

Matter of Fernandez v New York City Hous. Auth.

2012 NY Slip Op 32578(U)

October 3, 2012

Sup Ct, NY County

Docket Number: 112834/11

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ARLENE P. BLUTH

PRESENT: _____
Justice

PART 4

Index Number : 112834/2011
FERNANDEZ, FRANCES
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this ~~motion~~ petition 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: 10/3/12

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.: 112834/11

In the Matter of the Application of
 Frances Fernandez,

Petitioner,

-against-

**DECISION, ORDER
 AND JUDGMENT**

New York City Housing Authority,

Respondent.

Present: HON. ARLENE P. BLUTH

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

Petitioner commenced this Article 78 proceeding¹ challenging respondent New York City Housing Authority's (NYCHA) Determination of Status dated October 12, 2011 which upheld the hearing officer's decision, after a hearing, not to sustain petitioner's remaining family member grievance involving apartment 4E at 622 Water Street in Manhattan. NYCHA opposes the petition on the grounds that petitioner was twice denied permission to be added to the household because it was overcrowded.

Petitioner is the grandmother of one of the (former) tenants of record, Angel Hernandez, Jr.; his wife Tanya Hernandez, was the other tenant of record. Petitioner seeks to reverse the October 12, 2011 determination on the grounds that it was made on a "technicality that is

¹The petition was admittedly written by Angel Hernandez "on behalf of Frances Fernandez" (see para. 3). The petition was, however, verified by Frances Fernandez and so the Court will consider the petition, which challenges NYCHA's denial of Ms. Fernandez's remaining family member grievance, on the merits. The "affidavit in opposition" submitted by Angel Hernandez ("I, Angel Hernandez wish to respond [to NYCHA's memorandum of law]"), but signed by petitioner before a notary, was not considered by this Court as it is not petitioner's statement and she is not the "I" referred to throughout the affidavit.

unfair” and because “we were led to believe that the process was moving along for [petitioner] to remain & were misled [sic] upon vacating the apartment ... that [petitioner] could proceed with the process” (petition, para.3).

The hearing

A hearing was held on June 3, 2011 (at which time Mr. Hernandez “represented” his grandmother) and on September 21, 2011 (when petitioner was represented by counsel). The hearing officer heard testimony from the former tenant, Angel Hernandez, from NYCHA’s Resident Services Associate, Yvonne Imasuan and NYCHA’s Property Manager Juan Bello, from petitioner’s daughter, Orchid Cruz, and from petitioner. The hearing officer also reviewed various documents, including Tenant Data Summary Sheets, two 2008 Occupant’s Affidavit of Income, two Notices of Intent to Vacate and NYCHA’s manual relating to occupancy standards.

Mr. Hernandez testified, in pertinent part, as follows: In June 2008, when he was a tenant of record of the subject two-bedroom apartment, he submitted a permanent permission request for his grandmother to be added to the household (which included himself, his wife, his son, and his daughter). Even though he never received a response to his request, petitioner moved in to the apartment at the end of 2008. Mr. Hernandez and his family moved out in August 2009 but did not notify management - instead, he did not submit a Notice of Intent to Vacate until September 8, 2010.

Mr. Hernandez also testified that, sometime after March of 2009 (before he moved out), NYCHA’s Resident Services Associate Yvonne Imasuan told him that his request had been

denied back in July of 2008 because it would create an overcrowded condition in the apartment. In October 2009 (after he actually moved out but before he submitted his Notice of Intent to Vacate), he sent a letter to management detailing his efforts to secure the apartment for petitioner. In May 2010 (also after he actually moved out but before he submitted his Notice of Intent to Vacate), he submitted a second permanent permission request for petitioner to be added to the household. That request was also disapproved in June 2010 because it would have created an overcrowded condition for the grandmother to move into a two bedroom apartment with Mr. and Mrs. Hernandez, their son and daughter.

In her findings and conclusions, the hearing officer recounted testimony given by Mr. Hernandez and Ms. Cruz (Mr. Hernandez's mother and petitioner's daughter), and found that their conduct was "at best misguided and at worst dishonest" (p. 6). The hearing officer expressly rejected Mr. Hernandez's and Ms. Cruz's assertions that (1) management should assume that a person who has not been granted permission to join the household (here, petitioner) is actually residing in that household, and (2) if a disapproval was not received, petitioner was permitted to reside in that apartment.

In her six page decision, the hearing officer did not sustain the remaining family member grievance because it was undisputed that NYCHA never granted petitioner written permanent permission to reside in the subject apartment as required by its rules.

Standard of Review

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 NYCHA’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.

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 (1st Dept 2007); *Hutcherson v NYCHA*, 19 AD3d 246 (1st Dept. 2005) (denied remaining family member status because written permission to move in was not obtained).

Even though petitioner never obtained permission and did not reside in the apartment for a year before her grandson and his family moved out, she nevertheless asserts that she is entitled to succeed to her grandson’s public housing lease. In support of that position, she asserts that starting on May 12, 2009 (after she had already moved in without permission), NYCHA employees misled her and the tenant as to how to apply for permanent permission to be added to the lease. Petitioner also alleges that management misled the family into believing that management would approve the request to add petitioner to the household. To the extent that petitioner claims that NYCHA’s employees misinformed her about NYCHA’s policies and she relied on those statements, it is well settled that an agency “cannot be estopped from invoking [its] regulations” (citation omitted) (*Muhammad v New York City Hous. Auth.*, 81 AD3d 526, 917 NYS2d 173 (1st Dept 2011)).

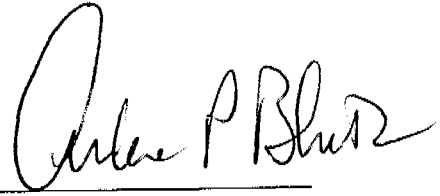
As it is undisputed that the tenant of record never received NYCHA’s permission for petitioner to permanently reside in the apartment and she did not reside in the apartment for a year before the tenants of record vacated (*See Weisman v New York City Hous. Auth.*, 91 AD3d 543, 937 NYS2d 189 (1st Dept 2012)), the hearing officer’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: October 3, 2012
New York, New York



HON. ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH