

**Ortiz v New York City Hous. Auth.**

2014 NY Slip Op 31213(U)

April 25, 2014

Supreme Court, New York County

Docket Number: 401515/13

Judge: Andrea Masley

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. ANDREA MASLEY

PRESENT: \_\_\_\_\_  
Justice

PART 25

Carmen Ortiz

INDEX NO. 401515/13

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

MOTION SEQ. NO. 01

MOTION CAL. NO. \_\_\_\_\_

John B. Rhea

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

PAPERS NUMBERED

Cross-Motion:  Yes  No


Upon the foregoing papers, it is ordered that this motion

is granted for the reasons stated in the annexed decision

**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: 4/25/14

  
HON. ANDREA MASLEY S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

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

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

**DECISION/ORDER**

**CARMEN ORTIZ,**

**Petitioner,**

**HON. ANDREA MASLEY  
Judge, Supreme Court**

**-against-**

**NEW YORK CITY HOUSING AUTHORITY,  
Respondent.**

---

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Order to Show Cause, Petition	1
Memo of Law	2
Answer, Exhibits	3
Respondent's Memo of Law	4
Reply Memo of Law	5

Pursuant to CPLR Article 78, petitioner Carmen Ortiz seeks to annul the February 28, 2013 determination of a hearing officer denying Ms. Ortiz succession rights to the apartment of her late mother Luz Torres, a tenant at respondent New York City Housing Authority Frederick Douglass Houses in New York, NY (NYCHA) until her death on January 9, 2011. Alternatively, if the court does not annul NYCHA's decision and direct NYCHA to issue a lease to Ms. Ortiz, then she seeks remand for consideration of a prior NYCHA decision which is consistent with her position.

After a hearing, Hearing Officer Desiree Miller-Beauvil determined that none of six written requests by Ms. Torres for permanent permission for Ms. Ortiz to remain in the apartment could have resulted in Ms. Ortiz being added to her mother's household as a remaining family member (RFM) because her permanent addition to the studio apartment was prohibited by NYCHA's occupancy standards. As Ms. Ortiz did not have written permission to join her mother's apartment on a permanent basis, the officer found the grievance could not be sustained.

In a proceeding under CPLR Article 78, judicial review is limited to a

determination of whether the administrative action complained of is arbitrary and capricious or lacks a rational basis. *Matter of Pell v Board of Education*, 34 NY2d 222, 230-31 (1974). The only questions that may be raised are whether the determination is in violation of lawful procedure, "was affected by an error of law or was arbitrary and capricious or an abuse of discretion," pursuant to CPLR 7803 (3). The court may not substitute its judgment for that of the administrative agency if the agency decision has a rational basis on the record. *Royal Realty Co. v New York State Division of Housing and Community Renewal*, 161 AD2d 404, 405 (1<sup>st</sup> Dept 1990).

NYCHA Management Manual states an RFM may succeed to a lease after the tenancy ends. Such a person acquires status as a RFM if they enter the apartment lawfully and are in continuous occupancy for a minimum of one year from the issuance of written permission for permanent occupancy status, subject to eligibility requirements. Chapter 1, Section XII. If the resulting new tenancy overcrowds the apartment, "Development Housing Manager informs the new tenant that (s)he may submit a request to transfer to a larger apartment." *Id.*, p 133. The Manual states that once an additional person acquires permanent status, if their addition constitutes an overcrowded apartment, the housing manager "shall offer the tenant the opportunity to transfer to a larger apartment of appropriate size." Chapter IV, p 117. According to NYCHA's Manual at Exhibit F, an apartment without a bedroom is overcrowded if two or more people are in occupancy.

Ms. Ortiz testified that in 1998 she relocated from Florida to live with her mother, who was suffering from dementia and a brain tumor. According to NYCHA's findings Ms. Ortiz was repeatedly granted temporary permission to live with her mother from 2003 through 2010 and her applications for permanent permission were neither granted

nor denied in writing until December 17, 2010, when NYCHA stated that Ms. Ortiz's permanent addition to the household would create an overcrowded apartment. The letter states that "[b]ecause you are living in a studio, management is unable to add your daughter to the lease permanently because it will create an overcrowded apartment which we are unauthorized to do."

NYCHA objects to this petition for annulment on grounds that (1) petitioner lacks standing; (2) the claim is time-barred; (3) petitioner cannot introduce on this motion an argument not presented to the hearing officer; and (4) Ms. Torres never requested transfer to a larger apartment.

A family member has the right to challenge a denial of succession rights to public housing, under Article 78. *Gutierrez v Rhea*, 105 AD3d 481 (1<sup>st</sup> Dept 2013). As Ms. Ortiz has standing to bring this claim, the action is not time-barred, as the time to bring this petition commenced not four months from the letter of denial from NYCHA to petitioner's mother in December, 2010, but four months from the date the determination became final and binding on petitioner, pursuant to CPLR 217(1).

NYCHA objects to petitioner's introduction of a final determination of a NYCHA hearing officer in an unrelated case on identical facts, overruling management's denial of RFM. As the court has not considered that final determination here, it need not reach NYCHA's objection.

NYCHA's objection that Ms. Torres never requested a transfer misstates the record before the court. Grievant's Exhibit 2 at the hearing was a letter dated December 19, 2002 from Ms. Torres' treating physician at the Ryan Community Health Center in Manhattan, stating that Ms. Torres was being treated for dementia and a brain tumor and needed assistance at home. The doctor states that Ms. Torres "will

need a separate room for herself.” The doctor is clear that due to her incapacity, Ms. Torres required assistance in making a written application, and also needed the care provided at home by her daughter.

NYCHA denied Ms. Ortiz RFM status not because she had not lived continuously in the apartment for over a year nor because she did not otherwise qualify as a remaining family member, but because she did not have written permission. According to NYCHA’s hearing officer, Ms. Ortiz was denied written permission for permanent status because the studio apartment was too small to accommodate her and her incapacitated mother.

The February 28, 2013 determination must be annulled because NYCHA’s decision is factually incorrect. The record reveals that in 2002 Ms. Torres had requested a larger apartment to accommodate her daughter upon whose round-the-clock care she depended.

In addition, the determination must be annulled because NYCHA violated its own rules. Overcrowding standards are to be considered after permanent permission is granted. By failing to do so, NYCHA has impermissibly conflated its RFM rules with its overcrowding procedures. As a result, Ms. Ortiz was relegated to 7 years of temporary status. Under NYCHA’s reasoning, growing families would forever be impermissibly stuck in a Catch 22. NYCHA must follow its own rules: step 1 consider RFM; Step 2 invite request for transfer. As there is no explanation on the record as to why this procedure was not followed, the decision lacks a rational basis and is arbitrary and capricious as a matter of law.

The court has confined its review to the “facts and record adduced before the agency.” *Featherstone v Franco*, 95 NY 2d 550, 554 (2000).

Accordingly, it is

ORDERED that the petition is granted. The February 28, 2013 determination is annulled and NYCHA is directed to take action consistent with this decision. The foregoing constitutes the judgment of the court.

Dated: April 25, 2014

  
\_\_\_\_\_  
Andrea Masley, Judge, Supreme Court

**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).