

Matter of Lofton v New York City Hous. Auth.

2012 NY Slip Op 31311(U)

May 9, 2012

Sup Ct, NY County

Docket Number: 403131/11

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH
Justice

PART 4

Index Number : 403131/2011
LOFTON, HERBERT
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 4, were read on this motion to/for Article 78

Notice of ^{Pet}Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits (Pl's 3/21/12 affidavit and 3/23/12 affidavit) | No(s). 3, 4

Upon the foregoing papers, it is ordered that this ^{petition} 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: 5/9/12

Arlene P. Bluth, 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 NY
COUNTY OF NEW YORK: PART 4

Index No.: 403131/11

In the Matter of the Application of
Herbert Lofton,

Petitioner,

**DECISION, ORDER
AND JUDGMENT**

-against-

New York City Housing Authority,
Respondent.

Present: HON. ARLENE P. BLUTH

Upon the foregoing papers, it is ORDERED and ADJUDGED that this Article 78 petition is denied and the proceeding is dismissed.

Petitioner, who is representing himself, commenced this Article 78 proceeding challenging respondent New York City Housing Authority's (NYCHA) determination of status dated August 3, 2011 which approved the hearing officer's July 18, 2011 decision denying petitioner's remaining family member claim to apartment 911 at 60 Avenue D in Manhattan. Petitioner's mother, Dorothy Lofton, was the tenant of record of the subject apartment until her death on November 23, 2009. Respondent opposes the petition.

Under NYCHA regulations, an individual who seeks succession rights to a NYCHA tenancy as a remaining family member must lawfully enter the apartment by obtaining the written permission of NYCHA and must reside in the apartment for not less than one year after the lawful date of entry and prior to the date the tenant of record vacates the apartment or dies.

Here, petitioner admits that (1) he was a former household member who moved out of the household many years ago and never received permission from NYCHA to return, and (2) his mother, the tenant of record, never requested or received NYCHA's permission for petitioner to join her household. "It is true that I lacked written permission to join the household" (petitioner's

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aff. in reply, sworn to March 21, 2012, para. 2). Nevertheless, petitioner asserts that he is entitled to succeed to his mother's public housing lease due to mitigating circumstances, specifically, her "declining health and mental impairment compromised her ability to follow through with NYCHA to add me to the lease". He further claims that the hearing officer's failure to "take into account [his] mother's condition was arbitrary and capricious" (Petition, para. 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 Board of Education*, 34 NY2d 222, 231 [1974]). 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 New York Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1st Dept 2007], *aff'd* 11 NY3d 859 [2008]).

The hearing officer's determination that petitioner is not a remaining family member was amply supported by the testimony and evidence presented at the hearing, and set forth in her July 18, 2011 decision. At the hearing, NYCHA introduced, *inter alia*, Ms. Lofton's annual income affidavits for 2000 through 2008 wherein she affirmatively stated that she was the sole occupant of the apartment for each of those years. Petitioner testified, on cross-examination, that he assisted his mother in completing those annual affidavits.

Petitioner further testified that his mother asked her home health care attendant to submit

documentation to Management so that he could be added to his mother's household, that his mother did not retain copies of this documentation, and that neither he nor his mother received any response from Management. After considering all the testimony, the hearing officer specifically found that petitioner failed to establish that either he or his mother requested or received written permission for him to join his mother's household.

Despite petitioner's testimony that he returned to the apartment in 2002, the hearing officer found that petitioner never informed Management that he had returned to live in the subject apartment. The hearing officer rejected petitioner's assertion that petitioner's presence in the apartment during maintenance repairs should have put Management on notice that he was residing in the subject apartment with his mother. To the extent that petitioner now suggests that he is entitled to remaining family member status because NYCHA knew of and implicitly approved petitioner's occupancy, that assertion lacks merit; a government agency cannot be estopped from complying with its legal obligations when a claimant "does not meet the eligibility requirements for succession rights to the apartment" even if the managing agent "acquiesced in petitioner's occupancy" (*see Schorr v New York State Div. of Hous. Pres. & Dev.*, 10 NY3d 776, 857 NYS2d 1 [2008]).

Finally, this Court lacks the authority to consider mitigating circumstances, such as Ms. Lofton's mental or physical health before she died, or potential hardship to petitioner, such as that petitioner would be homeless without this apartment (reply aff., sworn to March 21, 2012), as a basis for annulling NYCHA's determination (*see Guzman v NYCCHA*, 85 AD3d 514, 925 NYS2d 59 (1st Dept 2011)).

Based on the evidence presented at the hearing, it is undisputed that petitioner did not lawfully enter the apartment by obtaining the written permission of NYCHA and that Ms. Lofton did not even list petitioner as an occupant of the apartment on her 2000 through 2008 income affidavits. Accordingly, NYCHA's determination denying petitioner remaining family member status was supported by a rational basis, and not arbitrary or capricious. (*Aponte v New York City Hous. Auth.*, 48 AD3d 229, 850 NYS2d 427 (1st Dept 2008) [denial of grievance because written permission had not been given for petitioner to return to apartment not arbitrary; evidence included income affidavits indicating deceased was sole occupant]).

Accordingly, it is ORDERED and ADJUDGED that this Article 78 petition is denied and the proceeding is dismissed.

This is the Decision, Order and Judgment of the Court.

Dated: May 9, 2012

New York, New York



HON. ARLENE P. BLUTH, JSC

ARLENE P. BLUTH
J.S.C.

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