

<b>Matter of Davis v New York City Hous. Auth.</b>
2010 NY Slip Op 33676(U)
December 16, 2010
Sup Ct, New York County
Docket Number: 401816/10
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT. JAFFE BARBARA JAFFE  
J.S.C.

PART 5

Index Number : 401816/2010

DAVIS, MAURICE

vs

NEW YORK CITY HOUSING

Sequence Number : 001

ARTICLE 78

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

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

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

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

CAL #25

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Article 78

PAPERS NUMBERED

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

1

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

2, 3

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

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**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 \_\_\_\_\_)

Dated: 12/16/10  
DEC 16 2010

[Signature]  
BARBARA JAFFE J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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 5

-----X

In the Matter of the Application of MAURICE T.  
DAVIS and JOHNNY HOOKS,  
  
Petitioners,

Index No. 401816/10

Motion Date: 11/9/10  
Motion Seq. No.: 001

-against-

**DECISION & JUDGMENT**

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

-----  
BARBARA JAFFE, JSC:

For petitioners self-represented:  
Maurice T. Davis  
353 Kingsborough 3<sup>rd</sup> Walk, Apt. 2D  
Brooklyn, NY 11233  
347-240-9152

**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 141B).)*

For respondent:  
Melissa R. Renwick, Esq.  
Sonya M. Kaloyanides, General Counsel  
New York City Housing Authority  
250 Broadway, 9<sup>th</sup> Fl.  
New York, NY 10007  
212-776-5010

By notice of petition dated June 28, 2010, petitioners bring this Article 78 proceeding seeking to reverse respondent's determination, dated June 16, 2010, denying petitioners' application for tenancy in apartment 2D at 353 Kingsborough 3<sup>rd</sup> Walk in Brooklyn, New York. Respondent opposes the petition.

I. BACKGROUND

A. Respondent's procedures

Respondent manages the premises at issue, which is part of a public housing complex, pursuant to regulations promulgated by the Department of Housing and Urban Development, which require that it, at least annually, monitor a tenant's family composition and income after admitting the tenant into public housing. (Verified Answer, dated Oct. 1, 2010 [Ans.]). An admitted tenant must request respondent's approval to add any other family member as an

occupant and supply any requested information for the annual examination. (*Id.*). The tenant must also complete an annual affidavit of income, listing all occupants in the household; the form notifies the tenant that a failure to list all occupants may deprive them of their occupancy rights and that no person is allowed to reside in the household unless written permission is requested by the tenant and granted by respondent's management. (*Id.*, Exh. D).

Once a tenant is an admitted occupant, she may add another family member to the household by requesting and receiving the development manager's written consent. (*Id.*, Exhs. A, B). A family member who was originally part of the household and who then moves out of the household must be granted written permission to return. (*Id.*).

When an original tenant moves out or dies, a "remaining family member" may take over the tenant's lease if he establishes that he: (1) moved into the apartment lawfully (was listed on the housing application and authorized to reside there at the initial move-in, was born/adopted into the family, or moved in permanently with management's written permission); (2) falls within certain categories of relatives of the original tenant; (3) remained in the apartment continuously after lawful entry; (4) remained in the apartment for not less than one year after the date of lawful entry and prior to the date the original tenant vacated the apartment or died; and (5) is eligible for public housing. (*Id.*, Exhs. A, E, F). To show continuous occupancy, the remaining-family-member applicant must be included on all of the tenant's affidavits of income from the time of the applicant's lawful entry into the household to the time the tenant vacates or dies. (*Id.*, Exh. B).

To determine if an applicant qualifies as a remaining family member, he or she must first meet with the development manager, and if the manager denies the application, the manager

must submit the reasons for the denial along with the original tenant's record to the Borough/District Management Office (District Office) for review. (*Id.*, Exhs. E, G). After the District Office reviews the denial and the tenant's record, and if it upholds the denial, the applicant may request a hearing. At the hearing, the applicant bears the burden of proving his entitlement to the relief sought and respondent bears the burden of justifying its action or failure to act. The hearing officer will then make a recommendation, which respondent's Board reviews before making a final determination. During this process, the applicant must remain current in his or her payment of use and occupancy. (*Id.*).

