hearing, Brown testified that "the basement had been like an apartment, and her family moved into that unit because of that feature." She also testified that the basement had mold on the ceilings, mildew, and a pervasive odor. Her lawyer argued that Brown was withholding rent based on the loss of value of the unit due to flood damage. If the flood damage left the basement unusable and thereby reduced the value of the apartment, that diminution

would determine the merits of Brown's defense. That she was concerned for her lost personal property should not deprive her of the right to assert this defense.

The CHA does not dispute Brown's right to assert IWOH as a defense in her eviction action or dispute that Brown can present this as a defense to the charge that she violated her lease obligations. On remand, the CHA should consider the merits of Brown's IWOH defense, which should not have been barred simply because Brown's focus was on her lost belongings rather than a reduction in the value of the leased apartment.

The Court also notes that the Hearing Officer's focus on Brown's motions to extend the agreed Order of Possession may have been misplaced. That Brown sought additional time to move is not necessarily inconsistent with a finding that the unit was not, in some significant way, uninhabitable. As the CHA is aware, there is considerable administrative delay in obtaining moving papers for a new subsidized unit, which could have explained Brown's need for additional time.

The second violation was for Brown's failure to provide CHA with a copy of the owner eviction notice filed by Sowerby on October 8, 2010. The CHA Family Obligation number 8 states "the family shall be obligated under the terms of its voucher to: give CHAC a copy of any owner eviction notice." Sowerby had served Brown with a five-day eviction notice, a summons, and a complaint. Under the CHA family obligations, Brown was obligated to give the CHA a copy of these documents. At the administrative hearing, an employee who works with the CHA's electronic database testified that there was no record that Brown gave the CHA a copy of the eviction notice. Brown testified that she dropped off a copy of the eviction notice at a CHA satellite location on 88th and Ashland.

The Hearing Officer determined that Brown "more likely than not" did not supply CHA with any documents of her eviction. While the Hearing Officer made clear in her decision that this violation was not de minimus, the thrust of her reasoning centered on the eviction and nonpayment of rent rationales. The Court does not find the Hearing Officer's finding that Brown failed to provide this Notice to be against the manifest weight of the evidence. However, because it is certainly not clear that the CHA would terminate on this basis alone, this second violation cannot be a basis for upholding the termination decision.

Conclusion

For these reasons, the CHA decision is REVERSED and REMANDED for further consideration by the CHA. The status set for October 28, 2013 at 9:45 a.m. stands. Because this Court has remanded the case to the CHA, this is not a final and appealable order. *See Wilkey v. Ill. Racing Bd.*, 96 Ill. 2d 245 (1983).

ENTERED:

Mary L. Mikva 1890

Judge Mary L. Mikva
Circuit Court of Cook County, Illinois
County Department, Chancery Division

