Matter of Bruskin v City of N.Y. Dept. of Hous. Preserv. & Dev.
2006 NY Slip Op 30790(U)
July 25, 2006
Supreme Court, New York County
Docket Number: 112258/05
Judge: Shirley Werner Kornreich
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

In the Matter of the Application of

GERALD BRUSKIN,

Petitioner,

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

-against-

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

Respondents.

Index No.: 112258/05

DECISION and ORDER

FILED
AUG 08 2006
NEW YORK
COUNTY CLERK'S OFFICE

KORNREICH, SHIRLEY WERNER, J.:

This is a special proceeding pursuant to Article 78 brought by Gerald Bruskin. Petitioner now asks the court to reverse and annul the determination of respondent the City of New York Department of Housing Preservation and Development ("HPD"). The determination, which evicted petitioner from an apartment located at 280 9th Avenue, Apartment 17-E, New York, N.Y. (the "Apartment"), was commenced via the service of a certificate of eviction on petitioner by his landlord Mutual Redevelopment Houses, Inc. ("MRH").

I. ***Background***

Petitioner became a tenant/shareholder of the subject studio apartment in or around July 1997, pursuant to an agreement executed between petitioner and MRH. The apartment was provided to petitioner pursuant to Article 5 of the Private Housing Finance Law ("PHFL") and is subject to HPD supervision, pursuant to a 1959 Regulatory Agreement (the "Agreement"). Petitioner claims that from 1997 onward, he, his wife Anne and his sister were "included as

001

household members on the filed income affidavits."

On February 27, 2004, MRH served a Preliminary Notice of Grounds for Eviction (the "eviction notice") on petitioner. The notice states that petitioner was violating HPD regulations in that: (1) he did not occupy the apartment as his "primary place of residence and ha[s] been residing at 153 West 95th Street[,] New York, New York" (hereinafter, the "95th Street address"; (2) petitioner had represented to financial institutions that the 95th Street address was his residence; (3) petitioner's phone number was listed at the 95th Street address; (4) he "sublet and/or assigned [his] rights of occupancy to the Apartment to John and/or Jane Doe without the approval of the [HPD] or [MRH]; (5) he accepted "things of value from occupants as consideration in exchange for the right to occupy the [Apartment]"; and (6) petitioner "made material misrepresentations of facts in securing the occupancy rights to the Apartment[.]" The notice also provided petitioner with ten days in which to cure the violations or face eviction.

Thereafter, on April 21, 2004, MRH served petitioner with a Notice of Hearing to be held before the HPD "for the purpose of obtaining a Certificate of Eviction." The notice, which was also addressed to alleged undertenants "Jane and John Doe," informed petitioner that the "grounds for scheduling said hearing are that [he does] not occupy [the Apartment] as [his] primary residence and that [he has] sublet and/or assigned [his] rights to the Apartment in violation of [his] occupancy agreement." After conducting a hearing on August 4, 2004, the hearing officer, Frances Lippa, issued her decision (the "HPD decision"), in which she found that:

> some documentation [presented by the parties] reflects the subject apartment as Mr. Bruskin's address, some documentation reflects Mr. Bruskin's address as West 95th Street, and some documentation reflects the subject apartment as Mr. Bruskin's address but is not reliable or credible proof of primary residency.

The HPD hearing officer concluded that "the documentation reflecting the subject apartment as Mr. Bruskin's address is not sufficient to prove that the subject apartment remained his primary residence." Ms. Lippa noted that there was a lack of "significant, credible documentation" that proved Mr. Bruskin resided in the apartment and did not find his "testimony, which was somewhat vague on occasion, to be credible proof that the subject apartment remained his primary residence." On the other hand, MRH presented evidence that Mr Bruskin's voter registration reflects the 95 Street address as of the 2000 election. Additionally, an HPD Multiple Dwelling Registration and an Internet telephone listing indicate the 95 Street address as Mr. Bruskin's residence.

II. ***Conclusions of Law***

Initially, the court will only consider the portions of Mr. Bruskin's reply papers that are responsive to respondents' answers. *See Azzopardi v. American Blower Corp.*, 192 A.D.2d 453, 454 (1st Dept. 1993) (on summary judgment motion function of reply affidavit is "to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of the motion"). *See also Lumbermens Mut. Cas. Co. v. Morse Shoe Co.*, 218 A.D.2d 624, 625-26 (1st Dept. 1995) (party may not use reply affidavit to shift burden to demonstrate material issue of fact where opposing party "has neither the obligation nor opportunity to respond absent express leave of court"). In an Article 78 proceeding, the court cannot interfere with an administrative tribunal's exercise of discretion "unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious." *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974). "If the determination is rational, it must be upheld, even though the court, if viewing the case in the first instance, might have reached a different conclusion." *West Village Assocs. v. Division of Hous.*

& Community Renewal, 277 A.D.2d 111, 112 (1st Dept. 2000).

A. ***Petitioner's First, Third and Fourth Causes of Action Must Be Denied***

In his first cause of action, petitioner argues that the HPD "impermissibly ignored MRH's initial burden of proof." However, the cases that petitioner cites in support of his argument are inapposite, since those cases were not governed by the HPD regulations applicable here. *See Sharp v. Melendez*, 139 A.D.2d 262, 265 (1st Dept. 1988) (subject apartment regulated by rent stabilization law); *Katz v. Gelman*, 177 Misc. 2d 83, 84 (App. Term, 1st Dept. 1998). On the other hand, a 1987 amendment to the Agreement, provides that "as a condition of eligibility for occupancy and continued occupancy that the apartment of the tenant/cooperator be intended to be at initial occupancy and continue afterwards to be his or her primary place of residence." Agreement, sec. 209 (c). Further, "[t]he tenant/cooperator whose residency is being questioned will be obligated to provide proof that his or her apartment is his or her primary place of residency." *Id.* Thus, the HPD hearing officer applied the proper burden of proof in the eviction proceeding.

Although, in his third cause of action, petitioner claims that MRH may not establish an illegal sublet where a family member occupies the apartment, the cases he cites in support again are inapposite. *See PLWJ Realty, Inc. v. Gonzalez*, 285 A.D.2d 370 (1st Dept. 2001) (does not concern family member); *Park Holding Co. v. Rosen*, 241 A.D.2d 304 (1st Dept. 1997) (sets forth no facts regarding family member). While the relevant HPD rules provide that "[t]enant/cooperator and Family Members of tenant/cooperator(s) . . . shall have the right to occupy the tenant/cooperator(s)' apartment[,]" (Agreement, sec. 210) it prohibits unapproved sublets, providing that "[n]o tenant/cooperator shall have the right to sublet without prior written

[*.5]

approval of the Housing Company and of HPD. No tenant/cooperator shall have the right to assign." *Id.*, sec. 209 (a). Thus, the HPD was not precluded from finding that Mr. Bruskin illegally sublet his apartment, even were such sublet made to a family member, where there was no prior written approval.

Similarly, the fourth cause of action must be denied. Petitioner argues that the HPD certificate of eviction must be vacated since MRH "failed to name and serve necessary parties to thwart petitioner's family members from seeking succession rights." Presumably, petitioner refers to his wife and sister, both of whom he claims were residents of the apartment. However, petitioner has no standing to assert these claims. Before a party can establish standing to challenge a determination, "a petitioner must show that it would suffer direct harm, injury that is in some way different from that of the public at large[.]" *Lee v. New York City Dep't of Hous. Preservation & Dev.*, 212 A.D.2d 453, 454 (1st Dept. 1995). Here, petitioner's wife and sister are the parties who would, arguably, be aggrieved by their lack of inclusion in the underlying HPD proceeding. However, neither of those parties have moved for any relief in the instant proceeding. Thus, petitioner may not now assert these claims on their behalf.

Moreover, pursuant to HPD provisions, petitioner's family members would be unable to apply for succession rights while the apartment served as petitioner's primary residence, as he argues it does. Finally, the underlying HPD hearing named additional parties "John and Jane Doe," and petitioner's counsel at that time noted that he represented all parties. No other party asserted any rights in that proceeding.

B. *Petitioner's Second Cause of Action*

This cause of action involves an issue as to whether the HPD determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction of law is, on the entire record, supported by substantial evidence (CPLR 7803(4)).

[* 6]

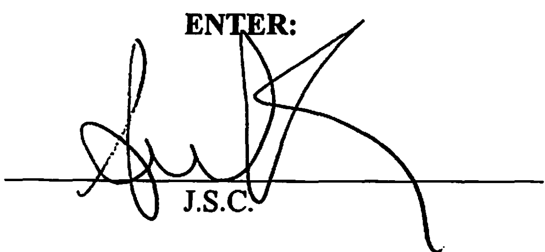
Specifically, petitioner claims that MRH failed to establish, by its proof, that petitioner did not use the apartment as his primary residence. Since the petition questions the interpretation of evidence at the administrative hearing, the matter must be transferred to the Appellate Division, First Department. *See Hammerl v. Mavis*, 41 A.D.2d 724 (1st Dept. 1973) citing CPLR 7804(g). Accordingly, it is

ORDERED and ADJUDGED that the petition's first, third and fourth causes of action are denied and those causes of action are dismissed; and it is further

ORDERED that petitioner's second cause of action, seeking to vacate and annul the determination by respondent HPD is respectfully transferred to the Appellate Division, First Department, for disposition, pursuant to CPLR 7804(g); and it is further

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

ENTER:



J.S.C.

Date: July 25, 2006
New York, New York

FILED
AUG 0 8 2006
NEW YORK
COUNTY CLERK'S OFFICE