B. McDaniel, the original tenant

Since approximately 1968, Dorothy McDaniel was the tenant of record for the subject apartment. (Ans.). During that time, respondent's records reflect that several family members moved in and out of the apartment, including petitioner Davis, McDaniel's nephew, who left in 1973. (*Id.*, Exh. I). Petitioner Hooks is McDaniel's son. (*Id.*).

By lease dated April 13, 2001, McDaniel agreed that the apartment was to be used as her sole residence and that of any of her household members, defined as those named in the signed lease, born or adopted into the household, or authorized by the landlord, who remain in continuous occupancy since the inception of the tenancy, birth, or authorization by the landlord. (*Id.*, Exh. C). She also agreed to obtain the housing manager's written consent before allowing anyone to reside in the apartment other than a family member named in her signed application or born or adopted into the household or subsequently authorized by the landlord. (*Id.*).

In her 2006 Affidavit of Income, McDaniel indicated that she was the only occupant of the apartment, and in her 2007 Affidavit of Income, that she and her granddaughter were the only

occupants. (*Id.*, Exh. D). On November 3, 2008, McDaniel passed away. (*Id.*, Exh. J).

### C. Hooks

Respondent first learned of McDaniel's death during the course of its 2009 annual review of her tenancy. (*Id.*, Exh. K). On May 21, 2009, respondent's management sent a letter to the occupants of McDaniel's apartment, advising them of the remaining-family-member application process and scheduling an appointment with management. (*Id.*, Exh. L).

On May 28, 2009, Hooks met with management and told them that he had been living in the apartment with McDaniel and taking care of her since October 2008. (*Id.*, Exh. M). Management declined to offer Hooks a lease and McDaniel's folder was sent to the District Office for a second level review. (*Id.*, Exhs. M, N).

By letter dated June 8, 2009, respondent advised Hooks that he could submit written documentation in connection with the review. (*Id.*, Exh. O). By District Grievance Summary dated June 12, 2009, the District Office dismissed Hooks's remaining-family-member grievance, finding that Hooks was not part of McDaniel's original household, nor did McDaniel request permission for him to join the household. (*Id.*, Exh. P).

By letter dated July 28, 2009, respondent scheduled Hooks's grievance hearing for September 2, 2009. (*Id.*, Exh. Q). The hearing was adjourned to October 6, 2009, at which time the hearing officer decided that Hooks should be evaluated to determine whether a guardian *ad litem* should be appointed to represent him, and adjourned the hearing to November 19, 2009. (*Id.*, Exh. S).

On or about November 25, 2009, a guardian *ad litem* was appointed for Hooks. (*Id.*, Exh. V). On February 16, 2010, the grievance hearing was adjourned to April 13, 2010 for Hooks's

guardian to obtain more evidence. (*Id.*, Exh. S).

#### D. Davis

On February 12, 2010, Davis met with respondent's management to apply for remaining-family-member status for McDaniel's apartment, claiming that he had lived with McDaniel before she passed away. (*Id.*, Exh. Y). By letter dated February 17, 2010, respondent denied Davis's application, finding that McDaniel never requested nor received permission for Davis to rejoin her household. (*Id.*). By Grievance Summary dated April 8, 2010, the District Office agreed with management's denial. (*Id.*, Exh. AA).

On April 13, 2010, Hooks's and Davis's grievances were consolidated. (*Id.*, Exh. S). On April 28, 2010, the grievance hearing was held, at which Hooks testified that he moved into McDaniel's apartment in 2004 and that McDaniel had suffered from dementia and could not communicate; respondent's witness testified that respondent had never given Hooks permission to reside in the apartment. (*Id.*). Davis's portion of the grievance hearing was adjourned to May 18, 2010 for him to retain a lawyer. On May 18, 2010, Davis appeared without a lawyer and testified that he moved out of the apartment in 1973 but then moved back. (*Id.*).

On or about May 25, 2010, Davis submitted additional documentation showing that he had obtained a driver's license using McDaniel's address in 2001 and that since 2003, other documents had been mailed to him at the address. (*Id.*, Exh. QQ).

#### E. June 16, 2010 determination

By decision dated June 1, 2010, the hearing officer found that respondent did not give consent for either petitioner to reside in the apartment, that Hooks did not occupy the apartment until August 2008, and that while Davis may have occupied or used the apartment, McDaniel did

not seek respondent's consent to do so. Thus, neither petitioner qualified for remaining-family-member status. (*Id.*, Exh. QQ).

