

Matter of Westbrook v HPD & Riverbend Hous.

2013 NY Slip Op 30292(U)

February 4, 2013

Sup Ct, New York County

Docket Number: 401907/11

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 21

In the Matter of the Application of
TRACI WESTBROOK,

INDEX NO. 401907/11

MOTION DATE 11/15/12

Petitioner,

- v -

MOTION SEQ. NO. 001

HPD and RIVERBEND HOUSING,

Respondents.

The following papers, numbered 1 to 13 **UNFILED JUDGMENT**
 Notice of Petition; Order to Show Cause—Verified Petition—~~Service based hereon.~~ To
 Affidavit of Service; Affidavit of Service—~~notice of entry cannot be served based hereon.~~ 1; 2-3; 4; 5
 Verified Answer— Exhibits A-L—Affirmation—~~appeal in person service~~ Judgment Clerk's Desk (Room
 Affidavit of Support of Petition; Memo of Law In Support of Petition—~~141B)~~ No(s). 6-7
 — Exhibits 1- 5, 6 [Affidavits] No(s). 8-11
 Verified Answer—Affidavit of Service No(s). 12-13

Upon the foregoing papers, it is **ADJUDGED** that this petition is denied, and the proceeding is dismissed.

In this Article 78 proceeding, petitioner challenges the determination of the New York City Department of Housing Preservation and Development, sued herein as respondent HPD, which denied petitioner's appeal to succession rights to a Mitchell-Lama apartment in the building located at 2301 Fifth Avenue in Manhattan, owned by Riverbend Housing Co., Inc., sued herein as respondent Riverbend Housing. The tenant of record, petitioner's father, died on March 27, 2009.

In a determination dated March 28, 2011, the Hearing Officer ruled, based on documentary evidence,

"Traci Westbrook has the burden of proving her entitlement to succession rights to the subject apartment. The extremely limited documentation reflecting the subject apartment as Ms. Westbrook's

(Continued . . .)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

address is not sufficient to prove the required co-residency. Ms. Westbrook maintained a bank account, received unemployment compensation and was employed during the co-residency period but she failed to submit any bank statements, unemployment compensation records or W-2s as proof of her primary residence in the subject apartment during the requisite co-residency period. Furthermore, the conflicting addresses for Ms. Westbrook on the transcripts of her 2008 federal tax returns calls into question her actual primary residence in 2008.

I note, based on the documentation, that even if a one year co-residency period were applied in this case, Ms. Westbrook would still have failed to prove the required co-residency.

Traci Westbrook is a family member of the tenant and she was included as an occupant of the subject apartment on the relevant income affidavits. However, Ms. Westbrook has failed to prove the required co-residency and therefore she is not entitled to succession rights.”

(Verified Petition, Ex A; HPD Verified Answer, Ex I.)

Judicial review of an agency's determination is limited to whether the determination was arbitrary and capricious or an abuse of discretion or made in violation of a lawful procedure or was affected by an error of law. (CPLR 7803; *Flacke v Onondaga Landfill Sys.*, 69 NY2d 355 [1987]); *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 (1974). 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*, 34 NY2d at 231.)

In order to succeed to leasehold rights in this Mitchell–Lama apartment pursuant to 28 RCNY § 3–02(p)(3), petitioner bore the burden of establishing that she resided there with her father, as her primary residence (28 RCNY § 3–02 [n] [4]). (*Pietropolo v New York City Dept. of Hous. Preserv. & Dev.*, 39 AD3d 406, 407 [1st Dept 2007].) The period of primary residency is not less

(Continued . . .)

Matter of Westbrook v HPD and Riverbend Hous., Index No. 401907/2011

than two years prior the tenant's permanent vacating of the apartment, but where the person seeking succession rights is a disabled person, the period of residency is not less than one year. (28 RCNY 3-02 [p] [3].)

Here, petitioner argues that the Hearing Officer should have applied the one year period of co-residency because she is disabled. In support of her contention that she is disabled, petitioner submits excerpts of a six page decision dated January 6, 2011, from Social Security Administration Office of Disability Adjudication and Review, which found that petitioner has been disabled since December 5, 2008. (Verified Petition, Ex C.)

As HPD indicates, the determination of the Social Security Administration was not and could not have been presented to the Hearing Officer. By letter dated October 19, 2010, the Hearing Officer informed petitioner, "You must submit all documents you wish to have considered in this appeal by November 24, 2010." (Verified Answer, Ex C.) Because this evidence was not presented to the Hearing Officer, the Court cannot consider this in support of petitioner's contention that the Hearing Officer ought to have determined, based on the Social Security Administration's decision, that petitioner was disabled.

In any event, the Hearing Officer stated, "I note, based on the documentation, that even if a one year co-residency period were applied in this case, Ms. Westbrook would still have failed to prove the required co-residency."

The determination that petitioner did not sustain her burden was not affected by an error of law, and was not irrational, unreasonable, or arbitrary and capricious. "[A]n agency has great discretion in deciding which evidence to accept and how much weight should be accorded particular documents or testimonial statements, and its determination in that respect is subject only to the legal requirement that the administrative finding be rationally based or, where appropriate, supported by substantial evidence." (*Matter of Kogan v Popolizio*, 141 AD2d 339 [1st Dept 1988].)

Here, the Hearing Officer found that the evidence that could affirmatively substantiate any portion of the period of co-residency, whether it be one year or two years, was insufficient. Petitioner was apparently sent a suggested list of documents to assist her in proving the requisite primary residency. (Verified

(Continued . . .)

Matter of Westbrook v HPD and Riverbend Hous., Index No. 401907/2011

Answer, Ex C [“Documents to Prove Primary Residency”].) The list includes 15 categories of documents, and states at the bottom, “FAILURE TO SUBMIT TAX RETURNS COULD RESULT IN A FINDING THAT THE SUBJECT APARTMENT WAS/IS NOT YOUR PRIMARY RESIDENCE.” (*Id.*) Many documents that petitioner submitted to the Hearing Officer fall within the category of publications and other general correspondence addressed to petitioner, but many of those mailings did not have US postmarks which bore dates to corroborate the period of primary residence. (Verified Answer, Ex D.) As the Hearing Officer noted, petitioner submitted two copies of petitioner’s tax return transcript for the 2008 tax year, but one copy bears a different address for petitioner than the apartment at issue. (*Id.*)

The Hearing Officer apparently drew negative inferences based on petitioner’s failure to submit documents which the Hearing Officer would have expected petitioner to have in her possession, which were among the categories of documents on the suggested list. The Hearing Officer’s decision states, “Additionally, significant documents that would have reflected Ms. Westbrook’s address were not provided as proof of the required residency.” (Verified Answer, Ex I.) For example, the Hearing Officer’s decision states that petitioner did not provide W2s, documentation from her employer, pension or annuity documents despite tax returns and transcripts indicating that petitioner had earned income, including taxable income from a pension or annuity. The Hearing Officer again noted that petitioner did not submit any bank statements, even though unemployment compensation was deposited directly into petitioner’s bank account.

On this Article 78 petition, petitioner submits unsworn statements ([Reply] Mem. of Law, Ex 5), and affidavits from the Assistant Property Manager at Riverbend Housing Co., and from a board member from the Riverbend Board of Directors. However, these submissions are unavailing, “since review of an agency determination is limited to the ‘facts and record adduced before the agency.’” (*Belok v New York City Dept. of Hous. Preserv. & Dev.*, 89 AD3d 579, 580 [1st Dept 2011] [citation omitted].)

As petitioner’s attorney notes, the Hearing Officer’s determination was

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Matter of Westbrook v HPD and Riverbend Hous., Index No. 401907/2011

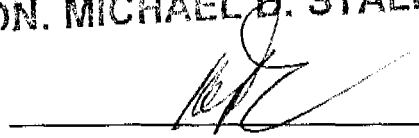
largely based on weighing the probative value and reliability of documentary evidence, against petitioner's contention that she necessarily resided in the apartment as her primary residence in order to care for her dying father. As HPD indicates, "petitioner's challenges to the credibility determinations of the administrative agency are unavailing because, in an Article 78 proceeding, the reviewing court may not weigh the evidence, choose between conflicting proof, or substitute its assessment for that of the administrative fact finder." (*Matter of Porter v New York City Hous. Auth.*, 42 AD3d 314 [1st Dept 2007]; *Matter of Aponte v New York City Hous. Auth.*, 48 AD3d 229 [1st Dept 2008].)

Contrary to petitioner's argument, petitioner was not entitled to an evidentiary hearing, because the regulation under which she claims succession rights "did not provide for a hearing." (*Pietropolo*, 39 AD3d at 407.) Therefore, the petition is denied and the proceeding is dismissed.

The Court's efforts to persuade the agency to reevaluate its determination were to no avail.

HON. MICHAEL B. STALLMAN

Dated: 2/4/13
New York, New York

 J.S.C.

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