

**Matter of Marsh v New York City Hous. Auth.**

2011 NY Slip Op 30584(U)

March 11, 2011

Sup Ct, New York County

Docket Number: 402656/10

Judge: Barbara Jaffe

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

BARBARA JAFFE  
J.S.C.

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

PART 5

Index Number : 402656/2010  
MARSH, FRANCES WASHINGTON  
vs.  
NYC HOUSING AUTHORITY  
SEQUENCE NUMBER : 001  
ARTICLE 78

*CAL # 56*

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

MOTION DATE 1/25/11

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

MOTION CAL. NO. 56

his motion to/for \_\_\_\_\_

PAPERS NUMBERED

1  
2, 3

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 Petition

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 141B).

Dated: 3/11/11  
MAR 11 2011

*[Signature]*  
BARBARA JAFFE J.S.C.  
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  
FRANCES WASHINGTON MARSH,

Petitioner,

-against-

Index No. 402656/10

Motion Date: 1/25/10

Motion Seq. No.: 001

Calendar No.: 56

**DECISION & JUDGMENT**

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

-----  
BARBARA JAFFE, JSC:

**For petitioner:**

Frances Washington Marsh, self,  
210 W. 230<sup>th</sup> Street, 14K  
Bronx, NY 10463  
718-503-0853

**For respondent:**

Sonya M. Kaloyanides, GC  
New York City Housing Authority  
250 Broadway, 9<sup>th</sup> Floor  
100 Church Street  
New York, NY 10007  
212-776-5020

**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).

By notice of petition dated September 17, 2010 petitioner moves pursuant to CPLR 7803 for a judgment annulling and vacating the decision in *Matter of Marsh v Marble Hill Houses*, Case No. G. 132/10, dated August 13, 2010, in which, following a hearing held pursuant to New York City Housing Authority (NYCHA) grievance procedures, respondent found that she is not a "remaining family member" as defined by NYCHA regulations and thus not entitled to the tenancy. Respondent opposes.

I. FACTS

NYCHA was established by the New York State Legislature to provide housing for low-income families in New York City. It creates and enforces standards for eligibility for occupancy of its apartments. (Public Housing Law §§ 3[2], 37[1][w], 156, 401; Verified Answer, dated Jan.

12, 2011 [Ans.]). Pursuant to its occupancy policies, a non-tenant may, under some circumstances, become a permanent member of a tenant's household. (Ans., Exhs. A, B). In order to qualify as a "remaining family member" and thus be eligible to be added as a tenant of public housing, the occupying tenant must first request and obtain the written consent of the development's housing manager for the family member to stay in the apartment. (Ans., Exh. B). The family member must then live in the apartment continuously for one year prior to the tenant's vacatur or death. (*Id.*).

After her mother passed away, petitioner and her family moved into the subject apartment on November 3, 2008, in order to take care of petitioner's father, the tenant of record. (Notice of Petition, dated Sept. 17, 2010 [Pet.]). Petitioner alleges that in December 2009 she accompanied her father to the management office to notify respondent of her mother's death and to provide the death transcript. (Ans., Exh. T). Petitioner and her father asked that petitioner be added to the household, and was given a permanent permission request form to apply for it. (*Id.*). Petitioner alleges that the housing assistant assured them it would "no problem" to add her to the household, so long as she passed a background check. (*Id.*).

On January 15, 2009, petitioner's father submitted the request form seeking permission to add petitioner and his family to the household. (Verified Answer, dated Jan.13, 2011 [Ans.]; Exh. K). Petitioner signed the request form, stating that she needed to take care of her father who required 24-hour care. (*Id.*, Exh. K).

On February 23, 2009, the request was disapproved on the ground that "additional 3 people will create overcrowded situation." (*Id.*). Petitioner denies having received the disapproval notice. (*Id.*, Exh. T).

On August 4, 2009, petitioner's father passed away. (*Id.*). Up until that time, petitioner and her family remained in her father's apartment, believing that, having heard nothing further, they were legally occupying the apartment. (*Id.*).

On September 24, 2009, petitioner initiated proceedings to be declared a "remaining family member" so that she and her family could remain in the apartment. (Ans.). She was told that she did not qualify because respondent had denied her father's request to add her as an occupant (*id.*; Exh. L), and on December 23, 2009, the housing manager denied petitioner's grievance on the same ground (*id.*, Exh. P). By letter dated January 19, 2010, respondent's district office informed petitioner that her remaining family member claim would be reviewed if she submitted documentation and requested an interview. (*Id.*). Petitioner did not do so, and on April 28, 2010, she was notified that the decision to deny her grievance was upheld. (*Id.*). The housing manager forwarded her grievance to respondent's law department for a hearing and informed her of rights pursuant to NYCHA grievance procedures. (*Id.*; Exhs. G, Q, R). A hearing was held before a chief hearing officer on July 23, 2010; petitioner declined to retain an attorney. (*Id.*, S).

The hearing officer summarized petitioner's evidence as follows, in pertinent part: Petitioner moved in with her father in November 2008 after her mother passed away to help take care of her father. (*Id.*, Exh. T). She provided respondent with her mother's death transcript, and requested to be added to the household. (*Id.*). Petitioner's father submitted a permanent permission request form on January 15, 2009 seeking to add petitioner, her husband, and her son to the apartment, and petitioner alleges that she was told that it would no problem. (*Id.*). Petitioner and her family are included on the third-party verification form submitted to

respondent on March 12, 2009. (*Id.*). Petitioner's father passed away on August 4, 2009, and, after providing respondent with a death transcript, petitioner was shocked to learn that she had no right to remain in the apartment. (*Id.*). She and her family have nowhere else to live, having lost their entitlement to Section 8 benefits when they moved into the apartment. (*Id.*).

