

**Matter of Cutler v Division of Hous. &  
Community Renewal**

2007 NY Slip Op 30169(U)

March 8, 2007

Supreme Court, New York County

Docket Number: 0114087

Judge: Karen S. Smith

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY  
HON. KAREN SMITH

PART 62

Index Number : 114087/2006

Justice

CUTLER, WILLIAM

vs  
N.Y.S.D.C.R.

Sequence Number : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE 12/18/06  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ his motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion Article 78 petition is decided in accordance with the attached decision, order and judgment.

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 41B).

Dated: 3/8/07

  
HON. KAREN SMITH J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 24

-----X

In the Matter of the Application of

WILLIAM CUTLER,

Petitioner,

For an Order pursuant to Article 78  
of the Civil Practice Law and Rules

Index No.  
106503/04

-against-

DIVISION OF HOUSING AND COMMUNITY  
RENEWAL,

Respondent.

-----X

**UNFILED JUDGMENT**  
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and notice of entry cannot be served based hereon. To  
obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
418).-----X

KAREN S. SMITH, J:

In this Article 78 proceeding, petitioner William  
Cutler moves for a judgment reversing and annulling an Order and  
Opinion (the Order) issued by respondent New York State Division  
of Housing and Community Renewal (DHCR) dated June 2, 2006, which  
upheld the denial of petitioner's request for a lease in his own  
name, as successor to the shareholder of record, Dorothy Cutler  
(the Tenant) to apartment 19A (the Apartment), located in the  
housing development known as Southbridge Towers, Inc., 100  
Beckman Street, New York, New York.

Southbridge Towers, Inc. (the Housing Company), which  
holds title to Southbridge Towers, is a state-supervised,  
limited-profit housing company organized under Articles II and IV

(also known as the "Mitchell-Lama Law") of the Private Housing Finance Law (PHFL).

On March 29, 2004, the Tenant died. On April 13, 2004, the petitioner executed an Occupants' Annual Affidavit of Family Income (the Affidavit) for calendar year 2003, listing the Tenant and himself, as her son, respectively, as the current residents of the Apartment, without noting that the Tenant was deceased. On April 29, 2005, the petitioner executed an Affidavit for calendar year 2004, listing the Tenant, himself, as her son, and Maira Nieto-Cutler, as her son's wife (daughter-in-law), respectively, as the current residents of the Apartment, again without noting that the Tenant was deceased.

By letter dated December 21, 2005, the Housing Company notified petitioner and his wife that it had rejected their claim for succession rights to the subject apartment pursuant to DHCR's Succession Regulations (9 NYCRR 1727-8, et seq.), based on the following factors:

- (1) Dorothy Cutler was the last remaining shareholder for the Apartment;
- (2) that Dorothy Cutler died on March 29, 2004;
- (3) that Dorothy Cutler was the only person listed on the income affidavits submitted for the calendar year 2003. No one else is known to occupy and/or reside in the subject premises with the tenant from at

least (sic) 2002 on;

(4) No one has submitted any proof or documentation to substantiate a family relationship or an emotional and financial interdependence with the former shareholder of record;

(5) No one has submitted any proof or documentation to substantiate a co-occupancy for the two years prior to the shareholder's death on March 29, 2004.

(DHCR's records, A-1, Letter to petitioner and his wife from the Housing Company dated 12/21/05 [the Denial Letter]). Petitioner sent a letter to DHCR, notifying it of his intention to appeal the Housing Company's rejection of his claim for succession rights. DHCR advised the Housing Company of petitioner's appeal, and requested that the Housing Company respond to it with documentation. The Housing Company confirmed that petitioner was denied succession rights, restating the requirements of DHCR's Succession Regulations and the basis for the Housing Company's rejection of the petitioner's claim for succession rights as set forth in the Denial Letter. The Housing Company further stated that, as petitioner was under 62 years of age and had not submitted documentation to establish that he was a disabled person within the meaning of 9 NYCRR 1727-8.2 (a) (4), he was subject to the two-year co-residency requirement, and that he had not submitted sufficient documentation to substantiate his claim

