SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 6

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GENENE PAUL-DAWSON,

Petitioner,

Index No. 152707/2018
**Decision and Order**
Motion Seq. 1

For Judgment Pursuant to CPLR Article 78 of the Civil Practice Law and Rules Setting Aside the Determination of the New York State Division of Housing and Community Renewal and Riverbay Corporation,

- against -

New York State Homes and Community Renewal F/K/A New York State Division of Housing and Community Renewal and Riverbay Corporation,

Respondents.

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HON. EILEEN A. RAKOWER, J.S.C.

Petitioner Genene Paul-Dawson ("Genene") brings this Article 78 proceeding to challenge an administrative determination made by the New York State Division of Housing and Community Renewal ("DHCR") dated November 28, 2017, which denied her claim for succession rights to her deceased mother's apartment ("the apartment" or "100 Erksine Place"), located at 100 Erksine Place, Apt. 14A, Bronx, New York 10475, operated by respondent Riverbay Corporation ("Riverbay"). Genene seeks an order setting aside DHCR's final determination so that she may receive succession rights to the apartment.

A. Background/Factual Allegations

Loretta Paul ("Loretta"), mother of Genene, was the tenant-of-record for 100 Erksine Place from 1986 until her death on January 23, 2016 (petition at ¶¶ 4-5).

Following Loretta's death, Genene applied for succession rights to the apartment (petition at ¶ 6); (*See* petition exhibit E). Riverbay denied her application on August 15, 2017, stating that Genene failed to establish that she "reside[d] with the leaseholder in the unit as [her] primary residence for the required amount of time" preceding Loretta's death. (petition exhibit G). As support, Riverbay pointed to Genene's 2013, 2014, and 2015 tax returns, which listed a different address, 3940 Carpenter Avenue, Apartment ID, Bronx, NY 10466 ("the Carpenter Avenue address"), as her primary residence instead of 100 Erksine Place. Additionally, Riverbay emphasized the fact that Genene was not named on her mother's annual income affidavits for 2013, 2014 and 2015. (*id.*)

In a letter dated August 17, 2017, Genene appealed Riverbay's denial to DHCR (affirmation defendant's counsel, Letter from Applicant appealing the denial of Succession, Exhibit A1). In the letter, Genene explains that she lived with her ex-husband at the Carpenter Avenue address from 2009-2012 but moved in with her mother to 100 Erksine Place in 2013 and lived there until Loretta's death in 2016. Genene acknowledges that her name was not on the income affidavits for that time period and describes that, despite pleading with her mother, Loretta was "adamant about [not] putting me on the income affidavit. She was afraid of her rent increasing." (*id.*) Eventually, "in December 2015, her condition deteriorating, she finally decided to put me on after her brother made her do it." (*id.*) Loretta filed an "Interim Update to Affidavit of Income" dated December 15, 2015, adding Genene (*see* petition exhibit E.)

On October 11, 2017, DHCR sent Genene a letter requesting additional documentation such as birth/marital records to establish a family relationship (affirmation defendant's counsel, Letter to Applicant from DHCR, exhibit A5). Additionally the letter stated,

> "If any of the subject apartment's required filings [annual affidavits or periodic re-certifications] are missing and/or your name does not appear on any of the relevant filings, please explain that situation and provide any relevant supporting documentation...Please submit documentary evidence to show that you and the tenant-of-record occupied the subject apartment as a primary residence during the two-year period before the tenant permanently vacated the apartment or died and that you have continued to do so since that occurrence. Those materials may include, without limitation: certified copies of tax returns, voting records, motor vehicle registration, driver license,

school registration, bank accounts, employment records, insurance policies, and/or other pertinent documentation or facts, That list is not exclusive." *Id.*

On October 23, 2017, Genene replied to the DCHR indicating that the only proof of her occupancy that she could provide were letters from the building association President and Vice President attesting to the fact that she had lived in the building with her mother (affirmation defendant's counsel, Letter from Applicant, exhibit A6). She submitted those letters but did not include any other additional documents that DHCR had requested. Additionally, she explained the use of the Carpenter Avenue address on her tax returns. She wrote, "I know that my taxes from 2013 and 2014 have my husband's address. My mother was so adamant and stubborn about me using her address while I was still married, but, separated. And in the end, this is what happened. I begged her several times when she first became ill to put me on the affidavit and her response was she didn't want her rent to increase and there is still time. Unfortunately, there wasn't enough time." (*id.*)

On November 28 2017, DHCR denied Genene's appeal on the grounds that she did not establish her residence in 100 Erksine place for the required two years before her mother's death (affirmation defendant's counsel, Order Denying Appeal, exhibit A8). DHCR found that Genene was not listed on her mother's income affidavits and Genene's driver's license and tax returns listed the Carpenter Avenue address instead of the 100 Erksine Place. (*id.*) Additionally, DHCR indicated that Genene failed to include documentation showing proof of her family relationship with Loretta, thus making her ineligible for succession rights in the first place. (*id.*)

After DHCR made its determination, Genene submitted additional materials, such as a letter asking for reconsideration dated January 2, 2018 (petition exhibit B at 1), annual income affidavits for 2015 and 2016 (petition exhibit C), and a birth certificate, providing proof that Genene was, in fact, Loretta's daughter. (petition exhibit D).

Presently before the court is Genene's article 78 petition, made on March 16, 2018, to overturn the decision of the DHCR (petition). In their May 1, 2018 "Answer in Special Proceeding," Riverbay requested a dismissal of the petition "with costs and disbursements, along with such other and further relief as to the Court seems proper and just." Similarly, on June 13, 2018, the DHCR submitted a cross-motion to dismiss Genene's petition as well.

B. Legal Standard

Background

Due to a shortage of affordable housing for low income New Yorkers, the legislature enacted the Private Housing Finance Law ("PHFL"), commonly known as the Mitchell-Lama Housing Law. *See* PHFL §11. Under the law, private housing companies are offered loans and tax exemptions in exchange for offering below market rent and submitting to statutory restrictions and regulatory oversight by the DHCR (PHFL §11, 31-32). Pursuant to PHFL §32[3], the DHCR is permitted promulgate regulations in line the Mitchell-Lama law.

For instance, under a DHCR regulation, housing companies must annually review the aggregate income of those "in possession" of Mitchell-Lama housing (9 NYCRR §1727-2.2[c]) and all tenants are required to report the income of all occupants via annual affidavits. (9 NYCRR §1727-2.4[b]-[c]). Failure to do so could result in a surcharge (9 NYCRR §1727-2.6[a]).

Additionally, in the event that the tenant of record dies or chooses to vacate the apartment, DHCR regulations govern the procedure for when a family member wishes to apply for succession rights to a Michtell- Lama apartment (*see* 9 NYCRR § 1727-8). "Regulations providing for succession rights to Mitchell-Lama apartments serve the important remedial purpose of preventing dislocation of long-term residents due to the vacatur of the head of household." (*Murphy v New York State Div. of Housing & Cmty. Renewal,* 21 N.Y.3d 649, 653 [2013].) "In the event that Mitchell–Lama tenants vacate an apartment, their co-occupants are not automatically entitled to succeed to the tenancy. Under the applicable regulations, succession applicants must make an affirmative showing in order to establish their eligibility." (*id.*)

An applicant seeking succession must be a family member who "occupied the dwelling unit with the tenant as the primary residence…for a period of not less than two years." (9 NYCRR §1727-8.2[a][1][i]). "Family Member" means "spouse, son, daughter…of the tenant" or another person living with the tenant who "can prove emotional and financial commitment and interdependence between such person and the tenant." (9 NYCRR §1700.2 [a][7]). "Primary residence" is "the dwelling unit in which the person actually resides, [and] maintains a permanent and continuous physical presence." (9 NYCRR § 1700.2[a][13]).

To establish primary residence, the applicant must provide "the listing of such person on all annual income affidavits, certifications or recertifications required to be executed and filed during the applicable period" and offer evidence to establish actual occupancy of the unit, such as "copies of tax returns, voting records, motor vehicle registration, driver's license, school registration, bank accounts, employment records, insurance policies, and/or other pertinent documentation or facts." (9 NYCRR §1727-8.2[a][2][i]-[ii]).

The absence of income affidavits, alone, is not dispositive and succession rights may still be found when the remainder of the evidence establishes the applicant's occupancy. (*Murphy,* 21 N.Y.3d at 652-655) (holding that "because the evidence of Murphy's primary residency was overwhelming, and because there was no relationship between the tenant-of-record's failure to file the income affidavit and the succession applicant's income or occupancy, the agency's determination was arbitrary and capricious.") (*Compare Hochhauser v City of New York Dept. of Hous. Preserv. and Dev.*, 48 AD3d 288, 289 [1st Dept 2008]) (holding that the mere presence of petitioner's name on the relevant income affidavits was insufficient to establish succession rights when the remainder of the evidence, such as "inconsistencies among the documents that were submitted, and the fact that petitioner provided an address other than the subject apartment as his place of residence on a tax return filed during the relevant time period," suggested otherwise.)

