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

PRESENT: WALTER B. TOLUB PART _____

Index Number : 111080/2006
JOHNSON, GEORGE C.
vs
NEW YORK CITY HSG AUTHORITY
Sequence Number : 001
ARTICLE 78

DEX NO. _____
OTION DATE _____
OTION SEQ. NO. _____
OTION 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	

FILED

FEB - 6 2007

COUNTY CLERK'S OFFICE

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 2/5/07

WALTER B. TOLUB J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 15

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In the Matter of the Petition of GEORGE C. JOHNSON, a/k/a GEORGE JOHNSON, JR.,

Petitioner,

INDEX NO. 111080/06

For Review and Annulment of the Decision of Respondent pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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WALTER B. TOLUB, J.,

Petitioner commenced this CPLR Article 78 proceeding to annul the determination of respondent New York City Housing Authority (the Housing Authority), dated April 12, 2006, which denied petitioner remaining family member status, and declared him ineligible for continued occupancy of the subject apartment, located in Gompers Housing development.

It is undisputed that plaintiff's father, George Johnson Sr., was admitted to public housing in or around 1963, and that he occupied apartment 16E, at 90 Pitt Street in Manhattan, as the registered tenant, until his death on December 22, 2003. The parties do not dispute that petitioner was one of five children who occupied the apartment as an original member of the tenant's household, or the fact that petitioner left the household in 1971. The parties do not dispute that George Johnson, Sr.

suffered a stroke and became incapacitated. Petitioner claims that he moved back into the apartment to assist in his father's care in or around 2000 or 2001. Petitioner does not dispute that annual affidavits of income and family composition, submitted to the Housing Authority by or on behalf of petitioner's father, listed George Johnson, Sr., as the sole occupant of the apartment for the years ending March 2001 through March 2003. Petitioner does not dispute that, prior to his father's death, neither he nor his father, nor anyone acting on his father's behalf, sought permission for petitioner to re-occupy the apartment.

The Housing Authority asserts that it received notice of the registered tenant's death on January 16, 2004. Project management served a 10-day notice to quit on petitioner on or about April 6, 2004. Petitioner and his brother Elston, who held the power of attorney for their father prior to his death, met with management personnel on April 12, 2004. The management interview entry for that date states that petitioner stated that he was staying with his father in the evenings due to his father's medical condition because the home health care worker was only available during the day. After a second meeting on June 14, 2004, during which petitioner informed the Project Manager that he had given up his apartment in Brooklyn to assist his father, the Project Manager, by written determination, denied petitioner permission for a lease, stating: 1) petitioner never

obtained written permission to permanently join the household; 2) petitioner did not remain in the apartment continuously; and 3) petitioner was not listed on any affidavits of income.

The Manhattan District Director denied petitioner's grievance of the Project Manager's determination by written decision dated August 23, 2004, stating, "[c]onsistent with Remaining Family Member Policy Revisions the person seeking remaining family member status must be an authorized member of the household. The tenant must complete and submit a Permanent Permission Request form...to request permission for an original member to return to the household. The request must be approved by the housing manager." Finding that George Johnson, Sr. did not request or obtain managements' approval for petitioner to rejoin the household, and that annual affidavits of income forms signed and submitted by the tenant from April 1992 through April 2003 showed George Johnson, Sr. as the sole occupant of the apartment, the Manhattan District Director concluded that petitioner was ineligible" for remaining family member consideration.

The determination of the Manhattan District Director was upheld, and petitioner's grievance of that determination was dismissed, after an administrative hearing, held February 4, 2005. The decision and order of the Hearing Officer, dated March 23, 2006, states that the annual income affidavits gave explicit

notice that the failure to list occupants of the apartment "may deprive them of all rights of occupancy," and that no one was allowed to join the household unless permission was requested and granted. The Hearing Officer found that the annual affidavits completed for the tenant by Elston Johnson for 2000, 2001, 2002 and 2003 listed the deceased tenant as the sole occupant of the apartment, and concluded that petitioner failed to make out a *prima facie* case of residential tenancy.

In an Article 78 proceeding, the court's role is limited to a review of whether the agency determination has a rational basis, and is not arbitrary or capricious (*Matter of Pell v. Board of Education*, 34 NY2d 222 (1974); *Matter of Nelson v. Roberts*, 304 AD2d 20 [1st Dept 2003]). The court may not substitute its judgment for that of the agency (*Matter of Nelson v. Roberts*, 304 AD2d 20, *supra*), and the agency's interpretation of the statutes and regulations it administers, if reasonable, must be upheld (*Matter of 85 Eastern Parkway Corp. v. New York State Div. of Hous. and Community Renewal*, 297 AD2d 675, 676 [2d Dept 2002]).

