

**Matter of Ayvazayan v City of N.Y. Dept. of Hous.
Preserv. & Dev.**

2010 NY Slip Op 31671(U)

June 24, 2010

Supreme Court, New York County

Docket Number: 115704/09

Judge: Joan A. Madden

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

PRESENT: Hon Joan A. Madden

PART 11

Justice

Index Number : 115704/2009

AYVAZAYAN, MARINA

VS.

CITY OF NEW YORK DEPT.

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE 3-18-10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

on this motion to/for _____

PAPERS NUMBERED

Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion application for Article 78 relief is decided in accordance with the answered memorandum Decision + Order.

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

Dated: June 4, 2010

HON. JOAN A. MADDEN

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
COUNTY OF NEW YORK : IAS PART 11

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 1119)

In the Matter of the Application of
MARINA AYVAZAYAN a.k.a. MARINA VANCE,
Petitioner,
For an Order Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

Index No. 115704/09

THE CITY OF NEW YORK DEPARTMENT OF
HOUSING PRESERVATION and DEVELOPMENT and
EAST MIDTOWN PLAZA HOUSING COMPANY, INC.,
Respondents.

-----X
Joan A. Madden, J.

In this Article 78 proceeding, Petitioner Marina Ayvazayan a.k.a. Marina Vance ("Ayvazayan"), seeks to annul the decision of Joseph Quigley ("Director Quigley"), Director of Administrative Services of the New York City Department of Housing Preservation & Development ("HPD"), dated July 10, 2009, which denied Petitioner's request to transfer from a studio apartment on a Mitchell-Lama property to a larger apartment on a Mitchell-Lama property. HPD and East Midtown Plaza Housing Company, Inc. ("East Midtown Housing") oppose Ayvazayan's petition. For reasons stated below, Ayvazayan's petition is denied.

Background

Since 1998, Ayvazayan has resided in a studio apartment ("Apt. 13C" or the "studio apartment"), located at 400 Second Avenue, New York, New York 10010, within East Midtown Plaza, a Mitchell-Lama apartment complex. East Midtown Plaza is owned by East Midtown

Housing, a Mitchell-Lama cooperative housing company, which is supervised by HPD and subject to HPD's regulations.

While Ayvazayan resided in Apt. 13C, she had various co-occupants who resided with her for differing periods of time, including two of her friends, Marina Ptskialadze ("Ptskialadze") and Nicholas Gartner ("Gartner"), and her minor son, Bradford Vance ("Bradford"). Ayvazayan is married to Gary Vance ("Vance"), with whom she files joint tax returns, although Ayvazayan asserts that they have been separated for a number of years. Ayvazayan is a hair/make-up stylist and is self-employed.

During 2008, Ayvazayan was on an internal transfer waiting list to be transferred to a larger apartment.¹ On August 25, 2008, Ayvazayan received a letter (the "First Offer Letter") from East Midtown Housing which stated that she was eligible to apply for a transfer to a two bedroom apartment ("Apt. 2LL"), located at 333 East 23rd Street, New York, New York, in East Midtown Plaza. The First Offer Letter stated that she was "#1 in this offer" and instructed her to complete an enclosed form letter indicating whether she desired to accept the offer. The First Offer Letter specified that if Ayvazayan rejected the offer, she would be entitled to two more offers, after which her transfer request application would be eliminated from consideration. However, the form letter stated that "HPD has the final approval as to whether or not you get the apartment. Until it approves your application, the apartment is not yours."

On September 4, 2008, Ayvazayan submitted an acceptance of the offer, a Tenant Data Verification Form and various supporting documents, including: (1) Ayvazayan's income affidavit, (2) a non-working affidavit from Ptskialadze, (3) a non-working affidavit from Gartner, and (4) a Home Visit Information permission form. On her Tenant Data Verification

¹ It is not clear from the parties' submissions whether Ayvazayan placed herself on a waiting list to be transferred to a two bedroom apartment specifically, or requested a transfer to any available larger apartment.

form, Ayvazayan listed Ptskialadze and Gartner as her co-residents. She did not designate Bradford as a co-resident.

