

**Matter of Aponte v Olatoye**

2014 NY Slip Op 33626(U)

September 8, 2014

Supreme Court, New York County

Docket Number: 400546/14

Judge: Cynthia S. Kern

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

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

PART 55

Jonas Aponte

INDEX NO. 400546/14

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

MOTION SEQ. NO. 1

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

Shola Olatoye, Et Al

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 decided in accordance with the annexed decision.

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

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Dated: 9/8/14

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X  
In the Matter of the Application of

JONAS APONTE,

Petitioner,

Index No. 400546/14

For an Order Pursuant to Article 78  
of the Civil Practice Law and Rules,

**DECISION/ORDER**

-against-

SHOLA OLATOYE, as Chairwoman of the New York  
City Housing Authority and THE NEW YORK CITY  
HOUSING AUTHORITY,

Respondents

-----X  
HON. CYNTHIA S. KERN, J.S.C.

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

Papers

**FILED** Numbered

Notice of Motion and Affidavits Annexed.....	SEP. 15. 2014	<u>1</u>
Answering Affidavits.....		<u>2</u>
Replying Affidavits.....		<u>3</u>
Exhibits.....		<u>4</u>

COUNTY CLERKS OFFICE  
NEW YORK

Petitioner Jonas Aponte brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to challenge a determination made by respondent New York City Housing Authority ("NYCHA") denying him remaining-family-member status to a certain apartment. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Victoria Aponte was the tenant of record of apartment 11A (the "subject apartment"), a one-bedroom apartment located in the Sedgwick Houses, a NYCHA-owned housing development, located at 150 West 174<sup>th</sup> Street, Bronx, New York from

February 1992 until her death on July 17, 2012. During her tenancy, Ms. Aponte was the sole authorized occupant of the subject apartment. In or around 2009, petitioner, Ms. Aponte's son, allegedly moved into the subject apartment to assist Ms. Aponte who had been diagnosed with advanced dementia of the Alzheimer's type. Thereafter, petitioner allegedly learned that due to his mother's medical condition, it would be unsafe for her to live alone and that she required regular assistance and supervision. Thus, on or about August 24, 2010, Ms. Aponte submitted a "Permanent Permission Request for a Family Member/Additional Person To Live With A Development Tenant" ("PPR") to the Sedgwick Houses Management Office purportedly signed by Ms. Aponte and petitioner seeking permission to permanently add petitioner to her household because she is "sick, dementia, need help." On September 20, 2010, the Sedgwick Houses Manager disapproved the PPR on the ground that approving the permanent residency request "will create overcrowding conditions."

On or about January 4, 2011, Ms. Aponte submitted her Occupant's Affidavit of Income, which included petitioner as a person living in the subject apartment and stated that "[t]here is someone in my household with a disability, but I am not requesting the Housing Authority to provide any accommodation at this time." Sedgwick Houses Resident Services Associate, Joel Berson, crossed out petitioner's name on the ground that petitioner was not authorized to be residing in the subject apartment and explained to Ms. Aponte that she could not add petitioner to her family composition because it would create overcrowding living conditions.

On or about January 12, 2011, Mr. Berson sent Ms. Aponte a Lease Addendum and Rent Notice, dated January 12, 2011, listing Ms. Aponte as the only authorized occupant of the subject apartment and stating that, except for a child born to, legally adopted by, or judicially declared

the guardian of, an authorized member of the household, "[n]o other person is permitted to reside permanently in the household unless the Housing Manager grants you WRITTEN PERMISSION to add that person to your household." In or around February 2011, a second PPR, purportedly signed by Ms. Aponte and petitioner, seeking permission for Ms. Aponte to permanently add petitioner to her household was submitted to the Sedgwick Houses Management Office. The PPR stated that the reason Ms. Aponte was requesting permanent residency permission for petitioner was that she was "[s]uffering from dementia cannot be alone." On or about February 7, 2011, the Sedgwick Houses Manager disapproved the PPR on the ground that he did not believe that Ms. Aponte had signed it and that her "son cannot request permission and cannot sign for his mother."

