

Matter of Grossbard v New York State Div. of Hous. & Community Renewal

2015 NY Slip Op 32045(U)

January 12, 2015

Supreme Court, New York County

Docket Number: 100497/14

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: _____
Justice _____

PART _____

Index Number : 100497/2014
GROSSBARD, DANA
vs
DIVISION OF HOUSING
Sequence Number : 002
OTHER _____

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

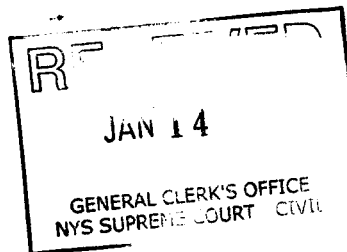
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.



FILED

JAN 14 2015

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/12/15

CGK, J.S.C.

1. CHECK ONE: ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
In the Matter of the Application of

DANA GROSSBARD,

Petitioner,

Index No. 100497/14

For an Order Pursuant to Article 78
of the Civil Practice Law and Rules,

DECISION/ORDER

-against-

NEW YORK STATE DIVISION OF HOUSING
AND COMMUNITY RENEWAL and
SOUTHBRIDGE TOWERS, INC.,

FILED

JAN 14 2015

Respondents.

-----X
HON. CYNTHIA S. KERN, J.S.C.

COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Affirmations in Opposition to the Cross-Motion.....	<u>3</u>
Replying Affidavits.....	<u>4</u>
Exhibits.....	<u>5</u>

Petitioner Dana Grossbard ("petitioner") commenced the instant proceeding pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR") seeking to challenge the determination made by respondent the New York State Division of Housing and Community Renewal ("DHCR") denying petitioner's request for succession rights to apartment 7J (the "Apartment") in the residential apartment building located at 90 Beekman Street, New York, New York (the "Building"), which is operated by respondent Southbridge Towers, Inc. ("Southbridge"). The

DHCR cross-moves for an Order pursuant to CPLR § 3211 dismissing the petition. For the reasons set forth below, the petition is denied and the cross-motion is granted.

The relevant facts are as follows. Petitioner's grandparents, Arlene and Irwin Grossbard, are the tenants-of-record of the Apartment. Mr. Grossbard died in November 1994 and Mrs. Grossbard died in November 2010. Thereafter, petitioner applied to Southbridge for succession rights to the Apartment. By letter dated June 6, 2012, Southbridge denied petitioner's application on the grounds that, although petitioner was listed as an occupant of the Apartment on the income affidavits for the last several years, Southbridge had obtained information that petitioner had not actually occupied or resided in the Apartment. Specifically, the letter noted that petitioner's income tax returns for 2008 and 2009 listed her address as 86 West 12th Street, New York, New York 10011, that Southbridge had requested that petitioner submit additional documentation to substantiate her claim for succession rights and that she had failed to do so.

By letter dated June 27, 2012, petitioner informed Southbridge that she had resided with and cared for her grandmother for several years and that she believed she was entitled to succession rights. Petitioner further stated that she had retrieved old bills and records demonstrating that she had lived with her grandmother in the Apartment and she requested a meeting. By letter dated July 6, 2012, DHCR wrote to petitioner stating that it would treat her June 27, 2012 letter as an appeal from the denial of succession rights if Southbridge did not permit her to renew or supplement her claim and asked her to respond by July 30, 2012.

By Affirmation dated July 18, 2012, Southbridge opposed petitioner's appeal and argued that petitioner had the burden of proving that she co-occupied the Apartment with the tenant-of-record, that she had not submitted sufficient proof or documentation to substantiate her claim and

that based on information from her income tax returns and an Accurint internet search, she did not actually reside in the Apartment for the required amount of time. Additionally, Southbridge included the documentary evidence it relied on in denying petitioner's application.

By letter dated July 14, 2012, petitioner wrote to DHCR reiterating her intent to appeal Southbridge's denial of her application and stated that "starting in 2008" she resided with her grandmother but also continued to rent a small studio apartment for when she wanted privacy or when she had a late night class at New York University where she was a part-time evening student from 2009-2011. Petitioner further stated that because help had been hired for her grandmother and because there were times when she was not there, she preferred to have her financial mail sent to the West 12th Street apartment. Additionally, petitioner included some documentary evidence that she lived at the Apartment, including, *inter alia*, a copy of her Social Security Card and her New York State driver's license, issued January 9, 2007, listing her address as 90 Beekman Street, Apt. 7J, New York, New York 10038; copies of certain bills mailed to the Apartment in the name of Dana Grossbard and copies of bank statements from January 2011 through March 2012 in petitioner's name listing her address as 90 Beekman Street, Apt. 7J, New York, New York 10038. Throughout the rest of 2012, petitioner and Southbridge continued to submit papers clarifying their arguments.

