

Matter of Seda v New York City Housing Auth.
2012 NY Slip Op 31241(U)
May 1, 2012
Supreme Court, New York County
Docket Number: 400293/12
Judge: Alexander W. Hunter Jr
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JP
Justice

PART 33

Index Number : 400293/2012
SEDA, ANGEL
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1-3; 4-5
Answering Affidavits — Exhibits _____ **No(s).** _____
Replying Affidavits _____ **No(s).** _____

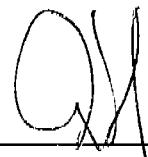
Upon the foregoing papers, it is ordered that this motion is

See memorandum decision and
judgment annexed hereto

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

FILED
MAY 11 2012
CLERK OF THE COURT
CLERK OF THE COURT

Dated: 5/1/12


_____, J.S.C.
ALEXANDER W. HUNTER JP

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 NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X
In the Matter of the Application of
Angel Seda

Index No.: 400293/12

Petitioner,

Decision and Judgment

-against-

New York City Housing Authority

Respondent.

-----X
HON. ALEXANDER W. HUNTER, JR.

The application by petitioner for an order pursuant to C.P.L.R. Article 78, declaring respondent's determination to dismiss his remaining family member grievance for failure to pay use and occupancy for the public housing apartment once leased by his grandfather, as arbitrary and capricious, is denied and the proceeding is dismissed, without costs and disbursements to either party. Respondent's cross-motion to dismiss the petition is granted.

Pro se petitioner's grandfather, Thomas Smith ("Smith"), was the tenant of record and the sole authorized occupant at 1806 First Avenue, #3G, New York, NY. At the time of Smith's death on April 26, 2009, petitioner was an authorized member of his mother's household. She is the tenant of record at 1806 First Avenue, #22B, New York, NY.

The New York City Housing Authority ("NYCHA") provides a grievance procedure whereby the claimant has the burden of proof to show that he or she qualifies as a remaining family member. A remaining family member may succeed to the former tenant's lease if certain requirements are met. NYCHA GM-3692 Amended, Chapter VII provides that in order to be eligible as a remaining family member, the individual must have: 1) moved into the apartment lawfully; 2) resided in the apartment continuously after lawful entry; 3) remained in the apartment for at least one year after the date of lawful entry and prior to the date the tenant of record vacates or dies; and 4) must be eligible for public housing. The tenant must request and receive approval from management in order to add a family member to his or her household. NYCHA also requires that a claimant continue to pay use and occupancy in the amount of rent paid by the tenant of record prior to and during the grievance. Continued payment of use and occupancy is a prerequisite to a grievance hearing.

On December 1, 2009, petitioner was afforded a remaining family member grievance to determine if he qualified to succeed's Smith's lease. The Project Manager and the District Office denied his grievance because: 1) Smith was the sole authorized occupant at the time of his death and he never requested in writing or obtained written permission for petitioner to permanently join his household; 2) petitioner failed to pay use and occupancy; and 3) petitioner was an authorized member of his mother's household at the time of Smith's death.

At petitioner's request, a hearing on his grievance was scheduled for October 12, 2010. Respondent notified petitioner that his grievance could be dismissed if his payments for use and occupancy were not current at the time of his hearing. The hearing was adjourned three times to allow petitioner to secure representation. On February 10, 2011, Carmen Valentin appeared to represent petitioner at the hearing. The hearing was adjourned at Ms. Valentin's request in order to give her time to review petitioner's file. At each hearing date, petitioner was informed of his obligation to pay use and occupancy.

On February 22, 2011, the final hearing date, respondent made a motion to dismiss petitioner's grievance because he was not current in the payment of use and occupancy. At that time, petitioner owed \$4,356.06 in use and occupancy, representing over nineteen months in arrears. Hearing Officer Arlene Ambert dismissed petitioner's grievance for failure to pay use and occupancy. NYCHA's Board adopted the hearing officer's determination on March 9, 2011. Respondent mailed a copy of the "Determination of Status" on March 15, 2011 to petitioner and to Ms. Valentin.

Thereafter, respondent commenced a holdover proceeding against petitioner in Civil Court. On November 9, 2011, Judge Verna Saunders issued a decision awarding possession of the apartment to NYCHA. On February 16, 2012, the City Marshal's Office evicted petitioner from the apartment. At the time of the eviction, petitioner owed more than \$7,000.00, representing over thirty one months in arrears. The apartment has since been rented to another tenant.

Petitioner asserts that he and his children had been residing at the subject apartment for several years prior to his grandfather's death. He argues that a verbal agreement was made with Manager Efrain Diaz to place his name on the new lease. Petitioner further asserts that Mr. Diaz told him that as long as he paid the rent that he and his children could remain in the apartment. Petitioner maintains that he made some payments but after a few months, Mr. Diaz stopped accepting payment. Petitioner also claims that his due process rights were violated because he was not given an opportunity to present evidence at his grievance hearing.

Respondent opposes the petition in its entirety and cross-moves to dismiss on the grounds that: 1) it is time-barred by the four month statute of limitations; 2) petitioner fails to state a cause of action; 3) the proceeding is barred by documentary evidence; 4) petitioner's claims are moot; and 5) a hearing would be futile since petitioner does not have succession rights to his grandfather's apartment. Petitioner does not deny receiving NYCHA's Determination of Status, dated March 9, 2011, within five days of its mailing. Moreover, he was specifically told of the four month statute of limitations by the hearing officer. Respondent argues that petitioner has failed to state a cause of action because he concedes to the fact he was not current in his use and occupancy payments, which was the basis for respondent's determination.

