

Matter of Walcott v Been
2017 NY Slip Op 30320(U)
February 7, 2017
Supreme Court, New York County
Docket Number: 451243/2016
Judge: Joan B. Lobis
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: IAS PART 6**

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In the Matter of the Application of
PAMELA WALCOTT,

Petitioner,

Index No. 451243/2016

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

**Decision, Order
and Judgment**

VICKI BEEN, as Commissioner of the New York City
Department of Housing Preservation and Development,

Respondents,

ESPLANADE GARDENS, INC.,

Respondent.

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In this proceeding petitioner Pamela Walcott appeals the determination of the New York City Department of Housing Preservation and Development, Vicki Been, Commissioner (HPD), which denied her succession rights to her parents' apartment. Both petitioner and her husband Glenn Walcott argued to HPD that the apartment was their primary residence, but this petition relates solely to the denial of Ms. Walcott's succession rights. Both HPD and co-respondent Esplanade Gardens (the landlord) oppose the petition. For the reasons below, the Court grants the petition to the extent of remanding the matter to HPD for further review.

According to the petition, Ms. Walcott moved into her parents' apartment, 101 West 147th Street, Apartment 5D ("the apartment") sometime in 2011. Both parents suffered from dementia and she took care of them until their deaths. Roscoe Bradley, her father, died on November 5, 2012. On February 11, 2013, while Josephine Bradley, petitioner's mother, was still

alive, petitioner and her mother took a six-day-old infant Aaliyah, who was the granddaughter of petitioner's cousin, into the apartment. Starting around June 3, 2013 she obtained certificates entitling petitioner and her mother to board Aaliyah at their home in the apartment as a foster child. Ms. Bradley passed away on August 10, 2013. Aaliyah remained in the apartment under petitioner and her husband's care. Eventually, petitioner and her husband were able to formally adopt the child.

On April 30, 2015, petitioner applied to the landlord for succession rights to the apartment. The landlord denied the application by letter on December 31, 2015, stating that petitioner had not provided enough proof that she resided in the apartment.¹ In response, Ms. Walcott appealed the decision to HPD. By letter dated January 13, 2016, HPD informed Ms. Walcott and the landlord of their right to submit additional papers to establish or disprove residency. The letter that petitioner received stated she had to include proof that she was a family member of her parents, the shareholders of the apartment, as well as proof that the apartment was her primary residence on a continuous basis for at least one year immediately prior to her mother's death if she was a senior or disabled.² The letter further indicated that even if her parents listed her as a resident on their income verification statements, petitioner had to provide additional proof.

HPD's letter included the types of documents it would consider in determining the question of residence: employment records, documents from governmental agencies, driver's license, voting identification records, insurance policies, bills, bank statements, medical bills,

¹ The letter did not specify any time restrictions on the evidence.
² Otherwise, the requirement is two years.

correspondence that includes a postmark, school records, military service records, marriage records, and a birth certificate. It stated that an applicant should produce as many of these documents as possible. The letter emphasized that it was mandatory to submit either certified copies of tax returns or a reason why no tax returns exist. HPD also quoted 28 RCNY ¶ 3-02(p), which states that HPD looks to the income affidavit along with additional evidence showing the longevity of the relationship, the sharing of household and other expenses, the intermingling of finances, and legal documents such as wills to show that there was an “emotional and financial commitment and interdependence between [the applicant] and the tenant/cooperator.” Moreover, the rules states, evidence that the applicant held herself out as a family member, participated in family functions, and behaved in a manner evidencing a long-term and committed relationship is relevant to the determination. Further, HPD provided 28 RCNY ¶ 3-02(N)(4), which states that evidence that the applicant does not use the apartment as a primary residence may include voter registration address, motor vehicle registration, driver’s license, or tax return which lists a different address as the applicant’s residence.

Following these guidelines, and as is relevant here, petitioner submitted:

- 1) the 2012 tenant/shareholder income affidavit of petitioner’s father, Roscoe Bradley, which stated that petitioner resided at the apartment, and the 2013 affidavit stating that her parents were deceased and she was the sole resident of the apartment;
- 2) the death certificates of her parents, dated November 15, 2012 and August 24, 2013, which established they were no longer in residence as of August 2013 and in which she gave her address as that of the apartment;

3) a certificate to board Aaliyah in the apartment from June 3, 2013 to June 3, 2014, issued to petitioner and her mother by Good Shepard Services;³

4) a receipt from the Office of Children and Family Services for fingerprinting services related to her foster parent/adoption status, dated March 22, 2013 and indicating that petitioner lived at the apartment;

