

**Kim v Woodysun Hous. Dev. Fund Corp.**

2014 NY Slip Op 33150(U)

August 7, 2014

Supreme Court, Queens County

Docket Number: 23204/2013

Judge: David Elliot

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Short Form Order/Judgment

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT  
J.S.C.

IAS PART 14

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APPLICATION OF  
MYUNG-HEE KIM, Power of Attorney Agent,  
On behalf of AE-KYUNG LEE,

Index  
No. 23204 2013

Petitioner,  
For a Judgment Pursuant to 22 N.Y.C.R.R.  
§ 202.57 regarding Judicial Review of Orders of the  
Division of Human Rights.

Motion  
Date: March 17, 2014

-against-

THE WOODYSUN HOUSING DEVELOPMENT  
FUND CORPORATION, PHIPPS HOUSES  
SERVICES, INC., STATE DIVISION OF  
HUMAN RIGHTS,

Motion  
Cal. No. 72  
Motion  
Seq. No. 2

Respondents.

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The following papers numbered 1 to 14 read on this special proceeding by self-represented petitioner Myung-Hee Kim on behalf of Ae-Kyung Lee for a judgment vacating the determination of respondent State Division of Human Rights (SDHR), dated October 18, 2013, which dismissed petitioner's complaint of age discrimination after an investigation for lack of probable cause, and awarding costs and disbursements incurred in this proceeding.

Papers  
Numbered

Notice of Amended Petition-Petition-Exhibits.....	1-2
Answer-Exhibit.....	3-5
Verified Answer.....	6-7

Opposing Affirmation-Exhibits.....	8-9
Verified Reply to Verified Answer.....	10-11
Verified Reply Affirmation to Opposing Affirmation.....	12-14

Upon the foregoing papers the petition is determined as follows:

Self-represented petitioner Myung-Hee Kim commenced this special proceeding on behalf of her mother, Ae-Kyung Lee, pursuant to a power of attorney.<sup>1</sup> Though not raised by any of the parties to this proceeding, the preliminary consideration which must be determined is whether such a document permits petitioner to appear *pro se* on her mother's behalf. That question must be answered in the negative and, as such, the petition must be dismissed (*see Whitehead v Town House Equities, Ltd.*, 8 AD3d 369 [2004] [(a) person who does so has unlawfully engaged in the unauthorized practice of law"]; *see also Megna v U.S. Department of Navy*, 317 FSupp2d 191 [EDNY 2004]).

In any event, the petition would otherwise require dismissal inasmuch as the court finds that the SDHR's determination had a rational basis in the record and was not arbitrary and capricious. A detailed analysis of the circumstances before the court follows.

Ae-Kyung Lee is presently 102 years of age and resides in a building known as Sunnywood Housing located at 44-20 64<sup>th</sup> Street, Apartment 4D, Woodside, New York. Petitioner alleges that her mother has resided at said address for over 30 years. Ms. Kim provides her mother with live-in care, including frequent overnight stays.

Sunnywood Housing is owned and sponsored by respondent Woodysun Housing Development Fund Corporation (Woodysun). Woodysun is a tax-exempt, not-for-profit corporation, and operates Sunnywood Housing as low-income housing, primarily for the elderly. The residents of Sunnywood are all elderly, with the exception of a small number of qualified non-elderly disabled individuals. Respondent Phipps Houses Services, Inc. is the property manager for Sunnywood Housing. Beginning in 2010, Woodysun obtained financing for a building renovation project. In addition to renovating the lobby and other common areas, Woodysun selected 15 of the building's 77 residential units for renovation. In order to renovate the apartments, the tenants were required to move to other apartments within the building, on either a temporary or permanent basis. The 15 apartments slated for renovation included 10 occupied apartments and 5 unoccupied apartments. Tenants could opt out of the renovations and another apartment would then be included in the list of 15 apartments.

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1. The court declines to make any determination as to the validity of said document.

Ms. Lee was the oldest tenant in occupancy whose apartment was selected for renovation. Petitioner alleges that, on March 22 and March 29, 2012, she orally requested that her mother be transferred to apartment 1I, a one-bedroom apartment, and that she also made written requests for said transfer on April 3 and April 17, 2012. These requests were denied on August 31, 2012, and the former tenant of apartment 3D, aged 82 at the time, was transferred to apartment 1I. Petitioner further alleges that on August 31, 2012, her mother was offered apartment 6L, which had not yet been renovated. She alleges that the L-line apartments are reserved for those needing wheelchair accessibility and that as her mother is not wheelchair bound, and as the lay out was not suited to two people, she rejected the apartment on her mother's behalf.

Petitioner alleges that, although apartment 7L was fully renovated and available as of August 31, 2012, it was rented to the former tenant of 6L, who was then 78. She alleges that, on September 20, 2012, her mother was offered apartment 3D which had not yet been renovated, and that she rejected this apartment. Ms. Kim alleges that she thereafter requested that Woodysun move the current tenant of apartment 1I to apartment 3D after it was renovated, and that her mother be moved to apartment 1I. Woodysun did not respond to this request. Ms. Kim alleges that her mother's apartment is carpeted; that the carpeting is filthy; and that she requested that the renovated apartment be fully carpeted, as her mother was prone to falling. She alleges that she was informed that carpeting was not being installed in the renovated apartments. In June 2013, Woodysun offered to relocate Ms. Lee to apartment 5I once renovations were completed. Ms. Kim, however, would not accept this offer unless Woodysun also paid monetary compensation. Woodysun refused her demands for monetary compensation.

On June 20, 2013, Ms. Kim filed a complaint with the SDHR on behalf of her mother alleging unlawful discriminatory practices in relation to housing based upon her age. Ms. Kim alleged that after her mother's apartment was slated for renovation, she requested that due to her mother's advanced age, she be moved to apartment 1I; that apartment 1I had been vacant for a couple of years; that Woodysun and Phipps did not consult with her or her mother prior to choosing apartment 6L; that 6L was not suitable due to its layout and size; that the respondents moved a younger tenant to 1I; and that respondents did not offer her mother the option of permanently residing in the transfer unit, although this option was offered to other tenants. Woodysun and Phipps responded to the complaint and denied the allegations of discrimination on the basis of age. Ms. Kim submitted a response, and a SDHR investigator examined the documentary evidence submitted by Woodysun and Phipps consisting of a list of the 15 apartments scheduled for renovation with the ages of the 10 occupied apartments, and a roster of all 82 Sunnywood Housing tenants, with their ages.

Leon C. Dimaya, the Director of the SDHR, in a determination and order after an

investigation, dated October 18, 2013, determined that there was no probable cause to believe that respondents had engaged in, or are engaging in, the unlawful discriminatory practice complained of, and dismissed the complaint. Mr. Dimaya stated as follows:

“The Division’s investigation failed to find sufficient evidence to support a finding of probable cause. Complainant failed to provide a nexus between Respondents’ actions and her mother’s age. Nothing in the record supports the claim that the mother’s age was the basis of Respondents’ decision to renovate her unit, or not transfer her to the unit Complainant desired. Instead, the investigation found that Respondents’ building Sunnywood Housing houses mostly elderly tenants. Out of the tenants over the age of 90, only Complainant’s mother’s apartment was slated for renovation. For instance, the only tenant older than Complainant’s mother did not have his apartment slated for renovation. Respondents provided a legitimate nondiscriminatory reason for selecting Complainant’s apartment for renovation. Respondents had received a grant to renovate a selection of apartments. They selected apartments, such as Complaint’s mother’s apartment, that had never been renovated. Contrary to Complainant’s position, Respondents did not require tenants in these apartments slated for renovation to transfer out of their apartments so that they could be renovated. Tenants had the option of refusing the offered renovations and Respondents would select another apartment to be included in the 15 to be renovated. The tenant transferred to the apartment Complainant’s mother desired was 82 years old. The comparative data supports the finding that Respondents’ selection of apartments was not based on pretextual discrimination on the basis of age. Out of the 15 apartments slated for renovation, the tenants residing in those apartments ranged in age from 77- to 101-years-old.”

Petitioner Kim thereafter commenced the within special proceeding and seeks to vacate the determination of respondent SDHR on the grounds that it is not supported by substantial evidence in the record and is an abuse of discretion. Petitioner alleges that she also filed a complaint with the U.S. Department of Housing and Urban Development (HUD) which is still pending; that in the HUD proceeding there is an on-going conciliation process, and that Woodysun’s rejection of her “counter-offer,” which included a request for monetary compensation, did not serve as a basis for declaring that her mother had opted out of the renovation.

Petitioner alleges that her mother desired to reside in a newly renovated apartment; that her mother has a right to make a permanent move to a “brand new” apartment like the other 14 tenants on the list of 15; and that the SDHR determination did not address her

allegation of disparate treatment toward her based on her age at a post-selection, post-renovation rental stage. She alleges that neither the SDHR investigator nor Woodysun offered a basis for the decision to deny her request with respect to apartment 1I, other than claiming that her mother and two other residents opted out of the renovations. She complains that other tenants were given “decent” choices while her mother was “dumped on with a series of bad choices.”

Petitioner also challenges the evidence submitted by Woodysun to the SDHR, regarding the occupancy of certain units, and when they were renovated, and claims that the SDHR’s “data analysis based upon unreliable and falsified data and/or any interpretation therefore is to be likewise unreliable and falsified (sic) to some extent.”

Respondent SDHR, in its answer, asserts that the evidence gathered by the Division during the course of its investigation was sufficient to support its determination and order, and that said determination and order are not arbitrary and capricious, or an abuse of discretion. Respondent SDHR further states that “[b]ecause Petitioner and Respondents, The Woodysun Housing Development Fund Corporation and Phipps Houses Services, Inc., are the real parties in interest, the Division will not actively participate further in this matter and is submitting on the record.”

Respondents Woodysun and Phipps have served an answer, and assert as objections in point of law that the verified petition fails to state a cause of action, and that the evidence on which the petitioner relies, comparing the treatment of individuals aged 77 to 89 with that of individuals over the age of 90 cannot constitute evidence of age discrimination. Respondents, in opposition to the petition, assert that Ms. Kim in her complaint before the SDHR was unable to demonstrate that her mother was unfairly treated on the basis of her age, as all of the participants in the apartment renovation program were over the age of 70, the protected class that formed the sole basis of her complaint.

Respondents Woodysun and Phipps assert that they utilized a neutral criteria for deciding which apartments were to be renovated; that petitioner’s mother’s apartment was on the initial list of 15 apartments to be renovated; and that petitioner failed to present any evidence to the SHDR that she was discriminated against on the basis of age. It is asserted that although petitioner and her mother were dissatisfied with the renovation and relocation process, particularly with respect to apartments 1I and 7L, petitioner in her complaint before the SDHR failed to demonstrate that her mother was subjected to unfair or disparate treatment on the basis of her age. Respondents further assert that the SDHR’s determination is supported by the evidence in the record and is not an abuse of discretion.

Petitioner has submitted a reply to the verified answer of respondents Woodysun and

Phipps, and a reply to their opposing affirmation. Petitioner asserts the SDHR failed to conduct a proper investigation, and asserts that respondents Woodysun and Phipps engaged in discriminatory conduct with respect to their failure to make available to her mother, the oldest tenant affected by the renovation, apartment 1-I. She asserts inferences of age discrimination exist based upon her encounters with the property manager, the failure to respond to her requests with respect to unit 1-I between March 22, 2012 and August 31, 2012, the gap in age between that of her mother and the other residents, and that only two tenants over the age of 90 were selected to have their apartments renovated. Petitioner asserts that, due to her mother's age, she should have been relocated to a suitable renovated apartment prior to other younger tenants.

Executive Law § 298 provides the “exclusive means” for reviewing a determination of the SDHR, including an order dismissing a complaint (*see Ken-Vil Assoc. Ltd. Partnership v New York State Div. of Human Rights*, 100 AD3d 1390, 1391 [4th Dept 2012]; *Matter of Baust v New York State Div. of Human Rights*, 70 AD3d 1107, 1108 [3d Dept 2010], *lv denied* 15 NY3d 710 [2010]). When, as here, a SDHR “determination of no probable cause is rendered without holding a public hearing pursuant to Executive Law § 297 (4) (a), the appropriate standard of review is whether the determination was arbitrary and capricious or lacking a rational basis” (*Matter of McFarland v New York State Div. of Human Rights*, 241 AD2d 108, 111 [1st Dept 1998]; *see Matter of Ramirez v New York State Div. of Human Rights*, 4 NY3d 789 [2005]; *Matter of Baird v New York State Div. of Human Rights*, 100 AD3d 880, 881 [2nd Dept 2012]; *Matter of Pajooch v State Div. of Human Rights*, 82 AD3d 609, 609 [1st Dept 2011]). Generally, “[a]n action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*Matter of Peckham v Calogero*, 12 NY3d 424, 431 [(2009)]; *see Matter of Pell v Board of Educ.*, 34 NY2d 222, 231 [1974]). Once a court finds “some--indeed, any--rational basis or credible evidence to support an administrative determination, the agency's decision must be upheld” (*Matter of Rivera v New York State Div. of Human Rights*, 18 Misc 3d 1133[A] [Sup Ct, NY County 2008]; *see Matter of Pell*, 34 NY2d at 231), and “[t]he judicial function is exhausted” (*Matter of CUNY-Hostos Community Coll. v State Human Rights Appeal Bd.*, 59 NY2d 69, 75 [1983]; *see Matter of Hughes v Doherty*, 5 NY3d 100, 107 [2005]; *Sullivan County Harness Racing Assn., Inc. v Glasser*, 30 NY2d 269, 277-278 [1972]; *Kuzminski v New York State Div. of Human Rights*, 2013 NY Slip Op 31416(U), 2013 N.Y. Misc. LEXIS 2779 [Sup Ct, NY County 2013]; *Matter of Friedman v New York State Div. of Human Rights*, 2012 WL 2951184, 2012 NY Misc LEXIS 3343, [Sup Ct, NY County 2012]).

