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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH Justice

PART 4

Index Number : 100094/2012
LONG, KATRINA
vs.
NYC HOUSING AUTHORITY
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3, were read on this motion to/for Article 78

Notice of Motion/Order to Show Cause — Affidavits — Exhibits (Pet) No(s). 1

Answering Affidavits — Exhibits No(s). 2

Replying Affidavits No(s). 3

Upon the foregoing papers, it is ordered that this petition is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER and JUDGMENT

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

FILED

MAY 22 2012

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/8/12

_____, J.S.C.

1. CHECK ONE: ..... [X] 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 NY
COUNTY OF NEW YORK: PART 4

Index No.: 100094/12

In the Matter of the Application of
Katrina Long,

Petitioner,

-against-

New York City Housing Authority,

Respondent.

DECISION, ORDER AND JUDGMENT

Present: HON. ARLENE P. BLUTH

Upon the foregoing papers, it is ORDERED and ADJUDGED that this Article 78 petition is denied and the proceeding is dismissed.

Petitioner commenced this Article 78 proceeding challenging respondent New York City Housing Authority's (NYCHA) determination dated September 7, 2011 which, after a hearing, denied petitioner's claim to Remaining Family Member status to apartment 5G at 60 Avenue D in Manhattan. Petitioner's grandmother, Margaret Long, was the tenant of record of the subject apartment until her death on December 1, 2009. NYCHA opposes the petition.

A hearing was held on May 18, 2011 and July 28, 2011 before a hearing officer who heard testimony from petitioner, petitioner's mother and NYCHA's Resident Services Associate, Denise Rogers. The hearing officer also reviewed various documents which were admitted into evidence. Petitioner was an original family member who according to the Tenant Summary Data left the tenant's household to go live with her mother. NYCHA's witness testified that the evidence showed that petitioner was never added back to the family composition of her grandmother's apartment.

In her decision, the hearing officer found that after management became aware that petitioner was residing in the apartment in 2006, it sent the tenant a letter dated August 17, 2006

informing her that she needed to obtain management's written permission to add petitioner to the household, but that the tenant did not take any action. For the next two years, tenant represented that she was the only occupant of the apartment in the Occupant's Affidavits of Income dated July 12, 2007 and July 14, 2008. In fact, in response to the question at the top of the July 14, 2008 affidavit "does anyone not listed on this affidavit of Income use your address as his/her mailing address", tenant checked "yes", listed petitioner and reported her address as 549 FDR Drive, New York, NY, which is petitioner's mother's address. The hearing officer specifically noted that it is unknown why the tenant of record did not pursue adding the petitioner to her household composition in 2006 after receiving the letter from Management, and why she did not list the petitioner's name on the annual income affidavits for 2007 and 2008 if petitioner was in fact residing in the apartment with her. The hearing officer made reference to the language on the affidavits of income which clearly notifies tenants of their obligation to report the names of all persons residing in the apartment as "***the failure to do so may deprive them of all rights of occupancy***" (emphasis provided).

The hearing officer considered petitioner's testimony that she spoke to the assistant manager in the Management Office in 2008 who informed her that she would need temporary permission "at least two times" before permanent permission could be granted. The hearing officer found that the tenant finally took action in February 2009 when she signed a Temporary Permission Request to add petitioner to her household but that this action did not entitle petitioner to become a remaining family member entitled to a lease after her grandmother passed away in December 2009. Significantly, the hearing officer reasoned that even if the temporary permission request were to be construed as a permanent permission request, it would not have qualified

petitioner as a remaining family member because she did not reside in the subject apartment for at least one year after receiving the written permission and prior to the tenant's death. Based on the evidence submitted, the Hearing Officer determined that petitioner is not a remaining family member as defined by NYCHA regulations.

The "[j]udicial review of an administrative determination is confined to the 'facts and record adduced before the agency'." (*Matter of Yarbough v Franco*, 95 NY2d 342, 347 [2000], quoting *Matter of Fanelli v New York City Conciliation & Appeals Board*, 90 AD2d 756 [1st Dept 1982]). The reviewing court may not substitute its judgment for that of the agency's determination but must decide if the agency's decision is supported on any reasonable basis. (*Matter of Clancy-Cullen Storage Co. v Board of Elections of the City of New York*, 98 AD2d 635, 636 [1st Dept 1983]). Once the court finds that a rational basis exists for the agency's determination, then the court's review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]). The court may only declare an agency's determination "arbitrary and capricious" if the court finds that there is no rational basis for the agency's determination. (*Matter of Pell v Board of Education*, 34 NY2d 222, 231 [1974]).