5) page one of an Adoption Subsidy and Non-Recurring Adoption Expenses Agreement, created in March of 2015 and issued by the New York State Office of Children and Family Services, which indicated that Aaliyah was placed in the adoptive home – the apartment -- on February 11, 2013, that Aaliyah was freed for adoption on July 22, 2014, and that the adoptive placement agreement was signed on November 3, 2014;

6) bank statements for the periods July 27, 2012 to August 24, 2012, September 28, 2012 to October 25, 2012, and March 27, 2013 to April 24, 2013, which were sent to petitioner at the apartment, her stated residence;

7) a bank statement for petitioner’s father, Roscoe Bradley, for the period from July 1, 2012 to October 16, 2012 and sent to petitioner, who had power of attorney for her father, at the apartment address;

8) an agreement between petitioner, as resident of the apartment, and the landlord, allowing petitioner to use the community room for a repast on November 17, 2012;

9) a November 17, 2012 bill for the cost of Mr. Bradley’s burial from Mount Rest Cemetery Association to petitioner which lists petitioner’s address as the apartment, and a November 9, 2012 bill for Mr. Bradley’s funeral services to petitioner at the apartment’s address;

³ Petitioner also submitted a subsequent certificate which Good Shepard Services issued solely to petitioner for June 3, 2014 to June 3, 2015, after the pertinent period and before Aaliyah’s official adoption.

10) bills from Deer Park covering the period from August 17, 2012 to September 16, 2012, and from Verizon, Cooking Pleasures, and Geico from January, March, and May of 2013, respectively;

11) two social security cards showing that at birth her last name was Bradley (the last name of her parents) but that she changed her last name after she married Glenn Walcott.

Of particular note are items three, four, and five above. According to these items, Aaliyah moved into the apartment just days after her birth in February 2013. As noted, permission to board the infant at the apartment in dispute was granted both to petitioner and her mother. Petitioner listed the apartment address as her own in getting fingerprinted by the Office of Children and Family Services. The petition, which petitioner personally verified, states that she received foster care certification and commenced adoption proceedings shortly thereafter. Petitioner additionally states in her verified petition that pursuant to the rigorous adoption process, an extensive background check was conducted, and there were monthly home visits at the apartment from February 11, 2013 to June 30, 2016, when the adoption became official. In addition, the Court notes that item five was prepared by a New York State agency.

The landlord provided copies of many of the same documents and correspondence. In addition, the landlord provided petitioner's mother's 2011 and 2012 social security benefit statements, which were sent to 210 West 146th Street, apartment 5E in care of petitioner. Like petitioner, the landlord also submitted materials which postdate and predate the pertinent period.

Frances Lippla, administrative hearing officer, issued an order dated April 14, 2016. He found petitioner had not established that the apartment was her primary residence. The hearing officer said that the critical question was whether petitioner resided in the apartment during the one-year period preceding Ms. Bradley's death – that was, from August 10, 2012 through August 10, 2013.⁴ Thus, documents which predated or postdated this period were not considered. The officer noted that petitioner was listed as a resident of the apartment in her parents' tenant shareholder income affidavit for 2012, but held that this document was insufficient to establish residence. The hearing officer found that an invoice, a receipt, the rental agreement for the community room, her father's death certificate, the Good Shepherd Services certificate, the adoption-related documents, and the fingerprint receipt supported petitioner's application. The hearing officer did not discuss the import of the adoption-related documents.

Despite the above evidence, the hearing officer said, petitioner's failure to submit Medicare or other medical documents, her expired driver's license from the pertinent time period, or her car registration weighed against her. He noted that petitioner submitted a letter from her insurance carrier but did not submit a copy of the insurance policy. Further, he stated, petitioner's mother's 2012 social security benefits statement listed petitioner's address as West 146th Street; he added this information likely would have been mailed in 2013 and thus suggests that she lived elsewhere during the critical period. He found that petitioner's failure to provide either tax returns or proof that she did not file tax returns was fatal to her claim.

⁴For the purposes of her application, the hearing officer accepted petitioner's statement that she is disabled. Therefore, he applied the one-year rather than the two-year residency requirement.

In this Article 78 proceeding, petitioner challenges the denial of succession rights as arbitrary and capricious. She argues that the income affidavits listing her as a resident create a presumption in her favor which the hearing officer ignored. Moreover, she claims, the additional evidence she submitted buttressed her claim and supported the presumption. She challenges the hearing officer's determination that her submissions contained inconsistencies regarding her residency. She states that the community space rental agreement with the landlord lists her as "shareholder," notes that many of the documents she submitted were issued by government agencies, and points out that one of the bills was for a crib, delivered to the apartment for her then-foster daughter. She contends the hearing officer's determination that the 2012 social security benefit statement militated against a finding in her behalf was irrationally based on his speculation that the statement would have been mailed to her in 2013. Even if this had constituted an inconsistency, she adds, it did not outweigh the compelling evidence that petitioner submitted.

