

Matter of Lumsby v Donovan

2007 NY Slip Op 31225(U)

May 10, 2007

Supreme Court, New York County

Docket Number: 0102196/2007

Judge: Marcy L. Kahn

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

PRESENT: KATHY MELINDY LUNA
Justice

PART 301C

Tom Nelson Lunsby
- v -
NYC DHPB

INDEX NO. 102196107
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

PAPERS NUMBERED
<u>1</u>
<u>2, 3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

Dated: MAY 10 2007

Marcel
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 50-K

-----X
In the Matter of the Application of :

JEANNE NELSON LUMSBY and COLLETTE LUMSBY, :
Petitioners, :

For a Judgment Pursuant to Article 78 of :
the Civil Practice Law And Rules. :

DECISION AND ORDER
Index No. 102196/07

-against- :

SHAUN DONOVAN AS COMMISSIONER, AND THE :
NEW YORK CITY DEPARTMENT OF HOUSING :
PRESERVATION AND DEVELOPMENT and 158 ST. :
RIVERSIDE DRIVE HOUSING CO., INC., :
Respondents. :

FILED
MAY 17 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
MARCY L. KAHN, J.S.C.

Jean Nelson Lumsby and Collette Lumsby ("Petitioners") seek an order pursuant to Article 78 of the Civil Practice Law and Rules vacating and annulling a determination and certificate of eviction issued on November 27, 2006 (the "HPD determination") by Administrative Hearing Officer Frances Lippa of the New York City Department of Housing Preservation and Development ("HPD") and staying its enforcement pending the outcome of the proceedings. The decision terminated Petitioners' leasehold interest at 156-20 Riverside Drive West, Apartment #12L, New York, New York 10032.

On February 15, 2007, after a conference by the court with counsel for Petitioners and counsel for Respondent 158 St. Riverside Drive Housing Co., Inc. (the "Respondent

Cooperative"), this court issued an order to show cause and temporary restraining order staying Respondent Cooperative's prosecution of eviction proceedings in the matter and directing Petitioners to continue to pay monthly use and occupancy charges pending the outcome of the instant proceeding.

Petitioners now seek a judgment pursuant to CPLR 7804(g) directing that the instant proceeding be transferred to the Appellate Division, First Department for disposition, alleging that the matter involves solely the issue of whether the HPD determination, made as the 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]).

Respondent Cooperative, by answer filed April 9, 2007, asserts that the HPD determination to issue the certificate of eviction was rational, reasonable and based upon substantial evidence, and that the determination conforms in all respects with statutes, laws and regulations. Nonetheless, Respondent Cooperative agrees with Petitioners that the matter must be transferred to the Appellate Division.

Respondents Shaun Donovan, as Commissioner, and HPD (collectively, the "City Respondents"), by answer filed April 13, 2007, similarly argue that the HPD determination, which concluded that petitioner Jean Nelson Lumsby did not occupy the

* 4]

subject apartment as her primary residence and that Collette Lumsby was not entitled to succession rights to the apartment, was rational and reasonable, and was supported by substantial evidence. They urge dismissal of the petition in its entirety. The City Respondents concur, however, that no other issue exists for this court's determination, and that the matter must be transferred to the Appellate Division for disposition pursuant to CPLR §7804(g). (See Mason v. Department of Buildings, 307 AD2d 94 [1st Dept. 2003]).


This court has reviewed the petition and concurs with all parties that the instant proceeding does not involve any other issue which could terminate the proceeding, such as lack of jurisdiction, statute of limitations or res judicata (see CPLR §7804[g]). The proceeding involves solely the issue of whether the determination of the Administrative Hearing Officer was supported by substantial evidence. (CPLR 7803[4]). Accordingly, it is hereby

ORDERED, that the application by Petitioner seeking to vacate and annul the HPD determination is respectfully transferred to the Appellate Division, First Department for disposition pursuant to CPLR §7804(g); and it is further

ORDERED, that 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.

The foregoing constitutes the decision and order of this court.

ENTER:



Marcy L. Kahn, J.S.C.

DATED: New York, New York
May 10, 2007

FILED
MAY 17 2007
NEW YORK
COUNTY CLERK'S OFFICE