

Matter of Johnson v Cedar Manor Mut. Hous. Corp.
2014 NY Slip Op 33095(U)
May 6, 2014
Supreme Court, Queens County
Docket Number: 736/2014
Judge: David Elliot
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Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

In the Matter of the Application of GREGORY
JOHNSON,

Petitioner,

For a Judgment under Article 78 of the Civil
Practice Laws and Rules,

-against-

CEDAR MANOR MUTUAL HOUSING
CORPORATION, et ano.,

Respondents.

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No. 736 2014

Motion

Date April 1, 2014

Motion

Cal. No. 64

Motion

Seq. No. 2

The following papers numbered 1 to 14 read on this Article 78 proceeding by petitioner for a judgment reversing, annulling, and setting aside the New York City Department of Housing Preservation and Development (HPD) Administrative Hearing Officer's Decision dated October 30, 2013, as arbitrary, capricious, irrational and as an abuse of discretion, and contrary to facts and applicable laws.

	<u>Papers Numbered</u>
Notice of Petition - Verified Petition - Exhibits.....	1-4
Verified Answer Exhibits.....	5-6
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Upon the foregoing papers it is ordered that the petition is determined as follows:

In this Article 78 proceeding, petitioner Gregory Johnson challenges the determination of respondent HPD, which denied his request for succession rights to the subject apartment,

by decision of Administrative Hearing Officer Frances Lippa (HO Lippa), dated October 30, 2013. The subject apartment is located in the housing complex known as Cedar Manor Mutual Housing Corporation, respondent herein, which is a state-supervised, limited-profit housing company organized under Article II of the Private Housing Financing Law, commonly known as the Mitchell-Lama Law.

Pursuant to an occupancy agreement executed on August 2, 1973, petitioner's mother – Doris Mitchell – was the member/lessee of apartment 3D, located in the building. Ms. Mitchell died on March 6, 2008. By letter dated January 15, 2013, respondent Cedar Manor advised petitioner of its determination that it was rejecting petitioner's claim for succession rights on the grounds that, inter alia, Ms. Mitchell was the only person listed on the calendar year 2005 income affidavit, petitioner was listed with Ms. Mitchell on the calendar year 2007 income affidavit, which was submitted in 2008 (after Ms. Mitchell's death), and that no one – including petitioner – had submitted proof that petitioner co-occupied the subject premises for the two years preceding Ms. Mitchell's death. By that same letter, petitioner was advised that Cedar Manor “will be commencing legal proceedings against [him] in order to recover possession of the subject premises,” and that he may appeal the decision within 30 days to HPD.

In or about April 2013, Cedar Manor commenced a holdover proceeding in Queens County Civil Court. The proceeding was marked off calendar in order to give petitioner herein an opportunity to obtain succession rights by appealing Cedar Manor's decision. By letter dated June 17, 2013 HO Lippa considered petitioner's appearance at HPD an appeal for succession rights, despite the fact that petitioner failed to appeal in writing. The letter further stated:

“The controlling regulation, RCNY § 3-02 (p)(8)(ii), provides that the occupant can submit additional relevant information even if not previously provided to the housing corporation. If you have additional documentation you wish to have considered, it **must** be received in this office no later than **July 15, 2013** . . .

“Your appeal must include proof that you are a family member of the tenant as defined by the HPD rules, as well as proof that you resided in the above apartment with the tenant of record as your primary residence for the two years immediately prior to the tenant vacating the apartment . . . You must prove your primary residence in the subject apartment for the requisite time period, even if you have been included on the relevant income affidavits or income recertifications . . .

“You should submit as many of the listed documents as you can, since this is your only opportunity to present your succession rights claim for administrative review. All documentation you wish to have considered in this appeal must be received in this office by July 15, 2013. If you need additional time to submit your documentation, you must make a request for an extension in writing, including email, with a copy to the housing company representative.

“The determination in your appeal will issue after July 15, 2013 without any further notice to you. The HPD rules provide that the only review of that determination is by commencing an action pursuant to Article 78 of the Civil Practice Law and Rules (emphasis in original).”¹

HO Lippa enclosed in the letter a copy of the current HPD rules regarding succession rights, as well as a suggested list of documentation to assist petitioner in providing proof of primary residency.

HPD issued its determination on October 30, 2013. HO Lippa noted the following: petitioner did not submit any documentation for consideration on the appeal; the relevant co-residency period for determining succession rights was March 6, 2008 to March 6, 2008; and petitioner was included as an occupant of the subject apartment on the income affidavits for the 2006 and 2007 calendar years. HO Lippa made the following findings:

“[I]nclusion on the relevant income affidavits is not a sufficient basis upon which to grant succession rights. An applicant for succession rights who has been included as an occupant of the subject apartment on the relevant income affidavits must still prove the required co-residency.

“Gregory Johnson did not submit any documentation proving that he resided in the subject apartment as his primary residence during the requisite co-residency period. Since Gregory Johnson has failed to prove the required co-residency he has failed to prove his entitlement to succession rights, regardless of his inclusion on the income affidavits and his family relationship to the tenant.

“Mitchell-Lama apartments provide housing for low and middle income individuals and as such they are a limited commodity. HPD has the obligation to insure that only individuals who meet the eligibility requirements reside in

1. A similar letter was sent to Cedar Manor, also dated June 17, 2013.

these apartments. Neither Gregory Johnson nor any other person has proved that he or she meets the eligibility requirements to reside in the subject apartment.

“The succession rights appeal is denied, and a certificate of eviction is hereby issued against Gregory Johnson and John Doe and Jane Doe.”

In this proceeding, petitioner asserts that he has resided in the subject apartment for 40 years with his mother until her death and that respondents completely disregarded the documentary evidence that he submitted in support of his appeal, finding simply that petitioner submitted no documentation at all to support the co-residency requirement. Petitioner annexes those documents which were offered by him; in addition, petitioner presents seven affidavits from building residents/friends attesting to petitioner’s continued residency at Cedar Manor. All of those affidavits are dated post-HO Lippa’s October 30, 2013 determination.

Pursuant to 28 RCNY § 3-02 (p) (3):

“Unless otherwise prohibited by occupancy restrictions based upon income limitations pursuant to federal, state or local law, regulations or other requirements of governmental agencies, 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 whose name is listed on any income documentation submitted by such tenant/cooperator to the Department or to any other governmental agencies (for example: income affidavits, recertifications or Section 8 forms), for at least the two consecutive annual reporting periods immediately prior to the tenant/cooperator's permanent vacating of the apartment . . . and the apartment was and continues to be the primary residence of the member of the tenant/cooperator’s family that resided with such tenant/cooperator, 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.”

Moreover, subsection (p) (8) (ii) states:

“A family member whose application to succeed to a lease or an occupancy agreement has been denied by a housing company may, within thirty (30) calendar days of receipt of the written denial, appeal to the Commissioner of HPD (hereinafter ‘Commissioner’) or his or her designee. Such appeal shall include proof of service of a copy of such appeal upon the housing company. The appeal shall briefly set forth the reasons why the family member believes he or she is entitled to occupy the apartment and any errors or erroneous findings he or she believes are contained in the housing company’s determination. The Assistant Commissioner or his or her designee shall review the housing company’s determination and any additional information submitted by the applicant and shall issue the final agency decision with regard to the applicant’s application. The only review of this determination is pursuant to Article 78 of the Civil Practice Law and Rules.”

It is well settled that judicial review of an administrative determination is limited to a review of the record before the agency and whether the agency’s determination was arbitrary or capricious, was an abuse of discretion, or lacks a rational basis in the law or the record (*see* CPLR 7803 [3]; *Gilman v N.Y. State Div. of Hous. & Community Renewal*, 99 NY2d 144 [2002]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222 [1974]; *Matter of Colton*, 21 NY2d 322 [1967]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken “without sound basis in reason and without regard to the facts” (*Matter of Pell*, 34 NY2d at 231). “[A]n agency has great discretion in deciding which evidence to accept and how much weight should be accorded particular documents or testimonial statements, and its determination in that respect is subject only to the legal requirement that the administrative finding be rationally based (*see Kogan v Popolizio*, 141 AD2d 339 [1988]).

Here, the determination by HPD that petitioner did not meet his burden of establishing that he resided with his mother in the subject apartment as his primary residence for the stated time period was neither arbitrary nor capricious; further, the decision had a rational basis in the record. Absent from petitioner’s petition is any specificity regarding, for example, the method by which petitioner submitted the documentation, the date those documents were submitted, or that the documents were submitted to HPD in accordance with HO Lippa’s letter dated June 17, 2013 (to wit: received by July 15, 2013). As such, it was not arbitrary, capricious, irrational or an abuse of discretion for HO Lippa to make a determination that petitioner failed to submit documentation in support of his appeal (*see e.g. Yunayeva v Kings Bay Hous. Co., Inc.*, 94 AD3d 452 [2012]; *Hochhauser v City of New York Dept. of Hous. Preserv. & Dev.*, 48 AD3d 288 [2008]). It follows, then, that petitioner’s submissions herein (particularly the affidavits which post-date HO Lippa’s determination)

cannot be considered, as this court is limited to the facts and record adduced before the agency (*see Matter of Yarbough v Franco*, 95 NY2d 342 [2000]; *Belok v New York City Dept. of Hous. Preserv. & Dev.*, 89 AD3d 579 [2011]). As a result, it was rational for HPD to conclude that the income affidavits alone were insufficient to establish petitioner's entitlement to succession rights as a matter of law (28 RCNY § 3-02 [p] [3]; *Pietropolo v New York City Dept. of Hous. Preserv. & Dev.*, 39 AD3d 406 [2007]).

Furthermore, though it would not appear that HO Lippa based the October 30, 2013 determination thereon, certainly Cedar Manor, in its January 15, 2013 denial of succession rights, considered the fact that the credibility of the 2007 income affidavit (listing both petitioner and his mother) had been placed into issue by virtue of the fact that same was sworn to before a notary after Ms. Mitchell had died.

Finally, petitioner's assertion that it was arbitrary and capricious not to be afforded a hearing is without merit. "The regulation under which he claimed succession rights (28 RCNY § 3-02 [p]) did not provide for a hearing. Petitioner utilized the statutory protections and was afforded all the due process to which he was entitled under the circumstances (§ 3-02 [p][8][ii]; *see generally Matter of Cadman Plaza N. v. New York City Dept. of Hous. Preserv. & Dev.*, 290 A.D.2d 344, 737 N.Y.S.2d 590 [2002])" (*Pietropolo*, 39 AD3d at 407). Neither was the burden on Cedar Manor to submit evidence that petitioner lived elsewhere between the relevant years of 2006 to 2008, as otherwise suggested by counsel (28 RCNY § 3-02 [p] [3]).

Accordingly, based upon the above, it is hereby

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

Dated: May 6, 2014

J.S.C.