

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

2013 NY Slip Op 32168(U)

September 10, 2013

Supreme Court, New York County

Docket Number: 65168/13

Judge: Cynthia Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.
Justice

PART _____

Index Number : 651698/2013
GRAMBY, MILTON
vs
NEW YORK CITY DEPARTMENT OF
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.

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

Dated: 9/10/13

CYNTHIA S. KERN
J.S.C., 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

MILTON GRAMBY,

Petitioner,

Index No. 651698/13

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,

Respondent.

-----X

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

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.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	3

Petitioner Milton Gramby brought the instant petition pursuant to Article 78 of the Civil Practice Law and Rules (“CPLR”) seeking to reverse 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 the reasons set forth below, the petition is denied.

The relevant facts are as follows. Lindsay Park Housing Corporation (“Lindsay Park”) is an Article II housing company organized under the Private Housing Finance Law (“PHFL”), also

known as the Mitchell-Lama Law, and is the owner of the apartment located at 30 Montrose Avenue, Apt. 5F, Brooklyn, New York (the “subject apartment”). Catherine Taylor (the “tenant”) became the tenant of record for the subject apartment on March 5, 1984. Since 2009, the tenant submitted income affidavits from calendar years 2009, 2010 and 2011 listing herself and plaintiff, her son, as the occupants of the subject apartment.

The tenant died on September 7, 2012 and subsequently, petitioner submitted an application to Lindsay Park requesting succession rights to the subject apartment. By letter dated October 18, 2012, Lindsay Park denied petitioner’s request for succession rights to the subject apartment on the grounds that petitioner “[f]ailed to establish the required co-residency. Applicant’s 2011 Social Security Benefit Statement states that applicant resided at 1000 Grand Concourse, Apt. 5-D, Bronx, NY” and the landlord’s “skip trace report shows only the Bronx address for the applicant, and not Lindsay Park.” The October 18, 2012 letter advised petitioner that he may appeal the landlord’s decision to HPD within thirty days. Lindsay Park also sent the denial letter to HPD.

By letter dated October 18, 2012, HPD Hearing Officer Frances Lippa (“HO Lippa”) informed petitioner that she had received Lindsay Park’s denial of petitioner’s request for succession rights to the subject apartment. In the letter, HO Lippa stated that according to the HPD rules, 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 that any appeal of Lindsay Park’s denial must include proof that the applicant is a family member of the tenant and that the applicant co-resided with the tenant 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 further informed petitioner that by November 26, 2012, 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.” Additionally, HO Lippa informed Lindsay Park that if it wished to provide any additional documentation that it wanted HPD to consider, it must do so by November 26, 2012.

On November 19, 2012, HPD received a letter from petitioner’s former counsel Steven E. Ginsberg, dated November 14, 2012, and documentation in support of petitioner’s succession rights claim. Upon review of all the documentation submitted, HO Lippa rendered a decision dated March 26, 2013 denying petitioner succession rights to the subject apartment and issuing a Certificate of Eviction against the petitioner. HO Lippa found that although petitioner was included on the tenant’s income affidavit for calendar year 2011, that inclusion was not sufficient as he still had to prove the required co-residency of one year in order to be granted succession rights. HO Lippa found that there was a significant lack of credible and sufficient documentation proving that petitioner resided in the subject apartment as his primary residence during the requisite co-residency period and that there was evidence that petitioner resided in the Bronx during the co-residency period instead. Additionally, HO Lippa found that the majority of petitioner’s documents were either undated or dated after or before the required co-residency period and that the documents addressed jointly to the tenant and petitioner were not considered to be credible or sufficient proof. Therefore, HO Lippa found that petitioner failed to meet his burden of proving that he resided in the subject apartment as his primary residence during the required co-residency period and was thus not entitled to succession rights to the subject apartment.

By a Notice of Petition and Verified Petition dated May 10, 2013, petitioner commenced the instant proceeding seeking to (1) reverse HPD's March 26, 2013 decision denying him succession rights and vacate the Certificate of Eviction; or, in the alternative (2) remand this matter back to HPD and require "HPD to review petitioner's claim de novo and requir[e] HPD to hold an evidentiary hearing at which Petitioner may present further evidence in support of his claim for succession to the Subject Apartment;" and (3) stay any and all proceedings and/or actions enforcing the Certificate of Eviction and Notice of Termination against petitioner until a decision has been entered by this court.

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 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 a qualified family member as defined by 28 RCNY § 3-02(p)(2)(ii). Second, where the person seeking succession rights is a senior citizen, the qualified family member must have (a) resided with the tenant in the apartment as a primary residence, as defined in 28 RCNY § 3-02(n)(4), for a period of at least one year; and (b) appeared on the income affidavit for at least the reporting period immediately prior to the permanent vacating of the apartment by the tenant. Pursuant to 28 RCNY § 3-02(n)(4), in determining primary residence, HPD may consider, *inter alia*, (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) whether the family member filed New York City tax returns listing the subject apartment as his or her primary residence. Additionally, as proof that the subject apartment is his or her primary residence, the applicant must provide certified New York State income tax returns, utility bills and voter registration data. *See* 28 RCNY § 3-02(n)(4)(iv).

In the instant action, it was rational for HPD to find that petitioner failed to prove his qualification for succession rights to the subject apartment. The relevant co-residency period ended on September 7, 2012 when the tenant passed away. As petitioner is a senior citizen, the one-year co-residency period applies in this case. Accordingly, to be eligible for succession rights to the subject apartment, petitioner had to co-reside with the tenant at the subject apartment as his primary residence from September 7, 2011 to September 7, 2012. However, respondent rationally found that the majority of petitioner's documents reflecting his address as the subject