Petitioner also states that it was irrational of the hearing officer to deny her application because she did not submit certain documents in support. First, she alleges, although medical bills and DMV documents such as registration records and a driver's license may be submitted in support, petitioner was not required to submit such materials and it was irrational to find these deficiencies fatal or to expect her to have explained their absence. Moreover, on this issue, petitioner provided a copy of her current driver's license, which included the apartment as her address, and it was not reasonable to require her to submit expired licenses which she may not have retained. Second, petitioner states that although she was required to submit tax returns or show that she was not obligated to file tax returns, it was irrational for the hearing officer to find that she failed to satisfy this requirement. Instead, she states, her sworn statements on the income

affidavits, stating that she did not file tax returns, constituted an adequate showing. Petitioner also argues that the foster care appointment and adoption process, which included monthly visits to petitioner and Aaliyah at the apartment, involved government agencies and constitutes an acknowledgement that these agencies recognized the apartment as petitioner’s home. For all these reasons, she concludes, the determination was arbitrary. As alternative relief, she seeks a remand to HPD for an evidentiary hearing.

Esplanade Gardens Inc. (the landlord) has filed an answer and an affirmation in opposition. The landlord emphasizes that the income affidavits by themselves do not prove primary residence. It points to the omissions the hearing officer discussed in his order, and argues that the hearing officer rationally relied on these in reaching its decision. The landlord states only five documents support petitioner’s claim of residence and asserts that the evidence is “paltry” and insufficient to satisfy petitioner’s burden. It reiterates the deferential standard of review this Court must apply in an Article 78 proceeding and argues HPD’s determination is not arbitrary. Thus, even if the Court disagrees with HPD’s conclusion, it must dismiss the petition. It contends that added deference is due to HPD’s expertise.⁵ The landlord argues that HPD followed its own rules and procedures and its decision protects the integrity of the Mitchell-Lama program, which is to reserve these apartments for the individuals for whom the program was created.

HPD also submits an answer and memorandum of law in opposition. It emphasizes that under the CPLR this Court can only intervene if it finds HPD’s decision violated lawful

⁵ HPD also argues the hearing officer assessed the credibility of witnesses, but this argument fails because there was not a hearing.

procedure, was arbitrary and capricious or affected by a legal error, or constituted an abuse of discretion. HPD states it has the discretion to decide who is entitled to Mitchell-Lama apartments and who has succession rights to them. The hearing officer's decision was rational and based on evidence, HPD contends, and therefore should not be overturned. While petitioner established that she was a family member and was on the income affidavits for the requisite period, HPD states, she also carried the burden of showing the apartment was her primary residence during that time. HPD states that petitioner's failure to submit tax returns or explain her failure to submit them is fatal to her application. HPD argues that the fact that petitioner's social security benefit statement for 2012 shows a different address is critical.⁶ It argues that the hearing officer rationally relied on petitioner's failure to submit Medicare benefit documents, motor vehicle registration records, or her expired driver's license for the requisite period. Petitioner does not have the right to a fair hearing, HPD states, because she received "all the due process to which she was entitled." HPD Mem. of Law p. 8 (quoting Quan v. New York City Hous. & Preserv. & Dev., 70 A.D.3d 528 (1st Dep't 2010)).

In reply, petitioner contends that respondents provided no support for their position that the hearing officer's decision was rational. Instead, they merely reiterated the highly deferential standard that courts apply. She disputes that she submitted only five documents showing primary residence during the pertinent period and that her evidence was paltry. Petitioner also argues that the 2012 social security benefits statement does not clearly relate to the pertinent time period. She argues that the hearing officer acted irrationally in deeming her failure to submit documents that

⁶ HPD also points to petitioner's 2011 statement. This statement does not relate to the time period in question and the hearing officer did not consider it.

he specified fatal to her application as the rule provides a list of possible documents but only makes a few mandatory. Petitioner was pro se at the time, she argues, and thus did not realize that the failure to submit certain documents might count so strongly against her. The voter registration records were not listed as mandatory items, she points out. She did not file tax returns, moreover, and she argues the income affidavits for the applicable time frame establishes she did not earn enough to file a tax return in 2011 and 2012. She urges the Court to consider the Court of Appeals' statement that HPD should be less rigid in its application of the succession law, citing Murphy v. New York State Div. of Hous. & Commun. Renewal, 21 N.Y.3d 649 (2013). In addition, though petitioner concedes there is not an absolute right to a hearing, she seeks one in the interest of justice and notes that HPD conducts hearings on succession claims in some cases.

