

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

2019 NY Slip Op 32844(U)

September 25, 2019

Supreme Court, New York County

Docket Number: 154349/19

Judge: Carol R. Edmead

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 35

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In the Matter of the Application of

HERMINIO MICHAEL TORRES,  
Petitioner,

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

Index No.: 154349/19  
DECISION/ORDER

-against-

NEW YORK CITY DEPARTMENT OF HOUSING  
PRESERVATION AND DEVELOPMENT and  
RUPPERT HOUSING COMPANY, INC.,  
Respondents.

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**HON. CAROL R. EDMEAD, JSC:**

In this Article 78 proceeding, petitioner Herminio Michael Torres (Torres) seeks a judgment to vacate the issuance of a certificate of eviction by the respondent New York City Department of Housing Preservation and Development (HPD) as arbitrary and capricious (motion sequence number 001). Because it raises the issue of “substantial evidence,” Torres’s petition is transferred to the Appellate Division, First Department, pursuant to CPLR § 7804 (g).

FACTS

Torres is the tenant of record of apartment 35G in a residential “Mitchell-Lama” apartment building (the building) located at 222 East 93<sup>rd</sup> Street in the County, City and State of New York. See verified petition, ¶ 12. Co-respondent Ruppert Housing Company, Inc. (landlord) is the building’s owner. HPD is an administrative agency of the City of New York which is charged with oversight of Mitchell-Lama housing.

On February 23, 2018, landlord served Torres with a notice to cure which alleged that he

was not using apartment 35G as his primary residence. *See* verified petition, exhibit C. On April 4, 2018, landlord served Torres with a petition for a certificate of eviction which contained the same allegation. *Id.*, exhibit E. HPD held a conference regarding the petition on April 26, 2018 and a formal hearing on June 18, 2018, at which Torres appeared pro se. *Id.*, verified petition, ¶ 13. At that time, HPD Administrative Hearing Officer Frances Lippa (AHO Lippa) heard testimony from Torres, from one of landlord's employees and from two of Torres's neighbors, and also received documentary evidence from both landlord and Torres. *Id.*, ¶¶ 14-17. Thereafter, on December 27, 2018, AHO Lippa issued a decision which granted landlord's request for a certificate of eviction against Torres. *Id.*, exhibit A. Torres then commenced this Article 78 proceeding on April 26, 2019. *See* verified petition. Landlord and HPD filed their respective answers on June 21, 2019 and June 28, 2019. *See* verified answers (landlord & HPD).

#### DISCUSSION

CPLR § 7803 (4) provides that “[t]he only questions that may be raised in a proceeding under this article are . . . whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.” CPLR § 7804 (g) further provides as follows:

“Where the substantial evidence issue specified [CPLR § 7803 (4)] . . . is raised, the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced. When the proceeding comes before it, whether by appeal or transfer, the appellate division shall dispose of all issues in the proceeding, or, if the papers are insufficient, it may remit the proceeding.”

CPLR § 7804 (g). The Appellate Division, Second Department, has noted that:

“[A] ‘substantial evidence’ question is presented only where a quasi-judicial evidentiary hearing has been held. Substantial evidence ‘is related to the charge or controversy and involves a weighing of the quality and quantity of the proof ... More than seeming or imaginary, it is less than a preponderance of the evidence, overwhelming evidence, or evidence beyond a reasonable doubt.’”

*Matter of Halperin v City of New Rochelle*, 24 AD3d 768, 769 (2d Dept 2005) (internal citations omitted).

Here, HPD AHO Lippa held a hearing on June 18, 2018 where she heard testimony from four witnesses, and received documentary submissions from both Torres and landlord. Although Torres’s Article 78 petition does not obliquely mention “substantial evidence,” it does nevertheless make three assertions about the hearing; i.e., that: 1) “[landlord] neither alleged nor proved that [he] spent less than 183 days in occupancy in the preceding calendar year”; 2) “proof of allegations not made in the preliminary notices is not ‘substantial evidence’”; and 3) “the burden of proof was misplaced.” *See* verified petition, ¶¶ 18-30.<sup>1</sup> Plainly, the first and second assertions are factual contentions, while the third is a question of law. Torres’s fact-based arguments necessarily “involve weighing of the quality and quantity of the proof,” since they constitute his claims that AHO Lippa did so incorrectly. As a result, the court concludes that Torres’s petition does indeed raise the question of “substantial evidence,” even if it took pains to avoid expressly using that term.

For its part, HPD asserts that, “after an evidentiary hearing pursuant to direction of law . . . [AHO Lippa] issued a certificate of eviction;” that “[Torres] alleges that AHO Lippa’s finding

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<sup>1</sup> Torres also restates these grounds in his reply papers. *See* petitioner’s reply memorandum, ¶¶ 1-3.

were [sic] not supported by substantial evidence;” and that “since the determination challenged herein [i.e., the December 27, 2018 AHO’s decision] was based on a hearing at which evidence was taken and [Torres] raises a substantial evidence question, this court should transfer this matter to the Appellate Division, First Department, for review.” *See* HPD mem of law, at 4. This is indeed the procedure that CPLR § 7804 (g) proscribes when an Article 78 petition raises a question of “substantial evidence.”

Finally, recent First Department precedent recognizes that tenants’ challenges to HPD certificates of eviction, issued after hearings at which the evidentiary sufficiency of a landlord’s “non-primary residence” claim was contested, do constitute questions of “substantial evidence” as defined by statute. *See e.g., Matter of Greene v New York City Dept. of Hous. Preserv. & Dev.*, 49 AD3d 345 (1<sup>st</sup> Dept 2008); *Matter of Kaufman v New York City Dept. of Hous. Preserv. & Dev.*, 45 AD3d 257 (1<sup>st</sup> Dept 2007); *Matter of Estate of Vaisman v East Midtown Plaza Hous. Co.*, 15 AD3d 290 (1<sup>st</sup> Dept 2005). Accordingly, the court finds that this Article 78 proceeding should be transferred to the Appellate Division, First Department, because Torres’s petition raises a question of “substantial evidence” within the meaning of CPLR § 7803 (4).

#### DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that, pursuant to CPLR § 7804 (g), the application by petitioner Herminio Michael Torres seeking to vacate and annul a determination by the respondent New York City Department of Housing Preservation and Development is respectfully transferred to the Appellate Division, First Department, for disposition pursuant to said subsection. This proceeding involves an issue as to whether a determination made as a result of a hearing held,

and at which evidence was taken, pursuant to direction by law, is, on the entire record, supported by substantial evidence (CPLR § 7803 [4]); and it is further

ORDERED that petitioner shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B), who is directed to transfer the file to the Appellate Division, First Department; and it is further

ORDERED that such service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that counsel for Respondent shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on Petitioner.

Dated: New York, New York  
September 25, 2019

ENTER:



Hon. Carol R. Edmead, J.S.C.

**HON. CAROL R. EDM EAD**  
**J.S.C.**