

**Matter of Bruno v Van Amerongen**

2009 NY Slip Op 30494(U)

February 18, 2009

Supreme Court, New York County

Docket Number: 113429/08

Judge: Joan B. Lobis

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

PRESENT:

PART 6

Justice

Index Number : 113429/2008

BRUNO, LISA

vs.

VAN AMERONGEN, DEBORAH

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 11342908

MOTION DATE 1/23/09

MOTION SEQ. NO. #001

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

are read on this motion to/for \_\_\_\_\_

PAPERS NUMBERED

1-17  
18 19 20  
21-25

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

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

*administrative record 23-32*

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this ~~motion~~ *petition*

*is decided in accordance with the accompanying decision, order and judgment*

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notices 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).

Dated: 2/18/09

*JSh*

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  
NEW YORK COUNTY: IAS PART 6

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

LISA BRUNO,

Petitioner,

Index No. 113429/08

-against-

Decision, Order and Judgment

DEBORAH VAN AMERONGEN, as Commissioner  
of the New York State Division of Housing and  
Community Renewal,

THE NEW YORK STATE DIVISION OF HOUSING  
AND COMMUNITY RENEWAL,

-and-

SOUTHBRIDGE TOWERS, INC., as Landlord  
The Building located at 100 Beekman St., NY, N

Respondents,

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

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

Petitioner Lisa Bruno brings this Article 78 proceeding, seeking to annul and vacate the determination by respondent, the New York State Division of Housing and Community Renewal ("DHCR" or the "Division"), to deny petitioner succession rights to the apartment located at 100 Beekman Street, Apartment 2F (the "Apartment") and to deny her application for reconsideration of the initial decision. Petitioner asks that respondents be ordered to recognize her as the successor tenant or, in the alternative, she seeks a remand of this matter for an evidentiary hearing concerning her claim as the successor tenant to the Apartment. She also seeks attorneys' fees, costs and disbursements. Both DHCR and Southbridge Towers, Inc. ("Southbridge"), the landlord, oppose the application.

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Beginning on or about April 28, 1977, Flaminia Bruno, the grandmother of petitioner Lisa Bruno, executed a written occupancy agreement for and moved into the Apartment at Southbridge, a housing development organized under what is commonly referred to as the Mitchell-Lama Law, Articles II and IV of the Private Housing Finance Law. Sometime in or about 1996, petitioner alleges that she moved into the Apartment with her grandmother. The first indication that petitioner resided in the Apartment is petitioner's name on the "Occupant's Annual Affidavit of Family Income—Calendar Year 1996," which is sworn to on May 14, 1997. The form lists Flaminia Bruno, age 96, as the head of household, and lists Lisa Bruno, age 28, as an occupant. The form was filed on May 15, 1997, together with a letter, also dated May 15, 1997, written by Olga Craigen, petitioner's aunt, stating that petitioner had permission to reside in the Apartment with her grandmother. Petitioner alleges, on information and belief, that this letter was submitted at the request of Southbridge.

On April 28, 1998, petitioner completed the "Occupant's Annual Affidavit of Family Income — Calendar Year 1997," which was filed with Southbridge's management office on May 1, 1998. This form lists petitioner Lisa Bruno as the head of household. Beneath her name is written "Bruno, Flaminia (deceased) (Feb. 4, 1998)." For the next ten years, from 1998 through 2007, inclusive, petitioner completed the income affidavit in the same manner. Every single form includes petitioner's name as the head of household and every single form sets forth, directly beneath petitioner's name, "Bruno, Flaminia (deceased) (Feb. 4, 1998)." For over ten years, petitioner alleges that she continued to reside in the Apartment, and continued to pay the monthly maintenance fees, without incident.

Petitioner received a letter from Southbridge, dated December 17, 2007, which states that based on management's review of her 2006 annual income affidavit, "[i]t appears that there is no longer a shareholder of record residing in [the] apartment." Petitioner was directed to submit a succession application so that Southbridge could determine whether she was entitled to succession rights, pursuant to 9 N.Y.C.R.R. §§ 1727-8.1, *et seq.* On or about January 14, 2008, petitioner submitted the succession package. By letter dated February 1, 2008, Southbridge denied the application. According to the letter, the ground for denying the application was management's determination that the first record of petitioner having resided in the Apartment was May 14, 1997, the date she swore to the 1996 income affidavit. Because Flaminia Bruno passed away on February 4, 1998, Southbridge concluded that petitioner could not have resided in the Apartment for the requisite two-year period required for succession.

Petitioner was advised of her right to appeal the decision to DHCR, which she did. In a letter dated April 18, 2008, petitioner wrote that she lived in the Apartment for over ten years, and that soon after her grandmother's death, petitioner submitted documentation to Southbridge providing the date her grandmother died. She states that she also provided other documentation, but that after ten years, she did not have all of the documentation from 1996. Petitioner stated her belief that it was not fair for Southbridge to wait over ten years to now try to reject her claim of succession. Petitioner states that she contacted the Internal Revenue Service ("IRS") to try to obtain her income tax return from 1996, but was told that she could only receive IRS records going back ten years.

By determination dated June 10, 2008, David B. Cabrera, the Deputy Commissioner of the Division, issued an Order Denying Appeal (the "Order"). In the Order, the Division notes that

since Flaminia Bruno passed away on February 4, 1998, petitioner would have to have moved into the Apartment before February 4, 1996, since the regulations require a family member to have resided in the subject Apartment "as a primary residence for a period of not less than two years." See 9 N.Y.C.R.R. § 1727-8.3(a), § 1727-8.4. The Deputy Commissioner also cited 9 N.Y.C.R.R. § 1727-3.6, which requires the tenant-of-record to advise the housing company "in writing within [ninety] calendar days of any additions to . . . the tenant's family who reside in the housing accommodation." There was no evidence that petitioner's grandmother had given notice to Southbridge that petitioner was residing in the Apartment anytime on or before February 4, 1996. Although petitioner's name appears on the income affidavit for 1996, at no time did petitioner ever come forward with proof that she resided in the Apartment prior to February 4, 1996.

In support of her petition, petitioner argues that she believed her request for succession rights had been processed and approved by Southbridge in 1998, when she contends that she met with Southbridge management and discussed with management what she needed to do to remain as a tenant once her grandmother passed away. Petitioner's counsel alleges, on information and belief, that petitioner was satisfied that "she had fulfilled her obligation to be recognized as the successor tenant." But, there is no evidence of any paperwork to support this claim. The copy of a "Preliminary Succession Rights Application" that is annexed to the petition is signed but undated; there is no proof as to whether or when it was submitted to Southbridge. There is no other document in her record supporting her claim.

Petitioner further claims that it was a violation of her due process rights for Southbridge to have taken no action as to petitioner's tenancy for ten years, and then suddenly send her a letter in December 2007. Petitioner argues that it was also a violation of her due process rights for DHCR to fail to afford her an evidentiary hearing and to base its determination solely on documentary evidence. Petitioner's reliance on 9 N.Y.C.R.R. § 1727-8.5 is misplaced. She cannot challenge Southbridge's failure to act on her application within thirty (30) days of receipt, as required by the regulation, when there is no evidence that she submitted a written application in May 1997. Petitioner further contends that her tenancy was ratified by Southbridge by Southbridge's approval of her request for storage space in February 2006, and the fact that she resided in the Apartment undisturbed for over nine years before the December 2007 letter was issued. In effect, she argues that respondents are estopped from disputing her tenancy at this time.

Petitioner's argument is without merit. The fact remains that she has never demonstrated that she resided in the Apartment for the required two-year period. Significantly, more than one year after being advised that her tenancy was called into question, petitioner has failed to come forward with any proof—a driver's license, a moving bill, voter's registration card, or an affidavit of someone with actual knowledge—to demonstrate that she moved into the Apartment before February 4, 1996. While it is regrettable that her tenancy was not challenged for nearly ten years, the passage of time does not preclude a determination to terminate her occupancy. Neither DHCR nor Southbridge can be estopped from evicting a tenant who does not meet the eligibility requirements for succession rights. Schorr v. New York City Dept. of Hous. Pres. and Dev., 10 N.Y.3d 776, 779 (2008). Petitioner's attempt to distinguish Schorr, because that case involved a

New York City Mitchell-Lama development rather than one supervised by the State DHCR, is unavailing. Regardless of the time of housing unit involved, “invoking estoppel . . . would impermissibly prevent [the governmental agency] from executing its statutory duty to provide Mitchell-Lama housing only to individuals who meet the specified eligibility requirements.” *Id.*; see also, Southbridge Towers, Inc. v. Renda, 21 Misc. 3d 1138(A), 2008 WL 5076468 (Civ. Ct. N.Y. Co. 2008). It is worth noting that the Renda case concerns the same Mitchell-Lama development in which petitioner resides. Although it is clear from the facts in Renda and from the facts in the instant case that Southbridge management has accepted monthly maintenance payments and has allowed tenants to continue residing in apartments for years before challenging their tenancy, this court is constrained to uphold the regulations concerning succession rights and find that it was neither arbitrary nor capricious to terminate petitioner’s tenancy for failure to demonstrate a right to succeed as a tenant. Even if it appears that a housing company has implicitly approved a tenancy for years, if a tenant has not complied with the regulations, the tenancy may still be terminated. McNeal v. Hernandez, \_\_\_ A.D.3d \_\_\_, 2009 WL 22265 (1st Dep’t 2009).

For all of these reasons, this court finds that the determination was neither arbitrary nor capricious, nor affected by an error of law. Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). Since petitioner has never come forward with any proof of her occupancy before February 4, 1996, there is no purpose in a remand for further proceedings. See, McNeal v. Hernandez, *supra*. The petition is denied. This constitutes the decision, order and judgment of the court.

Dated: February 18, 2009

*JBK*

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