In an Article 78 proceeding challenging succession rights to Mitchell-Lama apartments, courts evaluate whether a rational basis for the agency's determination exists, or whether the decision is arbitrary and capricious. Murphy v. New York State Div. of Hous. & Commun. Renewal, 21 N.Y.3d 649, 652 (2013). The court must recognize that "the agency maintains some measure of discretion in directing who may succeed to" a Mitchell-Lama apartment, Cadman Plaza North v. New York City Dep't of Hous., Preservation and Devel., 290 A.D.2d 344, 344 (1st Dep't 2002), and cannot substitute its judgment for a rational decision by the hearing officer, even when the court's conclusion has evidentiary support. See Olivero v. New York City Dep't of Hous. Preservation & Devel., 134 A.D.3d 481, 482 (1st Dep't 2015). In determining succession rights, however, courts also keep in mind that "[r]egulations providing for succession rights to Mitchell-Lama apartments serve the important remedial purpose of preventing dislocation of long-term residents due to the vacatur of the head of household." Murphy, 21 N.Y.3d

at 653. Succession rights are “in the spirit of the statutory scheme” because they “temper the harsh consequences” of the main resident’s death on those who also resided at the apartment. Id.

After careful consideration, the Court grants the petition to the extent of remanding the matter to HPD for further consideration. In reviewing the materials before him, the hearing officer mentioned that the foster-care and adoption-related documents, taken with items such as bills, receipts, and bank account statements, constituted some evidence of primary residence. It is significant, however, that the hearing officer apparently overlooked the fact that in order to approve placement of a newborn the proposed residence of the infant was investigated, and that in order to approve adoption, there were numerous home visits to petitioner and Aaliyah at the apartment.

HPD is correct that it can rationally reject an application where the evidence weighs heavily against the applicant. See Pietropolo v. New York City Dep’t of Hous. Preservation and Devel., 39 A.D.3d 406, 406-07 (1st Dep’t 2007) (denial was rational where the relevant tax returns, W-2 forms and bank statements showed that the applicant resided in Dutchess County, and the applicant prepared a New York City Non-Resident Tax Return stating he did not live in New York City). The statement that the income affidavits alone do not establish residency also is correct. See Grossbard v. New York State Div. of Hous. & Community Renewal, 137 A.D.3d 661, 661 (1st Dep’t 2016). However, as one of the few documents specifically required in an application to succeed to a Mitchell-Lama apartment, it should be accorded some weight. Though the hearing officer mentions the income affidavits, it does not appear that he gave them any consideration. The hearing officer improperly found that petitioner failed to offer an explanation as to why she did

not submit the other mandatory document, her tax returns for the subject period; in the relevant income affidavits, which petitioner submitted, her parents swore that she did not file tax returns.

In addition to the evidence before him, the hearing officer considered petitioner's failure to include certain enumerated documents he deemed critical to the issue of primary residence. See Horne v. Wambua, 143 A.D.3d 605, 606 (1st Dep't 2016) (decision was rational where petitioner submitted none of the materials which might establish residency). As petitioner points out, however, the notification petitioner received did not require the submission of these papers in particular and petitioner, who was pro se and submitted a number of pieces of evidence, may not have realized the hearing officer would weight them so heavily. Moreover, the hearing officer's order criticized petitioner for not explaining her failure to submit these materials but there is no evidence that she had the opportunity to explain this to him.


Finally, according to HPD's own statements, it looks to evidence of an "emotional and financial commitment and interdependence between [the applicant] and the tenant/cooperator." 28 RCNY ¶ 3-02(p). Moreover, the rules states, evidence that the applicant held herself out as a family member, participated in family functions, and behaved in a manner evidencing a long-term and committed relationship is relevant to the determination. The evidence clearly shows that petitioner shared a close family bond with her parents, as she undertook the care of her parents for the two years prior to their death. She had power of attorney and handled their bills and other affairs. The first Good Shepard certificate, which gave petitioner the right to board Aaliyah at the apartment from June 3, 2013 to June 3, 2014, was issued to petitioner and her

mother. The joint application further underscores the closely intertwined relationship between the two.

Due to these deficiencies, the Court remits the matter to HPD for a more thorough consideration of the evidence – in particular, of documents relating to the foster care placement and adoption of Aaliyah. The Court does not mandate that HPD conduct a hearing, however. As HPD states, “the procedures provided by the regulations for determining a family member’s claim to succession rights satisfy due process.” Hochhauser v. City of New York Dep’t of Hous. & Devel., 48 A.D.3d 288, 289 (1st Dep’t 2008). Accordingly, it is

ORDERED that the petition is granted to the extent of remanding this matter to HPD for further review.

Dated: Feb. 7, 2017

ENTER:


JOAN B. LOBIS, J.S.C.