

**In the Matter of MH Residential 1, LLC v New York
State Div. of Hous. and Community Renewal**

2008 NY Slip Op 33207(U)

November 24, 2008

Supreme Court, New York County

Docket Number: 103218/08

Judge: James A. Yates

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

PRESENT: Hon. JAMES A. YATES PART 50Y
Justice

MH Residential 1, LLC, MH Residential 2,
LLC, and MH Commercial LLC, as
Tenants in Common,

Petitioners

- v -

NYS DHCR, and HANNAH KEH,

Respondents

INDEX NO. 103218-08

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

FILED
DEC 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Papers Numbered

Notice of Motion/Order to Show Cause - Affidavits - Exhibits... | _____

Answering Affidavits - Exhibits _____ | _____

Replying Affidavits _____ | _____

Cross-Motion: Yes No Upon the foregoing papers, the Court

concludes that Respondent NYS DHCR's denial of Petitioners' request to annul the decision of DHCR granting a "first successor" lease and a rent overcharge award to Hannah Keh was not arbitrary and capricious, and therefore, this Article 78 petition is denied and dismissed (see attached Order and Decision).

Dated 11-24-08

ENTER: _____, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

HON. JAMES A. YATES
[Signature]
PART 50Y
SUP. CT. N.Y. COUNTY

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 50Y**

-----X
**In the Matter of the Application of
MH RESIDENTIAL 1, LLC, MH RESIDENTIAL 2,
LLC, and MH COMMERCIAL, LLC,
as Tenants in Common,**

Petitioners,

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

-against-

**THE NEW YORK STATE DIVISION OF HOUSING
and COMMUNITY RENEWAL and HANNAH
KEH,**

Respondents.

**Decision and Order
Ind. No. 103218/08**

FILED

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**COUNTY CLERK'S OFFICE
NEW YORK**

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Hon. James A. Yates, J.S.C.

In this Article 78 proceeding, petitioners MH Residential 1, MH Residential 2, LLC, and MH Commercial LLC (collectively Manhattan House) are seeking an order reversing the determination of respondent, New York State Division of Housing and Community Renewal (DHCR), issued on January 4, 2008 under administrator review docket numbers VJ410016R0 and V141001RT. The order found that Respondent, Hannah Keh (formerly Hai Ying Keh), qualified for "first successor" rights to apartment B504 at 200 East 66th Street. The building owner also was found liable for a willful rent overcharge, resulting in the imposition of treble damages.

Hannah Keh was the wife of the original tenant of record who died during the term of a prior lease which expired on December 31, 2003. That lease did not contain her name. After her husband's death, she continued to occupy the apartment with her adult stepson who was given succession rights to the apartment. After her husband's death, Ms. Keh continued to live in the apartment with her stepson. When her stepson left the apartment, Ms. Keh was offered a lease in her own name with a vacancy increase charge. Under the applicable statute, a vacancy increase is payable by each second succeeding tenant. Petitioner argues that since Ms. Keh failed to claim her succession rights as a first successor tenant upon her husband's death, she was not entitled to those succession rights. Since Ms. Keh is a second successor tenant to her stepson, petitioner

asserts that she was subject to a vacancy increase and therefore, DHCR misapplied its own succession provisions. DHCR contends that Ms. Keh is qualified for first successor rights as a remaining family member by virtue of her relationship with her deceased husband.

Background

Ms. Keh has resided in her rent-stabilized apartment since August 27, 1998 when she arrived from China and married her husband, David Keh. Prior to his death in 2003, Mr. Keh resided in apartment B504 for approximately twenty-five years in that apartment as the sole tenant of record. His adult son, William Keh, also resided in the apartment with the his father and step-mother. After Mr. Keh died, his son sought and received succession rights to the apartment. On September 3, 2004, he became the first successor-tenant of the apartment when he signed a two-year renewal lease,

In April 2005, William notified the building's managing agent, David Spector, that he and his fiancee were vacating the apartment on May 21, 2005. In his letter, William advised the managing agent that his step-mother, Hannah Keh, would remain in the apartment with her daughter.

By letter, dated April 13, 2005, Ms. Keh requested that her name be added to the lease without a vacancy increase. New York Life Insurance Company, the former owner of the building, advised her, through their attorneys, that she would be the second successor tenant because only David Keh's son requested and was granted succession rights after his father, the tenant of record, died. On or about July 27, 2005, Ms. Keh was offered a rent-stabilized lease. She signed a one-year lease that provided for a 17% vacancy increase.

On October 20, 2005, Manhattan House became the owner of 200 East 66th Street. On May 8, 2006, Ms. Keh filed a rent overcharge complaint with DHCR under Docket Number UE410038R. She claimed that because she had resided in the apartment with the original tenant of record, she was entitled to first succession rights. On August 29, 2007, DHCR's Rent Administrator issued a decision granting Ms. Keh an overcharge order plus treble damages for willfulness in the amount of \$17,362.74. The Rent Administrator found that because Ms. Keh and her step-son occupied the apartment as their primary residence for at least two years before the death of the original tenant, she was entitled to be listed as a co-first successor family member. The Rent Administrator also found a rent overcharge and the owner failed to establish by a preponderance of the evidence that the overcharge was not willful. On September 7, 2007, Ms. Keh filed a Petition for Administrative Review (PAR) under Docket Number VJ410016RO, and Manhattan House filed a PAR, under Docket Number VJ410016, on October 3, 2007. On January 4, 2008, DHCR Deputy Commissioner Leslie Torres upheld the Rent Administrator's order and upwardly adjusted the amount of the overcharge and treble damages to \$22,236.78. Once again, DHCR found that a family member is not time-barred from establishing her succession rights. On March 28, 2008, Petitioner filed their Article 78 petition.

Discussion

While succession rights to rent-stabilized apartments have been the subject of much litigation, the issue of co-tenants contemporaneously sharing succession rights does not appear to be the subject of any reported decision.

Judicial review of DHCR's order is limited to whether the agency determination had a rational basis or whether it was arbitrary or capricious. See CPLR 7803 [3]; *In re Salvati v Eimicke*, 72 NY2d 784 [1988]; *In re Elgart v DHCR*, 2 AD3d 218 [1st Dept 2003]. An agency's decision to "ignore its own published interpretation of the relevant regulations * * * constitutes arbitrary and capricious action." The apartment in this case is subject to the Rent Stabilization laws and regulations. The Rent Stabilization Law (RSL) and Code (RSC) provide that under certain circumstances family members residing in a housing accommodation with the tenant of record may acquire full rights of tenancy. These provisions were enacted in response to the harsh consequences resulting from displacement from one's home upon the death or departure of a named tenant with whom a family member, not named in the lease, resided. See *300 East 34th Street Co. v Habeeb*, 248 AD2d 50 [1st Dept 1997]; *Hughes v Lenox Hill Hospital*, 226 AD2d 4 [1st Dept 1996]. The first family member to establish succession rights is not required to pay the owner a vacancy increase. See DHCR Fact Sheet No. 30, Succession Rights.

Ms. Keh, the wife of the named tenant, comes directly within the protection of the successor provisions of the Rent Stabilization Code (9 NYCRR). Under DHCR succession rights regulations, Ms. Keh was required to make a two-part showing that: 1) she was a member of the tenant's family within the meaning of 9 NYCRR § 2520.6 ; and 2) she resided with the tenant of record in the apartment as a primary residence for a period of not less than two years. Of course, the wife of a tenant and the tenant's son are listed as family members who are entitled to succession rights. 9 NYCRR § 2520.6 [o]. Section 2523.5 [b][1] provides that a family member "who has resided with the tenant in the housing accommodation as a primary residence * * * from the inception of the tenancy or commencement of the relationship for a period of no less than two (2) years ..." is entitled to be named as a party to the renewal lease.

DHCR interprets "second successor" to mean a family member who did not qualify for succession rights as a first successor, but who did occupy the housing accommodation as a family member for at least two years upon the vacatur of the first successor. Under the 1997 amendments to the RSC, an owner/landlord is entitled to a special vacancy increase of 20% on a two-year renewal lease upon a second subsequent succession.

After considering the administrative record and submissions, the Court concludes that DHCR's determination has a rational basis, was not arbitrary or capricious, nor in violation of the law. The landlord argues that DHCR should have conducted a hearing where each party to the dispute would have had the right to present their respective position and would also have the opportunity to question witnesses. Because a hearing is not required by statute or law, the

argument fails. Even if the court were to consider this argument, the decision to hold a hearing is within the discretion of DHCR. *See* 9 NYCRR 2051.3 [b]. As well, it appears that no material factual issue was in dispute. It is important to highlight the fact that Petitioner never requested a hearing. Moreover, DHCR correctly asserts that a claim may not be made for the first time on judicial review. *See 985 Fifth Avenue Inc. v DHCR*, 171 AD2d 572 [1st Dept 1991].

Ms. Keh was the wife of the tenant of record with whom she resided for not only for the two years preceding her stepson's leaving the apartment, but for her entire married life. Her stepson was also within the class of protected family members. The record before the agency established that both she and her stepson contemporaneously occupied the apartment as their primary residence for at least two years before her husband's death. Under these circumstances, she acquired a legal status greater to or equal to that of her stepson. Therefore, she was undisputably entitled to a lease renewal as a first successor upon her husband's death. Ms. Keh continued to reside in the apartment from the time of her husband's death through the present time. In essence, as the surviving spouse of the original tenant, she remained a first successor to a renewal lease. She retained her first successor interest in the apartment by continuing to live with her stepson. While the parties dispute when the landlord became aware of Ms. Keh's presence in the apartment, Ms. Keh made a reasonable showing to DHCR that her role as the wife of the tenant of record was well-known to the landlord when the lease renewal was given to her stepson.

Finally, contrary to petitioners' contention, DHCR's determination that the building owner had overcharged the complaining tenant on rent was not arbitrary or capricious. Pursuant to the Rent Stabilization Code (9 NYCRR § 2526.1), in the case of a rent overcharge the landlord will be liable to the tenant for a penalty equal to three times the amount of the overcharge. The statute permits the owner to avoid the penalty of treble damages if he establishes by a preponderance of the evidence that the overcharge was not willful. Here, petitioners failed to meet that burden and consequently, treble damages were properly awarded (*see, In re Miller v DHCR*, 289 AD2d 20 [1st Dept 2001]; *In re Wai Leung Chan v DHCR*, 207 AD2d 552 [2d Dept 1994]). Accordingly, since DHCR's determination can be said to be rational and lawful, petitioners' motion is denied and the proceeding is dismissed.

ENTER:


James A. Yates, J.S.C.

Dated: November 24, 2008

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SUFFOLK COUNTY
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