By letter dated June 16, 2010, respondent approved the hearing officer's determination. (*Id.*, Exh. RR).

## II. CONTENTIONS

Davis contends that he is an original tenant of the household who never left, that Hooks has been living in the apartment since 2004, and that his mother filled out McDaniel's annual income affidavits after McDaniel became sick. (Verified Petition, dated June 28, 2010 [Pet.]). He submits documents showing his address as that of McDaniel's apartment in 2003, and alleges that Hooks has paid rent to respondent which respondent has accepted. (*Id.*). He also complains that Hooks's guardian failed to represent Hooks properly.

Respondent argues that its determination to deny petitioners' remaining-family-member status is rational and consistent with its policies and regulations. (Ans.).

## III. ANALYSIS

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *Matter of Kenton Assoc. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1<sup>st</sup> Dept 1996]). Moreover, the determination of an administrative agency, "acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its

judgment for that of the agency when the agency's determination is supported by the record."

(*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1<sup>st</sup> Dept 2007], *affd* 11 NY3d 859 [2008]).

Here, it is undisputed that irrespective of whether Hooks moved into McDaniel's apartment in 2004 or 2008, McDaniel never sought nor received respondent's permission for him to join her household, and that McDaniel did not list Hooks on her 2006 and 2007 income affidavits. Thus, respondent's determination denying him remaining-family-member status is rational. (See *Matter of Valentin v New York City Hous. Auth.*, 72 AD3d 486 [1<sup>st</sup> Dept 2010] [respondent's determination was rational as evidence showed that petitioner did not become authorized occupant of household before tenant's death]; *Matter of Johnson v New York City Hous. Auth.*, 50 AD3d 438 [1<sup>st</sup> Dept 2008] [petitioner conceded that he never obtain respondent's permission to live in apartment and income affidavits did not list him as occupant]; *Matter of New York City Hous. Auth. Hammel Houses v Newman*, 39 AD3d 759 [2d Dept 2007] [respondent failed to obtain written permission to reside in apartment]).

Moreover, although Davis may have been an original tenant of the apartment, it is undisputed that he moved out in 1973, and McDaniel did not list him as an occupant in the apartment in 2006 or 2007. There is also no evidence that McDaniel ever requested or received respondent's consent to permit Davis to re-enter the apartment. Thus, respondent's determination denying him remaining-family-member status is also rational. (See *eg Matter of Aponte v New York City Hous. Auth.*, 48 AD3d 229 [1<sup>st</sup> Dept 2008] [denial of grievance on ground that written permission had not been given for petitioners to return to apartment not arbitrary; evidence included income affidavits showing that deceased tenant was sole occupant];


*Matter of Fermin v New York City Hous. Auth.*, 67 AD3d 433 [1<sup>st</sup> Dept 2009] [petitioner did not qualify as remaining family member as, although he originally entered household lawfully, he then left and was not included in tenant's income affidavits]; *Matter of Pelaez v New York City Hous. Auth.*, 56 AD3d 325 [1<sup>st</sup> Dept 2008] [determination that petitioner not remaining family member not arbitrary as she had not applied for permission to rejoin household and was not listed on income affidavits]).

Petitioners also failed to establish, either during the hearing or here, that respondent was aware of and implicitly approved their residence in the apartment (*Aponte*, 48 AD3d at 229; *Newman*, 39 AD3d at 759 [no evidence that petitioner knew of applicant's residence as income affidavits did not list her]), and their payment of rent or use and occupancy does not relieve them of complying with the written permission requirement (*see Matter of Barnhill v New York City Hous. Auth.-Ralph J. Rangel Houses*, 280 AD2d 339 [1<sup>st</sup> Dept 2001] [petitioner was never authorized tenant notwithstanding that she may have paid rent]; *Matter of Kolarick v Franco*, 240 AD2d 204 [1<sup>st</sup> Dept 1997] [respondent not estopped from denying petitioner tenancy status by having accepted rent from him after tenant died]). Finally, petitioners' claim that Hooks's guardian was ineffective is conclusory and unsupported by any evidence of how the guardian failed to represent Hooks's interests adequately.

IV. CONCLUSION

Accordingly, it is hereby

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

  
\_\_\_\_\_  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: December 16, 2010  
New York, New York

DEC 16 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 1219)