

**Brown v New York State Div. of Hous. &
Community Renewal**

2008 NY Slip Op 30027(U)

January 4, 2008

Supreme Court, New York County

Docket Number: 0105463/2007

Judge: Nicholas Figueroa

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

PRESENT: NICHOLAS FIGUEROA

PART 46

Index Number : 105643/2007

BROWN, JARED

INDEX NO. 105643/07

vs

HOUSING & COMMUNITY RENEWAL

MOTION DATE 9/11/07

Sequence Number : 001

MOTION SEQ. NO. 001

ARTICLE 78

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

See accompanying Decision, Order and Judgement.

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 1418).

Dated: January 4, 2008

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE#

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

Index No. 105643/07

JARED BROWN,

Petitioner,

**DECISION, ORDER
AND JUDGMENT**

- against -

N.Y.S. DIVISION OF HOUSING AND
COMMUNITY RENEWAL, and
SOUTHBRIDGE TOWERS, INC.,

Respondents.

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 141B).

Nicholas Figueroa, J.:

Petitioner seeks a judgment reversing and annulling respondent's final determination denying him a lateral transfer from his current two bedroom apartment at the housing development known as Southbridge Towers (Southbridge) to another two bedroom apartment in that development. Respondent New York State Division of Housing and Community Renewal cross moves to dismiss the petition.

Southbridge is a limited-profit housing development organized under Article II Private Housing Finance Law. Such developments are commonly known as Mitchell-Lama projects. Tenants in Mitchell-Lama projects who are low and middle income persons, pay below-market maintenance charges (see PHFL §31(2)(1)). In return, the projects receive a real property tax exemption and subject themselves to respondent's supervision (PHFL §11; §§22, 23; §13.13 and 28).

PHFL §32(3) gives the Division specific authority to effectuate the purposes of the statute. The Division's regulation 9 NYCRR §1727-2.8 governs occupancy standards. In order to occupy

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a two-bedroom apartment, a family must consist of three or four persons.

9 NYCRR §1727-1.3(a)(2) authorizes the intra-project transfer, also known as a lateral transfer, that petitioner applied for. A person may be entitled to a lateral transfer if the tenant is occupying the current apartment in accordance with respondents regulations, and whose family composition is in accordance with respondent's minimum occupancy standards (9 NYCRR §1727-1.3(a)(2)(ii)). All transfers are subject to the Division's approval (9 NYCRR §1727-1.3(a)(2)(iv)).

Petitioner first moved into a two-bedroom apartment with his father in February, 1975. In June, 1977, petitioner and his father moved into petitioner's present two-bedroom apartment; however, in June, 1993, Southbridge transferred the apartment shares to petitioner and his wife, who is not a party to this proceeding.

On July 2, 2003 petitioner sent Southbridge a letter saying his April, 2001 application for a lateral transfer had been lost or misplaced. He requested a letter as a new lateral transfer application. Petitioner stated that he wanted to transfer to an apartment in development building number 6 or 8, facing south or east above the sixteenth floor, or in building 2, facing south or east above the nineteenth floor.

Petitioner subsequently submitted a formal transfer application that Southbridge Towers disapproved on July 13, 2006. Southbridge rejected the application on the ground that based on petitioner's income affidavit, the number of persons in his household was below the minimum required for the apartment size petitioner requested.

Petitioner appealed Southbridge's denial to the Division by letters dated July 18 and 24, 2006. In his July 24 letter, petitioner stated that he had always occupied a two bedroom apartment without any objection from Southbridge. He stated that as there has been no change in his family

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size, respondent could not rely on 9 NYCRR 1727-1.3(a)(1) and that as his family composition had not changed, the disallowance under 9 NYCRR 1727-1.3(a)(2)(iii) was “equally misplaced”.

Southbridge responded to petitioner’s appeal in a September 12, 2006 letter to respondent. It stated that petitioner was removed from a two-bedroom waiting list because “his household composition (husband and wife only) makes him ineligible for a two bedroom lateral transfer. Please refer to Section 2727-1.3 paragraph 2(ii) wherein it states that in order to transfer to a same size apartment, the tenant’s family composition must be in accordance with the division’s [respondent’s] occupancy standards.”

On October 16, 2006, petitioner sent a letter to the Division challenging Southbridge’s appeal. Petitioner re-iterated that his family size had always been two persons and added that after his father died, his wife’s name was placed on the stock certificate. Petitioner also added that “While residing in our present apartment, we have found the noise and pollution from the Brooklyn Bridge to be intolerable and deleterious to my health.” Continuing, he wrote that while the double-paned windows that Southbridge installed had ameliorated the noise factor in the apartment, “nevertheless the balcony is still unusable for any purpose because of the noise, dirt and pollution which only exasperate my sinus condition.” Petitioner concluded by writing “I appeal to DHCR to utilize its discretion herein and to grant an exemption and allow this lateral transfer from one two bedroom apartment to another two bedroom apartment, away from the noise and pollution that is unavoidable as long as we continue to reside six stories above the Brooklyn Bridge.”

The Division denied petitioner’s appeal in its January 2, 2007 order. The Division noted that petitioner alleged that noise and pollution from the Brooklyn Bridge prevented him from enjoying the use of his balcony and that Southbridge had always permitted his two-person family to occupy

the apartment.

The Division found that petitioner's "mere assertion that his ability to use his balcony is adversely affected does not constitute special circumstances under the regulations [9 NYCRR §1727-2.8(b)(3)], which would warrant waiver in this instance of applicable occupancy standards." The Division also rejected petitioner's argument that Southbridge had always allowed him to occupy a two-bedroom apartment. The Division found that Southbridge was not estopped from requiring compliance with the occupancy rule, as "The doctrine of waiver and estoppel requires one party to have relied to his detriment on the word or deed of the other party." Here, if the Housing Company did, in fact, wrongly admit Applicant to a two-bedroom apartment, the Applicant clearly benefitted by gaining the additional room.

In his petition challenging the determination, petitioner argues that he suffers from sleep apnea "which my doctors have confirmed is being aggravated by the noise and pollution incumbent from my apartment being six stories above the Brooklyn Bridge." Petitioner argues that the Division failed to consider evidence he submitted and failed to "conduct a hearing for petitioner [him] to produce witnesses attesting to his condition."

Petitioner also alleges that because his family size has not changed since he first occupied the apartment, the disallowance based on family size is arbitrary and capricious.

The petition includes three documents that were not submitted during the administrative proceedings.

The first document is a letter from Dr. Anna C. Krieger of the NYU Sleep Disorders Center to Dr. Joseph Devito who is apparently petitioner's physician. This document mentions petitioner's sleep apnea, as well as several other medical conditions. The letter makes no mention of petitioner's

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housing conditions or problems caused by traffic on the Brooklyn Bridge.

The second set of documents contains the results of various tests at NYU. This document also makes no reference to petitioner's living conditions.

The third set of documents is a copy of a communication from Peter Roccio to Tim Lani regarding the possible location change of a management firm. Petitioner provides no explanation of why he submitted this exhibit.

The Division cross moves to dismiss the petition for failure to state a claim which relief may be granted (CPLR 3211(a)(7)).

Respondent Southbridge did not file its answer on the return date of this proceeding in the court's Motion Support Part. In a conversation with the court, its attorney stated that the answering papers had been served and filed. At the court's request, the attorney brought the court a copy of the purportedly filed answer and cross claims. The upper right hand of the first page bears the notation CIK 8/20/07 and an illegible signature.

The County Clerk's file does not contain the answer. The court can only assume that the document was never filed and that the notation is not a *bona fide* copy of a court stamp.

Despite Southbridge's failure to file its answer, there is no dispute that it served the answer, as petitioner has replied to it. The court will consider the answer.

Southbridge's answer raises a statute of limitations defense the final determination was made on January 2, 2007 and the proceeding was commenced on June 4, 2007, more than four months after the decision was issued.

Southbridge further denies that the determination was not arbitrary and capricious.

It alleges that petitioner may not assert a waiver and estoppel argument, as estoppel may not

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be invoked as governmental authority.

Southbridge alleges that petitioner was not entitled to an administrative hearing.

Southbridge alleges that petitioner's damages, if any, are the result of the Division's "actions, omissions and culpable conduct." Southbridge cross-claims against the Division, seeking "indemnification and contribution from the co-respondent DHCR since they are [sic] the party which has taken the actions complained herein and made the determination of which form [sic] the cause of action herein."

Petitioner has not met its burden of proving that the administrative determination was arbitrary and capricious. There is no merit to its allegation that respondents are estopped from denying him the lateral transfer. Nor was petitioner entitled to an evidentiary hearing.

The determination was rational and based on the facts in the record; therefore, it was not arbitrary and capricious (see *Matter of Pell v. Board of Education of Union Free District No. 1 of Town of Scarsdale and Mamaroneck*, 34 NY2d 222, 231). A person may seek a lateral transfer if that person's family size is sufficient for the new apartment. Petitioner seeks to transfer to an apartment that is suitable for a family larger than his two-person family. Petitioner qualifies for a one-bedroom apartment; not a two bedroom unit. The Division's denial of petitioner's application is consistent with the applicable regulation; therefore, it is not contrary to law (9 NYCRR §1727-1.3(a)(2)(ii)). The Mitchell-Lama apartments are limited in number. This resource cannot be squandered by allowing a family to occupy an apartment that will accommodate a family larger than theirs.

The fact that petitioner is now occupying an unsuitably large apartment does not estop respondents from denying his transfer request. There is no estoppel against a governmental agency

(see *Matter of Daleview Nursing Home v. Axelrod*, 62 NY2d 30, 33). Nor has petitioner detrimentally relied on any action by respondents (see *Holm v. C.M.P. Sheet Metal, Inc.*, 89 AD2d 229, 234). Rather petitioner has gained a benefit by occupying an unmerited larger apartment. He may not compound this unfair situation by seeking to compel respondent to ignore its regulations governing occupancy and lateral transfers (see *F.A.S.A. Construction Corporation v. Village of Monroe*, 14 AD3d 532, 534).

Petitioner's assertion that the Division should have conducted an evidentiary hearing is without merit. Petitioner has not demonstrated that there is a statute or regulation providing for a hearing. Nor does he have a protected property right to a lateral transfer that would require a hearing to challenge its denial (see *Matter of Cadman Plaza North v. New York City Department of Housing Preservation and Development*, 290 AD2d 344, 345). Moreover, petitioner had the opportunity of submitting evidence that he believed supported his claim. He has not demonstrated that he was deprived of the opportunity to submit any documentation or make any written arguments.

The court will not consider the medical reports petitioner attaches to his petition as this material is not part of the administrative record (see *Matter of Featherstone v. Franco*, 95 NY2d 550).

The medical reports are unsworn documents and, in any event, do not support petitioner's assertion that residing in his current apartment is detrimental to his health. The third document petitioner attaches to his papers has no bearing on this case and its inclusion in these papers is inexcusable at best.

Although Southbridge correctly argues that the petition is time-barred, the final determination petitioner challenges is the Division's determination. However, as the latter respondent has waived

a statute of limitations defense, the issue is not before the court.

Southbridge's cross claim is moot, given the court's determination. In any event, it is meritless.

Accordingly, it is

ADJUDGED that the petition is denied and the proceeding dismissed, with costs, and it is further

ORDERED that the respondents shall have one bill of costs.

This constitutes the decision, judgment, and order of the court.

Dated: January 4, 2008

ENTER



J.S.C.

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