

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

2011 NY Slip Op 32835(U)

October 19, 2011

Supreme Court, New York County

Docket Number: 106019/11

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

ANASTASIA PAZANA,

Petitioner,

- v -

NYC DEPT. OF HOUSING PRESERVATION
AND DEVELOPMENT and VILLAGE VIEW
HOUSING CORP.,

Respondents.

INDEX NO. 106019/11

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

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

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answer — Affidavits — Exhibits _____	<u>2, 3</u>
Replying Affidavits _____	<u>4</u>

Cross-Motion: Yes X No

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION ORDER

UNFILED JUDGMENT

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Dated: October 19, 2011

HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO

JUSTICE

DATED:

J.S.C.

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

ANASTASIA PAZANA,

Petitioner,

-against-

NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION & DEVELOPMENT and
VILLAGE VIEW HOUSING CORPORATION,

Respondent

Index No.
106019/11

**DECISION
and ORDER**

Mot. Seq.
001

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HON. EILEEN A. RAKOWER:

Anastasia Pazana ("Petitioner") brings this Article 78 proceeding to challenge respondent New York City Department of Housing Preservation and Development's ("HPD") February 3, 2011 decision which denied Petitioner succession rights to Apartment #10E at 410 East 6th Street in New York County ("the Apartment"). The subject Apartment is owned by respondent Village View Housing Corporation ("the Landlord"), an Article II housing company organized under the Mitchell-Lama Law.

From August 1994 until her death on May 9, 2008, Anna Kulczycky was the tenant of record of the Apartment. Petitioner is Kulczycky's granddaughter. According to the petition, Petitioner moved into the Apartment on a permanent basis to take care of Kulczycky in 2001, and has continuously lived in the Apartment since that time. Petitioner states that she "suffers from permanent disabilities ... which interfere with normal major life activities, and which have led to her being unable to hold a permanent job."

On or around May 11, 2010, the Landlord sent a Preliminary Notice of Grounds of Eviction and Concurrent Notice to Cure to Petitioner and Kulczycky's estate at the subject Apartment based upon the belief that the lease conditions of the Apartment were being violated. By letter dated June 21, 2010, the Landlord (through counsel) advised Petitioner that a hearing would be held before HPD on

July 22, 2010. However, it was later determined that no evidentiary hearing would be held, and that HPD would consider written submissions and documentary evidence from the parties.¹

The Landlord provided HPD with a copy of the occupancy agreement, and the relevant income affidavits for the Apartment for calendar years 2000 through 2009. Petitioner is listed as a member of the household on the affidavits for 2001 through 2004, is absent from the 2005 and 2006 affidavits, and is once again listed on the affidavits from 2007 through 2009. Kulczycky completed the 2007 affidavit on April 8, 2008, approximately one month prior to her death. Petitioner listed herself as the Apartment's sole occupant on the 2008 and 2009 affidavits.

Petitioner submitted an "affidavit"² along with eleven exhibits. Exhibit 1 contains documentation establishing Petitioner's relation to Kulczycky. Exhibit 2 is a handwritten letter dated April 27, 2001 from "A. Eaton, MD" at Cabrini Medical Center. In the letter, Eaton states that "Ms. Kulczycky has been discharged from Cabrini Medical Center following a medical procedure, and will require 24-hour home assistance. Please allow Anastasia Pazana to stay with her." Although the letter is addressed simply "[t]o whom it may concern," Petitioner states that this letter was sent to the Landlord. Exhibit 3 is an unsigned and undated letter from Kulczycky to the Landlord requesting that Petitioner be added to the family composition of the Apartment. Petitioner stated that this letter was delivered to the landlord along with the April 27, 2001 letter. Exhibit 4 is a photocopy of Kulczycky's stock certificate which contains a handwritten note which reads

PLEASE MAKE
NEW SHERE
ANNA KULCZYCKY
ANASTECIA PAZANA [sic]

followed by Kulczycky's signature. Petitioner cited this as further evidence of Kulczycky's intent to have Petitioner added to the Apartment. Exhibit 5 is Kulczycky's October 12, 2007 Will, wherein she attempted to bequeath the

¹Under 28 RCNY §3-02(p)(8)(ii), an evidentiary hearing is not required in an administrative proceeding where an individual seeks succession rights to a Mitchell-Lama apartment (*see also Pietropolo v. HPD*, 39 A.D.3d 406 [1st Dept. 2007]).

²The court notes that the purported affidavit was not notarized.

Apartment to Petitioner, and also identified Petitioner as living in the subject Apartment. Exhibit 6 of Petitioner's HPD submission is her mother's passport application to the U.S. Department of State. The form lists Petitioner as an emergency contact, and identifies the Apartment as Petitioner's address. The form is dated as received by the State Department on August 8, 2001. Petitioner stated in her affidavit to HPD that she does not have a great deal of documentation that would establish her presence in the Apartment because she lives "off the grid," inasmuch as she is unemployed, does not have a driver's license, does not vote, does not have a credit card, and does not have medical insurance.

