

Matter of Ogunyemi v Been

2016 NY Slip Op 33077(U)

August 24, 2016

Supreme Court, Kings County

Docket Number: 501385/16

Judge: Dawn M. Jimenez-Salta

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At an IAS Term, Part 20 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on August 24, 2016.

P R E S E N T:

HON. DAWN JIMENEZ-SALTA,

Justice.

-----X

In the Matter of the Application of

~~MUSBAU OGUNYEMI,~~

MUBASU

Index No.: 501385/16

Petitioner,

For a judgment pursuant to Article 78 of the Civil Practice Laws and Rules

- against -

DECISION AND ORDER

VICKI BEEN, as COMMISSIONER of the New York City Department of Housing Preservation and Development,

Respondent, and

FIRST ATLANTIC TERMINAL HOUSING CORP.,

Respondent-Landlord.

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Recitation, as required by *CPLR 2219(a)*, of the papers considered in the review of:

- 1) Petitioner Musbau Ogunyemi's ("Petitioner") Order to Show Cause ("OSC") for an Order: a) to Annul a Decision by the New York City Department of Housing Preservation and Development ("HPD"), Denying Petitioner's Succession Rights in the Subject *Mitchell-Lama* Cooperative Apartment as well as b) to Grant a Preliminary Injunction, Barring the Respondent-Landlord First Atlantic Terminal Housing Corp. ("First Atlantic") from Commencing a Summary Eviction Proceeding against Petitioner in the New York City Housing Court during the Pendency of this Petition pursuant to *CPLR Sections 6301* and *6311*, dated February 3, 2016;
- 2) Respondent-Landlord First Atlantic Terminal Holding Corp.'s ("First Atlantic") Affirmation in Opposition, dated February 24, 2016;
- 3) Respondent Vicki Been ("Been") as Commissioner of the New York City Department of Housing Preservation and Development's ("Municipal Respondent") Verified Answer, dated April 22, 2016;
- 4) Municipal Respondent's Memorandum of Law, dated April 22, 2016, all of which submitted June 3, 2016.

Papers

Numbered

Notice of Motion and Affidavits Annexed.....

Notice of Cross-Motion and Answering Affidavits Annexed.....

Order to Show Cause and Affidavits..... Petitioner 1 [Exh. A-I]

Answering Affidavits..... Respondent-Landlord 2

Replying Affidavit.....

Supplemental Affidavits.....

FILED
 KINGS COUNTY CLERK
 2016 SEP -7 AM 7:02

Exhibits.....	
Other [Memoranda of Law]	Municipal Respondent Answer 3 [Exh. A-L] Municipal Respondent Memorandum of Law 4

Upon the foregoing cited papers, the Decision/Order on this motion is as follows: Petitioner Musbau Ogunyemi's ("Petitioner") Order to Show Cause ("OSC") for an Order to annul a Decision by the New York City Housing Preservation and Development ("HPD") denying Petitioner's succession rights in the subject *Mitchell-Lama* cooperative apartment is denied, and the Petition is dismissed. The HPD's decision was not arbitrary and capricious, an abuse of discretion, an error of law or in violation of lawful procedure. It had a rational basis. Petitioner's motion for a preliminary stay barring Respondent-Landlord First Atlantic Terminal Housing Corp. ("First Atlantic") from commencing a summary eviction proceeding in Housing Court against Petitioner is denied because Petitioner has failed to show a likelihood of success [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

MITCHELL-LAMA STATUTORY FRAMEWORK, PROCEDURAL HISTORY AND BACKGROUND

To address the shortage of safe and sanitary dwellings for low income persons and families, the New York State legislature created a program of government assistance to developers in the form of long-term, low interest government mortgage loans and real estate tax exemptions. *Article II* of the *Private Housing Finance Law* ("PHFL") entitled "Limited-Profit Housing Companies" is known as the *Mitchell-Lama Law*. In exchange for the financial assistance provided by the *Mitchell-Lama Law*, developers agree to follow regulations for rent, profit, disposition of property and tenant selection. See *PHFL Section 11 et seq.* Pursuant to *Section 1802(6)(d)* of the *City Charter*, the New York City Department of Housing Preservation and Development ("HPD") is the supervising agency for City-Aided Limited-Profit Housing Companies. *Title 28, Chapter 3* of the *Rules of the City of New York* ("RCNY") sets forth the rules promulgated by the HPD in the discharge of its duties and obligations under the *Mitchell-Lama Law* [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

A "tenant/cooperator" is any person named on a lease as a lessee or who is a party to a rental agreement or proprietary lease and obligated to pay rent or carrying charges for the use or occupancy of an apartment. See *28 RCNY Section 3-02(p)(2)(I)*. [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

An "occupant" is a person, other than a tenant/cooperator, residing together with the tenant/cooperator in an apartment in a rental or cooperative development subject to these rules, who is not a party to the lease or occupancy agreement, including, but not limited to, a member of a tenant/cooperator's immediate family, whose occupancy has been approved by the housing company and HPD. See *28 RCNY Section 3-02(o)(I)*, [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

A tenant of a *Mitchell-Lama* apartment must occupy the *Mitchell-Lama* apartment as his or her primary residence from his/her initial occupancy. He or she must continue to reside there as his or her primary place of residence. See *28 RCNY Section 3-02(n)(4)*.

In determining whether a tenant/cooperator occupies a dwelling unit as his or her primary residence, the facts and circumstances to be considered include but are not limited to, whether such tenant/cooperator:

- (1) specifies an address other than such dwelling unit as his or her place of residence or domicile on any tax return, motor vehicle registration, driver's license or other document filed with a public agency;
- (2) gives an address other than such dwelling unit as his or her voting address;
- (3) sublets or permits unauthorized persons to occupy the dwelling unit without written approval by HPD and the

housing company or attempts to assign such dwelling unit;

(4) spent less than an aggregate of one hundred eighty three (183) days in the preceding calendar year in the City at such dwelling unit (unless in active U.S. armed forces or took occupancy at such dwelling unit during the preceding calendar year). However, no dwelling may be considered the primary residence of the tenant/cooperator unless the tenant/cooperator provides proof that he or she either filed a New York City Resident Income Tax Return at the claimed primary residence for the most recent preceding taxable year for which such return should have been filed or that the tenant/cooperator was not legally obligated to file such tax return. The tenant/cooperator whose residency is being questioned will be obligated to provide proof that his or her apartment is his or her primary place of residence including but not limited to certified New York State income tax returns, utility bills and voter registration data. See *28 RCNY Section 3-02(n)(4)* [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

A tenant must submit to HPD an income affidavit executed by all occupants residing in the apartment indicating their income. The housing company shall distribute the income affidavit on February 15 of each year to each tenant/cooperator who shall return the income affidavit duly executed and notarized by April 30 of each year to the housing company. See *Title 28 RCNY Section 3-03(c)* [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

No occupant in a *Mitchell-Lama* apartment has any rights under the lease or occupancy agreement or any succession rights except as listed in *28 RCNY Section 3-02(p)*. See *Title 28 RCNY Section 3-02(o)(3)(I)*. Acceptance by the housing company of full or partial payment of rent/carrying charges from an occupant by check or otherwise shall not give the occupant any rights of tenancy under the lease/occupancy agreement or otherwise. See *Title 28 RCNY Section 3-02(o)(3)(I)* [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

There are strict residency requirements for a family member to qualify for succession rights. See *Title 28 RCNY Section 3-02(p)(3)*. Unless otherwise prohibited by occupancy restrictions based upon income limitations pursuant to federal, state or local law, regulations or other requirements of governmental agencies, if the tenant/cooperator has permanently vacated the apartment, any member of such tenant/cooperator's family may request to be named as a tenant/cooperator on the lease and where applicable on the stock certificate. However, the family member must have resided with the tenant/cooperator in the apartment as a primary residence, as determined by *Section 3-02(n)(4)* of these rules, for a period of not less than two (2) years immediately prior to the tenant/cooperator's permanent vacating of the apartment. The family member's name must have been listed on any income documentation submitted by the tenant/cooperator to the Department or to any other governmental agencies (for example: income affidavits, re-certifications or *Section 8* forms), for at least the two (2) consecutive annual reporting periods immediately prior to the tenant/cooperator's permanent vacating of the apartment or from the inception of the tenancy or commencement of the relationship if for less than such periods. The apartment must have been and continues to be the primary residence of the member of the tenant/cooperator's family who resided with the tenant/cooperator. In the event that HPD has authorized the housing company not to collect surcharges based on income documentation, the family member shall be asked to provide other evidence of occupancy for the required period of time. The burden of proof is on the family member to show use of the apartment as his or her primary residence during the required period to be eligible to succeed to possession [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Title 28 RCNY Section 3-02(p)(8) governs the application and appeal process for a family member seeking succession rights. When a family member applies to the housing company for permission to remain in occupancy as a tenant/cooperator, the housing company must act on the application within thirty (30) days of receipt by either requesting that HPD approve the application or by denying the application and notifying the applicant family members in writing of its determination [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

If the housing company denies the application, the notice to the applicant must set forth in writing the reasons why the evidence submitted was deemed inadequate and resulted in the denial. The housing company must inform the applicant of the right to appeal and the method of appeal. See *Title 28 RCNY Section 3-02(p)(8)* [Petitioner 1, Exhs. A-I; Respondent-

Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

If a housing company has denied a family member's application to succeed to a lease or an occupancy agreement, he or she may appeal to the Assistant Commissioner of HPD having jurisdiction of the applicant's housing company within thirty (30) calendar days of receipt of the written denial. The appeal must include proof of service of a copy of the appeal upon the housing company. The appeal must briefly set forth the reasons why the family member believes he or she is entitled to occupy the apartment and any errors or erroneous findings he or she believes are contained in the housing company's determination. The Assistant Commissioner or his or her designee is to review the housing company's determination and any additional information submitted by the applicant and shall issue the final agency decision about the applicant's application. The only review of this determination is pursuant to *Article 78 of the Civil Practice Law and Rules*. See *Title 28 RCNY Section 3-02(p)(8)* [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

