

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

2005 NY Slip Op 30368(U)

November 14, 2005

Supreme Court, New York County

Docket Number: 106474/2005

Judge: Karen Smith

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

PRESENT: KAREN S. SMITH

PART 44

Justice

MOSHE FRUCHTER,
Petitioner,

INDEX NO. 106474/2005

MOTION DATE 09/09/05

- v -

MOTION SEQ. NO. 001

CITY OF NEW YORK DEPARTMENT OF
HOUSING PRESERVATION AND DEVELOPMENT
and KENT VILLAGE HOUSING COMPANY, INC.,
Respondents.

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this Petition pursuant to CPLR Article 78 to annul an administrative determination of the New York City Department of Housing Preservation and Development

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

Notice of Motion/Petition Order to Show Cause - Affidavits - Exhibits ...
Notice of Cross-Motion - Answering Affidavits — Exhibits ... Memorandum
Replying Affidavit _____

PAPERS NUMBERED	
_____	1
_____	2 & 3
_____	4

Cross-Motion: Yes No

Upon the foregoing papers, it is ORDERED that this Petition pursuant to CPLR Article 78 is granted to the limited extent that the matter is remanded to the City of New York Department of Housing Preservation and Development for further proceedings.

Petitioner (hereafter referred to as "Fruchter") commenced this proceeding pursuant to Article 78 of the CPLR to review a determination of the respondent, City of New York, Department of Housing Preservation and Development (hereafter referred to as "HPD"), which purported to deny Fruchter's appeal for family succession rights pursuant to 28 RCNY§3-02(p) concerning a Mitchell-Lama apartment Fruchter occupies with his wife and nine children. The apartment is owned and operated by the respondent, Kent Village Housing Company, Inc. (hereafter referred to as "Kent Village") and is known as Apartment 4D at 115 Clymer Street, Brooklyn, New York (hereafter referred to as the "Apartment"). In his petition Fruchter alleges that he never applied for family succession rights to the Apartment. Instead, Fruchter contends that he is a co-tenant who has been named on the lease for the Apartment since in or around 1997. Fruchter further alleges that he resides in the Apartment based upon his own rights as a co-tenant and that there is no statutory basis for HPD to institute, prosecute or determine any proceedings in Fruchter's name for family succession rights to the Apartment. Therefore, Fruchter argues that HPD's determination denying him family succession rights and authorizing his eviction from the Apartment is arbitrary and capricious, an abuse of discretion, affected by errors of law and in violation of lawful procedure. Accordingly, Fruchter seeks a judgment annulling and vacating HPD's determination and declaring Fruchter's rights vis-a-vis HPD and Kent Village with respect to the Apartment.

In his affirmation in support of Fruchter's petition, Fruchter's counsel points out that 28 RCNY §3-18 establishes the procedure to terminate a tenant's lease rights. Fruchter's counsel further argues that lease termination procedures differ from family rights succession procedures because, in a lease termination proceeding, there must be a showing of the tenant's fault and HPD has the burden of proof while, in a family succession rights proceeding, the tenant has the burden of proof and fault is not an issue.

HPD has answered the petition alleging that Fruchter has no valid claim for family succession rights or any other valid lease rights to the Apartment. HPD further alleges, without elaboration, that "28 RCNY §3-02

governs petitioner's application for succession rights and §3-18 is not applicable." (HPD's Answer, Paragraph 150). Additionally, HPD argues that the instant CPLR Article 78 proceeding is untimely because HPD mailed a copy of its decision in the family succession rights proceeding to Fruchter on October 15, 2004 and he did not commence the instant proceeding until May 10, 2005.

On the return date of the petition, Kent Village appeared and orally argued against the petition but has failed to submit an answer to the petition and must, therefore, be deemed in default.

In reply to HPD's answer, Fruchter's attorney argues HPD has failed to address the issue of whether a family succession rights proceeding was appropriate under the circumstances of the instant case. Fruchter's attorney contends that a proceeding asserting family succession rights occurs before a lease is issued in the name of a prospective tenant and that there is no legal authority for HPD to affirmatively institute and prosecute such proceedings in order to conduct an after-the-fact review of the propriety of the issuance of an outstanding lease. Instead, he argues that, according to the Rules of the City of New York, the proper procedure to challenge a tenant's rights pursuant to an outstanding lease is a lease termination proceeding pursuant to 28 RCNY §3-18. Finally, Fruchter's attorney argues that the instant Article 78 proceeding is timely because it was filed within four months from the date that Fruchter alleges he first received notice of HPD's final administrative determination against him and, in spite of HPD's allegation that it mailed a copy of the determination to Fruchter substantially earlier, there has been no evidence to contradict Fruchter's allegation as to when and how he received notice of the determination.

