

Matter of Montañez v New York City Hous. Auth.

2010 NY Slip Op 30787(U)

April 5, 2010

Supreme Court, New York County

Docket Number: 402583/09

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lolis

PART 6

Index Number : 402583/2009
MONTANEZ, RAFAEL
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE 1/6/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-2
3-30

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

DECLINED 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 1412).

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 4/5/10

JBL
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
In the Matter of the Application of
Rafael Montañez,

Petitioner,

Index No. 402583/09

Decision, Order 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 based hereon. To
obtain entry, counsel or authorized representative must
respond in person at the Judgment Clerk's Desk (Room
751B).

JOAN B. LOBIS, J.S.C.

Petitioner Rafael Montañez, proceeding pro se, brings this special proceeding against the New York City Housing Authority ("NYCHA" or the "Authority") under Article 78 of the C.P.L.R., seeking to reverse the Authority's determination dated July 10, 2009. He seeks a lease to the subject NYCHA apartment, 1408 Webster Avenue, # 19E, Bronx, New York (the "Apartment") as a "remaining family member" of Gloria Cruz, his alleged common law wife. Ms Cruz, the tenant of record of the Apartment, died on February 27, 2008.

It is undisputed that petitioner and Ms. Cruz were originally both listed as tenants of record of the Apartment. A Tenant Data Summary indicates that petitioner was no longer residing in the Apartment as of April 2001. Included in the Authority's papers is a copy of a "to whom it may concern" letter purportedly from Ms. Cruz, dated March 4, 2001, which indicates that petitioner was no longer living in the Apartment and that was why Ms. Cruz was having difficulty paying her rent. A second "to whom it may concern" letter, dated March 29, 2001, indicates that petitioner was residing at a private house on Bronx River Avenue with someone named Wilfredo Sanchez. Although the letter says, "I, Raphael Montañez, will [sic] like to notify that I have moved out of

Gloria Cruz's apartment", it is signed by Wilfredo Sanchez. Ms. Cruz subsequently signed a lease for the Apartment in her name alone on May 24, 2001.

Mr. Montañez asserts in his petition that he went to Puerto Rico on May 13, 2001, because his mother was dying. He states that his wife gave him a letter to sign. The letter is in English. He states that he cannot read or write in English, so he did not know what he was signing, but he trusted her. He asserts that on that letter, she wrote that he was moving out. He was in Puerto Rico for two months. When he returned, the Apartment was in her name. He asked Ms. Cruz what happened, and she told him that the letter he signed was to remove him from the lease. Petitioner states that, a few times, he went to the management office to request to add himself to the lease, but was told that Ms. Cruz had to come to the office to sign the papers; it is unclear when these requests were made. He states that Ms. Cruz was hospitalized and very ill. Mr. Montañez asserts that he was in the Apartment taking care of Ms. Cruz until she died. He asks to keep the Apartment. He states that he is sick, that he suffers from insulin-dependent diabetes, a herniated disc in his back, osteoporosis, and high blood pressure.

Ms. Cruz did not list petitioner as a member of her household on her affidavits of income from 2003 to 2007. A rent change notice dated January 2008 listed only Ms. Cruz as an authorized occupant of the Apartment. On or about June 23, 2006, the housing manager interviewed petitioner regarding a "185 letter" sent to Ms. Cruz about an unauthorized person living in the Apartment. Management had been notified that petitioner had applied for an Authority apartment using the address of Ms. Cruz's Apartment as his home address. He stated he did not live with Ms.

Cruz, and that he was only there temporarily because Ms. Cruz is sick and needs help until she gets a home attendant. The manager advised petitioner to bring in, by the following Friday, verification of his home address. The notes in the tenant interview record also indicate that the manager also gave petitioner "a temporary permission to join the household" to assist Ms. Cruz, although it is unclear whether this note refers to the form to apply for temporary permission to join the house, or actual permission to join the household temporarily. Regardless, on or about June 24, 2006, petitioner submitted a written request for temporary permission to live with Ms. Cruz. He requested to stay for six months "because the apartment belongs to Gloria Cruz" and he had only been staying with her due to her physical impairment. Petitioner listed his home address on the form as 2035 Marmion Avenue, Bronx, New York (the "Marmion Avenue Address"), and listed his relationship to the tenant as "friend". The form was signed by petitioner and Ms. Cruz. This request was disapproved by the NYCHA manager on or about November 1, 2006, on the grounds that "no documentation submitted. Raphael Martinez [sic] was part of household; OHH 4/01." (Emphasis in original.) A letter to Ms. Cruz from G. Glenn, the Housing Assistant, dated November 14, 2006, informs her that permission for petitioner was disapproved because no documentation was submitted that petitioner was part of the household, because he has been out of the household since April 2001.

On or about February 20, 2008, the tenant interview record reflects that petitioner reported to the housing manager that Ms. Cruz was in the hospital and that he asked if he could take possession of the Apartment if she died. He was told to return the next day to speak with the area housing assistant, Mrs. Hamilton, because he was not authorized to live in the Apartment. Petitioner returned the next day and was informed that the head of household, Ms. Cruz, would have to come

to the office to request permission. Petitioner stated she was in the hospital and that he did not know when or if she would be leaving the hospital. Petitioner asked whether he could have the Apartment if Ms. Cruz passed away, and he was told no, that he has no rights to the Apartment, and that he would have to vacate the Apartment. Ms. Cruz died the following week.

In August 2008, petitioner met with the housing manager in the office to ask to stay in the Apartment. It was explained to petitioner that he is not entitled to the Apartment and that he would have to wait for the manager's approval. He was also asked to produce the original death certificate.

On or about November 20, 2008, the project manager, Evonne Parker, met with petitioner. The project grievance summary indicates that petitioner, the common law husband of Ms. Cruz, was a lessee but moved out in March 2001. He asked to remain in the Apartment. The guidelines for an eligible remaining family member were thoroughly explained to petitioner. He alleged that he has been residing in the Apartment since Ms. Cruz passed away and has been paying the rent on time. He alleged that he had nowhere else to go. The project manager denied him remaining family member status based on the facts that he had been out of the household since March 2001 and that a supplemental security income ("SSI") award letter, dated August 21, 2008, was addressed to petitioner at the Marmion Avenue Address.

Petitioner made a claim for a remaining family member grievance hearing. According to a letter to petitioner from Victor Hernandez, Manager of the Bronx Management Department,

dated December 4, 2008, based on that claim, an informal grievance hearing with the development management was completed. The letter indicates that the Bronx Management Department would now review petitioner's claim, and he was invited to submit written documentation in support of his claim. He was informed that he was entitled to an informal grievance hearing with Borough Management. If he failed to schedule the informal hearing or failed to submit any additional documentation by December 18, 2008, the claim would be reviewed and petitioner would be notified in writing of the decision. Petitioner did appear for a review of his remaining family member grievance. According to a district grievance summary, on or about January 23, 2009, Mr. Hernandez found petitioner ineligible to enter into a lease with NYCHA for the Apartment because (1) if he was living in the Apartment, it was without NYCHA's written permission, and (2) NYCHA procedure states that the tenant of record must have obtained permission from management in writing to allow the remaining family member to reside in the household one year before he/she died or vacated the apartment.

On or about January 31, 2009, petitioner requested a formal hearing before an impartial hearing officer. The hearing was scheduled for May 6, 2009. The Authority notified petitioner of its counterclaims, affirmative defenses, and/or defenses: "(1) Grievant has not met the hearing prerequisites in accordance with [NYCHA's] Grievance Procedures, paragraph 9; and (2) Grievant is not a Remaining Family Member in accordance with [NYCHA's] Management Manual, Chapter VII, Section E." The hearing was adjourned to June 24, 2009, to allow petitioner time to obtain counsel. However, he proceeded pro se on June 24. The Authority presented documentary evidence that petitioner was not an authorized occupant of the Apartment. Petitioner confirmed that

he told the project management that he was just staying in Ms. Cruz's apartment temporarily because she was sick. He testified that he was receiving his SSI at the Marmion Avenue Address, but that he was staying at the Apartment. He testified that the Marmion Avenue Address is his son's apartment. He was back and forth between the Marmion Avenue Address and the Apartment until about August 2006 when he completely moved out from the Marmion Avenue Address. He testified that he paid the rent on time, and that if he has to leave, he would be hard-pressed to find an affordable apartment. On or about July 10, 2009, the Impartial Hearing Officer, Joan Pannell, issued a disposition that the grievance was not sustained. The Hearing Officer found that even had petitioner been granted a request for temporary permission for residence, that permission would have expired upon the tenant's death. Management could not have approved a request for permanent permission to reside in the Apartment unless petitioner showed that he had a legal relationship with the tenant, and the record did not demonstrate that he had a legal domestic partnership with the tenant. While he had been an authorized member of the household until 2001, NYCHA's regulations were subsequently amended. Since petitioner did not show that he should have obtained permission for residence, the Hearing Officer determined that he is not a remaining family member as defined by NYCHA's regulations. NYCHA approved the Hearing Officer's decision in a written determination of status dated July 22, 2009. This special proceeding followed.

Petitioner challenges NYCHA's determination denying him succession rights to the Apartment as a remaining family member. The Authority maintains that petitioner, at some point moved out of the Apartment and never obtained written permission to rejoin Ms. Cruz's household. The Authority further maintains that petitioner is not within one of the categories of relatives to the

tenant eligible for permanent permission to join the household. Finally, the Authority argues that, if indeed petitioner has been residing in the subject Apartment, he failed to disclose his income to NYCHA to calculate the amount of rent charged.

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. In re 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. The administrative determination must be supported by some credible evidence. Goldman v. NYCHA, 18 Misc.3d 1102(A) (N.Y. Sup. Ct. 2007); See also Guzman v. Safir, 293 A.D.2d 281 (1st Dep't 2002), lv. denied 98 N.Y.2d 614 (2002). When NYCHA fails to follow its own guidelines and procedures, its decision must be annulled. Padilla v. Martinez, 300 A.D.2d. 96, 97 (1st Dep't 2002); see generally Frick v. Bahou, 56 N.Y.2d 777 (1982).

Pursuant to the NYCHA occupancy and remaining family member policy revisions of July 11, 2003, those persons entitled to remaining family member status include those who continuously occupied the household and are original tenant family members; persons born to, adopted by, or judicially declared to be the ward of the tenant of record or an authorized permanent family member; or persons who obtained written permission for permanent occupancy from the


housing manager prior to November 24, 2002. Additionally, certain other persons may be entitled to remaining family member status if they have received written permission from the housing manager for permanent occupancy on or after November 24, 2002, and who thereafter remain in continuous occupancy for not less than one year prior to the date the tenant of record vacates the apartment or dies, including certain enumerated relatives of the tenant of record (including spouses, but not including common law spouses), registered domestic partners of the tenant of record, who must submit a certificate of domestic partnership registration, and original family members born to, legally adopted by, or judicially declared to be the ward of the tenant, who moved out and subsequently obtained written permission to permanently rejoin the household from the housing manager.

It is uncontested that petitioner did not reside continuously in the Apartment; that he left at some point; and that Ms. Cruz was the sole tenant from 2001 onward as demonstrated by her lease, income verifications, and rent increase notice. Petitioner may very well have returned to the Apartment to take care of Ms. Cruz in 2006. But, neither temporary nor permanent permission for petitioner to re-enter the household was granted. It is troubling that the Hearing Officer based her decision, in part, on the fact that there was nothing in the record to show that petitioner had a legal domestic partnership with the tenant, since he was not represented by counsel at the hearing, he spoke through a Spanish interpreter, and there was no testimony whatsoever in the transcript of the hearing that touched on petitioner's legal relationship to Ms. Cruz. Nevertheless, even if petitioner and Ms. Cruz had a legally recognized relationship, after leaving the household and being taken off the lease, petitioner never obtained written permission to reside there once again. Since permission

to add petitioner as an occupant was never obtained, either implicitly or in writing, the court is constrained to find that it was not arbitrary and capricious for the Authority to find that petitioner cannot succeed Ms. Cruz to the Apartment. In re 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 since they failed to establish that [NYCHA] knew of and implicitly approved of their permanent residency in the apartment."); In re 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); In re Abdil v. Martinez, 307 A.D.2d 238, 242 (1st Dep't 2003) (denying Article 78 petition, and finding that daughter and her son cannot succeed to father's apartment where no written request was ever made and permission was not obtained).

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

Dated: April 5, 2010



 JOAN B. LOBIS, 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).