

Petitioner, **DECISION/ORDER**  
-against-  
NILA MEDINA,  
Respondent-Tenant  
-and-  
"JOHN DOE" and "JANE DOE,"  
Respondents-Undertenants.

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**HON. ARLENE H. HAHN, J.H.C.**

After trial, based on the testimonial and documentary evidence adduced therein, the Court finds and decides as follows:

Petitioner seeks to recover possession of Apartment #4F at 1050 Amsterdam Avenue, in New York county ("Apartment") from respondent in this summary holdover proceeding based upon allegations that respondent is a licensee not entitled to succession to this project based Section 8 Apartment, and that her license to occupy the Apartment, if any, expired upon the death of the tenant of record, Concepcion Diaz. Both parties were represented by counsel.

The subject premises is a federally regulated, project based Section 8 apartment governed by HUD pursuant to the Section 2020 Program for Housing for the Elderly (Section 202 of the Housing Act of 1959) and the HUD Section 8 program. As such, occupancy of the Apartment is controlled by strict guidelines. It is undisputed that the tenant of record, Concepcion Diaz, died in September of 2012 and that her daughter, respondent Nila Medina, was not listed as a family member on her mother's HUD Model Leases or 50059 Recertifications for the two years prior to her death, which reflected only Ms. Diaz as an occupant.

While the term "succession" does not appear in the HUD Handbook, the Code of Federal Regulations ("CFR") or the United States Code ("USC") in relation to Project Based Section 8 tenancies, the relevant concept regarding whether a person may remain in one of these regulated apartments after the death of the tenant of record is whether he or she qualifies as a "remaining family member." Chapter 3 of the HUD Handbook 4350.3 governs eligibility for assistance and occupancy in relation to federally regulated apartments. Section 3-16 relates to the determination of the eligibility of a "remaining family member" of a tenant's family. HUD Handbook 4350.3 Chapter 3-16 (B) provides:

"The following basic requirement for eligibility must be met for a person to qualify as a remaining member of a household:

1. The individual must be a party to the lease when the family member leaves the unit.

2. The individual must be legal contract age under the law.
3. The remaining family member is defined in Section 202 and 811 regulations as the surviving member or members of an elderly family or family with disabilities that was a party to the lease and living in the assisted unit with the now deceased member of the family at the time of his or her death.”

Further, 24 CFR 982.4 defines the term “family” as “a person or group of persons, as determined by the PHA consistent with 24 CFR 5.403, approved to reside in a unit with assistance under the program.” In order to be a recognized family member in a federally subsidized Section 8 apartment, 24 CFR 982.551[h][2] requires that:

“The composition of the assisted family residing in the unit must be approved by the PHA... the Family must request PHA approval to add any family member as an occupant of the unit. No other person [i.e. nobody but members of the assisted family] may reside in the unit (except for a foster child or live-in aide as provided in paragraph (h)(4) of this section).”

Although these sections are contained in the tenant based subsidy program regulations, they apply to project based subsidized units pursuant to 24 CFR 983.2.

It is undisputed that respondent, Nila Medina, herself requested to be added to the lease and that her mother, Concepcion Diaz, the tenant of record, did not want her added to the lease. As Ms. Diaz, and not respondent, was the only authorized person pursuant to the regulations able to make this request, respondent was never added to the lease. Although respondent may have met some of the other qualifications necessary to become a “remaining family member,” though respondent testified that she did not notify petitioner that she moved into the subject premises and never notified petitioner that she was living there, the fact remains that she is not a “remaining family member” as defined in the CFR because she did not obtain approval to reside in the unit in 2010, 2011 or 2012, and was not otherwise listed as a family member on the annual recertifications during those years. Pursuant to 24 CFR 982.551[h][2], only “the family” (defined in 24 CFR 982.4 as a “person or group of persons approved to reside in the unit”) may request to add an individual to a lease. The only approved family member on the lease was the tenant of record herself, Concepcion Diaz. As only Concepcion Diaz had the right to request that respondent be added to the lease, and she refused to do so, respondent was properly not added to the lease, disqualifying her from becoming a “remaining family member.”

