

**Romero-Mitchell v New York City Dept. of Hous.
Preserv. & Dev.**

2013 NY Slip Op 30469(U)

March 5, 2013

Supreme Court, New York County

Docket Number: 112854/11

Judge: Alice Schlesinger

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

PRESENT: ALICE SCHLESINGER
Justice

PART IA PART 16

Index Number : 112854/2011
ROMERO-MITCHELL, NORMA
vs.
NYC DEPARTMENT OF HOUSING
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
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~~ Article 78 petition is granted in accordance with the accompanying memorandum decision. The Clerk is directed to enter judgment in favor of the petitioner.

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).

Dated: MAR 05 2013

Alice Schlesinger
ALICE SCHLESINGER 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

-----X

In the Matter of the Application of
NORMA ROMERO-MITCHELL,

Petitioner,

Index No. 112854/11
Mot Seq. No. 001

For a Judgment Pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

NEW YORK CITY DEPARTMENT OF
HOUSING PRESERVATION & DEVELOPMENT,

Respondent.

-----X

SCHLESINGER, J.:

Petitioner Norma Romero-Mitchell commenced this Article 78 proceeding to annul the August 22, 2011 Order and Opinion of the New York City Department of Housing Preservation and Development (HPD) Administrative Hearing Officer Frances Lippa (Petition, Exh A). In that Order, HPD denied petitioner's request to remain in apartment 23-A at 65 West 90th Street after her mother's death and authorized her eviction. Petitioner claims, among other things, that HPD erred in compelling her to apply for succession rights, as she has long been a shareholder in her own right. In opposition, HPD asserts that ownership does not equate with succession rights. The resolution of the dispute turns on the interpretation of a complex scheme of regulations governing occupancy in an apartment building subject to the Mitchell-Lama Law.

Background Facts

Petitioner Norma Romero (a/k/a Norma Romero-Mitchell) moved into the subject apartment 23-A at 65 West 90th Street, New York, NY (the Apartment), with her mother Sally L. Romero in 1970 when she was a high school student. The Apartment is a cooperative apartment, and the housing company that owns the building is St. Martin's

Housing Corporation, a company organized pursuant to Article II of the Private Housing Finance Law, commonly known as the Mitchell-Lama Law, originally for the benefit of middle-income families. On July 1, 1975, about two months shy of petitioner's eighteenth birthday, St. Martin's issued stock certificate number 19 appurtenant to the Apartment, certifying that "Sally L. Romero and Norma Romero" owned approximately 28 shares in the housing company "AS JOINT TENANTS WITH RIGHT OF SURVIVORSHIP AND NOT AS TENANTS IN COMMON." (Exh B). Although it appears that Ms. Romero-Mitchell did not continuously occupy the Apartment for the entire period of about 30 years since that time, St. Martin's never took any steps to terminate Ms. Romero-Mitchell's rights in any way.

Petitioner's mother Sally L. Romero died on July 1, 2010. St. Martin's then insisted that petitioner prove that she was a "remaining family member" entitled to remain in the Apartment. In response, Ms. Romero-Mitchell produced the Tenant/Shareholder Annual Household Income Affidavits for the calendar years 2008 and 2009. The first, sworn to on April 30, 2009, indicated that Mrs. Romero, age 79, and her daughter, Norma Romero-Mitchell, age 51, were occupying the apartment. The second, sworn to on April 27, 2010, also listed both the mother and the daughter. (Exh C). Ms. Romero-Mitchell further indicated that she had been undergoing a divorce during that time and that, while she still maintained a business in Philadelphia, she lived with her mother most of the time and had no other primary residence.

When St. Martin's denied Ms. Romero-Mitchell's request to remain in the Apartment by letter dated March 29, 2011, Ms. Romero-Mitchell challenged that decision by submitting additional documentation supporting her request to HPD Administrative Hearing Officer Frances Lipa with a letter dated April 26, 2011 (Exh D).

