

**Matter of Widerman v New York City Hous. Auth.**

2014 NY Slip Op 30110(U)

January 13, 2014

Sup Ct, New York County

Docket Number: 400884/13

Judge: Jr., Alexander W. Hunter

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This opinion is uncorrected and not selected for official publication.

# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

Index Number : 400884/2013

PART 33

WIDERMAN, ISAAC

vs

NYC HOUSING AUTHORITY

INDEX NO. \_\_\_\_\_

Sequence Number : 001

MOTION DATE \_\_\_\_\_

ARTICLE 78

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). 1-49

Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 50-81

Replying Affidavits \_\_\_\_\_ | No(s). 82-106

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):

### 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: 1/13/14

*[Signature]*, J.S.C.  
**ALEXANDER W. HINTER JR.**

- 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  
Isaac Widerman,

Index No.: 400884/13

Decision and Judgment

Petitioner,

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

-against-

New York City Housing Authority

Respondent.

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

The application by pro se petitioner for an order 1) pursuant to CPLR Article 78, reversing the determination, dated February 6, 2013, of respondent New York City Housing Authority (“NYCHA”) denying his rent grievance; 2) advancing petitioner on the transfer waiting list; 3) directing the return and/or removal of certain documents located in his tenant folder; 4) directing the removal and replacement of exhaust fans; and 5) awarding damages in the amount of \$10 million for pain and suffering, is denied in its entirety and the proceeding is hereby dismissed without costs and disbursements to either party.

Irene Widerman, the mother of petitioner, was the tenant of record of 125 Taylor Street, Apartment 21A, Brooklyn, New York 11249 (the “subject apartment”) until her death in December 2002. The subject apartment is located at Independence Towers, a public housing development managed by NYCHA. Petitioner commenced a remaining-family-member grievance in which he claimed entitlement to a lease for the subject apartment. In order to pursue his remaining-family-member claim, petitioner was required to pay use and occupancy for the subject apartment. (NYCHA’s Exhibit C). From January 2003 to January 2006, petitioner paid \$198.00 per month in use and occupancy. (NYCHA’s Exhibit I).

In order to succeed to a lease as a remaining family member, petitioner was required to verify his income. By affidavit dated August 25, 2005, petitioner indicated that he only received \$200.00 per month in income from a charitable organization named Masbia. (NYCHA’s Exhibit J). Respondent determined that the reported income was unrealistic as petitioner would only be left with \$2.00 per month after payment of use and occupancy. Thereafter, the remaining-family-member grievance was denied by Determination of Status, dated February 13, 2008. (NYCHA’s Exhibit K). On January 22, 2010, after petitioner provided sufficient documentation demonstrating the receipt of Social Security income, the Hearing Officer sustained the remaining-family-member grievance and NYCHA adopted the decision. (NYCHA’s Exhibit L).

On December 8, 2010, petitioner signed a lease and became the tenant of record for the subject apartment. (NYCHA's Exhibit A).

On May 28, 2010, petitioner requested a transfer to a smaller one bedroom apartment located in the Wise Towers Rehab development. After petitioner became the tenant of record for the subject apartment, Management approved his transfer request. By letter dated January 26, 2011, petitioner was informed that his transfer request had been approved. (NYCHA's Exhibit Z). Petitioner was placed on a waiting list for an apartment in WSUR Rehabs, a division in the Wise Towers Rehab development.

In April 2011, petitioner filed a grievance requesting a rent credit for the period between January 2003 to January 2006. (NYCHA's Exhibit M). In October 2011, the Property Manager determined that petitioner was not entitled to a rent credit as the period in question predated his tenancy. The decision of the Property Manager was sustained by the Borough Manager in November 2011. At the request of petitioner, a hearing was held over the course of several days before Chief Hearing Officer Ester Tomicic-Hines. By Decision and Notice of Review, dated January 4, 2013, the Hearing Officer denied the rent grievance. The Hearing Officer determined that found petitioner "should have asserted his right to a reduction in use and occupancy at the time he was pursuing his remaining family member grievance claim, but did not do so. He continued to pay use and occupancy...and will not now be permitted to seek a retroactive rent reduction for that time period." (NYCHA's Exhibit W). By Determination of Status, dated February 4, 2013, respondent adopted the determination rendered by the Hearing Officer denying the rent grievance. (NYCHA's Exhibit X).

In April 2013, petitioner submitted a request pursuant to the Freedom of Information Law to review his tenant folder. On May 13, 2013, NYCHA made his tenant folder available for inspection. Petitioner takes issue with the contents of his tenant folder. Specifically, petitioner seeks an order directing respondent to return all missing documents dating from 1965 to 2005. He also seeks an order removing all documents which allege racial discrimination on his part. Finally, petitioner seeks an order directing respondent to remove the copy of his driver's license and to replace said copy with a document that reads as follows: "It is not my desire to have my organs donated upon my death. For I am Jewish, and as a Jew it is forbidden for me to do so."

CPLR 7804(g) provides that the court must transfer the proceeding to the Appellate Division if after a hearing is held, the issue of substantial evidence is raised. However, this court finds that the issue of substantial evidence was not raised as petitioner does not challenge any findings of fact made by respondent. See, Matter of Rosenkrantz v. McMickens, 131 A.D.2d 389 (1<sup>st</sup> Dept. 1987); Matter of Duboff Elec. v. Goldin, 95 A.D.2d 666 (1<sup>st</sup> Dept. 1983). As such, the February 6, 2013 determination shall be reviewed under the arbitrary and capricious standard. It is well settled 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.” **Matter of Mid-State Mgt. Corp. v. New York City Conciliation and Appeals Bd.**, 112 A.D.2d 72, 76 (1<sup>st</sup> Dept. 1985). Therefore, the role of this court is limited to whether or not the final determination rendered by respondent was made without a rational basis.

Despite his efforts, petitioner argues that respondent improperly failed to reduce his rent pursuant to its own regulations for the period of January 2003 to January 2006. Respondent argues that it properly denied the rent grievance because petitioner is not entitled to a rent credit for any payments made before he executed a lease and became the tenant of record on December 8, 2010. In reply, petitioner contends that he has continuously resided at the subject apartment since October 25, 1965. As a remaining family member, petitioner avers that he should have been offered a lease regardless of how long it took respondent to sustain his remaining-family-member grievance.

“[F]ederal regulations create a clear distinction between the tenant and family members who are not tenants.” **Matter of Faison v. New York City Hous. Auth.**, 283 A.D.2d 353 (1<sup>st</sup> Dept. 2001). An authorized occupant seeking to succeed to the lease as a remaining family member is considered a mere licensee. **Matter of Abdil v. Martinez**, 307 A.D.2d 238 (1<sup>st</sup> Dept. 2003). Petitioner did not attain the status of a remaining family member until his grievance was sustained in January 2010.

The continued payment of use and occupancy is a condition precedent to the commencement of a remaining-family-member grievance. **See, NYCHA Management Manual, ch. VII, § E(1)(c)(2); Garcia v. Franco**, 248 A.D.2d 263 (1<sup>st</sup> Dept. 1998). During the pendency of the grievance, the grievant must continue to make such payments. In the case at bar, no evidence was submitted to demonstrate that petitioner ever requested a reduction in use and occupancy payments prior to April 8, 2011. Petitioner consistently paid the full use and occupancy of \$198.00 per month as a condition of pursuing his remaining-family-member grievance.

This court finds that the determination by respondent denying his rent grievance was not arbitrary and capricious. Prior to January 2010, petitioner was a mere licensee who was obligated to make use and occupancy payments in order to pursue his remaining-family-member claim. Petitioner should have requested a reduction in the rate of use and occupancy while he was pursuing his remaining-family-member claim. **See, NYCHA Management Manual, ch. § XII(D)(2)(b)**. The obligation to pay rent was not triggered until petitioner executed a lease in December 2010. Thus, petitioner is not entitled to a retroactive rent credit for any period that predates his tenancy.