If the agency determines that the applicant is ineligible to remain in occupancy, the applicant must vacate the apartment. In the alternative, the housing company may seek to terminate the occupancy without any further approval by HPD. See *Title 28 RCNY Section 3-02(p)(8)* [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Respondent-Landlord First Atlantic Terminal Housing Corp. ("First Atlantic"), an *Article II* housing company organized under the *PHFL* is the owner of the building where the subject apartment is located at 161 South Elliot Place, Apt. 10H, Brooklyn, New York 11217 ("subject apartment") [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Mojisola Ogunyemi ("tenant/cooperator") is the tenant/cooperator of the subject apartment at 161 South Elliot Place, Apt. 10H, Brooklyn, New York 11217 pursuant to an Occupancy Agreement entered into on April 1, 2003. Petitioner Musbau Ogunyemi ("Petitioner") purports to be the son of the tenant/cooperator [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

First Atlantic denied Petitioner's claim for succession rights to the subject apartment in a letter, dated July 10, 2015 because Petitioner failed to co-reside in the subject apartment as his primary residence with the tenant/cooperator for the two (2) years preceding the vacatur by the tenant/cooperator. It advised Petitioner about his right to appeal [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Petitioner sent a letter, dated July 20, 2015 to HPD Administrative Hearing Officer ("AHO") Lippa, indicating his intent to appeal First Atlantic's denial of his request for succession rights [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

In a letter, dated July 28, 2015, AHO Lippa notified Petitioner about his right to submit additional documentation. She stated that his appeal must include proof that he was a family member of the tenant as defined by the HPD rules. He must submit proof that he resided in the apartment with the tenant of record as his primary residence for the two (2) years immediately prior to the tenant/cooperator's vacating the apartment or one year if a senior citizen or disabled according to the *HPD Rules*. He must submit proof that he has continued to reside in the subject apartment. She instructed him to provide proof that he was included as an occupant of the subject apartment on the relevant income affidavits and that he must prove his primary residence in the subject apartment for the requisite time period even if he were included on the relevant income affidavits or income recertifications. She informed him that he must provide proof through credible and reliable evidence about the date of the vacatur of the subject apartment by the tenant/cooperator of record [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

She provided Petitioner with a copy of the current *HPD Rules* for succession rights (*28 RCNY 3-02(p)*) as well as the *HPD Rules* about the facts and circumstances to be considered in the determination of a primary residence (*28 RCNY 3-02(n)(4)*). She included an Authorization for Release of Photocopies of New York State Tax Returns and/or Tax Information. She informed him that he was required to submit copies of his New York State tax returns for the relevant co-residency period or in the alternative explain why he was exempt from filing such returns [Petitioner 1, Exhs. A-I;

Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

She gave him a list of suggested documents to prove primary residence. Those documents include: certified New York State Tax returns; employment records; Social Security Administration documents; Board of Elections records; Department of Motor Vehicles documents such as a driver's license; insurance policies and billing statements; utility bills and statements and telephone (landline and cell), cable, gas, electric; credit card bills and statements and loan bills and statements; bank statements including checking and savings accounts and statements from other financial institutions; medical bills and statements including medical insurance statements and "explanation of benefits"; publications and other general correspondence addressed to the Petitioner which must include a postmark; school records for Petitioner and /or his family; U.S. military service records; deeds; marriages and/or birth certificates (most often used to prove a family relationship but may contain addresses relevant to primary residence) [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Pursuant to a letter, dated July 28, 2015, AHO Lippa requested First Atlantic to forward copies of all documents upon which it relied in its denial of Petitioner's request for succession rights to Petitioner [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

In a letter to AHO Lippa, dated August 27, 2015, Petitioner claimed that because of a fire on April 30, 2012 in the subject apartment, he did not have physical proof for his residency prior to 2004. However, he did provide four (4) documents: 1) a bank statement for the period of December 8, 2004 through January 9, 2005 showing Petitioner's address as the subject apartment; 2) a letter about a fire on April 30, 2012 in the subject apartment; 3) an Acknowledgment of Paternity signed by Petitioner in 2005 with the subject apartment listed as Petitioner's address; and 4) a letter from the tenant/cooperator to First Atlantic, dated November 21, 2006, requesting that Petitioner be named "head of the household" due to her frequent travel to and from Nigeria. In the letter, tenant/cooperator claims that Petitioner was occupying the subject apartment as well as paying rent. As a result, Petitioner appears to claim that the tenant/cooperator vacated the subject apartment in 2006 [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

First Atlantic filed its Opposition to Petitioner's Appeal of the Denial of Succession Rights, dated October 20, 2015. It underscores that Mojisola Ogunyemi was the shareholder of record for the subject premises but vacated the premises. Petitioner did not co-occupy the subject premises with the prior shareholder for the two (2) years before her vacatur. It provided a copy of Petitioner's driver's license issued February 26, 2004, showing a different address from the subject apartment. It argued that Petitioner failed and/or refused to submit or provide documentation to substantiate a co-occupancy for the two (2) years prior to the vacatur of Mojisola Ogunyemi. It submitted a copy of the HUD Certification dated April 1, 2003 when Mojisola Ogunyemi only listed herself and her daughter Aminotu Ogunyemi as occupants of the subject premises. Petitioner was only added to the household composition on the second income certification dated July 1, 2004. It submitted a copy of a July 5, 2006 notarized letter by Petitioner regarding residency verification, stating that the last conversation he had with his mother was in July 2004 [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

