

NORTHEAST HOUSING COURT

Docket # No. 09-CV-00026

Parties: VANITA ELLERBEE Plaintiff v. NORTH ANDOVER HOUSING AUTHORITY  
Defendant

Judge: /s/David D. Kerman  
Associate Justice

Date: April 27, 2009

DECISION AND ORDER

The plaintiff Section 8 tenant's substantive law argument that the criminal activities of theft, fraud, larceny, and receiving stolen property cannot constitute a permissive ground for termination under HUD regulations, 24 C.F.R. s. 982.551(k), (l) ("Obligations of participant; Fraud and other program violation, Crime by household members"), §982.552(c)(1)(i), (iv), (xi) ("PHA denial or termination of assistance for family; Authority to deny admission or terminate assistance; Grounds for denial or termination of assistance; [family obligations, fraud, criminal activity]"), and s. 982.553(b)(2) ("Denial of admission and termination of assistance for criminals and alcohol abusers; Terminating assistance; Terminating assistance for other criminals"), was made and rejected in *Costa v. Fall River Housing Authority*, 71 Mass.App. 269, 275-278, 881 N.E.2d 800, 805-808 (2008), aff'd 453 Mass. 614, 620, 903 N.E.2d 1098, \_\_\_ (2009). The substantive law argument is foreclosed by the appellate courts' rulings in the *Costa* case.

However, the tenant's procedural arguments are sound. Both the public housing agency's [PHA] notice of termination of assistance dated November 14, 2008, which terminated the tenant's participation in the Section 8 Housing Choice Voucher Program effective December 14, 2008, and the PHA's letter of decision dated December 12, 2008, which upheld the termination after an informal hearing, are inadequate and ineffective.

The November 14, 2008, notice (which inappropriately addresses the tenant by first name) merely states: "The reason for this action is Crime by family members. The source of this information is the Randolph Police Departments. See attached police report (sent certified)." It is not clear whether the seven-page police report was in fact attached to the PHA's termination notice. The copy of the report produced by the PHA at the court hearing of this matter bears the date of January 8, 2009, among others. Regardless, the police report which is captioned "\*\*PRELIM[INARY] DO NOT GIVE OUT\*" and "\*\*NARRATIVE\*" does not adequately amplify the clearly inadequate allegation "Crime by family members" as would furnish the tenant with "timely and informative" and legally sufficient notice. Compare, *Costa v. Fall River Housing Authority*, 71 Mass.App. 269, 280-281, 881 N.E.2d 800, 809 (2008), aff'd 453 Mass. 614, 903 N.E.2d 1098 (2009). See, *Olan v. New Bedford Housing Authority*, 435 Mass. 364, 372-373,

758 N.E.2d 1039, 1046-1047 (2001), mod. 50 Mass.App. 188, 204-206, 736 N.E.2d 410, 423-424 (2000). See also, *Piano Craft Guild v. Glasgow*, Bos.Hsg.Ct. No. 91-SP-01043 (June 4, 1991); *Lowell Housing Authority v. Sullivan*, N.E.Hsg.Ct. No. 92-SP-00063 (July 30, 1992); *Person v. Macintire*, N.E.Hsg.Ct. No. 00-CV-00099, No. 00-SP-02901 (January 26, 2001), and cases cited: *In Re Gault*, 387 U.S. 1, 7, 31-34 (1966); *Goldberg v. Kelly*, 397 U.S. 254, 267-268 (1970); *Escalera v. New York City Housing Authority*, 425 F.2d 853, 858 fn.2, 862-863 (2d Cir. 1970); *Caulder v. Durham Housing Authority*, 433 F.2d 998, 1003-1004 (4th Cir.1970); *Housing Authority v. Saylor*, 19 Wash.App. 871, 874, 578 P.2d 76, 78-79 (1978); *DeKalb County Housing Authority v. Pyrtle*, 167 Ga.App. 181, 182, 306 S.E.2d 9, 10-11 (1983); *Edgecomb v. Housing Authority*, 824 F.Supp. 312, 313-315 (D.Conn. 1993).

