

Matter of Doles v New York City Hous. Auth.

2012 NY Slip Op 32998(U)

December 14, 2012

Supreme Court, New York County

Docket Number: 401380/2012

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 : 401380/2012
DOLES, MALCOLM
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 ^{pet} 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 ^{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: 12/14/12

[Signature], 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.: 401380/12

**In the Matter of the Application of
Malcolm Doles,**

Petitioner,

-against-

New York City Housing Authority,

Respondent.

**DECISION, ORDER
AND JUDGMENT**

Present: HON. ARLENE P. BLUTH

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 dated February 29, 2012 which adopted Hearing Officer Tomicic-Hines's February 13, 2012 decision made after a hearing. In that decision, the hearing officer denied petitioner's remaining family member claim to apartment 19C at 55 LaSalle Street in Manhattan. Petitioner's grandmother, Elizabeth Doles ("Elizabeth"), was the tenant of record of the subject apartment until her death on June 8, 2010. Additionally, the hearing officer noted that while petitioner sought to assert a remaining family member claim for his niece Sharina Padron, a minor, petitioner was not her legal guardian; as such, the hearing officer did not permit petitioner to pursue a grievance on her behalf.¹ NYCHA opposes the petition.

The Hearing

On March 30, 2010 Elizabeth submitted a Permanent Permission Request form to add

¹The hearing officer permitted Sharina to testify at the hearing without prejudice to her independent claim. Sharina and her mother (petitioner's sister) were former members of Elizabeth's household. Elizabeth removed them from the household by letter dated March 25, 2002, claiming that they had not contributed their share of the rent (exh V to Answer).

petitioner to her household, which request management did not approve or disapprove. Elizabeth died approximately two months later, on June 8, 2010. According to Elizabeth's affidavits of income introduced at the hearing, she was the sole remaining occupant of the subject apartment at the time of her death (exh D to Answer).

Petitioner testified that he moved into his grandmother's apartment in 2006, but on cross-examination he admitted that he was (as of the date of the hearing, January 18, 2012) still listed as a member of his mother, Michelle Doles's, household--apartment 14J of the subject building.

In her decision denying petitioner's grievance, the hearing officer noted that management never granted Elizabeth's request for petitioner to permanently reside with her. She found that even if the request had been immediately approved, petitioner still would not have met the qualifications of a remaining family member because he would not have had the required one-year period of authorized residency.

Standard of Review

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]).

Gaining succession as a remaining family member requires an occupant to (1) move lawfully² 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 (exh A to Answer).

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).

Significantly, in support of the petition, petitioner has not asserted that the decision below was arbitrary and capricious, or an abuse of discretion. Instead, ignoring the fact that he is an authorized occupant in another apartment (his mother's) in the same building, petitioner says that NYCHA's determination should be reversed because he and his niece have no other home and no

²The occupant moves in lawfully if he or she: (1) was a member of the tenant's family when the tenant moved in and never moved out or (2) becomes a permanent member of the tenant's family after moving in (or after moving back in) as long as the tenant of record seeks and receives NYCHA's written approval or (3) is born or legally adopted into the tenant's family and thereafter remains in continuous occupancy up to and including the time the tenant of record moves or dies. (See NYCHA Management Manual, ch IV, sub IV, section (J)(1).

other family (pet., para. 3). This assertion does not change the fact that he does not qualify as an authorized occupant who lived continuously in the apartment for at least one year immediately before his grandmother's death. Additionally, 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, to the extent that petitioner asserts that his situation constitutes mitigating circumstances or potential hardship, that claim is denied on this basis as well.

NYCHA's decision to deny petitioner remaining family member grievance had a rational basis; the evidence shows that petitioner did not become an authorized occupant of Elizabeth's apartment prior to her death in June 2010, and even if the request to add him as an authorized occupant had been promptly granted, he still would not have met the one-year residency requirement. *See Perez v New York City Hous. Auth.*, __AD3d__, __NYS2d__, 2012 NY Slip Op 07199 (1st Dept, October 25, 2012).

Accordingly, it is ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed. Any stays issued by this Court are hereby vacated.

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

Dated: December 14, 2012
New York, New York



HON. ARLENE P. BLUTH, JSC