

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

2010 NY Slip Op 31523(U)

June 8, 2010

Supreme Court, New York County

Docket Number: 110160/09

Judge: Joan B. Lobis

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

PRESENT: HON. JOAN B. LOBIS  
Justice

PART 6

*l*  
*6/1/10*  
Matter of Gottlieb

Plaintiff(s),

- v -

*NYS DCHR*

Defendant(s).

INDEX NO. *110160/09*

MOTION DATE ~~11/10~~ *4/27/10*

MOTION SEQ. NO. *001*

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
<i>1-15</i>
<i>16-18 x Return</i>
<i>19</i>

Cross-Motion: [ ] Yes [X] No

THIS MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

**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: *6/8/10*

*JBL*  
\_\_\_\_\_  
JOAN B. LOBIS, J.S.C.

Check one: [ ] FINAL DISPOSITION

[ ] NON-FINAL DISPOSITION

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 6**

-----X

In the Matter of the Application of

STEPHEN GOTTLIEB,

Petitioner,

Index No. 110160/09

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

**Decision, Order and Judgment**

- against -

NEW YORK STATE DIVISION OF HOUSING AND  
COMMUNITY RENEWAL, and  
SOUTHBRIDGE TOWERS, INC.,

Respondents.

-----X

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

**UNFILED JUDGMENT**  
This Judgment has not been entered by the County Clerk  
and notice of entry cannot be served based thereon.  
To obtain entry, counsel or authorized representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).

Petitioner Stephen Gottlieb brings this Article 78 proceeding, by order to show cause, seeking to reverse, annul, and set aside the determination by respondent, the New York State Division of Housing and Community Renewal ("DHCR" or the "Division"), to deny petitioner succession rights to an apartment located at 90 Gold Street (the "Apartment"). DCHR opposes the petition. Southbridge Towers, Inc. ("Southbridge" or the "Housing Company") submitted no opposition.

This matter was originally assigned to the Hon. Marcy S. Friedman, who signed the order to show cause on or about July 20, 2009. The order to show cause sought a preliminary injunction enjoining respondents from proceeding against petitioner in Civil Court, L&T index number 70069/09. On July 30, 2009, the return date of the order to show cause, the parties agreed to adjourn this proceeding to September 17, 2009 and that the Civil Court matter would be stayed

pending a hearing on this matter, on the condition that petitioner continued to pay ongoing use and occupancy charges. This matter was adjourned several more times to January 14, 2010. After Justice Friedman recused herself from the matter on January 14, the case was randomly reassigned to the undersigned. The parties appeared for oral argument on April 20, 2010, and a further telephone conference was conducted on April 27, at which point the proceeding was marked fully submitted.

The Apartment is owned by Southbridge, a housing company organized under Article II of the Private Finance Housing Law ("PFHL") (commonly referred to as the "Mitchell-Lama Law"). Respondent DCHR is the administrative agency charged with supervising Mitchell-Lama housing companies. Cooperators (or tenants) of Mitchell-Lama units are shareholders who benefit from below-market maintenance charges due to the housing company receiving a municipal property tax exemption and low interest government financing. Cooperators sign a proprietary lease, called the "Occupancy Agreement".

Petitioner is seventy-three (73) years old and asserts that he has resided in the Apartment since 1991. Petitioner's father, Louis Gottlieb, was the shareholder of record for the Apartment until his death on March 8, 1994. The petition sets forth that after his father's death in 1994, petitioner "discussed with Douglas Kellner, the General Counsel for [Southbridge], the process for the transfer of shares from the estate of Louis Gottlieb to the [p]etitioner." Petitioner then apparently met with Antoinette D'Egido, then the managing agent of Southbridge, and Victor Papa, then the president of Southbridge, to discuss his succession request. Petitioner contends that these

discussions constituted his first succession application. Petitioner maintains that he was “led to believe” that the shares in his father’s name were transferred to his name to reflect that he was the shareholder of record. The petition sets forth that it now appears that the transfer of shares was never memorialized in a writing or new stock certificate.

Petitioner occupied the Apartment and paid maintenance to Southbridge for twelve years after his father’s death. In December 2007, Southbridge asked him to submit an application for succession rights. He did so on or about January 11, 2008. By letter dated January 31, 2008, the Housing Company denied petitioner’s application for succession rights, having determined that petitioner did not reside with his father for two years before the father’s death, as required by 9 N.Y.C.R.R. § 1727-8.3(a). The Housing Company based its determination on the 1992 income affidavit for the Apartment, which was not filed with the Housing Company until October 14, 1993. That income affidavit was signed by petitioner but not notarized or dated, and sets forth that petitioner was residing in the Apartment “as of 10/1/92” (the “10/1/92 Notation”). The time period between October 1, 1992 and March 8, 1994 is about seventeen months, or less than the required two years of residency prior to the shareholder’s death.

Petitioner, by his attorney, appealed the Housing Company’s decision to DCHR. His arguments were as follows: that Southbridge’s actions amounted to an impermissible rescission of its prior grant of a transfer of shares from Louis Gottlieb to petitioner; that Southbridge waited too long to act and is now estopped from disputing petitioner’s entitlement to succeed his father to the Apartment or petitioner’s ownership of the shares; that, contrary to the 1992 income affidavit,

petitioner has occupied and paid rent from 1991 through the present; and that petitioner was a senior citizen at the time Southbridge raised the issue of his right to occupy the Apartment, so he is only required to prove one year of concurrent occupancy with the prior shareholder, not two years. The Housing Company opposed the appeal, contending that petitioner did not establish through documentary evidence that he co-occupied the Apartment with the original shareholder for the required two years prior to the shareholder's death. The Housing Company also argued that the one-year rule for senior citizens does not apply to petitioner because he was not a senior citizen at the time of the father's death. Southbridge did not address petitioner's contention that the shares were already transferred to petitioner upon his original request in or about 1994.

DCHR then asked petitioner to submit his reply to the Housing Company's opposition. Petitioner's reply re-stated his previous arguments. At about the same point in the appeal process, DCHR asked the Housing Company to provide a copy of the Apartment's occupancy agreement and the income affidavits for the Apartment for the years 1989 through 1991. DCHR also asked the Housing Company whether petitioner had given it written notice that he had taken occupancy of the Apartment, and whether the Housing Company had filed the 1992 income affidavit with DCHR. The Housing Company's submission of additional documents included the occupancy agreement, but it informed DCHR that it was unable to locate the income affidavits for the years 1989 through 1991, so instead it provided the income affidavits from 1988 and 1994.

DCHR next asked petitioner to provide an explanation as to the inconsistencies regarding the actual date petitioner took occupancy; evidence concerning the transfer of the

Apartment's shares in 1994; evidence that petitioner occupied the Apartment from at least March 8, 1992 through March 8, 1994; notice to the Housing Company that petitioner took occupancy of the Apartment; and an explanation as to why income affidavits for the years 1990, 1991, and 1993 were not filed, and why the 1992 income affidavit was submitted late. Petitioner responded that the year he took occupancy was 1991, based on the rent checks he issued for the Apartment in 1991 and his recollection that he began residing in the Apartment when his mother died (although he does not set forth the year in which his mother died). He did not know why the 1990 or 1991 income affidavits were never filed, but understood that it was his father's responsibility to do so. He submitted the 1992 affidavit when management requested it from him. At that time, in October 1993, he was running for Civil Court Judge in New York County and had to demonstrate one year of residency in New York County. Petitioner maintains that he only added the 10/1/92 Notation "gratuitously" because he was seeking elected office, even though he had been living in the Apartment prior to that date. He had no recollection of receiving a request for a 1993 certification.

As to evidence that the shares were transferred to him, petitioner submitted an affidavit from Douglas A. Kellner, who was general counsel to Southbridge from 1990 to 1996 (and who served as the New York County Commissioner of the Board of Elections for the City of New York at the same time). Mr. Kellner set forth his recollection that petitioner contacted him, after petitioner's father's death in 1994, to learn the procedure for transferring the shares for the Apartment to petitioner's name. Mr. Kellner advised petitioner to speak with Antoinette D'Egido at Maxwell Kates, the company managing Southbridge at the time. Mr. Kellner also spoke directly to Ms. D'Egido, who told him that she would meet with petitioner and "take care of the situation."

Mr. Kellner also spoke to Victor Papa, then-president of Southbridge. Consequently, Mr. Kellner believed that petitioner's "request was being addressed in the ordinary course of business of Southbridge[.]"

On or about March 20, 2009, DCHR issued an order denying petitioner's appeal of the Housing Company's determination. The Division noted that despite petitioner's statements that he took up occupancy of the Apartment in 1991 or 1992, no evidence was submitted that he or anyone else acting on his behalf ever gave the Housing Company notice of that alleged occurrence. DCHR also noted that the Housing Company had not filed the Apartment's income affidavits for 1990 or 1991, and that in response to DCHR's request for copies of those affidavits, the Housing Company was unable to locate them. DCHR then summarized petitioner's and Southbridge's various arguments and submitted documents, as detailed above.

The applicable succession statutes were then cited by DCHR. Succession rights are only available to a family member who resided with the tenant-of-record as a primary residence for not less than two years prior to the tenant's death and has been named on the annual income affidavits, or in the case of senior citizens or disabled persons, for not less than one year prior to the tenant's death. 9 N.Y.C.R.R. §§ 1727-8.2, 8.3, and 8.4.<sup>1</sup> Tenants-of-record must notify the Housing Company, in writing, of any changes in family composition within ninety (90) days of the change, and must reflect the change in all subsequent income affidavits. 9 N.Y.C.R.R. § 1727-3.6. Proof

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<sup>1</sup> The court notes that the succession statutes were amended and renumbered in November 2009, but the papers in this matter were submitted prior to the changes, and the court will base its decision as the law existed at the time the events took place.

of "primary residence" may be demonstrated by the submission of (but not limited to) the annual income affidavits, written notices of a change in family composition, tax returns, voting records, motor vehicle registrations and/or driver's licenses, school records, bank accounts, employment records, and/or insurance policies. 9 N.Y.C.R.R. §§ 1727-8.2, 2.4, and 3.6. Based on those regulations, DCHR noted that succession claimants have the burden of showing that they are family members with the vacated tenant-of-record (not contested here), that they resided with the tenant in the unit as their primary residence for the required qualification period, and that they have had their names listed on a written notice of change to the tenant's family composition. Failure to be listed on a written notice of change is not grounds for automatic disqualification for succession, but if there is no written notice, the first annual income affidavit substitutes as the Housing Company's first formal, written notice of the change. If relying on an annual income affidavit as proof of occupancy, DCHR will determine occupancy to be effective as of the date that the parties sign the income affidavit.

In arriving at its determination to deny petitioner's appeal, DCHR sets forth that petitioner was not a "senior citizen" when the tenant died and the right to claim succession to the Apartment's tenancy accrued. DCHR rejected petitioner's argument that because he is a senior citizen now, and the Housing Company delayed in requiring him to submit a succession rights application, that the Housing Company should be required to apply the regulations "in the present day." Finding the burden to claim succession rights on the family member, not the Housing Company, DCHR concluded that if the family member omits to timely interpose a succession claim, the Housing Company is not required to request supporting documentation concerning potential

claims of which it has no notice. DCHR also rejected any retroactive application of the shorter, one-year qualification period, stating that such an application would encourage succession claimants to delay filing their requests for succession rights.

DCHR then went through the documentation, and found that no evidence existed that the Housing Company was ever provided with written notice that petitioner had taken occupancy of the Apartment. While not fatal to petitioner's claim to succession, DCHR then needed to see an annual income affidavit for calendar year 1990 (normally executed in mid-1991). No such affidavits were provided for calendar years 1990 or 1991. Citing the regulations that expressly require timely submission of those annual income affidavits, and petitioner being without explanation as to why the tenant-of-record did not file them, DCHR determined that petitioner's succession claim must fail. Based on DCHR's rule that it will rely on the first written notice to the Housing Company if no written notice of a change in family composition is provided, it relied on the income affidavit for calendar year 1992, signed but undated by petitioner, but reviewed by the Housing Company in or around October 1993. Based on the October 1993 date, the Division concluded that petitioner had only taken actual occupancy of the Apartment approximately four and one-half months prior to petitioner's father's death.