The December 12, 2008, letter of decision also is not sufficient. The decision correctly states the evidentiary standard of a preponderance of the evidence and cites the applicable HUD regulation, 24 C.F.R. §982.553(c) ("Evidence of criminal activity"), but the mere conclusory statement, "I find that the police reports presented show by a preponderance of the evidence that you engaged in criminal activity including identity theft, fraud, larceny and receiving stolen property" does not constitute a legally adequate written decision setting out factual findings and reasoning as required by HUD regulation, 24 C.F.R. s. 982.555(e)(6) ("Informal hearing for participant; Hearing procedures; Issuance of decision"). See, *Costa v. Fall River Housing Authority*, 453 Mass. 614, 629-632, 903 N.E.2d 1098, \_\_\_ (2009), aff'g 71 Mass.App. 269, 280, 282, 881 N.E.2d 800, 809, 810 (2008). See also, *Boston Housing Authority v. Bryant*, 44 Mass.App. 776, 779-780, 693 N.E.2d 1060, 1062 (1998) (a legal conclusion cannot rest on "conjecture about hypothetical facts"). See also, *Lowell Housing Authority v. Sullivan*, N.E.Hsg.Ct. No. 92-SP-00063 (July 30, 1992); *124 Green Street, LLC v. Rogers*, N.E.Hsg.Ct. No. 04-SP-00040 (February 24, 2004); *Rodriguez v. Salem Housing Authority*, N.E.Hsg.Ct. No. 02-CV-00099 (February 24, 2004), and cases cited: *Goldberg v. Kelly*, 397 U.S. 254, 267, 271 (1970); *Escalera v. New York City Housing Authority*, 425 F.2d 853, 858 fn.2, 862 (2d Cir. 1970); *Caulder v. Durham Housing Authority*, 433 F.2d 998, 1003-1004 (4th Cir. 1970); *Housing Authority v. Saylor*, 19 Wash.App. 871, 872-875, 578 P.2d 76, 78-79 (1978); *Edgecomb v. Housing Authority*, 824 F.Supp. 312, 316 (D.Conn. 1993).

Accordingly, the PHA's notice of termination of assistance dated November 14, 2008, which terminated the tenant's participation in the Section 8 Housing Choice Voucher Program effective December 14, 2008, and the PHA's letter of decision dated December 12, 2008, which upheld the termination after an informal hearing, must be annulled and set aside.

Two other issues, likely to arise again if the PHA chooses to proceed with termination of the tenant's Section 8 subsidy, should be considered.

First, the PHA seems to have relied only on the second-hand information contained in the police report, not on any first-hand testimony. I have ruled that such hearsay evidence, if reliable, is sufficient, and that if a tenant wants witnesses to appear it is her responsibility to call witnesses

and arrange for them to testify. See, *Person v. Macintire*, N.E.Hsg.Ct. No. 00-CV-00099, No. 00-SP-02901 (January 26, 2001); *Rodriguez v. Salem Housing Authority*, N.E.Hsg. Ct. No. 02-CV-00099 (July 29, 2003, February 24, 2004); *124 Green Street, LLC v. Rogers*, N.E.Hsg.Ct. No. 04-SP-00040 (February 24, 2004); *McDonald v. Schultz*, N.E.Hsg.Ct. No. 04-SP-02699 (January 4, 2005); *Heritage Common Associates v. Rosa*, N.E.Hsg.Ct. No. 05-SP-03127 (October 4, 2006), and cases cited: *Richardson v. Perales*, 402 U.S. 389, 402 (1971); *Murphy v. Superintendent*, 396 Mass. 830, 489 N.E.2d 661 (1986); *Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission*, 401 Mass. 526, 517 N.E.2d 830 (1988); *Merisme v. Board of Appeals*, 27 Mass.App. 470, 539 N.E.2d 1052 (1989); *Edward E. v. Department of Social Services*, 42 Mass.App. 478, 678 N.E.2d 163 (1997). However, in *Costa v. Fall River Housing Authority*, 71 Mass.App. 269, 281, 881 N.E.2d 800, 809-810 (2008), *aff'd* 453 Mass. 614, 623-629, 903 N.E.2d 1098, \_\_\_ (2009), the appellate courts held, in part because HUD regulations do not provide the participant with the right to subpoena witnesses, that the PHA's reliance on a police report and a "blatantly untrustworthy" newspaper article was misguided. At any future agency hearing in this matter, the PHA should ensure that any person whom the tenant wants to call as a witness appears and is present to testify.

Second, the PHA's notice of termination of assistance dated November 14, 2008, terminating the tenant's participation in the Section 8 Housing Choice Voucher Program effective December 14, 2008, states, "If you remain in the unit after this date, you will be responsible for the full amount of the rent." At the court hearing of this matter, the PHA stated that it had not paid the tenant's landlord the PHA's share of the Section 8 rents after December 14, 2008. This, the PHA cannot do.

Of course, the PHA may terminate the Section 8 subsidy for a tenant who is in breach of Section 8 program requirements, and the PHA may compel the landlord to terminate the Section 8 program subsidized landlord-tenant relationship and evict the tenant without unnecessary delay. But where the landlord is in compliance with his obligations under the HAP contract and the lease, the PHA may not treat him as though he is in breach, due to fault solely on the part of the tenant.

