

<b>Matter of Moore v City of N.Y.</b>
2013 NY Slip Op 30164(U)
January 23, 2013
Supreme Court, New York County
Docket Number: 102874/12
Judge: Peter H. Moulton
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MOULTON  
Justice

PART 40 BM

MOORE, HENRY

- v -  
CITY OF New York,  
ETAL.

RECEIVED  
JAN 29 2013  
MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

INDEX NO. 102874/12  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

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	
	_____
	_____
	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion partia is denied per  
attached

**FILED**  
JAN 29 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/23/13

[Signature]  
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 40 B

-----X

In the Matter of the Application of Index No. 102874/12

HENRY MOORE,

Petitioner,

-against-

CITY OF NEW YORK, DEPARTMENT OF HOUSING  
PRESERVATION AND DEVELOPMENT,  
ESPLANADE GARDENS

Respondent.

-----X  
PETER H. MOULTON, J.S.C.:

**FILED**  
JAN 29 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

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MOTION  
NYS SUPREME COURT - CIVIL

Petitioner Henry Moore brings this Article 78 proceeding to vacate the decision by respondent Division of Housing Preservation and Development ("HPD"), dated September 1, 2010, and the determination by administrative hearing officer Frances Lippa ("Lippa"), dated February 15, 2012, denying him succession rights to his grandmother's Brooklyn cooperative apartment. Petitioner's grandmother died October 29, 2005. Petitioner first appeared on the annual income affidavits after Ms. Moore's death.

Facts

Respondent Esplanade Gardens ("Esplanade") is an Article II limited-profit housing company organized under the New York State Private Housing Finance Law (the "Mitchell-Lama Law"). By letter dated September 1, 2010, HPD notified petitioner of certain

deficiencies in his request to be added to his grandmother's stock certificate. The deficiencies included lack of "[v]erification that Henry Moore and Susie Moore resided together at this apartment in 2003 and 2004 (e.g., W-2 forms, certified tax return, bills, etc.)."<sup>1</sup> Accordingly, HPD found that it could not approve petitioner's request, but allowed petitioner time to submit further proof. By letter dated March 28, 2011, Esplanade advised petitioner that his claim was denied for lack of "Proof of residency (2003 & 2004) and relationship between Henry Moore and shareholder Susie Moore (deceased as of 10/29/05)." Petitioner filed a timely appeal.

In connection with the appeal, Lipppa advised petitioner, in a letter dated May 5, 2011, that the controlling regulation required that petitioner be included on all relevant income affidavits signed after February 1, 2003.<sup>2</sup> He further advised petitioner that he could submit documents, by June 15, 2011, establishing his co-residency with Ms. Moore, for the two year period prior to her death. The letter enclosed a copy of HPD's rules regarding

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<sup>1</sup>HPD should have advised petitioner that the relevant period also included 2005, but the failure to do so is not fatal in light of the fact that petitioner received subsequent notices of the relevant time period, and does not appear to have been misled by such failure.

<sup>2</sup>Prior to that date, the regulation permitted the family member to rebut the presumption that the family member did not live in the apartment for the relevant time period if that member did not appear on the relevant income affidavit.

succession rights and a list of suggested documentation. The letter advised petitioner that he "should submit as many of the listed documents as you can, since this is your only opportunity to present your succession rights claim for review." The list referred to documents which included "Certified New York State Tax returns." The list did not suggest the submission of affidavits or of federal income tax returns, but provided that "You may submit any other documents that you believe will prove your primary residence.". By separate letter dated May 5, 2011, Lippa also advised Tanya Owens, Esq. of Kagan Lubric Lepper Lewis Gold & Colbert LLP (with a copy to petitioner), of petitioner's right to submit further documents to Lippa.

Petitioner, pro se, submitted documents by letter dated June 15, 2011. Most documents were outside of the relevant period of co-residency (October 29, 2003 to October 29, 2005) and only two documents related the relevant time period. Petitioner submitted an undated 2003 1040 income tax return, signed by the preparer Newkirk Associates, which was not certified. Petitioner also submitted an interim New York State driving permit which was issued on March 1, 2001 and expired on February 11, 2006.

In his decision dated February 15, 2012, Lippa denied petitioner's appeal and issued a Certificate of Eviction. Lippa found that there was no evidence that the petitioner was on the income affidavits during the period of October 29, 2003 to October

29, 2005.<sup>3</sup> He further found a lack of proof that petitioner co-resided with Ms. Moore. He noted that the only documents submitted for the relevant period were (1) the undated 2003 federal tax return, which was not certified, and (2) the interim permit, which was issued in 2001.

