

Matter of Cruz v Wambua
2013 NY Slip Op 30357(U)
February 14, 2013
Supreme Court, New York County
Docket Number: 403171/11
Judge: Barbara Jaffe
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: BARBARA JAFFE *Jaffe*
J.S.C. Justice

PART 12

Index Number : 403171/2011
CRUZ, MIGUEL
vs.
WAWBUA, MATHEW M
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. 403171/11
MOTION DATE _____
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for vacate administrative determination
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s) 1
Answering Affidavits — Exhibits _____ | No(s) 2,3
Replying Affidavits _____ | No(s) _____

Upon the foregoing papers, it is ordered that this ~~_____~~

**PETITION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION, ORDER AND JUDGMENT.**

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

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).

Dated: 2/14/13

BARBARA JAFFE, J.S.C.
J.S.C.

- 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 12

-----X
In the Matter of the Application of:
MIGUEL CRUZ and DOLORES CRUZ,

Petitioners,

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

-against-

MATHEW WAMBUA, as Commissioner of the New
York City Department of Housing Preservation and
Development,

Respondent,

-and-

HUDSONVIEW COMPANY,

Co-Respondent.

-----X
BARBARA JAFFE, JSC:

For petitioners:
Stuart W. Lawrence, Esq.
Housing Conservation Coordinators, Inc.
777 10th Avenue
New York, NY 10019
212-541-5996

For HPD:
Gabriel Taussig, ACC
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007
212-788-0986

By notice of petition dated December 8, 2011, petitioners bring this Article 78 proceeding seeking an order annulling respondent New York City Department of Housing Preservation and Development's (HPD) determination of their rent obligation and enhanced voucher subsidy and remanding the matter to respondent for retroactive calculation of same. HPD opposes.

I. BACKGROUND

HPD administers the section 8 Housing Choice Voucher Program, a federally funded

Index No. 403171/11

Argued: 11/13/12
Motion Seq. No.: 001
Motion Cal. No.: 17

DECISION & JUDGMENT

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).

program that provides rent subsidies to low-income families. (42 USC § 1437f[a]). Families residing in buildings that convert out of other housing assistance programs, such as the Mitchell-Lama Housing Program (Mitchell-Lama), are eligible to receive section 8 “enhanced vouchers.” (Ver. Ans., Exh. A; 42 USC § 1437f[t]). The amount of an enhanced voucher is calculated on the basis of the family’s minimum rent obligation, which is equal to “*the greater* of 30 [percent] of their income *or* the amount they were paying [in rent] at the time of conversion, even if it exceeds 40 [percent] of the family’s adjusted monthly income.” (Ver. Ans., Exh. A; *see* 42 USC § 1437f[t][1][A]). If the family’s gross income decreases 15 percent or more from the family’s gross income on the date their building converted, their minimum rent obligation is calculated as “30 [percent] of monthly adjusted income or the percentage of monthly adjusted income actually paid at the time of conversion, whichever is greater.” (Ver. Ans., Exh. A; *see* 42 USC § 1437f[t][1][D]).

In 1976, petitioners began living in apartment 3E of Hudsonview Terrace, a Mitchell-Lama building located at 747 Tenth Avenue in Manhattan. (Ver. Pet.; Ver. Ans.).

Sometime in 2003, petitioners were notified that Hudsonview Terrace’s management planned to opt out of Mitchell-Lama, and thus, that they were eligible for an enhanced voucher. (Ver. Ans.). The last certification of petitioners’ income completed by Hudsonview Terrace’s management before the building converted, dated August 26, 2003, reflects that their gross annual income in 2002 totaled \$28,960, \$16,000 from wages and \$12,960 from unemployment benefits, and that their monthly rent obligation was \$711. (Ver. Ans., Exh. Q).

Sometime before September 3, 2003, petitioners submitted an enhanced voucher application reflecting that their income consisted solely of Miguel Cruz’s earnings, the amount of

which was unspecified. (*Id.*, Exh. C). On December 13, 2003, Hudsonview Terrace converted out of Mitchell-Lama. (Ver. Ans.). As of that date, petitioners' monthly rent obligation remained \$711. (*Id.*, Exhs. E, L).

On February 3, 2004, HPD's records were amended to reflect that petitioners' income totaled \$5,196, comprised solely of Miguel's Social Security benefits. (*Id.*, Exhs. F, I). By rent breakdown letter of the same date, HPD informed petitioners that, effective February 15, 2004, the date of their admission to the section 8 program, their monthly rent obligation would remain \$711. (*Id.*, Exhs. H, L).