that he had co-occupied the Apartment with the Tenant as his primary residence for two years prior to her death on March 29, 2004 or of his family relationship with the Tenant. The Housing Company further noted that the Tenant had not listed the petitioner as a resident of the Apartment in her Affidavit for calendar year 2002, thereby ipso facto disqualifying him from obtaining succession rights, and that petitioner, by listing the deceased Tenant as a resident of the Apartment in his Affidavits for calendar years 2003 and 2004, had willfully misrepresented and concealed material facts which would have affected his eligibility for continued occupancy, thereby rendering himself liable to eviction pursuant to 9 NYCRR 1727-5.3 (a) (1) (DHCR's papers, A-7, A-9, the Housing Company's Affirmation in Opposition dated 2/7/06). The Housing Company annexed documentation, consisting of, inter alia: (1) the Denial Letter; (2) the Agreement of Lease executed for the Apartment on July 15, 1981, by the Tenant; (3) a Social Security Death Index Search Results reflecting the Tenant's death on March 29, 2004; (4) the Affidavits for calendar years 2002, 2003 and 2004; and (5) petitioner's January 9, 2006 letter to the Housing Company, enclosing a copy of his January 9, 2006 appeal to DHCR (id.).

DHCR initially requested that the Housing Company

forward the Affidavits for the Apartment for calendar years 2001 through 2004, and then requested those for calendar years 2002, 2001, and 2002 (DHCR's papers, A-11, Correspondence by DHCR to the Housing Company dated 1/19/06, 2/17/06, respectively). The Housing Company provided the Affidavit for calendar year 2002 for the Apartment, noting that, although its date of execution was illegible, the date of receipt by the Housing Company, namely March 31, 2003, was legible (DHCR's papers, A-12 & A-13, correspondence from the Housing Company to DHCR dated 3/3/06). The Housing Company also stated that the only notification in the Housing Company's file that the petitioner had taken occupancy of the Apartment was his January 9, 2006 letter to it (id.).

After another request by DHCR for legible copies of the Affidavits for calendar years 2000 and 2001 (A-14), the Housing Company stated that although it performed an extensive search, it was unable to locate copies of those affidavits in its files (DHCR's papers, A-15, correspondence from the Housing Company to DHCR dated 5/2/06). The Housing Company later advised that, since the Tenant had died on March 29, 2004, the relevant affidavits were those for calendar years 2002 and 2003, and that, as the Tenant had not listed the petitioner as a resident in her Affidavit for calendar year 2002, the petitioner was not entitled

to succession rights (DHCR's papers, A-17, correspondence from the Housing Company to DHCR dated 5/16/06).

On June 2, 2006, DHCR issued the Order, upholding the Housing Company's denial of the petitioner's request to have the proprietary shares and occupancy agreement transferred to him, since petitioner's name was not on the Apartment's Affidavits for the two-year period prior to the Tenant's death (DHCR's papers, B-1, the Order dated 6/2/06).

Petitioner now seeks to have the Order annulled and reversed, claiming that it was arbitrary and capricious, and violated his due process rights.

Judicial review in an Article 78 proceeding is limited to a determination of whether the administrative agency's determination had a rational basis, or was arbitrary and capricious (see Matter of HLV Associates v Aponte, 223 AD2d 362 [1st Dept 1996]). Courts are not permitted to substitute their judgment for that of the administrative agency where said decision is rationally based on the record (see Matter of Royal Realty Co. v New York State Div. of Hous. and Community Renewal, 161 AD2d 404 [1st Dept 1990]).

DHCR's regulations (9 NYCRR 1727-8, et seq.) govern succession rights to apartments in state-supervised limited-

profit housing developments, such as the Housing Company. The right to request succession arises when the tenant of record of an apartment dies or otherwise permanently vacates his or her apartment (9 NYCRR 1727-8.3 [a]). In the case of the death of the tenant of record of an apartment, family members, as defined by 9 NYCRR 1727-8 (a) (2), may apply pursuant to 9 NYCRR 1727-8.4 (a), to a housing company for a lease in their own name of that apartment, provided that they resided therein with the tenant as their primary residence, as defined in 9 NYCRR 1727-8.2 (a) (5) and 9 NYCRR 1727-8.3 (a).

9 NYCRR 1727-8.3 (a), provides, in pertinent part, as follows:

if the tenant has permanently vacated the housing accommodation, any member of such tenant's family, as defined in section 1727-8.2 (a) (2) of this Subpart, who has resided with the tenant in the housing accommodation as a primary residence for a period of not less than two years, has been listed on the income affidavit and/or on the Notice of Change to Tenant's Family as required under section 1727-3.6 of this Part, or where such person is a senior citizen or a disabled person as defined in section 1727-8.2 (a) (3) and (4) of this Subpart, respectively, for a period of not less than one year, immediately prior to the permanent vacating of the housing accommodation by the tenant, or from the inception of the tenancy or commencement of the relationship, if for less than such periods, may request to be named as a tenant

on the lease and on the stock certificate [emphasis in original].

The regulations define "family member" to include a tenant-of-record's son (9 NYCRR 1727-8.2 [a] [2] [i]). Additionally, the tenant-of-record must advise the housing company "in writing within [ninety] calendar days of any additions to ... the tenant's family who reside in the housing accommodation ... ." Further, the tenant-of-record must reflect "such changes ... in all subsequent affidavits of income" that the tenant annually submits (9 NYCRR 1727-3.6; 9 NYCRR 1727-2.4).

Primary residence is defined as "[t]he housing accommodation in which the person actually resides and maintains a permanent and continuous physical presence" (9 NYCRR 1727-8.2 [5]). This regulation further provides that:

[p]roof of such residency shall be the listing of such person on the annual income affidavit and/or the filing of the Notice of Change to Tenant's Family as set forth in section 1727-3.6 of this Part, together with other evidence, such as certified copies of tax returns, voting records, motor vehicle registration and driver's license, school registration, bank accounts, employment records, insurance policies, and/or other pertinent documentation or facts

(9 NYCRR 1727-8.2 [a] [5]).

Thus, the regulations specify three requirements to

obtain succession rights to an apartment in a Mitchell-Lama housing project. Succession claimants must: (1) be the vacated tenant-of-record's family members; (2) have resided with the tenant in the subject apartment as their primary residence for the required period; and (3) have had their names listed on a Notice of Change to Tenant's Family and/or the tenant's Affidavit(s) for that same period (9 NYCRR 1727-8.3 [a]). The applicable qualification period is two calendar years before the date of the Tenant's death (9 NYCRR 1727-8.3 [a]).

A review of the record discloses that DHCR's determination to deny petitioner succession rights to the Apartment was rational. Based on the regulations, DHCR held that petitioner was required to prove that he met all three requirements to be eligible to obtain succession rights to the Apartment. With respect to the first requirement, it found that petitioner's appeal did not state a basis for his challenge, and, while petitioner stated in the Affidavits 2003 and 2004, submitted to the Housing Company, that he was the Tenant's son, he did not provide any evidence in support thereof.

DHCR further found that, at the time of his application, petitioner was not a senior citizen, nor claimed to be a disabled person, and accordingly, the applicable

qualification period to satisfy the second and third requirements was two calendar years before the Tenant's death, pursuant to 9 NYCRR 1727-8.3 (a). Thus, DHCR held that petitioner was required to demonstrate, inter alia, that, for the two-year period before the Tenant's death on March 29, 2004, i.e., beginning March 29, 2002, the Tenant listed petitioner's name with hers on the Affidavit that she executed before the beginning of the two-year period (9 NYCRR 1727-2.4), and that their names appeared together on the subsequent Affidavits until the Tenant's death (9 NYCRR 1727-8.3 [a]).

DHCR noted that, while the Housing Company failed to produce copies of the Affidavits executed by the Tenant for 2000 and 2001, its own records revealed that the Housing Company had previously filed with DHCR the Affidavits executed by the Tenant for 2000, 2001 and 2002. DHCR relied on its own records in finding that the Affidavits for 2000 and 2001 contained petitioner's name, but that the Affidavit for 2002 did not. DHCR thus rationally held that since petitioner's name did not appear in the Affidavits covering the entire qualification period, he could not obtain succession rights to the Apartment.

Petitioner argues that, since the two-year qualification period commenced March 29, 2002, the only relevant

Affidavits should have been those filed for calendar years 2002, 2003 and 2004, as opposed to those relied on by DHCR for 2000, 2001 and 2002. DHCR rationally determined that the relevant Affidavits were those executed by the Tenant for the two-year period most recently antedating her death, and not the Affidavits for 2003 and 2004, which were executed by petitioner, and failed to disclose the Tenant's death.

Therefore, the record sufficiently supports a rational basis for DHCR's determination upholding the denial of petitioner's request for succession rights to the Apartment. Contrary to petitioner's contentions, DHCR's determination is neither capricious nor arbitrary (see Matter of Chelrae Estates, Inc. v State Div. of Hous. & Community Renewal, 225 AD2d 387 [1st Dept 1996]).

Further, it is well settled that disposition of the proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered (Matter of West Village Associates v Division of Hous. & Community Renewal, 277 AD2d 111, 113 [1st Dept 2000], quoting Fanelli v New York City Conciliation and Appeals Board, 90 AD2d 756, 757 [1st Dept 1982], affd 58 NY2d 952 [1983]). Thus, the documentation submitted by petitioner herein in support of his purported

relationship with the Tenant, and his claimed primary residence in the Apartment, which was not previously provided to DHCR, may not be considered by this court (*id.*). Moreover, such untimely submissions would not affect petitioner's ineligibility for succession rights to the Apartment in light of the absence of his name on the Tenant's Affidavit of 2002, a necessary requirement for succession rights, pursuant to 9 NYCRR 1727-8.3 [a]).

Additionally, petitioner's argues that he was denied due process by DHCR, since, as a pro se litigant, he was unaware of DHCR's administrative appeal procedures, and his need to specify the basis for his appeal; and that DHCR failed to notify him to submit a reply to the Housing Company's response to his appeal and to provide information and/or documentation to support his appeal.

A fundamental requirement of due process in a proceeding "which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise the interested parties of the pendency of the action and afford them an opportunity to present their objections" (Matter of Alvarado v State of New York, Dept. Of State, Div. of State Athletic Commn., 110 AD2d 583, 584 [1st Dept 1985]).

A review of DHCR's records discloses that various

written communications were forwarded to petitioner by DHCR, including a letter acknowledging receipt of petitioner's appeal, which stated, in pertinent part, as follows:

when the Division receives the housing company's response, the Office of Legal Affairs will send you a copy. After that, you will have fifteen days from the date of that notice to reply. That reply should provide any documentation and/or evidence that supports this appeal. The Division may request addition [sic] information and/or documentation ...

(DHCR's papers, A-4, correspondence from DHCR to petitioner dated 1/12/06). This court notes that petitioner does not deny receipt of this letter. Additionally, there is correspondence from DHCR to petitioner, subsequent to its receipt of the Housing Company's response to petitioner's appeal, wherein it stated, in pertinent part, as follows:

please submit your reply to the housing company's response to the above address within fifteen (15) days after the date of this letter. If you no longer want to pursue this matter, please notify the Office of Legal Affairs in writing at the above address. If you reply to the housing company's answer, that reply should provide any documentation and/or evidence that supports your appeal. The Division may request additional information and/or documentation

(DHCR's papers, A-8, correspondence from DHCR to petitioner dated

2/10/06). Although petitioner denies receipt of this letter, he acknowledges receipt of the Housing Company's response to his appeal, wherein the Housing Company set forth, inter alia, the basis for its rejection, including petitioner's failure to submit sufficient documentation to substantiate his succession claim (DHCR's papers, A-6, the Housing Company's Affirmation in Opposition dated 2/7/06). Further, a review of the record discloses additional correspondence sent to petitioner by the Housing Company (DHCR's papers, A-12, A-13 & A-15, correspondence from the Housing Company to DHCR and cc: to petitioner dated 3/3/06; 5/2/06), and DHCR (DHCR's papers, A-11 & A-14, correspondence from DHCR to the Housing Company and cc: to petitioner dated 2/17/06; 3/9/06), which sufficiently apprised petitioner of the ongoing communications and evidence that would be relied on by DHCR regarding his appeal, which he could have disputed with documentary evidence. Thus, petitioner's allegations of ignorance of the processing of his administrative appeal, and of the opportunity to proffer documentary evidence in support of his succession claim is lacking in merit.

Accordingly, it is

ADJUDGED that the petition is denied, and the proceeding is dismissed, with costs and disbursements to

respondent.

The foregoing constitutes the decision and judgment of  
this court.

Dated: March 8, 2007

  
J. S. C.

**HON. KAREN SMITH**

**UNFILED JUDGMENT**  
his judgment has not been entered by the County Clerk  
and notice of entry cannot be served based hereon. To  
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