

Matter of Rios v New York City Hous. Auth.
2013 NY Slip Op 32223(U)
September 13, 2013
Supreme Court, New York County
Docket Number: 400602/13
Judge: Alexander W. Hunter Jr
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: ALEXANDER W. HUNTER JR
Justice

PART 33

Rios, Eva

INDEX NO. 400602/13

- v -

NYC Housing Authority
Article 78

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 48 were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1-11	_____
12-45	_____
46-48	_____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*Decided in accordance with the attached
Decision and 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).

Dated: 9/13/13

ALEXANDER W. HUNTER JR J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33**

-----X
In the Matter of the Application of Eva Rios,

Index No.: 400602/13

Petitioner,

Decision and Judgment

-against-

New York City Housing Authority,

Respondent.
-----X

HON. ALEXANDER W. HUNTER, JR.

Petitioner's pro se application for an order pursuant to CPLR article 78, challenging respondent New York City Housing Authority's (the "Housing Authority") determination denying her succession rights as a remaining family member to the public housing apartment formerly leased to her deceased husband, Angel Rios ("Rios"), is denied and the proceeding is dismissed without costs and disbursements to either party. Respondent's motion to dismiss the petition is granted.

Before his death, Rios was the tenant of record for apartment 13H at 65 East 99th Street in the Carver Houses development ("Carver Houses") in Manhattan. A 1980 lease agreement named petitioner and Rios as co-tenants. Petitioner's tenancy ended in 1995, when Rios informed management that petitioner no longer resided in the apartment. On his 2009 and 2010 income affidavits, Rios declared himself the sole occupant in the apartment. In September 2010, Rios requested permission for petitioner to rejoin his household. He, subsequently, died in October 2010.

In February 2011, the management office at Carver Houses informed petitioner that she was occupying Rios' apartment without the benefit of a lease and subject to eviction. Petitioner commenced a remaining family member grievance, but it was determined that petitioner had no rights to Rios' apartment. Petitioner requested further consideration from the Housing Authority's Borough Management Office to remain in the apartment, but it determined that petitioner was ineligible for a lease and her claim was denied.

Petitioner's son Osvaldo Rios ("Osvaldo") requested an administrative hearing. In his request, he admitted that "Mrs. Rios was granted permanent resident permission in 2010 shortly before her husband's sudden death," but argued that petitioner should be granted succession rights because of the "rapid" decline in Rios' health.

During the administrative hearing, petitioner was represented by Osvaldo who testified that petitioner and Rios had been co-tenants before petitioner moved out of the apartment to care for an elderly parent. He claimed that petitioner returned to the apartment in 2009 or 2010 to live with Rios, who was then suffering from terminal cancer and severe depression. Although

Oswaldo did not dispute the fact that Rios failed to request permission for petitioner to rejoin the apartment until just before his death, Oswaldo claimed that petitioner and Rios met with housing management in 2009 to discuss Rios' medical condition and petitioner's occupancy. Oswaldo was unable to provide precise dates of visits to the management office and his accounts of what transpired during those visits were vague. Oswaldo offered into evidence documents, including several doctors' notes, a letter from a social worker dated April 1, 2010, photographs, and an informal tenant petition; however, none of these documents indicated if or when petitioner rejoined the apartment.

Petitioner provided inconsistent testimony of whether she had spoken to housing assistant Rosie Collazo ("Collazo") in 2008 or 2009. Collazo testified that she had not spoken to petitioner in 2008, because she did not work in the Carver Houses until September 2009. Collazo authenticated Rios' lease and the 2009 and 2010 income affidavits, which did not include petitioner as an occupant in the apartment. Collazo confirmed that Rios requested permission for petitioner to rejoin the apartment in September 2010.

After recounting the testimony and documentary evidence, the hearing officer denied petitioner's grievance. In the Decision and Notice of Review dated December 17, 2012, the hearing officer determined that petitioner had not established that she had the written permission of management to rejoin Rios' household at least one year prior to his death. The hearing officer also determined that petitioner's testimony was not sufficiently supported by documentary evidence to establish that she resided in the apartment for at least one year prior to the tenant's death. Petitioner's testimony concerning prior attempts and/or requests to be added to the household was determined to be vague, unspecific, and uncorroborated. In the Determination of Status dated January 23, 2013, the Housing Authority's Board adopted the hearing officer's decision denying petitioner's remaining family member grievance.

Petitioner commenced the instant special proceeding to reverse the January 23, 2013 Housing Authority decision denying petitioner succession rights as a family member to Rios' apartment. Petitioner avers that in October 2009, she and Rios informed a Housing Authority employee of his medical condition and that petitioner had rejoined the household to care for him.

Respondent moves to dismiss the petition on the ground that petitioner does not qualify as a remaining family member because she did not satisfy the one-year requirement as an authorized occupant. Respondent avers that petitioner cannot: (1) obtain succession rights based on her alleged unauthorized occupancy; (2) obtain remaining family member status by estoppel; and (3) claim an exception to the one-year requirement based upon mitigating circumstances.

In a reply affidavit, petitioner asserts that the Housing Authority resident assistant was aware that petitioner was living with and caring for Rios for over one year prior to his death.

