

Matter of Bajana v Rhea
2010 NY Slip Op 32436(U)
September 1, 2010
Sup Ct, NY County
Docket Number: 401062/10
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOBIS
Justice

PART 6

CECILIA BATTANA
- v -
NYCHA

INDEX NO. 401062/10
MOTION DATE 6/1/10
MOTION SEQ. NO. 1
MOTION CAL. NO. _____

The following papers, numbered 1 to 28 were read on this motion to/for Article 78 relief

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

PAPERS NUMBERED

1-14
15-28

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion petition decided
in accordance with accompanying decision,
order, and judgment.

FILED
SEP 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/1/10 _____ JBK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

THIS MESSAGE IS RESENT FULLY REFERRED TO JUSTICE

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

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

CECILIA BAJANA,

Petitioner,

Index No. 401062/10

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules,

Decision, Order and Judgment

- against -

FILED
SEP 02 2010
NEW YORK
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JOHN B. RHEA, as Commissioner of the
New York City Housing Authority and NEW YORK
CITY HOUSING AUTHORITY,

Respondents.

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

Petitioner Cecilia Bajana brings this Article 78 proceeding against respondents John B. Rhea, in his capacity as Commissioner of the New York City Housing Authority, and the New York City Housing Authority ("NYCHA"), seeking a court order reversing and annulling NYCHA's termination of her mother's Section 8 voucher and NYCHA's denial of petitioner's application for succession rights to her mother's Section 8 voucher. For the reasons stated below, the petition is granted and the matter is remanded to NYCHA for a determination on whether petitioner is entitled to the status of permanent family member and the right to succeed to her mother's Section 8 voucher.

Petitioner was born in 1960 and is 49 years old. Petitioner has been diagnosed with and treated for schizophrenia paranoia. In 1983, petitioner received disability benefits from the Department of Health and Human Services for this disability. In 1986, when petitioner was about 26 years old, she and her mother, Francisca Mosquera—who is also referred to as Francisca

Puello—moved into Apartment 2B at 99-25 42nd Avenue in Corona, New York (the “Apartment”). Petitioner has had some periods of employment, most recently as a clerk in accounts receivable at Saint Vincent’s Catholic Medical Center home care facility in Rego Park, New York, although it is unknown whether she is presently employed in this capacity.

In 2002, Ms. Mosquera applied for and was granted a Section 8 voucher. According to the copies of the Housing Assistance Payment Contracts between NYCHA and the owner of the Apartment from 2002 and 2003 (annexed to petitioner’s papers), both petitioner and her mother were listed as tenants and authorized residents of the Apartment. Petitioner was also listed on the Section 8 affidavits of income for recertification purposes.

In an effort at independence, petitioner left the Apartment in November 2004 and established a separate residence with her godmother. NYCHA was duly notified. Petitioner maintained a close relationship with her mother while she was out of the Apartment. Both petitioner and her mother experienced problems with their health over this period of time. In 2008, petitioner and her mother decided that it would be easier for them to take care of each other and their various health conditions and disabilities if they were living together again. They also mutually desired to reduce their individual expenses by living together. In advance of petitioner moving back in, in June 2008, petitioner and her mother formally requested permission for petitioner to move back into the Apartment. NYCHA provided petitioner’s mother with a number of documents to complete and return to NYCHA. After returning the paperwork to NYCHA’s offices, petitioner and her mother were told that petitioner could not move back into the Apartment without written confirmation from

NYCHA. They never received any such written confirmation. However, in October 2008, petitioner's mother received a letter from NYCHA indicating that her share of the rent would increase as of November 1, 2008, presumably because petitioner's income was now being calculated into the tenant's share of rent. Petitioner contacted NYCHA over the telephone and asked whether a decision had been made about permission for her to move into the Apartment. Petitioner sets forth that the NYCHA representative that she spoke to told her that she had been granted permission to move back in. Petitioner moved back to the Apartment on November 4, 2008.

On October 22, 2009, petitioner's mother was struck by a vehicle and died shortly thereafter from the injuries. One week later, NYCHA cancelled the Section 8 voucher. On or about December 23, 2009, after an inquiry by petitioner's attorney about her rights to succeed to the Section 8 voucher, NYCHA sent the attorney a letter asserting that the voucher terminated with the death of petitioner's mother. Petitioner was denied succession rights because she had only been "conditionally" re-added as a resident family member of the Apartment in 2008.

Petitioner argues that she has been denied due process and that NYCHA has violated its own regulations. She contends that she was never given notice or an opportunity to dispute NYCHA's classification of her as a conditional and not a permanent family member. Petitioner further argues that NYCHA exceeded its statutory authority in distinguishing between permanent and conditional family members and that she was never given an opportunity to dispute NYCHA's determination at an administrative hearing.

NYCHA asks the court to reject petitioner's claims for several reasons. First, NYCHA argues that petitioner's mother requested conditional permission for her daughter to resume living in the Apartment. Second, petitioner would not have been eligible for permanent permission to live in the Apartment under NYCHA's occupancy policy. Third, the permission request form clearly states that residents with conditional permission to reside in the premises are not entitled to succeed to a Section 8 subsidy. Fourth, the landlord certified that petitioner was eligible for conditional residency. Fifth, NYCHA approved petitioner's conditional residency request and provided her mother, Ms. Mosquera, with a copy of the approved request form. Respondents argue that NYCHA's policy regarding occupancy and succession rights is a lawful exercise of its discretion and desirable rule-making designed to maximize NYCHA's ability to distribute a scarce resource, Section 8 vouchers. Respondents assert that NYCHA's policy of granting qualified adult children the status of conditional permission to reside with a parent, in order for the adult child to care for that parent, but not allowing the care giver to remain after the death of the parent, prevents those families from obtaining priority over other families that are on waiting lists for Section 8 vouchers. Respondents further maintain that NYCHA's succession policy does not require even an informal conference prior to terminating a subsidy, and that even if such a conference took place in this case, it would not change the outcome for petitioner.

Under NYCHA's policy, only family members with permission for permanent residency in the household are eligible to succeed to a Section 8 voucher. A review of NYCHA's policy for Section 8 tenants regarding occupancy and succession as of July 6, 2007, reveals that under no circumstances can a biologically related adult child of an authorized family member ever

be granted permanent status. Permanent permission to join a household is restricted to: spouses or registered domestic partners of any authorized family member; dependent children of an added spouse or registered domestic partner; adults legally adopted by an authorized family member; and children under 18 years old born to or adopted by an authorized family member who is not currently residing in the household. (Emphasis in original). See NYCHA Leased Housing Department (“LHD”) Memorandum #07-22 (annexed to respondents’ papers).

The court rejects those of NYCHA’s arguments premised on the assumption that petitioner and/or her mother chose to request only conditional permission for petitioner to return to living in the Apartment. It is uncontroverted that Ms. Mosquera and her daughter were given a form checklist of documents that they were required to submit when they asked NYCHA for permission for petitioner to rejoin the household in 2008. The checklist itself is a pre-printed form which was already filled out with a check-mark next to the word “conditional” (as opposed to the other options of “permanent” or “temporary”) when the form was provided to petitioner and her mother. The signed acknowledgment of receipt at the bottom of the form did not acknowledge the accuracy of the form, only that it was received by petitioner. One of the documents from the checklist that petitioner and her mother were required to submit was the Permission Request Form. A copy of the Permission Request Form that petitioner and her mother completed is annexed to respondents’ answer. There is no indication anywhere on that form as to exactly what status the tenant is requesting for the additional person, except at the very top of the form, where the title of the form is set forth as “PERMANENT OR CONDITIONAL PERMISSION REQUEST FOR A FAMILY MEMBER/ADDITIONAL PERSON TO LIVE WITH A SECTION 8 FAMILY” (underlining in

original). Nothing on the form allowed the applicant or the proposed additional family member to choose whether permanent or conditional permission was being sought. Petitioner's mother either had no opportunity to request permanent status for her daughter or, if the underlined word "permanent" indicates anything, she may have believed she was affirmatively requesting permanent status for her daughter. The fact that the permission request form states that residents with conditional permission to reside in the premises are not entitled to succeed to a Section 8 subsidy is meaningless if petitioner and her mother were requesting that petitioner be granted permanent permission to reside in the Apartment. It cannot be said that petitioner or her mother knowingly waived petitioner's right to seek succession rights by choosing to seek only conditional permission for petitioner to reside in the Apartment. Similarly, the Landlord Certification for Permission that the landlord filled out and returned to NYCHA does not have an option for either permanent or conditional status; the only option on that form is for conditional status. Moreover, neither petitioner nor her mother filled out or signed that form; rather, it was filled out and signed by the landlord to the Apartment. There was no affirmative waiver of petitioner's right to seek succession to the Section 8 voucher.