Witness statements, in the absence of other documentation, may suffice to enable an applicant to meet his or her affirmative obligation to establish succession rights only if the statements are specific and the witnesses are "credible"(*see generally 300 E. 34th St. Co. v. Habeeb,* 248 A.D.2d 50, 55, 52 [1st Dept 1997]). When witness statements are less specific and less definitive, the court may deem them insufficient. (*See for example Renda v New York State Div. of Hous. and Community Renewal*, 22 AD3d 382 [1st Dept 2005]) (rejecting witness statements that did not "definitively state that she moved in, or that they met or saw her there"). (*See also Sherman v New York State Div. of Hous. and Community Renewal,* 144 AD3d 533, 534 [1st Dept 2016]) (The DCHR denied a petitioner's succession rights applications because "the record shows petitioner was not named on the income affidavits during the relevant time period and, other than an affidavit from a friend of petitioner's mother, who said that the apartment was petitioner's primary residence, petitioner failed to submit any other documentary evidence showing that the apartment was his primary residence.")

Article 78 Proceeding Standard

Article 78 proceedings are brought to determine "whether a[n agency] determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." (CPLR § 7803).

"In reviewing an administrative agency determination [the court] must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious." (*Gilman v New York State Div. of Hous. and Community Renewal*, 99 NY2d 144, 149 [2002]). "Arbitrary action is without sound basis in reason and is generally taken without regard to the facts." (*Pell v Bd. of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]).

When assessing whether a case is arbitrary and capricious, "courts must scrutinize administrative rules for genuine reasonableness and rationality in the specific context presented by a case." (*Kuppersmith v Dowling*, 93 NY2d 90, 96 [1999]). Yet, in order to defer to the agency's ruling, "all that is required is that the agency's determinations have a rational basis in the 'record' before it." (*Colton v Berman*, 21 NY2d 322, 334 [1967]).

"If the court finds that the determination is supported by a rational basis, it must sustain the determination even if the court concludes that it would have reached a different result than the one reached by the agency…Further, courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise." (*Peckham v Calogero*, 12 NY3d 424, 431 [2009]).

"In reviewing orders of the DHCR, courts are limited to the factual record before the agency when its determination was rendered. As a rule, the court may not consider evidence concerning events that took place after the agency made its determination." (*Rizzo v New York State Div. of Hous. and Community Renewal*, 6 NY3d 104, 110 [2005]).

C. Discussion

The DHCR's determination that Genene failed to make an affirmative showing of her eligibility for succession rights was neither arbitrary nor capricious (*Gilman*, 99 NY2d at 149). The decision had "rational basis in the record" since it

was generated upon consideration of all documents that Genene submitted (*Colton*, 21 NY2d at 334).

Genene was required to provide proof that she cohabited the apartment with her mother for at least two years prior to her mother's death (9 NYCRR §1727-8.2[a][1][i]). As such, Genene needed to submit documentation showing residency in the apartment for the period of January 23, 2014 to January 23, 2016 (the date of Loretta's death). However, Genene was not named on Loretta's annual income affidavits for 2013, 2014 and 2015. While, the absence of her name on these income affidavits, alone, is not dispositive, here, the remainder of the evidence does not clearly show that Genene lived in the apartment (*Murphy,* 21 N.Y.3d at 655). The fact that Genene's 2013, 2014, and 2015 tax returns list a different address instead of 100 Erksine Place suggests that Genene did not primarily reside at 100 Erksine Place during the period in question.

Moreover, when given the opportunity by DHCR, Genene could have submitted other materials to verify her residency, such as, "voting records, motor vehicle registration… school registration, bank accounts, employment records, insurance policies, and/or other pertinent documentation" but she failed to do so (9 NYCRR §1727-8.2[a][2][i]-[ii]).

Genene did submit letters from the building association President and Vice President attesting to the fact that she had lived in the building with her mother. (affirmation defendant's counsel, Letter from Applicant, exhibit A6). While such letters, in the absence of other documentation, might have sufficed for Genene to meet her affirmative obligation to establish succession rights, here, Genene provided other documentation that contradicted her neighbor's statements (namely her tax returns and driver's license featuring the Carpenter Avenue address instead of 100 Erksine Place) (*300 E. 34th St. Co*, 248 A.D.2d at 52).

Lastly, even though Genene submitted additional relevant materials to support her case, such as her annual income affidavits for 2015 and 2016 (petition exhibit C), and her birth certificate (petition exhibit D), these materials were submitted after DCHR made its final determination and "the court may not consider evidence concerning events that took place after the agency made its determination." (*Rizzo v New York State Div. of Hous. and Community Renewal*, 6 NY3d 104, 110 [2005]).

Wherefore it is hereby

ORDERED and ADJUDGED that the petition is denied and the cross motion to dismiss is GRANTED. The proceeding is dismissed and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: AUGUST 6, 2018

EILEEN A. RAKOWER, J.S.C.