

<b>Matter of Luna v New York City Hous. Auth.</b>
2012 NY Slip Op 32956(U)
December 13, 2012
Sup Ct, New York County
Docket Number: 401279/2012
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 : 401279/2012  
LUNA, NELSON  
vs.  
NYC HOUSING AUTHORITY  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 2, were read on this motion to/for Art. 78

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is granted

**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: 12.13.12

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

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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 4**

Index No.: 401279/12

**In the Matter of the Application of  
Nelson Luna,**

*Petitioner,*

**DECISION, ORDER  
AND JUDGMENT**

*-against-*

**New York City Housing Authority,**

**Present: HON. ARLENE P. BLUTH**

*Respondent.*

It is ORDERED and ADJUDGED that this Article 78 petition is denied and the proceeding is dismissed.

Petitioner, who is self-represented, commenced this Article 78 proceeding challenging respondent New York City Housing Authority's (NYCHA) Determination of Status dated February 14, 2012 which upheld the hearing officer's decision to deny petitioner's remaining family member claim to apartment #9C at 709 FDR Drive in Manhattan. Petitioner's mother, Emelinda Cruz, was the tenant of record of the subject apartment until her death on August 7, 2009. NYCHA opposes the petition.

Background

Petitioner was an original member of the household, but he moved out in 1999. See exh J to answer, Tenant Data Summary. On the annual income affidavits that Ms. Cruz submitted from 2002 through 2009, she listed herself as the sole occupant of the apartment. On February 13, 2009, Ms. Cruz submitted a temporary permission request for a family member/additional person (petitioner) to live with her; petitioner signed that form and listed his address as 2333 Webster Avenue, apt 5D in the Bronx. (exh L). Apparently NYCHA took no action with regard to this

request. Ms. Cruz died on August 7, 2009, approximately six months later.

### Hearing

A hearing was held on November 22, 2011 and January 27, 2012 before a hearing officer, who heard testimony from petitioner and NYCHA's Resident Services Associate Nilza Reversion. The hearing officer also reviewed various documents which were admitted into evidence at the hearing.

In her findings and conclusions, the hearing officer found that considering the evidence in the light most favorable to petitioner, even if the submitted temporary permission request had been a *permanent* permission request, and even if it had been approved by management on the day it was submitted (February 13, 2009), petitioner still would not have been entitled to remaining family member status. She specifically found that petitioner failed to make the necessary showing that he lived in the subject apartment with his mother for one year after becoming an authorized occupant. Based on the evidence, the hearing officer denied petitioner's grievance.

### Article 78 Standard

The "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000], quoting *Matter of Fanelli v New York City Conciliation & Appeals Board*, 90 AD2d 756 [1st Dept 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept 1983]). Once the court finds that a rational basis exists for the agency's

determination, then the court's review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if the court finds that there is no rational basis for the agency's determination. (*Matter of Pell v Board of Education*, 34 NY2d 222, 231 [1974]).

Gaining succession as a remaining family member requires an occupant to (1) move lawfully into the apartment and (2) qualify as a specified relative of the tenant of record and (3) remain continuously in the apartment for at least one year immediately before the date the tenant of record vacates the apartment or dies and (4) be otherwise eligible for public housing in accordance with NYCIIA's rules and regulations. See NYCHA Occupancy and Remaining Family Member Policy Revisions General Memorandum (GM) 3692 Section IV (b), as revised and amended July 11, 2003 (exh A). At issue here are requirements (1) obtaining the permission, and (3) living in the apartment for one year after getting the permission.

The requirement that permission is necessary is enforceable. See *Aponte v NYCHA*, 48 AD3d 229, 850 NYS2d 427 [1st Dept 2008] "The denial of petitioner's [remaining family member] grievance on the basis that written permission had not been obtained for their return to the apartment is neither arbitrary nor capricious." See also *NYCHA v Newman*, 39 AD3d 759 (1<sup>st</sup> Dept 2007); *Hutcherson v NYCHA*, 19 AD3d 246 (1<sup>st</sup> Dept 2005) (denied remaining family member status because written permission to move in was not obtained).

That one-year requirement has also been upheld (*see Torres v NYCIIA*, 40 AD3d 328, 330 [1st Dept 2007]) holding that when petitioner seeking to succeed to tenant of record's lease had not complied with the one year requirement, that "there [was] no basis whatsoever for holding the

[1st Dept 2007] holding that when petitioner seeking to succeed to tenant of record's lease had not complied with the one year requirement, that "there [was] no basis whatsoever for holding the agency decision to be 'arbitrary and capricious'").

Here, petitioner claims that he moved back into the apartment at his mother's request in 2007; if true, he was an unauthorized occupant. He asserts that the one-year requirement should be waived because his mother's failing health prevented her from filling out the proper form (temporary vs. permanent) (Petition, para. 3). However, the hearing officer indicated in her decision that this would not have made a difference because petitioner did not meet the requirement of one year of authorized occupancy. To the extent that petitioner states that this apartment has been his home since he was a baby, or that his mother told him that he had been added to the lease, or that he wants this apartment as a home for himself and his two children, this Court lacks the authority to consider mitigating circumstances or potential hardship as a basis for annulling NYCHA's determination (*see Guzman v NYCHA*, 85 AD3d 514, 925 NYS2d 59 [1st Dept 2011]).

Therefore, NYCHA's determination denying petitioner remaining family member status was rational, and not arbitrary or capricious. 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: December 13, 2012  
New York, New York



HON. ARLENE P. BLUTH, JSC

**UNFILED JUDGMENT**

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