SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD **PART** IAS MOTION 35EFM

Justice

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SKYLAR JENNETTE, ANDY SPENCER

Plaintiff,

- v -

THE NEW YORK CITY HOUSING AUTHORITY, GREGORY RUSS,

Defendant.

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INDEX NO. 451839/2019

MOTION DATE 10/01/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 11, 12, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

Upon the foregoing documents, it is

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioners Andy Spencer and Skylar Jennette (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent New York City Housing Authority shall serve a copy of this order along with notice of entry in ten (10) days.

In this Article 78 proceeding, petitioners seek an order to overturn a determination by the respondent New York City Housing Authority (NYCHA) and its chair, Gregory Russ, as arbitrary and capricious (motion sequence number 001). For the following reasons, the petition is denied and this proceeding is dismissed.

FACTS

This proceeding concerns apartment 2F in a building which is part of a federally funded public housing project called the Kingsborough Houses, and is located at 653 Kingsborough 6th Walk in the County of Kings, City and State of New York (the building). *See* verified petition, ¶ 12. NYCHA manages the Kingsborough Houses pursuant to the regulations promulgated by the U.S. Department of Housing and Urban Development (HUD). *Id.*, ¶ 13.

Apartment 2F's former tenant of record was one Joy Jennette (JJ), who resided there until her death on August 25, 2015 (which date is confirmed via her death certificate). *See* verified answer, ¶ 11; exhibit G. The parties agree that minor co-petitioner Skylar Jennette (SJ) is JJ's biological nephew, and that JJ adopted SJ as her son after his biological mother died. *See* verified petition, ¶¶ 2, 11, 26. They present JJ's court order of adoption dated June 20, 2008 as proof. *Id.*, exhibit C. The parties also agree that SJ resided with JJ in apartment 2F continuously from 2007[1] until JJ's death in June 2015. *Id.*, verified petition, ¶¶ 3, 5, 27. Co-petitioner Andy Spencer (AS) contends that he was JJ's husband and SJ's adoptive father, but maintains that he never resided in apartment 2F, and that he does not seek succession rights to it. *Id.*, ¶¶ 2, 12, 26. NYCHA disputes these contentions, however, and notes that AS has presented deficient proof to

[1] NYCHA presents a letter dated July 11, 2007 from licensed foster-care agency MercyFirst which acknowledged that SJ resided in the subject apartment with JJ in the year before she adopted him. *See* verified answer, ¶ 49; exhibit L.

support them; specifically, (a) an undated 2007 Islamic marriage certificate with JJ that was not registered with the State of New York, (b) a temporary guardianship order over SJ which expired on October 12, 2017, and (c) an order of filiation for SJ, dated February 14, 2018, which AS later admitted was false. *See* verified answer, ¶¶ 50, 51, 55; exhibits M, N, O.

After JJ died, petitioners filed a remaining family member (RFM) grievance with NYCHA. *See* verified answer, ¶ 45. The Kingsborough Houses Project Manager denied that grievance in a decision dated August 23, 2018, and NYCHA's Brooklyn District Manager upheld that denial in a decision also dated August 23, 2018. *Id.*, ¶ 45; exhibit H. AS then requested a hearing before an impartial NYCHA hearing officer (HO) which NYCHA held on February 14, 2019 and May 18, 2019. *Id.*, ¶¶ 46-57; exhibits I, J. On May 31, 2019, the HO issued a decision that denied petitioners' RFM grievance (the HO's decision), and found, in pertinent part, as follows:

> "Findings and Conclusions:
>
> "The Claim of Grievant SJ.
>
> "The Tenant Data Summary does not reveal that Grievant SJ . . . had ever been an authorized member of the tenant's [i.e., JJ's] household. The evidence did not establish that NYCHA had ever received documentation showing legal proof of SJ's relationship to the tenant *prior to her passing* in 2015 so that Grievant SJ could be added to her household. He did not obtain a year of authorized occupancy in the subject apartment prior to the tenant's passing and is not a remaining family member.
>
> "The Claim of Grievant [AS].
>
> "The Tenant Data Summary does not reveal that Grievant [AS] was ever an authorized member of the tenant's household prior to her death on August 25, 2015. The evidence does not reveal that permission was requested for Grievant [AS] to join the tenant's household, despite his marriage to the tenant in October 2007. Also, Grievant [AS] is not listed by the tenant as a person residing in the tenant's household; permission was not granted for his occupancy of the apartment prior to the tenant's passing.
>
> "Lastly, since it was not proven that Grievant SJ was an authorized member of the tenant's household at the time of the tenant's death in August 2015, Grievant [AS] is not able to sign a lease for the subject apartment on behalf of Grievant SJ as his parent."

Id., ¶ 58; exhibit U (emphasis in original). NYCHA thereafter issued a "determination of status" letter on August 2, 2019 which adopted the HO's decision to deny petitioners' claim for remaining family member status. *Id.*, ¶ 59; exhibit V.

Petitioners thereafter commenced this Article 78 proceeding on September 30, 2019. *See* verified petition. At this point, the Covid-19 national pandemic had caused the court to suspend many of its operations indefinitely. The parties nevertheless executed several stipulations to extend NYCHA's time to respond, and the agency eventually filed an answer on October 30, 2020. *See* verified answer. This matter is now fully submitted and ready for disposition (motion sequence number 001).

DISCUSSION

The court's role in an Article 78 proceeding is to determine, upon the facts before the administrative agency, whether the determination had a rational basis in the record or was arbitrary and capricious. *See Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974); *Matter of E.G.A. Assoc. v New York State Div. of Hous. & Community Renewal*, 232 AD2d 302 (1st Dept 1996). A determination will only be found arbitrary and capricious if it is "without sound basis in reason, and in disregard of the facts." *See Matter of Century Operating Corp. v Popolizio*, 60 NY2d 483, 488 (1983); citing *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231. However, if there is a rational basis for the administrative determination, there can be no judicial interference. *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d at 231-232. Further, NYCHA's "construction of its

own rules and regulations is entitled to deference and will not be disturbed unless clearly irrational or unreasonable." *Matter of Patel v New York City Hous. Auth.*, 26 AD3d 172, 173 (1st Dept 2006) citing *Matter of Howard v Wyman*, 28NY2d 434 (1971).

Here, the relevant rules and regulations are set forth in Sections XI and XII of the NYCHA Management Manual, and provide as follows:

> "**XI. Family Composition**
> "A. Original Tenant Family
> "The tenant (i.e., signatory to the lease or lessee) and other persons listed on the Housing Application and authorized to reside in the apartment at initial move-in, comprise the original tenant family and may occupy the apartment, provided, among other things, they remain in continuous occupancy.
> "B. Family Composition Changes
> "Changes in family composition may occur during the course of a tenancy. Tenants are required to report to NYCHA all changes in family composition. Adjustments to the lease, rent, and/or apartment size may be necessary.
>
> > "1. Family Growth
> > "A person may be added to the household through Family Growth if (s)he is either:
> > - Born to, or
> > - Legally adopted by, or
> > - Judicially declared to be the ward (under the legal custody or guardianship) of,
> >
> > "the tenant or an authorized permanent family member during the time that the tenant or authorized permanent family member resides in the apartment.
> > "Staff instructs the tenant to report the person entering the household through Family Growth by submitting to the Housing Manager, NYCHA form 040.767, Family Growth Notification, accompanied by valid legal proof of the relationship, as follows:
> >
> > * * *
> >
> > "b. Legal Adoption and Court-Ordered Wards: Valid proof shall be:
> > - Court documents approving the adoption or authorizing the guardian/ward status
> >
> > "Once the birth or legal relationship is verified by the Housing Manager or designee and the additional person passes a criminal background check, if applicable, the additional person is added as an authorized family member and acquires permanent residency status. The additional person added through Family Growth may occupy the tenant's apartment, provided, among other things, (s)he remains in continuous occupancy. If the additional person overcrowds the apartment (as defined in Appendix F, *Transfers-Tenant Selection and Assignment Plan (TSAP) Transfer Guide and NYCHA Occupancy Standards for Families-*

Public Housing), the Housing Manager shall offer the tenant the opportunity to transfer to a larger.