By letter dated January 15, 2013, DHCR wrote to petitioner's attorney requesting submission of certain documents including, *inter alia*, any additional documents showing petitioner occupied the Apartment during the qualifying period and voting records and a statement of petitioner's polling place. By letter dated January 30, 2013, petitioner submitted, *inter alia*, a copy of a Voter Registration Details Report from the New York City Board of

Elections showing petitioner was registered at 90 Beekman Street, Apt. 7J and copies of petitioner's graduate school transcript from 2009 and 2010 along with communications showing the addresses of both the West 12th Street apartment and the Apartment.

By letter dated May 15, 2013, DHCR wrote to petitioner requesting submission of voting records showing her registration during the relevant period and not the current registration status. By letter dated May 24, 2013, petitioner wrote to DCHR and submitted copies of her Voter Registration Detail Report and her driver's licenses issued in 2007 and 2011. Petitioner noted that the Report stated that she was registered to vote at 90 Beekman Street, Apt. 7J, effective January 12, 2007, that the address had never changed and that her status was "Active."

On or about April 4, 2014, DHCR issued an Order Denying Appeal. The Order noted that applicants for succession must make an affirmative showing of their entitlement to relief and that only those applicants who meet the regulations' requirements are entitled to relief. Specifically, the Order noted that the burden is on the applicant to show that the applicant is a family member as defined in the regulations; that the applicant was listed on the income affidavits covering the entire qualifying period; and that the applicant co-resided in the apartment with the tenant-of-record for the entire qualifying period as his or her primary residence. The Order further noted that primary residence is proven both by being listed on the annual income affidavits of an occupant of the apartment and by documentary evidence generated during the qualifying period showing that the applicant lived in the apartment to which he or she is seeking the right to succeed. DCHR's Order found that petitioner demonstrated by sufficient evidence that she was the granddaughter of Arlene Grossbard, the tenant-of-record, and that petitioner's name appeared on the income affidavits for 2008 and 2009. However, DHCR found that other

evidence showing her co-residency with Mrs. Grossbard in the two years prior to her death was lacking. Specifically, although phone bills, driver's licenses and voting documents all displayed the address of the Apartment, said documentation was dated from 2007 and thus, was of little probative value on the issue of co-occupancy during the relevant period. Similarly, DHCR found that documentation generated after the death of Mrs. Grossbard was irrelevant in proving co-occupancy during the qualifying period. Thus, DHCR found that petitioner had failed to sustain her burden of proof on the issue of co-occupancy and denied her appeal.

By Order to Show Cause and Verified Petition dated May 5, 2014, petitioner commenced an Article 78 proceeding seeking to challenge DHCR's Order. By Stipulation, dated July 14, 2014, petitioner agreed to withdraw the Article 78 proceeding without prejudice and the matter was remanded back to DHCR for reconsideration. DHCR agreed to provide petitioner with the opportunity to submit additional evidence that she believed demonstrated her residency in the Apartment and allowed Southbridge to submit documents in opposition to any newly submitted evidence. The parties agreed that no negative inference would be drawn from the decision of either petitioner or Southbridge not to submit additional evidence and DHCR's right to grant or deny petitioner's application on the basis of lack of supporting documentation would not be curtailed.

By letter dated August 4, 2014, DHCR wrote to petitioner's attorney requesting that petitioner "submit any additional documentary evidence to show that the claimant and tenant-of-record occupied the subject apartment as a primary residence during the two-year period before the tenant died or permanently vacated the apartment and that the claimant has continued to do so since that occurrence." Neither petitioner nor Southbridge submitted any additional evidence.

Thus, on or around September 30, 2014, DHCR issued an Order Denying Appeal upon Remand. The Order stated that “[t]he regulations also provide for the consideration of evidence in addition to the annual affidavits to show that succession claimants have occupied the subject apartment as their primary residence during the applicable co-occupancy period. 9 NYCRR § 1727-8.2(a)(2)(b),” and added that “[t]he record includes very little such evidence.” The Order acknowledged petitioner’s voter registration but found that as it was filed prior to the date on which petitioner claims to have moved into the Apartment, the mere fact of her registration at the Apartment does not document her co-occupancy with the tenant-of-record during the qualifying period, November 17, 2008 through November 17, 2010. Petitioner then commenced the instant Article 78 proceeding seeking to challenge DHCR’s Order.

On review of an Article 78 petition, “[t]he law is well settled that the courts may not overturn the decision of an administrative agency which has a rational basis and was not arbitrary and capricious.” *Goldstein v. Lewis*, 90 A.D.2d 748, 749 (1st Dep’t 1982). “In applying the ‘arbitrary and capricious’ standard, a court inquires whether the determination under review had a rational basis.” *Halperin v. City of New Rochelle*, 24 A.D.3d 768, 770 (2d Dep’t 2005); *see Pell v. Board. of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 N.Y.2d, 222, 231 (1974) (“[r]ationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard.”) “The arbitrary or capricious test chiefly ‘relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact.’ Arbitrary action is without sound basis in reason and is generally taken without regard to facts.” *Pell*, 34 N.Y.2d at 231 (internal citations omitted).

In the instant action, this court finds that DHCR's denial of petitioner's succession rights application on remand was rational. For an application for succession rights to be successful, the applicant must establish that he or she (1) is a family member of the tenant-of-record who has permanently vacated the unit; (2) has resided with the tenant-of-record for the applicable qualifying period and have used the unit as his or her primary residence; and (3) is included on the income affidavits for the qualifying period. *See* 9 NYCRR § 1727-8. DHCR rationally found that petitioner failed to establish that the Apartment was her primary residence during the qualifying period or that she co-occupied the Apartment with the tenant-of-record for the qualifying time period. Petitioner stated in her application that she moved into the Apartment in 2008 but provided no evidence of said move. Although petitioner provided numerous documents in support of her application, most of the documents were either dated before the relevant two-year period or after the tenant-of-record's death and thus, do not establish co-residency or primary residency. Furthermore, those documents dated during the relevant two-year period, such as petitioner's tax returns, list petitioner as living at the West 12th Street apartment.

Petitioner's assertion that the DHCR's Order is arbitrary and capricious on the ground that the DHCR did not follow the law set out in *Murphy v. New York State Division of Housing and Community Renewal*, 21 N.Y.3d 649 (2013) is without merit. Specifically, petitioner asserts that it was understood when the parties entered into the Stipulation that the application was being remanded so that "DHCR would bring its decision into conformity with *Murphy*..." but that DHCR did not do so. As an initial matter, the Stipulation contains no reference, explicit or implicit, to *Murphy* and places no obligation on DHCR to conform its decision in this case to that of *Murphy*. Additionally, the facts of *Murphy* are distinguishable and inapplicable here. In

Murphy, the petitioner provided overwhelming documentation demonstrating his residency in the subject apartment while at the same time failing to be listed on the apartment's income affidavits for the requisite period of time. However, in this case, the opposite is true. Petitioner's appeal was not denied on the ground that she failed to be listed on the Apartment's income affidavits but rather on the ground that she failed to provide sufficient documentation to sustain her burden of proving her residency and co-occupancy during the two-year period prior to the death of her grandmother.

Petitioner's assertion that the DHCR's Order is arbitrary and capricious on the ground that it failed to abide by the terms of the parties' Stipulation is also without merit. Specifically, petitioner asserts that DHCR's Order violated the Stipulation by noting that petitioner failed to submit any further documentation to support her application for succession rights despite the fact that the Stipulation stated that "[n]o negative inference shall be drawn if petitioner elects not to submit any additional documents...." However, there is no evidence that DHCR drew a negative inference from petitioner's decision not to submit any additional documents but only that DHCR offered her the opportunity to do so and that she declined. Indeed, the court finds that the DHCR's Order is clearly based on the evidence in the record and not on the fact that the record was not supplemented by petitioner after remand. Further, the Stipulation also stated that DHCR was entitled to deny petitioner's application on the basis of lack of supporting evidence.

Accordingly, the DHCR's cross-motion to dismiss the petition is granted and the petition is denied. The petition is hereby dismissed in its entirety. This constitutes the decision and order of the court.

Date: 1/12/15 **FILED**

Enter: CR
J.S.C.

JAN 14 2015

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