Regarding petitioner's argument that the shares had indeed been transferred to him in 1994, DCHR found this argument without documentary basis and unavailing. Petitioner acknowledged that no stock certificate had been issued to him. The discussions he had with various persons affiliated with Southbridge were not the equivalent of a transfer of shares. Petitioner had

no basis to believe the shares were transferred without a share certificate in his name. DCHR also noted the absence of evidence of the other requirements of the share transfer process, such as the surrendering of the shares for reissuance, and the Housing Company's submission of the succession claim to DCHR for approval, neither of which apparently occurred, and without which, any transfer would be considered a nullity.

DCHR evaluated petitioner's purported proofs of occupancy since 1991. There were copies of eight personal checks showing petitioner's payment of use and occupancy in January, May, June, July, August, September, November, and December 1991. The checks have the tenant's and petitioner's names imprinted, but no address. DCHR found that the checks show that petitioner "drew a somewhat sporadic series of checks on a joint account with the Tenant for the payment of the Apartment's maintenance charges on his elderly parent's behalf." DCHR did not find those checks to be evidence that petitioner occupied the Apartment as his permanent residence. There were also copies of petitioner's federal income tax returns for tax years 1992 and 1993 submitted. He listed the Apartment as his address on those records, although he also stated on those tax records that two daughters resided with him, neither of whom were listed on the annual income affidavits for those calendar years. The 1992 federal tax return is undated, although petitioner also submitted his resident income tax return for 1992, which was filed on October 15, 1993. Presuming that the federal tax return and the resident tax return were filed at about the same time, DCHR found that these items did not support occupancy prior to October 15, 1993, again only four and one-half months prior to petitioner's father's death.

DCHR also noted that the record contained a "Voter Registration Inquiry" indicating that petitioner registered to vote using the Apartment's address on October 8, 1992. The record also contained an "Investigator Information Sheet" that petitioner provided in connection with his succession claim. Petitioner had listed his former address as having been on Garth Road in Scarsdale, New York (the "Scarsdale Address"). Public records indicated that he was previously registered to vote at the Scarsdale Address. DCHR noted that public records also show that petitioner currently owns an apartment at the Scarsdale Address, and has a current telephone listing there with one of his daughters.

DCHR then pointed out the inconsistencies in petitioner's own statements as to when he took occupancy, focusing on the 10/1/92 Notation as it conflicted with his application for succession rights and his appeal of the matter before DCHR. The Division discredited petitioner's explanation as to why he "gratuitously" added the 10/1/92 Notation to the 1992 annual income affidavit, stating that a longer period of occupancy, as petitioner now argues, would not have affected the electoral residency requirement.

Finally, DCHR found unavailing petitioner's claims that the Housing Company should be estopped from contesting his right to succession because of its delay. The Division blamed the delay solely on petitioner's own failure to submit a timely claim for succession, not on any act or omission of Southbridge. Finding the record and submitted documents inadequate to support a claim to succession rights, DCHR denied petitioner's appeal.

Petitioner sought reconsideration of the order denying appeal by letter dated May 20, 2009, based primarily on a 2009 Supreme Court case from Albany County, Meyers v. New York State Div. of Hous. & Comm. Renewal, 23 Misc. 3d 1102(A) (Sup. Ct. Albany Co. 2009).<sup>2</sup> By letter dated June 29, 2009, DCHR denied petitioner's request for reconsideration on the basis of finality in administrative proceedings. This proceeding to challenge DCHR's denial followed shortly thereafter.

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. In re Pell v. Board of Educ., 34 N.Y.2d 222, 231 (1974). A determination is considered arbitrary when it is made "without sound basis in reason or regard to the facts." In re Peckham v. Calogero, 12 N.Y.3d 424, 431 (2009), citing Pell, 34 N.Y.2d at 231. If the agency's determination is rationally supported, the court must sustain the determination "even if the court concludes that it would have reached a different result than the one reached by the agency." Peckham, 12 N.Y.3d at 431 (citation omitted). The court must "defer to an administrative agency's rational interpretation of its own regulations in its area of expertise." Id. (citation omitted). The court cannot "weigh the evidence, choose between conflicting proof, or substitute its assessment of the evidence or witness credibility for that of the administrative factfinder." In re Porter v. New York City Hous. Auth., 42 A.D.3d 314 (1st Dep't 2007).

