

<b>Matter of LaFemina v NYC HPD</b>
2012 NY Slip Op 31825(U)
July 6, 2012
Supreme Court, New York County
Docket Number: 100985/12
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE PART 5  
*Justice J.S.C.*

LA FEINA, GERNARD R.

INDEX NO. 100985/12

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

- v -  
N.Y.C. HPD

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

1  
2, 3, 4, 5

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION ~~LETTER~~ JUDGMENT**

**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).

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MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

Dated: 7-6-12

JUL 06 2012

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  
In the Matter of the Application of GERARD  
LAFEMINA,

Index No. 100985/12

Petitioner,

Motion arg.: 4/24/12  
Motion Seq. No.: 001

-against-

**DECISION & JUDGMENT**

**UNFILED JUDGMENT**

NYC HPD,

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Respondent  
-----X  
**141B)**

BARBARA JAFFE, JSC:

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By order to show cause dated February 3, 2012, petitioner brings this Article 78 proceeding seeking to reverse the determination of respondent New York City Department of Housing Preservation and Development (HPD), dated December 5, 2011, denying his application for succession rights to the tenancy of apartment 12F at 410 East 6<sup>th</sup> Street in Manhattan (the premises), which is located in a public housing development operated by Village View Housing Corp. (Village). Village and HPD oppose. By order to show cause dated March 29, 2012, petitioner moves for an order staying his eviction pending a determination of the instant proceeding.

**I. PERTINENT BACKGROUND**

By occupancy agreement dated September 9, 1964, John Misiara became the tenant/cooperator of record for the premises, and as reflected on stock shares issued on July 16,

1970, he and Stella Misiara became joint owners of the stock for the premises. Stella Misiara died on November 26, 2010, and John Misiara had predeceased her. Petitioner is the great-nephew of Stella Misiara. The 2009 income affidavit for the premises, which was signed by Stella Misiara, reflects that she was the sole occupant of the premises. After her death, petitioner submitted a 2010 income affidavit identifying himself as the sole occupant. (Verified Petition, dated Jan. 26, 2012 [Pet.], Exh. A).

By letter dated September 28, 2011, Village denied petitioner's request for succession rights to the apartment on the grounds that petitioner had not been included on Misiara's income affidavits in the two years before her death nor had he ever been added to Misiara's lease. (Verified Answer, dated Apr. 10, 2012 [Ans.], Exh. E).

By decision dated December 5, 2011, an Administrative Hearing Officer employed by HPD denied petitioner's appeal of Village's decision, finding that he failed to establish that he had been included on Misiara's relevant income affidavit or that he had resided in the apartment before Misiara's death as his primary residence, observing that petitioner had conceded that Maryland had been his legal residence for many years and that he had never filed a New York State income tax return. (*Id.*, Exh. J).

Petitioner claims that HPD's determination should be annulled as it ignored the facts that Village had failed to comply with his succession request within 30 days as required, that since 2009 he has resided more than half a year in the premises in order to take care of Misiara and has been attempting to find employment in New York, and that his mother paid the monthly maintenance fee for the premises for some period of time which HPD accepted. (Pet.).

## II. APPLICABLE RULES AND PROCEDURES

The subject premises is governed by Article II of the New York State Private Housing Finance Law, otherwise known as the Mitchell-Lama law. Pursuant to 28 RCNY § 3-02(p)(3), a qualifying family member may request to be named on the lease of a Mitchell-Lama tenant who has permanently vacated the apartment at issue if the family member has resided with the tenant in the apartment as a primary residence for a period of not less than two years and has appeared on the income affidavits for at least the two consecutive annual reporting periods before the tenant vacated the apartment. The family member bears the burden of proof of establishing that the apartment was his primary residence, which includes a consideration of whether the family member, as pertinent here:

- (i) specifies an address other than such dwelling unit as his or her place of residence or domicile in any tax return, motor vehicle registration, driver's license or other document filed with a public agency;
- (ii) gives an address other than such dwelling unit as his or her voting address;
- (iv) spent less than an aggregate of 183 days in the preceding calendar year in New York City at such dwelling unit . . . However, no dwelling unit may be considered the primary residence of the family member unless he or she provides proof that he or she either filed a New York City Resident Income Tax return at the claimed primary residence for the most recent preceding taxable year for which such return should have been filed or that the he or she was not legally obligated to file such tax return . . . The person whose residency is being questioned will be obligated to provide proof that his or her apartment is his or her primary place of residence, including but not limited to, certified New York State income tax returns, utility bills, and voter registration data.

(28 RCNY § 3-02[n][4]).

## III. ANALYSIS

In reviewing an administrative agency's determination as to whether it is arbitrary and capricious under CPLR Article 78, the test is whether the determination "is without sound basis

in reason and . . . 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]; *Matter of Kenton Assoc. v Div. of Hous. & Community Renewal*, 225 AD2d 349 [1<sup>st</sup> Dept 1996]). Moreover, the determination of an administrative agency, “acting pursuant to its authority and within the orbit of its expertise, is entitled to deference, and even if different conclusions could be reached as a result of conflicting evidence, a court may not substitute its judgment for that of the agency when the agency’s determination is supported by the record.” (*Matter of Partnership 92 LP & Bldg. Mgt. Co., Inc. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 425, 429 [1<sup>st</sup> Dept 2007], *aff’d* 11 NY3d 859 [2008]).

Here, as it is undisputed that petitioner was not listed on Misiara’s income affidavits in the two years before her death, HPD had a rational basis for denying petitioner succession rights to the premises. (28 RCNY § 3-02[p][3]; *see Matter of Yunayeva v Kings Bay Housing Co., Inc.*, 94 AD3d 452 [1<sup>st</sup> Dept 2012] [denial of succession rights had rational basis as petitioner failed to demonstrate premises was her primary residence and that she had been listed on income affidavits in two years before tenant’s death]; *Matter of Belok v New York City Dept. of Hous. Preservation & Dev.*, 89 AD3d 579 [1<sup>st</sup> Dept 2011] [petitioner was not listed on income affidavits for two years before mother’s death]; *Matter of Quinto v New York City Dept. of Hous. Preservation & Dev.*, 78 AD3d 559 [1<sup>st</sup> Dept 2010] [same]; *Matter of Miney v Donovan*, 68 AD3d 876 [2d Dept 2009], *lv denied* 15 NY3d 712 [2010] [under Mitchell-Lama regulations, occupant who is not listed on income affidavits may not receive succession rights to apartment]).

While petitioner submitted proof that he sometimes resided in the premises before Misiara’s death, it is also undisputed that he never filed a New York State income tax return, nor

does he allege that he was not required to do so. Thus, pursuant to 28 RCNY § 3-02(n)(4)(iii), the premises may not be considered petitioner's primary residence, irrespective of any other factors that may have been present. (See *Matter of Girigorie v New York City Dept. of Hous. Preservation and Dev.*, 75 AD3d 430 [1<sup>st</sup> Dept 2010] [petitioner failed to provide proof that he filed New York State tax return or was not required to do so]; *Matter of Santiago v E. Midtown Plaza Hous. Co., Inc.*, 59 AD3d 174 [1<sup>st</sup> Dept 2009] [same]; *Matter of Nole v New York City Dept. of Hous. Preservation and Dev.*, 26 AD3d 163 [1<sup>st</sup> Dept 2006], *lv denied* 6 NY3d 890 [petitioner did not file New York tax return for relevant year]).

Finally, petitioner has failed to establish that HPD's failure to reply timely to his succession request, his mother's payment of Misiara's rent/fees, or Misiara's desire that the premises be given to him upon her death provide any legal grounds upon which HPD was required to grant him succession rights. (See *eg Matter of Schorr v New York City Dept. of Hous. Preservation & Dev.*, 10 NY3d 776 [2008] [even if landlord acquiesced in petitioner's occupancy, as petitioner was ineligible for succession rights to apartment, respondent could not be estopped from evicting him]; *Matter of Gottlieb v New York State Div. of Hous. and Community Renewal*, 90 AD3d 527 [1<sup>st</sup> Dept 2011] [determination denying succession rights upheld despite fact that landlord accepted maintenance payments from petitioner and permitted petitioner to occupy premises for 13 years after tenant's death]).

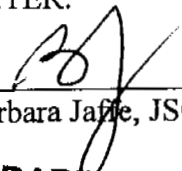
#### IV. CONCLUSION

Accordingly, it is hereby

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

ORDERED, that petitioner's motion for a stay is denied as moot.

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC  
**BARBARA JAFFE**  
J.S.C.

DATED: July 6, 2012  
New York, New York

JUL 06 2012

**UNFILED JUDGMENT**

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