The court also rejects NYCHA's contention that NYCHA provided petitioner's mother, Ms. Mosquera, with a copy of an approved conditional residency request form. This argument is given merely lip service in the preliminary statement of NYCHA's memorandum of law and is never authenticated with any documentary evidence in the exhibits annexed to respondents' papers showing that Ms. Mosquera was ever sent a written approval. Even assuming, *arguendo*, that respondents mailed a copy of the Permission Request Form to petitioner's mother after NYCHA had

determined that petitioner could resume living in the Apartment, the portion of the Permission Request Form where NYCHA indicates whether permanent or conditional residency has been approved or disapproved was not completed (“conditional residency” is checked off, but neither “approved” nor “disapproved” is checked off). Written notice was not provided to Ms. Mosquera or her daughter indicating that her application for permanent residency had been denied.

NYCHA’s last remaining viable argument is that petitioner was never eligible for permanent residency. The issue that must be determined at the heart of this controversy, then, is whether the application of NYCHA’s policy of never granting permanent status to adult children returning to live with a parent voucher holder—as applied to petitioner and to similarly situated individuals—violates lawful procedure, is arbitrary or capricious, or is affected by an error of law. In re Pell v. Board of Education, 34 N.Y.2d 222 (1974). In determining this issue, it is necessary to examine the federal law that established the Section 8 Program, the Housing and Community Development Act of 1974. 42 U.S.C.A. § 1437f (the “Act”). The purpose of the Act was “to provide decent and safe housing through the private sector to certain ‘lower-income’ families, the elderly and the disabled.” Morrisania II Assocs. v. Harvey, 139 Misc. 2d 651, 655 (Civ. Ct., Bronx Co. 1988) (citations omitted). The Act differed from early programs of federal housing assistance by providing government subsidized private housing instead of government constructed and managed public housing. See id. The Department of Housing and Urban Development (“HUD”) or local public housing authorities contract with private landlords to provide housing units to approved families. The private landlord receives a market rent while the family pays a share

calculated according to family income.¹ Throughout the Act and the federal regulations that further define the program, families are the intended beneficiaries of the Section 8 program. 42 U.S.C.A. § 1437f(a); see also 24 C.F.R. § 982.201(c). Although a family can be defined as a single person, “by recognizing the entire family as the tenant [the Section 8 Program] seeks to encourage family cohesion.” In re Manhattan Plaza Assocs., L.P. v. Dep’t of Hous. Preservation and Dev. of the City of New York, 8 A.D.3d 111, 112 (1st Dep’t 2004); see also In re Gill v. Hernandez, 22 Misc. 3d 390 (Sup. Ct., N.Y. Co. 2008); Morrisania II Assocs., 139 Misc. 2d at 651. Succession rights are part of the federal act which defines the term “family” to include “the remaining member of the tenant family.” 42 U.S.C.A. 1437a(b)(3)(iv); see also In re Manhattan Plaza Assocs., 8 A.D.3d at 111. Given the purpose of the Section 8 program, numerous courts in New York have held that succession rights should go to “a bona fide family member” without regard to rigid classifications of family members. Id.; see also Bronx 361 Realty, L.L.C. v. Quinones, 26 Misc. 3d 1231(A) (Civ. Ct., Bronx Co. 2010); NSA North Flatbush Assocs. v. Mackie, 166 Misc. 2d 446, 451 (Civ. Ct., Kings Co. 1995); Morrisania II Assocs., 139 Misc. 2d at 656. Here, there is strong evidence that petitioner is a bona fide family member. She was permitted by both NYCHA and the landlord at the inception of the subsidy and upon her return to reside in the Apartment and her income was considered in setting the rent for all periods of her residency. Contra In re Evans, 93 N.Y.2d 823 at 825. It is undisputed that the Apartment has been petitioner’s sole residence since November 2008. Moreover, petitioner’s return was never solely to care for her mother. She was returning to her family home.

