

**Matter of Arthur v East Midtown Plaza Hous.
Co., Inc.**

2009 NY Slip Op 30625(U)

March 23, 2009

Supreme Court, New York County

Docket Number: 114564/08

Judge: Marilyn Shafer

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

PRESENT: Marilyn Shafer
Justice

PART 8

CLINT ARTHUR, ET AL.

INDEX NO. 114564/08

EAST MIDTOWN PLAZA
HOUSING CO., ET AL.

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

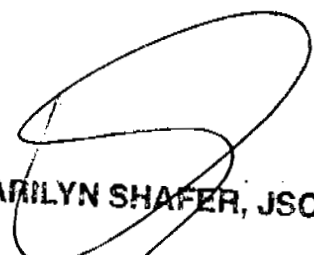
Upon the foregoing papers, it is ordered that this ~~motion~~ petition is dismissed
in accord with the annexed memorandum.

FILED

MAR 24 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/27/09


HON. MARILYN SHAFER, JSC

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 8

In the matter of the application of
CLINT ARTHUR, as Executor of the Estate of Daniel
Gross, and ROBERT GROSS,
Petitioners,

INDEX NO. 114564/08

MOTION SEQ. NO. 001

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

-against-

EAST MIDTOWN PLAZA HOUSING COMPANY, INC.,
and THE NEW YORK CITY HOUSING PRESERVATION
AND DEVELOPMENT; and SEA PARK WEST, L.P.,

Respondents.

FILED
MAR 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 7, were read on this petition:

	<u>PAPERS NUMBERED</u>
Order to Show Cause, Verified Petition – Exhibits	1,2
Verified Answer – Exhibits	3
Verified Answer – Exhibits	4
Memorandum of Law	5
Memorandum of Law	6
Memorandum of Law in Reply	7

Cross-Motion: Yes No

Upon the foregoing papers, the petition is dismissed.

Introduction

This is a proceeding brought pursuant to Article 78 challenging the determination of the New York City Housing Preservation and Development directing the surrender of a Mitchell-Lama apartment belonging to a deceased tenant.

Background

The deceased, Daniel Gross, was the sole resident and co-sharholder of a cooperative apartment located in defendant East Midtown Plaza Housing Company, Inc., an Article II housing company organized under the Private Housing Finance Law of the State of New York (Mitchell-Lama Law). At the time of his death, November 12, 2006, his son, petitioner Robert Gross, was a co-sharholder of the apartment and a resident of another apartment in the building.

In February, 2007, petitioner Clint Arthur advised EMP that Daniel Gross had died but that the apartment would not be surrendered because Robert resided there. EMP advised Arthur it required an application for succession rights, failing which it would initiate eviction proceedings.

No such application was received and, in December, 2007, EMP served a notice of its intent to commence an eviction proceeding, which proceeding was commenced the following month. Petitioners adjourned the hearing several times and it was finally scheduled for August, 2008. Petitioners failed to appear. Petitioners' attorneys appeared

and moved to be relieved based upon petitioners' advise that they did not intend to appear.

At the hearing, EMP submitted thirteen exhibits into evidence, including (1) income affidavits for the apartment for the three years prior to Daniel Gross' death listing him as the sole tenant; and (2) a letter from Robert to EMP, dated April 19, 2005, submitted proof of his residence in another apartment.

Following the hearing, the hearing officer contacted petitioners and offered them the opportunity to submit evidence. They failed to do so, notwithstanding their request for extra time was granted. The hearing officer issued a Certificate of Eviction.

The following month, petitioners, by new counsel, requested an opportunity to present a defense. The request was denied.

Petitioners instituted the instant Article 78 proceeding, seeking to vacate the certificate of eviction on the grounds that (1) the Preliminary Notice and Petition were not served in accord with the provisions of Section 3-18(a) of the HPD Rules and Regulations; and (2) the "entire purpose" of requiring surrender of an apartment upon the death of the tenant is to provide a person on the waiting list the opportunity to occupy it. Since there is a pending Voluntary Dissolution and Conversion Plan, it is "extremely unlikely" the shares will be sold to anyone on the waiting list.

Discussion

“It is well settled that judicial review in an Article 78 proceeding is limited to a determination of whether the administrative action complained of is arbitrary and capricious, or lacks a rational basis” (*In re Application of Chelrae Estates, Inc. v State Division of Housing and Community Renewal, Office of Rent Administration*, 225 AD2d 387, 389 [1st Dept. 1996]). In *Pell v Board of Education of Union Free School District*, the Court of Appeals defined arbitrary and capricious action as “action without sound basis in reason and generally taken without regard to the facts” (*Pell v Board of Education of Union Free School District*, 34 NY2d 222, 231 [1974])

The Private Housing Finance Law of the State of New York, also known as the Mitchell-Lama Law, provides financial assistance to developers who agree to follow regulations concerning rent, profit, disposition of property and tenant selection. (PHFL § 11 *et seq*) A tenant of a Mitchell-Lama apartment must occupy it as his primary residence. (28 RCNY § 3-02(n)(4)) Based upon the income requirement for tenancy, the tenant must keep HPD advised of all occupants of the apartment and their income. (28 RCNY § 3-03(c)) The right of occupancy of the apartments may not be bequeathed (28 RCNY § 3-06(d) and, upon the death of a tenant, the lease and stock shares must be surrendered. (28 RCNY § 3-02(p)(6)(i)) The only exception to this requirement is that a member of the tenant’s immediate family, who has resided in the apartment as his primary residence, may apply for succession rights to the apartment. (28 RCNY § 3-02(p)(6)(i))

This Court finds that the Certificate of Eviction was supported by substantial evidence, is reasonable and rational, and is not arbitrary or capricious or an abuse of discretion. The Mitchell-Lama law is clear that the shares and lease of an apartment must be surrendered upon a tenant's death unless a person in his immediate family, who resided in the apartment as his primary residence, applies for succession rights. This exception is not present here. Robert made no application for succession rights. However, even if he had, it would have been denied. The evidence established, and he has not denied, that the apartment was not his primary residence prior to his father's death.

This Court finds petitioners' defenses to the Certificate of Eviction to be unavailing. The Record shows that the petitioners were accorded their full due process rights of notice and an opportunity to be heard. Moreover, the suggestion that a pending Voluntary Dissolution and Conversion Plan negates unambiguous statutory requirements is both legally and factually without merit.

Accordingly, it is hereby

ORDERED that the petition is dismissed.

This reflects the decision and order of this Court.

Dated: 3/23/09

FILED
 MAR 24 2009
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 NEW YORK
 J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION