

**Matter of Hay Ling Chan v Mutual Redevelopment
Houses, Inc.**

2008 NY Slip Op 32270(U)

August 12, 2008

Supreme Court, New York County

Docket Number: 0104145/2008

Judge: Shirley Werner Kornreich

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SCANNED ON 8/14/2008
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____
Justice

PART 54

Chen, H

INDEX NO.

104145/08

MOTION DATE

5/29/08

MOTION SEQ. NO.

01

MOTION CAL. NO.

- v -

Mutual

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

1
2, 3, 4, 5

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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).

~~MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM AND ORDER.~~

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM AND ORDER.

HON. SHIRLEY WERNER KORNREICH

Dated: 8/12/08

[Signature]
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

-----X
IN THE MATTER OF THE APPLICATION OF HAY LING
CHAN, a/k/a, H. REBECCA CHAN,

Petitioner,

Index No.: 104145/08

DECISION & ORDER

-against-

MUTUAL REDEVELOPMENT HOUSES, INC. &
N.Y.C. DEPART. OF HOUSING PRESERVATION &
DEVELOPMENT,

Respondents.

-----X
KORNREICH, SHIRLEY WERNER, J.:

Petitioner Hay Ling Chan (Hay Ling) brings this Article 78 proceeding for a judgment annulling a January 2, 2008 decision issued by respondent New York City Department of Housing Preservation and Development (HPD) after a hearing before Hearing Officer Frances Lippa. That decision found that Hay Ling was not entitled to succession under the rights of her father, Kai Kuen Chen (the Father), to 321 West 24th Street, Apartment 5J, New York, NY 10011 (the Apartment). Respondent Mutual Redevelopment Houses, Inc. (Mutual) controls the Apartment as a Private Housing Finance Law Article V housing cooperative corporation. A holdover proceeding is pending, but stayed, in Housing Court.

Factual Background

Petitioner claims to have moved into the Apartment in 1999, living there with her mother, father and two, adult brothers. She further claims that her two brothers moved out in 2000, that she continued to reside in the Apartment with her parents until her father's death on August 20, 2002 and that she lived there after her father's death and after her mother, Chiu Hing Chan (the Mother), moved out in 2006. Petitioner has included a sworn affidavit from her

Mother, alleging that the Mother did not move out until 2006. This affidavit was not introduced at the administrative hearing. Petitioner submits the relevant income affidavits for the Apartment. The initial income affidavit, dated December 6, 1999, lists the Mother, the Father and Hay Ling's two brothers, Robert and Michael Chan, aged 25 and 22 years old, as part of the household. It does not list Hay Ling. The second, March 30, 2000 income affidavit lists the same four people. The third income affidavit, dated March 21, 2001, lists the Mother, the Father and only Robert Chan. The April 27, 2002 and April 11, 2003, income affidavits, however, list the Mother, the Father and petitioner.

Mutual's original request for a certificate of eviction based on the Mother's non-primary residency, was converted to a succession rights matter. The Hearing Officer found the Mother and the Father to be original tenants as of December 3, 1999. He also found that the City Agreement (the Agreement) between Mutual and HPD governed the relationship for the property. Noting that petitioner claimed succession rights under her father, he observed that the Agreement required petitioner to prove co-residency with her father for two years prior to his death on August 20, 2002, and to prove that she appeared on two income affidavits before he died. Finding the relevant period to be August 20, 2000 to August 20, 2002, the Hearing Officer found that even though petitioner claimed she resided in the Apartment since December 1999, she was not listed on the December 1999, March 2000, or March 2001 income affidavits. She appeared on the income affidavits for the first time in April 2002, three months prior to her father's death. As a result, the Hearing Officer denied petitioner's request for succession rights.¹

¹ The Hearing Officer stated that he believed the Mother had not resided in the apartment during the period following the Father's death and "[t]he household composition on the income affidavits misled the housing company for many years into believing that [petitioner] resided in the apartment with [her mother]."

Mutual supplies the entire hearing record which includes: the occupancy agreement; §§ 209, 210 of the Agreement between it and New York City; the Chan's income affidavits from 1998 to 2005; a December 6, 2002 letter from the Mother advising Mutual of the death of the Father and requesting petitioner's addition to the occupancy agreement; the Father's death certificate; a December 27, 2002 letter from Mutual to petitioner requesting documents to prove her primary residence to the point necessary for succession; petitioner's January 22, 2003 response to that document request; an October 24, 2006 letter from Mutual requesting documentary proof that the Apartment still was the Mother's primarily residence; a November 27, 2006 repetition of that request; November 28, 2006 correspondence from petitioner's lawyer, Charles Small, requesting a copy of the occupancy agreement and the Agreement; a December 14, 2006 letter from Charles Small to Mutual requesting a grant of succession rights to petitioner; a Westlaw person search for the Mother; the January 10, 2007 Ten Day Notice of Intent to Terminate Tenancy; a notice for the hearing; and a Westlaw person search for petitioner.

Section 209(c) of the 1987 Amendatory Agreement between Mutual and New York City requires, as a condition of eligibility for occupancy and for continued occupancy of the subject apartment complex, 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." Section 210 of the 1995 Amendatory Agreement defines family members as parents, spouses, children, adopted children, legal wards, and under certain conditions, domestic partners. A child of a tenant/cooperator who has reached his or her majority, has a right to succeed to the Apartment if he or she has:

resided in the apartment with the tenant/cooperator for a period of at least two (2) years and has appeared on the income affidavit for at least the two (2) consecutive

annual reporting periods immediately prior to the termination, other than for cause, of the occupancy agreement of the prior tenant/cooperator(s) and the apartment was and continues to be his or her primary residence. *Id.*

Section 211 of the 1987 Agreement allows for a hearing before any proposed eviction and requires written permission from HPD to commence an eviction process.

The occupancy agreement lists the requirements of the lease and indicates that the lease is subject to the provisions of the Agreement. Mutual's "Ten Day Notice of Intent to Terminate Tenancy" for cause to the Chan family contends that the Apartment was no longer the primary residence of the tenant/cooperators.

The Westlaw person search for the mother found seven different addresses listed from 2000 to 2001, in addition to the Apartment. The Westlaw person search for petitioner found three different addresses in 2001, in addition to the Apartment.

Conclusions of Law

A. Parties' Arguments

Petitioner argues that waiver and equitable estoppel warrant an annulment of the administrative hearing decision granting Mutual the right to evict. Respondents argue that the administrative decision was reasonable and should be upheld. Furthermore, they contend that petitioner should not be able to claim any succession rights under the Mother, both because she never so claimed at the hearing and because the mother's tenancy was terminated for cause.

B. Discussion

An Article 78 proceeding determines whether an administrative decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR §7803. In judging whether a decision was arbitrary, capricious or

an abuse of discretion, the court's inquiry is limited to deciding whether a rational basis existed for the decision, without delving into the factual determinations. *Heinz v. Brown*, 80 N.Y.2d 998, 1001 (1992). The court can only review the reasons invoked by the administrative agency. *Scherbyn v. Wayne-Finger Lakes Bd. of Cooperation. Educ. Servs.*, 77 N.Y.2d 753, 758 (1991). Exceptions to the general rule that the court is limited to the factual record before the administrative agency apply only to facts arising before the agency determination that could not have reasonably been brought in that forum or that were rejected at that level. *In Re Rizzo v. New York State Division of Housing and Community Renewal*, 6 NY3d 104, 110-111 (2005); 9 NYCRR § 2527.8. An agency determination must be affirmed unless it "shocks the judicial conscience and, therefore, constitutes an abuse of discretion as a matter of law." *Featherstone v. Franco*, 95 N.Y.2d 550, 554 (2000).

Here, the Hearing Officer's decision does not shock the judicial conscience. Petitioner's right to succeed under the Father's tenancy is governed by the Agreement, which requires her to be on two prior income affidavits before the Father's death. Petitioner failed to meet this requirement. *See Matter of Greichel v. New York State Div. of Hous. & Community Renewal*, 39 A.D.3d 421 (1st Dept. 2007). Equitable estoppel and waiver, which cannot be invoked against a governmental agency to prevent it from discharging its statutory duties, are to no avail here. *See Matter of Schorr v. N.Y.C. Dept. of Hous. Preserv. & Dev.*, 10 N.Y.3d 776, 779 (2008). Nor can petitioner seek succession, at this juncture, under the Mother's rights. Petitioner sought no such rights at the administrative level, and the affidavit from the Mother was not submitted below. Regardless, according to §210 of the Agreement, petitioner's rights to succeed the Mother ended when the Mother's tenancy was terminated for cause, because she did not maintain the Apartment as her primary residence. As a result, petitioner's application must

be denied. Accordingly, it is

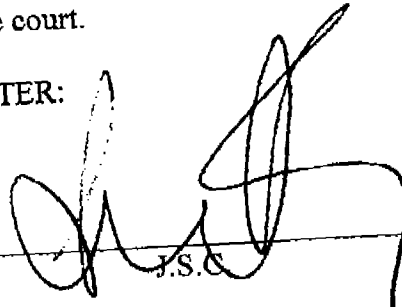
ORDERED and ADJUDGED that the Petition is denied and the proceeding is dismissed;

and it is further

ORDERED that all stays are lifted.

This shall constitute the decision and order of the court.

ENTER:

 ~~8/12/08~~ 8/12/08

J.S.C.

UNFILED JUDGMENT
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 and notice of entry cannot be served based hereon. To
 obtain entry, natural or authorized representative must
 appear in person at the Judgment Clerk's Desk (Room
 141B).