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<sup>2</sup> Meyers v. DCHR was subsequently reversed by the Third Department, and petitioner's arguments in his current application that are based on the lower court case will not be considered herein. See Meyers v. New York State Div. of Hous. & Comm. Renewal, 68 A.D.3d 1518 (3d Dep't 2009).

Most of petitioner's arguments are addressed to DCHR's evaluation of the evidence submitted during the appeal process. He believes that substantial evidence supports his position. Petitioner maintains that the documentary evidence establishes his residency for calendar years 1991 and 1992. Petitioner complains that DCHR arbitrarily and capriciously ignored Douglas Kellner's affidavit, failed to require Southbridge to submit its entire file for the appeal process and for petitioner to review, and disavowed petitioner's 1992 and 1993 tax returns. Petitioner further argues that DCHR erred in ignoring his explanation for the inconsistencies regarding the date he allegedly permanently moved into the Apartment. Petitioner also argues, for the first time, that he believes the 1990 and 1991 income affidavits were submitted to Southbridge, contradicting his earlier statement that filing the 1990 and 1991 income affidavits was his father's responsibility and that he did not know why the affidavits were not filed for those years. Petitioner argues that a negative inference must be drawn from Southbridge's failure to produce income affidavits that would establish petitioner's primary residency and that are required by law to be filed with DCHR. Based on these failures, and on his argument that Southbridge should be estopped from denying succession from having waited so long to contest his occupancy, petitioner concludes that DCHR's order must be found to be arbitrary and capricious in its result, and should be set aside.

In opposition, DCHR essentially argues that its determination was rationally supported and entitled to deference. DCHR also argues that estoppel does not apply to State-regulated housing or against the State. In reply, petitioner re-emphasizes his argument that DCHR and Southbridge have arbitrarily and capriciously ignored what he terms his "first succession application," *i.e.*, the discussions he maintains he had regarding the process for transferring the

shares to his name in 1994. He further rehashes his prior arguments. Finally, he asks the court to appoint a special master to hear and report on the issue of why Southbridge failed to transfer the shares after the first succession application in 1994.

Petitioner's arguments are without merit. He was not a senior citizen when his father died, so the two-year rule must apply to him, and it was not arbitrary or capricious for DCHR to determine that it does. The fact remains that petitioner has never demonstrated that he resided in the Apartment for the required two-year period. Significantly, more than two years after being advised that his tenancy was called into question, petitioner has failed to come forward with any proof—such as a driver's license, a moving bill, a bank statement, an employment record, or an affidavit of someone with actual knowledge—to demonstrate that he moved into the Apartment before October 1, 1992, the earliest documented account of his occupancy of the Apartment. Even giving his 10/1/92 Notation credit, the document on which the notation was written was undated and not even filed with Southbridge until October 1993. Furthermore, contrary to petitioner's contentions that DCHR ignored certain evidence, it is clear from the order that DCHR did consider the evidence in question and rationally determined, based on the facts available in the record, that the evidence did not support petitioner's claim to succession rights. Finally, it was not irrational, arbitrary, nor capricious for DCHR to determine from the circumstances and the evidence produced that petitioner had no basis to believe the shares were transferred to him in 1994 without ever receiving a share certificate in his name. Petitioner is a sophisticated attorney and his assertion that he believed that the stock shares were transferred to his name simply upon his inquiry as to how the procedure to transfer the shares was accomplished strains credulity.

While it is regrettable that petitioner's tenancy was not challenged for nearly fourteen years, the passage of time does not preclude a determination to terminate his occupancy. Neither DHCR nor Southbridge can be estopped from evicting a tenant who does not meet the eligibility requirements for succession rights. In re Schorr v. New York City Dept. of Hous. Pres. and Dev., 10 N.Y.3d 776, 779 (2008). "[I]nvoking 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) (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. See In re McNeal v. Hernandez, 58 A.D.3d 417 (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. See In re Pell v. Board of Educ., 34 N.Y.2d 222 (1974). Since petitioner has never come forward with any proof of his occupancy prior to October 1992, there is no purpose in a remand for further proceedings. See McNeal, 58 A.D.3d at 418. The petition is denied. This constitutes the decision, order and judgment of the court.

Dated: June 8, 2010

This judgment has not been entered by the County Clerk and notice of entry cannot be served based upon it. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Office (Room 141B).

JOAN P. GIBBS, J.S.C.