

Echeverria v New York City Hous. Auth.

2010 NY Slip Op 34098(U)

August 4, 2010

Supreme Court, New York County

Docket Number: 111085/09

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

ORietta ECHEVERRIA,

INDEX NO. 111085/09

MOTION DATE 09-15-2009

- v -

MOTION SEQ. NO. 1

NEW YORK CITY HOUSING AUTHORITY,

MOTION CAL. NO. _____

The following papers, numbered 1 to 2 were read on this petition to/for Art. 78

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>2</u>
Replying Affidavits _____	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered and adjudged that this Article 78 petition is denied and the proceeding is dismissed.

Petitioner resides at 530 West 55th Street Apt. 5E (Harbor View Terrace Houses) , a seniors only residence, which is managed by the Respondent New York City Housing Authority. Petitioner filed a grievance with Respondent to be qualified as a remaining family member and succeed to the apartment.

The apartment had been leased to Petitioner's mother, Ms. Clara Winston. Petitioner claims that due to her mother's deteriorating health she had to move in with her and resided in the apartment from the year 2000 until her mother's death in 2005; However, the affidavit of income filed by Ms. Clara Winston on July 15, 2005 lists Ms. Clara Winston as the only occupant of the apartment [see Respondent's answering affidavit Exhibit D]. Ms. Clara Winston passed away on August 15, 2005 [Exhibit J]. On June 30, 2005 Ms. Winston filed a "permanent permission request for a family member to live with tenant" listing petitioner Orietta Echeverria as the proposed additional person, and listing an address for petitioner as 539 West 54th street N.Y. N.Y. [Exhibit I]. This request was disapproved by Management on July 5, 2005, stating as a reason " this is a senior building relative too young." [see Exhibit I].

Following Ms. Winston's death Petitioner filed a grievance with management seeking remaining family member status. This grievance was denied on June 5, 2007 by project manager Clarence Gordon, stating as a reason " Ms. Echeverria is not a senior and this is a senior building and she was never granted permission to reside in the apartment. [see Exhibit L]. On July 16, 2008

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

the Borough Manager, Virgilio Cruz, agreed with the manager's disposition denying Petitioner's grievance [See Exhibit M]. The Grievance was then referred to Hearing Officer Howard Brookman who held hearings on October 29, 2008; December 17, 2008; March 3, 2009 and April 23, 2009. At the hearing petitioner was represented by counsel, had the assistance of a Guardian Ad Litem, presented witnesses and testified.

Petitioner argued that due to her mother's deteriorating health and chronic arthritis she was not able to file an affidavit of income listing petitioner as a family member, or file a permanent permission request listing petitioner as a family member intending to live with tenant. She also argued that due to her (petitioner) mental condition she was unable to fill out the required paperwork listing herself on the income affidavits or filing the permission request. Finally, Petitioner presented a witness, Oscar Rodriguez, to show that she resided in the building with Ms. Winston from the year 2000 until her death in 2005. Mr. Rodriguez also stated that although the building is a seniors only residence, there are young persons residing there without seniors.

The hearing officer by decision dated May 22, 2009 determined that "the grievant is not a remaining family member as defined by NYCHA regulations. A tenant who wished to have an additional person join the household on a permanent basis must submit a written request to the development manager and receive written approval for the additional occupant; and the occupant must reside in the subject apartment for at least one (1) year after receiving the written permission and prior to the tenant's death." [see Exhibit D D].

NYCHA'S Board reviewed the Hearing Officer's decision and approved it by decision date June 3, 2009. Petitioner filed the instant Article 78 petition on August 4, 2009, seeking judicial review of Respondent's determination denying her grievance. [see Article 78 petition].

"... A proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner...."[C.P.L.R. § 217(1)]. This abbreviated time frame is said to serve public policy by freeing government operations from the "cloud" of potential litigation [Best Payphones, Inc., v. Department of Information, Technology and Communications of City of New York, 5 N.Y. 3d 30, 832 N. E. 2d 38, 799 N.Y.S. 2d 182 (2005)]. An administrative determination becomes "final and binding" triggering the four month statute of limitations for commencing an Article 78 proceeding, when the petitioner seeking review has been aggrieved by it. [Rocco v. Kelly, 20 A.D. 3d 364, 799 N.Y.S. 2d 469 [App. Div. 1st. 2005]; Yarbough v. Franco, 95 N.Y. 2d 342, 740 N.E. 2d 224, 717 N.Y.S. 2d 79 [2000]. The four month limitations period for Article 78 review runs from petitioner's receipt of the adverse determination [Yarbough v. Franco, 95 N.Y. 2d 342, 740 N.E. 2d 224, 717 N.Y.S. 2d 79 [supra].

NYCHA's determination became final and binding when petitioner received notice of the Board determination in June of 2009. She filed this Article 78 Petition within four months of receipt of NYCHA's determination therefore the petition is timely.

According to the "one year rule" only where a remaining family member has lived in an original public housing tenant's apartment for one year after having been granted written permission to do so may the remaining family member succeed to the apartment (*Torres v. New York City Housing Authority*, 40 A.D. 3d 328, 835 N.Y.S. 2d 184 [App. Div. 1st. Dept. 2007]). As such remaining family member status has been denied to a Grandson who despite residing in the apartment many years, did not become " an authorized occupant of the apartment prior to the Grandmother's death." (*Valentin, v. New York City Housing Authority*, 72 A.D. 3d 486, 898 N.Y.S. 2d 130 [App. Div. 1st. Dept. 2010]), a Granddaughter who failed to obtain written approval or occupy the apartment continuously for a period of one year after obtaining permission (*Hargrove v. Van Dyke Housing*; 63 A.D. 3d 741, 880 N.Y.S. 2d 156 [App. Div. 2nd. Dept. 2009]), a Daughter who had not resided in the apartment for one year prior to her mother's death and had not applied for permission to rejoin household (*Pelaez v. New York City Housing Authority*, 56 A.D. 3d 325, 867 N.Y.S. 2d 413 [App. Div. 1st. Dept. 2008]), an occupant who did not enter the apartment lawfully and for which no written permission was given to the tenant of record (*Abreu v. New York City Housing Authority*, 52 A.D. 3d 432, 860 N.Y.S. 2d 115, [App. Div. 1st. Dept. 2008]; *Jamison v. New York City Housing Authority*, 25 A.D. 3d 501, 809 N.Y.S. 2d 14 [App. Div. 1st. Dept. 2006]; *New York City Housing Authority v. Newman*, 39 A.D. 3d 759, 834 N.Y.S. 2d 541 [App. Div. 2nd. Dept. 2007]).

" A showing that the authority knew of, and took no preventive action against, the occupancy by the tenant's relative, could be an acceptable alternative for compliance with the notice and consent requirements." [*McFarlane v. New York City Housing Authority*, 9 A.D. 3d 289, 780 N.Y.S. 2d 135 [App. Div. 1st. 2004]; However, it has not been shown by this record that the authority knew of Petitioner's occupancy and took no action. Finally, there was no evidence presented to indicate that the tenant lacked the mental capacity to request written permission for petitioner's occupancy [*Rivera v. New York City Housing Authority*, 2009 WL 673843 (App. Div. 1st. Dept. 2009)]. In fact the tenant requested written permission in June of 2005 which was denied in July 2005, approximately one month before the tenant's death.

Petitioner did not obtain written permission from Management to reside in the apartment permanently. The Permission request submitted approximately two months before the tenant of record passed away was denied. Petitioner did not reside in the apartment for a period of one year after with written permission from management. Therefore, petitioner cannot be granted remaining family member status and her petition to annul the Hearing Officer's determination must be denied.

The Landlord Tenant proceeding under index number L & T 020142/09 is transferred and referred back to housing court Part E for further proceedings.

Accordingly, it is ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED, that the Landlord Tenant proceeding under index number L&T 020142/09 is transferred to housing court Part E for further proceedings; and it is further

ORDERED that all stays of the Landlord Tenant Proceeding are vacated.

This constitutes the decision and judgment of this court.

Dated: August 4, 2010

MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE