

<b>Matter of Garcia v New York City Hous. Auth.</b>
2009 NY Slip Op 31228(U)
June 1, 2009
Supreme Court, New York County
Docket Number: 400349/09
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN B. LOBIS

PART 6

Index Number : 400349/2009

**GARCIA, PEDRO LUIS**

VS.

**NYC HOUSING AUTHORITY**

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE 5-20-09

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-6

7-28

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~~

*petition decided in accordance  
with accompanying decision,  
order, and judgment.*

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

**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).

Dated: 6/1/09

JBL

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X  
In the Matter of the Application of

PEDRO LUIS GARCIA,

Petitioners,

Index No. 400349/09

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

**Decision, Order and Judgment**

v.

NEW YORK CITY HOUSING AUTHORITY,

Respondent,

*[Faint, illegible text, possibly a stamp or signature area]*

-----X  
**JOAN B. LOBIS, J.S.C.:**

Petitioner Pedro Garcia brings this petition, pursuant to Article 78 of the C.P.L.R., seeking to overturn the decision of respondent, the New York City Housing Authority (“NYCHA” or the “Authority”) to deny his request for succession rights to apartment 14H at 430 West 125th Street, which is known as Grant Houses (the “Apartment”). The Authority opposes the petition.

Although petitioner was an original family member in the Apartment, he moved out some years ago. He claims to have moved back into the Apartment in or about 2006. Petitioner’s mother completed paperwork on or about September 27, 2007, requesting permanent permission for petitioner to return to assist her. Approval was granted on October 9, 2007. Petitioner’s mother died on December 10, 2007.

After advising the management office of his mother’s death, petitioner requested permission to remain in the Apartment. In a decision dated January 24, 2008, Rollin Deas, the

Project Manager, denied the request on the ground that petitioner had not been given permission to reside in the Apartment one year prior to the time of his mother's death. By decision dated March 7, 2008, the Borough Director, Virgilio Cruz, agreed with the disposition of Mr. Deas. The decision notes that although petitioner is current in his rent and passed the criminal background check, he did not live in the Apartment, with management's permission, for the requisite one-year period. The decision notes that he vacated the Apartment as of December 11, 2004<sup>1</sup> and did not receive permission to reside there until October 2007.

Petitioner appealed, and a hearing was held before NYCHA Hearing Officer Joan Pannell on October 30, 2008, after an adjournment to allow petitioner time to obtain counsel. Petitioner was unable to obtain counsel, and appeared pro se at the hearing. In a decision dated November 18, 2008, Hearing Officer Pannell rendered a written determination finding that the grievance was not sustained. She noted that while petitioner "may well be a deserving individual," he is not a residual tenant, as defined by NYCHA's regulations, since he was unable to show the required one-year period of continuous and authorized residence prior to his mother's death. The Hearing Officer continued that even if petitioner had obtained permission to reside there in June 2007, he would still be unable to demonstrate continuous and authorized residence for the requisite one-year period. The Hearing Officer noted on the record that she was constrained by the one-year rule (see GM -3692, dated July 11, 2003, at IV[B]), and could not "stretch" petitioner's alleged length of stay to come within the one-year period. The Hearing Officer's decision was approved by

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<sup>1</sup> According to the transcript of the hearing, petitioner was residing elsewhere as of December 15, 1986, and was not listed on an income affidavit after 1984.

the Secretary of NYCHA in a Determination of Status notice, dated December 3, 2008. A Ten Day Notice to Quit was served on or about February 9, 2009. This Article 78 proceeding followed.

In the petition, petitioner affirms that he moved back in with his mother, who was suffering from cancer, and needed his assistance. Petitioner states that he has lupus and is not in good health, has no other family members, and has no place else to go. He states that he is a good tenant, who is current on his rent, and passed the criminal background check. He wants to stay in the Apartment, or asks to be considered for a smaller apartment or studio. Petitioner seeks to retain his late mother's possessions, and is concerned that he will have to give them up if he is forced to vacate the Apartment.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id.

It is undisputed that while petitioner was an original family member, he vacated the Apartment and did not reside in the Apartment, with permission, for more than one year before his

mother's death. Even if this court were to credit petitioner's uncorroborated testimony that he moved back into the Apartment sometime in 2006, petitioner did not testify as to the month when he allegedly moved back in, and he was not listed on the income affidavits for 2006 and 2007. He did not present any evidence that the Authority was aware that he moved back into the Apartment in 2006. The earliest date that petitioner testified to management being aware that he and his mother were seeking permission for him to reside in the Apartment was September 2007. The earliest letter from a hospital social worker, who wrote to advise that petitioner's mother will need her son's assistance when she is released from the hospital, is dated August 2, 2007. Notably, the letter states that petitioner "will be residing" at his mother's home, so the letter does not support petitioner's statement that he moved back in 2006.

Although the court sympathizes with petitioner, the court, like the Hearing Officer, is constrained to follow the rules of the United States Department of Housing and Urban Development and NYCHA which strictly limit residence in federally-funded housing projects to those who are authorized to live there. This includes individuals who are listed on the lease and income affidavits, and for whom permission has been granted to reside there. See 24 C.F.R. § 966.4(f)(3) and § 966.4(a)(1)(v). The NYCHA rule of one year occupancy, which is more lenient than the two-year occupancy rule in other government-run housing developments, is rationally related to the goal of making sure that public housing is fairly allocated. Since petitioner did not prove that he resided in the Apartment for one year prior to his mother's death, the court is constrained to find that it was not arbitrary and capricious for respondent to find that petitioner cannot succeed his mother as a tenant to the Apartment. Aponte v. New York City Housing

Authority, 48 A.D.3d 229 (1st Dep't 2008) (finding that there is "no basis to relieve petitioners of the written permission requirement"); McFarlane v. New York City Housing Authority, 9 A.D.3d 289, 290 (1st Dep't 2004) (grandchildren of deceased tenant cannot succeed to apartment where written permission was never granted).

The petition is denied and this proceeding is dismissed. This constitutes the decision, order and judgment of the court.

Dated: June 1, 2009

  
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JOAN E. LOBIS, J.S.C.

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