

**Matter of Girigorie v Department of Hous.
Preserv. & Dev.**

2008 NY Slip Op 33199(U)

November 20, 2008

Supreme Court, New York County

Docket Number: 108897/08

Judge: Joan B. Lobis

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

PRESENT: Joan B. Lobis
Justice

PART C

Index Number : 108897/2008
GIRIGORIE, BERTRAND JR.
VS.
HOUSING PRESERVATION/DEVELOPMENT
SEQUENCE NUMBER : # 001
ARTICLE 78

INDEX NO. 108897-08
MOTION DATE 10/27/08
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

_____ were read on this motion for Art. 78 petition

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3
4-18 ; 19-33

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).

PETITION
~~MOTION DECIDED IN ACCORDANCE WITH~~
ACCOMPANYING DECISION AND ORDER AND JUDGMENT

Dated: 11/20/08

JBL
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):

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6

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

BERTRAND GIRIGORIE, JR., BRIAN GIRIGORIE
AND GABRIELLE GIRIGORIE,

Petitioners,

Index No. 108897/08

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

Decision, Order and Judgment

v.

DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT, and G.R. HOUSING
CORPORATION,

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).**

-----X
JOAN B. LOBIS, J.S.C.:

Petitioners Bertrand Girigorie, Jr., Brian Girigorie, and Gabrielle Girigorie¹ bring the petition, pursuant to Article 78 of the C.P.L.R., seeking to overturn the decision of respondent Department of Housing Preservation and Development ("HPD" or the "Department") to deny their request for succession rights to apartment 18-K at 711 Amsterdam Avenue in Manhattan (the "Apartment"). Respondent G.R. Housing Corporation ("G.R. Housing") is the owner of the building. The Department and G.R. Housing oppose the petition.

Petitioners are the children of Edyth and Bertrand Girigorie, Sr., who are now deceased. Petitioners' parents were tenant/cooperators of the Apartment, pursuant to an occupancy

¹ Although named in the caption as a petitioner, Gabrielle Girigorie was not a party to the administrative proceedings, and does not seek succession rights in this proceeding. She apparently resides in Yonkers.

agreement, dated May 1, 1967. The Apartment is subject to the Mitchell-Lama Law. Bertrand Girigorie, Sr. died on October 8, 1996. His widow, Edyth, died on June 7, 2006.

By letter dated May 22, 2007, G.R. Housing advised petitioners Bertrand and Brian that they were illegally occupying the Apartment following the death of the tenant/cooperators, and that they must vacate the Apartment and surrender the stock and occupancy agreement. They were further advised that if they believed they had succession rights to the Apartment, they must submit a claim, together with supporting evidence.

Bertrand and Brian applied for succession rights; Gabrielle did not seek succession rights. After receipt and review of their documentation, G.R. Housing denied their application, by letter dated September 18, 2007. Under the regulations, an unsuccessful applicant has thirty (30) days to appeal the decision to HPD, which reviews the housing company's determination and the applicant's documentary submissions and renders a final determination without conducting an evidentiary hearing. See 28 RCNY § 3-02(p)(8)(ii). Bertrand and Brian appealed from this denial, by letter dated October 18, 2007, together with supporting documentation. By letter dated October 24, 2007, HPD informed petitioners' counsel that additional information was needed to consider the appeal.

By letter dated December 21, 2007, petitioners submitted additional material in support of their claims to succession rights. By letter dated January 7, 2008, G.R. Housing submitted a letter replying to the additional material. The housing company contended that the additional

material should “in no way disturb the soundness” of the denial of the claim to succession rights. In a subsequent letter, dated January 22, 2008, the housing company further elaborated that since the supplemental documentation was dated after the succession period, it was irrelevant to the determination.

In a decision dated February 27, 2008, HPD Administrative Hearing Officer Frances Lippa rendered a written determination denying petitioners’ appeal of succession rights. The first ground for denial was that none of the petitioners names appeared on an income affidavit for the calendar year 2005. Although the Hearing Officer found that this ground, standing alone, was sufficient to warrant a finding that petitioners had not established a right to succession, the Hearing Officer further found that neither Bertrand nor Brian had established that either resided in the Apartment for the two-year period from June 7, 2004 through June 7, 2006. This Article 78 proceeding followed.

According to the petition, Bertrand first moved into the Apartment “with his parents two days shy of his fourteenth birthday.”² Bertrand left the Apartment at some point and resided elsewhere, but claims he returned to reside in the Apartment as his primary and only residence in 2001. Brian, who was adopted by Edyth, claims that the apartment has been his primary residence since 1999. Petitioners assert that the Hearing Officer placed undue emphasis on the fact that petitioners’ names did not appear on two successive income affidavits during the relevant time period.

² Since Bertrand’s driver’s license sets forth his date of birth as May 7, 1953, he moved into the Apartment when his parents first took occupancy, in May 1967.

The income affidavit for the calendar year 2004, which was signed on or about April 20, 2005, includes Edyth, Bertrand and Brian as occupants of the apartment. The income affidavit for the calendar year 2003, which is dated April 6, 2004, lists Edyth, Bertrand, Bradley (a grandson) and Gabrielle as occupants of the Apartment. Although petitioners state that Brian was named on the 2003 income affidavit, this claim is incorrect. For the calendar year 2006, the year in which Edyth died, Brain and Bertrand submitted an income affidavit, dated June 27, 2007, which lists their two names. It is undisputed that no income affidavit was filed for the calendar year 2005.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id.

The HPD rule in effect after February 1, 2003 provides that listing on annual income and occupancy affidavits is an absolute requirement for an individual to seek succession rights. HPD cites the provision of its regulations that states that "[o]n February 15 of each year during occupancy, . . . the housing company shall distribute to each tenant/cooperator an affidavit to be executed by all occupants residing in the apartment as to the income realized by each of such

occupants during the preceding calendar year.” Noticeably, nowhere does HPD cite any deadline for the submission of the income affidavit. Section 3-03(c)(3) provides that the income affidavit supplied by the housing company is to be returned, duly executed and notarized, by April 30 of each year. Section 3-03(d)(1) provides that in the event the form is not returned, the income of such tenant/cooperator shall be presumed to have exceeded the maximum allowable income by 150 percent or more. The section continues by stating that in the event completed income affidavits are submitted after April 30 but before June 30, the maximum surcharge will not be imposed; but, an administrative fee in an amount not to exceed \$50.00 shall be charged. The regulation also refers to an additional administrative fee if an income affidavit is submitted after June 30. The regulations are silent as to the submission of a form for the prior year if the tenant/cooperator of record dies after the calendar year for the income affidavit but before the form is submitted.

It is undisputed that Edyth died on June 7, 2006, after the April 30 deadline. Petitioners state that the form was not submitted because Edyth was ill and then eventually died. The record is silent as to any attempts to file an income affidavit after her death, or the housing company’s efforts to obtain a signed income affidavit from Edyth before her death, when arguably, it would still have been accepted, albeit with payment of an administrative fee. Since no income affidavit was filed for the calendar year 2005, it is axiomatic that petitioners’ names could not have appeared on an income affidavit for the year preceding Edyth’s permanent vacating of the apartment. Bertrand’s name is listed on the filed income affidavits for 2003 and 2004; Brian’s name is not listed on the 2003 affidavit, but is listed on the 2004 affidavit.

Respondents fixate on the fact that petitioners' names "did not appear on an income affidavit for the year preceding the tenant/cooperator's permanent vacating of the subject apartment, and, therefore, are clearly barred from succeeding to the subject apartment." They cite cases holding that a prerequisite to succession rights is that the family member's name must be on the income affidavits for the two years preceding the tenant/owner's permanent vacating of the premises. The cases relied upon by respondent are inapposite, since in those cases, income affidavits were filed for the relevant time period, but the names of those seeking succession rights were not contained on the income affidavits. See, Greichel v. New York State Div. of Hous. and Comm. Renewal, 39 A.D.3d 421 (1st Dep't 2007) (where the lower court decision, cited at 2005 N.Y. Slip Op. 52016, sets forth that the widow was not listed on the 2000 and 2001 filed income affidavits); Anderson v. Donovan, Index No. 400152/07 (Sup. Ct. N.Y. Co. July 27, 2007) (Gische, J.) (noting that it is undisputed that the grandson is not listed on the 2004 and 2005 filed income affidavits); Chang v. HPD, Index No. 116331/04 (Sup. Ct. NY. Co. Mar. 16, 2005) (Payne, J.) (noting that petitioner was not listed on the income affidavits that were executed by the tenant of record on August 9, 2002 and June 23, 2003). Here, there simply was no income affidavit for the second of the two years. Therefore, this first ground for denying succession rights is arbitrary and capricious and cannot stand, particularly as to Bertrand, since his name is listed on both the 2003 and 2004 income affidavits, the two income affidavits that were filed before Edyth's death.

The second, alternative ground for respondents' determination that petitioners fail to qualify for succession rights is that petitioners failed to prove that the Apartment was their primary

residence for two years prior to the tenant/cooperator's permanent vacating of the Apartment.³ The relevant co-residency period began on June 7, 2004, two years before Edyth passed away. It is true, as petitioners apparently now concede, that the proof submitted by Brian was woefully inadequate. Although Brian claimed that the apartment was his primary and only residence since 1999, given the documentation from his non-resident New York State Income Tax Return that Brian did not move into New York until July 15, 2004; other documentation listing an address in Washington, D.C. during 2004; and his failure to submit a 2005 New York State Income Tax Return, it was not arbitrary and capricious to find that Brian failed to show that the Apartment was his primary residence for the relevant two-year period.

But, the documentation submitted by Bertrand was more substantial. Bertrand submitted an affidavit in which he states that he lived with various family members in Yonkers, the Bronx and in Philadelphia, Pennsylvania until in or about 2001, when he returned to the Apartment to live with his mother. He claims that he has not filed tax returns for a number of years, and did not save old papers. He also claims that he did not immediately change addresses upon returning to New York. In addition to a voter registration card, dated on or about December 1, 2004, and a New York State driver's license, dated November 24, 2004, he submitted a November 2003 bank statement

³ Petitioners argue, incorrectly, that since Edyth was a senior citizen, they need only show that they resided in the Apartment for one-year. The term "senior citizen" is defined in 28 RCNY § 3-02(p)(2)(iv) as "a person who is sixty-two (62) years of age or older." The length of residency requirement is two years, prior to the date the tenant/cooperator has permanently vacated the apartment, "or where such person seeking succession rights is a senior citizen or disabled person, for a period of not less than one year immediately prior to the tenant/ cooperator's permanent vacating of the apartment." Since it was the tenant/cooperator who was a senior citizen, and not those seeking succession, the two-year period applies.

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which was addressed to him at the building's address. Bertrand also submitted 1099 forms for the years 2005 and 2006 which listed the building as his address, and submitted a Vonage account statement which shows that an account was opened in February 2004, listing the Apartment as his address. The Hearing Officer questioned why bank statements and credit card statements were not submitted for the relevant two-year period, although sporadic statements were submitted for some months preceding the two-year period.

Since Bertrand's name was on the filed income affidavits "for at least two consecutive annual reporting periods prior to the tenant/cooperator's permanent vacating of the [A]partment," it was arbitrary and capricious for the hearing officer to find that he could not succeed to the Apartment on this ground. Bertrand submitted spotty documentation for the entire two-year period, perhaps under the mistaken belief that by submitting documentation tending to show that he resided in the Apartment in November 2003 and February 2004, prior to the relevant co-residency period, it would be presumed that he continued to reside there. Other evidence—such as witnesses who may have seen Bertrand living there prior to June 7, 2004—may be sufficient. See, Renda v. New York State Div. of Hous. and Comm. Renewal, 22 A.D.3d 382 (1st Dep't 2005). As to the issue of whether Bertrand resided in the Apartment from June 2004 through June 2006, Bertrand should be entitled to submit additional documentation, including bank records and other records, to show that he resided in the Apartment during the requisite time period. Significantly, it appears that the only gap is from June 7, 2004 (two years before Edyth's death) through on or before November 24, 2004 (the issuance date of this driver's license), which is the period for which there does not appear to be sufficient documentation. His admission that he does not save old papers, including bills and

financial records, is not an excuse for his failure to submit such documents; these records can be obtained directly from the relevant banks and credit card companies. But given his submission of some documentation tending to show that he resided in the Apartment before June 7, 2004, it was arbitrary and capricious not to allow him to submit additional evidence before denying his claim.

The petition is granted to the extent that this action is remanded to the Department of Housing Preservation and Development for further proceedings to allow petitioner Bertrand Girigorie, Jr. to show that he resided in the Apartment from June 2004 through June 2006, with particular emphasis on the period from June 2004 through November 2004, for which there was insufficient documentation. This constitutes the decision, order and judgment of the court.

Dated: November 20, 2008



JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT

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