

**Matter of Hou Kin Yuen v New York City Dept. of
Hous. Preserv. & Dev.**

2012 NY Slip Op 31839(U)

July 12, 2012

Supreme Court, New York County

Docket Number: 112600/2011

Judge: Peter H. Moulton

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SCANNED ON 7/13/2012
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Malton
Justice

PART 403

Yuen, Hou Kin

INDEX NO. 112600/1

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

NYC DHPD

The following papers, numbered 1 to _____ were read on this motion to/for Ans 78

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion per attached petition is decided

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

JUL 13 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/12/12 Re 141
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 40B

-----X

In the Matter of the Application of Index No. 112600/2011

HOU KIN YUEN, YUEN YEE YUEN, FELIX
CHAN, and SOPHIA CHEUNG

Petitioner,

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

-against-

NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT and
MASARYK TOWERS CORPORATION

Respondents.

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FILED

JUL 13 2012

NEW YORK
COUNTY CLERK'S OFFICE

Hon. Peter H. Moulton, J.S.C.:

Petitioners Hou Kin Yuen, Yuen Yee Yuen, Felix Chan, and Sophia Cheung¹ bring this Article 78 proceeding to vacate the determination of respondent New York City Department of Housing Preservation and Development (HPD) made on July 7, 2011, which denied petitioners' succession rights to apartment 15H at 65 Columbia Street, New York, New York. For the following reasons, the HPD decision is rational, and not arbitrary or capricious.

¹ A stipulation dated February 7, 2012, withdrew the petition as to petitioner Sophia Cheung.

[* 3]

Background

Respondent Masaryk Towers Corporation ("Masaryk") is a Mitchell-Lama cooperative organized under Article II of the Private Housing Finance Law of the State of New York. Masaryk owns the apartment building located at 65 Columbia Street, New York, New York.

Pursuant to the Occupancy Agreement dated October 24, 1980, Shuk Hing Fong Chan and her daughter, Yuen Yee Yuen (maiden name Yuen Yee Chan), were tenants/cooperators of unit 15H at 65 Columbia Street apartment ("the subject premises" or "the apartment"). Yuen Yee Yuen vacated the subject premises in 1986 and transferred her shares in the apartment to her mother and brother, Kenneth Chan.

Petitioners claim that Kenneth Chan lived in the apartment with Shuk Hing Fong Chan until 1996, when he permanently vacated the apartment. Petitioners also allege that in or about 2005 Yuen Yee Yuen moved back into the subject premises with her husband, Hou Kin Yuen, to care for her mother, Shuk Hing Fong Chan. Mrs. Chan died on October 17, 2008.

Following Shuk Hing Fong Chan's death in 2008, Masaryk served a notice dated March 10, 2010 to petitioners and nonparty, Kenneth Chan. The letter stated that Kenneth Chan was in violation of the terms of the lease by 1) failing to occupy the subject premises as his primary residence and 2) illegally

subletting the subject premises to Yuen Yee Yuen, Felix Chan, Sophia Cheung, and Hou Kin Yuen. According to the letter, if the violations were not remedied within ten days of the date of service of the notice, Masaryk would begin eviction proceedings with HPD.

An eviction hearing was held at HPD on October 7, 2010 before AHO Lippa. "During the course of the hearing, it was learned that Kenneth Chan was not the tenant of record and that the case should properly be treated as a review of succession rights" (Respondents' Verified Answer ¶ 41). Nearly six months later, in a letter dated April 6, 2011 Masarayk informed petitioners, through their attorney, that their request for succession rights was denied.

A letter dated April 14, 2011 from HPD informed petitioners, through their attorney, that under RCNY § 3-02(p)(8)(ii) they may appeal Masaryk's decision to HPD. Petitioners were instructed to submit any additional documentation they wished to be considered in their appeal to HPD by May 16, 2011. The letter also explained that the HPD determination would be based solely on the documentation provided.

On May 16, 2011 attorney Steven Lesh, Esq., submitted the following in support of petitioners' application for succession rights:

(a) A letter from the Social Security Administration dated June 17, 2006 addressed to petitioner Hou Kin Yuen at 814 56 Street, Brooklyn, NY 11220-3653 (not the subject premises);

(b) Uncertified copies of 2007 and 2008 federal and state income tax returns; and

(c) HSBC bank statements addressed to Hou Kin Yuen and Yuen Yee Yuen at the subject premises dated from 2006-2008.

On May 17, 2011 petitioners sent additional documents that consisted solely of TD Bank statements dated from 2005-2008 addressed only to Yuen Yee Yuen at the subject premises.

On July 7, 2011, AHO Lippa denied petitioners' succession rights and issued a Certificate of Eviction against them.²

In their appeal, petitioners, except for Mr. Yuen, had the burden to prove that they co-resided in the subject premises from October 17, 2006-2008, and that they were listed on the income affidavits from 2006 and 2007 (see 28 RCNY § 3-02[p][3]). Mr. Yuen was found to be disabled under HPD rules (Agency Decision at 3). Disabled persons must only show co-residency for a period of one year prior to vacatur (see 28 RCNY § 3-02(p)(2)(iii)). Thus, the relevant time period for Mr. Yuen is October 17, 2007-2008 and the relevant income affidavit is 2007.

² The July 7, 2011 HPD decision ("Agency Decision") is found in Exhibit L of respondents' Verified Answer.

AHO Lippa denied succession rights to Mrs. Yuen, Felix Chan, and Sophia Cheung, because they did not appear on the 2006 income affidavit (Agency Decision at 6).

Additionally, AHO Lippa noted that the TD bank statements were only in Yuen Yee Yuen's name and reflected only automatic deposits of a few cents each month, and two small withdraws in June and July of 2008. He concluded that this bank activity did not prove that the account was used "regularly or used for daily living" and thus did not establish primary residency for Mrs. Yuen (Agency Opinion at 6).

With regard to Mr. Yuen's claim, AHO Lippa held that the "extremely limited documentation" was insufficient to prove primary residency despite the fact that Mr. Yuen was listed on the 2007 income affidavit (Agency Decision at 5). Mr. Yuen's 2007 and 2008 tax returns bears the address of the subject premises, but were uncertified copies. Furthermore, "[a]ccording to the tax returns, Mr. Yuen and his wife are 50% owners of a four family home at 814 48th Street in Brooklyn that is three quarters rental" (Agency Decision at 4).³ AHO Lippa also noted that the 2006 letter from the Social Security Administration letter submitted by Mr. Yuen was addressed to 814 56th Street, Brooklyn NY, not the subject premises.

³ The Schedule E 1040 form filed in Hou Kin and Yuen Yee Yuen's names, reflected a "4 Family House (50% Owned, 3/4 Rental)" in Brooklyn under the "Income of Loss from Rental Real Estate and Royalties section."

Finally, AHO Lippa expressed concern that Mr. Yuen did not provide any documentation or communications from the Social Security Administration, from Medicare, or other insurance documents address to him at the subject premises.

Petitioners brought this proceeding in November 2011 seeking to annul AHO Lippa's July 7, 2011 decision.

Standard of Review

In reviewing the determination of an agency such as HPD, the court must consider whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion (see CPLR 7803[3]; Matter of Windsor Place Corp. v State Div. of Hous. & Community Renewal, Off. of Rent Admin., 161 AD2d 279 [1st Dept 1990]). 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 v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County, 34 NY2d 222, 231 [1974]). The court may not overrule the agency merely because it finds that the factual record could support a different conclusion (Matter of West Village Assocs. v Division of Hous. & Community Renewal, 277 AD2d 111, 112 [1st Dept 2000]).

Discussion

Respondent HPD "is vested with exclusive jurisdiction to determine the remaining-family-member claim in city-aided Mitchell-Lama housing" (Lindsay Park Hous. Corp. v Grant, 190 Misc2d 777, 777 [2001]). To succeed to the leasehold rights of a Mitchell-Lama apartment, the petitioner bears the burden of showing that he or she (1) is a member of the tenant's family; (2) resided with the tenant/cooperator in the apartment as a primary residence for a period of not less than two years, unless the petitioner is elderly or disabled and then the relevant period is not less than one year; and (3) was listed on the income affidavits for at least the two consecutive annual reporting periods prior to the tenant/cooperator's permanent vacating of the apartment, or one reporting period if the petitioner is elderly or disabled (28 RCNY § 3-02[p][3]; 28 RCNY § 3-02(p)(2)(iii); see Matter of Shupack v Dayton Towers Corp., 203 AD2d 134 [1994]).

The submission of income affidavits identifying the petitioner as a resident does not, in and of itself, establish the existence of succession rights as a matter of law (see Matter of Pietropolo v New York City Dept. of Hous. Preserv. & Dev., 39 AD3d 406, 406-407 [1st Dept 2007]). Rather, HPD may also rely upon "the lack of objective documentary evidence supporting petitioner's claim" to residency and "inconsistencies among the documents that were submitted" (Matter of Hochhauser v City of

N.Y. Dept. of Hous. Preserv. & Dev., 48 AD3d 288, 288 [1st Dept 2008]).

In the present proceeding, it is undisputed that petitioners are members of Shuk Hing Fong Chan's family. Petitioners had the burden to prove that they co-resided with Ms. Chan in the subject premises and that they appeared on the relevant income affidavits for the relevant time period.

It was not arbitrary and capricious for HPD to deny petitioners' succession rights because they failed to meet the burden of proof. Petitioners Yuen Yee Yuen, Felix Chan and Sophia Chan were not listed on the 2006 income affidavit, an important element to their succession claim (see Matter of Gottlieb v New York State Div. of Hous. & Community Renewal, 90 AD3d 527, 527 [1st Dept 2011]).

Further, no evidence was submitted to support the claims of Felix Chan and Sophia Cheung for succession rights. Only Yuen Yee Yuen was listed on the tax returns and bank statements, which AHO Lippa held were insufficient proof of co-residency. It was not irrational for AHO Lippa to give less weight to the uncertified tax returns. While the bank statements were in Mrs. Yuen's name and reflected the address of the subject premises, it was not irrational for AHO Lippa to conclude that the the limited banking activity illustrated that the account was not used for

daily living and thus could not serve as credible proof of her co-residency.

Hou Kin Yuen was listed on the 2007 income affidavit. Though this documentation is necessary, it not sufficient to establish succession rights. The lack of other relevant, certified documentation proffered by Hou Kin Yuen could rationally lead to the conclusion that he did not co-reside in the subject premises.

Of the few documents submitted, the Social Security letter caused an unexplained inconsistency regarding Hou Kin Yuen's residence because it was not addressed to the subject premises.⁴ Inconsistent documentation contributes to a agency's reasons to refuse succession rights (Matter of Hochhauser, 48 AD3d at 288). Further, it was not irrational for AHO Lippa to question residency at the subject premises given the Yuens' 50% ownership of a home in a Brooklyn.

The agency provided petitioners with specific guidance on the wide range of documentation they would accept.⁵ Petitioners were explicitly instructed to provide certified copies of their

⁴ Outside of the agency record, petitioners explained that the Social Security Administration letter was sent to the Brooklyn address because Hou Kin Yuen is not fluent in English and chose to send the documents to his son, who is fluent. (Order to Show Cause ¶ 20).

⁵ AHO Lippa suggested that Mr. Yuen could have provided Social Security statements, Medicare and medical documentation, utility bills, credit card statements, voter registration, or Department of Motor Vehicles documents (Agency Opinion at 6-7).

The above documents may be unattainable for low-income residents in subsidized housing, as they often do not need or have access to things like drivers licenses or credit cards. Even if petitioners' did not have these types of documents, however, they could have subpoenaed doctor records, or secured affidavits from neighbors.

tax returns in the April 14, 2011 letter from AHO Lippa. In "Suggested Documents to Prove Primary Residency" the letter states that "failure to provide certified copies of [New York State] tax returns will result in a finding that the subject apartment was not your primary residence" (Exhibit G to Respondents' Verified Answer).⁶

Most importantly, petitioners acted through legal counsel who could have submitted more, and not inconsistent documentation. Petitioners were offered a full and fair opportunity to litigate at the agency level, and thus the agency determination was not arbitrary and capricious.

Mr. Yuen's Article 78 Order to Show Cause, prepared by his attorney Nicole E. Lee, Esq., provides additional documentation. These documents are outside of the agency record and can not be considered by this court. Moreover, these documents still failed to establish petitioners' claim.⁷ "Disposition of the [Article 78] proceeding is limited to the facts and record adduced before the agency when the administrative determination was rendered" (Matter of Fanelli v New York City Conciliation & Appeals Bd., 90 AD2d 756, 757 [1st Dep't 1982]).

⁶ The Suggested Documents list was initially omitted from respondent's submission to the court. The court requested submission of the documentation and gave petitioners the opportunity to respond. Petitioners submitted no response.

⁷ The additional documents submitted are not from the relevant time period of October 17, 2007-2008. The hospital bill is dated 2004, the voter registration card is undated, the drivers license was issued in 2011, the jury notice was dated in 2009, and the income tax returns were again uncertified.

It is hereby

ADJUDGED that Petition is denied and the proceeding is dismissed.

This constitutes the Decision and Judgment of the Court.


Dated: July 12, 2012

FILED

ENTER:

JUL 13 2012

NEW YORK
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J.S.C.