Petitioner further stated in her affidavit that she is disabled. She claims that she "misspoke at the meeting [with HPD] when in response to [Administrative Hearing Officer Helen] Levy's question as to whether I was disabled I answered in the negative." Plaintiff stated that this was partly due to her misunderstanding of the legal definition of disability, and partly because she was embarrassed by her condition. Exhibit 7 of her HPD submission is a 1998 report from her high school which states that Petitioner, then in the 11th grade, has been diagnosed with "1) Identity Disorder of Adolescence and 2) Diminished Adaptive Capacities Related to Adjustment Disorder and Identity Disorder and 3) Motor Control Disturbance." Exhibit 8 of Petitioner's HPD submission contains records from her treatment at West Bergen Mental Healthcare from 1998 through 2001. The records state that Petitioner initially presented to West Bergen because of a "suicide attempt [in 1997], hypochondria interferes [unintelligible] school attendance & 'shutting down.'" Petitioner stated that she also visited Bellevue Hospital in 2001 and 2002, and annexed her request for those records to her affidavit as Exhibit 9. Exhibit 10 of Petitioner's HPD submission is a September 14, 2010 letter from psychologist Jeanne Seitler, Psy.D., stated that she was recently contacted by Petitioner, who requested "a treatment summary of the psychotherapy in which we engaged several years ago." Seitler further requests two weeks' time to compile responsive records. No records were produced by Seitler between the time of Seitler's letter, and HPD's February 3, 2011 determination.

Finally, as proof of Petitioner's residence in the Apartment, she submitted affidavits from eight neighbors in the building. The affidavits are virtually identical, and all state that the affiant knew Kulczycky, and that the affiant saw Petitioner and Kulczycky together in the building complex "many times" in the two-year period prior to Kulczycky's death.

On February 3, 2011, Administrative Hearing Officer (“AHO”) Levy issued her decision denying succession rights. AHO Levy noted that Petitioner does not qualify for succession rights to the Apartment because her name does not appear on both the 2006 and 2007 income affidavits (having only been named in the latter). AHO Levy rejected Petitioner’s claim that she was disabled on the grounds that she “has presented no evidence that she is currently disabled,” having only produced records from 1998 through 2001 (and further claiming, without supporting documentation that was requested but apparently never received, that she was treated at Bellevue in 2001 and 2002).

AHO Levy further found that, even if she accepted Petitioner’s claim that she is disabled, Petitioner has nevertheless “failed to provide sufficient evidence that the subject apartment was her primary residence throughout 2007.” AHO Levy noted that Petitioner “did not provide income tax returns, a driver’s license, voting records or credit card or other bills linking her to the apartment Significantly, she provided no medical bills or other documents pertaining to her alleged disability that could be expected to show her address as the subject apartment.” AHO Levy also found Petitioner’s supporting affidavits from neighbors in the complex to be “lacking in specificity and personal knowledge of [Petitioner’s] actual primary residence during this period”

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]).

28 RCNY §3-02(p)(3) provides

[I]f the tenant/cooperator has permanently vacated the apartment, any member of such tenant/cooperator's family, who has resided with the tenant/cooperator in the apartment as a primary residence ... for a period of not less than two years immediately prior to the tenant/cooperator's permanent vacating of the apartment, and has appeared on the income affidavits for at least the two consecutive annual reporting periods prior to the tenant/cooperator's permanent vacating of the apartment, or where such person seeking succession rights is a senior citizen or disabled person, for a period of not less than one year immediately prior to the tenant/cooperator's permanent vacating of the apartment, and has appeared on the income affidavit for at least the reporting period immediately prior to the permanent vacating of the apartment by the tenant/cooperator ... may request to be named as a tenant/cooperator on the lease and where applicable on the stock certificate The burden of proof is on said family member to show use of the apartment as his or her primary residence during the required period to be eligible to succeed to possession.

Here, the court finds that HPD's denial of succession rights is supported by a rational basis in the record, and thus cannot be disturbed by the court. It is undisputed that Petitioner does not appear on the Apartment's income affidavits for the two consecutive annual reporting periods preceding Kulczycky's death. While Petitioner claims that she is disabled, thus requiring that she only appear on the 2007 affidavit, AHO Levy rationally concluded that Petitioner failed to present evidence that she was disabled. 28 RCNY §3-02(p)(2)(iii) defines a disabled person as

a person who has an impairment which results from anatomical, physiological or psychological conditions, other than addiction to alcohol, gambling, or any controlled substance, which is demonstrable by medically acceptable clinical and laboratory diagnostic techniques and which is expected to be permanent and to

substantially limit one or more of such person's major life activities.

The medical records provided by Petitioner at the administrative level were dated from 1998 through 2001. Inasmuch as Petitioner failed to present any medical evidence demonstrating that she was currently disabled, as that term is defined above, AHO Levy's finding was rationally based.

Further, AHO Levy rationally concluded that, even assuming that Petitioner had proven that she was disabled, Petitioner still failed to meet her burden of proof that she used the Apartment as her primary place of residence. As noted by AHO Levy, Petitioner was unable to produce income tax returns, identification, bills, or any of the other "usual documentary indicia of residency."

Lastly, the court declines to consider any of the evidence presented by the Petitioner for the first time in this proceeding, as Article 78 review is limited to the record before the administrative agency.

Wherefore, it is hereby

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

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

Dated: October 19, 2011


EILEEN A. RAKOWER, J.S.C.

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