In reviewing the instant Article 78 proceeding, this court may not disturb an administrative decision unless the agency's action was arbitrary and capricious, was in violation of lawful procedures, or was made in excess of its jurisdiction. **Pell v. Board of Education, 34**

N.Y.2d 222 (1974). It is well settled that this court “may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion (citations omitted).” **Id. at 232.** Moreover, the determination of an administrative agency, “acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency’s determination is supported by the record.” **Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v. State of N.Y. Div. of Hous. & Cmty. Renewal, 46 A.D.3d 425 (1st Dept. 2007), *affd* 11 N.Y.3d 859 (2008).**

Pursuant to regulations promulgated by the Department of Housing and Urban Development (“HUD”), respondent must certify annually that it has admitted persons to public housing in accordance with HUD regulations. **See 42 U.S.C. §1437 *et seq.*; 24 C.F.R. §960.201.** HUD mandates that respondent promulgate and adhere to certain tenant selection guidelines. **See 24 C.F.R. §960.202 and §960.203.** Throughout the tenancy, a tenant must (1) request approval from the Housing Authority to add any other family member as an occupant of the unit; and (2) supply any information requested by the Housing Authority or HUD pertaining to family income and composition in accordance with HUD requirements. **See 24 C.F.R. §966.4(a)(1)(v); §960.259(a)(2).** Annually, the Housing Authority must reexamine family income and composition, and make necessary adjustments. **See 24 C.F.R. §960.257(a).**

The Housing Authority provides for exceptions to its tenant-selection procedures, including allowing a non-tenant to become a permanent member to the tenant’s household. (Verified answer, exhibit A). To permanently add a non-tenant to the household, a tenant in current occupancy must first request and obtain the written consent of the development manager. (Verified answer, exhibit B). This requirement does not apply to a person who (1) moved into the apartment with the original tenant family and never left the household or (2) was born or adopted into or became a ward of the tenant family and has continuously resided in the household since that time. (Verified answer, exhibit A). Original family members or authorized occupants who move out of the household do not automatically obtain permanent residency by virtue of former occupancy, notwithstanding the Housing Authority’s actual or constructive notice of the person’s return to the household. (**Id.**).

The Housing Authority also allows a remaining family member to take over the lease of a former tenant that has either moved out or died. (**Id.**). An occupant who wishes to succeed to a lease as a remaining family member must establish, *inter alia*, occupancy for not less than one year after the date of lawful entry and prior to the date the tenant of record vacates the apartment or dies (the “one year requirement”). (**Id.**). To establish continuous occupancy and compliance with the one year requirement, the occupant must be named on all income affidavits from the time he or she lawfully enters the apartment until the tenant of record vacates the apartment or dies. (**Id.**).

The Appellate Division, First Department has consistently upheld the one year requirement. **See Saad v. New York City Hous. Auth., 105 A.D.3d 672 (1st Dept. 2013);**

Ponton v. Rhea, 104 A.D.3d 476 (1st Dept. 2013); Rahjou v. Rhea, 101 A.D.3d 422 (1st Dept. 2012); Perez v. New York City Hous. Auth., 99 A.D.3d 624 (1st Dept. 2012); Weisman v. New York City Hous. Auth. 91 A.D.3d 543 (1st Dept. 2012); Matter of Guzman v. New York City Hous. Auth., 85 A.D.3d 514 (1st Dept. 2011); Valentin v. New York City Hous., 72 A.D.3d 486 (1st Dept. 2010); Pelaez v. New York City Hous. Auth., 56 A.D.3d 325 (1st Dept. 2008); Abreu v. New York City Hous. Auth., 52 A.D.3d 432 (1st Dept. 2008); Matter of Johnson v. New York City Hous. Auth., 50 A.D.3d 438 (1st Dept. 2008); Torres v. New York City Hous. Auth., 40 A.D.3d 328 (1st Dept. 2007).

It is undisputed that irrespective of whether petitioner moved into Rios' apartment in 2009 or 2010, Rios did not include petitioner in his 2009 or 2010 income affidavits, nor did he seek or receive respondent's permission for petitioner to rejoin the household until one month before he died. Thus, the Housing Authority's determination had a rational basis and was not arbitrary or capricious, as petitioner did not satisfy the one year requirement.

Moreover, petitioner failed to establish that respondent was aware of and implicitly approved petitioner's residence in the apartment. Matter of Aponte v. New York City Hous. Auth., 48 A.D.3d 229 (1st Dept. 2008). Notwithstanding petitioner's unauthorized occupancy, this did not relieve her of complying with the written permission requirement, and this is not enough to entitle her to be treated as a remaining family member. See Matter of Edwards v. New York City Hous. Auth., 67 A.D.3d 441 (1st Dept. 2009); McFarlane v. New York City Hous. Auth., 9 A.D.3d 289 (1st Dept. 2004), *rev'd* 1 Misc. 3d 744 (Sup. Ct. N.Y. Co. 2003). Although the denial of remaining family member status may present a hardship for petitioner, mitigating factors do not provide a basis for annulling respondent's determination. See Matter of Firpi v. New York City Hous. Auth., 107 A.D.3d 523 (1st Dept. 2013); Saad, 105 A.D.3d at 672. In addition, estoppel may not be invoked against respondent. See Matter of Parkview Assoc. v. City of New York, 71 N.Y.2d 274 (1988), *cert denied* 488 U.S. 801 (1988); Firpi, 107 A.D.3d at 523.

Accordingly, it is hereby,

ADJUDGED that petitioner's application is denied and the proceeding is dismissed without costs and disbursements to either party, and it is further


ADJUDGED that respondent's motion to dismiss the petition is granted.

Dated: September 13, 2013

ENTER:

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).


ALEXANDER M. HUNTER JJ