

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

2013 NY Slip Op 30959(U)

April 26, 2013

Supreme Court, New York County

Docket Number: 402696/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 402696/2012
BURTON JR., FOSTER
vs.
NYC DEPARTMENT OF HOUSING
SEQUENCE NUMBER : 001
ARTICLE 78

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____	No(s). _____
Answering Affidavits — Exhibits _____	No(s). _____
Replying Affidavits _____	No(s). _____

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

is decided in accordance with the annexed decision.

FILED
MAY 03 2013
NEW YORK
COUNTY CLERKS' OFFICE

MAY 02 2013

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

Dated: 4/26/13

CG, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
In the Matter of the Application of

FOSTER BURTON JR.,

Petitioner,

Index No. 402696/12

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

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

FILED

MAY 03 2013

Respondents.

-----X
HON. CYNTHIA S. KERN, J.S.C.

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner Foster Burton Jr. brings the instant petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to annul a determination made by respondent New York City Department of Housing Preservation and Development ("HPD") denying petitioner's application for succession rights to a certain apartment for his son. For the reasons set forth below, the petition is denied.

The relevant facts are as follows. Respondent Esplanade Gardens, Inc. ("Esplanade") is

an Article II housing company organized under the Private Housing Finance Law, also known as the Mitchell-Lama Law, and is the owner of the building located at 720 Lenox Avenue, New York, New York (the "building"). Pursuant to an Occupancy Agreement dated August 21, 1968, Foster and Wilhelmina Burton became the tenants of record for Apartment 10-I in the building (the "subject apartment"). Foster Burton predeceased Wilhelmina Burton, who became the remaining tenant of record for the subject apartment (the "tenant"). Since 2003, the tenant submitted Income Affidavits from calendar years 2003, 2004, 2005, 2008, 2009 and 2010 listing herself and Jalen Burton, tenant's grandson and petitioner's son, as the occupants of the subject apartment.

Tenant died on March 31, 2011. Subsequently, petitioner requested succession rights to the subject apartment for himself, Vanessa Burton and Jalen Burton. By letter dated May 18, 2012, Esplanade denied petitioner's request for succession rights to the subject apartment on the ground that "the only individuals listed on the income affidavits submitted by the tenant of record were Wilhelmina Burton and a minor child, Jalen Burton" and no proof of occupancy or family relationship to the tenant nor any documentation to substantiate a claim for succession rights was submitted to Esplanade. The May 18, 2012 letter advised petitioner that he may appeal the landlord's decision to HPD within thirty days.

By e-mail to Esplanade's counsel dated August 9, 2012, petitioner stated that he did not receive the May 18, 2012 letter and that he was appealing the landlord's denial of succession rights for his son, Jalen Burton. Petitioner sent an e-mail to "Francis Lippa" at HPD stating the same. By letter dated August 13, 2012, HPD Hearing Officer Frances Lippa ("HO Lippa") informed petitioner that she had received petitioner's appeal of the landlord's denial of

succession rights and that according to HPD rules, effective February 1, 2003, an occupant must be included on the relevant income affidavits or income recertifications in order to be eligible for succession rights. The letter also advised petitioner that the appeal must include proof that the applicant is a family member of the tenant as defined by HPD rules and that the applicant co-resided with the tenant of record in the subject apartment as his primary residence for the required period, even if he had been included on the relevant income affidavits or income recertifications. The letter also included a list of suggested documentation in proving the requisite primary residency and informed petitioner that he should "submit as many of the listed succession documents as [he] can, since this is [his] only opportunity to present [his] succession rights claim for administrative review." Finally, the letter stated that any documentation that petitioner wanted HPD to consider had to be submitted by September 17, 2012. By letter dated August 13, 2012, HPD sent Esplanade's counsel a request for all documentation supporting its decision denying petitioner's request for succession rights to the subject apartment.

On September 20, 2012, HPD received a letter from petitioner dated September 7, 2012 and documentation in support of petitioner's succession rights claim. On October 17, 2012, HPD received an Affirmation in Opposition to the Occupant's Appeal of the Denial of Succession Rights dated October 11, 2012 and its Exhibits 1-6 from Esplanade's counsel requesting that HPD deny petitioner's request for succession rights to the subject apartment. The Affirmation in Opposition stated that Jalen Burton was not entitled to succession rights to the subject apartment as petitioner failed to provide proof that Jalen Burton actually lived at the subject apartment from March 31, 2009 to March 31, 2011, the requisite co-residency period.

Upon review of all the documentation submitted by Esplanade and petitioner, HO Lippa

rendered a decision dated October 23, 2012 denying petitioner's appeal for succession rights for Jalen Burton. In her decision, HO Lippa found that although Jalen Burton was listed on the relevant Income Affidavits, that itself was not a sufficient basis to grant succession rights because he must still prove that he resided with the tenant at the subject apartment during the required co-residency period as his primary residence. HO Lippa found that there was no evidence, such as school or medical records, to prove that Jalen Burton had actually resided in the subject apartment during the required co-residency period as his primary residence. Further, HO Lippa found that "minor children are presumed to reside with their parents" and that "that presumption may be rebutted by proof that parental control has been surrendered and is being exercised by another person." HO Lippa found that there was no evidence establishing Jalen Burton's parents surrendered parental control or that the tenant had been exercising parental control over Jalen Burton. Thus, HO Lippa found that petitioner failed to prove Jalen Burton's entitlement to succession rights to the subject apartment and denied the appeal.