There she explained, among other things, that while she did get married in 1983, raise two sons, and start a business in Philadelphia for a period of time, she had separated from her husband in 2008 and had been living primarily in the subject New York Apartment since that time, caring for her mother whose health was deteriorating. She further stated that while she continued to have business interests in Philadelphia, she continued to reside in the New York Apartment with her son Marcus after her mother's death.

HPD denied petitioner's right to remain in the Apartment in the August 22, 2011 Order and Opinion of the New York City Department of Housing Preservation and Development (HPD) Administrative Hearing Officer Frances Lippa (Petition, Exh A). H.O. Lippa began by indicating that she had reviewed all the documentation submitted by St. Martin's, as well as that submitted by Ms. Romero-Mitchell. She then recited what she believed to be the governing law:

In order to obtain occupancy rights in Mitchell-Lama housing an individual must be approved from a waiting list or qualify for succession rights according to the HPD rules set forth at 28 RCNY 3-02(p).

The cited rule, entitled "*Occupancy rights of family members,*" addresses the "rights of family members of a tenant/cooperator who have requested to remain as the lawful tenant/cooperator." Although not directly referenced, it appears that H.O. Lippa was applying subdivision 3 of 28 RCNY 3-02(p), which states in relevant part that:

if 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, as determined by §3-02(n)(4) of these rules, 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 ... 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.¹

H.O. Lippa then proceeded to state her Findings of Fact in the next six pages of her decision. She noted initially that petitioner's mother Sally Romero had signed a subscription agreement for the Apartment on November 11, 1970, thereby making her the "tenant/cooperator of record." Based on Ms. Romero's death on July 1, 2010, Ms. Romero-Mitchell, the cooperator's daughter, was required to establish co-residency from July 1, 2008 through July 1, 2010 to establish her entitlement to succession rights, the Hearing Officer stated.

The Hearing Officer acknowledged that Ms. Romero-Mitchell had been included as an occupant on the income affidavits for the calendar years 2008 and 2009. However, she found that the affidavits were not "reliable or credible documents" because the income stated there differed from that in the Pennsylvania tax returns that had been provided by petitioner. In any event, she emphasized, petitioner still had the "burden of proving her entitlement to succession rights, including the required co-residency."

On that issue, the Hearing Officer found a "pronounced lack of documentation" establishing Ms. Romero-Mitchell's occupancy in the Apartment for the relevant time, as the various documents submitted with the Apartment's address either post-dated the

¹ The regulation refers to both tenants and cooperators, as well as leases and stock certificates, because the regulation applies equally to tenants of Mitchella-Lama rental apartments with leases and owners of Mitchell-Lama cooperative apartments with stock certificates.

cooperator's death or were undated. The only document reflecting the Apartment address for at least a substantial part of the relevant time was the New York State Automobile Insurance Card effective from September 3, 2008 through September 3, 2009. The tax returns showed a Philadelphia address, as did an affidavit that Ms. Romero-Mitchell had filed in her divorce proceeding in March 2010 and her mother's death certificate from July 2010. Ms. Romero-Mitchell explained in her submission to the Hearing Officer that she used the Philadelphia address as an alternate mailing address because she owned the property and maintained a business interest there, but she insisted that she lived in the New York Apartment and produced evidence that the residential apartments at the Philadelphia address were rented to others.

Particularly relevant to the dispute here is the Hearing Officer's statement regarding the burden of proof:

However, it is not the housing company's burden to prove where Norma Romero-Mitchell was residing during the required co-residency period. On the contrary, Ms. Romero-Mitchell has the burden of proving that she resided in the subject apartment as her primary residence throughout the requisite co-residency period. ...

In light of this significant lack of documentation, I find that Norma Romero-Mitchell has failed to prove that she resided in the subject apartment as her primary residence for the requisite co-residency period.