### Discussion

Respondent HPD "is vested with exclusive jurisdiction to determine the remaining-family-member claim in city-aided Mitchell-Lama housing" (Lindsay Park Hous. Corp. v Grant, 190 Misc 2d 777, 777 [2001]). To succeed to the leasehold rights of a Mitchell-Lama apartment, the petitioner bears the burden of showing that he or she (1) is a member of the tenant's family; (2) if not a senior citizen or disabled, resided with the tenant in the apartment as a primary residence for a period of not less than two years; and (3) if not a senior citizen or disabled, was listed on the income affidavits for at least the two consecutive annual reporting periods prior to the tenant's vacature of the apartment (28 RCNY § 3-02[p][3]; see, *Matter of Shupack v Dayton Towers Corp.*, 203 AD2d 134 [1994]). The submission of income affidavits identifying the petitioner as a resident does not, in and of itself, establish the existence of succession rights as a matter

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<sup>3</sup>Petitioner does not dispute that he did not appear on the 2003 and 2005 income affidavits, nor that the tenant's file did not include the 2004 income affidavits.

of law (*Matter of Pietropolo v New York City Dept. of Hous. Preserv. & Dev.*, 39 AD3d 406, 406-407 [1st Dept 2007]). Rather, HPD may also rely upon "the lack of objective documentary evidence supporting petitioner's claim" to residency (*Hochhauser v HPD*, 48 AD3d 288 [1st Dept 2008]).

In reviewing the determination of an agency such as HPD, the court must consider whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion (see CPLR 7803[3]; *Matter of Windsor Place Corp. v State Div. of Hous. & Community Renewal, Off. of Rent Admin.*, 161 AD2d 279 [1st Dept 1990]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken "without sound basis in reason and . . . without regard to the facts" (*Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). The court may not overrule the agency merely because it finds that the factual record could support a different conclusion (see *Matter of West Vil. Assoc. v Div. of Hous. & Community Renewal*, 277 AD2d 111, 112 [1st Dept 2000]). Generally, the court may not consider evidence which was not initially presented to the agency (see *Belok v New York City Dept. of Hous. Preserv. & Dev.*, 89 AD3d 579 [1st Dept 2011] [petitioner's submission of a copy of an income affidavit with his article 78 petition was unavailing because

review of an agency determination is limited to the facts and record adduced before the agency]).

Lippa's decision is not arbitrary and capricious in light of the lack of proof of petitioner's co-residency with Ms. Moore and the prior notifications to petitioner that this proof was required. Unfortunately, petitioner may not have realized the importance of his submission, despite the fact that Lippa's May 5, 2011 notified him that he "should submit as many of the listed documents as you can, since this is your only opportunity to present your succession rights claim for review."<sup>4</sup> Although the suggested list of documents referred to "Certified New York State Tax returns" and not to certified federal income tax returns, it was not arbitrary and capricious for Lippa to conclude that the 2003 1040 return was not sufficient. Even if that return was certified, it only related to the year 2003. No tax returns were submitted for 2004 and 2005. Thus, the evidence provided by petitioner to Lippa is not the "ample" evidence submitted in the case cited by petitioner, *Matter of Murphy v New York State Div. Of Hous. & Community Renewal* (91 AD3d 481 [1st Dept 2012] ["the failure to file the requisite annual

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<sup>4</sup>In attempting to settle this case, petitioner's counsel submitted to opposing counsel a 2003 UPS paystub for the period 10/11/03, a 1099-G from the Department of Labor for 2003 and a SMS, Inc-SMS Industries W-2 for 2004, all reflecting the apartment address. Although petitioner may have lived with his grandmother for the relevant period, the court is nevertheless constrained to deny the petition.

income affidavit is not fatal to succession rights, provided that the party seeking succession rights proffers an excuse for such failure . . . and demonstrates residency with other documentary proof" ]).<sup>5</sup> Nor has petitioner explained the failure to be included in the annual income affidavits, to fall within the ambit of *Murphy*.

Accordingly, it is

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

This Constitutes the Decision and Judgment of the Court.

Dated: January 23, 2013

ENTER:

  
J.S.C.

HON. PETER H. MOULTON  
SUPREME COURT JUSTICE

**FILED**  
JAN 29 2013  
NEW YORK  
COUNTY CLERK'S OFFICE

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<sup>5</sup>The regulation in *Murphy*, 91 AD3d 481, *supra*, is similar to the regulation at issue here, although the administrator of the Mitchell Lama program is different.