

<b>Bashmet v Hernandez</b>
2010 NY Slip Op 30237(U)
February 1, 2010
Supreme Court, New York County
Docket Number: 104836/2009
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JANE S. SOLONIN

PRESENT: \_\_\_\_\_

PART SS

Index Number : 104836/2009

**BASHMET, MIKHALL**

VS.

**HERNANDEZ, TINO**

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-3

4-5

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

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

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

Cross-Motion:  Yes  No

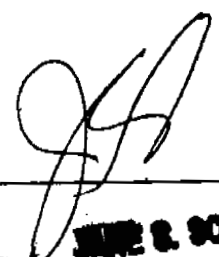
Upon the foregoing papers, it is ordered that this motion *is decided by the amended*  
*Decision, order and Judgment,*

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

**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 person at the Judgment Clerk's Desk (Room 1415).

Dated: 2-1-10



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 55

-----x  
MIKHAIL BASHMET,

Petitioner,

Index No.: 104836/2009

-against-

DECISION, ORDER and  
JUDGMENT

TINO HERNANDEZ as Chairman of the  
NEW YORK CITY HOUSING AUTHORITY

Respondent

-----  
JANE S. SOLOMON, J.

**UNFILED JUDGMENT**  
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and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
1417).

Petitioner, Mikhail Bashmet, brings this Article 78 proceeding against Respondent Tino Hernandez in his capacity as Chairman of the New York City Housing Authority (NYCHA). Bashmet challenges NYCHA's determination denying his claim for remaining family member status for Apartment #14E at 64-66 Essex Street, in Manhattan (the Apartment). The petition is denied for the following reasons.

FACTS

In 2000, Bashmet's grandmother, Olga Lensky, the Tenant, invited Bashmet to reside with her in the Apartment. He and his daughter moved in to the one bedroom apartment and remained there continuously. Lensky never applied for Permanent Residence status for Bashmet, and never reported his income to NYCHA. When questioned about Bashmet, Lensky informed building management that Bashmet was a frequent visitor, but did not live in the Apartment (Petition, Ex. D). Management informed Bashmet

that if he wanted to join the household, he needed permission (Id.) No permission was ever requested. Lensky died on January 2, 2008. Bashmet requested remaining family member status on January 30, 2008, which was denied on February 29, 2008 on the ground that no written permission request ever was submitted for him. Bashmet requested a hearing. On November 18, 2008, the Hearing Officer determined that Bashmet was not entitled to remaining family member status, finding:

"[M]anagement had reason to believe that [Bashmet] was residing in the apartment, and should have given the former tenant a form by which to request permission for his residence. . . . However, NYCHA's occupancy standards do not permit an additional person, not part of a domestic union, to join a household in a one-bedroom apartment. Consequently, even had management given the tenant a form by which to request permission for Grievant's residence, it would nevertheless have denied the request based on the occupancy standards . . . [which] do not permit an additional person, not part of a domestic union, to join a household in a one-bedroom apartment" (Answer, Ex. X, p.2).

NYCHA issued a final administrative decision on December 3, 2008. This petition followed.

DISCUSSION

Bashmet argues that NYCHA's decision was improper because NYCHA implicitly approved of his occupancy, as it had knowledge of his residency at the apartment but did not seek to remove him, and failed to give Lensky a form to request permission for him to reside with her. Bashmet further argues that basing denial of his tenancy on overcrowding was improper

because, according to the Housing Urban Development (HUD) Public Housing Occupancy (PHO) guidebook, overcrowding should be based on square footage, and not number of bedrooms, and because he was implicitly approved as a member of the household, NYCHA was required to offer Lensky a larger apartment.

NYCHA counters that Bashmet never received written permission to enter the apartment, which is a violation of NYCHA policy, and even if it acquiesced to Bashmet's occupancy, it is not estopped from enforcing compliance with those policies. NYCHA also argues that the HUD guidebook is merely a guideline, and does not have the authority of the HUD statutes, and therefore the NYCHA overcrowding guidelines are proper.

Occupancy of federally funded housing is strictly limited to family members who are identified in the lease (24 CFR 966.4 [f][3]) and the tenant must request the housing authority's approval in order to add other family members as an occupant to a unit (24 CFR 966.4 [a][1][v]).

In *McFarlane v. New York City Housing Authority*, 9 AD3d 289 [1<sup>st</sup> dept, 2004]), the first department held that petitioners' claims for remaining family member status were "precluded by the absence of any showing that any request was made during the tenancies for the approval of the Housing Authority to add petitioners as occupants" (*Id.* at 290 [emphasis in original]). Here, it is uncontested that no request was made to add Bashmet

as a member of Lensky's household.

However, in *McFarlane*, the court also noted that "a showing that the Authority knew of, and took no preventive action against, the occupancy by the tenant's relative, could be an acceptable alternative for compliance with the notice and consent requirements" (Id). Here, the Hearing Officer's finding that, had Bashmet applied to be added to the household, the application would have been denied defeats this argument. The record sufficiently supports the Housing Officer's findings as neither arbitrary nor capricious. Accordingly, it hereby is

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

Dated: ~~January~~ <sup>February</sup>, 2010

ENTER:

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

JAN 23 2010

**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 person at the Judgment Clerk's Desk (Room 1-415).