* * *

"**XII. Remaining Family Members (Succession Rights)**

"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. This section also contains the remaining family member grievance procedure.

"A. Conditions to Acquire Remaining Family Member Status

"A person who claims to have Remaining Family Member Status ("REF claimant") shall acquire RFM 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 (according to Section XI [A]); or

"b. Joined the household through family growth (the person was born to, legally adopted by, or judicially declared to be the ward (under the legal custody or guardianship) of the tenant or of an authorized permanent family member during the time that the tenant or authorized permanent family member resided in the apartment (according to Section XI [B] [1]); or

"c. Obtained Permanent Residency Permission (i.e., written permission) from the Housing Manager (according to Section XI [B] [2]); 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 time (s)he lawfully enters the apartment until all tenants/lessees move out of the apartment or die.

"a. One Year Requirement

RFM claimants who received the Housing Manager's written Permanent Residency Permission on or after November 24, 2002, must remain in continuous occupancy, (i.e., on all Occupant's Affidavits of Income) from the date of issuance of the Housing Manager's written Permanent Residency Permission for not less than one year immediately prior to the date the tenant vacates the apartment or dies. If the authorized occupancy is less than one year, the RFM claimant is denied Remaining Family Member status.

"b. Acceptable Breaks in Continuous Occupancy

An RFM claimant who lawfully entered the apartment (refer to Section XII [A] [1]) and is not removed from the household by the tenant, does not violate the Continuous Occupancy Requirement, if

> the break in occupancy is for one of the following acceptable reasons:
>
> "(1) The resident is away in Military Service, or
>
> "(2) The resident is away at college.
>
> "Acceptable breaks in continuous occupancy must be verified by submission of valid proof to the Housing Manager."

See verified answer, exhibit A (emphasis in original). NYCHA asserts that the HO's decision to deny SJ's RFM grievance was rationally based because the evidence in the administrative record showed that SJ failed to satisfy both the "lawful entry" and "continuous residency" requirements of RFM status. *See* respondents' mem of law at 6-12. NYCHA particularly notes that JJ never presented the Kingsborough Houses Project Manager with a copy of SJ's adoption order, and failed to include SJ on the annual income affidavits that she submitted between 2008 and 2015. *Id.* After reviewing the evidence, the court agrees that there was a rational basis for the HO's decision.

With respect to "lawful entry," Section XII (A) (1) (b) of the NYCHA Manual requires an applicant for RFM status to establish that s/he joined a tenant of record's household in accordance with the "family growth" rules that govern changes to the tenant's original family composition. Those rules, set forth in Section XI (B) (1) (b) of the NYCHA Manual require the tenant of record to present a NYCHA Project Manager with copies of "court documents approving the adoption or authorizing the guardian/ward status" of a legally adopted child. Here, petitioners have presented a copy of the June 20, 2008 court order by which JJ legally adopted SJ. *See* verified petition, exhibit C. However, petitioners present no proof that JJ ever presented a copy of this document to the Kingsborough Houses Project Manager. This court (Schlesinger, J.) has observed that HUD regulations specifically require tenants of public housing to "promptly inform [NYCHA] of the birth, adoption, or court-awarded custody of a child," and that "[t]he family must request [NYCHA] approval to add any other family member as an

