

**Matter of Duffy v City of New York Dept. of Hous.
Preserv. & Dev.**

2006 NY Slip Op 30771(U)

July 12, 2006

Supreme Court, New York County

Docket Number: 107719/05

Judge: Herman Cahn

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 49

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In the Matter of the Application of
ELLEN M. DUFFY,

Petitioner,

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

-against-

Index No. 107719/05

THE CITY OF NEW YORK DEPARTMENT
OF HOUSING PRESERVATION AND
DEVELOPMENT and EAST MIDTOWN
PLAZA HOUSING COMPANY, INC.,

Respondents.

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NEW YORK
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HERMAN CAHN, J:

Petitioner Ellen M. Duffy brings this Article 78 proceeding to annul a determination of the respondent, The City of New York Department of Housing Preservation and Development (HPD), dated March 17, 2005, which issued a certificate of eviction to the respondent East Midtown Plaza Housing Company, Inc.

Petitioner is the tenant and owner of shares within the Mitchell Lama Building located at 319 East 24th Street, New York, New York. She occupies Apt. #28-D in the subject building. Petitioner is a senior citizen who has resided in the building for approximately 30 years.

East Midtown is a Limited-Profit Housing Company organized under the Private Finance Law and is the owner of the building. On June 30, 2003, the general manager at East Midtown arrived for work and discovered a woman, who was not Ellen Duffy, but rather one Leslie Gerchick, moving out of Ellen Duffy's apartment. East Midtown subsequently hired an

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investigator who reported, on August 12, 2003, that Ellen Duffy was renting an apartment in Glen Cove, New York. In addition, Ellen Duffy had claimed on three yearly income affidavits that her brother, James Duffy, was living in the apartment. The investigator stated that the brother was living in Florida.

Thereafter, on September 3, 2003, East Midtown served a Notice to Tenant, followed by a Petition and Notice of Hearing seeking to evict Duffy on the grounds that: (1) she had sublet her apartment without authorization; (2) she had failed to maintain the premises as her primary residence; and (3) that she had stated false information on her income affidavit.

A hearing was conducted before an HPD administrative hearing officer on January 20, 2004 and March 8, 2004. The hearing officer issued a determination in which he found, inter alia, that Ellen Duffy had ceased residing in the subject apartment as her primary residence and that she had sublet and/or assigned her occupancy rights in the apartment to Leslie Gerchick in violation of the HPD rules and her Occupancy Agreement with East Midtown. He further found that Duffy filed false income affidavits with East Midtown, and that together or separately, these violations constituted grounds for the issuance of a certificate of eviction. He finally found that nobody else was entitled to occupancy rights in the apartment.

Thereafter, Duffy commenced this proceeding, alleging that she did primarily reside in the apartment and that she had merely temporarily spent a majority of her time on Long Island, near the C.W. Post Campus for work and health reasons. She further alleges that she provided written notification that Ms. Leslie Gerchick would be occupying the apartment temporarily, and that she had been advised that, if the occupancy was temporary, and she continued to pay the rent, Ms. Gerchick's residence would be permissible.

Duffy further denies that she submitted false income affidavits. She alleges that her brother did reside in the apartment for several months throughout the year and that he intended to permanently relocate to the apartment when Duffy's temporary work assignment was completed, so that they could reside there together. Duffy states that she did not list Gerchick on the income affidavit as she was a temporary month-to-month occupant.

Duffy raises three objections to the administrative ruling. First, she argues that HPD rules, as well as her Occupancy Agreement, required East Midtown to have served a 10-day notice to cure with respect to all defaults occurring under a lease, and that she was never served with a notice to cure. Second, she alleges that she offered proof at the hearing that she resided at the subject apartment, and that her voting registration and bank accounts all listed the East Midtown address as her residence. She also submitted proof that she is a professor at Long Island University and has been employed there for over 30 years. For the last two years she had been required to spend nights and weekends working on learning a new field and that it was too difficult for her to travel back and forth from the Long Island campus. Therefore, she rented an apartment on Long Island. She alleges that she was about to move back into the East 24th Street apartment. Duffy also alleges that in January 2001, she notified East Midtown that Leslie Gerchick would be occupying the apartment as her roommate for a short period of time, and that no objection by East Midtown was made. Finally, Duffy alleges that the crux of the decision by the hearing officer was based on third-party hearsay and that such testimony should not have been considered.

Pursuant to CPLR 7804 (g), this court shall address Duffy's first objection regarding the failure of respondent East Midtown to serve a notice to cure, since a finding in Duffy's favor on

this ground could terminate the proceeding (Save Easton Environment v Marsh, 213 AD2d 961 [3d Dept 1995]; Matter of Bartley v Goord, 7 Misc 3d 1010(A) [Sup Ct, Westchester County 2005]). Duffy's claim that the hearing officer should not have admitted hearsay evidence goes to the issue of substantial evidence (Matter of Gelco Bldrs. v Holtzman, 168 AD2d 232 [1st Dept 1990]), and along with Duffy's contentions regarding the sufficiency of the evidence, must be referred to the Appellate Division.

As to Duffy's contention that she should have been served with a notice to cure, there is some disagreement among courts. In Knickerbocker Village, Inc. v Kei Cheuk Yeung, (2002 WL 27090 [App Term 1st Dept 2002]), the Appellate Term, citing In re O'Quinn v New York City Dept. of Housing Preservation and Dev., (284 AD2d 211 [1st Dept 2001]), determined that no notice to cure was required to evict the tenant of a Mitchell-Lama rental unit because non-primary residence, upon which the proceeding was based, is not curable. On the other hand, more recently, in Southbridge Towers, Inc. v Frymer, (4 Misc 3d 804 [Civ Ct, NY County 2004]), it was held that a Mitchell-Lama co-operative tenant who was being charged with not occupying the premises as his principal place of residence, illegal subletting, and making false statements on his annual income affidavit, did not receive an adequate notice to cure, since it was sent by mail and the housing company should have added an additional five days.

Chapter 3 of Title 28 of the Rules of the City of New York (RCNY) sets forth the rules regarding Mitchell-Lama apartments. These rules provide for criteria in determining whether a tenant maintains his or her primary residency in the apartment. 28 RCNY § 3-02 (n) (4) states, in relevant part:

(4) It is required that the apartment of the tenant/cooperator be at initial occupancy and continue to be his or her primary place of residence. The facts and circumstances to be considered in determining whether a tenant/cooperator occupies a dwelling unit as his or her primary residence include, but are not limited to whether such tenant/cooperator

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(iii) sublets or permits unauthorized persons to occupy the dwelling unit without written approval by HPD and the housing company or attempts to assign such dwelling unit, or

(iv) spent less than an aggregate of one hundred eighty three days in the preceding calendar year in the City at such dwelling unit (unless such individual is active in the armed forces of the United States or took occupancy at such dwelling unit during the proceeding calendar year).

Thus, the criteria for determining primary residence, has to do, in large part, with where the tenant resided in the preceding year. The issue of primary residence, as per HPD regulations, is therefore not "curable" since one cannot re-do the past. Nor can a tenant, who has falsified income affidavits, "cure" that defect.

Finally, as the hearing officer noted in his decision, the September 5, 2003 Notice to Tenant indicated that the subletting condition had recently been cured. However, subletting without the written permission of HPD and the housing company was a violation of the HPD rules which could not be cured.

Therefore, that part of the petition to annul the March 17, 2005 determination of HPD on the grounds that East Midtown failed to serve a 10-day notice to cure is denied.

Accordingly, it is


ORDERED that the application by petitioner Ellen Duffy, seeking to vacate and annul a determination by the respondents The City of New York Department of Housing Preservation

and Development and East Midtown Plaza Housing Company, Inc. is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR 7804 (g).

The Clerk of the Court is directed to transfer the file to the Appellate Division, First Department, upon service of a copy of this order with notice of entry.

Dated: July 12, 2006

ENTER:



J.S.C.

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