

**Vaskevich v New York City Dept. of Hous. Preserv. &
Dev.**

2011 NY Slip Op 30179(U)

January 25, 2011

Sup Ct, NY County

Docket Number: 109153/10

Judge: Barbara Jaffe

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

PRESENT: BARBARA JAFFE
J.S.C.

PART 5

Index Number : 109153/2010
VASKEVICH VICTOR
vs.
NYC DEPT. OF HPD
SEQUENCE NUMBER : 001
ARTICLE 78

CAL # 121

INDEX NO. ~~109153~~ 109153/10
MOTION DATE 11/30/10
MOTION SEQ. NO. 1
MOTION CAL. NO. 121

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits Exhibits...
Pet
Answering Affidavits — Exhibits _____
Replying Affidavits _____

PAPERS NUMBERED
123
45

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion petition

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

HON. BARBARA JAFFE
SUPREME COURT OF THE STATE OF NEW YORK
80 CENTRE STREET
NEW YORK, NY 10013-4395

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
1412).

Dated: 1/25/11
JAN 25 2011

Barbara Jaffe
BARBARA JAFFE J.S.C.
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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 5

-----x
VICTOR VASKEVICH,

Petitioner,

-against-

Index No. 109153/10

Motion Date: 11/30/10
Motion Seq. No.: 001
Calendar No.: 121

DECISION & JUDGMENT

NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT and
LUNA PARK HOUSING CORPORATION,

Respondents.

BARBARA JAFFE, JSC:

For petitioner:
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Schechter & Brucker, P.C.
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New York, NY 10118
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For respondent HPD:
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Michael A. Cardozo
Corporation Counsel
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New York, NY 10007
212-788-0790

FILED 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
7415)

By notice of petition dated July 12, 2010 petitioner moves pursuant to CPLR 7803 for an order and judgment vacating the decision of respondent New York City Department of Housing Preservation and Development (HPD) dated March 10, 2010, finding that petitioner is not eligible for succession rights in apartment 17C at 2821 West 12th Street (17C), Brooklyn, New York, and initiating eviction. Respondent HPD opposes. Respondent Luna Park Housing Corporation does not oppose.

I. FACTS

Luna Park is a housing company organized under the Private Housing Finance Law, known as the Mitchell-Lama Law. (HPD Memorandum of Law, dated Sept. 13, 2010 [HPD Mem.]). Petitioner seeks to remain in 17C, part of the Luna Park Housing Corporation (Luna

Park), where he once lived with his now ex-wife. It is uncontested that he has resided in 17C during the pendency of the eviction proceedings, and that he has not signed income affidavits for 17C for the two years before his ex-wife vacated the apartment.

On February 1, 1997, petitioner and his then-wife became shareholders in a different apartment in Luna Park and signed income affidavits as joint occupants of that apartment for 1997 and 1998. (Notice of Petition, dated July 12, 2010 [Pet.], Exh. 1). They separated in 1999, and pursuant to a separation agreement, petitioner listed as his residence an apartment on Avenue U in Brooklyn. (*Id.*). Petitioner also signed a guarantor notice for the apartment on Avenue U on August 12, 2004. (*Id.*).

On October 1, 2004, petitioner's ex-wife moved, becoming the sole shareholder of 17C. (*Id.*). Petitioner's divorce from his then-wife was finalized in 2005. (*Id.*). Petitioner's tax returns for 2004 and 2005 reflect that he lived elsewhere for those years. (*Id.*, Documents Submitted by Pet. to New York City Dept. of Hous. Preserv. and Dev. in Connection with the Final Agency Review Regarding's Succession Rights [Docs], Vol. II at 518-19).

In March 2007, petitioner listed himself and another woman on 2006 income affidavits for 17C. (Pet., Exh. 1). Separately, in April 2007 petitioner's now ex-wife filed an 2006 income statement listing herself, her new husband, her daughter, and her parents as occupants of 17C. (*Id.*).

By letter dated March 4, 2008, petitioner's ex-wife informed petitioner that she had vacated 17C, and authorized him to take ownership of the shares and move into the apartment. (*Id.*).

By letter dated August 5, 2008, in response to Luna Park's request that HPD add

petitioner's name to the stock certificate for 17C, HPD explained that it was unable to do so absent petitioner's demonstration that he had resided in 17C for two years, observing that he had not been listed as an occupant on income affidavits, as required since 1998 by the Rules of the City of New York (RCNY) § 3-02. (Pet., Exh. 3). HPD advised Luna Park to provide documentation to support its request. (*Id.*).

By letter dated October 22, 2008, Luna Park advised petitioner that in order to obtain succession rights, he was required to submit proof, and that if his name did not appear on income affidavits for the two years before his ex-wife vacated the apartment, he would not be entitled to succession rights. (Verified Answer of HPD, dated Sept. 13, 2010 [Ans.], Exh. A). By letter dated December 8, 2008, Luna Park determined that petitioner was not entitled to succession rights, as the documentation he provided was insufficient. Petitioner was notified that legal proceedings would be commenced against him to recover possession of the apartment, and that he had the right to appeal to HPD. (*Id.*).

