

<b>Drayton v Visnauskas</b>
2023 NY Slip Op 30414(U)
February 9, 2023
Supreme Court, New York County
Docket Number: Index No. 151795/2020
Judge: Debra A. James
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART 59

*Justice*

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WINTER DRAYTON,

Petitioner,

- v -

RUTHANNE VISNAUSKAS, Individually and as  
Commissioner of the New York Department of Homes and  
Community Renewal, and RIVERBAY CORPORATION,

Respondents.

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INDEX NO. 151795/2020MOTION DATE 02/08/2023MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 11, 12, 13, 14, 15, 16, 21

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

ORDER

Upon the foregoing documents, it is

ADJUDGED that the petition is denied and the proceeding is dismissed, without costs and disbursements, to respondents.

DECISION

Nothing in [9 NYCRR 1727-8.2 'Vacating of apartment by tenant'] requires the DCHR Commissioner to hold [an evidentiary] hearing. In the absence of such a mandate, all that due process requires is that reasonable notice be afforded to the parties to a proceeding and that they have an opportunity to present their objection.

Matter of Rubin v Eimicke, 150 AD2d 697 (1<sup>st</sup> Dept 1989). Thus, petitioner's contention that she should have been afforded an evidentiary hearing is unavailing.

Since niece is not among the consanguinity categories listed as a "Family member" in 9 NYCRR § 1700.2(a)(7), petitioner must demonstrate that she was a "person residing with the . . . cooperator in the dwelling unit as a primary or principal residence,"

who can prove emotional and financial commitment and interdependence between such person and the . . . tenant cooperator. Although no single factor shall be solely determinative, evidence which is to be considered in determining whether such emotional and financial commitment and interdependence existed shall be the income affidavit filed by the tenant for the dwelling unit and other evidence which may include, without limitation, the following factors:

- (i) longevity of the relationship;
- (ii) sharing of or relying upon each other for payment of household or family expenses, and/or other common necessities of life;
- (iii) intermingling of finances as evidenced by, among other things, joint ownership of bank accounts, personal and real property, credit cards, loan obligations, sharing a household budget for purposes of receiving government benefits, etc.;
- (iv) engaging in family-type activities by jointly attending family functions, holidays and celebrations, social and recreational activities, etc.;
- (v) formalizing of legal obligations, intentions, and responsibilities to each other by such means as executing wills naming each other as executor and/or beneficiary, granting each other a power of attorney and/or conferring upon each other authority to make health care decisions each for the other, entering into a personal relationship contract, making a domestic partnership declaration, or serving as a representative payee for purposes of public benefits, etc.;
- (vi) holding themselves out as family members to other family members, friends, members of the community or religious institutions, or society in general, through their works or actions;
- (vii) regularly performing family functions, such as caring for each other or each other's extended family

members, and/or relying upon each other for daily family services; and

(viii) engaging in any other pattern of behavior, agreement, or other action which evidences the intention of creating a long-term, emotionally committed relationship. In no event would evidence of a sexual relationship between such persons be required or considered.

9 NYCRR § 1700.2(a)(7), supra.

This court concurs with respondent Commissioner that her finding that non-party Keith Peterson, the tenant/cooperator of record, ceased to maintain the subject apartment as his primary residence no later than July 31, 2015 is rationally based, as such was the date when Peterson was issued a Permanent Resident Visa by the Republic of the Philippines. See Katz Park Ave Corp v Jagger, 46 AD3d 186, 189 (1<sup>st</sup> Dept 2007):

This is not . . .to equate domicile and primary residence, but merely to reach the obvious conclusion that one who maintains her "principal, actual dwelling place in fact" in the [Philippines] cannot maintain a primary residence in New York.

See also Sherman v New York State Div of Housing and Community Renewal, 144 AD3d 533 (1<sup>st</sup> Dept 2016).

So too, neither arbitrary nor capricious was respondent Commissioner's finding that, having moved into the subject apartment on February 26, 2015, petitioner could not have cohabited with Peterson for two years prior to his vacatur of the apartment, as his primary resident, a mere five months thereafter.

Finally, respondent Commissioner's findings that petitioner's representations about her relationship with her uncle, the power of attorney that Peterson issued to her, and Peterson's income affidavits were wholly insufficient to establish "emotional and financial commitment and interdependence between" petitioner and her uncle, the tenant cooperator, has a rational basis, given that there is not a scintilla of record or documentary evidence for six of the eight factors delineated in the regulation. See Olivero v New York City Dept of Housing Preservation and Development, 134 AD3d 481, 482 (1<sup>st</sup> Dept 2015).

*Debra A. James*

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2/9/2023  
DATE

DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  OTHER  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT  REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: