

**Matter of Gorelick v New York City Dept. of Hous.
Preservation & Dev. (HPD)**

2011 NY Slip Op 31165(U)

May 3, 2011

Supreme Court, New York County

Docket Number: 111005/2010

Judge: Martin Schoenfeld

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

PRESENT: SUNOENFELD
Justice

PART 28

SAMANTHA GOREWICK
- v -
NYC DHD

INDEX NO. 111005/10
MOTION DATE _____
MOTION SEQ. NO. 01
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for A.T. 78

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

PAPERS NUMBERED	
1-3	
4-5	6-7
8	

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum decision.

FILED
MAY 04 2011
NEW YORK
COUNTY CLERK'S OFFICE

Dated: May 3, 2011 _____ 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 28

-----X
IN THE MATTER OF THE APPLICATION OF
SAMANTHA GORELICK

Petitioner,

**MEMORANDUM DECISION
AND JUDGMENT**

-against-

Index No.: 111005/2010

THE NEW YORK CITY DEPARTMENT OF
HOUSING PRESERVATION AND DEVELOPMENT
(HPD), ST. MARTIN'S HOUSING CORPORATIONS
(ST. MARTIN'S) AND TUDOR REALTY SERVICES
CORP. (TUDOR)

Respondent.

-----X
For Petitioner:
Samantha Gorelick
65 West 90th Street
New York, NY 10024

For Respondent HPD:
Michael A. Cardozo
Corporation Counsel
100 Church Street
New York, NY 10007

For Respondents St. Martins & Tudor Realty
Jonathan E. Meer
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP
150 East 42nd Street
New York, NY 10017

FILED

HON. MARTIN SCHOENFELD, J.:

MAY 04 2011

NEW YORK
COUNTY CLERK'S OFFICE

Petitioner Samantha Gorelick, acting pro se, brought this Article 78 proceeding against respondents New York City Department of Housing Preservation and Development ("HPD"), St. Martin's Housing Corporations ("St. Martin's") and Tudor Realty Services Corp. ("Tudor") after her application for Mitchell-Lama housing was rejected. Petitioner seeks an order to (1) enjoin St. Martin's and Tudor from selling, transferring, leasing or offering the unit to another person, (2) vacate and reverse HPD's determination regarding her application, and (3) reinstate her to the top of the wait list for a unit.

For the reasons set forth herein, the Court is constrained to deny the petition and to

dismiss the proceeding.

Background and Factual Allegations

In 1994, St. Martin's conducted a lottery to add applicants to the waiting list for the units of Mitchell-Lama housing in its building. Jamie Gorelick, Petitioner's sister, participated in the lottery. In December 1994, Wentworth Property Management (the building management at that time) notified Jamie Gorelick that she was selected by the lottery to submit an application and be placed on the waiting list for a unit. Jamie Gorelick, who was 25 at the time, submitted an application listing herself as the applicant and the head of household. Petitioner, who was then just 12 years old, was listed on this application only as a proposed additional resident.

In 2006, Jamie Gorelick, who had not yet received an offer for an apartment, and no longer was interested in living there, sought information on how to substitute Petitioner for herself on the waiting list. Petitioner and Jamie Gorelick contacted Donna Mantin of Wentworth Property Management. According to an affidavit submitted by Ms. Mantin, she contacted Elaine Smith, an HPD employee, regarding this situation¹. Further, according to the Mantin affidavit, Ms. Smith informed her that the place on the waiting list was transferable, despite Petitioner's age at the time the application was submitted and the lottery held. Ms. Mantin conveyed this information to Petitioner and to Jamie Gorelick (HPD's verified answer states that Ms. Smith categorically denies providing such advice, and would have never approved of a transfer in which

¹ In the affidavit submitted by Donna Mantin, she notes that the waiting list for St. Martin's was disorganized, and that she had to go through a process to reinstate multiple applicants who were eligible, but somehow absent from the list, including Jamie Gorelick. It appears the reinstatement to the list is not at issue.

a minor, at the time of the application, was involved).

Relying on the information, as stated in the Mantin affidavit, Jamie Gorelick submitted a notarized letter to St. Martin's saying that: 1) she was no longer interested in a unit; 2) she was stepping aside so that Petitioner may take her place on the list; and 3) that all rights were to be relinquished to Petitioner.² Petitioner was 23 at the time the letter was notarized and submitted. The building manager then substituted Petitioner for Jamie Gorelick on the waiting list.

In 2008, Petitioner began contacting management, inquiring about her place on the waiting list and how much longer her wait for an apartment might be. At that time, although she was then 25 years old, Petitioner continued to live at home with her parents, in their one-bedroom apartment, anticipating that she soon would be able to have her own studio apartment in the building.

In early 2010, Petitioner was offered an apartment at St. Martin's. She filled out the paperwork, paid the requisite fees, and submitted a seemingly complete application to take the unit.³ Tudor, now the building manager at St. Martin's, found the application to be complete and forwarded it to HPD for final approval. Before receiving official notice, Petitioner contacted Tudor regarding the status of her application and was told that it had been rejected by HPD. In a letter dated July 21, 2010 Petitioner was informed that she had not reached the age of majority at the time of the original Jamie Gorelick application, and therefore, that she was ineligible under New York City's Mitchell-Lama Rules. Petitioner appealed HPD's determination by letter dated

² The notarized letter is signed by "Jamie Greenip (Gorelick)"

³ At this time it appears Petitioner satisfied all other requirements, including income level.

August 3, 2010. In an August 9, 2010 response letter from Julie Walpert, an Assistant Commissioner at HPD, the agency advised Petitioner that it found no basis to disturb its original determination.

In this Article 78 proceeding, Petitioner challenges HPD's determination, arguing that the agency's decision to reject her application was arbitrary and capricious. She asks this Court for an order allowing her to occupy the apartment. Tudor takes no position regarding her petition.

Discussion

Under Article 78 of the CPLR, courts have limited power when reviewing the determinations made by administrative agencies. *See CPLR § 7803*. An administrative determination by an agency is only arbitrary and capricious when it is made "without sound basis in reason and is generally taken without regard to the facts." *Pell v. Board of Education*, 34 N.Y.2d 222, 231 (1974). The court's role is limited to reviewing "whether there is a rational basis for the administrative determination without disturbing underlying factual determinations." *Heintz v. Brown*, 80 N.Y.2d 998, 1001 (1992). If there is a rational basis for an agency's decision, it must be upheld "even if the court concludes that it would have reached a different result than the one reached by the agency" *Matter of Peckham v. Calogero*, 12 N.Y.3d 424, 431 (2009).

Furthermore, courts are generally expected to accord due deference to an agency's interpretation of its own rules and regulations. "[T]he interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable." *Gaines v. New York State Div. of Hous. &*

Community Renewal, 90 N.Y.2d 545, 548-549 (1997).

Here HPD states that it followed relevant agency rules in rejecting Petitioner's request for an apartment. Specifically, Chapter 3 of Title 28 of the Rules of the City of New York ("RCNY") governs the duties of HPD with respect to Mitchell-Lama housing. 28 RCNY § 3-02(h) sets forth rules for maintaining the waiting lists for units, the filing of applications and the eligibility of applicants.

Two provisions of this section are applicable to HPD's determination that Petitioner was ineligible. In particular, § 3-02(h)(2) states that:

Any bona fide resident of the State of New York who has reached his/her majority under the laws of the state of New York may file an application for the lease of a dwelling unit in a rental housing company or the purchase of shares in a mutual housing company...
(emphasis added)

Additionally, § 3-02(h)(8)(i) unequivocally states that:

All eligibility requirements for age, residency and family composition must be met by the cut-off date for the lottery... (emphasis added)

Thus, under a plain reading of 28 RCNY § 3-02(h)(8)(i), to be eligible an applicant must meet all requirements, including age, by the cut-off date for the lottery, and not when the unit is offered from the waiting list, or when an applicant assumes the rights of another.

Under these rules, Petitioner was required to have reached the age of majority by the cut-off date for the 1994 lottery, which determined her sister's position on St. Martin's waiting list. Unfortunately, at that time she was only twelve years old. Although sympathetic to Petitioner's plight, the Court is constrained by the agency's rules. As a result, the fact that Petitioner had reached the age of majority when her sister's interest in the apartment was transferred to her, and later when the apartment lease was offered, is immaterial. HPD, having acted in accordance with

its rules, its actions were neither arbitrary nor capricious.

Petitioner next argues that she nevertheless should be given the apartment because she relied on the advice of HPD, or more correctly on the statement of Ms. Mantin, whose alleged source was an HPD employee. As such, Petitioner, acting under the assumption that she had taken her sister's place on the wait list, continued to contact the building management to find out her place on the waiting list. She was repeatedly told, after years of delays, that she was nearing the top. In the meantime, Petitioner continued to live in her parents' one-bedroom apartment as an adult – a situation she understandably describes as being “not ideal” – while believing she was drawing closer to residential independence.

Even assuming that an HPD employee was the source of an incorrect interpretation of its Rules, which HPD firmly denies, and that Petitioner somehow relied on this statement to her detriment, equitable estoppel is an unavailable remedy herein.

It is well settled that “estoppel may not be invoked against a municipal agency to prevent it from discharging its statutory duties.” *Parkview Associates v. New York*, 71 N.Y.2d 274, 282 (1988). See also *Scruggs-Leftwich v. Rivercross Tenants' Corp.*, 70 N.Y.2d 849 (1987). This is applicable to the instant case. An estoppel against HPD is improper, herein, as it would force an agency to create an exception for a prospective tenant who did not meet Mitchell-Lama law requirements.

HPD is “statutorily required to enforce the Mitchell-Lama Law and regulations regardless of any actions or acquiescence by ... [the] limited-profit housing companies it supervises.” *Matter of Schorr v. New York City Dept. of Hous. Preserv. & Dev.*, 10 N.Y.3d 776, 778 (2008). While *Matter of Schorr* deals specifically with succession rights in a Mitchell-Lama unit, the underlying

policy equally applies here. Pursuant to RCNY, HPD has an obligation to allow housing to go only to tenants who meet *all* eligibility requirements during the established time frames. HPD must enforce these regulations as the creation of an exception for one applicant could deny an otherwise eligible applicant the right to a unit, if not in this situation, then certainly in other cases. Therefore, despite Petitioner's diligence in complying with all other requirements, she was underage at the cut-off date for the lottery, and thus ineligible for this Mitchell-Lama unit.


In accordance with the foregoing, it is hereby:

ADJUDGED that the petition is denied and the proceeding is dismissed.

Dated: New York, New York

May 3, 2011

ENTER:

FILED 
J.S.C.

MAY 04 2011

NEW YORK
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