

<b>Matter of Nuñez v New York City Hous. Auth.</b>
2007 NY Slip Op 34458(U)
May 4, 2007
Supreme Court, New York County
Docket Number: 0107480/2009
Judge: Alice Schlesinger
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

**ALICE SCHLESINGER**

**IA PART 16**  
PART \_\_\_\_\_

Index Number : 107480/2009

**NUNEZ, EVANGELISTA**

VS.

**NEW YORK CITY HOUSING AUTHORITY**

SEQUENCE NUMBER : # 001

ARTICLE 78

Justice

INDEX NO.

*107480-09*

MOTION DATE

MOTION SEQ. NO.

*#001*

MOTION CAL. NO.

were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

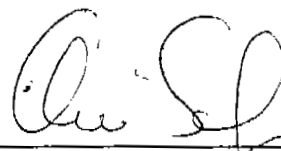
Upon the foregoing papers, it is ordered that this motion

*Article 78 petition is denied and the proceeding is dismissed and the cross-motion is denied as moot, in accordance with the accompanying memorandum decision.*

**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 1415).

MAY 04 2010

Dated: \_\_\_\_\_



**ALICE SCHLESINGER** J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

-----X  
n the Matter of the Application of  
EVANGELISTA NUÑEZ,

Petitioner,

Index No. 107480/09  
Motion Seq. No. 001

For an Order Pursuant to Article 78 of the Civil  
Practice Law and Rules,

-against-

NEW YORK CITY HOUSING AUTHORITY

Respondent.  
-----X

SCHLESINGER, J.:

This case reveals the troubling state of public housing policy in the City of New York and the lack of available counsel for low-income tenants seeking to avoid homelessness.

Petitioner Evangelista Nuñez commenced this Article 78 proceeding challenging the denial of her application for a lease in her own name as the "remaining family member" of the deceased tenant of record, her husband Francisco Nuñez. Respondent New York City Housing Authority (NYCHA) cross-moved to dismiss the proceeding as barred by the statute of limitations. Following the initial conference with the Court, NYCHA also filed a Verified Answer addressing the merits of the petition. Thereafter, the Court held repeated conferences in an effort to resolve the matter so that Evangelista Nuñez could continue to reside in the apartment, along with her adult daughter Belkis, who is deaf and disabled in other respects, and her two teenage granddaughters, who are the daughters of Belkis. No resolution having been reached, this Court is proceeding to determine the narrow issue presented; that is, whether the decision by the Hearing Officer upholding NYCHA's denial of Ms. Nuñez' request for a lease was arbitrary and capricious. However, this decision is

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not intended to in any way tie the hands of Judge José Rodríguez, who is being presented with far broader issues in the related holdover proceeding pending before him in the Bronx Housing Court.

Background Facts and the Administrative Proceedings Below

The following summary of facts is based on the NYCHA tenant file, as discussed in NYCHA's Verified Answer and Exhibits. They are essentially undisputed.

In or about the year 2000, Francisco Nuñez became the tenant of record in apartment 11G, a four-room apartment in Sedgwick Houses located at 156 West 174<sup>th</sup> Street in the Bronx. The records confirm that Jocelyn Nuñez, an adult daughter of Mr. Nuñez, also resided in the apartment until she moved out some time in 2005. Whereas Mr. Nuñez had listed Jocelyn's income on his annual income affidavit filed every spring in the early years of his tenancy, he did not list Jocelyn in 2006 or 2007. (See Exh. D to Answer).

On his April 5, 2007 income affidavit, Mr. Nuñez listed his name and the name of his wife Evangelista Nuñez. For some reason, Evangelista's name was crossed off the section of the affidavit entitled "Persons Living in Apartment." However, Ms. Nuñez signed the form as "co-lessee" and included her annual income of \$32,000 for work as a home attendant. (Exh. D). Neither of those entries was crossed out. The NYCHA Interview Records contain no entries confirming when Ms. Nuñez moved into the apartment and what communications NYCHA had with the tenant upon receipt of the income affidavit. Indeed, the file contains no entries whatsoever written by a Housing Assistant during the critical three-year period from February 17, 2004 through May 4, 2007, after which the tenant passed away. (Exh. I).

According to NYCHA records, Mr. Nuñez submitted a formal written request to NYCHA on or about May 4, 2007, for his wife Evangelista to permanently join the household. Mr. Nuñez explained that he was ill and wanted his wife to live in the apartment and care for him. On May 9, 2007, NYCHA approved the request. (Exh. I). On May 11, 2007, Mr. Nuñez passed away.

Evangelista Nuñez then asked NYCHA for permission to stay in the apartment and obtain a lease in her own name, and she followed all the required procedures to pursue that request. The Housing Manager denied the request, and the Borough Manager agreed, finding that Ms. Nuñez was not eligible for a lease in her own name because she had not been living in the apartment with Mr. Nuñez with NYCHA's permission for the requisite one-year period before the tenant of record died. (See August 7, 2007 decision, Exh. N to Answer).

Thereafter, Ms. Nuñez requested and was granted a hearing. At the first appearance on October 31, 2007, Ms. Nuñez indicated through a Spanish interpreter that she wished to obtain counsel. Over NYCHA's objection, the Hearing Officer Joan Pannell adjourned the hearing for that purpose. (Exh. R). On the adjourned date, December 13, 2007, Ms. Nuñez explained the difficulty she had been having obtaining counsel and she requested more time. Again NYCHA objected, but since Ms. Nuñez had been timely paying the rent, the Hearing Officer granted another adjournment to January 23, 2008. (Exh. R).

The hearing was held on January 23 after the Hearing Officer ceded to NYCHA's insistence that the hearing proceed and denied the request by Ms. Nuñez for a further adjournment to seek counsel. The Hearing Officer did indicate that she would hold her decision in abeyance for some period of time and then accept further submissions if Ms.

Nuñez were able to obtain counsel after the hearing. (Exh. R, p 21, l 14 ff). The Grievance Determination was then admitted into evidence, and Ms. Nuñez was provided a copy when she indicated that she did not have one. The Housing Assistant Sandra Paulino then testified for NYCHA.

Significantly, Paulino's testimony was fraught with inconsistencies as to material matters, and was based largely on the records, rather than personal knowledge. For example, in response to questions by her counsel, Ms. Paulino testified (p 24) that, whereas she had been employed by NYCHA for nine years, she had only been assigned to Sedgwick Houses since November 2007, a date about six months *after* Mr. Nuñez's death. Nevertheless, Ms. Paulino then testified in response to the next question that she had been the Housing Assistant for Mr. Nuñez "One year and like about – yeah, one year." (P 24, l 24-25). The inconsistency was ignored.

NYCHA then entered into evidence various documents from the tenant folder; i.e., the death certificate for Mr. Nuñez, the tenant's request for Evangelista Nuñez to live in the apartment, and the tenant's April 2007 income affidavit. When asked if she knew why the name of Evangelista Nuñez had been crossed out in one section of the income affidavit, Ms. Paulino testified that, upon receipt of the affidavit, she had informed Mr. Nuñez that he had to request permission for his wife to live in the apartment before he could list her on the income affidavit (p 27, l 18-25). Counsel then concluded her questioning.

The Hearing Officer then asked Ms. Paulino whether the file contained "any indication that this former Tenant ever raised the issue of getting approval for his wife before he actually submitted the permanent request" (p 29, l 3-7). Ms. Paulino answered "No" (p 29, l 8). At no point did anyone inquire whether anyone else resided in the

apartment and whether anyone at NYCHA knew whether Evangelista or anyone else had been living in the apartment with the tenant before April 2007.

