Matter of Quigley v New York State Div. of Hous. & Community Renewal
2006 NY Slip Op 30760(U)
September 25, 2006
Supreme Court, New York County
Docket Number: 104532/05
Judge: Emily J. Goodman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 17

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In the Matter of the Application of
KATHLEEN QUIGLEY,

Petitioner,

Index No. 104532/05

for a Judgment pursuant to Article 78 of the
Civil Practice Law and Rules,

-against-

NEW YORK STATE DIVISION OF
HOUSING AND COMMUNITY RENEWAL,
JUDITH A. CALOGERA, COMMISSIONER
and STARRETT CITY, INC.

Respondents.

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EMILY JANE GOODMAN, J.S.C.:

Petitioner brings this Article 78 proceeding to review a determination of an administrative hearing officer (the "hearing officer"), dated March 7, 2005 (the "determination") denying Petitioner succession rights to an apartment subject to Mitchell-Lama and supervised by Respondent New York State Division of Housing and Community Renewal (DHCR). While the hearing officer did not question that Petitioner is the daughter of the deceased shareholder of record, Joseph Quigley, who passed away on March 13, 2004, he noted that Petitioner's name was added to the income recertifications as of March 11, 2004, two days before Joseph Quigley died. Accordingly, despite Petitioner's contention that she lived in the apartment since 1982, the hearing

officer concluded that Petitioner failed to establish succession rights on the sole basis that she was not listed as an occupant of the apartment on the annual re-certifications for a requisite two year period of time, or, that Respondent Starrett City, Inc. (Starrett) was given written notice of her occupancy.[1] Starrett cross moves to dismiss the Petition and vacate all stays in place.

Petitioner incorrectly maintains that the failure to be listed on the income affidavit merely creates a rebuttable presumption that Petitioner was not an occupant during the requisite period. That used to be true with respect to regulations for programs administered by the Department of Housing Preservation and Development (see Manhattan Plaza Assoc. v DHPD, 8 AD3d 111 [1st Dept 2004]), but those regulations were subsequently amended to eliminate the rebuttable presumption. In any event, the failure to be listed on the relevant income affidavits, or prove that the housing company received a notice of change to the tenant's family, would usually be fatal here (see Matter of Gee v DHCR, 276 AD2d 444 [1st Dept 2000]). However, the Petition alleges that "[i]n February 2004 an employee from Starrett City named Lynn visited the apartment and she knew Kathleen occupied the apartment with her father as their primary

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[1]9 NYCRR §1727-8.3 provides that "any member of the tenant's family. . .who has resided with the tenant in the housing accommodation as a primary residence for a period of not less than two (2) years, has been listed on the income affidavit and/or on the Notice of Change to Tenant's Family. . . or where such person is a senior citizen or a disabled person . . . for a period of not less than one (1) year, immediately prior to the permanent vacating of the housing accommodation by the tenant . . . may request to be named as a tenant on the lease and on the stock certificate.

residence." The record reviewed by the hearing officer includes a letter from Petitioner's attorney, indicating that Petitioner was well known to "security guards." Accordingly, the hearing officer should have considered whether Petitioner should be relieved of the written notice requirement (see Matter of McFarlane v Martinez ,9 AD3d 289 [1st Dept 2004] [a showing that the New York City Housing Authority "knew of, and took no preventative action against, the occupancy by the tenant's relative, could be an acceptable alternative for non-compliance with the notice and consent requirements"]; Jamison v NYCHA, 809 NYS2d 14 [1st Dept 2006]).[2]

"Arbitrary action is without sound basis in reason and is generally taken 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]). Because the issue of Starrett's knowledge of, or implicit approval of, Petitioner's occupancy was raised below [3] but not considered by the hearing officer, the decision is

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[2]Although the Court has not found any precedent applying the McFarlane exception to Mitchell-Lama programs administered by DHCR, the reason cited by the First Department for the exception-that the controlling federal HUD regulations express an overriding policy that the housing authority administering the program has untrammeled authority to monitor and approve who lives in the building for the purpose of providing decent and safe housing to low income families -applies here (see Columbus Park Corp. v DHPD, 80 NY2d 19 [1992] [the State enacted Mitchell-Lama law to encourage private industry to build affordable housing for low and moderate income tenants]).

[3]Clearly, the record was poorly developed by Petitioner in all respects, especially considering that the hearing officer's decision is based on a review of documents, as opposed to an evidentiary hearing. However, Petitioner's allegation that she was known to Starrett was sufficiently raised for purposes of a remand, especially considering that Petitioner now alleges that she suffers from severe mental depression.

vacated as arbitrary and is remanded for a determination regarding whether Petitioner should be relieved of the written notice requirement because Starrett knew of, or implicitly approved of, Petitioner's occupancy for the requisite period of time.[4] On remand, in considering whether Petitioner should be relieved of the written notice requirement, the hearing officer should further consider whether Starrett violated 9 NYCRR §1727-3.6. That regulation provides that "[h]ousing companies shall notify all tenants, and shall provide in all leases, that the housing company must be advised in writing with 90 Calendar days of any additions to or deletions from the tenant's family who reside in the housing accommodation. . . and that such changes shall be reflected in all subsequent affidavits of income submitted by the tenant" (emphasis added). The lease dated May 27, 1980, between Respondent Starrett City, Inc. and Joseph L & Marilyn Quigley provides that the tenant agrees to recertify income annually, and, that the rental will be adjusted based upon that income. The lease also provides that family composition shall be deemed substantial and material obligations of the tenancy with respect to the amount of rent paid and with respect to the tenant's right of occupancy. However, the lease does not include the requisite language under 9 NYCRR §1727-3.6. Nor do the annual notices that serve as lease extensions contain the requisite language. Although the computer generated certification of compliance form signed by the tenant includes a

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[4]Starrett submits the affidavit of Lynn Douglas, who denies Petitioner's claim that she knew of Petitioner's occupancy. This affidavit, and any other affidavits or documents must be considered by the hearing officer, not the Court.

section on household composition, the requisite language is similarly absent. Accordingly, absent the proper notice, the tenant of record may not have known that Petitioner's name had to be included on the annual re-certifications. This may be especially true because Petitioner maintains that her only income is/has been Food Stamps and therefore, the rental amount paid by the shareholder would not have changed based on Petitioner's occupancy.

It is hereby

ORDERED and ADJUDGED that Petition is granted to the extent that the determination is vacated and annulled, and the matter is remanded for a determination regarding whether Petitioner should be relieved of the written notice requirement in accordance with the terms of this Decision, Order and Judgment; and it is further

ORDERED that the parties submit affidavits or documents to the hearing officer to enable the hearing officer to decide the issue; and it is further

ORDERED that the cross motion is denied.

This constitutes the Decision, Order and Judgment of the Court.

Dated: September 25, 2006

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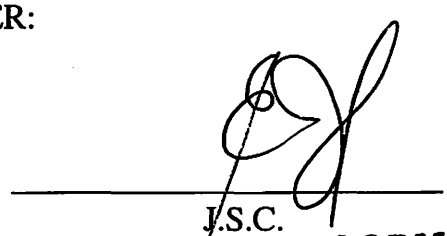

J.S.C.
EMILY JANE GOODMAN