

Matter of Devitt v Riverbend Hous. Co., Inc.
2009 NY Slip Op 32235(U)
September 29, 2009
Supreme Court, New York County
Docket Number: 104036-09
Judge: Joan B. Lobis
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Joan B. Lobis

PART 6

Justice

Index Number : 104036/2009

DEVITT, RONALD

VS.

RIVERBEND HOUSING COMPANY, INC.,

SEQUENCE NUMBER : # 001

ARTICLE 78

INDEX NO. 104036-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were read on this ^{petition} motion to/for Art 78 relief

PAPERS NUMBERED

1-10
11-18, 19-21
22

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 ^{petition} motion

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

MOTION DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION AND ORDER AND JUDGEMENT

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).

Dated: 9/29/09

JBL
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

-----X
In the Matter of the Application of
Ronald Devitt,

Petitioner

Index No.: 104036/09

Decision, Order, and Judgment

- against -

RIVERBEND HOUSING COMPANY, INC., and
CITY OF NEW YORK DEPARTMENT OF
HOUSING PRESERVATION AND DEVELOPMENT,

Respondents

UNFILED JUDGMENT

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141B).

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

Petitioner Ronald Devitt brings this petition, pursuant to Article 78 of the C.P.L.R., seeking to overturn the February 2, 2009 decision of respondent Department of Housing Preservation and Development ("HPD" or the "Department") to deny his request for succession rights to apartment 9E at 2333 Fifth Avenue in Manhattan (the "Apartment"). Respondent Riverbend Housing Company, Inc. ("Riverbend") is the owner of the building. The Department and Riverbend oppose the petition.

The Apartment is subject to the Mitchell-Lama Law, Article II of the Private Housing Finance Law and, therefore, tenants are subject to certain restrictions and occupancy regulations. Petitioner alleges that he resided in the Apartment with Reginald Casey, the tenant of record, since January 2002. Mr. Casey died on February 14, 2004, at the age of 92. Petitioner asserts that their relationship was akin to that of father and son, as evidenced by the use of the term "stepson" on the 2002 income affidavit in referring to petitioner.

Sometime after Mr. Casey's death, Riverbend sent petitioner a "Notice of Intention to Terminate Lease & Preliminary Notice of Grounds for Eviction," dated January 18, 2005 (the "Notice"). The Notice sets forth that petitioner was occupying the Apartment unlawfully because he was not a member of Mr. Casey's immediate family. The Notice further states that unless petitioner vacated the premises, Riverbend would request that the Department proceed with a hearing to address the charges against petitioner, and seek a certificate of eviction.

In January 2005, petitioner was served with a Notice of Hearing, which advised petitioner that a hearing was scheduled for February 9, 2005. The hearing was subsequently adjourned to November 14, 2006. In an undated stipulation, the parties agreed to convert the proceeding to a succession rights proceeding and waive a hearing. The parties agreed that the issue would be determined on submission, with all documents regarding the occupancy of the Apartment or relating to any claim for succession rights to be submitted on or before December 14, 2006.

Petitioner submitted his documents in a timely manner. These documents included a petition signed by a number of cooperators in support of petitioner's effort to remain as a resident of the building and bills addressed to petitioner at the Apartment. Riverbend apparently failed to submit its documents until nearly two years later, on November 12, 2008. Riverbend submitted a letter from each of Mr. Casey's two sisters; a durable power of attorney appointing petitioner to act on Mr. Casey's behalf; and, a letter from Marie Davis, Mr. Casey's daughter, together with Mr. Casey's will, death certificate, and check register.

On February 2, 2009, HPD Administrative Hearing Officer Frances Lipa rendered a written determination denying petitioner's appeal of succession rights. The Hearing Officer noted that the 2002 income affidavit, dated April 30, 2003, and notarized on May 14, 2003, lists Ronald Devitt as residing in the Apartment. Petitioner's gross income is reported as \$2,100. Under the heading "relationship," petitioner is described as a "stepson." The Hearing Officer noted, however, that no documentary evidence was submitted to prove that petitioner was the stepson of Mr. Casey. To be considered a family member, the Hearing Officer noted, the individual claiming succession rights must be related to the tenant of record either in one of the ways specified in R.C.N.Y. § 3-02(p)(2)(ii)(A), or in a non-traditional manner, as defined by § 3-02(p)(2)(ii)(B), by a showing that the individual claiming succession rights had a shared financial and emotional commitment and interdependence with the tenant of record.

The power of attorney, which was executed by Mr. Casey on December 16, 2003, describes petitioner as a "dear and loving friend." Mr. Casey's 1995 will, which also describes petitioner as a "dear friend," bequeathed audio and stereo equipment to petitioner; others in the will were also described as dear friends. Mr. Casey's sisters, who resided in California and Illinois (one of whom has since died), submitted letters in support of petitioner's claim; the letters state that petitioner volunteered his services to assist their brother, since they both lived so far away. Both sisters described petitioner as a dear friend, who was like a member of the family. Their brother, they both wrote, was like a father to petitioner. Petitioner, in turn, was there to tend to their brother's needs once Mr. Casey became ill, and gave up his own apartment to move into the Apartment with Mr. Casey.

