

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

2010 NY Slip Op 30209(U)

January 19, 2010

Supreme Court, New York County

Docket Number: 113833/09

Judge: Eileen A. Rakower

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

PRESENT: Hon. EILEEN A. RAKOWER
Justice

PART 15

MICHELLE CALISTRO MCALEER,

INDEX NO. 113833/09

Petitioner,

MOTION DATE _____

- v -

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

NYS DHCR,

Defendant.

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

PAPERS NUMBERED

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

1-5

Answer — Affidavits — Exhibits _____

Replying Affidavits _____


Cross-Motion: Yes No

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED: _____ 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).

Dated: January 14, 2010


HON. EILEEN A. RAKOWER, C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
MICHELLE CALISTRO MCALEER,

Index No.
113833/09

Petitioner,

-against-

DECISION
and ORDER

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL

Mot. Seq.
001

UNFILED JUDGMENT
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141B).

HON. EILEEN A. RAKOWER:

Petitioner Michelle Calistro McAleer (“Petitioner”), acting *pro se*, brings this Article 78 proceeding seeking an order annulling Respondent New York State Division of Housing and Community Renewal’s (“DHCR”) June 2, 2009 determination, which denied Petitioner’s appeal in her claim to succession rights to the tenancy of Apartment 5-D of 66 Frankfort Street, New York, New York (“the Apartment”).

The Apartment is part of the Southbridge Towers development, which is owned by Southbridge Towers, Inc. (“Southbridge”). Southbridge holds title to the building as a state-supervised, limited-profit housing company organized under Article II of the Private Finance Housing Law (“PFHL”) - also known as a Mitchell-Lama company. Mitchell-Lama companies offer housing at below-market rents due to municipal real property tax exemptions and low-interest government financing. PFHL §32(3) vests DHCR with authority to promulgate rules and regulations to carry out the provisions of the PFHL. These regulations are contained in 9 NYCRR Part 1727.

Joseph Calistro (“Joseph”), Petitioner’s father, was the tenant of record in the subject Apartment until his death on January 20, 2007. Prior to his death, on April 28, 2006, Joseph executed an annual affidavit of family income (“income affidavit”) for calendar year 2005. Joseph listed Petitioner as a member of the Apartment household.

A little over a year earlier, on April 21, 2005, Joseph submitted an income affidavit for calendar year 2004, which also listed Petitioner as a member of the Apartment household. Petitioner was not listed on earlier income affidavits for the Apartment, however, and in fact was listed as a member of the household of Apartment 3-A in its respective income affidavit for calendar year 2003.

On April 27, 2007, Petitioner executed the income affidavit for calendar year 2006, listing herself, her child, and Joseph as members of the household, but noting that Joseph was deceased. On or around April 7, 2008, Petitioner submitted an Application for Apartment form, which sought succession rights to the Apartment. On August 28, 2008, Southbridge found that Petitioner was eligible for succession rights to the Apartment, and forwarded the application to DHCR for review.

On December 10, 2008, DHCR found that Petitioner's application was lacking the necessary documentation to establish that she had been a resident of the Apartment for the requisite two year period set forth under DHCR regulations. Specifically, DHCR noted that, in addition to the 2004 and 2005 income affidavits, there was no notice of a change in the Apartment's family composition (which is required by DHCR regulations upon an addition of member to the household) placing Petitioner in the Apartment on or before January 20, 2005 (*i.e.*, two years prior to Joseph's death). Petitioner appealed that decision by letter dated February 16, 2009. Petitioner's appeal was denied by DHCR on June 2, 2009.

Petitioner subsequently commenced the instant Article 78 proceeding. Petitioner submits a verified petition with DHCR's June 2, 2009 decision and documentation Petitioner submitted in support of her application annexed thereto as exhibits. Petitioner argues that DHCR's decision was arbitrary and capricious in that it was based upon the fact that there was neither an income affidavit nor a notice of change to the Apartment's family composition documenting her physical presence in the apartment for the three-month period from January 20, 2005 (two years prior to Joseph's death) to April 21, 2005 (the date of the income affidavit for calendar year 2004). Petitioner also asserts that DHCR's decision should be annulled based on the fact that she introduced documentary evidence such as bank records and tax documents which list the Apartment as her address for the requisite two-year period and beyond. Petitioner also states that she offered to have numerous other residents and staff verify her presence in the Apartment, "to no avail."