East Midtown Housing requested that Ayvazayan provide additional documentation in support of her application including, among others: (1) W-2 forms and New York State Tax Returns for each working member of the household, (2) a verified letter from an accountant for self-employed household members, (3) notarized income affidavits from non-working household members, and (4) proof of residency for all individuals in the apartment and the prior year's income affidavit or recertification. It appears that Ayvazayan provided some, but not all, of the requested documentation. She provided, among others, her New York State tax return, non-working affidavits for Ptskialadze and Gartner, a working affidavit, and an income affidavit for herself. Additionally, she provided Annual Household Income Affidavits ("AHI Affidavits") for 2006 and 2007, which both list Gartner and Ptskialadze as co-residents. She also stated that Ptskialadze and Gartner do not have bills.

On October 7, 2008, Director Quigley disapproved the transfer, in writing (the "First Disapproval") on the stated grounds that Ayvazayan did not meet the occupancy standards for the requested apartment and that Ayvazayan did not provide satisfactory proof that the studio apartment was the primary residence of her listed co-residents, Ptskialadze and Gartner. He also noted that it was questionable that the studio apartment was Ayvazayan's primary residence, as she filed a joint tax return with her husband, who does not reside in the studio apartment.

On October 8, 2008, by way of letter (the "10/8/08 Letter"), Elizabeth Cintron ("Cintron"), the Assistant Property Manager for East Midtown Housing, notified Ayvazayan that her transfer request was denied, and included a copy of the First Disapproval.² After she was

² The 10/8/08 Letter states that Ayvazayan's chances on "the two bedroom list will be eliminated." It does not state that she was removed from the waiting list for a transfer to any larger apartment, such as a one bedroom apartment. However, the First Disapproval

informed of the denial of her request, Ayvazayan states that she asked for a review of the documents submitted.

On December 4, 2008, Director Quigley wrote a letter (the "First Disapproval Confirmation") to Ayvazayan, which informed her that the "information [she] provided regarding [her] roommates, is not sufficient to establish eligibility for a larger apartment at East Midtown Plaza." The First Disapproval Confirmation states that she did not sufficiently document the primary residency of her co-residents and that, in order to determine her eligibility for a two bedroom unit, she needed to submit the following documentation for her co-residents: (1) 2007 tax returns and proof of any other income or (2) if there is no income, statements from the IRS and Social Security Administration to verify lack of tax return and SS/SSI benefits.³ Furthermore, the First Disapproval Confirmation states that, "[a]t this time the previous decision to deny your transfer request will remain in effect until this information is provided."

On May 5, 2009, East Midtown Housing sent Ayvazayan a letter (the "Second Offer Letter") informing her that she was eligible to transfer to a different two bedroom apartment ("Apartment 10 MM"), located at 311 East 23rd Street, New York, New York, within East Midtown Plaza. The Second Offer Letter, like the first, stated that Ayvazayan was "#1 in this offer" and instructed her to complete an enclosed form letter, which like the earlier form letter, specified that HPD's approval was necessary in order for her to get the apartment. The Second Offer Letter specified that if she rejected the offer, she would be entitled to one more offer, after which her transfer request application would be eliminated from consideration. Ayvazayan submitted her acceptance of this offer on or around May 6, 2009.

Confirmation states that she did not provide sufficient information to establish eligibility for a larger apartment.

³ The letter also stated that, if Gartner was a full-time student, Ayvazayan should submit evidence of the school he is attending.

Based on a facsimile transmittal (the "Fax"), on May 8, 2009, sent by Geri Roberson ("Roberson"), General Manager at East Midtown Housing, to Hilda Wexler ("Wexler"), an employee of HPD, it appears that Ayvazayan informed East Midtown Housing of the revised household composition at her studio apartment after Ayvazayan received the offer for Apt. 10MM. In the Fax, Roberson wrote to Wexler that, having learned this, Roberson did not believe that Ayvazayan was eligible for a transfer to a two bedroom apartment as there was no record that Bradford resided with her for one year. Roberson further stated that she wanted to discuss this situation with Wexler.