occupant of the unit. 24 CFR § 966.4 (a) (1) (v)." *Matter of Russo v New York City Hous. Auth.*, 44 Misc 3d 401, 414-415 (Sup Ct, NY County 2014). Because the administrative record contains no evidence that JJ ever did so, it was reasonable for the HO to conclude that her failure to notify the Kingsborough Houses Project Manager of her adoption of SJ violated the HUD "family growth" regulation set forth in 24 CFR § 966.4 (a) (1) (v). It was therefore also reasonable for the HO to conclude that JJ's non-compliance with the "family growth" regulation precluded SJ from later establishing compliance with the "lawfully entry" requirement set forth in Section XII (A) (1) (b) of the NYCHA Manual. Although the court has been unable to locate any appellate precedent that ruled on NYCHA's "lawful entry" requirement in the context of the "family growth" regulation, it notes that the appellate courts routinely uphold the dismissal of Article 78 petitions by RFM claimants who fail to demonstrate "lawful entry" by establishing that they complied with NYCHA's written "Permanent Residency Permission" regulation. *See e.g.*, *Matter of Aponte v Olatoye*, 30 NY3d 693 (2018); *Matter of Crawford v Brezenhoff*, 187 AD3d 598 (1st Dept 2020); *Matter of Becerril v New York City Hous. Auth.*, 168 AD3d 586 (1st Dept 2019). That regulation is a coordinate of the "family growth" regulation and appears right after it in the NYCHA Manual. *See* verified answer, exhibit A. The court finds that the apparent co-equality of these two regulations (coupled with the fact that the "family growth" regulation was derived from a federal HUD regulation) indicates that they should be enforced in the same manner; specifically, by upholding the HO's denial of SJ's RFM grievance on the ground that he failed to establish "lawful entry" into apartment 2F via one of the three methods prescribed in Section XII of the NYCHA Manual. The court notes that this alone would be a sufficient ground to dismiss the instant Article 78 proceeding.

Nevertheless, the court notes NYCHA also argues that SJ failed to establish the "continuous occupancy" requirement necessary to demonstrate a claimant's entitlement to RFM status because JJ did not list him as an occupant of apartment 2F on the income affidavits that she submitted to NYCHA between 2008 and 2015. *See* respondents' mem of law at 11-12. The First Department consistently upholds the dismissal of Article 78 petitions by RFM claimants whose relatives failed to list them on their annual NYCHA income affidavits on the ground that that omission affords a "rational basis" on which to base a finding that the applicant failed to demonstrate "continuous occupancy." *See, e.g.*, *Matter of Becerril v New York City Hous. Auth.*, 168 AD3d at 586; *Matter of Blas v Olatoye*, 161 AD3d 562 (1st Dept 2018); *Matter of McBride v New York City Hous. Auth.*, 140 AD3d 415 (1st Dept 2016); *Matter of Carmona v New York City Hous. Auth.*, 134 AD3d 404 (1st Dept 2015). Because the record before the HO included JJ's 2008 through 2015 NYCHA income affidavits and SJ was not listed on any of them, the court agrees that it was reasonable for the HO to find that SJ failed to demonstrate "continuous occupancy," and that it was also reasonable for the HO to base his denial of SJ's RFM application, in part, on that failure. Accordingly, the court concludes that the HO's decision had a rational basis in the administrative record. Respondents nevertheless raise three arguments that the HO's decision was arbitrary and capricious.

First, petitioners cite the First Department's decision in *Matter of Aponte v Olatoye* (138 AD3d 440 [1st Dept 2016]) for the proposition that "additional circumstances" can justify overlooking a tenant of record's failure to list a relative on his/her annual income affidavits. *See* petitioners' mem of law at 8-10. Petitioners specifically assert that, like the tenant of record in *Aponte*, JJ received a medical diagnosis (terminal cancer, in her case) that caused her sufficient stress to justify excusing her failure to list SJ on her income affidavits. *Id.* However, petitioners base this

argument on the First Department's decision in *Matter of Aponte v Olatoye,* which the Court of Appeals overturned in a subsequent decision that rejected the argument that petitioners seek to rely on. As a result, the court rejects petitioners' first argument as unfounded. *Matter of Aponte v Olatoye,* 30 NY3d 693.

