

**Slesinger v Department of Housing Preservation and
Development of City of New York**

2005 NY Slip Op 30349(U)

April 1, 2005

Supreme Court, New York County

Docket Number: 109430/04

Judge: Nicholas Figueroa

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

PRESENT: HON. NICHOLAS FIGUEROA
Justice

PART 46

Henry S. Slesinger

INDEX NO. 109430/01

MOTION DATE 9/28/04

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

NYC Dept. of Housing Preservation & Development

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

**COPY
UNFILED JUDGMENT**

*All necessary
decision, order and
judgment*

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

Dated: April 1, 2005

[Signature]
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 46

HENRY S. SLESINGER,

Index No. 109430/04

Petitioner,

- against -

THE DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT OF THE CITY OF NEW YORK
and MUTUAL REDEVELOPMENT HOUSES, INC.,

**DECISION, ORDER
AND JUDGMENT**

Respondents.

Nicholas Figueroa, Justice:

Petitioner seeks to reverse and annul the March 1, 2004 decision by respondent New York City Department of Housing Preservation and Development (HPD) denying his appeal of the decision by respondent Mutual Development Houses, Inc. (Mutual) denying him succession rights to the apartment he occupied by his deceased cousin, Florence Barnes. HPD issued a certificate of eviction authorizing Mutual to commence an eviction proceeding.

Petitioner asserts succession rights on the ground that he occupied the apartment as his primary residence as Ms. Barnes's family member. The premises are maintained as a Redevelopment Company as defined by Private Housing Finance Law §101, *et seq.* Tenants of Redevelopment Company complex pay a discounted rent. HPD is the supervising agency charged with administering such housing in the City of New York (PHFL §102(2)). Apartment occupancy rights are governed by a Regulatory Tax-Exemption Agreement (the Agreement) between DHPD and Mutual defining "family members" entitled to succession (§210) and listing the documentation required to demonstrate primary residency (§209).

Under 28 RCNY §3-02(2)(R)(a)(b)(c) a person other than a tenant's spouse, child, parent, grandparent, grandchild or son or daughter-in-law may succeed to the tenancy if it is shown that they intermingle finances and act as a family. Petitioner alleges that he resided in Arizona until 1996, when he joined Barnes at the subject premises, and that they were financially interdependent and lived as family members.

On March 10, 2003, Mutual notified petitioner that it "determined that you are not a person entitled to succeed to ownership...pursuant to the Rules of the City of New York and Section 210 of the Agreement between the City of New York and Mutual...and those rules and decisions arising therefrom." (emphasis in the original). The letter did not contain any specific allegations.

On April 8, 2003, HPD's hearing officer sent petitioner a list of "Suggested Documentation To Be Used To Substantiate A Claim of Residency". The suggested documents are:

- “1. Tax Returns - Certified (State, City & Federal - W-2 forms and/or 1099 forms).
2. Employment Records - Pay stubs, names and addresses of employers from _____ to present [left blank in the original].
3. Records of Social Security Administration, Department of Social Services.
4. Board of Elections - voting record.
5. Driver's license, vehicle registration, car loan payments and bills.
6. Insurance policies - health, life, apartment, fire, car, etc.
7. Utility bills and statements - telephone, gas and electric, cable t.v., etc.
8. Bank statements - (savings and checking).

9. Medical records - doctors, hospitals.
10. School records.
11. U.S. Service Records.
12. Credit cards - bills and statements.
13. Deeds.
14. Marriage and/or birth certificates.
15. Business publications and other general correspondence containing U.S. postmarks addressed to you at the apartment.”

The list ended with the instruction,

“SUBMIT AS MANY OF THE ABOVE DOCUMENTS
AS YOU HAVE IN YOUR POSSESSION”.

Petitioner appealed of Mutual’s determination to HPD on June 4, 2003, submitting an affidavit and several exhibits.

According to petitioner’s affidavit in support of his petition, Barnes was his “first cousin (once removed).” His relationship with her “was the functional equivalent of a mother-son relationship and not a typical relationship of cousins.” He stated that his father left him in Barnes’s care in 1952, when he was twelve years old, and that she treated him as a surrogate son.”