Gaining succession as a remaining family member requires an occupant to (1) move lawfully[1] into the apartment and (2) qualify as a specified relative of the tenant of record and (3) remain continuously in the apartment for at least one year immediately before the date the tenant

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[1]The occupant moves in lawfully if he or she: (1) was a member of the tenant's family when the tenant moved in and never moved out or (2) becomes a permanent member of the tenant's family after moving in (or after moving back in) as long as the tenant of record seeks and receives NYCHA's written approval or (3) is born or legally adopted into the tenant's family and thereafter remains in continuous occupancy up to and including the time the tenant of record moves or dies. (See NYCHA Management Manual, ch IV, sub IV, section (J)(1).

of record vacates the apartment or dies and (4) be otherwise eligible for public housing in accordance with NYCHA's rules and regulations. See NYCHA Occupancy and Remaining Family Member Policy Revisions General Memorandum (GM) 3692 Section IV (b), as revised and amended July 11, 2003. At issue here are requirements (1) - obtaining the permission - and (3) - living in the apartment for one year after getting the permission.

The requirement that permission is necessary is enforceable. See *Aponte v NYCHA,* 48 AD3d 229, 850 NYS2d 427 [1st Dept 2008] "The denial of petitioner's [remaining family member] grievance on the basis that written permission had not been obtained for their return to the apartment is neither arbitrary nor capricious." *See also NYCHA v Newman,* 39 AD3d 759 (1st Dept 2007); *Hutcherson v NYCHA,* 19 AD3d 246 (1st Dept. 2005) (denied remaining family member status because written permission to move in was not obtained).

That one-year requirement has also been upheld *(see Torres v NYCHA,* 40 AD3d 328, 330 [1st Dept 2007] holding that when petitioner seeking to succeed to tenant of record's lease had not complied with the one year requirement, that "there [was] no basis whatsoever for holding the agency decision to be 'arbitrary and capricious.'").

Petitioner nevertheless asserts that she is entitled to succeed to her grandmother's public housing lease because she asserts that starting on May 12, 2009, NYCHA employees misled petitioner and the tenant as to how to apply for permanent permission to be added to the lease (petition, para. 26). To the extent that petitioner claims that NYCHA's employees misinformed her about NYCHA's policies and she relied on those statements, it is well settled that an agency "cannot be estopped from invoking [its] regulations" (citation omitted) (*Muhammad v New York*

City Hous. Auth., 81 AD3d 526, 917 NYS2d 173 (1st Dept 2011). In any event, as the hearing officer stated in her determination, because tenant represented that she was the sole occupant of the apartment in 2008 and 2009, petitioner has not demonstrated that she met the one year residency requirement. *See Weisman v New York City Hous. Auth.*, 91 AD3d 543, 937 NYS2d 189 (1st Dept 2012).

Here, it is undisputed that the tenant of record never sought or received NYCHA's permission for petitioner to permanently reside in the apartment. As the hearing officer stated, even deeming the temporary request signed February 2009 and granted on June 9, 2009 for a six-month period a "permanent request" , which was the only affirmative act taken by tenant to add her petitioner to her household, petitioner still did not demonstrate that she lived in the apartment with the tenant of record after being granted written permission for one year prior to the tenant's death on December 1, 2009.

To the extent that petitioner claims that NYCHA implicitly approved her occupancy in the subject apartment because it allegedly knew that petitioner had been living there since 2006 (petition, para. 24), she did not raise this argument at her administrative hearing, and thus may not be considered by this Court. *See Featherstone v Franco*, 95 NY2d 550, 554 (2000). Moreover, the Appellate Division, First Department has held that the written permission requirement is enforceable even in cases where NYCHA may have been aware of a petitioner's unlawful occupancy. *See Matter of Edwards v New York City Hous. Auth.*, 67 AD3d 441, 442 (1st Dept 2009).

Based on the foregoing, the hearing officer's determination denying petitioner remaining

family member status was rational, and not arbitrary or capricious.

Accordingly, it is ORDERED and ADJUDGED that this Article 78 petition is denied and the proceeding is dismissed.

This is the Decision, Order and Judgment of the Court.

Dated: May 8 , 2012
New York, New York

HON. ARLENE P. BLUTH, JSC

ARLENE P. BLUTH
J.S.C.