After the Hearing Officer confirmed that Ms. Nuñez did not wish to cross-examine Ms. Paulino, she asked Ms. Nuñez "What would you like me to know?" (P 30, l 2-3). Ms. Nuñez responded through the interpreter: "I really need the apartment. That everything that you can do to help me will be greatly appreciated." (P 30, l 4-7). The Hearing Officer explained that she was bound to apply the rules, which did not "make any allowances for unfortunate situations," but which did give Ms. Nuñez the right to appeal to the Supreme Court, "the only authority that can change the rules." (P 30, l 8-16).

The Hearing Officer then asked Ms. Nuñez when she had moved into the apartment. After pausing for a significant enough time for the transcriber to note it on the transcript (p 30, l 19), Ms. Nuñez responded "November 2006" (l 20). No effort was made to confirm whether that date was correct or to inquire whether the actual date was earlier. Ms. Nuñez then explained in response to further questioning that her husband had been ill and needed her to take care of him (l 23 - 25).

The Hearing Officer then asked Ms. Nuñez whether she had ever spoken with her husband "about getting permission for [Ms. Nuñez] to live there" (p 31, l 2-4), and Ms. Nuñez answered "No" (l 5). Presumably, though, there had been some discussion because, as discussed above, Ms. Nuñez had signed the 2007 income affidavit as "co-lessee" and Mr. Nuñez had then filed for formal permission for his wife to live in the apartment when instructed by the Housing Assistant to do so.

The Hearing Officer then stated that, to obtain a lease, the law required a year of co-occupancy with the tenant of record, which did not appear to be the case based on the

testimony given (p 31, l 6-14). She promised to look for “any loophole” before rendering a decision (p 31, l 15-18). A colloquy followed wherein Ms. Nuñez asked again about obtaining counsel, and the Hearing Officer explained about NYCHA’s need to commence a Housing Court proceeding before Ms. Nuñez could be evicted from the apartment, even after she had received a hearing decision against her, and about the procedure for filing an Article 78 petition (p 32, l 2 - 25; p 33, l 2 - 18).

On March 4, 2008, Hearing Officer Pannell rendered her written decision (Exh. T). The Hearing Officer stated : “Housing Assistant Sandra Paulino testified that NYCHA had first learned of Grievant’s presence in 4/07, when the tenant submitted an annual affidavit listing Grievant as occupant.” In fact, Ms. Paulino *never* testified about her knowledge of Ms. Nunez’ occupancy, and no one ever asked her that question. Rather, as indicated above, Ms. Paulino merely testified that, when she received the April 2007 income affidavit listing Ms. Nunez, she advised Mr. Nunez that he could not list his wife on that form without first obtaining permission for her to live there:

Okay, when – when he submitted the affidavit of income, she was not listed on the family composition. So, I informed Francisco Nunez, the Tenant, that he’s supposed to ask for permission request, first, and then if the permission request is approved, then he can put his wife on the family – on the affidavit of income, but not without the permission.

(P 27, l 18 - 25). Thus, while NYCHA’s knowledge of a remaining family member’s occupancy is legally significant, even absent written permission [*Detres v NYCHA*, 65 AD3d 442, 443 (1<sup>st</sup> Dep’t 2009), citing *McFarlane v NYCHA*, 9 AD3d 289, 291 (1<sup>st</sup> Dep’t

2004)], no evidence was offered, and no questions were asked, specifically addressing that point. Instead, NYCHA counsel scrupulously avoided the issue entirely.

#### The Judicial Proceedings

In June 2009, NYCHA commenced a licensee holdover proceeding in the Bronx County Housing Court to remove Evangelista Nuñez and all other occupants from the apartment (Exh. V). On May 27, 2009, at or about the time she was served with the Notice to Quit preliminary to the holdover, Evangelista Nuñez came to this courthouse and commenced this Article 78 proceeding representing herself. As indicated earlier, NYCHA moved to dismiss the proceeding as time-barred. At the conference, Ms. Nuñez indicated through a Spanish interpreter, in response to the Court's question, that she had first received the Hearing Officer's decision in or about the spring of 2009 from the Housing Assistant when she went to see her after receiving papers threatening her eviction. That statement was reduced to a writing, sworn to in open court, over NYCHA's objection (Exh A to Culverhouse Aff., attached to NYCHA Answer).

