

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

2013 NY Slip Op 30502(U)

March 6, 2013

Supreme Court, New York County

Docket Number: 401979/12

Judge: Donna M. Mills

Republished from New York State Unified Court  
System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

*In the Matter of the Application of*  
ROBERT SOSA,

INDEX NO. 401979/12

Petitioner,  
-against-

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

NEW YORK CITY DEPARTMENT OF HOUSING,  
PRESERVATION AND DEVELOPMENT, and  
MASARYK TOWERS,

MOTION SEQ. NO. 001

Respondents.

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

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion \_\_\_\_\_

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1

Answering Affidavits- Exhibits... 2, 3

Replying Affidavits \_\_\_\_\_

CROSS-MOTION: YES  NO

**UNFILED JUDGMENT**

**THE judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representatives must appear in person at the Judgment Clerk's Desk (Room 1411B).**

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH ATTACHED ORDER.

Dated: 3/6/13



DONNA M. MILLS, J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 58

-----X  
In the Matter of the Application of ROBERT  
SOSA,  
Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against-

Index No. 401979/12

NEW YORK CITY DEPARTMENT OF  
HOUSING PRESERVATION AND DEVELOPMENT  
and MASARYK TOWERS,  
Respondent.

**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).**

-----X  
**DONNA M. MILLS, J.:**

In this special proceeding pursuant to C.P.L.R. Article 78, Petitioner Robert Sosa ("Petitioner") challenges a determination by the Respondent, New York City Department Of Housing Preservation And Development ("HPD"), which upheld Masaryk Towers Corporation's denial of succession rights to the premises located at 85 Columbia Street, New York, New York 10002, Apartment 20F.

In the instant proceeding, Petitioner seeks to obtain Mitchell-Lama succession rights to which he believes he is entitled. On May 8, 2012, HPD Hearing Officer Frances Lippa ("AHO Lippa") reviewed petitioner's documentation and concluded that he was not entitled to succession rights to the subject apartment. AHO Lippa found that Petitioner was not entitled to succession rights because he did not appear on the income affidavit for the calendar year 2004. Furthermore, AHO Lippa found that Petitioner was not entitled to succession rights because he failed to prove that the subject apartment was his primary residence for two years immediately proceeding the vacatur of the subject apartment by Myrna Sosa (December 31, 2002 through

December 31, 2004).

“Mitchell–Lama housing projects provide subsidized housing for low-income families, and, as is to be expected, the demand for such apartments far exceeds the available supply. As a result, each housing company maintains waiting lists, and as each unit becomes available it is filled from either an internal waiting list (residents who want to move from one apartment to another) or an external waiting list (people who do not live in Mitchell–Lama housing). Other than from one of these waiting lists, the only way to become the prime tenant of a Mitchell–Lama apartment is to succeed' to the rights of a prior tenant” ( Waldman v. New York City Dept. of Housing Preservation and Development, 10 Misc.3d 1075(A) [NY Sup.2005] ).

This last method is the one at issue in this proceeding. The rules for succession rights are set forth at 28 RCNY § 3–02(p): The person claiming succession rights must be related to the tenant of record either in one of the ways specified in §3–02(p)[2](ii)[A], or in a non-traditional manner as defined by § 3–02(p)[2](ii)[B]. Either way, the applicant “must have resided in the apartment with the former legal tenant for two years immediately prior to the tenant's permanent vacatur of the apartment” (Alfred v. Barrios–Paoli, 251 A.D.2d 659, 660 [2nd Dept., 1998] ) and “appeared on the income affidavits for at least the two consecutive annual reporting periods prior to the [tenant of record]'s permanent vacating of the apartment” (28 RCNY § 3–02(p)[3] ) ( Waldman v. New York City Dept. of Housing Preservation and Development, 10 Misc.3d 1075(A) [NY Sup.2005] ). The time period is reduced to one year if the occupant is a senior citizen or disabled ( Manhattan Plaza Associates, LP v. Department of Housing Preservation and Development of the City of New York, 3 Misc.3d 717, 719 fn 3; [NY

Sup.2004]; 28 RCNY § 3-02(p)[3].

“The regulations implementing the Mitchell–Lama Law which relate to succession rights were amended as of February 1, 2003 ( see 28 RCNY § 3-02[p] ). Prior to the amendment, if a family member did not appear on the income affidavits for the subject apartment for the two years prior to the tenant's vacatur of the apartment, a rebuttable presumption was created that the family member did not reside in the apartment during those two years. The amendment eliminated this rebuttable presumption, so that an occupant who does not appear on the relevant income affidavits may not receive succession rights to the apartment, and does not have the opportunity to present a rebuttal” ( Miney v. Donovan, 68 AD3d 876, 877[2nd Dept., 2009] ).

