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| Matter of Martinez v Russ |
| 2021 NY Slip Op 30546(U) |
| February 24, 2021 |
| Supreme Court, New York County |
| Docket Number: 452057/2020 |
| Judge: Debra A. James |
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| This opinion is uncorrected and not selected for official publication. |

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

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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In the Matter of the Application of

ANA MARTINEZ,

Petitioner,

For Judgment Pursuant to Article 78 of the Civil Practice
Laws & Rules,

- v -

GREGORY RUSS, as Chairperson of the New York City
Housing Authority, and the NEW YORK CITY HOUSING
AUTHORITY,

Respondents.

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**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 12, 13, 14, 15,
16, 17, 18, 19, 20, 21, 22

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER)

ORDER

Upon the foregoing documents, it is

ADJUDGED that the petition is denied and the proceeding is
dismissed, without costs and disbursements to respondents.

DECISION

Respondent New York City Housing Authority ("respondent")
Housing Choice Voucher Program Administrative Plan effective May
18, 2020, states, in relevant part:

"V. ELIGIBILITY

NYCHA may only admit eligible households to the program.
To be eligible, the applicant must be a "family", must be
income-eligible, and must be a citizen or noncitizen with
eligible immigration status.

A. Definition of Family and Household Members

Succession rights to the Section 8 voucher are determined pursuant to NYCHA's Occupancy and Succession Policy."

Respondent's "Leased Housing Department Memorandum LHD #12-06 dated October 3, 2012, Subject: Revised Section 8 Occupancy/Succession Policy", states, in pertinent part:

"I. GENERAL OCCUPANCY STANDARDS

Only a head of household (the "Lessee") and authorized original family members who are continuously listed on the Lessee's Affidavit of Income (AOI) as part of the family composition are authorized family members permitted to reside in the subsidized apartment. Except for births or adoption, no person may join a Section 8 household unless the Housing Authority grants written permission.

II. GENERAL REQUIREMENTS FOR ADDING ADDITIONAL PERSONS TO THE SECTION 8 HOUSEHOLD**A. Births and Adoptions**

A child born to, or a person adopted by, any authorized family member shall automatically be approved for permanent permission. The Lessee shall notify the Housing Authority of the birth or adoption and provide a copy of the birth certificate and the social security number of the child or adopted person.

B. Requirements for all Requests for Permission

All requests to have additional person(s) reside in a Section 8 apartment must meet the following conditions:

1. The request must be made by the Lessee.

2. The Lessee must reside in the apartment on the date of the request.
3. The request must be made in writing by submitting either a signed NYCHA "Permanent/Conditional Permission Request" form or a signed "Temporary Permission Request" form.

III. PERMANENT PERMISSION REQUESTS

A. Eligible Relationships

In addition to the requirements listed in Section II(B) above, the proposed additional household member must be:

4. A child under 18 years old born to or adopted by an authorized family member who is currently residing in the household (see Conditional Permission section for children 18 or older).

IV. CONDITIONAL PERMISSION REQUESTS

A. Eligible Relationships

In addition to the requirements listed in Section II(B) above, the proposed conditional additional household member must be:

1. Mother, father, brother, sister, aunt, uncle, niece, nephew, stepparents and stepchildren of the Lessee, and their immediate family members.
2. Grandparents and grandchildren of the Lessee."

SUCCESSION POLICY

I. REMAINING-FAMILY-MEMBER STATUS

After the Lessee(s) dies or otherwise ceases to be a member of the assisted household, an individual must meet the following conditions to qualify as a remaining family member entitled to success to the Lessee's voucher:

- A. The individual must have entered the unit as an original family member or the Housing Authority granted the individual permanent permission to join the household.

Individuals who received conditional or temporary permission cannot qualify as a remaining family member and cannot succeed to the voucher.

- B. Resided in the unit for a minimum of one year after originally entering the household or after obtaining the permanent permission. However, in the event the head of household dies within the year, the additional person shall be granted succession rights immediately.

VII. CHALLENGES TO DENIAL OF PERMISSION REQUEST

The Lessee may dispute the denial of permission at an informal conference with any employee at the level of Housing Manager or higher."

The following facts are not in dispute, viewing the facts most favorably to the petitioner. See Jacobsen v New York City Health & Hospitals Corp., 22 NY3d 824, 833 (2014). Petitioner is the biological daughter of the now late Ana Batista, who was the authorized original family member or Lessee, who received an apartment rent subsidy under the Section 8 Housing Choice Voucher Program, and held voucher number 0589767. Since December 2017, petitioner has primarily and consistently resided in the rent subsidized apartment, and with Batista until her

death on April 14, 2019. By application dated July 12, 2018, Batista submitted to respondent petitioner's Affidavit of Income for New Occupant. Respondent recognized petitioner as a member of Batista's household, generating a Recertification Summary Report on September 24, 2018 that listed petitioner and her six-year-old daughter as formal household members, having obtained written permission to be added as occupants from respondent. Such report does not state that petitioner was granted conditional or temporary permission. Petitioner discovered that she was not listed on the voucher only after she contacted respondent to report Batista's death, as well as to inquire about succeeding to Batista's voucher and was so informed by phone only. On June 28, 2019, petitioner filed a Freedom of Information ("FOIL") request. On August 7, 2019, when respondent responded to her request, petitioner learned for the first time that she was granted status as a "conditional" and not a "permanent" occupant.

Petitioner, through counsel, filed a grievance of the determination that she was not entitled to succeed to Batista's voucher, by letter dated November 27, 2019, requesting a formal hearing concerning her status as a remaining family member. By letter dated July 1, 2020, respondent denied such grievance, and stated, in pertinent part:

"NYCHA records indicates (sic) that effective November 1, 2018, Ana Martinez, and Lia Ramos were added to Ms. Batista's Section 8 voucher as Conditional Status.

Effective April 30, 2019, Ms. Batista was moved off from the Section 8 Program due to tenant deceased.

According to NYCHA's Policy, individuals who received conditional or temporary permission cannot qualify as a remaining family member and cannot succeed to the voucher. Therefore Ms. Martinez does not qualify as a remaining family member.

NYCHA does not provide informal hearings for individuals seeking to succeed to a Section 8 voucher."

Petitioner now challenges and seeks to annul such determination, on the grounds that it is arbitrary and capricious and contrary to state and federal law, the latter of which requires respondent to provide petitioner notice and an opportunity to be heard in connection with its decision.

In its Answer, respondent denies that its decision recognizing petitioner as a conditional occupant only and failing to either add her name to Batista's voucher or grant her a hearing, is either arbitrary or capricious or unlawful.

This court is flummoxed about the rationale for respondent's lack of transparency in its September 24, 2018 Recertification that failed to inform Batista or petitioner that the permission for "additional household member" was conditional, and the implications for same. Such notice to petitioner and/or her mother was critical information that would have enabled petitioner to anticipate and explore options for obtaining and maintaining affordable housing for herself and her

daughter. Petitioner's options would have included applying for Section 8 benefits in her own name and, hopefully, gaining a place on the waiting list, especially in light of the fact that she joined her mother's household to care for her in that parent's later years of ill health.

Such opacity on the part of respondent was, in part, what the court disapproved in Matter of Bajana v Rhea, 2010 NY Slip Op 32436(U) (Supreme Court, New York Co) (Lobis, J) and Matter of Gill v Hernandez, 21 Misc3d 390 (Supreme Court, New York Co 2008) (Kornreich, J).

The question for this court is whether the lack of transparency in the facts of the proceeding at bar rises to the level of rendering respondent's determination herein irrational, or whether the facts of this case are more akin to those in Matter of Klein v Rhea, 39 Misc3d 1216(A) (Supreme Court, New York Co 2013) (Stallman, J), which upheld the respondent's decision, finding its facts distinguishable from those in Bajana and Gill. In Klein, Stallman, J also observed that "lower courts are divided as to whether NYSCHA's succession policy contravenes the federal policies of the Section 8 program", comparing Matter of Bajana, supra, wherein Lobis, J found such contravention, with Matter of Studdivant v Hernandez, Sup Ct, NY County, March 18, 2005, Abdus-Salaam, J, Index No. 403320/2004, where Abdus-Salaam, J did not.

