

<b>Matter of Lau v City of N.Y. Dept. of Hous. Preserv. &amp; Dev.</b>
2009 NY Slip Op 30471(U)
March 2, 2009
Supreme Court, New York County
Docket Number: 111912-08
Judge: James A. Yates
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts ( <a href="http://www.nycourts.gov/ecourts">http://www.nycourts.gov/ecourts</a> ) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

7

**SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY**  
**PRESENT: Hon. JAMES A. YATES PART 50Y**  
**Justice**

In the Matter of the Application of

**GEORGE LAU,**

**Petitioner,**

**Index No.: 111912-08**

**Motion Seq.: 001**

**-against-**

**ORDER and  
JUDGMENT**

**CITY OF NEW YORK DEPARTMENT OF  
HOUSING PRESERVATION AND  
DEVELOPMENT, AND CHINATOWN  
APARTMENTS, INC.,**

**Respondents.**



The following papers, numbered 1 to \_\_\_\_\_ 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**

**Petitioner seeks to reverse and annul City Respondent's April 26, 2008 determination evicting Petitioner from a Mitchell-Lama apartment. The petition is denied and dismissed because substantial evidence in the record supports**

**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).**

US102

the City's determination that Petitioner was subject to eviction (see attached Decision, Judgment, and Order).

Dated PT. 50<sup>th</sup> MAR 0 2 2006

ENTER: \_\_\_\_\_, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

**HON. JAMES A. YATES**

**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).**



After several notices in 2005 (see *id.*, exhibit B, at 16), Mr. Lau provided some documents to support his application to add his wife, Sarah Lam, to the household.<sup>1</sup> Documents included an official request letter dated August 18, 2005 (see *id.*, exhibit B, at 22; *id.*, exhibit E), a questionnaire regarding private property ownership dated November 7, 2005 (see *id.*, exhibit B, at 28; *id.*, exhibit E (revealing Ms. Lam claiming she owned no private property); but see *id.*, exhibit C, at 75-76 (showing Mr. Lau and Ms. Lam had purchased a house in New Jersey in 1988)), and Ms. Lam's 2004 W-2 Wage and Tax Statement submitted in January 2006 (see *id.*, exhibit B, at 28; *id.*, exhibit E). Additionally, Mr. Lau enclosed Ms. Lam's New York State Identification Card reflecting the apartment's address with a letter dated April 20, 2006 (see *id.*, exhibit E). Mr. Lau, however, failed to supply certified income tax returns or other documents supporting his own residency (see *id.*, exhibit B, at 37).

On December 14, 2006, the property manager and other staff members inspected the apartment. In the apartment, "the arrangement of the belongings is consistent with use of the premises as storage purposes only." (*Id.*, exhibit D.) Staff members "couldn't get into the bedroom" due to "obstruction" (*id.*, exhibit B, at 45; *id.*, exhibit C, at 29). "There was no available bed[,] . . . [and there was] excessive clutter located in the apartment contain[ing] clothing and papers" (*id.*, exhibit D).

On January 11, 2007, Chinatown Apartments served Mr. Lau with a Ten Day Notice of Intent to Terminate Under the Occupancy Agreement and of Grounds of Eviction Under 28 RCNY § 3-18 (a). Chinatown Apartments found Mr. Lau "in default under . . . 28 RCNY § 3-02 (n) (4), which require[s] that the premises be surrendered to the Housing Company when a shareholder ceases to occupy the premises as a primary residence." (*Id.*, exhibit D.)

Pursuant to the Notice of Intent, DHPD Hearing Officer Helen Levy conducted a hearing on July 25, 2007, which continued and concluded on February 27, 2008 (see *id.*, exhibits B, C). Christine Ang, Chinatown Apartment's managing agent employee, testified that Mr. Lau has not filed any recertifications or income affidavits, nor provided any tax returns, since 2004 (see *id.*, exhibit B, at 36-37). Ms. Ang also testified that when management asked Mr. Lau about his New Jersey property, Mr. Lau claimed he had sold it. Management asked for Mr. Lau's proof of sale and his driver's license, neither of which was received. (See *id.*, exhibit C, at

---

<sup>1</sup> Mr. Lau and Ms. Lam had wed in December 2004 (see Resp. Verified Answer, Nov. 10, 2008, exhibit E).

42-43.)

Mr. Lau testified on his own behalf at the hearing. He submitted some documents as evidence that he resides in the apartment, including cable television and telephone bills from 2001 to 2007, a mailing from his former employer, and statements from two apartment tenants that they believe he resides in the building (*see id.*, exhibit C, at 64-65, 72-74, 78-80; *id.*, exhibit F).

Mr. Lau also acknowledged that he had not filed income tax returns since 2002. He "owed IRS some money" and was trying to remain "under the[] radar." (*Id.*, exhibit C, at 66-67.) Mr. Lau further testified that he bought the New Jersey property in 1988 with Ms. Lam, before they were married. They had been renting it for twenty years at \$1000 per month. (*See id.*, exhibit C, at 75-76.)

On cross-examination, Mr. Lau produced his driver's license issued in 2004. It reflected the New Jersey property's address. (*See id.*, exhibit C, at 86-87; *id.*, exhibit E.) Mr. Lau's car registration was also issued by New Jersey (*see id.*, exhibit C, at 97-98).

On April 29, 2008, Hearing Officer Levy issued a Certificate of Eviction against Mr. Lau (*see id.*, exhibit A). Thereafter, on August 27, 2008, only Mr. Lau brought this Article 78 proceeding seeking to reverse the Certificate of Eviction (*see* Pet. Verified Petition, Aug. 27, 2008, at 1). The Court, therefore, is only addressing whether DHPD properly issued the Certificate of Eviction against Mr. Lau.

### Discussion

"Mitchell-Lama housing is designed to be available for persons of limited income" (*Axelrod v Gliedman*, 104 AD2d 327, 328 [1st Dept 1984], citing PHFL § 31 [2] [a]). The Legislature created this government program in response to a "seriously inadequate supply of safe and sanitary dwellings . . . for families and persons of low income" (PHFL § 11). As the supervising agency for Mitchell-Lama housing, DHPD has the exclusive power to promulgate "rules and regulations for carrying into effect the provisions of this article" (*id.* § 32 [3]).

Section 3-02 (n) (4) of Title 28 Rules of the City of New York requires "the [Mitchell-Lama] apartment of a tenant . . . to be his or her primary place of residence." The tenant must reside in the subject apartment for at least "one hundred eighty-three days in the preceding calendar year . . . [N]o dwelling unit may be

considered the primary residence of the tenant/cooperator unless the tenant/cooperator provides proof that he or she either filed a New York City Resident Income Tax return at the claimed primary residence for the most recent preceding taxable year." (28 RCNY § 3-02 [n] [4] [iv].)<sup>2</sup>

Further, "[t]he facts and circumstances to be considered in determining whether a tenant/cooperator occupies a dwelling unit as his or her primary residence include, but are not limited to, whether such tenant/cooperator . . . specifies an address other than such dwelling unit as his or her place of residence or domicile in any tax return, motor vehicle registration, driver's license or other document filed with a public agency" (*id.* § 3-02 [n] [4] [i]).<sup>3</sup>

Mr. Lau asks that the Court declare 28 RCNY § 3-02 (n) (4) (iv) unconstitutional as a matter of law (*see* Pet. Verified Petition, Aug. 27, 2008, at 12 ¶ 34). He argues that 28 RCNY § 3-02 (n) (4) (iv) violates the Fourteenth Amendment Due Process Clause because it "shifts away from [DHPD] . . . the obligation to meet any burden of proof . . . The State Administrative Procedure Act § 306 (1) provides that the burden of proof rests with [DHPD] unless otherwise provided by statute. There is no such applicable statute and the State Administrative Procedure Act makes no mention of local rules." (*Id.* ¶ 33.)

However, the State Administrative Procedure Act (SAPA) does not apply to 28 RCNY § 3-02 (n) (4) (iv) because SAPA affects only state administrative agencies, not city agencies such as DHPD (*see* SAPA § 100; *Matter of 1777 Penfield Rd. Corp. v Morrison-Vega*, 116 AD2d 1035, 1037 [1st Dept 1986] ("[T]he State Administrative Procedure Act applies only to agencies of the State government . . . and local entities are excluded from coverage of the act.")).

Finally, Mr. Lau contends that the missing portions in the

---

<sup>2</sup> Under 28 RCNY § 3-02 (1) (2), "a tenant/cooperator . . . shall [also] submit when requested by [DHPD] certified copies of their IRS and/or New York State income tax returns for audit or verification purposes with regard to continued eligibility, surcharges or any other valid purpose."

<sup>3</sup> Although Mr. Lau provided some cable television and telephone bills linking him to the apartment, DHPD reasonably accorded these documents little weight. These documents are merely consistent with the apartment's occasional use as a convenience.

July 25, 2007 and February 27, 2008 hearing transcripts warrant an annulment of the administrative determination. Missing transcript portions, however, are not grounds for reversal where, as here, this Court "is able to undertake a meaningful review of the administrative determination under the substantial evidence standard based upon the available testimony and the documentary evidence" (*Matter of Weinstein v City of NY Dept. of Hous. Preserv. & Dev.*, 39 AD3d 764, 764 [2d Dept 2007], citing *Matter of Sledge v Sledge*, 228 AD2d 310, 310 [1st Dept 1996]; *Matter of Peterkin v Reid*, 105 AD2d 707, 707 [2d Dept 1984]).

### Conclusion

In an Article 78 petition, a reviewing court is limited to determining whether the agency determination is arbitrary and capricious or an abuse of discretion (see e.g. *Matter of Pell v Bd. of Educ.*, 34 NY2d 222, 230-231 [1974]). Judicial reversal of an administrative order pursuant to CPLR Article 78 is for instances in which the agency acted arbitrarily or capriciously (see *Fiore v O'Connell*, 297 NY 260, 262 [1948]). A determination is arbitrary and capricious if it is untenable as a matter of law (see *Siegel*, *New York Practice*, § 561, at 967 [4th ed 2005]). If a rational basis supports an administrative order, judicial review is narrow, and the court must uphold the agency's finding (see *Pell*, 34 NY2d at 231).

The First Department has found that 28 RCNY § 3-02 (n) (4) (iv) "does not create an unconstitutional irrebuttable presumption" (*Matter of Nole v NY City Dept. of Hous. Preserv. & Dev.*, 26 AD3d 163, 164 [1st Dept 2006]). In *Nole*, the First Department held that 28 RCNY § 3-02 (n) (4) (iv) was "constitutional," and "petitioner's argument about the burden of proof [wa]s academic" (*id.*).

Since substantial evidence in the record supports DHPD's determination that Mr. Lau was subject to eviction from the Mitchell-Lama apartment, Mr. Lau's application is denied and the petition is dismissed.

This constitutes the Decision, Judgment, and Order of the Court.

Dated: March 2, 2009

PT. 50<sup>v</sup> WAR 0 2 2009

ENTER:

### 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).

James A. Yates, J.S.C.  
NON. JAMES A. YATES