According to petitioner, in 1996, when Barnes’s health began to fail, petitioner alleges he moved in with her. Since then his name has appeared on each household composition section of the Tenant/Shareholder Annual Household Income Affidavit filed.

Petitioner claims that he has been Barnes’s trustee and her attorney in fact, since 1982, and that he was the beneficiary of the largest share of her estate.

Petitioner annexed various documents to his affidavit. He attached New York State income tax returns for the years 1998 to 2002, a voter registration notice bearing information about primary and general elections in September and November, 1998, a New York County jury questionnaire dated December 7, 1998, a copy of the County Clerk's payment invoice for jury service dated July 6, 1999, a copy of a New York State driver's license issued in June 26, 2000, two Verizon telephone bills, one for service from October 19, 2000 to November 13, 2000 and one for service from April 19, 2003 to May 14, 2003.

Petitioner also submitted copies of commercial mailings, including magazines and other documents. All were dated 2003.

In an apparent effort to show a financial interdependence with his late cousin, petitioner submitted copies of bank statements of their joint account, for the periods April to May, 1998, and December to January, 2000.

Petitioner also submitted Barnes's January 9, 2000 Arizona death certificate. This document signed by petitioner lists him as the informant and gives his address as 1807 Palmcroft Drive, N.W., Phoenix, Arizona.

In her final decision of June 4, 2004, the hearing officer found that Barnes died in Arizona on January 9, 2000, after living there for a year, and that she vacated the apartment in 1999.

The hearing officer noted that petitioner first resided with petitioner in 1996 and was included as an occupant on the household income affidavits for 1996, 1997 and 1999. She found no income affidavit filed for 1998; and gave the 1999 affidavit no weight because it was signed by petitioner in 2000, after Barnes's death.

The hearing officer noted that under the applicable rule, in effect on February 1, 2003, the failure to appear on the income affidavit created a rebuttable presumption that an occupant did not reside in the apartment as a primary residence. This presumption can be rebutted by submitting documents proving residency. However, the hearing officer held that the documents petitioner submitted were, nevertheless, insufficient to prove co-residency between petitioner and Barnes.

Concerning the joint bank account statements, addressed to both Barnes and petitioner, the hearing officer determined that, "Such joint bank statements do not prove that Mr. Slesinger was actually residing in the apartment as his primary residence."

The hearing officer determined a letter from a tenant of a neighboring apartment was insufficient, as it did "not specifically state that Mr. Slesinger actually resided in the subject apartment with the tenant as his primary residence..."

The hearing officer acknowledged that petitioner was registered to vote at the subject apartment, and that he received a notification of the September and November, 1998 elections. Then, in the same paragraph of her decision, she noted that petitioner signed a jury questionnaire on December 7, 1998 addressed to him at the subject apartment. Continuing, she wrote that petitioner "claims that an invoice from the State of New York jury service payment dated August 30, 1999, was evidence of his jury service." However, she rejected this as proof of residency, as the jury invoice did not contain petitioner's name or address. The hearing officer did not give a reason for rejecting the voter registration as proof of primary residency.

The hearing officer found that petitioner submitted New York state tax returns for the years 1998 through 2002 listing the subject apartment as his address. However, the hearing officer did not consider the tax returns probative, stating that "no evidence was submitted to

indicate whether those tax returns were ever filed in New York.” She noted that petitioner failed to submit W-2 forms, credit card statements, “or other financial documentation” addressed to him at the apartment in 1998 or 1999. She also noted that petitioner did not submit “employment records”. Despite the fact that earlier in her decision, she noted that petitioner had submitted joint bank statements, she stated, in this portion of her decision, that petitioner had not submitted any bank statements.

The hearing officer repeated her prior finding that despite the fact petitioner was registered to vote at the apartment and had been mailed a jury questionnaire, this was insufficient proof, given the lack “of additional documentation and evidence proving that he was residing in the subject apartment as his primary residence between January 1998 and January 1999.”