On or about July 27, 2012, petitioner informed Sedgwick Houses Management Office that Ms. Aponte had died and that he would like to lease the subject apartment. By letter dated August 14, 2012, the Sedgwick Houses Manager informed petitioner that an appointment was scheduled to meet to discuss his remaining-family-member status on August 17, 2012. On that date, the Sedgwick Houses Manager met with petitioner and thereafter denied petitioner's remaining-family-member grievance noting that he had explained to petitioner that he was never part of the household and was never given written permission to join the household. On or about January 23, 2013, NYCHA's Bronx Borough Property Manager met with petitioner regarding his remaining-family-member grievance and, on February 1, 2013, denied the grievance, agreeing with the Manager's disposition of the matter and informing petitioner that he may appeal to a Hearing Officer.

On or about April 15, 2013, NYCHA commenced a holdover proceeding against

petitioner in Bronx Housing Court seeking to evict petitioner from the subject apartment (the "Holdover Proceeding"). The Holdover Proceeding was adjourned numerous times and, at the last court appearance on March 24, 2014, it was adjourned to July 17, 2014. Meanwhile, petitioner appealed NYCHA's denial of his remaining-family-member grievance and a hearing was commenced on September 18, 2013 but was adjourned to November 19, 2013 at petitioner's request. At the hearing, petitioner's direct case consisted of his testimony and of the introduction of numerous exhibits bearing upon Ms. Aponte's tenancy, her health condition and requests for permission for petitioner to permanently join her household. Petitioner testified that he moved into his mother's apartment sometime in mid-2009 and that neither he nor his mother filled out or signed the August 24, 2010 PPR, which he saw for the first time when he reviewed Ms. Aponte's tenant's folder in preparation for the hearing. Petitioner also called his sister to testify, who stated that she helped Ms. Aponte at one point but that she eventually gave that responsibility to petitioner, who moved in with Ms. Aponte to help her and that Ms. Aponte had a health aide for a time as well. NYCHA also introduced numerous documents into evidence. Additionally, Mr. Berson appeared on behalf of NYCHA and testified that Ms. Aponte lived in a three-room, one-bedroom apartment; that petitioner was not listed on the Tenant Data Summary as residing in the subject apartment; that it is NYCHA's policy that for a one-bedroom apartment, the standard occupancy is a married couple or an adult with a child under the age of six; that an overcrowded one-bedroom apartment consists of a couple that is neither married nor registered as partners or an adult with a child over the age of six; that the first PPR was disapproved by the Manager because adding petitioner to the household would have created an overcrowded condition in the subject apartment; that the second PPR was disapproved by the

Manager because she believed that Ms. Aponte did not sign the PPR, that petitioner had signed the document for Ms. Aponte and that he could not request such permission; that although petitioner was listed in Ms. Aponte's January 4, 2011 Affidavit of Income as an occupant of the subject apartment, petitioner's name was crossed out because petitioner was never authorized to reside in the subject apartment; and that petitioner was not listed as an occupant of the subject apartment in the annual review papers submitted to the management office by Ms. Aponte dated December 20, 2011.

In a decision dated December 18, 2013, the Hearing Officer found that Ms. Aponte was the sole authorized occupant of a three-room, one-bedroom apartment; that the grievant was never an authorized member of Ms. Aponte's household and did not obtain management's written permission to join her household; that the two PPRs submitted to management to add petitioner to Ms. Aponte's household were properly disapproved; and that petitioner's addition to Ms. Aponte's household would have caused overcrowding and would violate NYCHA's Occupancy Standards. Thus, the Hearing Officer denied petitioner's grievance stating "[the grievant] did not have NYCHA's permission to reside in the apartment [and he] is not a remaining family member as defined by NYCHA regulations." On or about April 17, 2014, petitioner commenced the instant proceeding by Order to Show Cause challenging NYCHA's denial of his remaining-family-member grievance. The Order to Show Cause sought a stay of the Bronx Housing Court proceeding pending against petitioner and of the enforcement against petitioner of any possessory judgment pending the hearing of the Article 78 proceeding. This court granted the requested stay on April 22, 2014.

On review of an Article 78 petition, "[t]he law is well settled that the courts may not

overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious." *Goldstein v. Lewis*, 90 A.D.2d 748, 749 (1<sup>st</sup> Dep't 1982). "In applying the 'arbitrary and capricious' standard, a court inquires whether the determination under review had a rational basis." *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep't 2005); see *Pell v. Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974)("[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.") "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.' Arbitrary action is without sound basis in reason and is generally taken without regard to facts." *Pell*, 34 N.Y.2d at 231 (internal citations omitted). The First Department has repeatedly enforced NYCHA's written-consent policy and has upheld, as rational, determinations denying remaining family member status based upon the failure of the tenant of record to obtain permanent residency permission for the petitioner. See *Rahjou v. Rhea*, 101 A.D.3d 422 (1<sup>st</sup> Dept 2012)(upholding as rational the denial of tenancy by succession as a remaining family member noted that "Petitioners failed to demonstrate that the tenant of record received written consent for them to reside in the subject apartment"); *Perez v. New York City Hous. Auth.*, 99 A.D.3d 624 (1<sup>st</sup> Dept 2012)(upholding NYCHA's determination as rational because the "evidence shows that petitioner did not become an authorized occupant of her grandmother's apartment prior to the latter's death" inasmuch as management had denied a permanent permission request); *Adler v. New York City Hous. Auth.*, 95 A.D.3d 694, 695 (1<sup>st</sup> Dept 2012)(upholding as rational NYCHA's decision to deny remaining family member status stating that "Petitioner did not sustain her

burden of establishing entitlement to succession rights as a remaining family member to the apartment held by her husband because the record demonstrates that her occupancy was not pursuant to respondent's written permission, nor was it reflected in the affidavits of income submitted by her husband to respondent"); *Rosello v. Rhea*, 89 A.D.3d 466 (1<sup>st</sup> Dept 2011)(upholding as rational the denial of remaining family member status where "the record reflects that [petitioner's] deceased husband, the tenant of record, never received written consent for her to reside in his apartment.")

In the instant action, the court finds that NYCHA's denial of petitioner's application for succession rights to the subject apartment was made on a rational basis. Pursuant to NYCHA's Management Manual,

The Remaining Family Member (RFM) policy defines who may succeed to a lease as a remaining family member after a tenancy ends i.e., the tenants/lessees move out of the apartment or die...

A. Conditions to Acquire Remaining Family Member Status

A person who claims to have Remaining Family Member Status ("REF claimant") shall acquire REF status if (s)he lawfully enters the apartment and is in continuous occupancy of the apartment, as follows:

1. Lawful Entry

An RFM claimant enters the apartment lawfully if (s)he became part of the household as one of the following:

- a. Original Tenant Family member...; or
- b. Joined the household through family growth; or
- c. Obtained Permanent Residency Permission (i.e., written permission) from the Housing Manager; **and**

2. Continuous Occupancy

The RFM claimant must remain in continuous occupancy in the apartment, i.e., be named on all affidavits of income from the (s)he lawfully enters the apartment until all tenants/lessees move out of the apartment or die.

NYCHA Management Manual, Chapter I, Section XII (A)(1) & (2). Here, it is undisputed that petitioner was not an original tenant family member, did not join the household through family growth and never obtained written permanent residency permission from NYCHA's Housing Manager. Thus, NYCHA's denial of his succession rights application was rational.

Petitioner's assertion that the denial was irrational because NYCHA failed to adhere to its own rules when it denied Ms. Aponte's August 2011 PRR on the basis of overcrowding is without merit. NYCHA's Management Manual directs that when deciding whether to grant a tenant's PRR,

The proposed additional person shall not receive permanent residency permission if the total number of persons in the apartment, including the proposed additional person, exceeds the requirements for standard occupancy...based on apartment size.

**NOTE:** The Housing Manager must deny a permanent residency permission request if the increase in family size creates an overcrowded condition....

NYCHA Management Manual, Chapter I, Section XI (B)(2)(a)(3)(d). Additionally, the parties do not dispute that pursuant to NYCHA's rules, an overcrowded condition includes a one-bedroom apartment that is occupied by (1) two adults who are unmarried or not domestic partners; or (2) one adult and one child who is over the age of six. Thus, as the addition of petitioner to the subject apartment as a permanent resident would have exceeded the requirements for standard occupancy, this court finds that NYCHA properly adhered to its own

rules when denying Ms. Aponte's August 2011 PRR.

Petitioner's assertion that any issue of overcrowding should only have been addressed after his remaining-family-member request was granted is also without merit. In making such assertion, petitioner relies on that portion of the Management Manual which states

Family Size - If an RFM claimant meets all other qualifications for the offer of a lease, the Development Housing Manager can offer the RFM claimant a lease to the apartment in which (s)he resides...after a lease to the current apartment in which the RFM claimant resides is signed, apartment size/occupancy issues are resolved according to procedure as follows:

- Overcrowded Apartment: If the resulting new tenancy overcrowds the apartment...the Development Housing Manager informs the new tenant that (s)he may submit a request to transfer to a larger apartment.

NYCHA Management Manual, Chapter I, Section XII (B)(3)(c). However, such provision does not apply in the instant case as it only applies when the succession rights applicant meets "all other qualifications for the offer of a lease" which includes acquiring remaining-family-member status in the first instance. As this court has already found, petitioner failed to acquire remaining-family member status because he could not show that he lawfully entered the subject apartment while Ms. Aponte was the tenant of record, as required by NYCHA's rules. To the extent petitioner relies on *Ortiz v. Rhea*, 2014 N.Y. Slip Op 31213 (Sup. Ct. N.Y. County 2014) for the proposition that a PRR may not be denied on the basis of overcrowding, this court declines to adhere to such finding as NYCHA's rules state otherwise.

Petitioner's assertion that NYCHA's denial of his succession rights application was irrational because NYCHA failed to follow precedent it set in *Matter of Juan Gonzalez*, Case No. G4/08 is also without merit. In that case, the Development Management Office had verbally

denied the tenant's verbal request for permission for her daughter to join her household on the ground of overcrowding; it failed to act on the tenant's request for a transfer to a larger apartment; it denied the tenant's written request for permission for her son to join her household; and it denied the tenant's second request for a transfer to a larger apartment on the ground that there was no reason for the transfer. NYCHA's Hearing Officer determined that the grievant was entitled to remaining-family-member status because NYCHA should have processed the transfer request and the PRR together even though NYCHA's denial of the tenant's PRR comported with its rules and there was no basis to approve the tenant's request for a transfer because she was occupying the appropriately-sized apartment. As an initial matter, *Matter of Juan Gonzalez* is distinguishable because there is no record in this case that Ms. Aponte ever requested a transfer to a larger apartment. However, even if she had, NYCHA is not bound under the doctrine of administrative *stare decisis* to follow an incorrect prior interpretation and application of its own rules and policies. See *Matter of Charles A. Field Delivery Serv. (Robertis)*, 66 N.Y.2d 516, 518 (1985) ("Stare decisis is no more an inexorable command for administrative agencies than it is for courts. They are, therefore, free, like courts, to correct a prior erroneous interpretation of the law by modifying or overruling a past decision") (internal citations omitted). Thus, it was not irrational for NYCHA to choose not to follow its decision in *Matter of Juan Gonzalez*.