The Housing Authority is authorized, and required, to promulgate guidelines in accordance with United States Department of Housing and Urban Development (HUD) regulations (*see* 47 U.S.C. § 1437 *et seq*; 24 CFR § 960 *et seq*), which impose standards of eligibility for occupancy for public housing (*see* 24 CFR §

960.202[a]; NY Public Housing Law §§ 3 [2], 37[1][w], 156, 401), and which outline a means to regularly monitor family composition and income after a family has been admitted into public housing (*see e.g.* 24 CFR § 960.257[a]). HUD regulations create a corresponding duty, on the part of tenant families, to request Housing Authority approval to add family members as occupants of their apartments (24 CFR § 966.4[a][1][v], [2]; *see Matter of McFarlane v New York City Hous.* Auth., 9 AD3d 289 [1st Dept 2004]), and require all occupants of the tenant family to provide income and other information pertinent to the determination of the amount of rent to charge, and the size of the apartment necessary to accommodate the persons occupying the unit (24 CFR § 960.259[a]). The general policy of the Housing Authority regarding residence in public housing, as contained in Section IV (F) of its Management Manual (GM-3692) provides that only the tenant and other persons listed as part of the original family composition, "who remain in continuous occupancy...may occupy the tenant's apartment," and that "no person may join a tenant's household, unless the tenant requests their inclusion in writing and the project manager approves the request in writing." Pursuant to Chapter VII, Section E of the Management Manual, as amended November 4, 2002, when a tenant moves or dies, remaining family member status is limited to occupants who were: 1) member(s) of the original tenant family or who became permanent

member(s) of the tenant family subsequent to move-in, with the written approval of the project manager; or 2) who were born or legally adopted into the tenant family after move-in, and remained there continuously until the tenant of occupancy moved or died. Admittedly, petitioner does not fall into any of these categories.

It is well settled, in this jurisdiction, that the Housing Authority's finding, that a remaining family member is ineligible for a lease, based upon the lack of written permission to occupancy the subject public housing unit, is not arbitrary, capricious or an abuse of discretion (*see Matter of Jamison v New York City Hous. Auth.*, 25 AD3d 501 [1st Dept 2006]; *Matter of Chavez v Hernandez*, 22 AD3d 408 [1st Dept 2005]; *Matter of Hutcherson v New York City Hous. Auth.*, 19 AD3d 246 [1st Dept 2005]; *Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d at 290). Petitioner's argument, that he should not be denied occupancy simply because he failed to get "a piece of paper," has been rejected by the Appellate Division (*see Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d at 290), and neither petitioner's testimony, nor the poof submitted to demonstrate his actual occupation of the apartment, are sufficient to create a substantive issue regarding whether the Housing Authority knew of and implicitly approved his residency in the apartment (*see Matter of Chavez v Hernandez*, 22 AD3d 408, *supra*; *Matter of*

Hutcherson v New York City Hous. Auth., 19 AD3d 246, *supra*).[1] Petitioner's story, although heart rending, does not provide a basis to overturn the decision of the agency.

Thus, for the reasons stated above, it is:

ADJUDGED that the petition is denied, and the proceeding dismissed.

This constitutes the decision and judgment of the Court.

Dated: 2/5/07

ENTER:

WALTER B. TOLUB J.S.C.

[1] Such argument appears to be pre-empted by the November 24,2002 revisions to the Management Manual, stating that persons who move out of the tenant's household do not automatically obtain permission for permanent occupancy by virtue of their former occupancy, "notwithstanding the Housing Authority's actual or constructive notice of the persons' return to the apartment" (GM-3692, §III [C][3]). As noted by the Housing Authority, the 2002 revisions were approved as part of a settlement in a federal class action (*see generally Williamsburg Fair Hous. Comm. v New York City Hous. Auth. & United Jewish Orgs. of Williamsburgh, Inc.*, Case No. 76-CV-2125 [SDNY][Sweet, J.]). Subsequent case law, however, appears to continue the exception (*see e.g. Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d at 291 [a showing that Authority knew of, and took no preventive action against, the occupancy by tenant's relative, could be an acceptable alternative for compliance with the notice and consent requirements]).