But, the Hearing Officer found that all of this evidence was outweighed by the evidence presented by Riverbend from Mr. Casey's daughter, Marie Davis, the executrix of her father's estate. Ms. Davis submitted a letter, dated January 26, 2005, which sets forth that petitioner was an employee who was paid to care for her father, and was not a relative. Included with the letter was a copy of Mr. Casey's check register, beginning with a check dated August 30, 2002. The check register reflected that checks were written to petitioner from on or about September 24, 2002, through on or about February 9, 2004, initially in the amount of \$1,300, and then increasing to \$1,500 beginning on or about October 15, 2003. The register reflects that the checks are dated approximately on a bi-weekly basis. Two entries—dated July 16, 2003 and October 2, 2003—include the notation that the checks were for caretaking services. One entry, dated July 7, 2003, contains the notation "late—should've been for the 1st." It does not appear that petitioner had any opportunity to rebut the information in the check register; but, as noted above, he stipulated to have the issue of succession determined by submission of documents.

Based on the check register evidence, the Hearing Officer found that while petitioner may have had a "close relationship" to Mr. Casey, it was apparent that he was paid for his caretaking services, which evinces an employer-employee relationship, and not a family relationship. She found no evidence that they intermingled their finances; therefore, she found there was no evidence of an "emotional and financial commitment and interdependence," as required under the regulations.

In an Article 78 proceeding, the court's review of an administrative action is limited to a determination of whether that administrative decision was made in violation of lawful

procedures, whether it is arbitrary or capricious, or whether it was affected by an error of law. Matter of Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). "The arbitrary or capricious test chiefly 'relates to whether a particular action should have been taken or is justified . . . and whether the administrative action is without foundation in fact.'" Id. (citation omitted). A determination is considered "arbitrary" when it is made "without sound basis in reason and is generally taken without regard to the facts." Id.

The rules for occupancy rights of family member and succession rights to a Mitchell-Lama unit are set forth in 28 R.C.N.Y. § 3-02(p). The term "family member" is defined in § 3-02(p)(2)(ii) as

(A) A husband, wife, son, daughter, stepson, stepdaughter, including any adopted children father, mother, stepfather, stepmother, brother, sister, nephew, niece, uncle, aunt, grandfather, grandmother, grandson, granddaughter [sic], father-in-law, mother-in-law, son-in-law, or daughter-in-law of the tenant/cooperator.

(B) Any other person residing with the tenant/cooperator in the apartment as a primary residence who can prove emotional and financial commitment and interdependence between such person and the tenant/cooperator. Although no single factor shall be determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence existed shall be the income affidavit filed by the tenant/cooperator for the apartment and other evidence which may include, without limitation, the following factors:

(a) longevity of the relationship;

(b) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;

(c) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, person and real property, credit

cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;

(d) engaging in family activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;

(e) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, registering a domestic partnership pursuant to Executive Order No. 48, dated January 7, 1993 or Local Law No. 27 of 1998, serving as a representative payee for purposes of public benefits, or other such formalizations;

(f) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their words or actions;

(g) regularly performing family functions, such as caring for each other or each other's extended family members, and/or relying upon each other for daily family services;

(h) engaging in other patterns of behavior, or other action which evidences the intention of creating a long-term, emotionally committed relationship.

(Emphasis added.)

In support of the petition, petitioner has submitted a sworn statement, dated February 25, 2009, in which he sets forth that he was not Mr. Casey's primary caretaker. Petitioner states that he took an early retirement as an inspector from the Department of Transportation. He states that Mr. Casey's primary caregivers were petitioner's brother, Robert Devitt, Jr., and Kathy Jones, who is not otherwise identified. Petitioner further states that he is a disabled Vietnam War veteran, with chronic Post Traumatic Stress Disorder ("PTSD") since the war. Petitioner states that he had

formerly worked two blocks from the World Trade Center, and the events of September 11, 2001 triggered his PTSD, which caused him to retire early. He also submitted a sworn statement by Ms. Jones, dated February 25, 2009, which states that she was one of the two primary caretakers for Mr. Casey while petitioner was working. She states that she was paid \$10 per hour by petitioner. A similar sworn statement, also dated February 25, 2009, was submitted by petitioner's brother, Robert Devitt, Jr. Petitioner's brother states that he wrote checks from Mr. Casey's account and gave them to his brother to deposit. Petitioner's brother avers that he and Ms. Jones were each paid \$10 per hour from these funds.

All three statements are sworn to on February 25, 2009. None of these statements were submitted to the Hearing Officer. "Judicial review of administrative determinations is confined to the 'facts and record adduced before the agency.'" Matter of Yarbough v. Franco, 95 N.Y.2d 342, 347 (2000), quoting, Matter of Fanelli v. New York City Conciliation & Appeals Bd., 90 A.D.2d 756, 757 (1st Dep't 1982), aff'd for reasons below, 58 N.Y.2d 952 (1983). It was incumbent upon petitioner to submit these statements or similar evidence to rebut the evidence presented by Mr. Casey's daughter, at the time of the administrative proceedings, to show that he was not a paid caregiver. Since these statements are not part of the administrative record, this court cannot consider them. Id.

Based on the evidence that was before the Hearing Officer, it was not arbitrary and capricious for her to conclude that petitioner was a paid employee of Mr. Casey. There was no evidence to show that petitioner was actually Mr. Casey's lawful stepson, nor was there evidence of

a shared financial and emotional commitment and interdependence with the tenant of record. In contrast, there was at least some evidence that petitioner was being paid as a caretaker; therefore, the Hearing Officer's determination must be upheld.

For these reasons, the February 2, 2009 decision must be upheld. This constitutes the decision, order, and judgment of the court.

Dated: September 29, 2009


JOAN B. LOBIS, J.S.C.

UNFILED JUDGMENT
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