

Matter of Cantu v New York City Hous. Auth.

2009 NY Slip Op 32667(U)

November 12, 2009

Supreme Court, New York County

Docket Number: 400059/09

Judge: Nicholas Figueroa

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

PRESENT: NICHOLAS FIGUEROA

PART _____

Justice

Index Number : 400059/2009

CANTU, AIDA

VS.

NEW YORK CITY HOUSING AUTHORITY

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 400059-09

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 ...

1

Answering Affidavits — Exhibits _____

1

Replying Affidavits _____

1

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

See Decision and Judgment.

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: 11/12/09

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: _____ DO NOT POST

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

In the Matter of the Application of

AIDA CANTU,

Petitioner,

Index No. 400059/09

for a Judgment pursuant to Article 78 of the Civil
Practice Law and Rules,

**DECISION AND
JUDGMENT**

- against -

NEW YORK CITY HOUSING AUTHORITY

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk
and notice of entry cannot be served hereon. Respondent
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Office (Section
141B).
-----X

Nicholas Figueroa, J.S.C.:

Petitioner in this Article 78 proceeding seeks to annul a Determination of Status issued by the New York City Housing Authority following a hearing. The Determination adopted the hearing officer's decision denying petitioner's claim to succeed to her aunt's apartment lease in a federally subsidized, low-income housing development.

It is undisputed that petitioner's aunt became the tenant of record in 1990 and continued to occupy the apartment until 2006, when she relocated to Puerto Rico. Petitioner moved into the apartment in 1998 and claims that she and her aunt soon thereafter asked the building's management orally to give her permanent permission to reside with her aunt. Petitioner also claims that she and her aunt were given the impression that no greater formality was needed for such permission. In 2003, however, petitioner and her aunt learned otherwise, when they again visited management offices after respondent's discovery that the aunt had understated her income

on annual income reports. Arrangements were made at that point for repayment of the excess assistance that the aunt had received as the result of her under-reporting. Petitioner claims that at the same time she was given two permanent-permission-request forms. She further claims to have returned one completed original to management in October 2003, for processing, but received no word on the disposition of her request.

After the aunt failed to file her annual income review papers in 2004, respondent commenced a proceeding to terminate her tenancy, based not only on that delinquency, but also, on her failure to report the composition of her household and on her failure to sign a new lease. After a series of defaults by the aunt, respondent's Board formally terminated the aunt's lease on March 8, 2006. The aunt relocated to Puerto Rico in July 2006. In December 2006, the aunt signed a Notice of Intent to Vacate. A few weeks thereafter, petitioner filed a grievance in which she sought to be issued a lease in her own right, as a "remaining family member." Petitioner's claim was initially denied at a local level, because there had never been written authorization for her permanent occupancy, a prerequisite to remaining-family-member status (*see* NYCHA Management Manual, Chapter IV, Subdivision IV(J); *id.*, Chapter VII(E); NYCHA General Management Directive 3692, *as amended* 11/22/02). The formal hearing followed.

At the hearing, petitioner served as her only witness. Her documentary evidence confirmed her residency in the subject apartment as of 2000; reflected the repayment arrangement to which her aunt had agreed in 2003; included the aunt's 2006 Notice of Intent to Vacate; and substantiated petitioner's assertions that she suffers from various physical and emotional ailments. Respondent for its part also offered only one witness, a Housing Authority

employee. Her testimony established that respondent's file for the aunt's tenancy does not contain any copy of an executed form request for permanent permission or any other indication that such a form had ever been filed.

The threshold question is whether this matter must be transferred to the Appellate Division as a challenge to the sufficiency of the evidence supporting the Determination (CPLR 7804[g]). In this connection, it is noted that the petition does not question the Determination in terms of the sufficiency or substantiality of evidence. In other words, petitioner does not expressly fault the hearing officer's decision as being without support in the record. Instead, petitioner asks that the Determination be annulled on several legal and equitable grounds that she proposes warrant Article 78 relief (CPLR 7803[3]). Accordingly, the instant matter must be decided by this court (*Ferguson v Meehan*, 141 AD2d 604, 605).

Petitioner first contests the hearing officer's observation that, even if a permission request had been filed in October 2003, as petitioner alleges, it would in any event have been futile, since, under respondent's then applicable rules, a niece was not included within the category of relatives who might be formally added to a tenant's household (Manual GM-3692, as amended). But petitioner herself is in error, wrongly assuming that the earlier, more expansive rule would have been grand-fathered in her case (*see* Appendix to GM-3692 Amended).

Petitioner next faults respondent for the failure of its management to advise her and her aunt, during their 1998 visit to the management office, that more than merely an oral request for permanent permission would do. But, as a challenge to the Determination, such contention is unavailing for at least two reasons. First, petitioner concedes that she was aware of the filing requirement by 2003. Second, respondent's failure in such respect would not bar it from

enforcing the rules that it has promulgated pursuant to statutory mandate (see 24 C.F.R. § 966.1 *et seq.*), including the rule preconditioning remaining-family-member status on prior written permanent permission (see *Hutcherson v New York City Housing Auth.*, 19 AD3d 246; *Stokely v Franco*, 251 AD2d 97).

Petitioner apparently would also make much of her allegation that her aunt filed a “Notice of Intent to Vacate” only because respondent had pressed her into doing so without pointing out that it would subvert petitioner’s position on her grievance. But the merits of petitioner’s grievance are fatally undercut in any event by the aunt’s prior failure to have obtained a permanent permission for petitioner’s occupancy.

Finally, petitioner urges that Article 78 relief be allowed her in view of her lengthy occupancy of the apartment, without which she fears she may be homeless, and in light of her ill health. As to this, it is observed that a long-standing, but unauthorized occupancy cannot bootstrap a grievant into, in effect, a preferred claim to a scarce resource (public housing) at the expense of other would-be tenants whose circumstances may be as or more fragile (*see*

McFarlane v New York City Housing Auth., 9 AD3d 289, 290-91).

On the basis of the foregoing, the petition is denied and the proceeding is dismissed.

This constitutes the decision and judgment of the court.

Dated: November 12, 2009

ENTER:



A handwritten signature in cursive script, appearing to be 'J.S.C.', is written over a horizontal line.

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).