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

PRESENT: HON. NICHOLAS FIGUEROA, Justice

PART 46

Index Number : 116656/2008

SALAMON, RACHEL

VS.

HOUSING AUTHORITY

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	1
Replying Affidavits	1

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in the Judgment Clerk's Desk (Room

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

Dated: Nov. 2, 2009

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

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In the Matter of the Application of

RACHEL SALAMON,

Petitioner,

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

- against -

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

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Index No. 116656/08

DECISION AND ORDER

Nicholas Figueroa, J.S.C.:

Petitioner in this Article 78 proceeding seeks to annul a Determination of the New York City Housing Authority (NYCHA) denying her grievance, by which she claimed entitlement to her deceased great aunt's apartment lease. The Determination, dated August 13, 2008, approved the decision of a hearing officer following a hearing on petitioner's grievance.

The great aunt was the apartment's tenant of record from 1996 until her death in October 2002. At some point thereafter, petitioner filed a request to be put on the lease in her own right, claiming to have shared occupancy with the great aunt since 2000. Management, however, rejected such claim, because there had never been written authorization for her permanent occupancy, a prerequisite to remaining-family-member status (*see* NYCHA Management Manual, Chapter IV, Subdivision IV(J); *id.*, Chapter VII(E); NYCHA General Management Directive 3692, *as amended* 11/22/02). The formal hearing followed.

According to her grievance, petitioner moved into the apartment in December 2000, in

order to tend to her elderly and ailing relative. At the hearing, petitioner was her only witness, and the transcript of her brief testimony is in part unclear. However, it is clear enough that petitioner claimed to have made periodic efforts, between the end of 2000 and October 2002, to obtain respondent's permanent permission for her added tenancy. Thus, she testified that, over the two-year period, she had made numbers of visits to respondent's management office, accompanied on one such occasion by her great aunt. She also testified, or so it appears, that on another such occasion she had brought with her the great aunt's Income Affidavit for 2001, an annual filing required of all of respondents' tenants, and that the Affidavit listed her as a co-occupant of the apartment. It is noted, however, that the great aunt's 2001 Income Affidavit, put into the record by respondent, lists the great aunt alone as an occupant. Petitioner also testified that an employee, or "housing assistant," at the management office had supplied her with a makeshift permanent permission request (as opposed to respondent's standard, pre-printed form), which her great aunt had signed and which petitioner had returned to that office for filing. It is further noted, however, that the file maintained by the management office with respect to the great aunt's tenancy contained no such form. Nor for that matter did the file contain any reference to the office visits to which petitioner attested. Petitioner further testified that, each time she visited the management office to inquire about the status of the request for permanent permission, she had been assured by the housing assistant that the latter "would take care of it." Nevertheless, when the great aunt died, no written permission had been received.

The threshold question is whether this matter must be transferred to the Appellate Division as a challenge to the sufficiency of the evidence supporting the Determination (CPLR 7804[g]). In this connection, it is noted that the petition does not question the Determination in

terms of the sufficiency or substantiality of evidence. In other words, petitioner does not expressly fault the decision rendered by the hearing officer and adopted by respondent as being without support in the record. Instead, the petition avers that mandamus is warranted here because respondent acted "arbitrar[il]y and capricious[ly]," "abused its discretion" (CPLR 7803[3]), and made "errors of law." Accordingly, this is a matter to be decided by this court (*Ferguson v Meehan*, 141 AD2d 604, 605), and such decision must assume that the record supported the hearing officer's findings.

Petitioner contends that the record developed at the hearing was infected by several errors of law. Thus, according to petitioner, the hearing officer failed to take judicial notice that respondent had an unofficial policy of refusing to provide or process requests for permission. However, petitioner offers no basis to conclude that the "unofficial policy" during the 1990's, as evidenced by findings of hearings officers in certain prior cases (*Matter of Friedman*, G105/98, dated 1/27/00; *Matter of Perl*, G2/01, dated 5/30/02; *Matter of Rosenfeld*, G92/02, dated 4/14/03), extended beyond the 1990's at Independence Towers, a housing development administered by respondent to be sure, but not the housing development in which the subject apartment is located. Indeed, in one of the above-cited administrative decisions (*Matter of Friedman*, at 2), the hearing officer had noted that the practices proved in the case before him had departed radically from the "host" of other cases with which he was familiar. Accordingly, *Friedman, Perl, and Rosenfeld* do not provide a basis for taking judicial notice of something relevant to the instant matter.

In a related vein, petitioner argues that the presumption of regularity (*see Energy Nuclear Indian Point 2, LLC v New York State Dept. of Envtl. Conservation*, 23 AD3d 811, 813-14)

should not have been entertained by the hearing officer in relation to the contents of the file in question, given the various examples petitioner now offers of missteps and oversights allegedly committed by respondent in recent years in relation to petitioner's case. In this connection, it need only be noted that petitioner did not make the litany of alleged errors that she now ascribes to respondent a part of her case before the hearing officer. In other words, the issue raised in this connection is not cognizable in this proceeding.

Petitioner further contends that the hearing officer failed to recognize a possible exception to the written permission requirement, *i.e.*, where respondent has had notice of the occupancy and at least tacitly consents to it (*see McFarlane v New York City Housing Auth.*, 9 AD3d 289, 291). As to that contention, even assuming the viability of petitioner's estoppel theory in this connection, *but see Morley v Arricale,* 66 NY2d 665, 667; *Matter of Hamptons Hosp. & Med. Ctr. v Moore,* 52 NY2d 88, 93-94; *Matter of Stokely v Franco*, 251 AD2d 97), the difficulty is that such exception could not apply to the instant case. After all, the hearing officer's observation that, "Grievant submitted no documents into evidence, nor did she describe any activities such as work for the tenant patrol which might have made her presence known." Such observation would have been beside the point if the hearing officer had in any event credited petitioner's testimony as to her discussions at, and submissions to, the management office. In other words, the hearing officer implicitly found that respondent had not received notice of petitioner's occupancy, much less consented to it.

In view of the foregoing, it is unnecessary to consider whether the hearing officer was, as petitioner maintains, wrong in positing that respondent's occupancy standards would have doomed a request for permanent permission had such request been made. On the basis of the

above analysis, the petition is denied and the proceeding is dismissed..

This constitutes the decision and judgment of the court.

Dated: November 2, 2009

ENTER:

J.S.C.