The hearing officer summarized respondent's evidence as follows, in pertinent part: on February 23, 2009, respondent denied her father's request to add petitioner, her husband, and her son to due to overcrowding. (*Id.*). Respondent's witness did not know why petitioner and her father were not notified of the disapproval. (*Id.*).

The hearing officer concluded that the permission request was properly denied based on respondent's occupancy standards that the addition of three people to the apartment would create overcrowding. (*Id.*). NYCHA regulations require that, in order for petitioner to succeed her father, she must have had obtained written approval for occupancy and must have resided in the apartment for at least one year prior to the occupant's death. (*Id.*). The hearing officer concluded that although petitioner credibly testified that she and her father were never notified of respondent's disapproval, a year would not have passed if the request had been granted on the day of submission. (*Id.*).

## II. CONTENTIONS

As petitioner is self-represented, her petition is to be liberally construed. (*Pehzman v City of New York*, 29 AD3d 164, 168 [1<sup>st</sup> Dept 2006]). She alleges that, having been assured that she and her family would be permitted to move in with her ailing father, she reasonably assumed that her occupancy was approved absent any notice to the contrary. She maintains that the disapproval of her request was arbitrary and capricious because four people had lived in the

apartment at another time, that nine months is a sufficient amount of time to establish remaining family member status, that the one-year rule should not apply because the date of someone's future death cannot be known, and that she is a good tenant. (Pet.).

Respondent argues that petitioner does not qualify as a remaining family member as she was not authorized to move into the apartment, she was not living in the apartment for at least one year prior to her father's death, and there are no mitigating factors. (Respondents' Memorandum of Law in Support of its Verified Answer, dated Jan. 13, 2011).

### III. ANALYSIS

Pursuant to Article 78, a party aggrieved by an administrative decision may challenge it in court, although the grounds for annulment or vacatur of the decision are limited. Where the petitioner challenges a determination rendered after a hearing required by law on the ground that it was not supported by substantial evidence, the action must be transferred to the Appellate Division. (CPLR 7803[4], 7804[g]; Siegel, NY Prac § 568 [4<sup>th</sup> ed]). However, if no issues are raised involving substantial evidence, a transfer need not be ordered. (*Matter of Kinard v New York State Hous. Auth.*, 2009 WO 3780701, 2009 NY Slip Op 32584[U] [Sup Ct, New York County]; *Matter of Rolon v New York State Hous. Auth.*, 23 Misc 3d 1114[A], 2009 NY Slip Op 50751[U] [Sup Ct, New York County]). Here, as there are no disputed issues of fact, there is no substantial evidence issue and I review the proceeding to discern whether the determination reached is arbitrary and capricious.

Judicial review of an administrative agency's decision is limited to whether the decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of

penalty or discipline imposed.” (CPLR 7803[3]). 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., Ltd. 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], *aff’d* 11 NY3d 859 [2008]).

The hearing officer’s decision was based on clearly applicable NYCHA regulations that an occupant qualifies as a remaining family member only if the party had been authorized to live in the apartment at the time she moved in, and had lived in the apartment continuously for at least one year. Despite petitioner’s credited testimony that neither she nor her father were notified that her occupancy was disapproved, she was not relieved of the obligation of obtaining written permission even if respondent was aware of her occupancy yet failed to act (*Edwards v New York City Hous. Auth.*, 67 AD3d 441 [1<sup>st</sup> Dept]; *see Schorr v New York City Dept. of Hous. Preserv. and Dev.*, 10 NY3d 776, 779 [2008] [estoppel cannot be invoked to prevent government agency from discharging statutory duties]), and the disapproval was a reasonable exercise of respondent’s discretion, based on NYCHA regulations on overcrowding (*see Farkas v New York*

*City Hous. Auth.*, 17 Misc 3d 1122[A], 2007 NY Slip Op 52107[U] [Sup Ct, New York County] [hearing officer reasonably denied request as it would create overcrowding]).

Even if NYCHA did not properly apply its regulations prohibiting overcrowding, and even if the hearing officer found that petitioner credibly testified that she never received the disapproval and thus had no chance to challenge it, petitioner would still be ineligible for remaining family member status as her father died less than a year after the request was submitted. (*McNeal v Hernandez*, 58 AD3d 417, 418 [1<sup>st</sup> Dept 2009] [petitioner did not qualify where occupant left within one year of request, even though request was incorrectly denied on ground of overcrowding]; see also *Pelaez v New York City Hous. Auth.*, 56 AD3d 325 [1<sup>st</sup> Dept 2008] [petitioner had not resided in apartment with her mother for one year prior to her death]; *Abreu v New York City Hous. Auth. East*, 52 AD3d 432 [1<sup>st</sup> Dept 2008]; cf *In re Valentin v New York City Hous. Auth.*, 72 AD3d 486 [1<sup>st</sup> Dept 2010] [even if petitioner never received notice of denial, no showing that it was incorrect]). Mitigating factors may not be considered (*Matter of Fermin v New York City Hous. Auth.*, 67 AD 433 [1<sup>st</sup> Dept 2009]), and plaintiff's desirability as a tenant is not in issue.

To the extent the petition is interpreted to challenge the one-year requirement as unfair, an Article 78 is not the proper vehicle for such a determination. (*Save Plne Bush, Inc. v City of Albany*, 70 NY2d 193 [1987]; *Press v County of Monroe*, 50 NY2d 695 [1980] [Article 78 not proper venue to address constitutionality of regulations]).

#### IV. CONCLUSION


Accordingly, it is hereby

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

#### 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).

This constitutes the decision and order of the court.

  
Barbara Jaffe, JSC

DATED: March 11, 2011  
New York, New York

**BARBARA JAFFE**

MAR 11 2011

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2410).