There is no dispute between the parties as to the underlying facts involved in the instant matter.

At about the time they were married, Fruchter and his wife were issued a lease for and moved into a one-bedroom apartment in the publicly subsidized housing complex managed by Kent Village. HPD has not challenged the propriety of the issuance of that lease. As the Fruchters began having children, they applied for and were added to the internal waiting list for a two-bedroom apartment in the complex. In or around 1996, the Fruchters were approved for an internal transfer to a two-bedroom apartment in the complex. At the same time, another family in the complex applied for an internal transfer from a three-bedroom apartment to a two-bedroom apartment. Fruchter alleges that, at the direction and with the knowledge and consent of Kent Village, his family and the other family switched apartments. Although there is no evidence to indicate who orchestrated the apartment swap, Kent Village began issuing leases to the apartment in the name of Fruchter as co-tenant with the head of the family that had previously lived in the apartment. Fruchter was aware that this was transpiring because Fruchter signed, *inter alia*, leases which also included the signature of the head of the other family and listed both family heads as co-tenants. Since Kent Village prepared the leases and other paperwork, Kent Village was also aware that this was transpiring.

In or around 1998, HPD conducted an application audit and a re-certification audit of Kent Village's property management records. In an application audit, HPD reviews the paperwork that relates to applications for occupancy, transfer or successor tenancy. In a re-certification audit, HPD reviews the paperwork that relates to current occupants' annual re-certifications of family composition and financial resources in connection with the occupant's continued eligibility for housing subsidies. During the course of its audits, HPD discovered numerous discrepancies in Kent Village's records. Among the discrepancies was the fact that the records for the apartment (including the 1997 and 1998 lease renewals, family income certifications and family composition certifications as shown in Exhibits P and Q to HPD's answer herein) indicated a change in the head of the household (from the name of the head of the family previously occupying the apartment to that individual and Fruchter) yet no application for the change had been submitted to HPD (as required by regulations). Furthermore, the record before the court indicates that there were no documents in Kent Village's file to justify the change as a transfer based upon any waiting list or as a family member's succession to the lease rights of a prior lessee of the apartment.

By letter dated June 23, 1998, HPD advised Kent Village that the results of HPD's audit of Kent Village's records indicated; "...that the housing company has permitted inappropriate succession practices for a number of years." (See Exhibit E to HPD's answer herein) and requested that Kent Village submit certain specific documents to HPD concerning certain apartments identified in HPD's audits including the apartment involved in this matter.

In response to HPD's request and apparently without any application or request by Fruchter, Kent Village's managing agent sent Fruchter a form letter dated June 29, 1998 advising Fruchter that he was; "...currently occupying an apartment in violation of the Rules and Regulations Governing City-Aided Limited

Profit Housing Companies." (See Exhibit L to HPD's answer herein.) and that Fruchter's file contained insufficient information for Kent Village; "...to approve your tenancy and forward its approval to the Department of Housing Preservation and Development for their approval in compliance with Section 3-02(p)(8) of the rules and regulations." (Id.) Although the form letter advises Fruchter that he may appeal the "determination" to HPD within thirty calendar days of its receipt, the letter contains no information that would provide any notice of the substance of the alleged violation of the applicable rules and regulations nor any explanation of what rule Fruchter had purportedly violated or any opportunity or time period to cure the alleged violation.

By letter dated July 2, 1998, Kent Village's managing agent notified HPD that; "[a]t that present time, all known apartments that may be in violation of the succession rules have been notified by the housing company as per my letter to you dated 6/29/98." HPD was listed as receiving a copy of Kent Village's June 29, 1998 letter to Fruchter. However, the record contains no letter dated June 29, 1998 addressed directly to HPD.

By letter dated July 31, 1998, Kent Village notified Fruchter that his; "...application for permission to remain in occupancy as a tenant of the above apartment is hereby denied." (See Exhibit G to HPD's answer herein.) This letter specifically refers to the occupancy of the Apartment by the prior family of record and makes specific factual statements that would be relevant to an application by an apartment's occupant for family succession rights and then directly states: "You were notified of the rejection of succession by letter mailed June 30, 1998 ..." (Id.) The July 31, 1998 letter further states: "You may within thirty (30) calendar days of the receipt of this denial, appeal to the Assistant Commissioner of HPD ... The appeal shall briefly set forth the reasons why you believe you are entitled to occupy the apartment and any errors or erroneous findings you believe are contained in this determination. The Assistant Commissioner or her designee will review this determination and any additional information submitted by you and will issue the final agency decision with regard to your application." (Id.)

By letter dated August 17, 1998 containing the reference "Kent Village Housing Co v. Fruchter", HPD directly advised Fruchter; "[t]he above housing corporation has denied your request for succession rights to apartment #4D." (See Exhibit H to HPD's answer herein.) The letter also indicates that Fruchter; "... can submit any additional relevant information..." and advises Fruchter to; "...remember to include proof of your relationship with the tenant of record ..." (Id.)

By letter dated January 28, 1999, Fruchter's counsel submitted additional information to HPD including, *inter alia*, the fact that; "Mr. Fruchter never made ... a request for succession rights." (See Exhibit I to HPD's answer herein) and the legal argument; "...that there is no succession rights case properly before you." (Id.)

Nothing further seems to have transpired in the instant matter until November 8, 2001 when, in spite of the fact that the regulations relating to family succession rights do not provide for a hearing before an administrative law judge, HPD conducted just such a hearing captioned; "Kent Village Housing Associates. Vs. Moshe Fruchter." (See Exhibit J to HPD's answer herein.) Fruchter was present and testified at such hearing. As a result of that hearing, HPD's hearing officer issued a decision dated October 14, 2002 titled "DENIAL OF APPEAL FOR SUCCESSION RIGHTS" (See Exhibit A to HPD's answer herein). In that decision, HPD's hearing officer concluded; "... the succession rights appeal is denied ..." (Id.)

HPD has offered an affidavit of its hearing officer and another employee who allege that they mailed the above decision to Fruchter on October 15, 2004 together with 26 other decisions they mailed out on that date. However, Fruchter alleges that he did not receive the decision or any notice thereof until he received a notice of the termination of his tenancy dated February 18, 2005 which had a copy of the decision attached to it. Thus, HPD has offered no evidence contradicting Fruchter's statement concerning the date of his receipt of the decision.

First, addressing the issue of the statute of limitations, it is well settled (and HPD itself concedes) that its determination did not become binding upon Fruchter until it had an impact upon him and the; "...petitioner was negatively impacted when he received respondent's decision,..." (HPD's answer herein, paragraph 159; cf. *In the Matter of 80 E. 116th Street Corp. v City of New York Department of Housing Preservation and Development et al*, 245 AD2d 107 [1st Dept 1997]). Thus, the issue becomes the timing of Fruchter's receipt of the determination not the date of its mailing.

HPD argues that proof of a routine office practice with respect to mailing a document is sufficient to

establish a rebuttable presumption of the document's receipt. However, none of the cases cited by HPD establish any presumption as to the timing of the receipt of the document.

Moreover, except for the cases relating to the service provisions of the CPLR (in which the operative issue is the fact of mailing not the fact of receipt) all of the cases relied upon by HPD either directly or indirectly cite *Nassau Insurance Co. v Murray*, 46 NY2d 828 (1978) as support for the argument advanced by HPD. Omitting citations, the entire published decision in the *Nassau* case reads as follows:

Where, as here, the proof exhibits an office practice and procedure followed by the insurers in the regular course of their business, which shows that the notices of cancellation have been duly addressed and mailed, a presumption arises that those notices have been received by the insureds. Denial of receipt by the insureds, standing alone, is insufficient to rebut the presumption. In addition to a claim of no receipt, there must be a showing that routine office practice was not followed or was so careless that it would be unreasonable to assume that the notice was mailed. We would hasten to add, however, that in order for the presumption to arise, office practice must be geared so as to ensure the likelihood that a notice of cancellation is always properly addressed and mailed. (Id.)

The proof submitted to this court by HPD in the instant matter is not sufficient to establish the presumption set forth in *Nassau*. The affidavits of Ms. Lippa and Ms. Falcon do not demonstrate an office practice established and followed by HPD in the regular course of its business. Instead, they discuss what two individuals did on one specific day in response to a perceived need to mail out 27 decisions on that day. The affidavits offer no basis for the court to conclude that the conduct of those two individuals conformed to any established procedure whatsoever.

Based upon the foregoing, the only evidence presented to the court to establish when Fruchter received the determination is Fruchter's acknowledgment that he received it on February 18, 2005. "The burden rests on the party seeking to assert the statute of limitations as a defense to establish that its decision provided notice more than four months before the proceeding was commenced..." (*Berkshire Nursing Center, Inc. v Novello* 13 AD3d 327 [2nd Dept, 2004]). Since HPD has failed to meet its burden, the instant Article 78 proceeding must be considered timely.

Turning to the merits of Fruchter's arguments, 28 RCNY §3-02(p) states: "Occupancy rights of family members. (1) The rights of family members of a tenant/cooperator who have requested to remain as the lawful tenant/cooperator are governed by policies and procedures set forth in this subdivision.... (8) Where a family member applies to the housing company to remain in occupancy as a tenant/cooperator, the housing company shall act on the application within thirty (30) days of receipt by either requesting that HPD approve the application or by denying the application and notifying the applicant family members in writing of its determination." (emphasis added).

The entire process for obtaining family succession rights as set forth in 28 RCNY §3-02 is prospective and initiated by a tenant/cooperator's family member at the time that the tenant/cooperator either leaves the apartment or dies. The process contemplates that the family member may continue to use and occupy the apartment which is the subject of the request while the request is pending (provided that they continue to pay the appropriate charges). There is no provision, however, for the issuance of a new lease naming the requesting family member as the tenant/cooperator until the application process (including any appeal provided for in the event the request is denied) becomes final. The burdens of prosecuting the proceeding and presenting proof are upon the family member claiming the rights. The regulations contain no provisions for HPD or the housing company to institute or prosecute proceedings concerning family succession rights pursuant to 28 RCNY §3-02(p).

In contrast, once a lease has been issued, 28 RCNY §3-18 contains regulations setting forth appropriate procedures for lease terminations or non-renewals. The rules, *inter alia*, provide for the housing company to commence the proceeding and contain provisions for an administrative hearing from which there is no further administrative appeal. Instead, the rules specifically state that the administrative determination is subject to direct review in a CPLR Article 78 proceeding. Furthermore, 28 RCNY §3-18(f) states; "... It is the express intention of HPD that no other section of these rules is applicable." Therefore, the proper proceeding to deal with the circumstances of the instant matter, i.e; an allegedly improper occupancy based upon an existing but allegedly invalid lease, is the commencement of lease termination or non-renewal proceedings pursuant to 28 RCNY §3-18 (cf. *Wong v Gouverneur Gardens Housing Corp.*, 308 AD2d 301 [1st Dept 2003]).

In the instant matter, HPD has attempted to create a proceeding not established by its rules to address Fruchter's alleged violations of the Mitchell-Lama rules. HPD may be correct in its premise that Fruchter's occupancy of the Apartment is in violation of the rules and his lease void because he has not complied with appropriate transfer procedures and is not entitled to family succession rights. Moreover, Fruchter may, by virtue of his actions, have subjected himself and his family to such sanctions as liability for the full market value of the occupancy of the Apartment (28 RCNY§3-18[h]) and removal of his name from any waiting list he may have properly been on (28 RCNY § 3-02 [h] [13]). However, none of that justifies HPD inappropriate use of a family succession rights proceeding to remove Fruchter from the Apartment. "The rules of an administrative agency, duly promulgated are binding upon the agency as well as any other person who might be affected..." (*Frick v Bahou*, 56 NY2d 777 [1982]). Since the process undertaken by HPD in the instant matter is in violation of HPD own rules, the determination reached by HPD herein must be set aside. Accordingly, it is;

ORDERED: that the instant petition pursuant to Article 78 of the CPLR is granted to the limited extent that determination of HPD dated October 14, 2002 in the instant matter is hereby annulled and the matter is remanded to HPD for further proceedings pursuant to the rules and regulations applicable to the termination and non-renewal of publicly subsidized housing leases.

The foregoing constitutes the decision, order and judgment of the court.

FILED
NOV 25 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/14/05

KSS
Hon. Karen S. Smith, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST REFERENCE