

**Matter of Hernandez v New York City Hous.
Auth.**

2009 NY Slip Op 30257(U)

February 3, 2009

Supreme Court, New York County

Docket Number: 402278-08

Judge: James A. Yates

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SCANNED ON 2/6/2009
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. JAMES A. YATES PART 50Y
Justice

In the Matter of the Application of

MILTON HERNANDEZ,

Index No.: 402278-08

Petitioner,

Motion Seq.: 001

-against-

ORDER and
JUDGMENT

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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

Notice of Motion/Order to Show Cause - Affidavits - Exhibits... _____

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Petitioner seeks to reverse and annul Respondent's May 14, 2008 determination denying him succession rights as a remaining family member to the apartment formerly leased to his father. The petition is denied. The NYCHA's decision was neither arbitrary nor capricious, and was fully justified by the statutes, regulations, policies, and case law that bind the agency (see attached Decision and Order).

Dated 1 PT. 50Y FEB 0 9 2009

HON. JAMES A. YATES

ENTER: _____, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Papers Numbered
FILED
FEB 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50Y

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 In the Matter of the Application of :
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 MILTON HERNANDEZ, :
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 Petitioner, :
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 For a Judgment under Article 78 :
 of the New York Civil Practice :
 Law and Rules :
 :
 :
 -against- :
 :
 NEW YORK CITY HOUSING AUTHORITY, :
 :
 Respondent. :
 -----X

Decision and Order
Ind. No. 03278/08

FILED
FEB 06 2009
COUNTY CLERK'S OFFICE
NEW YORK

Hon. James A. Yates, J.

Petitioner seeks to reverse and annul Respondent's May 14, 2008 determination denying him succession rights as a remaining family member to the apartment formerly leased to his father. The apartment is part of the Johnson Houses, a federally aided public housing project that Respondent owns and operates.

Background

Milton Hernandez (Hernandez) seeks to succeed the tenancy of his deceased father, Epifanio Hernandez (Epifanio), who resided in apartment 5C, at 175 E. 112th Street, New York, New York. The apartment is part of public housing owned and/or managed by the New York City Housing Authority (NYCHA). Epifanio was added to the household in October 1973 (see Resp. Verified Answer, exhibit I). Through the years, all other household members moved out, leaving Epifanio as the apartment's sole occupant (see id., exhibit J). Mr. Hernandez was never listed as an apartment occupant.¹

¹ As with all NYCHA tenants, Epifanio was required to submit to management an affidavit disclosing his family income and composition each year (see 24 CFR 960.257 [a] (stating NYCHA "must conduct a reexamination of family income and composition at least annually")). Epifanio submitted nine affidavits of income

On March 22, 2007, Mr. Hernandez informed management that Epifanio had died. Mr. Hernandez elaborated that he and his alleged wife, Lyndsay Whitener, had lived in the apartment since June 2006, and they sought to transfer the lease to Mr. Hernandez through a remaining family member grievance. (See Resp. Verified Answer, exhibit I; *but see id.*, exhibit L (noting Ms. Whitener was Mr. Hernandez's girlfriend).) In a letter dated March 23, 2007, Mr. Hernandez and Ms. Whitener acknowledged that "we forgot about talking to management about getting put on the lease" (see *id.*, exhibit L).

On August 10, 2007, the Housing Manager interviewed Mr. Hernandez and Ms. Whitener. The Housing Manager explained to them that "they don't qualify [for remaining family member status] because they were never part of the family composition" (see *id.*, exhibit I; see also *id.*, exhibit M). In other words, "Epifanio . . . never requested permission [from management] to allow Milton Hernandez or Lindsay [sic] Whitener to reside in the apartment" (see *id.*, exhibit M). The Manhattan Borough reviewed the Housing Manager's decision and concurred, dismissing the grievance on August 24, 2007 (see *id.*, exhibit O). Mr. Hernandez subsequently submitted a written request, dated September 5, 2007, for a formal hearing before a hearing officer to pursue the matter further (see *id.*, exhibit P).

After two adjournments on December 6, 2007, and February 14, 2008, for Mr. Hernandez to find counsel, Hearing Officer Joan Pannell decided to proceed on the merits on April 9, 2008 (see *id.*, exhibit R, transcript at 37-38). The Housing Assistant testified that Epifanio never sought written permission to add Mr. Hernandez to the household, and management had no knowledge of Mr. Hernandez's existence until he came to the management office to inform them of Epifanio's death (see *id.*, exhibit R, transcript at 55-56).

Mr. Hernandez also testified on his own behalf at the April 9, 2008 hearing. Mr. Hernandez provided conflicting accounts about when he moved into the apartment.² Mr. Hernandez claimed

from 1998 to 2006 and did not list Mr. Hernandez as a household member on any of them (see Resp. Verified Answer, exhibit E). Epifanio died on March 14, 2007 (see *id.*, exhibit K).

² Mr. Hernandez asserted moving into the apartment in 2003 (see Resp. Verified Answer, exhibit R, transcript at 4 (testifying he has "been living [at the apartment] for the past

he moved into the apartment to care for his father, but also claimed his mother was ill in the Bronx, thus splitting his time between the Bronx and Manhattan. Finally, Mr. Hernandez acknowledged that he did not notify management of his presence, and Epifanio did not talk to management about his presence in the apartment.³

On May 1, 2008, the Hearing Officer concluded that Mr. Hernandez and Ms. Whitener "did not obtain permission for residence and hence are not remaining family members as defined by NYCHA's regulations" (see *id.*, exhibit W). Thereafter, Mr. Hernandez brought this Article 78 proceeding.

Discussion

The United States Department of Housing and Urban Development (HUD) regulations state that public housing authorities should have "the maximum amount of responsibility and flexibility in program administration" to provide safe and decent housing for low income families (42 USC § 1437 [a] [1] [C]). However, federal regulations circumscribe who may occupy a public housing unit, and also impose obligations on tenants benefitted by their occupancy of public housing. HUD regulations mandate that housing authorities promulgate and adhere to certain tenant selection guidelines. (See 24 CFR 960.202 [a].) These regulations require NYCHA to screen tenant families' behavior and their suitability for tenancy (see 24 CFR 960.203 [c]).

For example, tenant families must (1) "request [NYCHA's]

four years" [since 2007])), in 2005 (see *id.*, exhibit R, transcript at 77 (testifying he "moved in with [his father] around 2005")), in May 2006 (see *id.*, exhibit L), and in June 2006 (see *id.*, exhibit I). Moreover, even though Mr. Hernandez is not listed on the original tenant data summary, Mr. Hernandez and Ms. Whitener claim Mr. Hernandez resided in the apartment as a child (compare Resp. Verified Answer, exhibit H, with Resp. Verified Answer, exhibit R, transcript at 83, and Pet. Verified Petition, lines 2-3).

³ Mr. Hernandez speculated that Epifanio's home health aid might have assisted Epifanio in drafting letters about Mr. Hernandez. However, Mr. Hernandez could not prove these letters were ever submitted to the development. They are not date-stamped as received by the development and do not appear in Epifanio's tenant folder (see Resp. Verified Answer, exhibit R, transcript at 62-65, 67-69, 79-81).

approval to add any other family member as an occupant of the unit" (24 CFR 966.4 [a] [1] [v]), and (2) "supply any information requested by [NYCHA] or HUD for use in a regularly scheduled reexamination or an interim reexamination of family income and composition in accordance with HUD requirements" (24 CFR 960.259 [a] [2]). Tenants may not "provide accommodations for boarders or lodgers" (24 CFR 966.4 [f] [2]), and use is strictly limited to "the tenant and the tenant's household as identified in the lease" (24 CFR 966.4 [f] [3]).

Gaining succession as a remaining family member requires an occupant to (1) move lawfully⁴ into the apartment, (2) qualify as a specified relative⁵ of the tenant of record, (3) remain continuously in the apartment for not less than one year immediately prior to 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 § [IV] [B], as amended July 11, 2003).

Generally, courts have enforced NYCHA's policy requiring the Housing Manager's written consent to add household individuals in remaining family member claims for public housing (see *Matter of Aponte v N.Y. City Hous. Auth.*, 48 AD3d 229, 229 [1st Dept 2008] ("The denial of petitioners' [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."); *Matter of N.Y. City Hous. Auth. Hammel Houses v Newman*, 39 AD3d 759, 759 [1st Dept 2007] (denying remaining family member argument because occupant "failed to obtain the

⁴ The occupant moves in lawfully if he: (1) is a member of the original tenant family, (2) becomes a permanent member of the tenant family subsequent to move-in with the management's written approval, or (3) is born or legally adopted into the tenant family subsequent to move-in and thereafter remained in continuous occupancy up to and including the time the tenant of record moves or dies (see NYCHA Management Manual, ch IV, subd IV, § [J] [1]).

⁵ Relatives of the tenant of record include: "[h]usband, wife, son, daughter, stepdaughter, father, mother, stepfather, stepmother, brother (including half-brother), sister (including half-sister), grandfather, grandmother, grandson, granddaughter, son-in-law, daughter-in-law, father-in-law, and mother-in-law" (GM 3692 § [IV] [B]).

project management's written permission to reside in the subject apartment while the tenant of record was still alive"); *Matter of Hutcherson v N.Y. City Hous. Auth.*, 19 AD3d 246, 246 [1st Dept 2005] ("denying petitioner's application for remaining family member status on the ground that written permission had not been obtained for her occupancy in the apartment")).⁶

In *Jamison v N.Y. City Hous. Auth.*, 25 AD3d 501, 502 [1st Dept 2006], the court held that "petitioner's application for 'remaining family member' status on the ground that written permission had not been obtained for her occupancy in the apartment, is neither arbitrary nor capricious . . . Respondent never gave the tenant of record written permission for petitioner to join his household, and petitioner admitted that no such permission was ever obtained from project management for her to reside in the subject apartment. The fact that no written permission was ever obtained was further corroborated by the tenant's annual income affidavits for the years petitioner allegedly lived in the apartment, in which he listed no occupants of the apartment other than himself, and by the testimony of the Housing Assistant that prior to the tenant's death, he had never requested that anyone join his household. Nor was there any reference to petitioner in the tenant's file while he was alive. The record affords no basis for relieving petitioner of the written notice requirement, since she failed to establish that respondent knew or implicitly approved of her permanent residency in the apartment."

⁶ (But see *Matter of McFarlane v N.Y. City Hous. Auth.*, 9 AD3d 289, 291 [1st Dept 2004] (denying succession but noting "[o]ne type of circumstance that could . . . [establish] a right to be treated as a remaining family member despite the absence of notice or written consent, would be a showing that NYCHA was aware of the petitioner having taken up residence in the unit, and implicitly approved it"); but see also Section 8 rent subsidies cases, *2013 Amsterdam Ave. Hous. Assoc. v Estate of Almeda Wells*, 10 Misc 3d 142A, 142A [App Term 2006] ("[A]bsence of appellant's name on the family composition document was not fatal to her succession claim otherwise established by the trial evidence."); *Upaca Site 7 Assoc. v Hunter-Crawford*, 12 Misc 3d 1154A, 1154A [Civ Ct, NY County 2006] (same).) In any case, here, NYCHA was unaware of Mr. Hernandez's presence in the apartment (see Resp. Verified Answer, exhibit R, transcript at 55-56 (Housing Assistant's testimony); see also *id.*, exhibit L, and exhibit R, transcript at 79 (showing Mr. Hernandez admitting that Epifanio never spoke to management about his presence, and that Mr. Hernandez never notified management)).

The facts in the present case mirror the facts in *Jamison, supra*, as management never gave Mr. Hernandez written permission to join Epifanio's household. Mr. Hernandez admitted that Epifanio never talked to management about his presence, and Mr. Hernandez never notified management about his presence either (see Resp. Verified Answer, exhibit L, and exhibit R, transcript at 79). Epifanio's tenant data summaries and affidavit of income also did not list Mr. Hernandez as an apartment occupant (see *id.*, exhibits E, H, and J). Additionally, Housing Assistant Cassaunder Harris testified that Epifanio never sought written permission for Mr. Hernandez to join the household, and management was unaware of Mr. Hernandez's existence until after Epifanio died (see *id.*, exhibit R, transcript at 55-56). Finally, Epifanio's file showed no reference to Mr. Hernandez.

Although Mr. Hernandez did not obtain the requisite written permission, he claims he is still entitled to a lease because Epifanio promised the apartment to him (see *id.*, exhibit R, transcript at 79). Public housing apartments, however, cannot be bequeathed (see *Matter of Levin v Dept. of Hous. Preserv. & Dev. of City of N.Y.*, 140 Misc 2d 110, 113 [Sup Ct, NY County 1988] ("Clearly, subsidized housing ought not to be allowed to be passed down from one tenant generation to another . . . [The reason] I must issue a ruling contrary to such sound policy is due to the [City's] sloth."); see also *Matter of Farkas v N.Y. City Hous. Auth.*, 17 Misc 3d 1122A, 1122A [Sup Ct, NY County 2007] (noting NYCHA "is not obliged to permit a scheme to pass the apartment from one family to another"))).

Further, Mr. Hernandez suggests that he is entitled to the lease because he paid use and occupancy. However, rent payment does not confer tenancy rights, and payments cannot substitute for written permission (see *Matter of Barnhill v N.Y. City Hous. Auth.*, 280 AD2d 339, 339 [1st Dept 2001] ("Petitioner, whom the original tenant apparently identified as her 'niece,' was never an authorized tenant of this public housing, notwithstanding the fact that she may have paid the rent on occasion."); *Matter of Kolarick v Franco*, 240 AD2d 204, 204 [1st Dept 1997] ("Nor is respondent estopped from denying petitioner tenancy status by having accepted rent from him after his mother died.")).

Lastly, Mr. Hernandez contends that he should succeed to the apartment as a matter of equity because (1) he moved in to care for his father who was allegedly too ill to request written permission, (2) Mr. Hernandez will have nowhere to go, and (3) Mr. Hernandez, himself, has medical issues (see Pet. Verified Petition, lines 16-18, 28-31, 39). But, the Appellate Division, First Department expressly rejected a mitigating factor approach

to remaining family member claims (see *McFarlane v N.Y. City Hous. Auth.*, 9 AD3d 289, 290-291 [1st Dept 2004], revg 1 Misc 3d 744, 756 [Sup Ct, NY County 2003] (reversing trial court decision granting succession in part based on "mitigating circumstances" such as petitioner's age and tenant's infirmity)).

Conclusion

In an Article 78 petition, a reviewing court is limited to determining whether the agency determination is arbitrary and capricious or an abuse of discretion (see e.g. *Matter of Pell v Bd. of Educ.*, 34 NY2d 222, 230-231 [1974]). Judicial reversal of an administrative order pursuant to CPLR Article 78 is for instances in which the agency acted arbitrarily or capriciously (see *Fiore v O'Connell*, 297 NY 260, 262 [1948]). A determination is arbitrary and capricious if it is untenable as a matter of law (see Siegel, *New York Practice*, § 561, at 967 [4th ed 2005]). If a rational basis supports an administrative order, judicial review is narrow, and the court must uphold the agency's finding (see *Pell*, 34 NY2d at 231).

The Court concludes that NYCHA's denial of Mr. Hernandez's request for remaining family member status was neither arbitrary nor capricious, and was fully justified by the statutes, regulations, policies, and case law that bind the agency. The Court, therefore, dismisses the petition.

This constitutes the Decision and Order of the Court.

Dated: February 3, 2009

ENTER:

1 PT. 50Y FEB 03 2009

James A. Yates, J.S.C.

NON. JAMES A. YATES

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