

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

2009 NY Slip Op 31586(U)

July 17, 2009

Supreme Court, New York County

Docket Number: 100740/09

Judge: O. Peter Sherwood

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

PRESENT: O. PETER SHERWOOD

PART 61

Justice

AMARYLLIS VILLIFANE a/k/a AMY, VILLAFANE

Petitioner,

-against-

NEW YORK STATE DIVISION OF, HOUSING AND COMMUNITY RENEWAL and NORTHTOWN PHASE III HOUSING,

Respondents.

INDEX NO.

100740/09

MOTION DATE

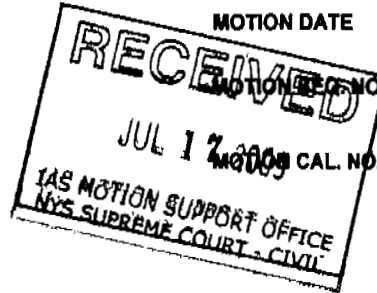
May 13, 2009

MOTION SER. NO.

001

CAL. NO.

88



The following papers, numbered 1 to 8 were read on this petition pursuant to CPLR Article 78

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

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits _____

4-6,7

Replying Affidavits _____

8

Cross-Motion: Yes No

Upon the foregoing papers, the petition pursuant to CPLR article 78 is decided in accordance with the accompanying decision, order and judgment.

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 representatives must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 7/17/09

O. Peter Sherwood
O. PETER SHERWOOD, J.S.C.

CASE DISC

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

AMARYLLIS VILLAFANE a/k/a AMY
VILLAFANE

DECISION, ORDER
AND JUDGMENT

Petitioner,

Index No. 100740/2009

-against-

NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL
and NORTHTOWN PHASE III HOUSING

Respondent.

O. PETER SHERWOOD, J.:

Petitioner Amaryllis Villifane a/k/a Amy Villafane ("petitioner") brings this CPLR Article 78 proceeding to challenge as arbitrary and capricious and not supported by substantial evidence the determination of respondent New York State Division of Housing and Community Renewal ("DHCR"), dated September 19, 2008, which denied her request for succession rights to Mitchell-Lama apartment 609 ("the apartment"), located in Northtown Phase III Houses, Inc. a/k/a Westview ("Northtown"), 595 Main Street, Roosevelt Island, New York. DHCR and Northtown both oppose the petition and seek to have the proceeding dismissed. For the reasons that follow, the petition is denied and the proceeding is dismissed.

Factual Background

Respondent Northtown is an Article II limited-profit housing company organized under the New York State Private Housing Finance Law ("PHFL") of the State of New York, popularly known as the Mitchell-Lama Law. Northtown owns an apartment building located at 595 Main Street, Roosevelt Island, New York ("the premises"). Respondent DHCR is a State administrative agency charged with the supervision of such limited profit housing companies. Mary Patsy Mance, who was the tenant of record of apartment 609 at the premises (the "tenant" or "Ms. Mance"), died on March 20, 2004. Petitioner Amaryllis Villafane a/k/a Amy Villafane ("petitioner") sought succession rights to the apartment as a non-traditional family member of the tenant of record.

By letter dated October 18, 2004, Northtown's counsel notified petitioner that the landlord was rejecting her claim to succession rights. Counsel asserted that the denial was based, *inter alia*,

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upon the fact that petitioner was listed as a "roommate" on the tenant of record's March 2004 income affidavit, petitioner's failure to document a family relationship or an emotional and financial interdependence with Ms. Mance, and her failure to document an actual two-year co-occupancy with Ms. Mance prior to her death. Petitioner was also advised of her right to appeal Northtown's denial of her succession application to DHCR.

