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Supreme Court, New York County, Robinson v. Finkel

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SUPREME COURT OF NEW YORK

Robinson v. Finkel[1]

(decided September 17, 2002)

Petitioner Tawana Robinson challenged an administrative determination terminating her twenty-one year tenancy by respondent, the New York City Housing Authority and its acting chairman, Kalman Finkel, through an Article 78[2] proceeding.[3] Robinson also sought a judgment declaring the New York City Housing Authority's tenancy termination policies and practices unlawful.[4] Robinson argued the Housing Authority's termination was "infected by errors of law, including denial of due process of law, was arbitrary and capricious, rested on abuse of discretion and was unsupported by substantial evidence."[5] The New York Supreme Court granted Robinson's petition and annulled the Housing Authority's determination to terminate Robinson's tenancy after finding the Housing Authority penalized Robinson in

[1] 748 N.Y.S.2d 448 (N.Y. Sup. Ct. N.Y. County 2002).

[2] Article 78 "creates a cause of action by which petitioners can challenge decisions by state administrative agencies in the State Supreme Court, and obtain '[r]elief previously obtained by writs of certiorari to review, mandamus or prohibition.'" Morris v. New York City Employees' Ret. Sys., 129 F. Supp. 2d 599, 607-08 (S.D.N.Y. 2001) (quoting N.Y. C.P.L.R. § 7801 (2003)). *See also* N.Y. C.P.L.R. §§ 7801, 7803, 7804 (McKinney 2003) (discussing Article 78 proceedings).

[3] *Robinson*, 748 N.Y.S.2d at 451.

[4] *Id.* at 454. The court subsequently determined that a declaratory judgment was not required. *Id.* at 465.

[5] *Id.*

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an unduly harsh and shockingly disproportionate manner.[6] The court reasoned that while the Housing Authority's failure to follow its own rules was sufficient to annul the determination terminating Robinson's tenancy, its policy of replacing "the procedural safeguards of a recorded hearing before an impartial hearing officer . . . with form stipulations" violated Robinson's federal due process rights.[7]

Respondent Housing Authority operates the public housing project where Robinson is a tenant.[8] In August 1996, Robinson's son, Donnel Robinson, an authorized occupant of the apartment, was arrested on project grounds for unlawful possession of a controlled substance.[9] In March 1997, Robinson was informed that her failure to ensure Donnel's compliance with the Tenant Rules and Regulations resulted in a tenancy termination recommendation.[10] According to the Housing Authority, Donnel violated the regulations and rules by "unlawfully possess[ing] marijuana and/or possess[ing] a contro[l]led substance."[11]

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[6] *Id.* at 465.

[7] *Id.* at 458-59; *see also* U.S. CONST. amend. XIV, § 1 providing in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

[8] *Robinson*, 748 N.Y.S.2d at 451.

[9] *Id.* Robinson contended that the charges against Donnel had been dismissed and the file sealed; the court adopted this fact as true since the respondents did not offer any evidence to the contrary. *Id.*

[10] *Id.* The Tenant Rules and Regulations require that individuals on the property with the tenant's consent "conduct themselves in a manner conducive to maintaining the project in a decent, safe and sanitary conditions [sic]. . . ." *Id.* Robinson's other son, Shamel Robinson, was also named in the recommendation for termination charges. However, the Housing Authority never sought his expulsion from the apartment and he still resides with Robinson. *Id.* at 452 n.1.

[11] *Id.*

Robinson failed to appear at the first hearing in April 1997, and a Hearing Officer issued a default decision and disposition against her.[12] Upon Robinson's request, she was granted a new hearing and, at that time, received written notice and a copy of the Housing Authority's Termination of Tenancy Procedures.[13]

During the rescheduled August 1997 hearing, Robinson and the Housing Authority's attorney, Carle, stipulated in writing that the administrative proceeding would be resolved by Robinson agreeing to permanent exclusion of her son, Donnel, from both residing and visiting with Robinson on the project's premises.[14] Additionally, paragraph four of the stipulation provided for unannounced Housing Authority visits to Robinson's apartment to check for compliance with the stipulation.[15] Furthermore, paragraph nine stated, "the foregoing determination shall have the

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[12] *Id.*

[13] *Robinson*, 748 N.Y.S.2d at 451. Pursuant to the Housing Authority's tenancy termination procedures, project managers must "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 help." Additionally, if the project manager believed termination of the tenancy was appropriate, he or she was to forward the entire file, along with written recommendations, to a Tenancy Administrator for review and appropriate action. In cases of terminated tenancy, files were forwarded to the Legal Department for the preparation of a Notice of Charges. No project manager ever interviewed Robinson. *Id.* at 457.

