Matter of Schwartz v New York City Hous. Auth.
2007 NY Slip Op 34489(U)
January 5, 2007
Supreme Court, New York County
Docket Number: 100900/2006
Judge: Paul G. Feinman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

----------X

In the Matter of the application of
LIBA SCHWARTZ,
Petitioner,

for a judgment pursuant to Article 78
of the Civil Practice Law and Rules

- against -

NEW YORK CITY HOUSING AUTHORITY,
Respondent.

----------X

Index Number	100900/2006
Submission Date	Sept. 13, 2006
Mot. Seq. No.	001
Mot. Cal. No.	16

DECISION, ORDER AND JUDGMENT

For the Petitioner:
Tenenbaum & Berger, LLP
By: Michele L. Henry, Esq.
26 Court Street, Penthouse
Brooklyn NY 11242
(718) 596-3800

For the Respondent:
Ricardo Elias Morales, Esq.
General Counsel, NYCHA
By: Steven W. Goodman, Esq.
250 Broadway, 9th Floor
New York NY 10007
(212) 776-5000

Papers considered in review of this petition to annul or remand:

Papers	Numbered
Notice of Petition and Affidavits Annexed	1
Transcript of Hearing	2
Verified Answer, Brief	3, 4
Reply Memorandum	5

PAUL GEORGE FEINMAN, J.:

In this Article 78 proceeding, petitioner seeks to annul and vacate respondent's administrative determination of September 21, 2005. For the reasons which follow, the petition is denied and the proceeding is dismissed.

Factual Allegations and Procedural Background

Petitioner Liba Schwartz (née Spilman, also spelled Spielman and Spillman), lives in

apartment 3B in the Independence Towers Houses, a housing development in Brooklyn owned by respondent New York City Housing Authority (NYCHA) (Ver. Pet. ¶¶ 1-2). The former tenant of record of apartment 3B was Esther Weinberger who signed a lease on September 1, 1970 (Ver. Ans. Ex. 1). Esther Weinberger died on May 6, 2002 (Ver. Pet. Ex. K, Certif. of Death).

NYCHA is a corporate governmental entity created pursuant to the New York State Public Housing Law to provide housing for low-income families in the City of New York (Ver. Ans. ¶ 44). Pursuant to New York's Public Housing Law and federal regulations, it is vested with the power to make and impose eligibility standards for occupancy in its apartments (Ver. Ans. ¶ 44, citing Pub. Hous. Law §§ 3[2], 37[1][w], 156, 401; CFR § 960.202[a]). NYCHA is funded and regulated by the federal government and must annually certify its compliance with regulations concerning family income and composition set forth by the U.S. Department of Housing and Urban Development (HUD) (Ver. Ans. ¶¶ 45-49, citing 24 CFR §§ 960.201[c]; 960.257[a]).

On December 1, 1998, the management office of Independence Towers received a "Permanent Permission Request" on behalf of Ms. Weinberger to allow her grandchild, petitioner's sister, Friedy Spielman, then living in Monroe, New York, to permanently join her household (Ver. Pet. Ex. C). The reason for the request, as explained in an unidentified person's handwriting on page two of the application, was that Ms. Weinberger was 96 and "no longer can be left alone. She desperately needs help with basic necessities of life." According to the printed information on the first page of the application, the manager had 90 days to make a decision and would consider "income, family size, composition, continued occupancy standards and desirability." As it transpired, the manager's initial decision to deny on April 19, 1999 was

made more than 90 days after the application was filed, and the application was therefore subsequently approved on August 10, 1999 (Ver. Pet. Ex. C, p. 2).[1]

On about April 17, 2001, the management office received a Permanent Permission Request on behalf of Ms. Weinberger, signed by her son, to allow petitioner Liba Spilman, described as "family," to permanently join Ms. Weinberger's household (Ver. Pet. Ex. D). Typewritten on the second page of the application was the explanation which said in part that petitioner's sister "had to move to a different apt.," and that Ms. Weinberger was "forced to take [petitioner] instead to live with" her, and "we developed a wonderful relationship being together, currently she is very important to me as a close family member which boosts my spirits and console[s] my loneliness."