Petitioner submitted an administrative appeal to DHCR by letter dated November 18, 2005 (Pet. ¶ 7) including an affidavit dated October 24, 2004, in which she alleged that she and Ms. Mance were family to each other for more than thirty years and that she, together with Ms. Mance's sister, was the beneficiary and executrix of Ms. Mance's will, beneficiary of Ms. Mance's investment account, and Ms. Mance's health care proxy. After receipt of the appeal and the landlord's opposition, DHCR's Office of Legal Affairs in a letter dated February 22, 2005, advised petitioner that she could submit within thirty (30) days evidence showing that the apartment was her primary residence during the two-year period prior to Ms. Mance's death and proof of an emotional and financial interdependence between herself and Ms. Mance (Opp. Aff. Olga Someras, Esq., Ex. "6").

By letter dated March 11, 2005, DHCR's Office of Legal Affairs stated that it had not received any of the items requested in its February 22, 2005 letter and again requested that petitioner provide such documentation. In response, on March 25, 2005, petitioner submitted the following documents in support of petitioner's contention that she resided at the premises for at least the two years prior to Ms. Mance's death: (1) W-2 forms for the tax years 2003 and 2004, both of which reflected the premises address, an AARP life insurance application dated February 25, 2003, bearing the premises address, and a copy of petitioner's New York State driver's license, issued December 20, 2001, also reflecting the premises address.

DHCR's Legal Department responded by letter dated March 30, 2005, stating that petitioner's March 25th submission did not address the issue of a financial and emotional interdependence between petitioner and Ms. Mance as defined by DHCR's rules and regulations (9 NYCRR § 1727-8) so that petitioner may be considered a non-traditional family member for purposes of succession rights to the apartment. Northtown submitted opposition reiterating its position that petitioner had failed to adequately document either that she co-occupied the apartment with Ms. Mance for the requisite two-year period before Ms. Mance's death or that she had both an

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emotional and financial interdependence with Ms. Mance. Thereafter, on or about May 13, 2005, DHCR again wrote to petitioner, noting the statements made in petitioner's October 26, 2004 affidavit in which petitioner claimed that she and Ms. Mance shared household expenses; held each other out as family; vacationed and traveled together; attended each other's family functions; spent holidays together; and did other things as a family, and again requesting documentation to support the statements made in the affidavit. An extension of DHCR's request was granted on application of petitioner's counsel giving petitioner until June 30, 2005 to respond.

Petitioner responded with her own affidavit with six exhibits including an affidavit of her son Armando Perez. In her affidavit, petitioner repeated many of the allegations of her earlier affidavit of October 24, 2004. She contended that during the more than 30 years that she and Ms. Mance resided together they shared living and household expenses with Ms. Mance paying 75 % and petitioner paying the remaining 25%. She again alleged that she and Ms. Mance held themselves out as family. They cooked and ate together, had guests to their apartment, and vacationed together, including international trips to Italy, Portugal, England and Greece. They spent winters together at Ms. Mance's condominium on Captiva Island, Florida. Petitioner further alleged that they attended family functions together, including the funerals of both Ms. Mance's parents and the vocational school graduation of Ms. Mance's niece. During Ms. Mance's final illness, petitioner served as Ms. Mance's health care proxy, consulting with her doctors and making health care decisions such as increasing the dose of pain medication. Petitioner again noted that she is an executrix of Ms. Mance's estate, made her funeral arrangements and was a 50% beneficiary of Ms. Mance's brokerage account. Petitioner also advised that she divorced her husband over thirty years ago "for obvious reasons" and that after that time she resided as a family unit with Ms. Mance and her son Armando, who referred to Ms. Mance as "Aunt Patsy". The three of them generally celebrated holidays together as a family. Petitioner's supporting exhibits consisted of Ms. Mance's Last Will and Testament executed June 8, 1999; letters testamentary issued to her for the estate of Ms. Mance, dated June 18, 2004; an accounting of various estate expenses; a statement from Ms. Mance's brokerage account; and Ms. Mance's health care proxy. Lastly, petitioner's son stated in his affidavit that he resided with his mother and his "Auntie" Ms. Mance from the age of five until he went away to school. He essentially repeats the allegations of petitioner's affidavit claiming that he lived

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together with petitioner and Ms. Mance as a family unit, depending on each other and doing all of the usual things that families do together.

By decision and order dated August 12, 2005 ("the decision"), Deputy Commissioner David B. Cabrera denied petitioner's appeal of Northtown's decision to deny her claim to succession rights to the apartment. Deputy Commissioner Cabrera conducted a thorough review of the record finding that other than her own allegations and the affidavit of her son, petitioner failed to supply any documentation of her trips with Ms. Mance, to support her claim that she and Ms. Mance attended each others family functions or visited Ms. Mance's sister or that they shared household expenses and Ms. Mance financially supported petitioner. Moreover, Deputy Commissioner Cabrera observed that while petitioner claimed she continuously resided with petitioner for more than thirty years her evidence does not demonstrate that her relationship with Ms. Mance dated back that far. Deputy Commissioner Cabrera concluded that petitioner had not established that she was a "family member" of Ms. Mance as defined by DHCR's regulations governing succession rights (*see*, 9 NYCRR §§ 1727-8.1 to 1727-8.6).

Petitioner thereafter commenced a CPLR article 78 proceeding in this court (Index No. 117204/05) seeking to annul DHCR's determination. By order dated February 8, 2006 (Nicholas Figueroa, J.), the petition was withdrawn and dismissed without prejudice on stipulation of the parties, dated February 2, 2006, and the matter was remanded to DHCR for further proceedings.

By letter dated June 30, 2008, DHCR's Office of Legal Affairs again requested that petitioner produce documentation in support of her claim to succession rights. In the letter, DHCR specified in detail the eight evidentiary factors relevant to establishing that an applicant is a "family member" of the deceased tenant of record within the meaning of DHCR's regulations, afforded petitioner thirty days to respond, and stated that additional time could be requested in writing. Upon her attorney's request, petitioner was granted an additional ten days to submit additional documentation. Notwithstanding this extension, petitioner failed to provide any additional documents in support of her application. DHCR, by Deputy Commissioner Cabrera, in a decision dated September 19, 2008, again denied petitioner's appeal finding that she failed to meet her burden of establishing an entitlement to succession rights to the apartment.

In the petition, petitioner contends that the evidence submitted before the DHCR establishes that she qualifies as the tenant-of-record's family member, is, therefore, entitled to succeed to the apartment as a tenant, and the determination of the DHCR finding otherwise is affected by error of law, is arbitrary and capricious, an abuse of discretion and not supported by substantial evidence. The allegations of the petition consist of a repetition of the allegations made before the administrative agency with an additional statement that "Out of respect to Mary Mance and her and petitioner's privacy, petitioner is not discussing matters which should properly remain behind closed doors" (Ver. Pet. ¶ 28). In an affirmation annexed to the petition, petitioner's attorney, Edward C. Kramer, Esq., suggests that the reason the Attorney General's Office agreed that the 2005 petition be withdrawn and the matter remanded to DHCR for further review was that it disagreed with DHCR's decision and believed that upon reconsideration the decision would be reversed. Mr. Kramer contends further that DHCR is guilty of laches and should be estopped from denying petitioner's succession application as it "sat" on the matter for 2 ½ years before "perfunctorily" issuing what Mr. Kramer characterizes as the same decision as previously issued. Mr. Kramer also asserts that "this matter wreaks of discrimination based on perceived sexuality" and that if a man and a woman were involved in the proceeding the result would have been different.

Respondent DHCR argues that a review of the record establishes that DHCR's determination was rationally based and neither arbitrary nor capricious. DHCR contends that while petitioner produced evidence demonstrating that Ms. Mance had formalized her legal obligations and relations with respect to the petitioner, there is an absence of reciprocity on the part of petitioner. The record shows that Ms. Mance repeatedly referred to petitioner as her friend or roommate rather than a family member, including on the official income affidavits for the apartment. Moreover, in spite of having numerous opportunities to submit documentation to support her allegations and meet the statutory requirements for qualifying as a non-traditional family member, DHCR avers that petitioner failed to produce sufficient evidence to demonstrate anything more than a close relationship with Ms. Mance which is not sufficient to establish entitlement to succession.

Northtown makes similar arguments and contends that within the narrow legal standards governing adjudication of CPLR article 78 proceedings and the limited judicial role in conducting such review, DHCR's determination must be upheld as factually and legally sound as the record is

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devoid of evidence of an emotional and financial interdependence between petitioner and tenant so as to qualify petitioner as a non-traditional family member for purposes of succession.

Discussion

Mitchell-Lama housing developments are restricted to tenants with moderate income and the law governing such complexes imposes rental surcharges on tenants when their income exceeds statutory limits. In order to ensure compliance with such income requirements, tenants are required to submit an annual income affidavit (9 NYCRR 1727-1.3) and the housing company must be notified within 90 days of any additions or deletions from the tenant's family who reside in the housing accommodation (9 NYCRR § 1727-2.5 [a]). It is undisputed that Ms. Mance included petitioner on her annual income recertifications for the calendar years 2001 and 2002, listing herself as head of household and describing her relationship with petitioner as that of "roommate". Before that time, for the calendar years 1996 through 1999, Ms. Mance is listed on the annual income affidavits as the sole occupant of the apartment.

The right to request succession in housing accommodations subject to the PHFL arises when the tenant of record of the subject apartment dies or otherwise permanently vacates the apartment (9 NYCRR § 1727-8.3 [a]). In order to succeed to the leasehold rights of the apartment, the DHCR succession rights regulations applicable to Mitchell-Lama housing complexes require the petitioner to make a three-fold showing that: (1) she is a member of the tenant's family within the meaning of regulation section 1727-8.2 (a) (2); (2) she resided with the tenant of record in the apartment as a primary residence for a period of not less than two years; and (3) she was listed on the income affidavit for at least the two consecutive reporting periods prior to the tenant's death and/or the Notice of Change in Tenant's Family (9 NYCRR § 1727-3.6). A "family member" as defined by the regulations includes various individuals related to the tenant by consanguinity or marriage or "[a]ny other person residing with the [tenant-of-record] in the housing accommodation as a primary or principal residence, who can prove emotional and financial commitment and interdependence between such person and the [tenant-of-record]" (9 NYCRR § 1727-8.2 [a][2][I]).

The regulations identify eight factors relevant to making such a determination (9 NYCRR § 1727-8.2 [a][2][ii][a-h]). Those factors include longevity of the relationship; sharing the payment of household or family expenses; intermingling of finances; engaging in family-type activities;

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formalizing of legal obligations; holding themselves out as family members; regularly performing family functions; engaging in any other pattern of behavior that would evidence the existence of a long-term, emotionally committed relationship between the applicant and the tenant-of-record. The petitioner was required to supply documentation to establish the existence of such a relationship between herself and Ms. Mance bearing in mind these various enumerated factors. Indeed, in its letter of June 30, 2008, the DHCR reviewed the documentation petitioner had submitted to support her application, measured it against the various regulatory factors, and identified in what respects petitioner's documentation was lacking.

The court's role in reviewing a decision of an administrative agency such as the DHCR is limited with the standard of review being whether the administrative determination was made in violation of a lawful procedure, was affected by an error of law or was arbitrary and capricious and without a rational basis in the administrative record (*see*, CPLR 7803; *Pell v Board of Education*, 34 NY2d 222, 231 [1974]). The court may not conduct a de novo review of the facts and circumstances or substitute its own judgment for that of the administrative agency (*see*, *Greystone Management Corp. v Conciliation and Appeals Bd.*, 94 AD2d 614, 616 [1st Dept 1983], *affd.* 62 NY2d 763 [1984]). Rather, the court should review the record as a whole to determine whether a rational basis exists to support the findings of the administrative agency (*see*, *Nelson v Roberts*, 304 AD2d 20 [1st Dept 2003]). Moreover, where the administrative determination requires an evaluation of the facts within an area of the administrative body's expertise, the determination must be accorded great weight and judicial deference (*see*, *Flacke v Onondaga Landfill Systems, Inc.*, 69 NY2d 335, 363 [1987]). An action is arbitrary and capricious when the action is taken "without regard to the facts" (*Pell v Board of Education, supra*).

DHCR's determination here that petitioner did not sustain her burden of establishing her entitlement to succession rights to Ms. Mance's apartment was not arbitrary or capricious and had a rational basis in the record. As DHCR observed, petitioner's affidavits were self-serving and the allegations therein as to the emotional and financial interdependence between herself and Ms. Mance were largely undocumented in spite of the guidance provided by DHCR as to the nature of the documentation required and the numerous invitations given to petitioner and her counsel to submit documentation in support of her succession application. Although petitioner claims a thirty-year

family-type relationship with Ms. Mance the evidence she produced does not support such a relationship extending back that far. Ms. Mance's will naming petitioner as a co-beneficiary and co-executrix is dated June 8, 1999. Ms. Mance also named petitioner as an alternate to her sister as her health care proxy in a document bearing that same date. However, in both documents the nature of Ms. Mance's relationship with petitioner is characterized as "friend". The only other document bearing an earlier date is a jewelry appraisal in petitioner's name, dated September 30, 1993, which bore the apartment address. Moreover, petitioner was not listed on the annual income affidavits prior to the calendar year 2001 and then was listed simply as "roommate". Ms. Mance's failure to include petitioner in the income affidavits or to file a Notice of Change in Tenant's Family undermines petitioner's allegation of a long-term family relationship with Ms. Mance.

The record also lacks sufficient proof to support petitioner's claim of financial interdependence between herself and Ms. Mance. Although she claims that Ms. Mance was essentially supporting her and she paid only one-quarter of the household expenses, she submitted no documentary proof in support of those claims. Nor was there any proof that petitioner and Ms. Mance had intermingled their financial affairs by, for example, having joint bank accounts, jointly owned real property, or shared credit obligations.

Petitioner also alleged that she and Ms. Mance held themselves out as family and engaged in family-type activities such as celebrating holidays, attending family events and vacationing together. The only proof other than her own affidavits to support these contentions is the affidavit of petitioner's son which lacks sufficient specificity. Petitioner has submitted no documentary proof such as airline ticket receipts, credit card statements, photographs, hotel receipts, passport stamps, or affidavits from friends or other family members to support her allegations. The court notes that petitioner annexed to her reply affidavit cancelled checks which she asserts reflect shared expenses on her and Ms. Mance's trip to Portugal in 1993. However, the court in its review is limited to the facts and record adduced before the administrative agency and, therefore, such additional documents may not be considered in this proceeding (*see, Matter of Yarbough v Franco*, 95 NY2d 342 [2000]).

Lastly, petitioner submitted some documentary proof concerning the factor as to formalization of her and Ms. Mance's legal obligations. However, as DHCR noted, petitioner was named as a friend in Ms. Mance's will and was an alternate in Ms. Mance's health care proxy. In

addition, these documents were executed by Ms. Mance and there is no evidence that petitioner reciprocated in formalizing her legal obligations with respect to Ms. Mance.

Conclusion

In sum, DHCR's determination finding a lack of objective documentary evidence to support petitioner's application for succession rights is neither arbitrary nor capricious and has a rational basis in the record. Accordingly, such determination will not be disturbed and it is hereby

ORDERED AND ADJUDGED that the petition is denied and the proceeding is dismissed.

This constitutes the decision, order and judgment of the Court.

DATED: 7/17/09

ENTER,

O. PETER SHERWOOD
J.S.C.

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).