Further, petitioner's assertion that NYCHA's denial of his succession rights was an error of law because NYCHA failed to reasonably accommodate Ms. Aponte's disability in accordance with federal, state and city laws is without merit. As an initial matter, the issue of reasonable accommodation of Ms. Aponte's disability was not raised at the hearing and thus, this court may not address such claim. See *Matter of Yarbough v. Franco*, 95 N.Y.2d 342, 347 (2000) ("Judicial

review of administrative determinations is confined to the 'facts and record adduced before the agency'"(citing *Matter of Fanelli v. New York City Conciliation & Appeals Bd.*, 90 A.D.2d 756, 757 (1<sup>st</sup> Dept 1982)); see also *Rivera v. New York City Hous. Auth.*, 107 A.D.3d 404 (1<sup>st</sup> Dept 2013)("Because petitioner never raised this argument at the administrative hearing, it is not properly before this Court.") Additionally, petitioner lacks standing to bring such claim on behalf of Ms. Aponte or himself. Petitioner may not bring such claim on behalf of Ms. Aponte as Ms. Aponte was the tenant of record who was responsible for obtaining NYCHA's permission to add petitioner to the household. See *Rosello v. Rhea*, 89 A.D.3d 466, 67 (1<sup>st</sup> Dept 2011)(holding that petitioner "lacks standing to assert disability claims on the tenant's behalf" on the ground that "under respondent's rules, only the tenant of record could have requested and obtained written permission for her occupancy"); see also *Echeverria v. New York City Hous. Auth.*, 85 A.D.3d 580 (1<sup>st</sup> Dept 2011)("Petitioner's argument that respondent should afford her mother, who suffered from rheumatoid arthritis, the 'reasonable accommodation'...is unavailing, as petitioner does not have standing to invoke the Americans with Disabilities Act...on behalf of her mother.")

Furthermore, petitioner does not have standing to assert a reasonable accommodation claim on his own behalf based on associational discrimination. It is well-settled that in order to establish standing to assert such a claim, a grievant must provide evidence that he "sustained an independent injury causally related to the denial of federally required services of" the tenant of record. *Filonuk v. Rhea*, 84 A.D.3d 502 (1<sup>st</sup> Dept 2011). Here, petitioner has not alleged any such injury and thus, he may not assert such claim.

Finally, petitioner's assertion that NYCHA must be estopped from denying him remaining-family-member status because NYCHA was aware of petitioner's presence in the

subject apartment after the denial of the PRRs and did not seek to terminate Ms. Aponte's tenancy on that basis is without merit. It is well-settled that "estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties." *Scruggs-Lefwich v. Rivercross Tenants' Corp.*, 70 N.Y.2d 849, 852 (1987). Further, the doctrine of estoppel cannot give rise to tenancy rights even when an agency allegedly knew about and acquiesced to the grievant's occupancy of an apartment. See *Schorr v. new York City Dep't of Hous. Pres. & Dev.*, 10 N.Y.3d 776, 778 (2008) ("it is clear that petitioner did not meet the eligibility requirements for succession rights to the apartment and was, therefore, an illegal tenant. Thus, invoking estoppel against [respondents] would impermissibly prevent HPD from executing its statutory duty to provide Mitchell-Lama housing only to individuals who meet the specified eligibility requirements"); see also *Gonzalez v. New York City Hous. Auth.*, 112 A.D.3d 531, 532 (1<sup>st</sup> Dept 2013) ("Contrary to petitioner's contention, he is not entitled to [remaining-family-member] status on the ground that the agency had implicit knowledge of his alleged long-term occupancy of the apartment"); see also *Perez v. New York City Hous. Auth.*, 99 A.D.3d 624 (1<sup>st</sup> Dept 2012) ("[a] governmental agency cannot be estopped from discharging its statutory duties when a claimant does not meet the eligibility requirements for succession rights to an apartment, even if the managing agent acquiesced in an unauthorized occupancy."). Thus, as petitioner may not invoke the doctrine of estoppel in this case, the petition must be denied.

Accordingly, the petition is denied and dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 9/8/14

**FILED**

SEP 15 2014

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