

Matter of Jimenez v New York City Hous. Auth.
2013 NY Slip Op 33286(U)
December 11, 2013
Supreme Court, New York County
Docket Number: 401252/13
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

In the Matter of the Application of
RUBEN JIMENEZ,

Index No. 401252/13

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

MOTION DATE _____

-against-

MOTION SEQ. NO. 001

**NEW YORK CITY HOUSING AUTHORITY, WILLIAM
PLAZA HOUSES,**

Respondents.

MOTION CAL NO. _____

The following papers, numbered 1 to _____ were read on this motion _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1

Answering Affidavits- Exhibits 23

Replying Affidavits _____

UNFILED JUDGMENT

CROSS-MOTION: _____ YES ☒ NO

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).

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

DECIDED IN ACCORDANCE WITH ATTACHED DECISION AND ORDER.

Dated: 12/11/13


DONNA M. MILLS, J.S.C.

Check one: ☒ FINAL DISPOSITION

_____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

-----X
In the Matter of the Application of RUBEN
JIMENEZ,

Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against-

Index No. 401252/13

NEW YORK CITY HOUSING AUTHORITY,
WILLIAM PLAZA HOUSES,

Respondents.

UNFILED JUDGMENT

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DONNA M. MILLS, J.:

In this special proceeding pursuant to C.P.L.R. Article 78, Petitioner Ruben Jimenez ("Petitioner") challenges a determination by the Respondent, New York City Housing Authority ("Housing Authority or Respondent"), which dismissed his grievance to succeed as a remaining family member to the apartment formerly leased to his grandmother, the deceased tenant of record, Carmen Cotto ("Ms. Cotto").

Starting in 1987, Ms. Cotto was the tenant of record of apartment 18E at 255 Havemeyer Street in the Williams Plaza Development in Brooklyn. Throughout her entire tenancy, Ms. Cotto was the sole authorized occupant of her one-bedroom apartment. In her August 2002 annual affidavit, Ms. Cotto listed Petitioner as an occupant of her apartment. In September 2002, management notified Ms. Cotto that Petitioner did not have permission to reside in her apartment and, if she wished for him to join her household, she must visit the management office and submit a permission request form.

It is undisputed that Ms. Cotto resided in Keser Nursing and Rehabilitation Center from October 18, 2002 through April 11, 2006. Additionally Ms. Cotto resided in Woodhull Hospital as of April 26, 2006. ON September 10, 2007, Ms. Cotto dies while residing at Wayne Nursing Center, a long term care facility.

Petitioner met with the Property Manager concerning his request to succeed to Ms. Cotto's lease and the Property Manger concluded Petitioner did not qualify as a

remaining family member because (a) Ms. Cotto never requested and was never granted written permission for Petitioner to join the household, and (b) even if a request had been submitted, management could not have granted Petitioner permanent permission to join the household because it would violate the Housing Authority's occupancy standards.

The District Office informed Petitioner it would review his claim and he could appear for an interview. After meeting with Petitioner, the Borough Manager found Petitioner did not prove he had written permission to join Ms. Cotto's household and, therefore, upheld the Property Manager's denial of Petitioner's grievance.

On May 15, 2013, the parties appeared for an Administrative Hearing before an impartial Hearing Officer. Petitioner testified that in 1989 he began living with Ms. Cotto who had custody of him and he continued to live with her until around 1992 or 1993 when he was approximately 18 or 19 years old, at which point he moved into his own apartment. Petitioner claimed he moved back in with his grandmother in November or December 2001 to care for her and has remained in the apartment since.

Housing Assistant Nina Dinkevich ("Dinkevich") testified Ms. Cotto was the only person authorized to reside in the apartment. Dinkevich also testified that she reviewed Ms. Cotto's tenant folder, and Ms. Cotto did not submit a permanent permission request form to management to add Petitioner to her household. Moreover, Ms. Dinkevich testified that, under Housing Authority's occupancy standards, a one-bedroom apartment is only suitable for a couple, or a parent with a child less than 6 years of age. Therefore, even if Ms. Cotto had submitted a request, management could not have granted Petitioner permanent permission to reside with Ms. Cotto in her one-bedroom apartment.

After recounting the testimony and the documentary evidence, the Hearing Officer denied Petitioner's grievance, finding Petitioner failed to establish that he was an original family member who remained in continuous occupancy of the subject apartment until Ms. Cotto's passing on September 10, 2007, or that he, with the written permission of management, resided in the apartment for at least one year prior to the tenant's passing.

By written determination dated June 26, 2013, the Housing Authority's Board

adopted the Hearing Officer's decision denying Petitioner's remaining-family-member grievance. Petitioner commenced this Article 78 proceeding on August 12, 2013, by filing a Verified Petition.