After a review of all submitted documentation, AHO Lippa issued a final determination dated November 18, 2015, denying Petitioner's appeal of First Atlantic's denial of his claim for succession rights. She noted that the letter submitted by Petitioner dated November 21, 2006 was insufficient to establish the date of the vacatur of the subject apartment by the tenant/cooperator. As a result, she found that he failed to prove that he resided with the tenant/cooperator in the subject apartment as his primary residence for the two (2) years immediately preceding her vacatur [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Although Petitioner claimed that he resided in the subject apartment since May 2003, she noted his letter dated July 5, 2006 when he stated that he had not spoken with or heard from the tenant/cooperator since July 2004. Thus, she considered July 2004 as the date of the permanent vacatur of the subject apartment by the tenant/cooperator for purposes of determining the applicant's entitlement to succession rights. Consequently, the relevant co-residency period for the determination of succession rights was from the commencement of the tenancy in April 2003 through July 2004. She pointed

out that no documentation was submitted to prove that the applicant resided in the subject apartment as his primary residence at any time from the commencement of the tenancy through July 2004. She found that any documents dated after July 2004 do not prove primary residence in the subject apartment from the commencement of the tenancy until July 2004. She observed that the evidence indicates that the applicant resided elsewhere between the commencement of the tenancy and July 2004. Specifically she pointed to applicant's New York State driver's license issued on February 26, 2004 which reflected his address as Adelphi Street but not the subject apartment [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Addressing Petitioner's claim about having paid rent for the subject apartment since May 2003, AHO Lippa cited the *HPD Rules*. Acceptance by the housing company of full or partial payment of rent/carrying charges from an occupant by check or otherwise does not give the occupant any rights of tenancy under the lease/occupancy agreement. See *28 RCNY 3-02(o)(3)(I)*. [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Therefore, based upon the evidence, AHO Lippa denied Petitioner's appeal for succession rights to the subject premises and issued a Certificate of Eviction [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Petitioner commenced this *Article 78* proceeding seeking annulment of the HPD's denial of his request for succession rights to the subject apartment by Order to Show Cause ("OSC") dated February 3, 2016 along with a Petition dated February 1, 2016. In his OSC, Petitioner contends that there is an imminent threat of irreparable harm because any commencement of a Housing Court eviction proceeding will allegedly cause him to be "blacklisted" from renting another apartment anywhere in the country. He states that he is the son of Mojisola Ogunyemi, the tenant of record/shareholder and claims to have resided in the subject apartment from May 2013, one month after his mother moved into the apartment in 2003 through the present date. He argues that HPD erred in its determination and based credibility solely upon its review of documents. He claims that he did not have many of them in his possession because of a fire in 2012 at the subject apartment. He thinks that First Atlantic acknowledged him as the cooperator of the subject apartment because of his mother's letter to First Atlantic in 2006 when she proclaimed his succession rights. He insists that HPD hold a hearing for him to explain the "unique circumstances surrounding his status as a co-operator and/or his succession rights" [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Petitioner states that his mother began traveling back and forth from Brooklyn to Nigeria in 2004 to care for her elderly, infirm mother and to tend to family business. Sometime in 2006 when it became clear that she needed to spend an indefinite amount of time caring for her mother, he states that Mojisola Ogunyemi wrote to First Atlantic, indicating her desire to turn over her rights as "head of the household" of the subject apartment to Petitioner. Petitioner states that she permanently vacated the subject apartment on November 21, 2006. Because his mother's first language is not English, he claims that she was unaware of the correct language to use in order to notify the Housing Corporation that her son had "succession rights" or that she "permanently vacated". Because of a "devastating fire" on April 30, 2012, he states that he lost all personal, financial and important documentation. Because First Atlantic temporarily relocated Petitioner and his family to another apartment in the building following the fire's aftermath, he claims that First Atlantic was aware of its occurrence [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Petitioner alleges that in 2006 when he began submitting the required income verification forms to First Atlantic, he omitted his mother from those forms. Because of the fire, he only has a copy of the income certification form dated June 25, 2004. He finds fault with AHO Lippa's decision about his driver's license at another address because it "may have been the former home he shared with his mother in 2003 before they began occupying the unit". Due to the fire, he does not have a copy of the driver's license in question. He challenges AHO Lippa's decision about his last contact with his mother in July 2004. As a result of the fire, he maintains that he cannot produce the requested documentation, showing that he resided with his mother from at least November 2004 through November 2006. He claims to have diligently attempted to locate documentation to substantiate his residency during the relevant time period. He emphasizes that his proof of residency is

shown by: 1) a December 2004-January 2005 bank statement; 2) a letter from First Atlantic's insurance company about the fire in his unit; 3) a paternity acknowledgment for his son from June 2005; and 4) a notarized letter from his mother dated November 21, 2006 about her request for her son to become "head of the household" for the unit [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Because of a June 26, 2006 stipulation settling rent arrears for the subject apartment with Petitioner, he contends that First Atlantic had actual knowledge of his residency in the subject apartment. He claims that after the fire not only did First Atlantic provide Petitioner with a move-in/move-out permit where he was listed as the "co-operator" of the subject apartment but also its property manager signed off on the form. He believes that First Atlantic acknowledged Petitioner as a shareholder because: 1) it accepted his mother's 2006 letter; 2) it accepted the income verification forms in his name alone as the head of the household; and 3) it treated Petitioner as a co-operator but not an occupant of the subject apartment. Because of the length of time for First Atlantic to challenge his status along with the April 30, 2012 fire, he feels that he has been prejudiced [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Although he timely appealed AHO Lippa's decision, Petitioner argues that he did not include additional documentation because he was unable to do so prior to the thirty (30) day deadline. As a pro se litigant, he contends that he was unaware of the legal requirements to establish a succession claim. He requests a hearing about his last contact with his mother. He wants to have a full and fair opportunity to present his case because he feels that the determination was based upon an assessment of the witnesses' credibility [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

In its Affirmation in Opposition to Petitioner's Appeal of the Denial of Succession Rights, dated February 24, 2016, First Atlantic points out that Petitioner failed to meet his burden of proof. In particular, he failed to establish: 1) the date of the vacatur of the subject apartment by the tenant/cooperator; and 2) that he lived in the subject apartment with the tenant/cooperator as his primary residence for the two (2) years immediately preceding her vacatur. First Atlantic attached a letter from Petitioner dated July 5, 2006, stating that he had not heard from his mother since July 2004; a copy of Petitioner's driver's licence with an address other than the subject apartment and a copy of the Housing and Urban Development ("HUD") income certification for the subject premises dated April 1, 2003 where Petitioner is omitted from the "Household Composition" in contrast with another HUD income affidavit dated July 1, 2004 where Petitioner is included in the "Household Composition" for the subject apartment [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

First Atlantic emphasizes that the last tenant of record of the subject premises was Mojisola Ogunyemi. Because she vacated the apartment in July 2004, it denied the Petitioner's claim for succession rights pursuant to *New York City Department of Housing Preservation and Development Rules and Regulations Section 3-02(p)*. It argues that Petitioner cannot prevail on his application for the issuance of a preliminary injunction because: 1) he has not shown the likelihood of ultimate success on the merits; 2) there is no irreparable injury absent the granting of the preliminary injunction; and 3) there is no balancing of the equities in favor of Petitioner's position. See *Gregory P. Peterson v. Roger H. Corbin*, 275 AD2d 35 (2nd Dept., 2000); *Straisa Realty Corporation v. Woodbury Associates*, 154 AD2d 453 (2nd Dept., 1989); *County of Orange v. Raymond Lockey*, 111 AD2d 896 (2nd Dept., 1985); *Coinmuch Corp. Fordham Hill Owners Corporation*, 770 NYS2d 310 (1st Dept., 2004) [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

First Atlantic stresses Petitioner's failure to comply with the requirements for succession rights. In particular, he did not prove that: 1) he was an immediate family member or a person with a financial and emotional interdependence with the tenant of record; 2) he resided with the tenant for at least two (2) years prior to the tenant of record's death or vacatur (or one year if a senior citizen or disabled); and 3) he was listed on the last two (2) income affidavits submitted by the tenant of record prior to the tenant's death or vacatur [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent

Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

First Atlantic points out that Petitioner's request for succession rights was denied after appeal by HPD in an Order, dated November 18, 2015 because: 1) Mojisola Ogunyemi was the shareholder of record for the subject premises; 2) Mojisola Ogunyemi vacated the premises; 3) Petitioner did not co-occupy the subject premises with the prior shareholder for the two (2) years prior to her vacatur; 3) there was information that Petitioner reported an alternative address for the last several years; and 4) Petitioner failed and/or refused to submit or provide documentation to substantiate a co-occupancy for the two (2) years prior to the vacatur of Mojisola Ogunyemi [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

In the Verified Answer, dated April 22, 2016 by Vicki Been ("Been") as Commissioner ("Commissioner") of the New York City Department of Housing Preservation and Development ("HPD") (collectively "Municipal Respondents"), Municipal Respondents assert as a First Affirmative Defense that HPD's November 18, 2015 determination, denying Petitioner's succession rights application was not arbitrary, capricious, an abuse of discretion, an error of law or in violation of lawful procedure. The Second Affirmative Defense is that Petitioner is not entitled to an evidentiary hearing pursuant to *28 RCNY Section 3-02(p)(8)(ii)* [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