In article 78 proceedings, the doctrine is well settled that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence ( see, Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222 at 230–231). The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals ( id.). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious ( id.). Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard ( id.).

Further, the “arbitrary and capricious test chiefly relates to whether a particular

action should have been taken or is justified ... and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" ( id. at 231; see also Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 300, 417 [1986] ). On review of agency action under CPLR Article 78, the courts may not "second guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence (Montefusco v. New York State Div. of Housing and Community Renewal, 2009 WL 595564[NY Sup.2009] ).

Under CPLR § 7803, subd. 4, the substantial evidence test applies only where a hearing has been held and evidence taken pursuant to direction by law ( Colton v. Berman, 21 N.Y.2d 322, 329 [1967] ). When there is no hearing pursuant to direction by law, then CPLR § 7803, subd. 3 applies. Under CPLR § 7803, subd. 3, the court reviews 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, including abuse of discretion as to the measure or mode of penalty imposed ( see Felton v. Halperin, 228 A.D.2d 595 [2nd Dept., 1996] ).

The following facts are undisputed and were considered by AHO Lippa. Petitioner's parents Myrna and Peter Sosa are the tenant/cooperators of record for the subject apartment pursuant to an Occupancy Agreement dated March 27, 1990. The parties also agree that Myrna and Peter Sosa permanently reside in New Jersey. Peter Sosa last appeared as an occupant of the subject apartment on the income affidavit for calendar year 1997 and Myrna Sosa last appeared as an occupant of the subject apartment on the income affidavit for calendar year 2004. The income affidavits for

calendar years 1998 through 2003 reflect Myrna Sosa, Robert Sosa and Elsie Lopez, as the sole occupants of the subject apartment. Thereafter, Elsie Lopez was the sole occupant of the subject apartment on the income affidavits for calendar years 2005 through 2007.

Based on the income affidavits, AHO Lippa found that Myrna Sosa, the remaining tenant, vacated the subject apartment on December 31, 2004 since she last appeared as an occupant of the subject apartment on the income affidavit for calendar year 2004. The relevant co-residency period for determining succession right is therefore December 31, 2002 through December 31, 2004. It is undisputed that Petitioner was not included as an occupant of the subject apartment on the income affidavit for calendar year 2004 which was signed by Myrna Sosa in May 2005.

In support of this Article 78 proceeding, Petitioner does not refute the fact that he was not included on the 2004 income affidavit but claims that his mother moved out in 2003 and therefore the relevant years to determine succession should be December 2001 through December 2003. He submits an affidavit from his mother that attests that she actually moved out as of December 31, 2003. Petitioner also submits other documentary evidence which he believes supports his contention that his mother vacated the subject apartment in 2003.

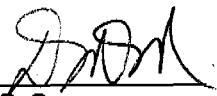
To the extent petitioner claims for the first time that his mother actually vacated the subject apartment as of December 31, 2003, thereby attempting to shift the relevant co-residency period and attaches documentary evidence in support of his assertion, such cannot be considered by this Court as the documentary evidence was not before AHO Lippa when she made the final agency determination denying Petitioner succession rights. It is well settled that "judicial review of an administrative action in a

CPLR Article 78 proceeding is limited to the facts and record adduced before the agency when the determination was made (see Kelly v. Safir, 96 NY2d 32, 39 [2009]). The Court cannot consider substantive information that was not before the decision maker at the time the challenged decision was made (Welch v. New York State Division of Housing & Community Renewal, 287 A.D.2d 725, 726 (2nd Dept.2001); Montalbano v. Silva, 204 A.D.2d 457, 458 (2nd Dept.1994); Matter of Celestial Food v. New York State Liquor Authority, 99 A.D.2d 25, 26-27 (2nd Dept.1984); City of Saratoga Springs v. Zoning Bd. of Appeals of the Town of Wilton, 279 A.D.2d 756, 760 (3rd Dept.2001).

Since Petitioner was not included as an occupant of the subject apartment on the income affidavit for calendar year 2004, this Court can not disturb AHO Lippa's determination because it was rational and reasonable, is entitled to deference, and in all respects conforms with the statutes, laws and rules relating to succession rights in Mitchell Lama housing.

Accordingly it is ADJUDGED that the petition is denied and the proceeding dismissed.

Dated: 3/6/13

ENTER:   
 \_\_\_\_\_  
 J.S.C.

**DONNA M. MILLS, J.S.C.**

**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).**