Matter of Marteles v New York City Depart. of Hous. Preserv. & Dev.
2019 NY Slip Op 30406(U)
February 20, 2019
Supreme Court, New York County
Docket Number: 160611/2017
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

----------X

INDEX NO. 160611/2017

MOTION DATE 11/30/2017

MOTION SEQ. NO. 001

In the Matter of

PAMELA MARTELES and ARTHUR MARTELES

Petitioner,

- v -

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION & DEVELOPMENT,

Respondent.

DECISION, ORDER, and JUDGMENT

----------X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In this CPLR article 78 proceeding, the petitioners seek judicial review of an August 7, 2017, New York City Department of Housing Preservation & Development (HPD) determination that denied their application for succession rights to a Mitchell-Lama apartment. The HPD opposes the petition. The petition is denied and the proceeding is dismissed.

Esplanade Gardens (hereinafter Esplanade) is a residential cooperative corporation that owns and operates a cooperative apartment building at 2541 7th Avenue in Manhattan pursuant to the Private Housing Finance Law. The late Ronald Johnson was the tenant-shareholder of Apartment 2C. Johnson died on November 5, 2014. On March 29, 2015, the petitioners---Johnson's daughter and grandson, respectively---applied for succession rights to the apartment. On April 20, 2015, Esplanade denied their request, concluding that the petitioners failed to show that they resided in the apartment as their primary residence with Johnson for two years preceding his death, as required by 28 RCNY 3-02(p)(3). Rather, Esplanade concluded that Johnson, although the tenant of record, had vacated the apartment several years earlier, and

established a permanent residence in Jacksonville, Florida. The petitioners appealed the denial to the HPD.

Over the next two years, HPD afforded the petitioners the opportunity to supplement the administrative record with any documentation proving that they resided with Johnson in the apartment as their primary residence between November 5, 2012, and November 4, 2014. The petitioners submitted at least 23 separate documents, while Esplanade submitted 18 documents. Most of the documents showed that the petitioners resided in the apartment, but only a handful had any bearing on their contention that Johnson actually resided there with them as his primary residence during that time period. These included checks with Johnson's name and the address of the subject apartment inscribed thereon and an undated tax warrant mailed to Johnson at the apartment in 2014. The documents also included a 2006 interview report with Esplanade in which Johnson stated that, although he purchased property in Jacksonville, it was only a vacation house, and that he considered the subject apartment to be his primary residence.

The HPD hearing officer concluded that, although the petitioners were members of Johnson's family and resided in the apartment, they did not establish that Johnson first "vacated" the apartment only upon his death. Rather, the hearing officer found that Johnson had vacated the apartment by 2010, adopted Florida as his permanent residence, and only stayed at the New York apartment during summer months. Specifically, the hearing officer noted that Johnson listed a Jacksonville, Florida, address for both himself and his wife on his wife's March 24, 2010, death certificate, and that the petitioner Pamela Marteles identified the Jacksonville address as Johnson's residence on his own 2014 death certificate. She further found that, although the petitioners were listed each year on Johnson's income affidavits, his wife was not listed as a resident of the apartment in 2008 and 2009, suggesting that both she and Johnson had permanently resided in Florida since that time. The hearing officer also noted that, although "Mr. Johnson earned income every year from 2008 through 2013 . . . no

documentation, such as pension or Social Security statements, was submitted as proof that he continued to reside in the subject apartment as a primary residence."

The hearing officer concluded that, despite being given ample opportunity to demonstrate that the apartment was Johnson's primary residence as of his date of death, the petitioners failed to do so. The hearing officer concluded that the documentation they submitted, consisting of cancelled checks, letters from friends and former neighbors, and undated permission forms and correspondence, was insufficient to establish that Johnson resided at the apartment as his primary address between November 2012 and November 2014. The hearing officer found the letters to be conclusory in nature and lacking facts and details sufficient to constitute proof that Johnson continued to live in the apartment as his primary residence during that time. Nor did she find persuasive the contention that Johnson occasionally had mail delivered to him at the apartment.

In addition, the hearing officer did not credit the petitioners' contention that they could not provide copies of Johnson's income tax returns in support of their claim. Although the petitioners contended that Johnson was exempt from filing income tax returns after 2004, the hearing officer noted that Johnson certified on his income affidavits for each year from 2008 through 2013, save 2012, that he did indeed file income tax returns.

Moreover, the hearing officer concluded that, were she to deem March 24, 2010, to be the date that Johnson vacated the apartment, and assume that the petitioner Arthur Marteles was disabled, thus shortening the required co-residency period from two years to one, the petitioners submitted insufficient documentation to establish that they were "co-residents" with Johnson for the one year between March 24, 2009, and March 24, 2010.