¹ For a full discussion of the Section 8 Program, see the detailed history set forth in Morrisania II Assocs. v. Harvey, 139 Misc. 2d 651 (Civ. Ct., Bronx County 1988).

NYCHA justifies its succession policy with concerns about family members using the health of an elder or infirm Section 8 recipient as a pretext to acquire the subsidy in the future. While this may be a legitimate concern, NYCHA fails to acknowledge that nowhere in the Act or the federal regulations applicable to Section 8 does the distinction between conditional and permanent family member exist. The federal scheme—including other forms of federal housing assistance to low income families administered by NYCHA, such as public housing—does not broadly prohibit additional family members from attaining permanent residency with an authorized tenant in a housing unit that benefits in some way from federal subsidies. The local housing authority cannot promulgate regulations that frustrate the purpose of Section 8 legislation. Lopez v. White Plains Hous. Auth., 355 F. Supp. 1016 (S.D.N.Y. 1972); In re Evans v. Franco, 93 N.Y.2d 823 (1999). The inability of a qualified family member previously residing as a protected family member to return to permanent status in Section 8 housing is such a violation. Furthermore, a close look at NYCHA's occupancy policy reveals that it frustrates NYCHA's justification for disallowing returning adult children from being granted permanent status. Notably, permanent permission can be granted to "an adult legally adopted by an authorized family member," while a natural adult child cannot be added as a permanent family member. The former policy stance seems to create just as much of a risk of interference with priority as affording a natural born adult child permanent status and, thus, the distinction is irrational.

As NYCHA's rules for Section 8 succession rights are applied to petitioner, she could never be considered as a remaining family member once she has any break in her residency. NYCHA never clearly explains why its policy towards adult family members who seek to join a

household with an authorized beneficiary of a Section 8 vouchers is different than its policy towards adult family members who join a household with an authorized beneficiary to NYCHA project housing. While there are criteria for succession in NYCHA public housing—for example, a two year period of residency prior to the named tenant's death may be considered in an application for succession rights—there is no absolute bar to succession rights for an adult child. It is inconsistent that an adult relative would have at least an opportunity to seek permanent residency with a family member in NYCHA public housing, while an adult relative has no opportunity to seek permanent residency with a family member in Section 8 housing. NYCHA's reliance on the oft-repeated and seldom questioned phrase that NYCHA is authorized by federal law to develop policy as it sees fit is not a rational basis for NYCHA's across-the-board prohibition on granting permanent residency status to bona fide adult family members who are named as original members of the household, who leave for a period of time, and who later seek to permanently rejoin the Section 8 household, particularly in light of their regulation on adult adoptees. Having lived with her mother as an authorized family member with permission of both NYCHA and the landlord at the inception of the subsidy, and her income having been considered in setting the rent during all periods of residency, petitioner should have been eligible to seek permanent residency status. At the very least, her application to be added as a resident should not have been treated differently than an application submitted on behalf of "an adult legally adopted by an authorized family member," who would be entitled to seek permanent permission. The court recognizes that NYCHA may have other guidelines for approving applicants for permanent residency, *i.e.*, income requirements and a satisfactory criminal background check; however, unequivocal denial of permanent residency with no succession rights for petitioner was arbitrary, capricious, and in violation of the law for the reasons discussed above.

Furthermore, petitioner's mother was entitled to written notice of NYCHA's determination regarding her daughter's status as a conditional resident only, which was effectively a denial of permanent residency status. According to NYCHA policy, petitioner's mother would have been entitled to dispute the denial "at an informal conference with an employee at the level of Housing Manager or higher." See LHD Memorandum #07-22, § VI. However, since there was a clear failure on NYCHA's part to duly notify Ms. Mosquera in writing of the determination regarding her daughter's residency status, neither petitioner nor her mother ever had the opportunity to contest this determination. Accordingly, it is hereby

ADJUDGED that the petition is granted and the matter is remanded to NYCHA for a determination, consistent with these proceedings, as to whether petitioner should have been granted permanent permission to reside in the Apartment with the right to seek succession to the Section 8 voucher.

Dated: *Sept. 1*, 2010

ENTER:



JOAN B. LOBIS, J.S.C.

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