On November 5, 2012, petitioner e-mailed HO Lippa renewing his request for succession rights for his son Jalen Burton and submitted new documents in support of his claim. By letter dated November 19, 2012, HO Lippa informed petitioner that she had reviewed the new documents but that they "do not provide a reason or basis for reversal or reopening of the decision issued in this matter on October 23, 2012." HO Lippa further advised petitioner that the only review or appeal of the October Decision was pursuant to Article 78 of the CPLR commenced within four months of the date of her Decision. Thus, by Notice of Petition and Verified Petition dated December 18, 2012, petitioner commenced the instant Article 78 proceeding seeking to annul HPD's determination denying Jalen Burton succession rights to the

subject apartment.

On review of an Article 78 petition, “[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious.” *Goldstein v Lewis*, 90 A.D.2d 748, 749 (1st Dep’t 1982). “In applying the ‘arbitrary and capricious’ standard, a court inquires whether the determination under review had a rational basis.” *Halperin v City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep’t 2005); see *Pell v Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974) (“[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.”) “The arbitrary or 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 facts.” *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, the court finds that HPD’s decision denying petitioner’s application for succession rights to the subject apartment for his son was made on a rational basis. HPD has established rules and regulations that set forth the requirements for family members seeking succession rights to a shareholder’s lease of a Mitchell-Lama apartment. First, the occupant must be included on any income documentation submitted to HPD for at least two consecutive years immediately prior to the tenant’s vacating. See 28 RCNY § 3-02(p)(3). Second, the family member seeking succession rights must occupy the apartment as his or her primary residence, as defined in 28 RCNY § 3-02(n)(4) for that same time period. See *Id.* “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.” *Id.* To determine an applicant’s primary residence, HPD may consider, among other things, (1) whether the family member specifies an address other than the subject apartment in a tax return, motor vehicle registration, driver’s license or other document filed with a public agency; (2) whether the family member gives an address other than the subject apartment as his or her voting address; and (3) and whether the family member filed New York City tax returns listing the subject apartment as his or her primary residence. *See* 28 RCNY § 3-02(n)(4)(i)-(iv). Additionally, the family member whose residency is being questioned should provide proof in the form of certified New York State income tax returns, utility bills and voter registration data. *See* 28 RCNY § 3-02(n)(4)(iv). HPD also forwards a list of suggested documents for determining primary residency to applicants.

In the instant action, HO Lippa rationally found that pursuant to 28 RCNY § 3-02, petitioner did not prove Jalen Burton’s qualifications for succession rights to the subject apartment. Although he was listed on the Income Affidavits for calendar years 2009 and 2010, petitioner did not submit any documentation to prove that Jalen Burton occupied the subject apartment as his primary residence during the relevant period as required by 28 RCNY § 3-02(p)(3). Petitioner failed to submit school or medical records establishing that Jalen Burton actually occupied the subject apartment as his primary residence during the required co-residency period and HO Lippa rationally found that the two letters from Future Leaders Institute Charter School, dated September 21, 2012 and June 11, 2012, were beyond the required co-residency period as they only state that Jalen Burton is enrolled at the school as of those dates. Further, HO Lippa rationally concluded that minor children are presumed to reside with their parents and that while the presumption may be rebutted by proof that parental control has been surrendered,

petitioner failed to submit any evidence to rebut that presumption.

Although petitioner submitted additional documentation in support of his claim that Jalen Burton is entitled to succession rights to the subject apartment, these are facts and information that were not before HO Lippa when she made her final determination denying Jalen Burton succession rights to the subject apartment. The court cannot consider the submission and consideration of evidence outside of the Administrative Record. "The role of a court in reviewing a decision of an administrative agency, such as HPD, is limited with the standard of review being whether the administrative determination was in violation of a lawful procedure or was affected by an error of law or was arbitrary and capricious and without a rational basis in the administrative record." *Rowan v. NYC HPD*, 21 Misc.3d 1235 at *3 (Sup. Ct. N.Y. Ct., 2011); *see also Matter of Pell v. Board of Educ.*, 34 N.Y.2d 222, 231 (1974). "The court cannot conduct a de novo review of the facts and circumstances or substitute the court's judgment for that of the agency's determination" as judicial review of administrative determinations is confined to the facts and record adduced before the agency. *Rowan*, 21 Misc.3d *3; *see also Greystone Management Corp. v. Conciliation and Appeals Bd.*, 94 A.D.2d 614, 616 (1st Dept 1983), *affd.* 62 N.Y.2d 763 (1994). Further, even if the court could consider the additional documents, they do not establish that Jalen Burton lived in the subject apartment for the relevant time period.

Accordingly, petitioners' petition is denied in its entirety. This constitutes the decision and order of the court.

Dated: 4/26/13

FILED
MAY 03 2013
NEW YORK Enter:
COUNTY CLERK'S OFFICE

J.S.C.