Just as she discounted the income affidavits, the Hearing Officer gave virtually no weight to the fact that Ms. Romero-Mitchell was a shareholder in possession of a stock certificate bearing her name and an approved member of the household when her mother commenced her occupancy. Relying again on the succession rules [28 RCNY 3-02(p)(2)(i)], the Hearing Officer concluded that Ms. Romero-Mitchell could not be

considered a “tenant/cooperator” for the Apartment as there was no indication that she was named on the occupancy agreement and obligated to pay rent.² Noting that occupancy rights in Mitchell-Lama housing cannot be bequeathed, Hearing Officer Lippa concluded her decision as follows, again with a focus on burden of proof:

Norma Romero-Mitchell is the daughter of the tenant and she appeared as an occupant of the subject apartment on the relevant income affidavits. However, she has failed to provide sufficient, credible, reliable proof that she actually resided in the subject apartment as her primary residence for the two years immediately prior to her mother’s death. . .

The succession rights appeal is denied and a certificate of eviction is hereby issued against Norma Romero-Mitchell and John Doe.

Discussion

While the regulations governing Mitchell-Lama housing are extensive and complex, the dispute between the parties here can be stated fairly simply. Petitioner argues that respondent erred in imposing on her the burden of proving succession rights; since petitioner undeniably is a shareholder named on the original stock certificate and an initial member of the household approved by HPD from its waiting list, the burden is more properly placed on the housing company to prove non-primary residence or some other ground for terminating petitioner’s documented ownership rights. Respondent HPD argues that because Mitchell-Lama rights cannot be bequeathed, the agency properly placed on petitioner the burden of proving succession rights, which included the burden of proving that she occupied the Apartment as her primary residence with her mother for the two years preceding her mother’s death.

² As discussed below, neither party submitted a copy of any occupancy agreement to the Hearing Officer, so the Hearing Officer had no knowledge of whose name was stated there.

Counsel for HPD implies in her papers here that the dispute is much ado about nothing; because primary residence is relevant under either scenario and the evidence strongly suggests that petitioner resided in Philadelphia, and not in New York, a certificate of eviction would have been issued in either case. However, petitioner disagrees, as does this Court. The burden of proof is a key, and oftentimes determinative, element in most cases. What is more, as respondent's counsel herself acknowledges in her July 20, 2012 Affirmation (at n 3), the "procedural difference between the hearings is not insignificant"; in addition to the burden being placed on the housing company rather than the cooperator, petitioner in a nonprimary residence proceeding would be entitled to an actual hearing where she could present witnesses in her favor and cross-examine opposing witnesses, and she would not be limited to the submission of documents as she was in the succession rights proceeding that was conducted here. See 28 RCNY §3-18.

Before examining the regulatory scheme, the procedural history of this Article 78 proceeding merits some further discussion. In the petition and at oral argument, petitioner's counsel argued that various provisions in the By-Laws for St. Martin's that are printed on the back of petitioner's stock certificate (Exh A) indicate that the stock certificate and occupancy agreement go hand in hand. Further, since St. Martin's had failed to produce any occupancy agreement for consideration, the Hearing Officer should have drawn a negative inference against the housing company to the effect of concluding that the occupancy agreement, if produced, would support petitioner's position.

In response, the Court directed that a nonparty subpoena be served on St. Martin's for a copy of Sally Romero's entire file. That was done, and a diligent search

purportedly unearthed the original occupancy agreement dated March 15, 1971 that reflected the name of Sally Romero only. (A copy is attached as Exhibit A to the July 20, 2012 Aff from HPD's counsel).³ Citing various well-recognized cases, petitioner then argued that this Court could not consider the terms of the occupancy agreement because it had not been included in the administrative record considered by the Hearing Officer. In any event, since petitioner was a minor in 1971, her name could not have been legally included on the occupancy agreement as a person contractually obligated to pay rent, but her name was appropriately included on the stock certificate issued four years later in 1975 as she was about to turn 18. Respondent, of course, argued that the absence of petitioner's name from the occupancy agreement supported HPD's position that stock ownership does not guarantee occupancy rights. Significantly, though, HPD has at no point disputed the authenticity of the 1975 stock certificate bearing petitioner's name; a copy does appear in St. Martin's file, along with documentation confirming that petitioner moved into the Apartment as a minor with her mother when the family commenced its occupancy in 1971 with the knowledge and consent of HPD. In any event, this Court cannot consider the occupancy agreement as it was not considered by the Hearing Officer in the administrative proceeding being reviewed here. *See Matter of Fanelli v New York City Conciliation & Appeals Bd.*, 90 AD 2d 756 (1st Dep't 1982), *aff'd* 58 NY2d 952 (1983).

³ Petitioner's counsel disputes the validity of the document, as counsel declined to show him the original. Counsel for HPD argued that producing the original was a waste of time, but she agreed to produce it for review by the Court. The Court has not asked to see it, preferring to accept counsel's word as an officer of the Court. In any event, as discussed herein, the occupancy agreement is not dispositive here.

Whether or not the March 15, 1971 occupancy agreement is considered, this Court agrees with petitioner that the Order issued by Hearing Officer Lippa must be annulled because HPD improperly placed upon the petitioner the burden to prove succession rights as a remaining family member pursuant to 28 RCNY § 3-02(p)(3) and thereby wholly ignored the import of the stock certificate in petitioner's name and the fact that Ms. Romero-Mitchell was one of the initial occupants of the Apartment selected by HPD from its waiting list.

As petitioner notes in her petition, the By-Laws for St. Martin's that are written on the back of petitioner's stock certificate suggest that a stock certificate and an occupancy agreement go hand in hand. Thus, Section 3(B)(4) provides that upon purchase of shares, a party shall enter into an occupancy agreement. Conversely, Section 3(B)(6) provides that upon termination of the occupancy agreement, the cooperator must surrender the shares. Treating the stock certificate and occupancy agreement as a unit is consistent with the rules and policies of the Mitchell-Lama program as a whole, as the only people eligible to purchase stock in a Mitchell-Lama cooperative are the people who will be occupying the apartment. Why no one can locate an occupancy agreement that names both shareholders, Ms. Romero-Mitchell and her mother Sally Romero, is a question that no one can answer, but the mere absence of an occupancy agreement naming petitioner cannot strip her of her rights as an owner. What is more, as noted above, this Court cannot consider the terms of the 1971 occupancy agreement that names only Sally Romero, as Hearing Officer Lippa did not have that document before her in the administrative proceeding below. *See, Fanelli, supra.*

None of the regulations cited by HPD in its responsive papers provide otherwise; on the contrary, some support the petitioner's position. For example, 28 RCNY § 3-

02(n)(1) contemplates that an occupancy agreement will be routinely issued to all shareholders, stating that: " No ... cooperator shall be permitted to occupy an apartment until an executed ... occupancy agreement has been approved by HPD." Ms. Romero-Mitchell undeniably had the right to occupy the Apartment when the stock certificate was issued in her name in 1975, as she was one of the initial occupants of the Apartment with her mother and had been continuously residing there the entire time. As noted above, she was not listed on the occupancy agreement signed when the family commenced its occupancy because she was a minor.

As an owner, Ms. Romero-Mitchell is entitled to the procedural safeguards to which all tenant/cooperators are entitled; that is, she is entitled to remain in occupancy until St. Martin's establishes at an actual hearing before HPD that a ground exists to terminate Ms. Romero-Mitchell's rights and evict her pursuant to RCNY § 3-18. As counsel for HPD correctly notes, primary residence is a requirement for continued occupancy pursuant to 28 RCNY § 3-02(n)(4). However, the housing company must prove at a hearing that the cooperator does not occupy the Apartment as a primary residence before a certificate of eviction can be issued. The cooperator's rights cannot be simply nullified because, as was the case here, the Hearing Officer is not persuaded by the documents submitted by the cooperator.

This construction of the law, which entitles Ms. Romero-Mitchell to a hearing based on her status as a shareholder and initial occupant, can be readily reconciled with the two provisions in 28 RCNY § 3-06 cited by respondent's counsel in her papers. Subdivision (c) of § 3-06 addresses the situation where an owner wishes to *add* a family member "in occupancy to become co-owners of shares and co-signatories on the

occupancy agreement ...”⁴ The section applies to someone not named on the shares who has **joined** the household **after** the original cooperator commenced occupancy and while the original cooperator is still present, which is not the case here.

Similarly misplaced is HPD’s reliance on the provision in subdivision (c) of § 3-06 which states that: “Co-ownership of shares does not guarantee the right to succession to an apartment in a mutual housing company development.” This Court’s decision in no way disputes that proposition of law; it simply holds that every named shareholder and approved occupant of a Mitchell-Lama apartment is entitled to the procedural safeguard of a hearing before ownership rights can be terminated and the shareholder evicted.

Nor is the Court persuaded by HPD’s reliance on the final sentence in that section, which states that: “Successor cooperators must qualify under § 3-02(p) of these rules.” First and foremost, Ms. Romero-Mitchell is not a “successor cooperator” who joined the household after the original cooperator. She is an initial occupant and member of the household approved from HPD’s waiting list, and she is named on the one and only stock certificate that anyone has ever produced. Thus, the provision regarding “successor cooperators” has no application to petitioner’s case.

But assuming *arguendo* that the provision does apply, it merely species the **substantive “criteria** [that] shall be utilized for all residents” seeking to become “joint” owners of cooperative shares, alongside a cooperator who remains in possession. It does not mandate the **procedures** that should be followed in the presumably unique situation presented by Ms. Romero-Mitchell’s case or otherwise compel her to prove succession rights or deny her the right to a hearing. When read as a whole, section 3-

⁴ Again, the stock certificate and occupancy agreement go hand in hand, with the intention that a party named on the stock also be named on the occupancy agreement.

06(c) simply states the criteria for assuming joint ownership and indicates that someone who joins a Mitchell-Lama household and becomes a joint shareholder must comply with all rules and regulations to retain rights, just as the initial shareholder must.

Similarly misplaced is HPD's reliance on 28 RCNY § 3-06(d), which states that: "In no event may the right of occupancy in a Mitchell-Lama mutual housing company development be bequeathed to another." Petitioner is not relying on a bequest here. She is relying on the inclusion of her name on the stock certificate and her status as a member of the original household approved by HPD from its waiting list. Ms. Romero-Mitchell is not a "family member" who has joined the household after the fact and who seeks succession rights under that provision or 28 RCNY § 3-02(p). She is an initial occupant and a shareholder whose rights must be terminated before she can be evicted.

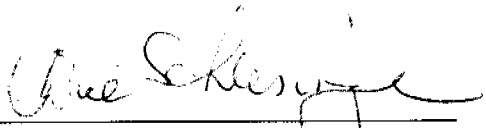
For these reasons, the decision of Hearing Officer Lipa must be annulled. St. Martin's may proceed to commence a proceeding to obtain a certificate of eviction based on Ms. Romero-Mitchell's claimed nonprimary residence pursuant to 28 RCNY § 3-18 if it so chooses, and it may well succeed as HPD's counsel insists it will. However, it may not simply ignore the fact that Ms. Romero-Mitchell is a named shareholder and initial member of the household selected by HPD from its waiting list to occupy the Apartment and compel her to prove succession rights. *Cf Matter of Waldman v New York City Dept. of Hous. Preserv. & Dev.*, 36 AD3d 501 (1st Dep't 2007)(because petitioners had been issued leases by the housing company, albeit without the required approval of HPD, the proper procedure was for the housing company to commence lease termination proceedings pursuant to 28 RCNY 3-18, rather than compel petitioners to prove succession rights). The difference is an actual hearing and all the procedural safeguards that accompany it, a difference which HPD's counsel herself has recognized is "not insignificant."

Accordingly, it is hereby

ADJUDGED that the Article 78 petition is granted and the August 22, 2011 Order and Opinion of the New York City Department of Housing Preservation and Development Administrative Hearing Officer Frances Lipa, which authorized the issuance of a certificate of eviction, is annulled. The Clerk is directed to enter judgment in favor of the petitioner dismissing this proceeding.

Dated: March 5, 2013

MAR 05 2013



J.S.C.

ALICE SCHLESINGER