

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

2008 NY Slip Op 33595(U)

December 1, 2008

Supreme Court, New York County

Docket Number: 102285/09

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB

PART \_\_\_\_\_

Justice

Index Number : 102285/2009

COGNATA, DOMINICK

VS.

NYS DIV. HOUSING & COMMUNITY RENEWAL

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 102285-09

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. #001

MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ were 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, it is ordered that this motion

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

**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: 12/1/08

[Signature]  
WALTER B. TOLUB J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: TAS PART 15

-----X  
In the Matter of the Application of  
DOMINICK COGNATA

Petitioner,

Index No. 102285/09  
Mtn Seq. 001

-against-

THE NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL

Respondent.

For a Judgment Pursuant to Article 8  
of the Civil Practice Law and Rules

**UNFILED JUDGMENT**  
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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).

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**WALTER B. TOLUB, J.:**

By this Article 78 application, petitioner Dominic Cognata seeks review and reversal of the October 23, 2008 decision issued by respondent, the New York State Division of Housing and Community Renewal (DHCR) which denied petitioner succession rights to Apartment 21M located at 333 Pearl Street in Manhattan ("the apartment").

The apartment unit in question is located in a building operated by Southbridge Towers, Inc. (Southbridge Towers), a State-supervised limited profit mutual (cooperative) housing company, organized under Private Finance Housing Law (PFHL) Article II. Apartments created under these provisions are known as Mitchell-Lama properties (*id.*).

Petitioner in this action is the grandson of the prior tenant-of-record for apartment 21 M, Marie Tafaro. Ms. Tafaro

passed away in 1997. Petitioner, who grew up in the Southbridge Towers apartments, claims that, while still a minor, he resided with his grandmother from 1994 through 1997. Petitioner continued to reside in the apartment after his grandmother's passing and is currently raising a family there.

In August of 2007, petitioner applied for succession rights to apartment 21M. In support of his application, petitioner submitted numerous documents, including documents from Southbridge Towers sent to him after September 11, 2001 and various correspondence from the Internal Revenue Service, the New York State Department of Motor Vehicles, and the New York State Supreme Court. Petitioner additionally included letters from various friends and family members in support of his application. Upon review, the DHCR denied petitioner succession rights based on the fact that petitioner's name did not appear on a change of family composition form or on any of the required income affidavits forms submitted for Apartment 21 M in 1994, 1995, or 1996. This application followed.

#### Discussion

A court may only intervene in an administrative agency determination where it is demonstrated that the action taken by the agency was arbitrary and capricious, that is, the action taken was without reason or basis in fact (see, Caso v. New York State Public High School Athletic Association, Inc., 78 AD2d 41

[4th Dept. 1980]). As long as the agency's action is rationally based, the determination will be upheld (Fanelli v. New York City Conciliation and Appeals Board, 90 AD2d 756 [1st Dept 1982], aff'd 58 NY2d 952 [1983]; see generally, Barr, Altman Lipshie Gerstman, New York Civil Practice Before Trial 42:01 et seq. [James Publishing 2009]).

As a preliminary matter, this court addresses the portion of petitioner's argument that claims that the DHCR, having waited ten years to assert their rights, is now estopped by the doctrine of waiver and can no longer challenge petitioner's presence or deny succession rights. This argument is rejected. As aptly stated by the Court of Appeals, "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties" (Matter of Schorr v. New York City Department of Housing Preservation and Development, 10 NY3d 776, 779 [2008], quoting, Matter of New York State Medical Transporters Association v. Perales, 77 NY2d 126 [1990]).

The balance of petitioner's argument focuses on the claim that the DHCR's determination is unfair because the determination deprives him of the right to continue living in the apartment he has occupied for the last ten years. Petitioner further argues that the determination is unfair because other individuals living in the same housing complex have successfully obtained succession rights to apartments following the loss of an immediate family

member (see, petitioner's Memorandum of Law). Whether or not a determination is fair, however, is not the proper standard of review given to an agency determination (see, Matter of West Village Associates v. Division of Housing and Community Renewal; 277 AD2d 111 [1st Dept 2000]), as it would call for this court to substitute its judgment for that of another agency, which the court cannot do (see, Purdy v. Kreisberg, 47 NY2d 354 [1979]; Howard v. Wyman, 28 NY2d 434 [1971]). The only inquiry therefore, is whether the challenged determination was rationally based, or whether it was made in violation of lawful procedure, was affected by an error of law, was arbitrary and capricious or an abuse of discretion (see, Pell v. Board of Education, 34 NY2d 222, 231 [1974]; Chinese Staff & Workers Association, 68 NY2d 359, 363 [1986]; Flacke v. Onondaga Landfill Systems, Inc., 69 NY2d 355 [1987]).

The apartment at the core of this dispute is one of the dwindling number of Mitchell-Lama apartments remaining in New York City. Created by statute, these apartments carry both strict income and residency restrictions (PHEL §§ 31(a); (31)(2)(a)), and many of them to this day, have extensive, and

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<sup>1</sup>Petitioner's examples include the case of a son residing with his father who did not appear on any of the income affidavits for that apartment prior to his father's death, and the case of two minor children who resided with their mother, and who were not listed on the income affidavits at the time of their mother's death (see, Petitioner's Memorandum of Law).

mandated, waiting lists (see 9(C)NYCRR 1727.1 *et seq.*). By law, DHCR is the administrative agency charged with the supervision of these properties (PHFL § 32(3)), and as part of that supervision, DHCR requires tenants and prospective applicants to report the income of all occupants or intended occupants for every apartment on an annual basis (9 NYCRR 1727-2.1). DHCR requires Mitchell-Lama housing companies to conduct the same type of annual review.

The responsibility for completing and submitting the income affidavit and family composition forms falls upon the tenant or tenants of record for the apartment (9 NYCRR 1727-2.5(a)). Both forms are a critical component of determining succession rights, which requires a demonstration that the applicant was listed on documents required to be filed with the housing company, *i.e.* notices of change in tenant family composition and the required annual income affidavits.<sup>2</sup> In addition, applicants seeking succession rights must establish, through objective documentary

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<sup>2</sup>NYCRR 1727-8.3(a), which sets forth the requirements which must be met for succession rights, reads in pertinent part: ... if the tenant has permanently vacated the housing accommodation, any member of such tenant's family, as defined in Section 1727-8.2(a)(2) of this Subpart, who has resided with the tenant in the housing accommodation as a primary residence for a period of not less than two years, has been listed on the income affidavit and/or on the notice of Change to Tenant's Family as required under 1727-3.6 of this Part, or where such person is a senior citizen or disabled person [...] for a period of not less than one year, immediately proper to the permanent vacating of the housing accommodation by the tenant [...] may request to be named as a tenant on the lease [...]

proof,<sup>3</sup> that they occupied the apartment as their primary residence with the tenant of record for at least two years prior to the tenant of record's vacating of the apartment (9 NYCRR 1727-8.2 (a)(5)).

Although petitioner submitted numerous documents to the DHCR supporting his claim that he has resided in the subject apartment prior to his grandmother's death in 1997, the fact remains that petitioner's name not does not appear on any of the submitted income affidavits for Apartment 21M in 1994, 1995, or 1996. In fact, the income affidavits for Apartment 21 M in each of the three years preceding Ms. Tafaro's death list only two occupants: Ms. Tafaro, and her granddaughter, Domonique Cognata (Return, Exhibit A-3). Petitioner's name indeed appears on an income affidavit for an apartment in that same building in 1995 and 1996, but it is for Apartment 21K, the apartment occupied by petitioner's mother (Return, Exhibit A-14). Given this evidence, it is this court's conclusion that the decision of the DHCR was not arbitrary or capricious. Petitioner was unable to demonstrate that in the two years prior to his grandmother's death, that he was a reported member of the household during the two-year qualifying period set forth in 9 NYCRR 1727-8.3(a),

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<sup>3</sup> Objective documentary proof consists of being listed as an occupant of the apartment on the annual income affidavit together with other evidence such as tax returns, voting records, driver's licenses and school registration or employment records.

which is a statutory prerequisite to issuing a lease for a Mitchell-Lama apartment (see, Matter of Schorr, 10 NY3d 776).


Although this court is sympathetic to petitioner's situation, there is nothing contained within the papers submitted warranting additional Judicial intervention. Accordingly, it is

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

ORDERED that the clerk of court enter judgment accordingly.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 12/1/08

  
\_\_\_\_\_  
HON. WALTER B. TOLUB, J.S.C.

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