As a matter of contract law, the PHA is no more free to unilaterally alter the terms of the HAP contract with the landlord than is the landlord (or the tenant) free to unilaterally alter the terms of the lease. See, *Williams v. Seder*, 306 Mass. 134, 136-137, 27 N.E.2d 708, 710 (1940); *Maguire v. Haddad*, 325 Mass. 590, 91 N.E.2d 769 (1950).

As a matter of federal regulatory law, the PHA (but not the tenant) is liable for the PHA's share of the Section 8 rents until the tenant vacates. See, *HTG Realty v. Fabal*, N.E.Hsg.Ct. No. 08-SP-02917 (October 30, 2008), and authorities cited: HUD Regulation 24 C.F.R. §982.311(b) ("When assistance is paid; Termination of payment: When owner terminates the lease") ("if the owner has commenced the process to evict the tenant, and if the family continues to reside in the unit, the PHA must continue to make housing assistance payments to the owner in accordance with the HAP contract until

the owner has obtained a court judgment or other process allowing the owner to evict the tenant. The HA may continue such payments until the family moves from or is evicted from the unit."); §982.311(d) ("Family move-out") ("the PHA may not make any housing assistance payment to the owner for any month after the month when the family moves out. The owner may keep the housing assistance payment for the month when the family moves out of the unit."); *Curtis v. Surrlette*, 49 Mass.App. 99, 726 N.E.2d 967 (2000). See also, HUD Regulation 24 C.F.R. §982.451(b)(5)(i) ("Housing assistance payments contract") ("The PHA must pay the housing assistance payment promptly when due to the owner in accordance with the HAP contract").

I am aware that the above-quoted language of subsection §982.311(b) ("Termination of payment: When owner terminates the lease") does not appear in subsection §982.311(c) ("Termination of payment: Other reasons for termination") ("Housing assistance payments terminate if: (1) The lease terminates; (2) The HAP contract terminates; or (3) The PHA terminates assistance for the family."). The above-quoted language of subsection §982.311(b) also does not appear in subsection §982.311(d). And the quoted language of subsection §982.311(d) ("Family move-out") does not appear either in subsection §982.311(c) or in subsection §982.311(b).

The structural placement of the language of subsections §982.311(b) and §982.311(d) cannot be regarded as determinative because subsection §982.311(c), which uses the word "if" and does not use the word "until" or the word "after" or the word "when," does not speak to the issue of the effective date of cessation of housing assistance payments. Compare, §982.311(b) ("until the family moves") and §982.311(d) ("after the month when the family moves out"). And logically, there is no reason to suppose that the HUD rule-makers intended a different outcome for the continuation and effective date of cessation of housing assistance payments depending on whether the owner, the tenant, or the PHA terminates the Section 8 program subsidized landlord-tenant relationship. In all three cases, the result is the same - the landlord cannot re-rent the Section 8 program assisted dwelling unit to another tenant until the Section 8 program assisted tenant family vacates.

Indeed, a contrary result would leave the landlord wholly without remedy because, the unlikelihood of collection aside, the landlord cannot legally recover the PHA's share of the Section 8 program rent from the tenant. See, *Curtis v. Surrlette*, 49 Mass.App. 99, 726 N.E.2d 967 (2000); HUD Regulations, 24 C.F.R. §982.310(b) ("Owner termination of tenancy; Nonpayment by PHA: Not grounds for termination of tenancy. (1) The family is not responsible for payment of the portion of the rent to owner covered by the housing assistance payment under the HAP contract between the owner and the PHA. (2) The PHA failure to pay the housing assistance payment to the owner is not a violation of the lease between the tenant and the owner. During the term of the lease the owner may not terminate the tenancy of the family for nonpayment of the PHA housing assistance payment."); §982.451(b)(4)(iii) ("Housing assistance payments contract") ("The family is not responsible for payment of the portion of rent to owner covered by the housing assistance payment under the HAP contract between the owner and the PHA. See

§982.310(b) ").

In this particular case a contrary result would be particularly perverse, inasmuch as the PHA alleges that the landlord was the victim of the tenant's crimes.

ORDER

The November 14, 2008, notice of termination and the December 12, 2008, decision are annulled and set aside. The PHA is free to terminate the tenant's Section 8 program assistance in accordance with law. Meanwhile, the PHA shall reinstate assistance and shall forthwith pay the landlord the PHA's share of rents due, unless and until the tenant voluntarily vacates the Section 8 program assisted unit, or until the tenant is evicted pursuant to court order.

End Of Decision