By letter (the "Appeal"), dated May 19, 2009, Ayvazayan's attorney, Mark Lindenburg ("Lindenburg"), notified Director Quigley that Ayvazayan had retained him to respond to the Second Offer Letter and to appeal the First Disapproval Confirmation. The Appeal stated, in response to the issue of Ptskialadze's residency, that Ptskialadze was included on Ayvazayan's AHI Affidavit since 2006; however, the Appeal does not address the issue of Gartner's residency nor refer to him in any capacity. The Appeal further stated that Bradford primarily resided with Ayvazayan since January 2007, when Vance became ill. Lindenburg submitted various evidence to document Bradford's residency with Ayvazayan in the studio apartment. The Appeal also stated that the issue of Ayvazayan's primary residency in the apartment has been decided in her favor on multiple prior occasions.⁴

⁴ It is not clear from the submissions of the parties how many times Ayvazayan's residency in Apt. 13C was in dispute. In 2005, a dispute about whether Apt. 13C was Ayvazayan's primary residence was settled in her favor, although she was placed on probation by HPD for two years for falsely designating an alleged co-occupant as a relative on her AHI Affidavits in 2000 and 2001.

By letter, dated July 10, 2009, Director Quigley reaffirmed the disapproval of Ayvazayan's request to transfer to a two bedroom apartment (the "Final Disapproval").⁵ The Final Disapproval states that Ayvazayan failed to provide documentation that Ptskialadze or Gartner resided at the studio apartment, as Ayvazayan claimed on her application. Director Quigley also writes Ayvazayan did not provide an adequate explanation as to what happened to Gartner, or why Ayvazayan does not "file her taxes from her address."⁶ Director Quigley states that Bradford was not reported as residing with Ayvazayan on either the 2007 transfer application or the 2007 income affidavit. Director Quigley further stated that Ayvazayan first reported her son as an occupant of the studio apartment on her 2008 AHI Affidavit, which was "just recently submitted."

On September 21, 2009, Ayvazayan commenced this Article 78 proceeding in which she seeks an order reversing, setting aside or otherwise modifying the Final Disapproval, and granting the requested transfer. In the petition, Ayvazayan challenges the determination in the Final Disapproval, arguing that it was arbitrary and capricious due to the fact that Director Quigley failed to adequately consider and take notice of each of the following: (1) evidence that Ptskialadze was on the AHI Affidavit since 2006, (2) evidence that Bradford's primary residence was the studio apartment since 2007, and (4) the facts that her tax returns do list the studio

⁵ HPD's answer states that the Final Disapproval reaffirmed the disapproval of Ayvazayan's request to transfer to either two bedroom apartment; however, it is not clear when the disapproval in respect to the second apartment was initially made. Furthermore, it should be noted that the Final Disapproval does not specifically address whether Ayvazayan was ineligible to remain on a waiting list for a one bedroom apartment.

⁶ While the issue of the address which Ayvazayan lists on her joint tax returns is not critical to the disposition of this petition, it appears that the address of the studio apartment is handwritten on the front page of her 2007 federal and state income tax returns, next to a different address, which is typed.

apartment as her address (along with her husband Vance's address) and that the issue of Ayvazayan's primary residence was previously settled in her favor.

HPD opposes the motion, arguing that the decision to deny the transfer was reasonable, rational, and in conformity with applicable statutes, law, and regulations. HPD asserts that Ptskialadze and Gartner were not valid residents of the studio apartment, as they did not receive written permission to reside there. HPD also asserts that Ptskialadze and Gartner failed to fulfill their requirement as co-residents to submit certain financial documents, such as tax returns or verifications of no tax return, to East Midtown Housing. HPD further argues that Ayvazayan failed to establish, with acceptable proof such as tax returns, motor vehicle registration, driver's license, or other documents filed with a public agency (28 RCNY §3-02(n)(4)), that Ptskialadze and Gartner, and/or Bradford used the subject apartment as their primary residence. HPD also contends that Ayvazayan failed to establish that the studio apartment was the primary residence of Ptskialadze and/or Gartner since, under 28 RCNY §3-02(n)(4), no dwelling may be considered the primary residence of a tenant unless the tenant filed his/her state tax return from that address, or provides proof that he/she is not required to file.⁷ Additionally, HPD asserts that Ayvazayan should not have been offered the second apartment because her attempt to recast her family composition would have the effect of her not being eligible to go back onto the waiting list until one year from the date she claimed her son moved in with her, which would have affected her placement on the internal waiting list. As such, East Midtown Housing argues that she should not have been offered the apartment as she should not have been next on the waiting list.

⁷ The provision actually states that a tenant must show proof that he/she filed his/her New York City Income Tax Return from the claimed residence; however, individual New York City residents do not file city income tax returns that is separate from their state income tax returns.

East Midtown Housing adopts HPD's opposition, and also asserts that Ayvazayan failed to demonstrate that the studio apartment was her primary residence or explain why she did not file taxes from the studio apartment. East Midtown Housing argues that prior determinations of primary residency are of no effect as each shareholder must maintain his/her apartment as his/her primary residence at all times.

In reply, Ayvazayan states that "in response to respondent's request for additional documentation, all such documentation was furnished." As to Bradford, Ayvazayan appears to argue either that Bradford is a minor and, as such, he should be considered a primary resident of each of the addresses where each of his parents primarily reside. She also argues that a denial of the transfer would be tantamount to a finding that the studio apartment was not her primary residence.

Discussion

In an Article 78 proceeding, the court is limited to the question of whether an administrative agency's determination was arbitrary and capricious. Beacon Hill Apartments v. New York State Division of Housing and Community Renewal, 278 A.D.2d 319 (2nd Dep't 2000). When making this determination, the court will look to whether or not the agency charged with the interpretation of applicable statutes and regulations was unreasonable or irrational. Salvati v. Eimicke, 72 N.Y.2d 784, 791 (1988). HPD's interpretation of the statutes and regulations it administers is entitled to deference if it has warrant in the record and a reasonable basis in the law. Plaza Management Co. v. City Rent Agency, 48 A.D.2d 129, 131 (1st Dep't 1975); Ista Management v. New York State Division of Housing and Community Renewal, 161 A.D.2d 424, 426 (1st Dep't 1990).

Under this standard, there is no basis for annulling HPD's determination that Ayvazayan was not entitled to a transfer to a two bedroom apartment. 28 RCNY §3-02(i)(1) states that, in

order for a tenant to be eligible to transfer to a larger apartment, she must be able to show that the subject apartment is the primary address of the required number of occupants for that apartment size both at the time the transfer application is made and at the time an offer for a larger apartment is received. 28 RCNY §3-02(m) states that there must be a minimum of three residents in each two bedroom apartment. Thus, it is clear that Ayvazayan would not be entitled to transfer to a two bedroom apartment, even if she put forth sufficient proof that the studio apartment was the primary residence of both her and Bradford, as she has not established that the studio apartment was the primary residence of three valid co-occupants at the time she made the internal transfer application and at the time she received either the First Offer or the Second Offer.

The only "evidence" that Ayvazayan provided in relation to the question of whether the studio apartment was the primary residence of Gartner and/or Ptskialadze were non-working affidavits and their inclusion on the AHI Affidavit submitted to HPD. HPD reasonably determined this to be insufficient proof of primary residency in light of the regulations, which refer to documents from public agencies as examples of acceptable proof. Additionally, Ayvazayan failed to establish that the studio apartment was the primary residence of Ptskialadze and/or Gartner because she did not provide income tax returns for them, as required to establish primary residence under 28 RCNY §3-02(n)(4), or provide proof that they were not required to file.

Furthermore, Ayvazayan was offered a number of chances to submit evidence of her alleged co-residents primary residency, including income tax returns or statements of no income from the IRS and Social Security Administration, but she and her co-residents failed to provide this information, or even present an explanation as to why this documentation was not provided. The record also indicates that Gartner and Ptskialadze may not have been valid co-occupants,

since it appears that they did not receive prior written approval to co-occupy the studio apartment as required under §3-02(o)(2)(i), and, if they were not valid co-occupants, neither of them could be included in satisfying the occupancy requirements of §3-02(i)(1).

In addition, Ayvazayan's blanket statement in her reply that she supplied all the documentation that was requested from her is not supported by the record. In fact, she has not even provided many of the documents that were requested from her as evidence here.

Finally, to the extent HPD's determination is at odds with its earlier decision that the studio is Ayvazayan's primary residence, any inconsistency in this regard does not provide a basis for finding that HPD's determination is irrational as the record contains evidence suggesting that Ayvazayan did not use the studio as her primary residence at the time of the transfer application. In any event, the primary residence issue was not central to HPD's denial of the transfer application.

Accordingly, it cannot be said that HPD's determination that Ayvazayan was not entitled to a transfer to a two bedroom apartment was arbitrary, capricious or irrational.

Conclusion

In view of the above, it is

ORDERED and ADJUDGED that the petition is denied and dismissed.

Dated: June 24, 2010



J.S.C.
HON. JOAN A. MADDEN
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 for both parties must appear in person at the Judgment Clerk's Desk (Room 141B).