The management office requested various pieces of information prior to its approval of this request such as proof that Friedy Spilman had moved out, none of which involved establishing petitioner's relationship to Ms. Weinberger (Ver. Pet. Ex. E). For instance, Friedy Spilman completed a notice stating that she had vacated apartment 3B at some unspecified date prior to May 25, 2001 (Ver. Pet. Ex. F). In addition, Ms. Weinberger's son completed an affidavit on his mother's behalf which indicated that as of May 25, 2001, petitioner was residing in the apartment with his mother, and Friedy was not residing in the apartment with her (Ver. Pet. Ex. G). This affidavit was termed "invalid" by respondent by letter dated June 15, 2001, as "Liba Spielman has not yet been granted Permanent Permission." (Ver. Pet. Ex. H). The letter

---

[1]An attorney acting on behalf of the family wrote to the management office concerning its failure to comply with the time frame (Ver. Ans. Ex. B, C), and the application was changed to "approved" in August 1999.

further indicated that "[i]n addition," until the management office received information concerning family support from petitioner's family who lived on the same floor as Ms. Weinberger, the request would not be processed. A notarized letter from petitioner's father concerning this issue was received in respondent's office on June 22, 2001 (Ver. Pet. Ex. I).

On June 27, 2001, the management disapproved Ms. Weinberger's request on the basis that there was "No Family Relationship." (Ver. Pet. Ex. D, p. 2). Petitioner herself wrote a letter on October 19, 2001 to the management office seeking an appeal of this decision (Ver. Ans. Ex. 4). A typewritten letter dated December 5, 2001 purportedly from Ms. Weinberger, but unsigned, made a "second request" for an appeal based on being "family related" and having "established a cohesive family with living together" (Ver. Ans. Ex. 5).[2]

On February 26, 2002, Ms. Weinberger's annual "Occupant's Affidavit of Income" was completed and thereafter submitted to the management office (Ver. Ans. Ex. 6). It averred that she was the sole occupant of her apartment.[3] Notably, this affidavit includes on its first page a Notice stating that a failure to list all occupants could deprive them of "all rights of occupancy." As indicated above, Ms. Weinberger died thereafter on May 6, 2002.

More than a year later, on about October 21, 2003, the management office of Independence Towers received a letter from petitioner again appealing the earlier disapproval of the Permanent Residence Request, in language that virtually repeated word for word the

---

[2]According to the Verified Answer, on May 1, 2002, the manager of Independence Towers conducted a grievance meeting in response to Ms. Weinberger's letter. Bernard Weinberger did not appear although a telephone message was left for him, and the hearing was "terminated" (Ver. Pet. ¶ 75).

[3]The handwriting and signature on the affidavit seem, to the untrained eye, similar to that on other documents signed by Ms. Weinberger's son on her behalf.

December 5, 2001 letter (Ver. Ans. Ex. 8). On May 11, 2004, a "project grievance" was held with the attorneys for petitioner and respondent, and the new manager for Independence Towers (Ver. Ans. ¶ 79); petitioner's request, now termed a Remaining Family Member grievance, was denied on the basis that she was not an authorized occupant (Ver. Pet. Ex. L). This was affirmed on default by the borough director on July 27, 2004 (Ver. Pet. Ex. L). Petitioner then requested a formal Remaining Family Member grievance hearing which took place on July 20, 2005, the record of which was transcribed and submitted as part of her motion papers (hereinafter Transcript).

At the hearing, the hearing officer heard the testimony of petitioner and examined many of the documents and exhibits described herein. Petitioner testified that she has lived continuously in the apartment since 2001 (Transcript 34).[4] She moved into the apartment after her sister Friedy moved out, in April 2001 (Transcript. 43, 45, 47). Before that she had been living on the same floor of the apartment building with her parents, in the apartment where her parents still live (Transcript 40-41). She explained that the reason she was denied rights to Ms. Weinberger's apartment was because she could not prove that she was related to Ms. Weinberger, as the Holocaust had destroyed all the family documentation (Transcript 35-36). Although she first testified that Ms. Weinberger was her grandmother (Transcript 33), upon cross-examination she amended that to say she was her great-grandmother (Transcript 37-38, and later admitted she did not know how she was related to Ms. Weinberger (Transcript 39-40). She explained she never asked Ms. Weinberger family questions as it was hard for the woman to

[4]Petitioner was married in 2004 (Transcript 47).

speak about the subject (Transcript 39). When asked whether she were related to Bernard Weinberger, she stated she did not know who he was (Transcript 48), although it is apparent from the documents that he was the son involved with Ms. Weinberger's care.

Petitioner's counsel argued that the denial based on no family relationship, is contrary to respondent's earlier approval of the request to allow petitioner's sister to reside with Ms. Weinberger and, as noted by the hearing officer himself, that the regulations did not require a family relationship (see, Transcript 24 et seq.). She also argued that the Housing Authority had a common practice of allowing the elderly to have live-in family members even in a one-bedroom apartment, especially when they need assistance (Transcript 66).

In turn, respondent's attorney argued that the term family relationship encompasses two aspects, one legal and one inferred from two unrelated persons living together in a close cohesive family unit (Transcript 60, 62). He noted that the Permanent Residence Request form asks that the applicant state "relationship to tenant, if any," showing that a legal relationship was not required (Transcript 71). However, the NYCHA Occupancy Standards for Families provide that two people may reside in a three-room apartment only if they are married, domestic partners, or where one is a child under the age of six, and he argued that the initial granting of residency to petitioner's sister was not in fact proper and should not be continued by a second incorrect decision (Transcript 58-59).

By disposition dated August 30, 2005, the hearing officer upheld the denial of petitioner's residence application (Ver. Pet. Ex. B [hereinafter Decision]). The disposition noted that the form seeking permission for petitioner's occupancy was not signed by Ms. Weinberger, but by her son in a violation of the regulations. It noted that petitioner "never thought to inquire as to

who "a 'Mr.' Weinberger, may have been" (Decision unnumbered 2). It found "mysterious" that petitioner did not know who Bernard Weinberger was or why she claimed to be Ms. Weinberger's granddaughter (Decision unnumbered 3). It noted that NYCHA's occupancy standards allow only married couples, domestic partners or a single adult with a child under six to live in a one-bedroom apartment, and that the "error" in approving the older sister was not a binding precedent. It concluded that the decision of "no family relationship" adequately described petitioner's lack of status as either "spouse, partner or child under six, and thus not meeting the occupancy standards," and that the record did not support the claim that the Housing Authority erred by denying petitioner's application for residency (Decision unnumbered 3). Respondent issued its final determination dismissing petitioner's grievance on September 21, 2005 (Ver. Pet. Ex. A).

Sometime shortly after respondent's final determination was issued, it commenced a summary holdover proceeding against petitioner in Housing Court, Kings County (Ver. Pet. ¶ 7).

Petitioner commenced the instant proceeding by filing her petition on January 20, 2006 and serving it thereafter on respondent. She seeks an order annulling and vacating the September 21, 2005 determination and directing respondent to offer her a lease to the subject apartment or, alternatively, remanding the proceeding for a final determination, sustaining the Remaining Family Member grievance and directing respondent to offer her a lease to the subject apartment.

Respondent filed and served its verified answer and 11 affirmative defenses including lack of standing, mootness, lack of municipal estoppel, and unclean hands. In sum, it argues that petitioner has not established there were either family connections or close affectional bonds

between petitioner and the deceased woman, and that the management of Independence Towers acted rationally and within the constructs of the federal, state, and local regulations to correctly deny petitioner's application where only married couples, domestic partners, or single adults with a child under six may live in a one-bedroom apartment (Decision p. 3).

Legal Analysis

An Article 78 proceeding against a public body may be commenced only when a matter has been finally determined (CPLR 7801[1]). CPLR 217(1) provides that an Article 78 proceeding must be commenced within four months of the date of the final determination (*Carter v State of New York*, 95 NY2d 267, 270 [2000]). An agency determination is deemed final "when the petitioner is aggrieved by the determination" (*Biondo v New York State Bd. of Parole*, 60 NY2d 832, 834 [1983]). "In analyzing the Statute of Limitations issue we must first ascertain what is the determination sought to be reviewed" (*Martin v Ronan*, 44 NY2d 374, 380 [1978]).

It is a well-settled rule that judicial review of administrative determinations is limited to the grounds invoked by the agency (*Matter of Aronsky v Board of Educ.*, 75 NY2d 997 [1990]). The court may not substitute its judgment for that of the agency's determination but shall decide if the determination can be supported on any reasonable basis (*Matter of Clancy-Cullen Storage Co. v Board of Elec. of the City of New York*, 98 AD2d 635, 636 [1st Dept. 1983]). The test of whether a decision is arbitrary or capricious is "'determined largely by whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" (*Matter of Pell v Board of Educ.*, 34 NY2d 222, 232 [1974]), quoting 1 N.Y. Jur., Admin. Law, § 184, p. 609). An arbitrary action is without sound basis in reason and is generally taken without regard to the facts (*Matter of Pell*, at 232).

Reviewing courts are "not empowered to substitute their own judgment or discretion for that of an administrative agency merely because they are of the opinion that a better solution could thereby be obtained." (*Peconic Bay Broadcasting Corp. v Board of App.*, 99 AD2d 773, 774 [2d Dept. 1984]). The scope of review does not include "any discretionary authority or interest of justice jurisdiction in reviewing the penalty imposed by the Authority" and "the sanction must be upheld unless it shocks the judicial conscience" (*Featherstone v Franco*, 95 NY2d 550, 554 [2000], citing *Matter of Pell*, at 232-234). Credibility determinations made by hearing officers are largely unreviewable by the courts (*Berenhaus v Ward*, 70 NY2d 436, 443 [1987]). The reviewing court must defer to the administrative fact finder's assessment of the evidence and the credibility of the witnesses (*Lindemann v American Horse Shows Assn.*, 222 AD2d 248, 250 [1st Dept. 1995] citing *Berenhaus* at 443).

The record establishes that the tenancy of Ms. Weinberger was governed by her signed lease agreement which commenced in 1970. The agreement required, among other things, that she seek written permission to obtain the consent in writing of the housing manager before allowing any person to take up residence in her apartment. This requirement was derived from NYCHA's Management Manual, the pertinent version and portions of which are contained in as an exhibit to the petition (Ver. Pet. Ex. M, Management Manual, ch. IV, subd. IV [1991] [hereinafter Manual]). Notably, the Manual sets forth the following rules concerning residence: "Except for person(s) added by birth or legal adoption, no person may join a tenant's household, unless the tenant requests their inclusion in writing and project management approves the request in writing." (Manual § F[1]). Where a tenant wishes to add an additional person to his or her household, a tenant "must make a written request to the Manager for a relative or other 'family

member' . . . to become either a legally authorized permanent member or a co-tenant." The form, a Permanent Residence Request, must be completed by both the tenant and the additional person and the project manager will review and grant permission if all necessary conditions are met (Manual § F [4]). The proposed additional person must not cause the tenancy to fall out of compliance with the occupancy standards based on apartment size, and the tenants must fit within the definition of being a "family," i.e., related by blood, marriage, or adoption, or unrelated but living together as a cohesive family group in a sharing relationship (Manual § F[4][a][2]). There is a 90-day review period and if the manager fails to grant or deny within that time frame, thereafter the person "shall be deemed to have received permanent residency permission" (Manual § F [4][b][3]). Where the manager denies permanent residency status, "the tenant shall remove the additional person(s), if they are living in the apartment, within 15 days of the denial. . . If not, the Manager shall commence Termination of Tenancy proceedings for unauthorized occupant(s)." (Manual § F [4][b][9]). If during the review period the tenant who made the request dies, the additional person "shall be deemed to have lawfully entered the apartment, and may commence a 'Remaining Family Member' Grievance." (Manual § F [4][b][11]). A Remaining Family Member is defined as (1) a member of the original tenant family; (2) a permanent member of the tenant family subsequent to move-in, having the written approval of the project management, or (3), born or legally adopted into the tenant family (Manual § J [1]). A Remaining Family Member shall be offered a lease if they are otherwise eligible for public housing (Manual § J [1]).

Here, the request brought on behalf of Ms. Weinberger to add petitioner to her household, considered by the management of Independence Towers although improperly signed by her son,

was denied in writing. Only Ms. Weinberger, according to the Manual, had the right to grieve the denial of her request, and a letter of appeal was received by respondent in her name in December 2001. That grievance, according to respondent, was terminated on May 1, 2002, based on the failure of anyone representing Ms. Weinberger to appear at the hearing, and Ms. Weinberger died shortly thereafter.[5] Petitioner herself had no right to appeal and, according to the Manual, she does not properly have the status of a Remaining Family Member, although through apparent bureaucratic error, respondent allowed her to bring a grievance on such grounds.

Although petitioner argues that she should be considered as a Remaining Family Member either because she is related in the same manner that her sister Friedy is related to the deceased, or because Ms. Weinberger and she had a close caring family-type relationship, respondent's determination to deny petitioner's grievance on the ground that she had "no family relationship" to the tenant of record is neither irrational or arbitrary. Petitioner offers nothing other than the two letters, one from petitioner herself, using substantially the same language describing the relationship, and the initial request form with its typewritten declaration of a close and caring relationship, written at about the time Friedy moved out and petitioner moved in, to show the supposedly close and caring nature of her relationship with Ms. Weinberger. That the hearing officer thought it "mysterious" that she did not know the very son of the woman with whom she was so very close, is not irrational. Even granting that young people often do not know a lot

---

[5]Respondent argues that this grievance meeting, should be considered the final agency determination, and that accordingly the four-month statute of limitations ran long before she ever commenced this proceeding (Brief for Resp. p. 5).

about their family heritages, that she had never sought to find out anything about "Mr." Weinberger, lends credence to the hearing officer's determination that petitioner was neither related nor closely tied emotionally to the tenant.

Petitioner suggests, as stated in both request forms seeking permission for the occupancies of Friedy and petitioner, that Ms. Weinberger, or her son, sought someone to take care of the elderly woman, and that the requests should have been granted for that reason alone. However, the Housing Authority has provisions for allowing both home care attendants and temporary occupants to live in the apartments of the elderly or others who need assistance with daily living, although neither category of individual would be allowed to remain in an apartment after the tenant of record has died (Manual §§ F[2][c]; [3]). In an Article 78 review, the court is only asked to determine whether respondent's determination is rational, not whether it would reach the same conclusion given the same facts.

Petitioner's argument that respondent should be estopped from denying her grievance and the lease of the apartment because it had previously approved her sister's occupancy of the apartment on the same grounds that it is now denying her, is also unpersuasive. As noted above, the request to allow Friedy to reside with Ms. Weinberger was approved not based on its merits but because the manager of Independence Towers did not make his disapproval in a timely fashion. Estoppel may not generally be invoked against a municipal agency to prevent it from discharging its statutory duties or to ratify an administrative error (*Parkview Assoc. v City of New York*, 71 NY2d 274, 282, *cert. denied* 488 U.S. 801 [1988]). Here, where petitioner has not established that she is a member of Ms. Weinberger's family, nor that she had a cohesive sharing family relationship, and where by rights she has no standing to bring a grievance or this petition,

respondent need not be directed to commit one more incorrect action (*see, Matter of Barnhill v New York City Hous. Auth.*, 280 AD2d 339 [1st Dept. 2001] [petitioner, who lived in her aunt's public housing apartment without written approval, did not become Remaining Family Member when her aunt moved out, and lacked standing to bring a proceeding; furthermore court committed error by remanding the matter for a hearing on entitlement]). That respondent chose not to base its decision on the prior decision concerning Friedy Spilman, is not contrary to law nor arbitrary or capricious.

Finally, petitioner also argues that NYCHA had notice of her occupancy and that notice is an exception to the rule requiring written permission. She points to *Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289 (1st Dept. 2004), in which the Court held that a circumstance that could be of "critical importance in establishing a right to be treated as a remaining family member despite the absence of notice or written consent," would be a showing that the Housing Authority was aware that a petitioner had taken up residence in the unit, and had implicitly approved it (*McFarlane*, 9 AD3d at 291). *McFarlane* involved the grandchildren of deceased public housing tenants, who had been denied Remaining Family status based on their failure to apply for and obtain the written consent of management to become permanent members of the tenant families during the grandparents' tenancies; there was no showing made that the Housing Authority was aware and implicitly approved of their occupancy, and their petitions were dismissed. See also, *Jamison v New York City Hous. Auth.*, 25 AD3d 501 (1st Dept. 2006) (no basis to relieve the petitioner of the written notice requirement since she failed to establish that respondent knew or implicitly approved of her residency in the apartment, where the tenant was never given permission to add her to his household, his affidavits of income listed only himself