After subsequent income recertifications, some of which reflected that petitioners' income totaled less than \$24,276, 15 percent less than their 2002 income, petitioners' rent remained \$711. (*Id.*, Exhs. O, P). By letter dated January 25, 2010, petitioners challenged the most recent rent determination and requested an informal hearing. (*Id.*, Exh. J).

On March 7, 2011, the hearing was held, during which petitioners argued that Hudsonview Terrace's management erred in certifying that their 2002 annual gross income totaled \$28,960, as financial documentation, which they offered during the hearing, reflects that their earnings and benefits totaled only \$16,716, and thus, that their monthly rent obligation when the building converted out of Mitchell-Lama should have been \$407.90, not \$711. (*Id.*, Exhs. K, Q). They admitted that the building's management's calculations would have been based on documentation that they submitted, and conjectured that management may have assumed Miguel was a seasonal worker and thus inflated his income by annualizing the amounts reported on his pay checks. (*Id.*, Exhs. K, L, Q). However, they could not recall what they submitted to management. (*Id.*, Exhs. K, L). They claimed that they paid around \$400 monthly

in rent before the building converted out of Mitchell-Lama, notwithstanding building management's determination that their share of the monthly rent totaled \$711, that they continued to do so thereafter, and that the building commenced a non-payment of rent proceeding against them as a result. (*Id.*, Exhs. K, L).

As petitioners asserted that they contacted management to complain about their rent, the hearing officer permitted the record to remain open so that they could submit evidence of the communication. (*Id.*, Exhs. K, L). By letter dated March 21, 2011, petitioners informed the hearing officer that they could not find documentation and requested that she rely on the credibility of their testimony. (*Id.*, Exhs. L, Q).

By decision dated April 19, 2011, the hearing officer determined that HPD properly calculated petitioners' minimum rent to be \$711, as that amount always exceeded 30 percent of their monthly income and that, as management's calculation of petitioners' rent before converting out of Mitchell-Lama is not subject to HPD's review, petitioners' proper recourse is to raise the issue with management, not HPD. (*Id.*). She noted that petitioners failed to explain how the building's management erred in calculating their rent absent any proof of the documentation they submitted to them. (*Id.*).

II. CONTENTIONS

Petitioners do not dispute the hearing officer's determination that HPD properly based its calculation of petitioners' minimum monthly rent obligation on management's calculation of their 2002 annual income and their minimum monthly rent. (Ver. Pet.). However, they assert that her decision is arbitrary and capricious insofar as she failed to recalculate their minimum monthly rent obligation in light of the greater than 15 percent decrease in their annual income.

(*Id.*).

In opposition, HPD observes that, as petitioners did not argue that HPD erred in calculating their minimum monthly rent obligation on the basis of the greater than 15 percent decrease in their annual income, they have failed to exhaust their administrative remedies. (Mem. of Law in Opp.). In any event, they claim that as petitioners' annual income has not fallen below \$5,196, HPD did not err in calculating their minimum monthly rent to be \$711. (*Id.*).

III. ANALYSIS

In an Article 78 proceeding, a court may not consider arguments or evidence not presented during the administrative hearing. (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000]; *Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [1st Dept 2007]; *Matter of Patrick v Hernandez*, 309 AD2d 566, 566 [1st Dept 2003]). "To authorize a petitioner to raise [] issues for the first time in an [A]rticle 78 proceeding . . . would deprive the administrative agency of the opportunity 'to prepare a record reflective of its expertise and judgment' . . . and would render judicial review meaningless." (*Yarbough*, 95 NY2d at 347).

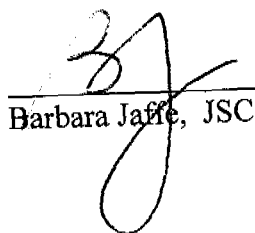
Here, as petitioners challenge only the building management's calculation of their income and minimum monthly rent before the building opted out of Mitchell-Lama, and not HPD's calculation of their monthly rent obligation thereafter, their arguments with respect to the decrease in their annual income may not now be considered. To consider such arguments now, which are based on the conclusion that their 2002 income was \$28,960, and not \$16,716 as they claimed during the hearing, would permit them to assert an alternative argument for relief, and thus, obtain de novo review of the matter.

[* 7]
As petitioners do not otherwise challenge the hearing officer's decision, there is no basis to vacate it.

IV. CONCLUSION

Accordingly, it is hereby
ORDERED and ADJUDGED, that the petition is denied in its entirety and the proceeding is dismissed.

ENTER:


Barbara Jaffe, JSC

DATED: February 14, 2013
New York, New York

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).