By letters dated January 2, 2009, HPD informed petitioner and Luna Park that it had denied petitioner's request for succession rights, and advised that they submit additional documentation no later than February 5, 2009. (Pet., Exh. 3). It again informed petitioner that in order to be eligible for succession rights his name must have been included on the relevant income affidavits, regardless of whether he occupied the apartment. (*Id.*). HPD also requested additional documentation establishing that 17C was his primary residence. (*Id.*).

Petitioner supplied numerous documents in response, and by letter dated February 12, 2009, Luna Park informed petitioner that the documentation was insufficient to establish his right to succession. (Ans., Exh. D). Petitioner pursued an appeal, and on April 28, 2009, provided

HPD with additional documentation consisting of two binders containing 637 pages. (Pet., Exh. 7). Petitioner's ex-wife submitted an affidavit dated March 1, 2009, stating that petitioner lived in 17C between 2004 and 2006. (Pet., Exh. 5).

On March 10, 2010, a hearing officer rendered her decision on petitioner's appeal. (Pet., Exh. 1). Notwithstanding petitioner's voluminous evidence, the hearing officer found that petitioner had not established his residency in 17C for the relevant time period. (*Id.*). Most critically, she found that petitioner was not listed on the income affidavits from 1998 through 2005, that petitioner was not the shareholder of record, that the separation agreement and other documentation reflected his Avenue U address, and that his income tax returns for the years ending 2004 and 2005 reflected that he did not live at 17C. She apparently credited a 2006 income affidavit filed by his ex-wife over one petitioner had filed for that time period. The hearing officer thereupon issued a certificate of eviction. (*Id.*).

By letter dated June 11, 2010, Luna Park's board of directors requested that HPD vacate its decision and permit petitioner to remain in 17C. (Pet., Exh. 2). By letter dated June 15, 2010, HPD responded that it had no authority to reverse the hearing officer's decision, and that the only recourse was to file the instant petition. (Ans., Exh. I).

Petitioner has remained in the apartment during the pendency of these proceedings.

II. CONTENTIONS

Petitioner argues that the decision to evict him was arbitrary and capricious, as the hearing officer should have relied on the documentation he submitted in response to Luna Park's request for proof of residence, but instead relied solely on the income affidavits. (Pet.). In

support, he annexes the 637 pages of documents that he submitted to the hearing officer, and for the first time, affidavits from the president of Luna Park's board of directors and numerous other Luna Park residents stating that petitioner has consistently lived in 17C. (Pet., Exhs. 8, 9).

Petitioner also argues that the hearing officer was obligated to impose a lesser penalty than eviction, relying on several appellate divisions whereby courts vacated HPD evictions despite the petitioner's submission of false tax documents. (*In re Williams v Donovan*, 60 AD3d 594 [1st Dept 2009]; *Davis v New York City Dept. of Hous. Preserv. and Dev.*, 58 AD3d 418 [1st Dept 2009]; *Holiday v Franco*, 268 AD2d 138 [1st Dept 2000]).

HPD maintains that the hearing officer's determination was reasonable and rational, as petitioner's name was not listed on the legally required income affidavits, and that petitioner had not otherwise established residency for the two years before his ex-wife vacated the apartment. It asks that the additional documents now provided for the first time be disregarded. (HPD Mem.).

In reply, petitioner argues that HPD has acknowledged that the hearing officer made errors of fact in her written opinion, that HPD has not challenged the veracity of the affidavits submitted by petitioner or produced evidence to rebut them, and that HPD would not have asked for further documentation of petitioner's residence if it intended to rely solely on the income affidavits. (Verified Reply of Petitioner, dated Oct. 18, 2010).

III. ANALYSIS

Judicial review of an administrative agency's decision is limited to whether the decision "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of

penalty or discipline imposed.” (CPLR § 7803[3]). In reviewing an administrative agency’s determination as to whether it is arbitrary and capricious, the test is whether the determination “is without sound basis in reason and is generally taken without regard to the facts.” (*Matter of Pell v. Bd. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]; *E.W. Tompkins Co., Inc. v. State Univ. of New York*, 61 AD3d 1248, 1250 [3d Dept 2009], *lv denied* 13 NY3d 709; *Matter of Mankarios v. New York City Taxi and Limousine Commn.*, 49 AD3d 316, 317 [1st Dept 2008]; *Matter of Soho Alliance v. New York State Liquor Auth.*, 32 AD3d 363, 363 [1st Dept 2006]; *Matter of Kenton Assoc. Ltd. v. Div. of Hous. & Community Renewal*, 225 AD2d 349 [1st Dept 1996]).

New York’s Private Housing Finance Law, generally known as the Mitchell-Lama law, creates a program of government assistance, providing long-term, low-interest mortgage loans and real estate tax exemptions to developers. (Ans.). Its recipients must adhere to “strict guidelines for tenant eligibility and succession.” (28 RCNY § 3-02[p][8][ii]; *Matter of Schorr v New York City Dept. of Hous. Preserv. and Dev.*, 10 NY3d 776, 778 [2008]). HPD supervises, administers, and enforces Mitchell-Lama in New York City. (PHFL § 2[15]; New York City Charter § 1802[6][d]; *Schorr*, 10 NY3d at 778).

Occupants of Mitchell-Lama housing are required to submit affidavits stating their income during each year of occupancy. (28 RCNY § 3-02[p]; *Matter of Flores-Tully v City of New York Dept. of Hous. Preserv. and Dev.*, 70 AD3d 823, 824 [2d Dept 2010]). In order to establish succession rights, a purported occupant must demonstrate that his or her name appears on the income affidavits for the two years before a tenant’s vacatur from the apartment. (28 RCNY § 3-02[p]; *Flores-Tully*, 70 AD3d at 824; *Miney v Donovan*, 68 AD3d 876, 877-878 [2d

Dept 2009], *lv denied*, 15 NY3d 712 [2010]). Pursuant to a 2003 amendment to the RCNY, the failure to do so results in the denial of succession rights. (*Miney*, 68 AD3d at 878). Where the occupant has established that his name appears on the relevant income affidavits, HPD is then entitled to consider other objective evidence to support a petitioner's claim for succession, including tax returns. (28 RCNY § 3-02[n]; *Hochhauser v City of New York Dept. of Hous. Preserv. and Dev.*, 48 AD3d 288, 289 [1st Dept 2008]).

As the rule requires that the occupant first establish that his or her name appears on the income affidavits, and as petitioner's name does not appear on the income affidavits for the two years' before his ex-wife vacated the apartment, the hearing officer properly followed the law in denying succession rights to petitioner. (*Flores-Tully*, 70 AD3d at 824; *Miney*, 68 AD3d at 877-878). Any additional information in support of petitioner's residency is reviewed only if the income affidavits reflect the occupant's name. (*Miney*, 68 AD3d at 878; *Pietropolo v New York City Dept. of Hous. Preserv. and Dev.*, 39 AD3d 406 [1st Dept 2007]; *Kahn v New York City Hous. Preserv. and Dev.*, 28 Misc 3d 1206[A], 2010 NY Slip Op 51197[U] [Sup Ct, Kings County 2010]). And even where an occupant's name appears on income affidavits, it remains within the hearing officer's discretion to review and assess additional evidence to determine whether the apartment was occupied during the relevant time period. (*Quan v New York City Dept of Hous. Preserv. and Dev.*, 70 AD3d 528 [1st Dept 2010]; *Flores-Tully*, 70 AD3d at 824; *Hochhauser v City of New York Dept. of Hous. Preserv. and Dev.*, 48 AD3d 288, 289 [1st Dept 2008]). The absence of petitioner's name on income affidavits was thus a sufficient ground upon which the hearing officer based her decision, and it was neither arbitrary nor capricious for her to decide based on additional evidence, including the tax returns and separation agreement

reflecting that petitioner lived elsewhere. (See *Hochhauser*, 48 AD3d at 289 [HPD entitled to consider inconsistencies in documents, including tax returns]).

Although petitioner submitted documents that supported his position at the request of Luna Park, the hearing officer's assessment of the evidence may not be second-guessed here. (*Id.*). Nor am I permitted to recognize affidavits prepared for the purposes of this proceeding and not presented to the hearing officer. (*Featherstone v Franco*, 92 NY2d 550, 554 [2000]; *L & M Bus Corp. v New York City Dept. of Ed.*, 71 AD3d 127, 136 [1st Dept 2009], *affd in relevant part*, 15 NY3d 889 [2010]). Alleged errors in the hearing officer's findings of fact are not reviewable, and in any event, are immaterial to her determination.

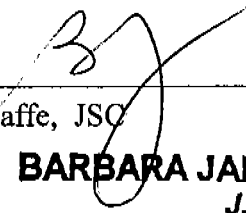
The hearing officer did not penalize petitioner for his inconsistencies in his filings to the HPD or IRS, but decided only whether he provided documentation sufficient to establish succession rights. Nothing in the record suggests that the hearing officer was authorized to do anything other than determine these rights. The decisions relied upon by petitioner, while appropriately sympathetic to evicted tenants, are distinguishable in that each court reversed a decision to evict long-term residents as a penalty for rule violations. (*Williams v Donovan*, 60 AD3d 594 [1st Dept 2009] [terminating petitioner's subsidy as penalty for failure to report income is "shockingly disproportionate to the offense"]; *Davis v New York City Dept. of Hous. Preserv. and Dev.*, 58 AD3d 418 [1st Dept 2009] [vacating termination of petitioner's housing subsidy for failure to report income disability payments]; *Holiday v Franco*, 268 AD2d 138 [vacating eviction where petitioner violated stipulation agreeing not to permit son into the apartment]). None involved succession rights or a determination that the petitioner had not resided in the apartment.

IV. CONCLUSION

I thus find that the hearing officer's determination was rationally based on the evidence and governing law, and therefore neither arbitrary nor capricious. Accordingly, it is hereby

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

ADJUDGED, that respondent, having an address at 100 Gold Street, New York, NY, 10038, do recover from petitioner, costs and disbursements in the amount of \$ _____, as taxed by the Clerk, and that respondent have execution therefor.



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: January 25, 2011
New York, New York

JAN 25 2011

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).