Next, petitioners argue that NYCHA "was put on notice about [SJ's] co-occupancy with his mother at the subject premises before and after her passing." *See* petitioners' mem of law at 10-11. NYCHA responds that it may not be estopped from applying its lawful occupancy requirements on the grounds that it "implicitly accepted" and RFM applicant's occupancy of a tenant of record's apartment without obtaining NYCHA's written permission to do so. *See* respondents' mem of law at 12-15. NYCHA is correct to assert that this is the general rule. *See e.g.*, *Matter of Becerril v New York City Hous. Auth.*, 168 AD3d at 586; *Matter of McBride v New York City Hous. Auth.*, 140 AD3d at 415; *Matter of Andrade v New York City Hous. Auth.*, 132 AD3d 598 (1st Dept 2015). Petitioners nevertheless cite the First Department's decision in *Matter of McFarlane v New York City Hous. Auth.* (9 AD3d 289 [1st Dept 2004]) for the proposition that NYCHA's knowledge of an RFM grievant's co-occupancy with a deceased tenant of record can be found to constitute "implicit acceptance" of the grievant's occupancy. *See* petitioners' mem of law at 10-11. NYCHA responds that the "implicit acceptance" exception created by the *McFarlane* holding does not apply, given the facts of this case. *See* respondents' mem of law at 12-15. The court agrees. In *Matter of McFarlane*, .the First Department held that "a showing that the Authority knew of, and took no preventive action against, the occupancy by the tenant's relative, could be an acceptable alternative for compliance with the notice and consent requirements." 9 AD3d at 291. In this case, however, petitioners made no such showing. Indeed, at the hearing the HO considered, and later rejected as

unfounded, AS's assertion that he had had a conversation at an unspecified time after JJ's death with a Kingsborough Houses employee that he variously identified as "Mr. Murphy" and "Mr. Mosely" who claimed that he was "aware" of SJ's presence in apartment 2F. *See* verified answer, exhibits J at 37-38, U. The court may not overturn the HO's decision based solely on his determination about a witness's credibility. *See Matter of Caldwell v Brezenoff*, 190 AD3d 583, 584 (1st Dept 2021), citing *Matter of Berenhaus v Ward,* 70 NY2d 436, 443-444 (1987); *Matter of Prado v New York City Hous. Auth.*, 116 AD3d 593, 593 (1st Dept 2014). Therefore, because petitioners have failed to make the showing required by the *Matter of McFarlane* holding, the court rejects petitioners' second argument.

Finally, petitioners argue that "public policy and the equities dicate that technical noncompliance with NYCHA's succession rules should not bar [SJ's] meritorious remaining family member claim." *See* petitioners' mem of law at 11-13. However, as was the case with their first argument, petitioners base this argument on a lower court decision in *Matter of Pullins v New York City Hous. Auth.,* 2019 NY Slip Op 31939 (Sup Ct, NY County 2019) which was later reversed by the First Department. 187 AD3d 616 (1st Dept 2020). Therefore, the court similarly rejects petitioners' final argument as unfounded.

The court notes in closing that petitioners papers raised no argument to assert that AS was entitled to occupy apartment 2F as a remaining family member. As a result, the court deems that they have abandoned so much of their Article 78 petition as made that assertion.

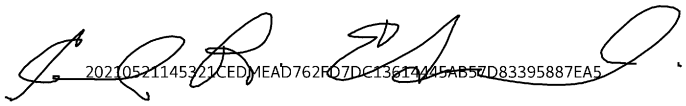
Accordingly, the court finds that this Article 78 petition to challenge the HO's decision, and NYCHA's subsequent determination of status order, should be denied as meritless, and that this proceeding should be dismissed.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of petitioners Andy Spencer and Skylar Jennette (motion sequence number 001) is denied and this proceeding is dismissed; and it is further

ORDERED that counsel for respondent New York City Housing Authority shall serve a copy of this order along with notice of entry in ten (10) days.



5/21/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
		GRANTED	X	DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE