

**Matter of Fisher v Hernandez**

2007 NY Slip Op 30888(U)

April 18, 2007

Supreme Court, New York County

Docket Number: 0403299/2006

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

Iris Fisher

INDEX NO.

403299/06

MOTION DATE

Tino Hernandez  
(NYCTHA)

MOTION SEQ. NO.

001

MOTION CAL. NO.

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**

APR 24 2007

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

*Petition denied*

Dated: APR 18 2007

HON. JUDITH J. GISCHE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

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

Supreme Court of the State of New York  
County of New York: Part 10

In the matter of the Application of  
IRIS FISHER

Petitioner,

-against-

TINO HERNANDEZ, as Chairperson and  
Member of the New York City Housing Authority,  
and THE MEMBERS OF THE BOARD OF THE  
NEW YORK CITY HOUSING AUTHORITY,  
Respondents.

**Decision/Order**  
Index#403299/06

Mot. Seq.#001  
Present:  
Hon. Judith J. Gische  
J.S.C.

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

<b>PAPERS</b>	<b>NUMBERED</b>
Amended Notice of Petition, verified petition, exhibits.....	1
Transcript of Administrative Hearing.....	2
Verified Answer, exhibits.....	3
Verified Reply.....	4

**FILED**

APR 24 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Petitioner brings this Article 78 petition to challenge respondents' April 3, 2006 decision which denied her grievance. She alleges that she was wrongfully denied a lease to her now deceased mother's apartment, although she was a remaining family member in that household. For the reasons set forth below, the court finds that the respondents decision is sustainable as a matter of law and that he petition should, therefore, be denied.

From 1959 until her death on May 15, 2005, Annette Webber was the tenant of record for apartment 3B at 18 Avenue V in Brooklyn, New York ("apartment"). The

apartment is part of a housing complex known as Marlboro Houses, which are operated by respondent ("NYCHA") and provide public housing for low income families.

Ms. Fisher lived in the apartment from the time she was born until the time she was married at age 19. At that time she and her new husband moved into another apartment in the same complex. Although Ms. Fisher and her husband occupied several apartments in the complex over the years, and raised their children there, only her husband was the lease tenant. In 1995 the Fisher family moved out of Marlboro Houses. There was a rent dispute at the time in which respondent claimed that Mr. Fisher owed \$14,821 in unpaid rent. Criminal charges were brought against Mr. Fisher and then dropped. Ms. Fisher denies that the rent was owed or unpaid and/or that she even knew about any rent arrears, if there were any. The rent dispute was not resolved at that time and thereafter, in 1999, the Marlboro House "wrote off" the rent charges that it had been carrying on its books.

Ms. Fisher claims that she separated from her husband and that in 2000 or 2001 she moved back into her mother's apartment with her daughter, Jenna Fisher. Approximately two years later, on July 11, 2003, Annette Webber, filed an application to add Ms. Fisher to the lease. On September 15, 2003 the application was denied by respondents' Housing Administrator for the following reasons: "(1) Iris Fisher & Husband James Fisher Sr. Moved out of NYCHA Marlboro Houses Acct 4-1G owing \$14,821.95 (2) no proof of prior Address after moving out of Acct 4-1G on 11/17/95 "

Although there was a further right to contest the finding made at that time, neither Ms. Webber nor Ms. Fisher did so. Notwithstanding the denial of permission, Ms. Fisher and her daughter continued to reside in the apartment in any event. Ms.

[\*4]

Fisher was not listed as part of the family composition in any affidavit of income submitted to NYCHA, either before or after 2003. These affidavits are relied upon in setting rent.

Ms. Webber died in May 2005, which was a little less than two years after decision to deny Ms. Fisher tenant status. Ms. Fisher then filed the instant grievance which sought to obtain a lease in her own name as a remaining family member. Part of her claim was that in 2003 when the application to add her name to the lease was denied, it was based upon the erroneous belief by respondent that she owed \$14,821 in rent arrears dating back to 1995.

In denying her present grievance, respondent reasoned that because Ms. Fisher had been denied permission to live in the apartment in 2003, she could not legally qualify as a remaining family member at this time. Notwithstanding such conclusion, however, respondent then allowed Ms. Fisher to contest the 2003 finding which formed the basis for its denial of permission for tenant status, to wit: that she owed rent when she moved out of Marlboro houses in 1995. After hearing testimony and taking evidence, respondent concluded that such rental arrears were owed.

Ms. Fisher now challenges the present determination that she is not entitled to remaining family member status. She argues that there was insufficient proof that she owed rent arrears from 1995. She further argues that even if she did owe rent, because the arrears were over three years old when she originally sought a tenant status, they could not be a basis for denying her status as a tenant.

The fundamental flaw in Ms. Fisher's present petition is that she is really seeking to attack the September 15, 2003 determination that she was not entitled to become a

tenant. This court holds that Ms. Fisher and/or her mother had a right to contest that decision at the time it was made. Having failed to do so then, it cannot be now collaterally attacked as part of this grievance. Therefore, the decision by respondents, to deny petitioner's grievance has a rational basis. Pell v. Board of Education of Union Free School District No. 1 of Towns of Scarsdale and Mamaroneck, 34 NY2d 222 (1974). had

*A bona fide family member remaining in an apartment in publicly funded housing may be entitled to a lease in his/her own name after the death or departure of the tenant of record.* 24 CFR § 966.53[f][2]. NYCHA defines remaining family member in its Management Manual. Chapter VII, Section IV, subsection E, See also: GM-3692. In order to qualify as a remaining family member the application must:

[a] have moved into the apartment lawfully [1] as a member of the original family composition, or [2] by birth or adoption subsequent to move-in or [3] with the permission of management, and

[b] have remained in the apartment continuously; and

[c] be otherwise eligible for public housing in accordance with the standards of admission set out in the manual for all applicants.

Where, as here, a person seeks to rejoin a family, NYCHA regulations explicitly provide that the original family member must seek permission for that person to rejoin the household. GM-3692 , Section III C.3.

It is incontrovertible that at the time petitioner filed a grievance based upon her claim that she was a remaining family member she was not occupying the apartment with the permission of management. Apparently she lived in the apartment from 2000

[\*6]

to 2003 without the knowledge of management. After 2003 she continued to live in the apartment despite management's express disapproval of the application to make her a tenant. Failure to comply with NYCHA's prior permission requirement is an appropriate legal basis to deny family member claims. Chavez v. NYCHA, 22 AD3d 408 (1<sup>st</sup> dept. 2005); McFarlane v. NYCHA, 9 AD3d 289 (1<sup>st</sup> dept. 2004).

Petitioner's argument that the 2003 determination was incorrect is unavailing. She should have pursued her administrative remedies at that time of the determination. Having failed to do so, the determination stands and may not be collaterally attacked at this time. To permit so would undermine the requirement that she was required to obtain NYCHA permission when she moved in with her mother. The court notes that the hearing officer found that Ms. Fisher had "standing" to raise the issue of denial of the application to make her a tenant. This is consistent, however, with this court's determination that even if Ms. Webber did not appeal the adverse ruling in 2003, Ms. Fisher could have done so.

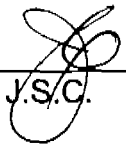
In this respect the court believes that the hearing officer was in error in hearing any testimony at all about the issues resolved in 2003. This error, however, did not adversely affect petitioner and is largely immaterial because her grievance was properly denied in any event.

Accordingly the petition is denied. The Clerk shall enter judgment in favor of the respondents against the petitioner. This constitutes the decision and order of the court.

Dated: New York, New York  
April 18, 3007

**FILED**  
APR 24 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

SO ORDERED:

  
\_\_\_\_\_  
J.G. J.S.C.