Continuing, the hearing officer found that in addition to the lack of documentation proving residence, the death certificate petitioner submitted was “evidence that he actually resided elsewhere, specifically Arizona.” The hearing officer arrived at this conclusion based on petitioner’s use of an Arizona address on the certificate.

The hearing officer concluded that petitioner, regardless of his family relationship with Barnes, failed to prove that the apartment was his primary residence.

In challenging the administrative determination, petitioner focuses on the alleged lack of notice of the grounds on which Mutual sought his removal. He alleges that Mutual’s notice was vague, as it merely stated that he was not a person entitled to succession rights under the agreement between Mutual and New York City. He asserts that he believed that the basis for the removal was his lack of a sufficient familial interdependence with his late cousin, and not that the apartment was not his primary residence. He argues that this lack of notice deprived him of

the opportunity to present evidence of his primary residency, thereby depriving him of due process of law.

However, petitioner asserts on this proceeding, as he did in the administrative proceeding, that the apartment was his primary residence and attaches the documents he relied on to support his argument at the hearing. However, three of the documents, his 1998 and 1999 New York State tax returns, were not the same documents he submitted to the hearing officer. He also submits a copy of the 1998 income affidavit that he failed to submit at the hearing.

The tax documents petitioner now submits are under a cover letter from the Centralized Photocopy Unit of the New York State Department of Taxation and Finance, dated April 9, 2004. The first document is a transcript of petitioner's 1998 tax return, filed with the Department of Taxation and Finance on April 15, 1999. The other document is the Department's Computer image of petitioner's 1999 tax return. Both documents list the subject apartment as petitioner's address.

In its answer, HPD asserts the affirmative defense that petitioner failed to submit his 1998 income affidavit on his administrative appeal. Relying on 28 RCNY §3-02(P)(3), HPD argues that that failure to submit the affidavit created a presumption that the apartment was not petitioner's primary residence. While HPD acknowledges that the petition includes a copy of the 1998 income affidavit, it argues that as petitioner did not submit the document at the hearing, the court may not consider it. HPD acknowledges, however, that petitioner did submit income affidavits for 1996, 1997 and 1999. HPD, in a footnote to its affirmation in opposition, argues a point not raised at the hearing: petitioner's tax returns and income affidavits recite different income amounts.

HPD argues that the affidavit from petitioner's neighbor "does not specifically state that [petitioner] actually resided at the subject premises during 1998."

HPD next asserts that "even if petitioner submitted the 1998 income affidavit and legitimate tax returns at the time of the appeal", he did not submit irrefutable financial documents such as W-2 forms, 1099 forms or employment records

Continuing, HPD argued that petitioner did not submit bank statements in his sole name, or 1998 credit card statements or other unspecified 1998 financial records addressed to him at the subject premises.

HPD then noted that the hearing officer stated that the Arizona death certificate was sufficient, "to suggest that petitioner resides in Arizona, not in New York City."

HPD argues that petitioner had adequate notice of Mutual's reason for denying him succession rights; moreover, he was given notice of the documents which could be submitted to prove primary residency.

Respondent Mutual raises arguments similar to HPD's arguments in its answer. As to the income affidavits petitioner is required to file, it "denied knowledge or information sufficient to form a belief" as to whether petitioner filed the 1998 income affidavit with its office; however, it admitted that a document purporting to be a 1998 income affidavit is annexed to the petition and that Mutual maintains copies of all documents filed with it.

Mutual, as does HPD, makes the new argument, not raised at the hearing, that from the different incomes listed on the tax returns and income affidavits, "it would appear that such income originated from out of State."

Mutual adds a further a new argument, contained in a footnote, that petitioner failed to explain “why he purportedly filed tax returns in New York, while his wife filed tax returns from Arizona for the same years.” Petitioner’s wife’s tax returns are not part of the record before this court; moreover, petitioner’s tax returns, which are included in the record, indicate that although married, he files separately.

The court notes that in a post-argument inquiry to counsel, Mutual’s attorney responded, in a February 8, 2005 letter, that Mutual’s file contains petitioner’s 1998 income affidavit.