Petitioner seeks possession of an apartment from which he has already been evicted. The Civil Court already issued an order awarding possession of the apartment to respondent.

Consequently, respondent argues first that this court cannot collaterally attack the Civil Court's order and second that the petition is moot.

Assuming arguendo that petitioner was current in use and occupancy, petitioner would still be unable to demonstrate that he is entitled to remaining family member status. Respondent asserts that Smith never requested in writing to add petitioner to his household and that petitioner did not continuously live in the subject apartment for at least one year prior to Smith's death.

Pursuant to C.P.L.R. 217(1), a proceeding against a body or officer must be commenced within four months after the determination becomes final and binding upon the petitioner. "An administrative determination becomes final and binding when the petitioner seeking review is aggrieved by it." **In the Matter of Yarbough v. Franco**, 95 N.Y.2d 342, 346 (2000). Courts have held Article 78 proceedings as time-barred even when commenced one day after the four month statute of limitations has expired. **See, Matter of Magat v. County of Rockland**, 265 A.D.2d 483 (2nd Dept. 1999); **Matter of Tuxedo Conservation and Taxpayers Ass'n v. Town Bd.**, 213 A.D.2d 655 (2nd Dept. 1995). The statute of limitations runs from the date petitioner received NYCHA's Determination of Status. **See, Blackman v. New York City Hous. Auth.**, 280 A.D.2d 324 (1st Dept. 2001). Petitioner commenced this special proceeding on February 6, 2012, more than four months after receiving the "Determination of Status". Accordingly, this petition must be dismissed as time-barred pursuant to C.P.L.R. 3211(a)(5).

Petitioner's claim as to a denial of due process is without merit. The Court of Appeals has upheld NYCHA's requirement for claimants to pay use and occupancy as a prerequisite to a grievance hearing. "This is consistent with the over-all purpose of the Federal law and nothing in the Federal regulation requires respondent to grant a formal hearing to every person who makes a bare assertion that he or she is the remaining family member of a deceased tenant but is unable to make a preliminary showing that the claim is reasonably based. **Matter of Henderson v. Popolizio**, 76 N.Y.2d 972, 974 (1990); **see also, Hawthorne v. New York City Hous. Auth.**, 81 A.D.3d 420 (1st Dept. 2011). Petitioner concedes to the fact that he has not met this requirement and therefore, he was not entitled to a grievance hearing.

Not only is the instant application barred by the statute of limitations, but the Civil Court's judgment of possession and a warrant of eviction against petitioner cannot be collaterally attacked unless there is showing that the Civil Court lacked jurisdiction to award possession of the apartment. **See, Matter of Bobian v. New York City Hous. Auth.**, 55 A.D.3d 396 (1st Dept. 2008); **Matter of Cherry v. New York City Hous. Auth.**, 67 A.D.3d 438 (1st Dept. 2009). By judgment of the Civil Court, NYCHA secured a valid warrant to evict petitioner from the subject apartment. The Civil Court judgment has not been set aside or reversed on appeal and therefore, this court cannot nullify that order. **See, McLaughlin v. Hernandez**, 55 A.D.3d 396 (1st Dept. 2005).

Based on the foregoing, this court need not determine whether respondent's determination was arbitrary and capricious. However, it should be noted that a determination is arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard

to the facts.” See Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 N.Y.2d 222, 231 (1974). “Even though the court might have decided differently were it in the agency’s position, the court may not upset the agency’s determination in the absence of a finding, not supported by this record, that the determination had no rational basis.” In the Matter of Mid-State Mgt. Corp. v. New York City Conciliation and Appeals Bd., 112 A.D.2d 72, 76 (1st Dept. 1985). Therefore, this court’s role is limited to whether or not respondent’s final determination was made without a rational basis.

NYCIIA grievance procedures clearly state that claimants must continue to make use and occupancy payments and the failure to do so “shall result in the termination of the grievance procedure.” Petitioner and his counsel was told on a number of occasions of his continuing obligation to make use and occupancy payments. He did not make the necessary payments and therefore his grievance was terminated.

Even if petitioner had a full hearing, he would not have been able to demonstrate that he was entitled to remaining family member status. The tenant must request and receive approval from management in order to add a family member to his or her household. No such request was ever made by Smith. While petitioner claims to have resided in the apartment for several years prior to his grandfather’s death, he was never authorized by management to legally occupy the apartment. Petitioner also cannot establish that he resided in the apartment for at least one year after receiving written approval from management and prior to the death of his grandfather. In fact, petitioner was a member of his mother’s household in a different apartment at the time of his grandfather’s death. Therefore, this court finds that respondent’s determination was rational and is supported by record.

Accordingly, it is hereby,

ADJUDGED that the petition is denied and the proceeding is dismissed, without costs and disbursements to either party. Respondent’s cross-motion to dismiss the proceeding is granted.

Dated: May 1, 2012

ENTER:


J.S.C.

NEW YORK CITY
COURT OF APPEALS