This court's role in an Article 78 motion is limited to the determination of whether the decision made by NYCHA was arbitrary or capricious, by assessing if there existed a rational basis for the determination. See, In the Matter of Pell v. Bd. of Educ., 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974) ("It is well settled that a 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."). This court cannot, "substitute its judgment for that of the agency. 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" (citations omitted). In the Matter of Mid-State Management Corp. v. New York City Conciliation and Appeals Bd., 112 A.D.2d 72, 75, 491 N.Y.S.2d 634 (1st Dept.1985); see also, In the Matter of Sullivan County Harness Racing Ass'n, Inc. v. Glasser, 30 N.Y.2d 269, 332 N.Y.S.2d 622, 283 N.E.2d 603 (1972).

Respondent, as a public housing authority, is subject to the rules of the United States Department of Housing and Urban Development. Under 24 CFR § 966.53(f)(2), a tenant is a person "who resides in the unit, and who is the remaining head of the household of the tenant family residing in the dwelling unit." Under respondent's regulations, a person may obtain remaining family member status if that person was a member of the original family or became one by birth or adoption; or, if that person received written permission from the project manager. That person also must have been in the apartment continuously and be otherwise eligible for public housing (see Chapter VII, Section IV, Subsection E of the Housing Authority's Management manual and its guidelines GM. 3692).

Respondent's requirement that an applicant receive permission to be added as a remaining family member is consistent with 24 CFR § 966.4(a)(v). This regulation states that, "The family must promptly inform the PHA [Public Housing Authority] of the birth, adoption or court-awarded custody of a child. The family must request PHA approval to

add any other family member as an occupant of the unit.”

In November, 2002, respondent amended its guidelines to restrict the granting and permission, and potential succession rights, to certain close relatives including spouses, children, grandchildren and grandparents. The new regulation excluded other persons including aunts, uncles and cousins. Courts have consistently upheld the written-consent requirement to obtain RFM status. See In the Matter of Edwards v. New York City Hous. Auth., 67 A.D.3d 441, 888 N.Y.S.2d 43 (1st Dept.2009) (upholding denial of remaining family member claim when petitioner failed to obtain written permission); In the Matter of Rivera v. New York City Hous. Auth., 60 A.D.3d 509, 876 N.Y.S.2d 3 (1st Dept.2009) (“Petitioner did not enter subject apartment lawfully, respondent never gave tenant of record written permission for petitioner to join household, and petitioner acknowledged that no such permission was ever obtained prior to tenant's death.”).

Petitioner argues in the instant motion that he is entitled to succession rights on the basis that the Housing Authority knew and implicitly approved of her residence in the subject apartment. Petitioner's argument is without merit. The dicta of In the Matter of McFarlane v. New York City Hous. Auth., 9 A.D.3d 289, 780 N.Y.S.2d 135 (1st Dept.2004) provides an exception to the written-consent requirement when there is evidence that the Housing Authority was aware of, and implicitly approved, the petitioner's residence in the apartment (“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.”). However, a subsequent decision by the Court of Appeals in In the Matter of Schorr v. New York City Department of Housing Preservation & Development, 10 N.Y.3d 776, 778, 857 N.Y.S.2d 1, 886 N.E.2d 762 (2008) abrogates the McFarlane dicta, holding that although respondent acquiesced in petitioner's occupancy, a governmental agency “is statutorily required to enforce Mitchell–Lama Law and regulations regardless of any actions or acquiescence” by the management office. See also In the Matter of Quinto v. New York City Dep't of Hous. Pres. & Dev., 78 A.D.3d 559, 913 N.Y.S.2d 23 (1st Dept.2010) (reiterating that “petitioners may not invoke estoppel to prevent HPD from executing its statutory duty to provide Mitchell–Lama housing only to individuals who

meet the specified eligibility requirements.”)(citing Schorr, 10 N.Y.3d at 779, 857 N.Y.S.2d 1, 886 N.E.2d 762); In the Matter of Kendra Edwards v New York City Housing Authority, 67 A.D.3d 441, 442, 888 N.Y.S.2d 43 (asserting that “[i]t would not avail petitioner even if respondent were aware of her occupancy” in NYCHA housing) (citing Schorr at 10 N.Y.3d at 776, 857 N.Y.S.2d 1, 886 N.E.2d 762). Therefore, Petitioner cannot obtain succession rights via the Housing Authority's implicit approval.

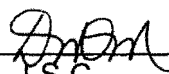
In the instant action, Petitioner did not obtain written consent to permanently join the household and, therefore, failed to fulfill the lawful entry requirement to obtain remaining family member status. Consequently, Petitioner's lack of remaining family member status precludes entitlement to succession rights. See McFarlane, 9 A.D.3d at 291, 780 N.Y.S.2d 135 (1st Dept.2004) (denying claims to succession rights because petitioners failed to apply for and obtain remaining family member status).

The Housing Authority's denial of Petitioner's grievance was neither arbitrary nor capricious. It is clear that the Petitioner did not lawfully enter the household because he did not have written permission to join the household.

Accordingly it is ADJUDGED that the petition is denied and the proceeding dismissed.

Dated: 12/11/13

ENTER:


J.S.C.

DONNA M. MILLS, J.S.C.

UNFILED JUDGMENT

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