

Matter of Torres v New York City Hous. Auth.

2012 NY Slip Op 30294(U)

January 31, 2012

Supreme Court, New York County

Docket Number: 109670/11

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON ARLENE BLUTH, JSC
Justice

PART 4

In the Matter of the Application of
Carlos Torres, Petitioner
against
New York City Housing Authority, Respondent

402023 -2011
INDEX NO. ~~109670/11~~

MOTION DATE _____

MOTION SEQ. NO. 1

The following papers, numbered 1 to 2, were read on this motion to/for Article 78

Notice of Motion/^{petition}Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this ^{petition}motion is decided in accordance with the attached typewritten decision, order and judgment.

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

FILED

FEB 08 2012

NEW YORK COUNTY CLERK'S OFFICE

_____, J.S.C.

Dated: 2/6/12

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 4

Index No.: 109670/11

Assigned to Justice Bluth on 1/11/12

In the Matter of the Application of
Carlos Torres,

Petitioner,

**DECISION, ORDER
AND JUDGMENT**

-against-

New York City Housing Authority,

Present: HON. ARLENE P. BLUTH

Respondent.

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

FILED

FEB 08 2012

The self-represented petitioner commenced this Article 78 proceeding challenging respondent New York City Housing Authority's (NYCHA) determination dated June 1, 2011 which, after a hearing, denied petitioner's claim to Remaining Family Member status to apartment 2D at 2123 Madison Avenue in Manhattan. Petitioner's mother, Elsie Pantojas, was the tenant of record of the subject apartment until her death on July 2, 2010. NYCHA opposes the petition.

NEW YORK
COUNTY CLERK'S OFFICE

Petitioner seeks reversal of the determination on the grounds that (1) his mother had cancer and did not fill out the papers correctly, and (2) he was unprepared at the hearing.

A hearing was held on April 5, 2011 before a hearing officer, who heard testimony from petitioner and from NYCHA's Resident Services Associate, Crystal Argueta. The hearing officer also reviewed various documents which were admitted into evidence at the hearing,

Petitioner testified to the following: He lived in the apartment as a child, but in 1999 or 2000 he moved out. By the end of the summer of 2008, after his mother was diagnosed with cancer, he and his children had moved into the apartment. Petitioner believes that his mother *intended* to add him and his children to the household, but mistakenly wrote his children's names

(not his name) on the 2008 and 2009 Occupant's Affidavit of Income. His mother never asked for permission for petitioner or his children to become members of her household. Two days before his mother died, petitioner prepared and submitted a Permanent Permission Request Form dated June 30, 2010 to Management; it was not signed by his mother, who died two days later.

NYCHA's witness, Ms. Argueta, testified as follows: Petitioner was an original family member who moved out of the apartment in 1999 based on her review of the Occupant's Affidavits of Income. Ms. Pantojas appears to have included the names of her grandchildren on the 2008 and 2009 Occupant's Affidavit of Income, and the grandchildren's names were crossed off on the 2009 Affidavit. Inclusion of the grandchildren's names on the affidavits did not constitute permission for them, or petitioner, to reside in the apartment. Petitioner was never given permission to rejoin the household.

In her findings and conclusions, the Hearing Officer found that petitioner, a former household member who had vacated the apartment in 1999, did return to the apartment to reside with his mother and care for her when she became ill. However, she never asked for or obtained written permission for him or her grandchildren to reside in the apartment. The Hearing Officer specifically found that neither the inclusion of the grandchildren on the Occupant's Affidavits of Income, nor the Permanent Permission Request submitted by petitioner (but not signed by Ms. Pantojas) to Management two days before Ms. Pantojas died, conveyed tenancy rights to petitioner or his children. The unsigned Permanent Permission Request was never approved.

Based on the evidence, the Hearing Officer determined that petitioner is not a remaining family member as defined by NYCHA regulations because Ms. Pantojas never requested and

received written approval for petitioner to be added as an additional occupant, and he did not reside in the apartment for at least one year after receiving the written permission.

The “[j]udicial review of an administrative determination is confined to the ‘facts and record adduced before the agency’.” (*Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000], quoting *Matter of Fanelli v New York City Conciliation & Appeals Board*, 90 AD2d 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 of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept 1983]). Once the court finds that a rational basis exists for the agency’s determination, then the court’s review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]). The court may only declare an agency’s determination “arbitrary and capricious” if the court finds that there is no rational basis for the agency’s determination. (*Matter of Pell v Board of Education*, 34 NY2d 222, 231 [1974]).

