

<b>Matter of Ortiz v New York City Hous. Auth.</b>
2009 NY Slip Op 31998(U)
August 31, 2009
Supreme Court, New York County
Docket Number: 401026/09
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER

PART 5

Index Number : 401026/2009

ORTIZ, DOMINGO

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

VS

NYC HOUSING AUTHORITY

MOTION DATE \_\_\_\_\_

Sequence Number : 001

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

ARTICLE 78

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

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

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

PAPERS NUMBERED

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

1

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

2

3

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

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

**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).

Dated: 9/1/09

  
**HON. EILEEN A. RAKOWER** C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 5

-----X

In the Matter of the Application of  
DOMINGO ORTIZ,

Index No.  
401026/09

Petitioner,

-against-

DECISION  
and ORDER

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

Mot. Seq. 001

-----X

HON. EILEEN A. RAKOWER:

Petitioner Domingo Ortiz (“Petitioner”), acting *pro se*, brings the instant petition pursuant to CPLR Article 78 for an order setting aside the February 4, 2009 decision of Respondent New York City Housing Authority (“NYCHA”), which denied Petitioner succession rights to Apartment 1H in 210 East 102<sup>nd</sup> Street in New York, New York (“the Apartment”).

Osvaldo Bobe (“Bobe”) was the Apartment’s tenant of record from 1997 until 2008. As a NYCHA tenant, Bobe was required to submit affidavits of income and family composition annually. In his last affidavit, which reported the period between April 1, 2004 and March 31, 2005, he listed himself, a daughter, and a son as the occupants of the Apartment. NYCHA commenced a termination of tenancy proceeding against Bobe on December 26, 2006 based upon his failure to verify his income and identify the other occupants of the Apartment and their respective incomes. Although Bobe failed to appear at his hearing and the hearing officer recommended termination of the tenancy, NYCHA did not pursue the matter any further. In June 2007, Bobe advised management that he was hospitalized in Puerto Rico and was unable to return to the apartment as a result of his medical condition.

Petitioner has lived in the Apartment since about August 2007. Rent on the Apartment had been in arrears for some time and, according to Petitioner, he and Bobe

agreed that the former would move into the apartment and pay the rent in arrears. Although Petitioner and Bobe are not blood relatives, Petitioner refers to him as an "uncle" because they are close, and because Bobe had dated Petitioner's aunt. However, in June 2008, Petitioner and Bobe's daughter (who also resided in the apartment) had a disagreement over the daughter's desire to have her boyfriend move into the apartment. Petitioner took issue with this because he had a young daughter residing with him in the apartment. Petitioner states that this disagreement prompted Bobe to submit a written Notice of Intent to Vacate the Apartment on June 18, 2008.

On June 23, 2008, Petitioner met with management and explained that Bobe and most of his family had moved out of the apartment several years ago, and that he was requesting remaining-family-member status. Management conducted a criminal background check of Petitioner on July 1, 2008. The background check disclosed convictions for attempted assault in the first degree in 1997; and for attempted criminal possession of a controlled substance in the third degree and criminal possession of a weapon in the third degree in 2002.

Petitioner met with the Housing Manager on June 27, 2008. After the meeting, the Housing Manager concluded that Petitioner was not legally entitled to the Apartment due to his prior convictions. The Housing Manager forwarded her decision to the Manhattan District Management Office ("District Office") for review. On July 11, 2008, the District Office upheld the Housing Manager's initial determination to deny Petitioner's grievance on the grounds that (1) Petitioner was not an original family member under NYCHA regulations; (2) the lessor of the Apartment neither requested nor obtained permission for Petitioner to remain in the Apartment; and (3) Petitioner's criminal convictions render him ineligible for NYCHA tenancy until 2014.

Petitioner subsequently requested a formal hearing to resolve his remaining-family-member claim of entitlement to the Apartment. On September 24, 2008, NYCHA's Impartial Hearing Office sent Petitioner a letter advising him of his hearing date, as well as a copy of NYCHA's grievance procedures, which advised Petitioner of his right to be represented by counsel at the hearing, and of his right to cross-examine NYCHA witnesses.

The hearing was held before Hearing Officer Ambert on January 14, 2009. After a hearing on the record, Hearing Officer Ambert found that Petitioner's grievance that he was entitled to possession of the Apartment as a remaining family

\* 4 ]

member was not sustained, on the grounds that Petitioner did not qualify as a remaining family member under NYCHA rules and regulations. NYCHA's decision to deny Petitioner's grievance became final on February 4, 2009, when the NYCHA Board approved Hearing Officer Ambert's decision.

Petitioner commenced the instant Article 78 proceeding on April 30, 2009. Petitioner contends that the decision to deny his grievance should be reversed because he was not represented by counsel at the hearing, and did not know that he could cross-examine NYCHA witnesses; the hearing was "rushed and unfair"; NYCHA did not fully consider Petitioner's evidence; and NYCHA allowed Petitioner to remain in the apartment despite being aware of "the entire scenario." Petitioner submits a verified petition. Annexed to the petition as exhibits are copies of Hearing Officer Ambert's decision; NYCHA's prior proceeding against Bobe; various receipts for payments allegedly made by Petitioner; Bobe's 6/18/08 Notice of Intent to Vacate; and return receipts for rent payments allegedly made by Petitioner.

NYCHA has submitted a verified answer and a memorandum of law in support thereof. Annexed to NYCHA's answer as exhibits are portions of NYCHA's Management Manual; the NYCHA Resident Lease Agreement pertaining to the subject Apartment; Bobe's 8/30/05 annual Affidavit Income form; NYCHA's grievance procedures; a Tenant Data Summary for the Apartment from 1997; documents pertaining to the proceedings commenced against Bobe; Bobe's 6/18/08 Notice of Intent to Vacate; NYCHA interview records; Petitioner's criminal background check; the certificate of disposition pertaining to Petitioner's criminal charges; the 7/11/08 letter from NYCHA to Petitioner from the District Office inviting Petitioner to schedule an interview; a 8/5/08 District Grievance Summary; NYCHA's 9/24/08 letter advising Petitioner of his upcoming hearing; NYCHA's Notice of Counterclaims/Affirmative Defenses; the transcript of Petitioner's administrative hearing; cable bills introduced by Petitioner into evidence; Hearing Officer Ambert's 1/20/09 decision; and the 2/4/09 Determination of Status, wherein the NYCHA Board approved Hearing Officer Ambert's decision.

It is well settled that the "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency.'" (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 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*



As for Petitioner’s claim of entitlement to possession of the Apartment as a remaining family member, Chapter VII, Section E(1)(a) of the NYCHA Management Manual defines a “remaining family member” as

- Persons who were member(s) of the original tenant family, or
- who became permanent member(s) of the tenant family subsequent to move-in with the written approval of the project management, or
- who subsequent to move-in were born or legally adopted into the tenant family and thereafter, and remained in continuous occupancy up to an[d] including the time the tenant of record moves or dies.

In addition to these criteria, Section E(1)(a) requires that the putative remaining family member be “otherwise eligible for public housing in accordance with the admission standards for applicants contained in the Housing Applications Manual.” Any remaining family member otherwise eligible shall undergo a criminal background check.

Petitioner’s claim of entitlement to the apartment as a remaining family member clearly fails, as Petitioner cannot establish that he meets any one of the above criteria.

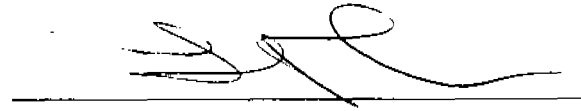
As for Petitioner’s claim that NYCHA knew of the arrangement whereby he inhabited the Apartment and acquiesced in his doing so, this is contradicted by Petitioner’s own testimony at the hearing, which stated that management was unaware of Petitioner’s presence in the Apartment until he “went in and spoke to them... [w]hen the apartment was gonna get closed” (Hearing Transcript at 13-14). Moreover, even if NYCHA were somehow aware of Petitioner’s occupancy for the approximately ten months between Petitioner’s entry into the apartment and Bobe’s Notice of Intent to Vacate, it is well settled that a governmental agency such as NYCHA cannot be estopped from discharging its statutory duties (*see Schorr v. New York City Dep’t of Hous. Pres. & Dev.*, 10 N.Y.3d 776, 778-79 [2008]).

Wherefore, it is hereby

ADJUDGED that the petition is denied and the proceeding is dismissed.

\*7]  
This constitutes the decision and order of the court. All other relief requested is denied.

Dated: August 31, 2009



EILEEN A. RAKOWER, J.S.C.

**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).