

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

2013 NY Slip Op 32745(U)

October 29, 2013

Sup Ct, New York County

Docket Number: 100726/13

Judge: Donna M. Mills

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

*In the Matter of the Application of*  
*MALKE SCHWARTZ,*

Index No. 100726/13

Petitioner,  
For a Judgment Pursuant to Article 78 of the Civil Practice  
Law and Rules

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

-against-

MOTION SEQ. No. 001

NEW YORK CITY HOUSING AUTHORITY,  
Respondent.

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1

Answering Affidavits- Exhibits \_\_\_\_\_

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

CROSS-MOTION: YES  141B

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

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH ATTACHED DECISION AND ORDER.

Dated: 10/29/13

*Donna M. Mills*  
**DONNA M. MILLS, J.S.C.**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

-----X  
In the Matter of the Application of MALKE  
SCHWARTZ,

Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against-

Index No. 100726/13

NEW YORK CITY HOUSING AUTHORITY,

Respondent.

-----X

**DONNA M. MILLS, J.:**

In this special proceeding pursuant to C.P.L.R. Article 78, Petitioner Malke Schwartz ("Petitioner") challenges a determination by the Respondent, New York City Housing Authority ("Housing Authority or Respondent"), which dismissed her grievance to succeed as a remaining family member to the apartment formerly leased to her grandmother, the deceased tenant of record, Dora Katz ("Ms. Katz").

Petitioner maintains that she resides in the subject apartment, at 626 Wythe Place, Apt. 8N, Brooklyn, New York, an apartment in the Taylor Street/Wythe Avenue development of the Housing Authority. Petitioner claims entitlement to a lease as remaining family member to the apartment of Ms. Katz and her cousin, Joel Katz, who vacated the subject apartment on February 1, 2011. Petitioner argues that she has resided in the subject apartment, continuously since 2005, first with the former tenant of record, Ms. Katz and after the passing of Ms. Katz, with the subsequent tenant of record, Joel Katz.

It is undisputed that permanent permission was sought for the Petitioner to be added to the family composition, but only temporary permission was granted. However, upon the expiration of the temporary permission time period, the Petitioner did not vacate the subject apartment and the Housing Authority took no action indicating an objection to the continued occupancy of the Petitioner in the subject apartment. Therefore, Petitioner contends that the Housing Authority implicitly approved of her

continued occupancy therein.

On April 11, 2011 shortly after Joel Katz vacated the apartment, Petitioner through her counsel notified the Housing Authority that Mr. Katz had vacated and asserted Petitioner's claim to a lease as a remaining family member to Ms. Katz and Joel Katz. Petitioner and her husband met with the Property Manager concerning their grievance on January 12, 2012 and claimed to have resided in the apartment for years. The Property Manager concluded Petitioner was not entitled to a lease because Joel Katz never obtained management's written permission for Petitioner to permanently reside in the apartment. The Borough Manager upheld the Property Manager's decision and dismissed Petitioner's remaining-family-member grievance.

The Housing Authority held a hearing on October 18, 2012, before an impartial Hearing Officer. The Hearing Officer after recounting the testimony and the documentary evidence, denied Petitioner's grievance. The Hearing Officer found that Petitioner was not a remaining family member as defined by Housing Authority regulation. The Hearing Officer also concluded that Joel Katz did not request nor receive written permanent permission of the Housing Authority for the Petitioner to reside in the subject apartment.

By determination, dated January 9, 2013, the Housing Authority's Board adopted the Hearing Officer's decision denying Petitioner's remaining-family-member grievance. Petitioner commenced this proceeding on May 13, 2013 when she filed a verified petition.

This court's role in an Article 78 motion is limited to the determination of whether the decision made by NYCHA was arbitrary or capricious, by assessing if there existed a rational basis for the determination. See, In the Matter of Pell v. Bd. of Educ., 34 N.Y.2d 222, 356 N.Y.S.2d 833, 313 N.E.2d 321 (1974) ("It is well settled that a court may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and unreasonable and constitutes an abuse of discretion."). This court cannot, "substitute its judgment for that of the agency. Even though the court might have decided differently were it in the agency's position, the court may not upset the agency's determination in the absence of a finding, not supported by this record, that the determination had no rational basis" (citations

omitted). In the Matter of Mid-State Management Corp. v. New York City Conciliation and Appeals Bd., 112 A.D.2d 72, 75, 491 N.Y.S.2d 634 (1st Dept.1985); see also, In the Matter of Sullivan County Harness Racing Ass'n, Inc. v. Glasser, 30 N.Y.2d 269, 332 N.Y.S.2d 622, 283 N.E.2d 603 (1972).

