

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D32065  
G/kmb

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Argued - June 21, 2011

WILLIAM F. MASTRO, J.P.  
CHERYL E. CHAMBERS  
LEONARD B. AUSTIN  
JEFFREY A. COHEN, JJ.

2011-00265

DECISION & ORDER

In the Matter of Eugene Peterkin, respondent, v  
Marcy Houses, appellant.

(Index No. 19779/10)

Sonya M. Kaloyanides, New York, N.Y. (Seth E. Kramer and Corina L. Leske of  
counsel), for appellant.

In a “proceeding” pursuant to CPLR article 78 to review a determination of the New York City Housing Authority, sued herein as the Marcy Houses, dated July 21, 2010, which, after a hearing, dismissed the grievance of Eugene Peterkin seeking to establish his status as remaining family member with succession rights to the tenancy of a deceased relative, the New York City Housing Authority, sued herein as the Marcy Houses, appeals from an order and judgment (one paper) of the Supreme Court, Kings County (Baynes J.), dated October 5, 2010, which, in effect, denied its cross motion to dismiss the “proceeding” pursuant to CPLR 3211(a)(2) and (8), and granted the petition.

ORDERED that the order and judgment is reversed, on the law, with costs, the appellant’s cross motion to dismiss the “proceeding” pursuant to CPLR 3211(a)(2) and (8) is granted, and the “proceeding” is dismissed.

A special proceeding is “commenced by filing a petition” (CPLR 304; *see Matter of Montecalvo v Columbia County*, 274 AD2d 868, 869). “The failure to file the initial papers necessary to institute a proceeding constitutes a nonwaivable jurisdictional defect rendering the proceeding a nullity” (*Matter of One Beacon Ins. Co./CGU Ins. Co. v Daly*, 7 AD3d 717). Here, since the petitioner failed to file the petition, the “proceeding” was a nullity (*see Matter of Parkinson v Leahy*,

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277 AD2d 810, 811). Therefore, the Supreme Court should have granted that branch of the appellant's motion which was to dismiss the "proceeding" pursuant to CPLR 3211(a)(2) for lack of subject matter jurisdiction.

Alternatively, since the appellant demonstrated that it was never served with the petition, the Supreme Court should have granted that branch of its motion which was to dismiss the "proceeding" pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction (*see Matter of Ortiz v State of N.Y. Off. of Children & Family Servs.*, 66 AD3d 1026, 1027; *see also Matter of Barclay v State of New York Dept. of Correctional Servs.*, 22 AD3d 974).

In light of our determination, we need not address the appellant's remaining contentions.

MASTRO, J.P., CHAMBERS, AUSTIN and COHEN, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court