The branch of the instant application in which petitioner seeks an order moving him up the transfer waiting list is time-barred. The Court of Appeals in **Walton v. New York State Department of Correctional Services** reiterated that “[a] petitioner who seeks an article 78 review of a determination must commence the proceeding within four months after the determination to be reviewed becomes final and binding upon petitioner.” 8 N.Y.3d 186, 194 (2007) (citing CPLR 217(1)); **Blackman v. New York City Hous. Auth.**, 280 A.D.2d 324, 325 (1<sup>st</sup> Dept. 2001). Petitioner received notice of his placement on a transfer list in January 2011.

At the very latest, petitioner should have commenced an Article 78 proceeding by May 2011. The instant proceeding was not commenced until June 2013. Therefore, the claims brought by petitioner concerning the processing of his transfer request is untimely.

Mandamus to compel is a judicial command to an officer or body to perform a specified ministerial act that is required by law to be performed. **See, Matter of Hamptons Hosp. & Med. Ctr. v. Moore, 52 N.Y.2d 88 (1981)**. The petitioner must show a “clear legal right” to the requested relief to succeed in mandamus and the petition must be denied if the right to performance is clouded by “reasonable doubt or controversy.” **Matter of Assn. of Surrogates & Supreme Ct. Reporters within City of N.Y. v. Bartlett, 40 N.Y.2d 571, 574 (1976)**. Mandamus cannot be used to compel an officer or tribunal to reach a particular outcome with respect to a decision that turns on the exercise of discretion or judgment. **Klosterman v. Cuomo, 61 N.Y.2d 525 (1984)**.

With respect to the contents of petitioner’s tenant folder maintained by respondent, this court finds that petitioner is not entitled to the mandamus relief he seeks. Petitioner has failed to establish his clear legal right to dictate what documents respondent must include in his tenant folder. The Records Retention and Disposal Schedule directs the destruction of “all forms and papers relating to income reviews that are over six (6) years old” and “all other papers that are over six (6) years old except those that relate to the desirability of the tenants...” (NYCHA’s Exhibit CC, NYCHA Standard Procedure Manual, V(C)(2)). Thus, documents older than six years of age, with the exception of certain specified categories of documents, have been removed from the tenant file. Similarly, interview records memorializing communications between building management and counsel for respondent must be maintained in the tenant folder. (NYCHA’s Exhibit CC, NYCHA Standard Procedure Manual, V(C)(3)).

The requests by petitioner for the removal and replacement of the ceiling fans are not properly before this court. The only questions that may be raised in a special proceeding brought under CPLR Article 78 are 1) “whether the body or officer failed to perform a duty enjoined upon it by law”; 2) “whether the body or officer proceeded...in excess of jurisdiction”; 3) “whether a determination was made in a violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion”; or 4) “whether a determination made as a result of a hearing held, and at which evidence was taken,...supported by substantial evidence.” **CPLR 7803**. Petitioner argues that NYCHA has exposed him to harmful conditions in violation of section 14 of his residential lease. Any action concerning hazardous conditions in the subject apartment must be brought in the Housing Part of the Civil Court of the City of New York. **See, CCA 110(a)**.

The application by petitioner for damages in the amount of \$10 million is denied. For the past twenty years, petitioner avers that he has had to endure living with the cacophonous whirring of exhaust fans located on the roof of the apartment building. He also claims that the incessant noise has had a deleterious effect on his health. CPLR 7806 provides in pertinent part that “[a]ny restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or


officer in its or his official capacity.” Here, the primary relief sought is the reversal of the February 6, 2013 determination denying the rent grievance. Damages in any amount to compensate petitioner for pain and suffering due to excessive noise are completely unrelated to the primary relief sought. Therefore, the request for damages is denied.

Accordingly, it is hereby,

ADJUDGED that the application by petitioner is denied in its entirety and the proceeding is dismissed without costs and disbursements to either party.

Dated: January 13, 2014

ENTER:

  
\_\_\_\_\_  
J.S.C.  
**ALEXANDER W. HUNTER JR**

**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).