as occupant, there were no references to the petitioner in the tenant's file, and the Housing Assistant testified that the tenant had never requested that anyone be allowed to live with him); *Hutcherson v New York City Hous. Auth.*, 19 AD3d 246 (1st Dept. 2005) (where petitioner failed to establish that the Housing Authority knew of and implicitly approved of her permanent residency in the apartment, she was ineligible to continue occupancy in the apartment); *Chavez v New York City Hous. Auth.*, 22 AD3d 408 (1st Dept. 2005) (petitioner failed to establish that the Housing Authority knew of and implicitly approved of her permanent residency in the apartment); *Matter of Miller v New York City Hous. Auth.*, 279 AD2d 349 (1st Dept.), *lv denied* 97 NY2d 602 (2001) (petitioner's 10-year presence in the apartment held not to have been covert; hearing needed to determine whether there were sufficient mitigating factors present to render him fit for tenancy); *NYCHA v Mangual*, NYLJ, Mar. 21, 1994, at 29, col. 6; 22 HCR 181B (App. Term, 1st Dept.) (where daughter who had resided in the premises from the inception of the tenancy for 11 years, left for four years and then returned without obtaining permission, and lived nearly three more years with her mother until her mother's death, and the tenant file indicated that the Authority was on notice of her occupancy about two years before her mother's death, the court held that NYCHA's knowledge, coupled with her having been an original member of the household and her co-occupancy with the last three-year occupancy of her mother, qualified her for Remaining Family Member status); *NYCHA v Galan, Jr.*, NYLJ, Dec. 22, 1993, at 22, col 2; 21 HCR 656B (App. Term 1st Dept.) (remanded for new trial to consider factors including not only that the son of the deceased tenant was not listed on the annual statements of household composition and income, a fact which is significant but "not dispositive," but whether or not NYCHA had notice or approved of the son's occupancy, and included the fact that

subsequent to the tenant's death, the son received a demand for use and occupancy).

Petitioner advises that respondent knew that she resided in the apartment because of the affidavit of family composition submitted to respondent which listed her presence as of May 25, 2001. She contends that although the Housing Authority advised Ms. Weinberger that the affidavit was "invalid," the advisement was ambiguous as it stated that it was invalid because petitioner "has not *yet* been granted Permanent Permission," which, petitioner argues, would lead one to believe that permission would be granted and that she would remain in the apartment. However, the issue is that subsequently, Ms. Weinberger's request **was denied,** and the grievance terminated on default shortly before Ms. Weinberger's death in May 2002. Moreover, in the interim, the 2002 occupant's affidavit of income form was filed, indicating under oath that Ms. Weinberger was the sole individual in her apartment. Although petitioner argues that respondent knew or should have known that she never moved out of the apartment, she offers absolutely no evidence to substantiate this claim. Unlike *Galen, Chavez*, or *Hutcherson*, petitioner does not show that respondent "implicitly approved" of her permanent residency. Rather, the evidence shows that her occupancy was **disapproved**. She did not, for instance, proffer correspondence from the Housing Authority addressed to her in the apartment following Ms. Weinberger's death. She did not even establish other than through her testimony that she actually live in the subject apartment.[6] She did not produce envelopes addressed to her at the subject apartment, or proof that she paid rent or utility bills, or that any rent or utility bills were paid in her name, or any other indicia to establish that she lived openly in Esther Weinberger's

[6]The fact that she had lived with her parents, who live on the same floor as Ms. Weinberger's apartment, clouds the issue.

former apartment, number 3B. Petitioner has not established that respondent was aware and implicitly approved of her tenancy.

The disposition of the hearing officer explicitly denied petitioner's grievance based on the finding that she was not the spouse, partner, nor child of Ms. Weinberger and did not meet the occupancy standards and, additionally, implicitly denied it based on Bernard Weinberger's improperly signed request form seeking her occupancy and the evidence that petitioner showed very little actual knowledge or caring for the late Ms. Weinberger.

Once the court has found a rational basis exists for the agency's determination, its review is ended (*Matter of Sullivan County Harness Racing Assoc., Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]). Put another way, the courts may not interfere unless there is no rational basis for the exercise of discretion or the action complained of is found to be "arbitrary and capricious." (*Pell v Board of Ed.*, 34 NY2d at 231, citations omitted).

Petitioner's argument that respondent's occupancy standard violates the United States Fair Housing Act, 42 USC § 3604, New York State Executive Law § 296(2), and New York Property Law § 235-f (the Roommate Law), is improperly first articulated in the Reply Brief, and therefore will not be addressed by the court.

It is

ADJUDGED and ORDERED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that any stay from this court of the Kings County Civil Court proceeding entitled *New York City Hous. Auth. v Liba Schwartz a/k/a Liba Spilman*, L&T Index No. 023827/05 (Civ. Ct., Kings County) shall be deemed dissolved 10 days after the date of entry of

this order.

The foregoing shall constitute the decision, order and judgment of this court.

ENTER

Dated: Jan. 5, 2007
New York, New York

J.S.C.

CLERK

FILED
JAN 17 2007
NEW YORK
COUNTY CLERK'S OFFICE