Respondent, as a public housing authority, is subject to the rules of the United States Department of Housing and Urban Development. Under 24 CFR § 966.53(f)(2), a tenant is a person "who resides in the unit, and who is the remaining head of the household of the tenant family residing in the dwelling unit." Under respondent's regulations, a person may obtain remaining family member status if that person was a member of the original family or became one by birth or adoption; or, if that person received written permission from the project manager. That person also must have been in the apartment continuously and be otherwise eligible for public housing (see Chapter VII, Section IV, Subsection E of the Housing Authority's Management manual and its guidelines GM. 3692).

Respondent's requirement that an applicant receive permission to be added as a remaining family member is consistent with 24 CFR § 966.4(a)(v). This regulation states that, "The family must promptly inform the PHA [Public Housing Authority] of the birth, adoption or court-awarded custody of a child. The family must request PHA approval to add any other family member as an occupant of the unit."

In November, 2002, respondent amended its guidelines to restrict the granting and permission, and potential succession rights, to certain close relatives including spouses, children, grandchildren and grandparents. The new regulation excluded other persons including aunts, uncles and cousins. Courts have consistently upheld the written-consent requirement to obtain RFM status. See In the Matter of Edwards v. New York City Hous. Auth., 67 A.D.3d 441, 888 N.Y.S.2d 43 (1st Dept.2009) (upholding denial of remaining family member claim when petitioner failed to obtain written permission); In the Matter of Rivera v. New York City Hous. Auth., 60 A.D.3d 509, 876 N.Y.S.2d 3 (1st Dept.2009) ("Petitioner did not enter subject apartment lawfully, respondent never gave tenant of record written permission for petitioner to join household, and petitioner acknowledged that no such permission was ever obtained prior to tenant's death.").

Petitioner argues in the instant motion that she is entitled to succession rights on the basis that the Housing Authority knew and implicitly approved of her residence in the subject apartment. Petitioner's argument is without merit. The dicta of In the Matter of McFarlane v. New York City Hous. Auth., 9 A.D.3d 289, 780 N.Y.S.2d 135 (1st Dept.2004) provides an exception to the written-consent requirement when there is evidence that the Housing Authority was aware of, and implicitly approved, the petitioner's residence in the apartment ("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."). However, a subsequent decision by the Court of Appeals in In the Matter of Schorr v. New York City Department of Housing Preservation & Development, 10 N.Y.3d 776, 778, 857 N.Y.S.2d 1, 886 N.E.2d 762 (2008) abrogates the McFarlane dicta, holding that although respondent acquiesced in petitioner's occupancy, a governmental agency "is statutorily required to enforce Mitchell–Lama Law and regulations regardless of any actions or acquiescence" by the management office. See also In the Matter of Quinto v. New York City Dep't of Hous. Pres. & Dev., 78 A.D.3d 559, 913 N.Y.S.2d 23 (1st Dept.2010) (reiterating that "petitioners may not invoke estoppel to prevent HPD from executing its statutory duty to provide Mitchell–Lama housing only to individuals who meet the specified eligibility requirements.")(citing Schorr, 10 N.Y.3d at 779, 857 N.Y.S.2d 1, 886 N.E.2d 762); In the Matter of Kendra Edwards v New York City Housing Authority, 67 A.D.3d 441, 442, 888 N.Y.S.2d 43 (asserting that "[i]t would not avail petitioner even if respondent were aware of her occupancy" in NYCHA housing) (citing Schorr at 10 N.Y.3d at 776, 857 N.Y.S.2d 1, 886 N.E.2d 762). Therefore, Petitioner cannot obtain succession rights via the Housing Authority's implicit approval.

In the instant action, Petitioner did not obtain written consent to permanently join the household and, therefore, failed to fulfill the lawful entry requirement to obtain remaining family member status. Consequently, Petitioner's lack of remaining family member status precludes entitlement to succession rights. See McFarlane, 9 A.D.3d at 291, 780 N.Y.S.2d 135 (1st Dept.2004) (denying claims to succession rights because petitioners failed to apply for and obtain remaining family member status).

The Housing Authority's denial of Petitioners' grievance was neither arbitrary nor

capricious. It is clear that the Petitioner did not lawfully enter the household because she did not have written permission to join the household. Moreover, Petitioner as the cousin of Joel Katz does not fall into one of the categories of persons that are eligible to succeed to a lease as a remaining family member.

Accordingly it is ADJUDGED that the petition is denied and the proceeding dismissed.

Dated: 10/29/13

ENTER:   
J.S.C.

DONNA M. MILLS, J.S.C.

**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).