Gaining succession as a remaining family member requires an occupant to (1) move lawfully¹ into the apartment and (2) qualify as a specified relative of the tenant of record and (3) remain continuously in the apartment for at least one year immediately before the date the tenant of record vacates the apartment or dies and (4) be otherwise eligible for public housing in accordance with NYCHA’s rules and regulations. See NYCIIA Occupancy and Remaining

¹The occupant moves in lawfully if he or she: (1) was a member of the tenant’s family when the tenant moved in and never moved out or (2) becomes a permanent member of the tenant’s family after moving in (or after moving back in) as long as the tenant of record seeks and receives NYCHA’s written approval or (3) is born or legally adopted into the tenant’s family and thereafter remains in continuous occupancy up to and including the time the tenant of record moves or dies. (See NYCHA Management Manual, ch IV, sub IV, section (J)(1).

Family Member Policy Revisions General Memorandum (GM) 3692 Section IV (b), as revised and amended July 11, 2003. At issue here are requirements (1) - obtaining the permission - and (3) - living in the apartment for one year after getting the permission.

The requirement that permission is necessary is enforceable. See *Aponte v NYCHA*, 48 AD3d 229, 850 NYS2d 427 [1st Dept 2008] “The denial of petitioner’s [remaining family member] grievance on the basis that written permission had not been obtained for their return to the apartment is neither arbitrary nor capricious.” See also *NYCHA v Newman*, 39 AD3d 759 (1st Dept 2007); *Hutcherson v NYCIA*, 19 AD3d 246 (1st Dept. 2005) (denied remaining family member status because written permission to move in was not obtained).

That one-year requirement has also been upheld (see *Torres v NYCIA*, 40 AD3d 328, 330 [1st Dept 2007] holding that when petitioner seeking to succeed to tenant of record’s lease had not complied with the one year requirement, that “there [was] no basis whatsoever for holding the agency decision to be ‘arbitrary and capricious.’”).

Here, even though it is uncontested that the tenant of record, petitioner’s mother, never requested or received written permission from NYCHA for petitioner join her household, petitioner nevertheless asserts that he is entitled to succeed to his mother’s public housing lease because he speculates that his mother mistakenly signed the wrong papers “thinking it was the lease adding me and my children” (Petition, para. 3). This is because petitioner’s mother listed her grandchildren on an income affidavit in 2008 and perhaps in 2009 (the grandchildren’s names were crossed off the 2009 affidavit submitted at the hearing). However, even if his mother had listed him on income affidavits, that is not the same thing as requesting and receiving written

permission to become a member of the household, and there is no question that such permission was never sought by the tenant or granted by NYCHA. To the extent that petitioner is claiming that his mother's illness prevented her from complying with the regulations, or that he has no place to go if he is evicted from this apartment, this Court lacks the authority to consider mitigating circumstances or potential hardship as a basis for annulling NYCHA's determination (*see Guzman v NYCHA*, 85 AD3d 514, 925 NYS2d 59 (1st Dept 2011)).

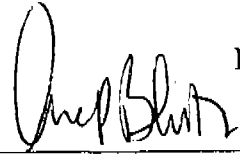
Petitioner also claims that NYCHA's determination should be reversed because he "didn't know that [he] had to bring evidence, lawyer" (Petition, para. 3). The record demonstrates that petitioner was in fact notified several times how to prepare. By letters dated February 17 and 24, 2011, respondent informed petitioner that he could appear at the hearing "in person with such witnesses as [he] may desire and be represented by counsel or other representative of your choice". Enclosed with the February 24, 2011 letter was a copy of the hearing procedures which explicitly informed him that he has "the right to present evidence" at the hearing. Additionally, at the hearing, the Hearing Officer explained to petitioner that he had a right to be represented by an attorney, but petitioner stated that he wanted to proceed and to represent himself (T. at 6-8). Accordingly, this ground for reversal lacks merit.

Here, it is undisputed that petitioner moved out of the apartment many years ago and in order to move back in as a member of the household, NYCHA's written consent was required. It is further undisputed that the tenant, Ms. Pantojas, never sought or received NYCHA's permission for petitioner to join or re-join her household. Therefore, after Ms. Pantojas died, NYCHA's determination denying petitioner remaining family member status was rational, and not arbitrary or capricious.

Accordingly, it is ORDERED and ADJUDGED that this Article 78 petition is denied and the proceeding is dismissed.

This is the Decision, Order and Judgment of the Court.

Dated: January 31, 2012
New York, New York



HON. ARLENE P. BLUTH

HON. ARLENE P. BLUTH, JSC

*copies sent
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