DHCR has submitted a verified answer; affidavit from DCHR Assistant

Commissioner for Housing Operations Richmond McCurnin; and a memorandum of law in response to the petition. DHCR also submits the entire administrative record pertaining to Petitioner’s application. DHCR argues that its determination is supported by a rational basis because Petitioner failed to provide income affidavits and/or a notice of change of family composition which established her presence in the Apartment for the entire two-year period preceding Joseph’s death.

It is well settled that the “[j]udicial review of an administrative determination is confined to the ‘facts and record adduced before the agency’.” (*Matter of Yarborough v. Franco*, 95 N.Y.2d 342, 347 [2000], quoting *Matter of Fanelli v. New York City Conciliation & Appeals Board*, 90 A.D.2d 756 [1st Dept. 1982]). The reviewing court may not substitute its judgment for that of the agency’s determination but must decide if the agency’s decision is supported on any reasonable basis. (*Matter of Clancy -Cullen Storage Co. v. Board of Elections of the City of New York*, 98 A.D.2d 635,636 [1st Dept. 1983]). Once the court finds a rational basis exists for the agency’s determination, its review is ended. (*Matter of Sullivan County Harness Racing Association, Inc. v. Glasser*, 30 N.Y. 2d 269, 277-278 [1972]). The court may only declare an agency’s determination “arbitrary and capricious” if it finds that there is no rational basis for the determination. (*Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 231 [1974]).

9 NYCRR §1727-8.3(a)¹ provides, in pertinent part, that upon the departure of the tenant of a Mitchell-Lama apartment,

any member of such tenant’s family... who has resided with the tenant in the housing accommodation as a primary residence for a period of not less than two years, [and] has been listed on the income affidavit and/or on the Notice of Change to Tenant’s Family as required under section 1727-3.6 of this Part... may request to be named as a tenant on the lease and on the stock certificate.

§1727-8.2(a)(5) further states that

¹Subsequent to DHCR’s June 2, 2009 determination, Part 1727 was renumbered and partially amended. The regulations referred to herein are the regulations that were in effect at the time of DHCR’s decision.

Proof of [primary] residency shall be the listing of such person on the annual income affidavit and/or the filing of the Notice of Change to Tenant's Family as set forth in section 1727-3.6 of this Part, together with other evidence, such as certified copies of tax returns, voting records, motor vehicle registration and driver's license, school registration, bank accounts, employment records, insurance policies, and/or other pertinent documentation or facts.

§1727-3.6 requires Mitchell-Lama housing companies such as Southbridge to provide in all leases

that the housing company must be advised in writing within 90 calendar days of any additions to or deletions from the tenant's family who reside in the housing accommodation..., and that such changes shall be reflected in all subsequent affidavits of income submitted by the tenant.

Based upon the foregoing, the court finds that DHCR had a rational basis for denying Petitioner's appeal, and thus the court is required to uphold DHCR's decision. The above-cited regulations require that an applicant for succession rights demonstrate his or her entitlement to tenancy by presenting, *inter alia*, proof in the form of income affidavits and, if required, as it is in the instant petition, a notice of change of family composition to establish residency in the subject apartment for the requisite two-year period. The apartment's income affidavits for calendar years 2004 and 2005, executed in 2005 and 2006, respectively, do not establish Petitioner's presence in the Apartment for the years 2004 and 2005. The documents on their face indicate that the tenant is directed to list "all members of [the] household currently residing in the apartment," and simply calculate the current level of income of a household using the members' individual incomes from the previous calendar year. Accordingly, for purposes of establishing residency, the income affidavit merely reflects the member's presence in the apartment on the date of its execution - it does not establish his or her presence beforehand (*see Martino v. Southbridge Towers, Inc.*, 2009 NY Slip Op 08870 [1st Dept. 2009]) ("Contrary to petitioner's argument, the listing of her name on the affidavit of income filed in April 1998 did not establish her occupancy of the apartment in 1997"). While Petitioner claims that her presence in the apartment for the requisite period could not be documented by virtue of the income affidavits (the

[* 6]
execution dates for which fell in April), any period of time between her moving into the Apartment and the execution of the income affidavit could have been - indeed, should have been - accounted for by filing a notice documenting Petitioner's addition to the Apartment household (*see* 9 NYCRR §1727-3.6).

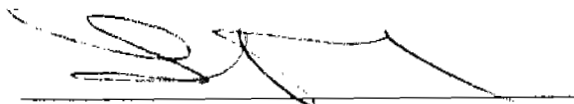
Wherefore, it is hereby

ORDERED and ADJUDGED that the petition is denied and the proceeding is dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: January 19, 2010



EILEEN A. RAKOWER, J.S.C.

UNFILED JUDGMENT
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