In their Memorandum of Law, dated April 22, 2016, Municipal Respondents contend that HPD's denial of Petitioner's request for succession rights to the subject apartment was rational and reasonable. They point out that administrative agencies enjoy broad discretionary power in their determinations on matters upon which they are empowered to decide. See *CPLR 7803*. In deciding whether an agency's determination was arbitrary, capricious or an abuse of discretion, they argue that courts are limited to an assessment of whether a rational basis exists for the administrative determination and their review ends when a rational basis is found. See *Heintz v. Brown*, 80 NY2d 998 (1992); *Pell v. Board of Education*, 34 NY2d 222 (1974); *Sullivan County Harness Racing Association v. Glasser*, 30 NY2d 269 (1972); *Barton Trucking Corp. V. O'Connell*, 7 NY2d 299 (1959); *Matter of Morton v. New York City Department of Housing Preservation and Development*, 93 AD3d 727 (2nd Dept., 2012) [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Municipal Respondents maintain that a rational or reasonable basis for an administrative agency determination exists if there is evidence in the record to support its conclusion. See *Sewell v. New York*, 182 AD2d 469 (1st Dept., 1992). They argue that courts do not review the facts de novo to arrive at an independent determination. See *Marsh v. Hanley*, 50 AD2d 687 (3rd Dept., 1975); *Heintz v. Brown, supra*; *West Village Associates v. Division of Housing and Community Renewal*, 277 AD2d 111 (1st Dept., 2000) [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Because HPD has discretion in directing who may succeed to an apartment, Municipal Respondents contend that AHO Lippa's determination to deny Petitioner succession rights satisfied the standard of review. See *Cadman Plaza North, Inc. v. New York City Department of Housing Preservation and Development*, 290 AD2d 344 (1st Dept., 2002). They point out that Petitioner failed to establish any of the requirements to qualify for succession rights pursuant to *28 RCNY Section 3-02(p)(8)*. They point out that Petitioner: 1) failed to submit a birth certificate to prove that he is a "family member" of the tenant/cooperator; and 2) did not establish the date of vacatur of the subject apartment by tenant/cooperator. Petitioner only submitted a letter from the tenant/cooperator, dated November 21, 2006, stating her desire to turn over her rights as "head of the household" to the subject apartment to her son because of her frequent travel to Nigeria. They note that AHO Lippa properly found that the letter was insufficient because it directly contradicted a letter from Petitioner, dated July 5, 2006 in which he claimed that he resided at the subject apartment since May 2003 but had not heard from the tenant/cooperator since July 2004, suggesting that the tenant/cooperator vacated the subject apartment in 2004 [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Even assuming that Petitioner established the date of vacatur of the subject apartment by the tenant/cooperator, Municipal Respondents contend that he failed to establish that he resided with the tenant/cooperator as his primary residence for the requisite co-residency period pursuant to *28 RCNY Section 3-02(p)(3)*. They note that since AHO Lippa considered

July 2004 as the date of permanent vacatur by the tenant/cooperator pursuant to the July 5, 2006 letter by Petitioner, he was required to prove his residency at the subject apartment as his primary residence with the tenant/cooperator from the commencement of her tenancy in April 2003 until July 2004. They point out that Petitioner failed to submit any documentation to prove that the subject apartment was his primary residence from April 2003 to July 2004. They refer to his driver's license issued in February 2004, showing he resided elsewhere. They argue that he failed to establish that he appeared on the income certifications for at least two (2) consecutive years immediately prior to the permanent vacatur by the tenant/cooperator. Although he is included on the income certification for the subject apartment dated July 1, 2004, they note that he is omitted from the income certification dated April 1, 2003 [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Municipal Respondents emphasize that when rejecting petitioners' claims for succession rights, HPD is entitled to consider the lack of objective documentary evidence supporting petitioners' claims as well as inconsistencies among the documents which were submitted. See *Hochhauser v. City of New York Department of Housing Preservation and Development*, 48 AD3d 288 (1st Dept., 2008); *Studley v. New York City Department of Housing Preservation and Development*, 277 AD2d 101 (1st Dept., 2000) [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Although Petitioner claims an inability to provide supporting documentation due to the fire, Municipal Respondents point out that it does not relieve him of his burden to establish his right to succession. They underscore that the list of documents to establish primary residency is exhaustive, noting that it was given to Petitioner by AHO Lippa. If original documents were lost or destroyed, they maintain that Petitioner bears the burden of obtaining duplicates. Despite the attachment of additional documents to his Petition, they argue that they should not be considered because they fail to establish Petitioner's entitlement to succession rights. They argue that the "Move-In/Move-Out" permit dated October 29, 2012 is not relevant as to whether Petitioner resided at the subject apartment as his primary residency during the requisite co-residency period from April 2003 through July 2004. They point out that the stipulation between First Atlantic and Petitioner in 2006 merely binds Petitioner to pay back rent for the subject apartment but paying rent does not afford Petitioner any tenancy rights. See *28 RCNY Section 3-02(o)(3)(I)*. They contend that both documents have no impact on HPD's statutorily prescribed duties of enforcing the *Mitchell-Lama Law and Regulations*. See *Schorr v. New York City Department of Housing Preservation and Development*, 10 NY3d 776 (2008). They argue that both these documents were not part of the administrative record. Thus, they should not be considered because they constitute additional facts and documentation outside of the record [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Municipal Respondents emphasize that pursuant to an *Article 78* proceeding this Court must decide whether the administrative agency determination had a rational basis in the record or was arbitrary and capricious upon the proof before it. See *Fanelli v. New York City Conciliation and Appeals Board*, 90 AD2d 756 (1st Dept., 1982); *Levine v. New York State Liquor Authority*, 23 NY2d 863 (1969). Because Petitioner failed to establish any of the necessary requirements to qualify for succession rights pursuant to *28 RCNY Section 3-02(p)(3)*, they contend that HPD's determination to deny Petitioner's request for succession rights and to issue a Certificate of Eviction was entirely rational, reasonable and lawful [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Municipal Respondents argue that Petitioner is not entitled to an evidentiary hearing because the appeals procedure does not provide for an evidentiary hearing pursuant to *28 RCNY Section 3-02(p)(8)(ii)*. They point out that since he utilized the statutory protections, he was afforded all the due process to which he was entitled under the circumstances. See *Quan v. New York City Department of Housing Preservation and Development*, 70 AD3d 528 (1st Dept., 2010). Because applicants for succession rights do not have a protected property interest, they emphasize that due process does not mandate an evidentiary hearing in connection with a claim for succession rights. See *28 RCNY Section 3-02(p)(8)(ii)*; *28 RCNY Section 3-02(n)(1)*; *Pietropolo v. New York City Department of Housing Preservation and Development*, 39 AD3d 40 (1st Dept., 2007); *Cadman Plaza North Incorporated v. New York City Department of Housing Preservation and Development*, 290 AD2d 344 (1st Dept., 2002) [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs.