[14] *Id.* at 451-52. The permanent exclusion of Robinson's son Donnel was contained in paragraph three of the stipulation. Additionally, paragraph five of the stipulation placed Robinson on general probation for one year and stated that "ANY" violation of housing policies would, in effect, constitute a violation of the stipulation, subjecting Robinson to "additional penalties, *including termination*." *Id.* at 452.

[15] *Id.* at 452.

same force and effect as a decision and disposition by the hearing officer."[16]

In October 1997, during an unannounced visit by a Housing Authority employee, Donnel was found in Robinson's apartment.[17] A subsequent April 1998 notice informed Robinson of the Housing Authority's recommendation to terminate her tenancy due to breach of the stipulation agreement and that the recommendation could be contested at a hearing.[18] At the ensuing June 1998 hearing, Robinson admitted violating Donnel's stipulated permanent exclusion from the apartment; she maintained, however, that Donnel's October sleepover was the sole violation of the stipulation and was done for a medical purpose.[19] Robinson also produced an affidavit from her cousin averring that Donnel resided in the cousin's Bronx home, and she further testified that Donnel began living there three months prior to her signing the stipulation.[20] The Hearing Officer found that Robinson violated the permanent exclusion term in the stipulation and the Housing Authority adopted this disposition of termination on July 29, 1998; Robinson claimed that no notice of this action was given.[21] Approximately five months later, the Housing Manager told Robinson that her entire file was being reviewed, but Robinson

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[16] *Id.*

[17] *Id.* at 453.

[18] *Robinson,* 748 N.Y.S.2d at 453.

[19] *Id.* Robinson testified that Donnel had an appointment at a hospital across the street from the project for treatment of a bone disease. *Id.* at 465.

[20] *Id.* at 454.

[21] *Id.*

would have an opportunity to appear at a hearing with her attorney before a final termination decision was reached.[22] However, instead of giving her notice of a hearing, the Housing Authority's subsequent correspondence advised Robinson that her tenancy was terminated and that she had a month to vacate the apartment.[23]

In her petition, Robinson alleged, *inter alia*, that the termination of tenancy was based on an unenforceable stipulation.[24] In particular, Robinson claimed that the Housing Authority's practice of using form stipulations signed by unrepresented tenants under the guidance of a Housing Authority attorney removed the "procedural safeguards of a recorded hearing before an impartial hearing officer."[25] Such tenancy termination procedures therefore failed to provide due process of law and were "contrary to the consent decrees from which they derive[d]."[26]

The court held that the stipulation could not effect an informed, knowing and voluntary waiver of constitutionally protected rights because the stipulation:

> was not made on the record, was not independently reviewed by a Hearing officer, . . . Petitioner lacked legal representation, . . . the role of the Housing Authority attorney was partisan, *per se*, . . . the stipulation itself did not clearly show waiver, and

[22] *Id.*
[23] *Robinson*, 748 N.Y.S.2d at 454.
[24] *Id.*
[25] *Id.* at 459.
[26] *Id.*

> . . . the bargaining power between Robinson and the Housing Authority was unequal.[27]

Initially, the court recognized that two federal constitutional law decisions controlled whether the Housing Authority's stipulation practice accorded public housing tenants due process in tenancy terminations.[28] The first case, *Escalera v. New York City Housing Authority*,[29] is a class action brought by public housing tenants alleging, among other things, deprivation of the tenants' rights to due process secured by the United States Constitution's Fourteenth Amendment.[30] More specifically, the tenants challenged the constitutionality of the procedures used by the Housing Authority to terminate tenancies based on nondesirability[31] and for procedures used when the basis of

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[27] *Id.* at 464.

[28] *Robinson*, 748 N.Y.S.2d at 459.

[29] 425 F.2d 853 (2d Cir. 1970).

[30] *Id.* at 856.

[31] *Id.* at 857. The procedures for termination of tenancy due to nondesirability consisted of: a meeting between the project manager and the tenant where the tenant was informed that the manager was considering a recommendation to terminate tenancy and the tenant was given a chance to explain the undesirable conduct; once the project manager decided that recommendation of termination was appropriate, the tenant was notified that he or she could submit a statement along with the manger's recommendation, and the tenant's entire file was sent to the Tenant Review Board; if the Board made a preliminary determination that tenancy should be terminated, the tenant had to request an appearance in ten days at which time the tenant would be informed, usually by a one sentence statement, of the undesirable conduct at issue and that he or she could bring any person to assist him or her at the meeting. During the hearing, the tenant was not generally permitted to see the entire contents of the folder, the names of those complaining about his conduct, or the summary of the entries; however, the basis for termination for nondesirability was premised on the contents of the entire folder, even if the tenant had no knowledge of the entries. No transcript of the hearing was maintained. If the Board determined that the tenant was no longer eligible for public housing, the Board Chairman so notified the tenant without releasing any findings or reasons therefore. If the tenant failed to vacate