The Court also inquired into the allegations in the petition. There, Ms. Nuñez stated as follows: "I was legally married to Mr. Francisco Nuñez and was living with him and our daughter Belkis Nuñez and granddaughter Helen Nuñez. The petition to include me on the lease as his wife was already on file when he died." Ms. Nuñez explained that her daughter Belkis was deaf and disabled, that she had been added as a named respondent in the holdover proceeding, and that Housing Judge Jose Rodriguez had appointed Maurice Gray, Esq., to serve as her guardian *ad litem*.

At the Court's request, Mr. Gray appeared at the next conference and on several conferences thereafter, along with Evangelista and Belkis Nuñez and official Spanish and

sign language interpreters. Mr. Gray confirmed that he had reviewed both the NYCHA file and various documents held by Belkis Nuñez, such as school records. According to Mr. Gray, the documents appeared to confirm statements made by Belkis Nuñez through a sign language interpreter that she and her two daughters had been living in the apartment with her father, the tenant of record Francisco Nuñez, for several years before he died.

Helen Nuñez, the fifteen-year-old daughter of Belkis, appeared at one conference and corroborated her mother's statements regarding the extended occupancy. In addition, she indicated that the superintendent knew the family and was aware of their occupancy and that he continued to be employed by NYCHA at another project. Thereafter, Evangelista Nuñez contacted the superintendent and obtained his complete name and telephone number, which were given to Mr. Gray.

Based on these facts, the Court perceived a good faith basis for a request by Belkis Nuñez to obtain a lease as a remaining family member of the tenant of record, as she had been residing with the tenant (her father) for well over a year before his death with the knowledge of NYCHA's employee and the implicit approval of NYCHA. See *Detres v NYCHA*, 65 AD3d 442, 443 (1<sup>st</sup> Dep't 2009). As the family had been unable to retain counsel, Mr. Gray reluctantly agreed to file such a request with NYCHA. However, the Housing Assistant refused to accept it, claiming it was untimely, and NYCHA counsel refused to take any steps to allow the lease request to be filed. Notwithstanding the fact that Evangelista Nuñez would have an absolute right to remain in the apartment with her daughter Belkis should Belkis obtain a lease in her own name, NYCHA counsel adamantly asserted that Evangelista's predicament was wholly separate from that of Belkis, and she urged the Court to determine this proceeding without regard to the still-pending holdover

proceeding or the possibility that Belkis could obtain a lease to secure the continued occupancy of the entire family. The determination follows.

#### Discussion

The threshold issue is the timeliness issue raised by NYCHA's cross-motion to dismiss. Pursuant to CPLR §217(1), a party must commence an Article 78 proceeding "within four months of the date after the determination to be reviewed becomes final and binding upon the petitioner." As confirmed by the Court of Appeals in *Biondo v New York State Board of Parole*, 60 NY2d 832, 834 (1983), the "four-month Statute of Limitations did not begin to run until the petitioner has received notice of the "[agency's] determination ..."

In the case at bar, the Hearing Officer's determination is dated March 4, 2008. It was accompanied by a Notice of Review which stated that the matter was "under review by the members of the New York City Housing Authority." (Exh. G to Cross-Motion). NYCHA issued a Determination of Status approving the Hearing Officer's decision on March 19, 2008 (Exh. F). The March 19 document is the key document for purposes of the statute of limitations, as the determination was not final until that document was issued and received.

NYCHA's cross-motion is supported by two affidavits. The first is from Raisa Arias, a NYCHA employee whose job was to prepare the Determination of Status for mailing to Evangelista Nuñez. Having no independent recollection, Ms. Arias attested to her "regular business practice" of placing a copy of the Determination in a "window" envelope, folded so that the address was visible through the window. She then customarily placed the envelope in an outgoing mail box in the office for pick up by another employee. She further attested that she had made a computer entry confirming that she had placed the Nuñez envelope with the Determination in the outgoing mail box and that she had not received it

back in the mail. No computer printout is attached confirming her statements regarding the preparation for mailing of the specific document at issue here on any particular date.

The second affidavit is from Shawn Younger, Administrative Manager of NYCHA's Mail Center. He attested to the practice in his department of having an employee twice each business day pick up mail placed by other employees in certain boxes designated for outgoing mail. The employees customarily bring the envelopes to the Mail Center where they pre-sort them by zip code, add postage, and then place them "inside receptacles provided by the USPS", typically within one business day of pick up. No documentation of any sort was provided to confirm that Mr. Younger's staff had, in fact, followed that procedure with respect to the Nuñez Determination or that any steps were taken to confirm that a particular item, such as the Determination in this case, had actually been brought to the Post Office and mailed.

The previously mentioned affidavit from Evangelista Nuñez specifically denying receipt by mail of the Determination is sufficient to raise an issue of fact requiring a traverse hearing, particularly in light of the general nature of the NYCHA affidavits. However, it would not serve to expend the limited resources of the Court and the parties on a traverse hearing when the merits have been fully briefed and can be determined at this time.

On the merits, the petition must regrettably be denied. As stated above, co-occupancy for a minimum period of one year with the knowledge and implicit approval of NYCHA is all that our courts require. *Detres v NYCHA*, 65 AD3d 442, 443 (1<sup>st</sup> Dep't 2009). Clearly, the apartment is large enough for a family, and it appears that a family had been living there, not only at the beginning of the tenancy as confirmed by the NYCHA files

regarding Jocelyn, but throughout. Arguably, then, the Hearing Officer or NYCHA counsel should have inquired at the hearing whether other persons were occupying the apartment and for what period of time before the tenant of record passed away. Arguably, the issue of NYCHA's knowledge of the apartment's occupants should have been fully explored. In light of the file's confirmation that Jocelyn Nuñez, one of the tenant's adult daughters, had been living in the apartment for a significant period of time with the tenant, in light of the material inconsistency in the testimony by NYCHA's witness, and in light of Evangelista Nuñez' self-representation, a more probing inquiry at the hearing was appropriate. Nevertheless, rather than allow the Hearing Officer to fully address the issues, NYCHA repeatedly objected to efforts by Ms. Nuñez to obtain counsel and kept the inquiry at the hearing extremely limited.

Presumably, Evangelista Nuñez filed the remaining family grievance to secure the apartment not only for herself, but also for her deaf and disabled daughter Belkis and her granddaughters. Clearly, if the family had been able to obtain counsel, the full set of facts and circumstances would have been brought to light, either in the context of the grievance filed by Evangelista Nuñez on behalf of her family or by the separate filing by Belkis of a grievance in her own name, if that was required. This Court acknowledges attempts at obtaining counsel for the family with various legal services groups, but without success.

Nevertheless, the Court must remain bound by the limited role of judicial review and cannot find under these circumstances that the decision of the Hearing Officer was arbitrary and capricious based on the limited record presented. As indicated above, this decision is limited to the determination of that narrow issue and is not intended to preclude

any efforts by Belkis Nuñez to secure her rights and avoid the homelessness of her family so vigorously sought by NYCHA.

Accordingly, it is hereby

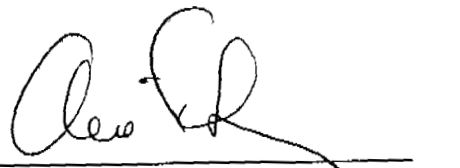
ORDERED AND ADJUDGED that the petition is denied and this proceeding is dismissed without costs or disbursements and without prejudice to the determination of the related issues pending before Judge Rodriguez in the related Housing Court proceeding; and it is further

ORDERED that the cross-motion by NYCHA to dismiss this proceeding as untimely is denied as moot.

This constitutes the decision, order and judgment of this Court.

Dated: May 4, 2010

**MAY 04 2010**

  
\_\_\_\_\_  
J.S.C.  
**ALICE SCHLESINGER**

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