In Evans v. Franco, 93 N.Y.2d 823 (1999), the New York Court of Appeals determined that a respondent was not entitled to succeed to a housing subsidy as a “surviving family member” pursuant to the Section 8 Program because each year the deceased tenant of record “completed a form which was submitted to the New York City Housing Authority (“NYCHA”), the agency administering the Section program for the

federal government, stating that she was the sole occupant of her apartment and that because of her income, she was qualified for Section 8 benefits. The Court reasoned that:

“Federal regulations define a family member as a “single person or group of persons” (24 CFR 982.201[c]). The composition of the assisted family residing in the unit must be approved by the HA (Housing Authority (24 CFR 982.551[h][2])). “The family must request HA approval to add any other family member as an occupant of the unit. No other person may reside in the unit.

On this record, it is clear that the petitioner was never certified by the NYCHA as a family member. Given the 13 unequivocal annual statements by the deceased that she lived in the apartment alone, there is no basis on this record to conclude that petitioner is a family member or that a hearing is necessary to confirm his status. To permit petitioner to claim status as a surviving family member would be to open the door to possible fraudulent claims and to wholesale disregard of the intent of the subsidy program.”

In Davidson 1992 Associates v. Corbett, 190 Misc. 2d 813 (App. Term, 1<sup>st</sup> Dept, 2002), the Appellate Term, First department applied Evans v. Franco, *supra*, to a project based Section 8 housing unit, denying a claim of succession, reasoning that “no approval was requested or obtained for appellant to reside in the premises as an additional family member” (citing 24 CFR 982.551 [h][2] et al) for continued occupancy purposes, and finding that “under such circumstances, appellant is neither entitled to continuation of the Section 8 subsidy nor to the necessarily intertwined benefit of successor occupancy.”

Respondent’s reliance upon 2013 Amsterdam Avenue Housing Associates v. Estate of Almeda Wells 10 Misc. 3d 142(A) (App. Term 1<sup>st</sup> Dep’t 2006) is misplaced. While Wells, under certain, specific circumstances not present here, stands for the proposition that the fact that a person claiming succession was not listed on annual recertifications was not fatal to a claim of succession, it is not controlling here because the case and regulation relied upon by the Appellate Term in rendering its decision is inapplicable, and it is based on a regulation since amended and upheld by the Court of Appeals.

In Wells, the Appellate Term held that “[T]he absence of appellant’s name on the family composition document was not fatal to her succession claim otherwise established by the trial evidence, see Matter of Manhattan Plaza Assocs. v. DHPD, 8 AD 2d 111 [2004]. Manhattan Plaza Assocs. v. DHPD is the sole basis for the decision in Wells, with the Court’s citing no other cases, statutes or regulations as the basis for this decision. The issue in Manhattan Plaza Assocs was whether or not a DHPD regulation, in relation to Mitchell-Lama apartments, which specifically permitted family members not listed on annual recertifications to rebut the presumption that he or she did not live in the apartment (former 28 RCNY 3-02[p]) violated the purpose of the federal Section 8 legislation (42 USC 1437f) as interpreted by the Court of Appeals in Evans v. Franco.

The Court in Manhattan Plaza Assocs. simply found that the challenged DHPD regulation (relating to Mitchell-Lama Apartments and inapplicable to the instant project based Section 8 apartment), which specifically and explicitly permitted an applicant to establish that he or she was a bona fide family member entitled to succession rights “does not frustrate the purpose of the section 8 law.” If the CFR, USC or HUD Handbook provided the same language as that of the DHPD regulation in question, then respondent’s reliance on Wells would be founded. However, no such similar statute applicable to project based Section 8 apartments exists. Moreover, the regulation at issue has since been amended (28 RCNY 3-02[p]) with respect to claims of succession, and no longer provides a “rebuttable presumption” and does not allow succession to individuals not listed on recertifications. This amended statute was upheld by the New York State Court of Appeals in a challenge involving succession in The Matter of Schorr v. DHPD, 10 NY 3d 776, 2008 NY Slip Op 02083 (Ct. Of Appeals, 2008.)

In light of the foregoing, respondent has failed to prove her eligibility as a remaining family member entitled to succeed to the apartment. Accordingly, the Court awards petitioner a final judgment of possession, warrant to issue forthwith, and execution stayed through April 30, 2014 for respondent to vacate.

The foregoing constitutes the decision and order of this court.

Dated: New York, New York  
March 13, 2014

  
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HON. ARLENE H. HAHN, J.H.C