

**Matter of Musial-Aderer v City of New York Dept. of
Hous. Preserv. & Dev.**

2005 NY Slip Op 30624(U)

January 5, 2005

Supreme Court, New York County

Docket Number: 113277/04

Judge: Kibbie F. Payne

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4**

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In the Matter of the Application of

KRISTINA J. MUSIAL-ADERER,

Petitioner,

Index No. 113277/04
Motion Sequence 01

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

-against-

**CITY OF NEW YORK DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT, and
INDEPENDENCE PLAZA ASSOCIATES, LP,**

DECISION/JUDGMENT

Respondents.
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KIBBIE F. PAYNE, J.:

Petitioner Kristina Musial-Aderer seeks an order and judgment reversing the decision of Administrative Hearing Officer Frances Lipka, which denied petitioner's appeal seeking succession rights to the apartment located at 40 Harrison Street, Apartment 17A, New York, New York 10013. The building is governed by the Private Housing Finance Law, known as the Mitchell-Lama Law. Petitioner contends that the decision was arbitrary and capricious and was not based upon the substantial weight of the evidence.

According to the petition, petitioner was a high school sophomore when she began to reside on a full-time basis with the tenant of record, Mr. Michael Ribanick. Although Mr. Ribanick was not a blood relative of petitioner's, he was considered by her, as well as her whole extended family, as her grandfather. He knew petitioner since she was a baby, and he often cared

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for her and her siblings after school. According to [redacted] petition, petitioner began to reside with Mr. Ribanick in the spring of 1999, when Mr. Ribanick started to need help with chores around the apartment, and was unable to do his shopping and cooking by himself. Mr. Ribanick died in December 2001, by which time petitioner was 18 years old. She continued to reside in the apartment, and paid rent.

In December 2002, attorneys for the housing company notified petitioner that she was not entitled to succeed to the tenancy of the apartment, because she did not provide sufficient proof of the period of her occupancy, or that she was Mr. Ribanick's family member. Respondent Department of Housing Preservation and Development (HPD) notified petitioner of her right to appeal the decision, by letter dated December 16, 2002. In January 2003, petitioner's stepmother submitted a letter to HPD, describing petitioner's relationship with Mr. Ribanick, and attached cancelled checks to help show the relationship. Petitioner also submitted a letter appealing the decision. On or about September 15, 2003, the housing company submitted an explanation of its decision and copies of the documentation it relied upon. By letter dated October 15, 2003, HPD gave petitioner further opportunity to submit additional documentation in support of her appeal. Petitioner submitted another letter in November 2003, together with additional documentation.

By decision dated May 18, 2004, the Administrative Hearing Officer issued a decision denying the appeal, without a hearing. The Hearing Officer based the decision on petitioner's failure to submit adequate evidence to overcome the presumption of non-residency, arising from her exclusion from the annual income affidavits or income recertifications. Petitioner submitted her passport that has no address, a jury questionnaire that is undated, and a jury summons for jury duty, dated well after Mr. Ribanick died. Petitioner also submitted a letter postmarked

September 14, 2000, a UPS invoice dated February 2000, and a credit card statement for the period of September 29, 2001 through December 31, 2001. However, there are no documents supporting petitioner's claim to have lived in the apartment beginning in 1999.

Petitioner includes many affidavits as an exhibit to this petition attesting to her having resided in the apartment as her primary residence since 1999. These include affidavits from her mother, stepmother, Mr. Ribanick's nephew, Mr. Ribanick's niece, several neighbors, petitioner's brother, the head coach of petitioner's soccer team in high school, petitioner's aunt, a former security guard for the building, and friends. However, these affidavits were not included in the administrative proceeding.

Mitchell-Lama apartments are governed by Title 28 of RCNY. At the time of Mr. Ribanick's death, the statute provided that no occupant can succeed to rights under the lease for the apartment except as set forth in § 3-02 (p), and that acceptance by the housing company of full or partial payment of rent does not give the occupant any rights of tenancy. 28 RCNY § 3-02 (o) (3). In order to succeed to possession of an apartment, the occupant must be a family member who has resided with the tenant as a primary resident for a period of not less than two years, and has appeared on the income affidavits for at least the two consecutive annual reporting periods, prior to the tenant's permanent vacating of the apartment. 28 RCNY § 3-02 (p) (3). The failure to appear on the appropriate income affidavits creates a rebuttable presumption that the occupant did not reside in the apartment as a primary residence. *Id.* If a person is not one of the enumerated relatives, that person can still qualify as a family member if he or she proves emotional and financial commitment and interdependence between him or herself and the tenant. 28 RCNY § 3-02 (p) (2) (ii).

In reviewing the agency's determination, the court can determine only 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..." (CPLR 7803 [3]). Thus, the court cannot substitute its own judgment for that of the administrative agency, but can determine only whether the agency had a rational basis for reaching its conclusion (*Matter of Purdy v Kriesberg*, 47 NY2d 354, 358 ; *Matter of Pell v Board of Educ.*, 34 NY2d 222, 230-231).

It is undisputed that petitioner did not appear on the income affidavits. Therefore, there is a presumption that she was not a primary resident, which it is her burden to overcome. The documents petitioner provided to the agency did not demonstrate that she lived at Mr. Ribanick's apartment as her primary residence for more than two years prior to his death. Thus, the Administrative Hearing Officer's conclusion that she failed to meet her burden was neither arbitrary nor capricious, but was supported by the record.

Petitioner submits many affidavits to support her assertion that she has lived at the apartment since 1999. However, those affidavits were not before the administrative agency. "Judicial review of administrative determinations is confined 'to the facts and record adduced before the agency'" (*Matter of Featherstone v Franco*, 95 NY2d 550, 554 quoting *Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD2d 756, 757, *aff'd for reasons stated below* 58 NY2d 952). Accordingly, this court cannot consider those affidavits in reviewing the agency's determination.

Petitioner also contends that the determination was made without a hearing, and without her being represented by an attorney. However, there is nothing in the Mitchell-Lama rules that requires a hearing under these circumstances (see e.g., *Matter of Cadman Plaza North, Inc. v*

New York City Dept. of Hous. Preservation and Dev. (290 AD2d 344). The regulation relied upon by petitioner, 28 RCNY § 3-02 (o) (3), does not apply in this matter, because it is applicable only to evictions of tenants or cooperators based on holdover or a breach of the lease or occupancy agreement. Here, petitioner is not a tenant or cooperator, but seeks succession rights. The fact that petitioner was not represented by counsel is also irrelevant. There is no indication that she was precluded from being represented by counsel, nor is the agency obliged to provide counsel for her.

Accordingly, it is

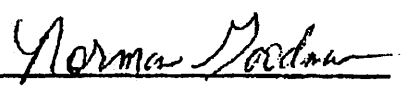
ORDERED AND ADJUDGED that the petition is denied and the proceeding is dismissed. This constitutes the decision and judgment of the court.

DATED: JAN 5 2005

ENTER:



J.S.C.


CLERK

FILED
FEB 25 2005
NEW YORK
COUNTY CLERK