As in Matter of Klein, supra, the paragraph of the NYCHA Occupancy/Succession policy that set forth the right of a

remaining family member to a hearing challenging the denial of a succession to the subsidy, upon which Kornreich, J., in Matter of Gill, supra, partially relied, no longer exists. Although, unlike Matter of Klein, supra, and similar to Matter of Gill, supra, petitioner at bar is claiming that neither she nor her mother were aware that NYCHA granted conditional, rather than permanent, permission for petitioner to join her parent's household, the current Succession/Occupancy Policy authorizes a hearing for the Lessee, who would be Batista, to challenge the denial of permission. It gives no such right to the remaining family member, here petitioner.

Respondent's failure to specify the type of occupancy in the September 24, 2018 recertification provided to Batista bothers this court, as upon Batista's death, such omission compelled her daughter, the petitioner, to find counsel and submit a FOIL request, in order to understand that she had been granted only conditional occupancy.

Other than the absence of transparency, however, the matter at bar is significantly distinguishable on its facts from those in Bajana, supra. The Bajana case involved a petitioner who suffered from lifelong mental illness, residing with her mother until at age 44, including for two years after her mother obtained a Section 8 voucher. Then,

"[i]n an effort at independence, petitioner left the apartment and established a separate residence with her godmother. NYCHA was duly notified. Petitioner maintained a close relationship with her mother while she was out of the Apartment. Both petitioner and her mother experienced

problems with their health over this period of time. In 2008, petitioner and her mother decided that it would be easier for them to take care of each other and their various health conditions and disabilities if they were living together again."


What followed in Bajana was respondent imposing tremendous red tape and unclear and confusing requirements upon petitioner and her parent, two severely disabled people. In Bajana, supra, *4 (underlining supplied), Lobis, J noted the pivotal issue, thusly,

"at the heart of this controversy . . . is whether the application of NYCHA's policy of never granting permanent status to adult children returning to live with a parent voucher holder- as applied to petitioner and to similarly situated individuals- violates lawful procedure, is arbitrary or capricious, or is affected by an error of law."

In contrast to Bajana¹, at the time she applied for permission to join Batista's household, petitioner at bar was able bodied, and was not "returning" to live with her mother in her rent subsidized household, but was seeking to reside there for the first time. Therefore, the question of "the inability of a qualified family member previously residing as a protected family member to return to permanent status in Section 8", as violative of the purpose of the Section 8 legislation (Bajana, supra, *5), is not present in the herein proceeding. Thus, though respondent's

¹Though Gill, supra, did not involve the question of a "return" to permanent occupancy, as in Bajana, both petitioner Gill and her parent- holder of the voucher, suffered from serious illness, and together experienced multiple paperwork mistakes on the part of respondent. Gill, pp 391-394.

failure to disclose, as soon as possible, the type of occupancy permitted under these circumstances was unnecessarily and unhelpfully secretive, this court finds that respondent's July 1, 2020 decision was neither a violation of federal or state law, nor arbitrary and capricious.

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| <u>2/24/2021</u> DATE |  DEBRA A. JAMES, J.S.C. | | | |
| CHECK ONE: | <input checked="" type="checkbox"/> | CASE DISPOSED | <input type="checkbox"/> | NON-FINAL DISPOSITION |
| | <input type="checkbox"/> | GRANTED | <input checked="" type="checkbox"/> | DENIED |
| APPLICATION: | <input type="checkbox"/> | SETTLE ORDER | <input type="checkbox"/> | GRANTED IN PART |
| CHECK IF APPROPRIATE: | <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | <input type="checkbox"/> | SUBMIT ORDER |
| | | | <input type="checkbox"/> | FIDUCIARY APPOINTMENT |
| | | | <input type="checkbox"/> | OTHER |
| | | | <input type="checkbox"/> | REFERENCE |