The court also notes that, after telephonically alerting counsel of its intention, it inquired of the court’s jury clerk’s office, and confirmed that the only address for petitioner that the court has had is the subject premises. The court may take judicial notice of its own records and files (*Matter of Khatibi v. Weill*, 8 AD3rd 485).

The standard of review on this proceeding is whether the agency’s decision is arbitrary, capricious or contrary to law. The court must determine whether the determination is rationally based on facts in the record (*Matter of Pell v. Board of Education*, 34 NY2d 222, 230). HPD’s decision does not withstand scrutiny under this standard of review. This matter must be remanded to the HPD for further, limited purposes: whether petitioner filed the 1998 and 1999 tax returns. HPD’s hearing officer arbitrarily rejected documentary proof that petitioner submitted, although this proof was comprised of legally recognized indicia of primary residency, and arbitrarily determined that a single document, the Arizona death certificate, outweighed all the other proof.

At the outset, the court notes that although petitioner concededly did not submit his 1998 income affidavit at the hearing, he apparently met the filing requirement by filing it with Mutual.

Mutual's counsel's letter to the court demonstrates that the affidavit was filed; although not produced at the hearing. Thus, the presumption that the apartment was not petitioner's primary residence apparently does not apply in this case. In any event, the documentary, proof petitioner submitted overcomes any presumption that the apartment was not his primary residence.

The First Department has articulated the documentary proof constituting "traditional indicia of primary residence...driver's license, voter's registration, income tax returns, telephone records, bank statements, mail addressed...at the address..." (*Lesser v. Park 65 Realty Corp.*, 140 AD2d 169). Subsequently, that court held that there are many factors to be considered in determining primary residence; thus, although a person may have filed a tax return indicating another address in a different state, that one document was not determinative of the primary residence question (*Village Development Associates, LLC, v. Walker*, 282 AD2d 369).

However, in the instant case, the hearing officer arbitrarily assigned dispositive weight to a single document, the Arizona death certificate. Not only was this disproportionate weight legally erroneous, as it places a greater weight on one aspect of proof over the other, it is not factually supported. Even assuming that petitioner has an Arizona address, there is nothing in the record to factually prove that this is a primary residence, as opposed to a secondary address. Under Section 209(c) of the Agreement between respondents, on which both respondents rely, an apartment is not a primary residence if it is occupied less than 183 days in the preceding calendar year. Nothing in the hearing officer's decision or in the record before the court gives any indication that petitioner spent less than 183 days at the apartment and the remaining portion in Arizona.

Moreover, Section 209(c) of the agreement states that a person may not have primary residence status after giving another address as a voting address. The Arizona document does prove that the Arizona address was a voting address. On the other hand, the hearing officer arbitrarily discounted the fact petitioner's voting address is the subject premises.

The hearing officer found that petitioner was registered to vote at the subject premises; in fact, he received mailed communications about upcoming 1998 elections. Nothing in the record refutes the fact that petitioner is registered to vote at the premises; neither respondent contests that fact on this proceeding. However, the hearing officer, without any reason or explanation, ignored the legal, and factual, significance that petitioner's listed voting address as the subject premises.

The hearing officer arbitrarily rejected the fact that petitioner served on a New York jury. This rejection was not a rational determination. Although the jury payment invoice, dated 1999 does not list an address, the jury questionnaire petitioner received the year in question, 1998, shows his address as the subject premises. The jury questionnaire contains a question asking whether the potential juror is a New York County resident, and contains the warning that a false answer is a crime under Penal Law §210.45 (a class A misdemeanor). Without any proof that the payment voucher is a forgery, or that it was sent to another address, the hearing officer simply rejects the 1998 document by saying the 1999 document does not bear the address. This rejection is inexplicable, given the other documents in the record, including petitioner's 1999 income affidavit, whose authenticity is not in question, which lists the subject premises as his address in 1999. Moreover, the court's examination of its own records show that the only address for petitioner in those records is the subject apartment; therefore, invoice could only have

been mailed to that address.

A Justice of this court, in a similar proceeding, found that a hearing officer arbitrarily, capriciously and irrationally rejected proof of voter registration in finding that a person did not occupy an apartment as his primary residence (*Diaz v. Perine*, N.Y.L.J., 10/9/02, p.26 col.2 (Sup. Ct. N.Y.Co., Abdus-Salaam, J.)).

The fact that petitioner submitted a joint bank account statement instead of an individual one, does not negate his claim to succession rights; rather it supports it. Again, the hearing officer's finding is not rational. In order to become eligible for succession rights, petitioner had to demonstrate that there was a financial inter-dependence between him and his late cousin. 28 RCNY §3-02(B)(C) lists, among the criteria for family member status, entitling a person to succession rights is "intermingling of finances as evidenced by among other things, joint ownership of bank accounts..." (See also Agreement §210(a)(ii)). Had petitioner furnished proof of only an individual account, he would have failed to satisfy a necessary element of his proof of entitlement.

Although petitioner did not furnish the hearing officer with proof that he filed his 1998 and 1999 New York State Income tax returns, although he furnished copies of the returns, the petition he submitted on the instant proceeding shows that the 1998 and 1999 returns were filed with the New York State Department of Taxation and Finance. There is nothing in the opposition papers showing that these documents are not genuine; however, the material petitioner relies on to support his claim of filing is *dehors* the record (see *Matter of Raquib v. Coughlin*, 214 AD2d 788) and the court may not consider such proof (see *Matter of Fanelli v. New York City Conciliation and Appeals Board*, 90 AD2d 756).

Other material, which petitioner submitted to the hearing officer, include a driver's license, utility bills, mail addressed to him and his neighbor's affidavit. The bills, however, do not indicate that petitioner's address was the subject premises, in the pertinent year. The driver's license was issued in 2000, subsequent to the relevant year. The mail, likewise, is subsequent to 1998. The neighbor's affidavit is not probative of petitioner's residency.

In determining this proceeding, the court does not consider counsel's arguments that are *dehors* the record (*Matter of Fanelli v. New York City Conciliation and Appeals Board, id.*). In any event, whether petitioner failed to accurately list his actual income is irrelevant to this proceeding. Even if petitioner under-reported his income, this is not a basis for denying succession rights. Mutual would only have the right to impose a surcharge on petitioner's rent if his income exceeded a certain level and bring a non-payment proceeding if petitioner were delinquent (28 RCNY §3-03(a)(2), et seq.).

The argument that petitioner earned income in Arizona is something the hearing officer did not discuss or determine, and is also *dehors* the record. The argument is nothing but counsel's post hearing speculation and may not be considered (see *Matter of Carr v. New York State Parole Board*, 231 AD2d 767).

The argument that petitioner's wife filed an Arizona tax return is without merit. As noted, the record does not support this assertion. There is nothing in the record indicating that petitioner and his wife reside together. In any event, "It is well settled that a husband and wife may establish two primary residences without penalty..." (*Glenbriar Co. v. Lipsman*, 11 AD3rd 352).

The hearing officer arbitrarily rejected proof indicative of petitioner's primary residence at the subject premises; however, the hearing officer correctly found that petitioner failed to prove that he filed the pertinent tax returns. While such proof may not be crucial in a case involving a rent controlled or rent stabilized apartment (see *Village Development v. Walker, id.*), proof of filing is necessary in the instant case, as it is required by §209(c)(iv) of the Agreement.

The court agrees with petitioner's counsel suggestion, on oral argument, that a remand is appropriate for the purpose of determining whether petitioner filed the relevant tax returns. Although the court may not now consider the belatedly submitted proof that petitioner filed the returns, he ought to be given the opportunity to submit this proof at a hearing, as there is no challenge to the authenticity of the returns on this proceeding. If petitioner proves that he filed the 1998 and 1999 returns, then, given the other proof he submitted, he is entitled to succession rights.

Accordingly, it is

ORDERED and ADJUDGED that the petition is granted to the extent that the determination is annulled and the matter is remanded to respondent Department of Housing Preservation and Development of the City of New York for proceedings consistent with this decision.

This constitutes the decision, order, and judgment of the court.

Dated: April 1, 2005

ENTER



J.S.C.