A-L; Municipal Respondent Memorandum of Law 4].

COURT RULINGS

This Court denies Petitioner's Order to Show Cause for an order to annul the HPD decision, denying his succession rights in the subject *Mitchell-Lama* cooperative apartment. This Court recognizes HPD's broad discretionary power in its determination of successor rights to an apartment. Accordingly, this Court finds that HPD's decision was not arbitrary and capricious, an abuse of discretion, an error of law or in violation of lawful procedure because its decision was rationally based upon the proof submitted in the record. See *CPLR 7803*; *Fanelli v. New York City Conciliation and Appeals Board*, *supra*; *Levine v. New York State Liquor Authority*, *supra*.; *Heintz v. Brown*, *supra*; *Pell v. Board of Education*, *supra*; *Sullivan County Harness Racing Association v. Glasser*, *supra*; *Barton Trucking Corp. V. O'Connell*, *supra*; *Matter of Morton v. New York City Department of Housing Preservation and Development*, *supra*; *Sewell v. New York*, *supra*; *Marsh v. Hanley*, *supra*; *West Village Associates v. Division of Housing and Community Renewal*; *Cadman Plaza North, Inc. v. New York City Department of Housing Preservation and Development*, *supra* [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

According to *Title 28 RCNY Section 3-02(n)(4)* and *Title 28 RCNY Section 3-02(p)(3)*, a tenant of a *Mitchell-Lama* apartment must occupy the *Mitchell-Lama* apartment as his or her primary residence from his or her initial occupancy and continue to reside there as his or her primary place of residence. If the tenant/cooperator has permanently vacated the apartment, any member of his or her family may request to be named as a tenant/cooperator on the lease if he or she resided with the tenant/cooperator in the apartment as a primary residence, pursuant to *Section 3-02(n)(4)* of the rules, for a period of not less than two (2) years immediately prior to the tenant/cooperator's permanent vacating of the apartment. However, that family member must have had his or her name listed on any income documentation submitted by the tenant/cooperator to HPD or to any other governmental agencies (for example: income affidavits, re-certifications or *Section 8* forms), for at least the two (2) consecutive annual reporting periods immediately prior to the tenant/cooperator's permanent vacating of the apartment or from the inception of the tenancy or commencement of the relationship if for less than such periods. The apartment must have been and continue to be the primary residence of the member of the tenant/cooperator's family who resided with the tenant/cooperator. *The burden of proof is on the family member to show use of the apartment as his or her primary residence during the required period to be eligible to succeed to possession* (emphasis added) [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

This Court finds that AHO Lippa correctly determined that Petitioner failed to establish any of the requirements for succession rights pursuant to the *Mitchell-Lama Law*. Although he claimed that he resided in the subject apartment since May 2003, his letter dated July 5, 2006 regarding residency verification stated that he had not spoken with or heard from the tenant/cooperator since July 2004. It is in contradiction to the letter dated November 21, 2006 by the tenant/cooperator wherein she allegedly made him "head of household". Consequently, AHO Lippa determined that July 2004 was the correct date of the permanent vacatur of the subject apartment by the tenant/cooperator. Accordingly, the relevant co-residency period for the determination of succession rights was from the commencement of the tenancy in April 2003 through July 2004 [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Petitioner claims that he was unable to obtain the necessary documentation to establish succession because the documents were allegedly destroyed in an April 2012 fire. However, this Court finds that he is not relieved of the burden to establish his succession rights. See *Title 28 RCNY Section 3-02(p)(3)*. As noted, the list of documents to establish primary residency is exhaustive. If any of those documents were lost or destroyed, he bears the burden of obtaining duplicates. Consequently, HPD is entitled to consider the lack of objective documentary evidence supporting his claims as well as any inconsistencies among them. See *Hochhauser v. City of New York Department of Housing Preservation and Development*, *supra*; *Studley v. New York City Department of Housing Preservation and*

Development, supra [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

This Court finds that Petitioner failed to show his efforts to obtain the appropriate documents even though he was invited to submit proof from an exhaustive list of documents in order to prove that he resided in the subject apartment as his primary residence during the relevant time period. This Court notes that First Atlantic is the same owner of the building as in 2003. Petitioner does not state that he attempted to obtain any of these documents from the tenant/cooperator file in First Atlantic's possession. 28 RCNY Section 3-02(n)(4) mandates that no dwelling may be considered the primary residence of the tenant/cooperator unless he or she provides proof that he or she filed a New York City Resident Income Tax Return at the claimed primary residence or he or she was not obligated to file such a return. While AHO Lippa specifically provided Petitioner with an Authorization for Release of Photocopies of New York State Tax Returns and/or Tax Information, Petitioner claims that the IRS and the bank do not have documents prior to 2005. However, he does not provide any correspondence from them, attesting to that fact. Moreover, Petitioner's name does not appear on the HUD Certification dated April 1, 2003 (the commencement of the tenancy) when Mojisola Ogunyemi only listed herself and her daughter Aminotu Ogunyemi as occupants of the subject apartment. Petitioner was only added to the household composition on the second income certification dated July 1, 2004. Thus, Petitioner failed to meet the requirements that he appeared on income documentation for at least two (2) consecutive annual reporting periods immediately prior to the tenant/cooperator's permanent vacating of the subject apartment in July 2004 [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

This Court agrees with AHO Lippa's finding that any documents dated after July 2004 do not prove that the subject apartment was Petitioner's primary residence from the commencement of the tenancy until July 2004. Further, Petitioner's New York State driver's license issued on February 26, 2004 (almost one (1) year after the commencement of the tenancy of tenant/cooperator in April 2003) reflected his address as Adelphi Street but not the subject apartment [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

This Court finds that the documents which Petitioner did submit in his appeal do not support his claim because they are not part of the administrative record. Even if they were considered, they fail to prove that he resided with the tenant/cooperator during her tenancy from April 2003 through July 2004. See *Schorr v. New York City Department of Housing Preservation and Development, supra* [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

This Court agrees with AHO Lippa's finding that Petitioner's argument about having paid rent for the subject apartment since May 2003 does not assist in his claim of entitlement to succession rights. As AHO Lippa correctly found, 28 RCNY 3-02(o)(3)(I) does not give the occupant any rights of tenancy under the lease/occupancy agreement even if the housing company accepts full or partial payment of rent/carrying charges from an occupant by check or otherwise [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Consequently, this Court finds that there was a rational basis for AHO Lippa to deny Petitioner's appeal for succession rights based upon the evidence in the record because he failed to prove that he resided with the tenant/cooperator in the subject apartment as his primary residence for the two (2) years immediately preceding her vacatur in July 2004 [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

Since applicants for succession rights do not have a protected property interest, this Court holds that Petitioner is not entitled to an evidentiary hearing because the appeals procedure does not provide for it. Petitioner was afforded all the due process to which he was entitled pursuant to the statutory protections. Moreover, AHO Lippa's decision was not predicated upon the credibility of any witnesses but instead based exclusively upon the submissions of documentary

evidence in the record. See 28 RCNY Section 3-02(p)(8)(ii); 28 RCNY Section 3-02(n)(1); *Pietropolo v. New York City Department of Housing Preservation and Development, supra*; *Cadman Plaza North Inc. v. New York City Department of Housing Preservation and Development, supra*; *Quan v. New York City Department of Housing Preservation and Development, supra* [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

This Court denies Petitioner’s motion for a preliminary stay barring Respondent-Landlord First Atlantic from going forward with a summary eviction proceeding in Housing Court against Petitioner because: he has failed to show a likelihood of success; there is no irreparable injury absent the granting of the preliminary injunction and there is no balancing of the equities in favor of his position. See *Gregory P. Peterson v. Roger H. Corbin, supra*; *Straisa Realty Corporation v. Woodbury Associates, supra*; *County of Orange v. Raymond Lockey, supra*; *Coinmuch Corp. Fordham Hill Owners Corporation, supra*. As required by the *HPD Rules and Regulations*, Petitioner failed to prove that: 1) he was an immediate family member or a person with a financial and emotional interdependence; 2) he resided with the tenant/cooperator for two (2) years prior to her vacatur; and 3) he was listed on the last two (2) income affidavits submitted by the tenant of record prior to her vacatur [Petitioner 1, Exhs. A-I; Respondent-Landlord 2; Municipal Respondent Answer 3, Exhs. A-L; Municipal Respondent Memorandum of Law 4].

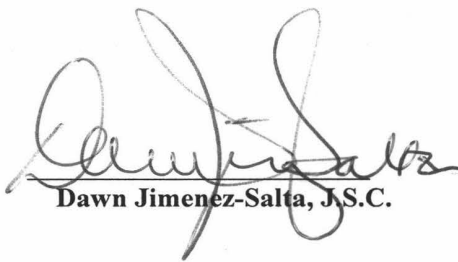
Based on the foregoing, it is hereby ORDERED as follows:

Petitioner Musbau Ogunyemi’s Order to Show Cause for an Order to annul the decision by the New York City Department of Housing Preservation and Development (“HPD”), denying his succession rights in the subject *Mitchell-Lama* cooperative apartment is DENIED, and his Petition is DISMISSED.

Petitioner Musbau Ogunyemi’s motion for a preliminary injunction barring Respondent-Landlord First Atlantic Terminal Housing Corp. from going forward with a summary eviction proceeding in Housing Court against him is DENIED.

This constitutes the Decision and Order of the Court.

Date: August 24, 2016
 In the Matter of Ogunyemi v. Been and First Atlantic
 (Index Number 501385/16)



Dawn Jimenez-Salta, J.S.C.

Hon. Dawn Jimenez-Salta

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