Furthermore, as long as the agency's decision has a rational basis, a court may not weigh the evidence, or substitute its judgment for that of the agency (*see Matter of Nehorayoff v Mills*, 95 NY2d 671, 675 [2001]; *Matter of State Div. of Human Rights [Granelle]*, 70 NY2d 100, 106 [1987]; *Matter of Pell*, 34 NY2d at 232). Nor may a court

“overturn an agency's decision merely because it would have reached a contrary conclusion” (*Sullivan County Harness Racing Assn., Inc. v Glasser*, 30 NY2d 269, 278 [1972]; see *Matter of Peckham v Calogero*, 12 NY3d 424, 431[2009]; *Matter of Imperial Diner v State Human Rights Appeal Bd.*, 52 NY2d 72, 79 [1980]; *Matter of Mize v State Div. of Human Rights*, 33 NY2d 53, 56 [1973]).

Moreover, when an administrative agency’s determination “involves factual evaluations in an area of the agency’s expertise and is supported by the record, such [determination] must be accorded great weight and judicial deference” (*Flacke v Onondaga Landfill Sys., Inc.*, 69 NY2d 355, 363 [1987]; see *Matter of Peckham*, 12 NY3d at 431; *Matter of Roberts v Gavin* 96 AD3d 669, 671[1st Dept 2012]; *Matter of Rosario v New York State Div. of Human Rights*, 21 Misc 3d 1108[A],[Sup Ct, NY County 2008]). “Indeed, a court’s opinion that a particular outcome is not fair or is not in the interests of justice is not sufficient to overcome the deference to be afforded an agency acting rationally within its area of expertise” (*Matter of Terrace Ct., LLC v New York State Div. of Hous. & Community Renewal*, 79 AD3d 630, 635-636 [1st Dept 2010], *affd* 18 NY3d 446 [2012]; see *Matter of Roberts*, 96 AD3d at 672).

Thus, the determination of the SDHR in this case is “entitled to considerable deference due to its expertise in evaluating discrimination claims” (*Matter of Camp v New York State Div. of Human Rights*, 300 AD2d 481, 482 [2d Dept 2002]; see *Matter of Eastport Assoc., Inc. v New York State Div. of Human Rights*, 71 AD3d 890, 891 [2d Dept 2010]; *Bruno v Pembroke Mgt., Inc.*, 212 AD2d 314, 318 [2d Dept 1995]). In addition, the SDHR “has broad discretion in determining the method to be employed in investigating a claim, and its determination will not be overturned unless the record demonstrates that its investigation was ‘abbreviated or one-sided’ ”(*Matter of Bal v New York State Div. of Human Rights*, 202 AD2d 236, 237 [1st Dept 1994]; see *Matter of Pajooh*, 82 AD3d 609, 609 [1st Dept 2011]; *Matter of Pascual v New York State Div. of Human Rights*, 37 AD3d 215, 216 [1st Dept 2007]).

Petitioner’s assertion that the SDHR's determination of no probable cause was not supported by the evidence, and that the SDHR misperceived or ignored her claim, and that its SDHR’s investigation was one-sided, is without merit. The evidence in the record demonstrates that petitioner was given the opportunity to submit evidence in support of her claim, that the SDHR reviewed her evidence, and that its conduct of the investigation was not one-sided.

There is sufficient evidence in the record to support the administrative determination, as petitioner had failed to provide a nexus between the respondents’ actions and her mother’s age. The SDHR found that subject building houses mainly elderly tenants, and that the

respondents provided a legitimate non-discriminatory reason for selecting Ms. Lee's apartment for renovation. In addition, the tenants were not required to have their apartments renovated and relocate to another apartment in the building. Petitioner, while desiring to have her mother's apartment renovated, also sought to permanently relocate her mother to a specific renovated apartment, unit 1I. Petitioner's subjective belief that her mother should have been offered a specific unit she desired, either 1I or 7L, due to her advanced age, and that the failure to transfer her to said unit, constitutes discrimination, was unsubstantiated. Contrary to petitioner's assertions, the fact that Ms. Lee is over 100 years of age, and the tenant who was relocated to apartment 1-I is 82 years old, in itself, is not evidence of discrimination based upon age.

In view of the foregoing, the court would have otherwise found, irrespective of petitioner's improper appearance on behalf of her mother, that the SDHR's determination had a rational basis in the record and was not arbitrary and capricious, and thus will not be disturbed.

Accordingly, it is hereby

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

Dated: August 7, 2014

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J.S.C.