

Benke v New York City Dept. of Hous. Preserv. & Dev.

2013 NY Slip Op 33511(U)

November 12, 2013

Supreme Court, New York County

Docket Number: 101022/13

Judge: Donna M. Mills

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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
JOHN BENKE,

Index No. 101022/13

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

MOTION DATE _____

-against-

MOTION SEQ. NO. 001

NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION & DEVELOPMENT and MPLAZA,
L.P.,

MOTION CAL NO. _____

Respondents.

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

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1, 2

Answering Affidavits- Exhibits 3, 4

Replying Affidavits _____

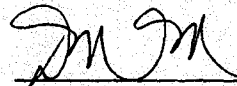
CROSS-MOTION: YES

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

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).

DECIDED IN ACCORDANCE WITH ATTACHED DECISION AND ORDER.

Dated: 11/12/13


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 JOHN BENKE,

Petitioner,

For a Judgment Pursuant to CPLR Article 78

-against-

Index No. 101022/13

NEW YORK CITY DEPARTMENT OF
HOUSING PRESERVATION AND DEVELOPMENT,
and MPLAZA, L.P.,

Respondents.

-----X

DONNA M. MILLS, J.:

In this special proceeding pursuant to C.P.L.R. Article 78, Petitioner John Benke (“Petitioner”) challenges a determination by the Respondent, New York City Department Of Housing Preservation And Development (“HPD”), which upheld Respondent MPlaza, L.P.’s denial of succession rights to the premises located at 484 West 43rd Street, New York, New York 10036, Apartment 22R (the “subject apartment”).

The Petitioner claims to have resided at the subject apartment as his primary residence since 1991 together with his life partner, the former tenant of record Dennis Williams. In September 2011, the former tenant of record advised the Respondents that he was relocating and wanted the Petitioner to become the tenant of record. After contacting HPD about the status of his succession rights application, counsel for MPlaza issued a rejection letter dated September 28, 2012.

Petitioner appealed to HPD for succession rights to the subject apartment based on his alleged family relationship as a partner to and occupancy with the former tenant. HPD Hearing Officer Frances Lippa denied Petitioner’s appeal on April 11, 2013 on the

ground that the Petitioner failed to prove that he and the tenant shared a financial commitment and interdependence that would qualify Petitioner as a “family member” as that term is defined in 28 RCNY §3-02(p)(2)(ii)(B).

“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–Paolj, 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].

A “family member” as defined by the regulations includes various individuals related to the tenant by consanguinity or marriage or “[a]ny other person residing with the [tenant-of-record] in the housing accommodation as a primary or principal residence, who can prove emotional and financial commitment and interdependence between such person and the [tenant-of-record]” (9 NYCRR § 1727-8.2[a][2][1]).

The regulations identify eight factors relevant to making such a determination (9 NYCRR § 1727-8.2[a][2][ii][a-h]). Those factors include longevity of the relationship; sharing the payment of household or family expenses; intermingling of finances; engaging in family-type activities; formalizing of legal obligations; holding themselves out as family members; regularly performing family functions; engaging in any other pattern of behavior that would evidence the existence of a long-term, emotionally committed relationship between the applicant and the tenant-of-record. The petitioner was required to supply documentation to establish the existence of such a relationship between himself and Mr. Williams bearing in mind these various enumerated factors. Indeed, in its decision of April 11, 2013, Hearing Officer Lippa reviewed the documentation petitioner had submitted to support his application, measured it against the various regulatory factors, and identified in what respects petitioner's documentation was lacking.

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.).

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]).

In support of his application for succession rights, Petitioner submitted testimonial evidence from eight friends and acquaintances that attested to the close loving relationship between the Petitioner and the former tenant of record, and that the two held themselves out as family and engaged in family-type activities. The record however, is devoid of credible and reliable proof that Petitioner and Mr. Williams shared a financial and emotional commitment and interdependence. There was no evidence that the two intermingled their finances through joint ownership of bank accounts,

personal and real property, credit cards, debit cards, or other means. Moreover, there is no claim or evidence that the former tenant and Petitioner formalized any legal obligations, intentions, or responsibilities to each other by executing wills designating the other as beneficiary and/or executor, granting the other power of attorney, or designating the other as his health care proxy.

Although this Court may not concur with HPD's conclusion in denying succession rights, this Court will not second guess the agency's decision which is based on applicable rules. In sum, HPD's determination finding a lack of objective documentary evidence to support Petitioner's application for succession rights is neither arbitrary nor capricious and has a rational basis in the record. Accordingly, such determination will not be disturbed and it is hereby

ORDERED AND ADJUDGED that the petition is denied and the proceeding dismissed.

Dated: 11/12/13

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).