Hence, the hearing officer determined that the petitioners failed to establish their entitlement to succession rights to the apartment.

The standard of review of the determination in this matter, which was not made after a trial-type hearing directed by law, is whether the HPD's determination to deny succession rights

was arbitrary and capricious (*see Matter of Borekas v New York City Dept. of Hous. Preservation & Dev.*, 151 AD3d 539 [1st Dept 2017]). "Where a succession claim is made after a Mitchell-Lama tenant of record dies, the applicant must make an affirmative showing of three criteria: (1) that the applicant qualifies as a family member or was otherwise interdependent with the tenant of record, (2) that the unit at issue was the applicant's primary residence during the two years immediately prior to the tenant's death, and (3) that the applicant was listed as a co-occupant on the income affidavits filed for the same two year period" (*id.* at 539; *see* 28 RCNY 3-02[p][3]). Where, as here, there is documentary evidence that the decedent did not reside in the apartment as his primary residence with the petitioners during the relevant two-year period preceding his death, affidavits or letters from neighbors attesting only that they occasionally observed the decedent at the apartment are generally insufficient to rebut that evidence or prove that the apartment was his primary residence, particularly in the absence of overwhelming proof to the contrary (*see Matter of Borekas v New York City Dept. of Hous. Preservation & Dev.*, 151 AD3d 539 [1st Dept 2017].; *see also Matter of Murphy v New York State Div. of Hous. & Community Renewal*, 21 NY3d 649 [2013]; *Matter of Grossbard v New York State Div. of Hous. & Community Renewal*, 137 AD3d 661 [1st Dept 2016]).

The petitioners submitted virtually nothing constituting "traditional indicia of primary residence at this address -- i.e., driver's license, voter's registration, income tax returns, telephone records, bank statements, mail addressed to [the decedent] at the address, moving receipts, and canceled checks" (*Lesser v Park 65 Realty Corp.*, 140 AD2d 169, 174 [1st Dept 1988]), and that which they did submit was not persuasive (*cf. Glenbriar Co. v Lipsman*, 5 NY3d 388, 392-393 [2005] [with respect to whether a leasehold is a tenant's primary residence within the meaning of the Rent Stabilization Code, no single factor is dispositive, although tax returns, drivers' licenses, voter registrations, and the subletting of the subject unit are all relevant factors]).

The petitioners rely on the decision of Justice Figueroa in *Matter of Slesinger v Department of Hous. Preservation & Dev.* (2005 NY Slip Op 30349[U] [Sup Ct, N.Y. County, Apr. 1, 2005]) for the proposition that an address identified in a death certificate---there the petitioner's---does not constitute valid evidence of primary residence. However, the Appellate Division, First Department, reversed Justice Figueroa's order and judgment on April 5, 2007, and denied the petition, concluding that the petitioner there "failed to submit adequate documentation to establish that he resided in the subject premises for the requisite time period" (*Matter of Slesinger v Department of Hous. Preservation & Dev.*, 39 AD3d 246, 247 [1st Dept. 2007]). The First Department in *Slesinger* also determined that it was error for the Supreme Court to remit the matter to the HPD to consider additional evidence where a petitioner had ample opportunity to compile relevant documentation, the very situation that obtains here.

The HPD's determination here was similarly based on its conclusion that the petitioners' documentation was inadequate. The HPD's determination that the petitioners failed to establish that Johnson resided in the apartment with them as his primary residence from November 2012 to November 2014 has support in the record, was rational, and was not arbitrary and capricious. Administrative agencies enjoy broad discretionary authority under CPLR §7803, where a court may only overturn an administrative action if the record reveals that there is no rational or reasonable basis for it. The reviewing court "may not substitute its own judgment of the evidence for that of the administrative agency but should review the whole record to determine whether there exists a rational basis to support the findings upon which the agency's determination is predicated" (*see Purdy v Kreisberg,* 47 NY2d 354, 358 [1979]). If there is sufficient evidence to support the agency's determination, the court cannot overturn the agency's decision merely because it might have reached a contrary conclusion (*see Sullivan County Harness Racing Assn v Glasser*, 30 NY2d 269, 278 [1972]).

Accordingly, it is

ORDERED that the petition is denied; and it is

ADJUDGED that the proceeding is dismissed.

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

2/20/2019
DATE

JOHN J. KELLEY, J.S.C.
HON. JOHN J. KELLEY
J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE