

Matter of Andux v New York City Hous. Auth.

2012 NY Slip Op 32999(U)

December 14, 2012

Supreme Court, New York County

Docket Number: 401451/2012

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 : 401451/2012
ANDUX, JALEN
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.: 401451/12

**In the Matter of the Application of
 Jaden Andux,**

Petitioner,

**DECISION, ORDER
 AND JUDGMENT**

-against-

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, who is self-represented, commenced this Article 78 proceeding challenging respondent New York City Housing Authority's (NYCHA) Determination of Status dated March 28, 2012 which upheld the hearing officer's decision to deny petitioner's remaining family member claim to apartment #5D at 60 Amsterdam Avenue in Manhattan. Petitioner's grandmother, Caridad Andux, was the tenant of record of the subject apartment until her death on July 27, 2010. NYCHA opposes the petition.

Hearing

A nine session hearing was held from July 2011 through February 2012 before a hearing officer, who heard testimony from petitioner, his father and his aunt, and NYCHA's Resident Services Associate, Anthony Aron, and Housing Assistant Kathy Washington. The hearing officer also reviewed various documents which were admitted into evidence by both sides.

In her findings and conclusions, the hearing officer found that petitioner did not establish

that he was an original family member in continuous occupancy of the subject apartment until Ms. Andux died on July 27, 2010, or that he resided in the apartment with the written permission of management for at least one year prior to Ms. Andux's death. Although the hearing officer noted that Ms. Andux submitted a written request for permanent permission for petitioner to join her household, NYCHA disapproved that request on December 10, 2010, indicating that petitioner was living with his mother and attending high school in Poughkeepsie NY, and ineligible to reside with Ms. Andux. The hearing officer further indicated that even if that request had been approved by management on the day it was submitted, petitioner still would not have been entitled to remaining family member status because petitioner would not have had one year of authorized occupancy. 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 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). 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 (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).

That one-year requirement has also been upheld (see *Torres v NYCHA*, 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 agency decision to be 'arbitrary and capricious'").

Petitioner's Claims

In short, petitioner states (petition, para. 3) that he "fully understand[s] the one year rule and [is] looking to get an exception" because his family is in need.

Petitioner was never part of Ms. Andux's household, and he was never listed as an occupant of her apartment on the affidavits of income she submitted to management, or any tenant summary form. Petitioner admitted that while he spent time on weekends, holidays and during the summer in the subject apartment, he lived upstate and attended high school there, which is documented by his driver's license and high school diploma, introduced into evidence at the hearing. Although petitioner states that this apartment has been important to him, and that he and his father are model tenants and will be homeless without it, 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]). To the extent that petitioner suggests that his grandmother intended to leave the apartment to him, public housing apartments are not private property and thus cannot be bequeathed or transferred. *See Hernandez v New York City Hous. Auth.*, Index No. 402278/08 at 6 (n.o.r.) (Sup Ct, NY County 2009).

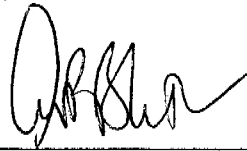
Petitioner also claims that he is entitled to a lease to the apartment because he has paid rent (use and occupancy). First, petitioner waived this claim by not raising it at the administrative hearing. Moreover, the alleged payment of use and occupancy cannot change an unauthorized occupant's status and cannot be deemed a substitute for written permission. *Muhammad v New York City Hous. Auth.*, 81 AD3d 526, 527 (1st Dept 2011).

Therefore, NYCHA's determination denying petitioner remaining family member status was rational, and not arbitrary or capricious. Petitioner did not demonstrate that he resided in the apartment with the written permission of management for at least one year prior to Ms. Andux's death.

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 14, 2012
New York, New York



HON. ARLENE P. BLUTH, JSC