termination was a violation of Housing Authority rules and regulations.[32] The Second Circuit Court of Appeals, reversing the district court's grant of the Housing Authority's motion to dismiss, held that "the government cannot deprive a private citizen of his continued tenancy, without affording him adequate procedural safeguards. . . ."[33] The court reasoned the Housing Authority's tenant termination for nondesirability procedures failed to give tenants adequate notice of the evidence against them, failed to provide an evidentiary record on which the decision was based and failed to give tenants a chance to confront and cross-examine persons giving evidence against them before an impartial hearing officer.[34]

As to the termination procedures for rule and regulation violations, the court found those procedures suffered deficiencies

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the apartment after a month, tenants could contest the decision in the New York City Civil Court, but only on the issue of whether the notice to vacate was timely. *Id.* at 857-58. The Housing Authority's Tenant Review Handbook deemed families non-desirable if they represented:

> a detriment to health, safety, morals or its neighbors or the community; an adverse influence upon sound family and community life; a source of danger or a cause of damage to the property of the Authority; a source of danger to the peaceful occupation of other tenants, or a nuisance.

Id. at 857 n.1.

[32] *Id.* at 859. The procedure for termination of tenancy for violation of rules and regulations consisted of: the project manager holding a meeting with the tenant to discuss the alleged violation; if the project manager determined that termination was the appropriate course of action, the tenant's file, including the tenant's comments and a recommendation to terminate, was sent to the Housing Authority's Central Office; if the Central Office approved the manager's decision to terminate, a notice to vacate after one month was sent to the tenant. *Id.* at 861.

[33] *Id.* at 861.

[34] *Escalera*, 425 F.2d at 862.

similar to those for termination for nondesirability, and additionally, due process required that a tenant be afforded the right to present his or her side to an impartial official, not only to the project manager.[35] Subsequently, after remand to the district court, the "*Escalera* consent decree" was entered, "setting out the basic procedures for notice and hearing required by the applicable principles of due process of law in processing termination of tenancy proceedings against all tenants in public housing projects . . . ."[36]

The second "federal constitutional decision form[ing] the backdrop for consideration of the issues raised by the Housing Authority's stipulation practice"[37] is *Tyson v. New York City Housing Authority*.[38] In consolidated actions, the plaintiffs in *Tyson* disputed the constitutionality of the Housing Authority's termination proceedings for nondesirability under a substantive due process theory; the issue was whether the Housing Authority could evict an entire family for nondesirability based on the criminal acts of an adult child not residing with the family.[39] The court's holding, that "implicit within the concept of due process is that liability may be imposed on an individual only as a result of that person's own acts or omissions . . . ,"[40] resulted in a consent decree placing substantive limitations on the Housing Authority's

[35] *Id.* at 863.
[36] *Robinson*, 748 N.Y.S.2d at 459.
[37] *Id.*
[38] 369 F. Supp. 513 (S.D.N.Y. 1974).
[39] *Id.* at 518.
[40] *Id.*

policies for termination for nondesirability.[41] Subsequently, the *Randolph* consent decree further developed *Tyson's* substantive limitations and additionally required all termination of tenancy procedures for nondesirability to conform with newly adopted procedures.[42]

Thus, Housing Authority termination procedures are required to have "qualified Hearing Officers . . . mak[ing] specific written findings of fact on all issues raised at a termination hearing . . . ."[43] Moreover, such findings and determinations of a tenant's eligibility status must be "based solely on evidence presented at the hearing," and the evidence is to constitute the record.[44] Additionally, when the Housing Authority reviewed the Hearing Officer's decision, the review was to be based upon the record, and a Hearing Officer's decision was not to be overturned unless it was contrary to law.[45]

However, neither of the consent decrees provided for the use of stipulations to replace the hearing procedures for tenancy terminations outlined in the *Escalera* and *Tyson-Randolph* decrees.[46] Rather, minimal due process requirements for tenancy

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[41] *Robinson*, 748 N.Y.S.2d at 460.

[42] *Id.* The *Robinson* court noted that there were two related consolidated actions that produced two consent decrees. The *Tyson* decree addressed substantive limitations of termination of tenancy for nondesirability, while the second decree comprehended several consolidated class actions in which Randolph was the lead plaintiff; the *Randolph* decree addressed procedural requirements and substantive limitations on tenancy terminations. *Id.* at 459 n.9.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Robinson*, 748 N.Y.S.2d at 461.

terminations for nondesirability necessitate that "the tenant have adequate advance notice, an evidentiary hearing on the record, with an opportunity to confront and cross-examine and otherwise to be informed of the evidence, before an impartial hearing officer."[47] Therefore, by signing the stipulation as a means of resolving the termination proceeding, Robinson waived her federal due process right to a hearing before an impartial Hearing Officer; instead, she dealt only with the Housing Authority's attorney.[48] Additionally, there was no record and no evidence that a Hearing Officer ever approved the stipulation, and the Housing Authority never bore the burden of proving that Donnel's conduct warranted a proceeding terminating Robinson's tenancy in the first place.[49] Furthermore, without a hearing, Robinson lost the opportunity to show that she was no longer subject to termination because Donnel had already moved out of the apartment before Robinson signed the stipulation; there was no need for her to "bargain for a disposition of permanent exclusion or probation."[50]

Yet, federal constitutional rights such as due process rights to notice and a hearing before judgment are subject to waiver, and whether a federal constitutional right has been waived is a federal question controlled by federal law.[51] Therefore, "the appropriate standard for addressing whether stipulations . . . [in tenancy termination cases] should be given binding effect is that provided

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[47] *Id.* at 459.
[48] *Id.* at 461.
[49] *Id.*
[50] *Id.*
[51] *Robinson,* 748 N.Y.S.2d at 463.

by federal law, rather than that applicable to contracts generally."[52] In *D.H. Overmeyer Co. Inc. v. Frick Co.*,[53] the United States Supreme Court upheld a cognovit provision in a contract between corporate parties with equal bargaining power as constitutional where the party against whom the provision was enforceable "voluntarily, intelligently, and knowingly waived the rights it otherwise possessed to prejudgment notice and hearing, and that it did so with full awareness of the legal consequences."[54] On the other hand, contractual waivers of due process rights are unconstitutional under *Fuentes v. Shevin*[55] when there is unequal bargaining power between the parties or when the party against

[52] *Id. But see* Romero v. Martinez, 721 N.Y.S.2d 17 (N.Y. App. Div. 1st Dep't 2001) *aff'd*, 759 N.E.2d 372 (N.Y. 2001). The court applied the judicial standard of review for administrative decisions, i.e., whether substantial evidence supported the agency's findings, and upheld a terminated tenancy for violation of a stipulation which excluded the petitioner's son from residing in or visiting her apartment, and noted that stipulations entered into for the purpose of resolving tenancy termination proceedings, "like contracts generally, should not be set aside or modified absent a showing of fraud, collusion, mistake or the like." *Id.* at 19, 21.

[53] 405 U.S. 174 (1972).

[54] *Id.* at 187.

[55] 407 U.S. 67 (1972). The issue in *Fuentes* was the constitutionality of a replevin statute authorizing contractual provisions in installment contracts which allowed sellers to repossess property if the buyer defaulted on the payments. Plaintiff Fuentes signed sales contracts which provided in small print and without explanation of the meaning of the term, "in the event of default of any payment or payments, Seller at its option may take back the merchandise." The Court reasoned that the language of the contract was merely a statement entitling the seller to repossess the goods upon the happening of a default; on its face, the language did not waive plaintiff's constitutional right to a pre-seizure hearing. Ultimately, the Court held that the statute's prejudgment replevin provisions "work a deprivation of property without due process of law insofar as they deny the right to a prior opportunity to be heard before chattels are taken from their possessor." *Id.* at 94-96.

whom the waiver is enforceable did not bargain for it.[56] Additionally, if the contractual language of waiver of due process rights is not clear on its face, courts need not address whether the party agreed to the waiver intelligently or voluntarily.[57]

Accordingly, the *Robinson* court found that replacing the procedural "safeguards provided by the *Escalera* decision, the consent decrees and the Procedures" through use of form stipulations to resolve tenancy termination proceedings "increases the serious risk of unknowing or involuntary waiver."[58] The stipulation signed by Robinson was not, on its face, a clear waiver of constitutional rights.[59] Rather, the language in the stipulation was "opaque legalese"; the meaning and significance of what Robinson waived by agreeing to the stipulation was unclear.[60] Thus, as a matter of law, the stipulation used to resolve the prior termination hearing was not an informed, knowing and voluntary waiver of Robinson's constitutionally protected federal rights.[61] Consequently, in the public housing context, use of form stipulations to resolve tenancy termination proceedings will require

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[56] *Id.* at 95.
[57] *Id.*
[58] *Robinson*, 748 N.Y.S.2d at 464.
[59] *Id.*
[60] *Id.*
[61] *Id.*

stipulation policies incorporating procedural safeguards to satisfy due process.[62]

Denise Shanley

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[62] *Id.*

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New York Constitution Article I, Section 6:

In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel. . . .

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