

**Matter of Eichelbaum v New York City Dept. of
Hous., Preserv. & Dev.**

2018 NY Slip Op 30082(U)

January 5, 2018

Supreme Court, New York County

Docket Number: 151707/2017

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32**

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**In the Matter of the Application of
JACK EICHELBAUM,**

Petitioner,

-against-

**NEW YORK CITY DEPARTMENT OF HOUSING,
PRESERVATION & DEVELOPMENT,**

Respondent.

-and-

**EAST MIDTOWN PLAZA HOUSING
COMPANY, INC.,**

Respondent.

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

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The petition to annul a determination by respondent, the New York City Department of Housing, Preservation, and Development (“HPD”) denying petitioner succession rights to a Mitchell-Lama apartment formerly leased by his sister is denied and this proceeding is dismissed.

Background

Petitioner’s sister lived in an apartment located at 404 Second Avenue, New York, New York. Petitioner claims that he moved into the apartment around February 2012 to care for his ailing sister and continued to live in the apartment until she passed away on July 26, 2013. After his sister’s death, petitioner sought succession rights to the apartment on November 18, 2013.

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**DECISION, ORDER &
JUDGMENT**

HON. ARLENE P. BLUTH

Respondent East Midtown Plaza Housing Company, Inc. ("East Midtown") denied petitioner's application and petitioner appealed to HPD. In a decision dated October 24, 2016, HPD denied petitioner's appeal of East Midtown's rejection of petitioner application for succession rights.

Petitioner claims that HPD's decision was arbitrary and capricious because HPD refused to hold an evidentiary hearing to resolve discrepancies in the documents it reviewed. Petitioner insists HPD wrongly ignored statements from individuals claiming that petitioner lived with his sister for the requisite period. Petitioner also points to documents that he claims reflects his sister's address including a juror questionnaire, a letter from petitioner's accountant, 2012 tax returns, and a New York State driver's license dated the month *after* his sister died.

HPD insists that the determination was rational. HPD emphasizes that although petitioner's 2012 and 2013 tax returns indicated that he received social security and pension benefits, petitioner did not submit any documentation relating to these benefits that reference his sister's apartment. HPD also notes that there were contradictory income affidavits for the year 2012. The first one, notarized on April 25, 2013 and stamped by East Midtown, did not list petitioner as a resident while a second income affidavit dated July 7, 2013 (two weeks before his sister died) lists petitioner as a second occupant but does not contain East Midtown's stamp.

HPD stresses that the death certificate for petitioner's sister lists petitioner's address in Northport, New York and not the apartment on Second Avenue. HPD also points to a verification, oath and designation for a petition relating to the probate of his sister's estate which indicates that petitioner lives in Northport. HPD further emphasizes that petitioner did not submit other documentation typically relied upon by HPD such as medical bills, Medicare statements or insurance documents reflecting that he lived at the subject apartment. HPD argues that petitioner

submitted two different versions of his 2012 tax returns, *neither of which was dated before his sister's death*, and one of which states that petitioner lived in Suffolk County.

Discussion

In an article 78 proceeding, “the issue is whether the action taken had a rational basis and was not arbitrary and capricious” (*Ward v City of Long Beach*, 20 NY3d 1042, 1043, 962 NYS2d 587 [2013] [internal quotations and citation omitted]). “An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts” (*id.*). “If the determination has a rational basis, it will be sustained, even if a different result would not be unreasonable” (*id.*). “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 Sch. Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231, 356 NYS2d 833 [1974]).

Pursuant to 28 RCNY § 3-02(p)(3), a family member who is a senior citizen and has resided with the tenant in the subject apartment as a primary resident qualifies for succession rights if he or she lived with the tenant “for a period of not less than one year immediately prior to the tenant/cooperator’s permanent vacating of the apartment, and has appeared on such income documentation for at least the reporting period immediately prior to the permanent vacating of the apartment by the tenant/cooperator.”

28 RCNY § 3-02(n)(4) provides that:

“It is required that the apartment of the tenant/cooperator be at initial occupancy and continue to be his or her primary place of residence. The facts and circumstances to be considered in determining whether a tenant/cooperator occupies a dwelling unit as his or her primary residence include, but are not limited to, whether such tenant/cooperator [i] specifies an address other than such dwelling unit as his or her place of residence or domicile in any tax return, motor vehicle registration, driver’s license or other document filed with a public agency, [ii] gives an address other than

such dwelling unit as his or her voting address . . . [iv] . . . [N]o dwelling unit may be considered the primary residence of the tenant/cooperator unless the tenant/cooperator's name is listed on income documentation that must be sent by the tenant/cooperator to the Department or to any other governmental agencies (for example: income affidavits, re-certifications or Section 8 forms) for the most recent preceding year for which such documentation was required. No dwelling unit 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 pursuant to § 1705(b)(1)(A) and § 1751(a) of the Administrative Code due to residency in a foreign country or pursuant to § 11-1751(a) of the Administrative Code and § 6-01 of the Tax Law because the tenant/cooperator's income for such year was below that required for the filing of a return or pursuant to § 893 or 894 of the Internal Revenue Code due to employment by a foreign government or international organization or due to any treaty obligation of the United States which applies to such taxpayer. 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."

As an initial matter, contrary to petitioner's claim, he is not entitled to an evidentiary hearing (*see Quan v New York City Dept. of Hous. Preserv. & Dev.*, 70 AD3d 528, 528, 895 NYS2d 75 [1st Dept 2010] [holding that petitioner, who sought succession rights to a Mitchell-Lama apartment leased to her grandmother, "was not entitled to an evidentiary hearing since the regulation under which she claimed succession rights does not provide for a hearing"])).

Therefore, the question for this Court is whether it was arbitrary and capricious for HPD to find, after reviewing the documentation submitted, that petitioner failed to meet his burden to establish that his sister's apartment was his primary residence for the subject time period: July 26, 2012 through July 26, 2013 (the time period is one year because petitioner is a senior citizen).

Although petitioner may disagree with the findings of HPD's Hearing Officer, this Court

is unable to find that the determination denying him succession rights was arbitrary or capricious. The Hearing Officer evaluated the evidence submitted and articulated rational reasons why petitioner failed to establish that he co-resided in his sister's apartment for one year prior to her death. It is petitioner's burden to "show use of the apartment as his or her primary residence during the required period to be eligible to succeed to possession" (28 RCNY § 3-02[p][3]). It was rational for HPD to find that petitioner failed to meet his burden.

The Hearing Officer noted that there were discrepancies in the 2012 income affidavits. Petitioner was not listed on the first income affidavit dated in April 2013, which was stamped by East Midtown. Although he was included on an income affidavit dated a few months later in July 2013, the "differing household compositions reflected in the contradictory 2012 income affidavits calls into question the credibility and reliability of these income affidavits as proof of the applicant's primary residence in the subject apartment in 2012" (NYSCEF Doc. No. 17 at 4 [the Hearing Officer's determination]). The Court finds that it was not irrational for the Hearing Officer to find that conflicting income affidavits did not establish petitioner's right to succeed in the apartment.

Petitioner also submitted certain documents that were undated or dated *after* his sister's death— these documents were not sufficient to establish the required co-residency period (*id.*). For instance, petitioner obtained an interim New York State driver's license in August 2013, after his sister's death (*id.*). The Hearing Officer also noted that petitioner "provided copies of his 2012 tax returns dated in August, 2013, after the tenant's death" and a "copy of the New York State tax return lists [petitioner's] county of residence as Suffolk and his school district as Northport" (*id.* at 5).

The Hearing Officer also discounted letters from individuals claiming that his sister's apartment was petitioner's primary residence during the alleged co-residency period. "None of these letters provide sufficient facts and details to be considered credible and reliable evidence that the applicant resided in the subject apartment as his primary residence during the co-residency period" (*id.* at 6). The Hearing Officer was entitled to review these documents and conclude that they did not independently establish petitioner's right to succeed to the apartment.

With respect to his sister's death certificate, which lists petitioner's address as Northport, the Hearing Officer found that "the fact that he listed his address at Northport at this emotional time and not the subject apartment, is evidence that he considered the Northport home to be his primary residence and not the subject apartment" (*id.* at 7). Other documents also suggest that petitioner lived in Suffolk County. "Additionally, according to the first page of an undated Answer to Complaint with an index number from 2013 filed in Suffolk County Supreme Court seemingly related to a mortgage on the Northport home, Jack Eichelbaum admitted to being an individual residing in Suffolk County, New York. Correspondence related to that litigation was addressed to Jack Eichelbaum, and his wife, at their Northport home on June 12, 2013 (during the co-residency period)" (*id.* at 7-8).

The Hearing Officer concluded that petitioner "submitted very limited independent and reliable documentation reflecting the subject apartment as his address during the requisite co-residency period. Furthermore, significant documents that [petitioner] clearly had, such as Social Security and pension statements were not submitted to prove the necessary co-residency" (*id.* at 7). This Court is unable to find that this conclusion was arbitrary or capricious.

Summary

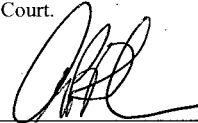
It is not the role of this Court to examine the evidence submitted to HPD and make its own determination whether petitioner is entitled to succession rights to his sister's apartment. Instead, this Court can only analyze whether the Hearing Officer's decision was rational. Here, the Hearing Officer detailed all the reasons why she found that petitioner failed to meet his burden. Petitioner sent in undated documents, documents dated after his sister's death, contradictory documents and failed to submit information that was likely to indicate his actual primary residence during the purported co-residency period (pension benefit documents). And other documentation reviewed by the Hearing Officer suggested that petitioner resided in a home on Long Island. Petitioner simply did not submit enough reliable evidence that his sister's apartment was his primary residence during the year prior to her death.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition to annul HPD's determination is denied, this proceeding is dismissed and the clerk is directed to enter judgment accordingly.

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

Dated: January 5, 2018
New York, New York



ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH