

**Southbridge Towers, Inc. v New York State Div. of  
Homes & Community Renewal**

2020 NY Slip Op 32522(U)

July 30, 2020

Supreme Court, New York County

Docket Number: 159384/2019

Judge: Eileen A. Rakower

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

**PRESENT: Hon. EILEEN A. RAKOWER**  
*Justice*

**PART 6**

**In the matter of the Application of  
SOUTHBRIDGE TOWERS, INC.,**

**INDEX NO. 159384/2019  
MOTION DATE  
MOTION SEQ. NO. 1  
MOTION CAL. NO.**

**Petitioner,**

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

**- against-**

**NEW YORK STATE DIVISION OF HOMES AND  
COMMUNITY RENEWAL,**

**Respondent.**

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

Notice of Motion/ Order to Show Cause – Affidavits – Exhibits ...  
Answer – Affidavits – Exhibits \_\_\_\_\_  
Replying Affidavits

**PAPERS NUMBERED**

█  
█  
█

**Cross-Motion: Yes    x    No**

Petitioner Southbridge Towers, Inc. (“Petitioner”), brings the Article 78 Petition seeking to annul the decision of Respondent New York State Division of Homes and Community Renewal (“DHCR” or “Respondent”), which granted Melissa Mejias Parker (“Applicant”) succession rights to 100 Beekman Street, Apt. 6/8F, New York, New York (hereinafter “Subject Premises”). Respondent opposes.

Facts

Petitioner was formed pursuant to Article 2 of the Private Finance Housing Law of the State of New York, known as the Mitchell-Lama Law. On September 10, 2015, Petitioner’s shareholders voted to become a free market cooperative with a multiyear privatization plan. Rosa Mejias (“Tenant”), the tenant of record in the Subject Premises, passed away on November 26, 2014, prior to Petitioner’s reconstitution. Applicant made a request to Petitioner seeking succession rights to the Subject Premises dated March 3, 2015. (Petition, Exhibit A). The Tenant’s passing, as well as the request for succession rights occurred prior to Petitioner’s reconstitution, thus Applicant’s right to succession is based on DHCR’s regulations.

On August 12, 2015, Petitioner denied Applicant's aforementioned application from March 3, 2015. (Petition, Exhibit B). On September 11, 2015, Applicant appealed Petitioner's rejection of her succession application to DHCR. (Petition, Exhibit C). On September 18, 2015, Respondent granted Applicant the right to appeal and requested further documentation. (Petition, Exhibit D). Respondent issued an Order dated May 31, 2019 (hereinafter, the "Order"), granting Applicant's appeal and granted Applicant succession rights. (Petition, Exhibit E).

The contentions of both Petitioner and Respondent, among other statutes, are mostly reliant upon 9 NYCRR § 1727-8. The various regulations that makeup 9 NYCRR § 1727-8 largely outline the procedures in the succession process for Mitchell-Lama apartments. These statutes outline the requirements that must be met to be entitled to succession. First, the applicant must be a family member as defined in 1700.2(a)(7). (9 NYCRR § 1727-8.2(a)). Next, the applicant must have occupied the apartment in question for a period of two years immediately prior to the tenant's departure, or a period of one year if the applicant is a senior citizen or disabled. (9 NYCRR § 1727-8.2(a)(1)(i)). If the applicant and tenant co-occupied the apartment in question for less than the aforementioned periods, the two must have co-occupied either from the start of the tenancy or the start of the relationship between the two individuals. (9 NYCRR § 1727-8.2(a)(1)(ii)). The second requirement for succession rights is to establish the applicant's proof of primary residency "which must include: the listing of such person on all annual Income Affidavits, certifications or recertifications required to be executed and filed during the applicable period;" as well as, "other evidence as establishes that such person actually occupies the dwelling unit for his or her own dwelling purposes and has an ongoing, substantial, physical nexus to the unit," which can be a variety of documents including tax returns, voting records, driver's license, and employment records. (9 NYCRR § 1727-8.2(a)(2)). The aforementioned requisite periods of co-residency "shall not be deemed interrupted by any period during which the *family member*, who is listed on the tenant's Income Affidavit temporarily relocates because he or she... is enrolled as a full-time student." (9 NYCRR § 1727-8.2(a)(2)(b)) (emphasis added).

Petitioner contends that they were correct in denying Applicant's succession request and as such the Order must be reversed. (Verified Petition at 5). Respondent and Applicant oppose the Petition.

#### Parties' Contentions

Petitioner contends that Respondent's decision to grant Applicant succession rights "was arbitrary and capricious... and should be annulled and reversed by this

Court.” (Reply Memorandum of Law in Further Support of Petition at 1). Petitioner contends that Applicant’s submissions do not prove her claim that she resided in the Subject Premises with Tenant for the requisite period. Petitioner argues that Applicant provided no proof that she occupied the Subject Premises prior to leaving for college, presumably in August of 2009, despite the fact that Applicant contends that she moved into the Subject Premises in 2008. This lack of evidence, Petitioner asserts, shows that Applicant’s time at college cannot qualify as an excused absence. Petitioner argues that Applicant and Tenant could not have co-occupied the Subject Premises for the requisite period because Tenant moved into a nursing home in January of 2013 and did not permanently return to the Subject Premises; thus, Petitioner contends, the two could not have co-resided for either one or two years.

Petitioner contends that although Applicant was included on Income Affidavits for the Subject Premises in 2009, 2010, and 2012, she was attending college in North Carolina during these years and only returned to the Subject Premises for temporary vacations. Petitioner further contends that the 2013 tax returns submitted by Applicant should not be considered valid evidence, as they state that Applicant spent the entirety of 2013 at Subject Premises, which is false, given that she was in North Carolina. Petitioner argues that the bank statements submitted by Applicant state that she was in North Carolina from August 11, 2012 to September 7, 2012 and November 8, 2012 to December 7, 2012, further prove that Applicant and Tenant could not have co-resided in the Subject Premises for the requisite time, whether this be one or two years.

Petitioner argues that it was irrational for Respondents to conclude that Applicant qualifies as disabled based on the documents she submitted. Petitioner contends that Applicant did not submit any diagnosis of a disability, simply a document explaining that she went “to college campus health services with complaints of depression.” (Reply Memorandum of Law in Further Support of Petition at 9). Petitioner asserts that Applicant redacted the physician’s examination so heavily that “the record is barren of any objective medical proof of disability, such as a letter from a physician containing a diagnosis or even record of treatment.” (*Id.*) Petitioner contends that even if Applicant was diagnosed with a disability, she provides no proof that this disability is permanent, thus there is no reason to conclude that Applicant’s disability was present one year prior to Tenant’s death. Finally, Petitioner contends that the diagnosis of a disability is typically issued through government documentation, which Applicant does not have.

In opposition, Respondent contends that it only has to prove to the Court that its decision was within reason and that in order to reverse its decision, the Court must not simply disagree with its decision, but must find it arbitrary, capricious, or

unable to be defended with reasonable facts and information. Respondent further contends that even if the Court would have made a different decision, its decision was grounded in fact and thus cannot be overturned.

Respondent argues that its decision to make a finding of fact that Applicant qualifies as disabled, and thus apply a minimum of one year of co-occupancy between Applicant and Tenant, was within reason. Next, Respondent argues that Applicant submitted Income Affidavits for April 2010, 2011, 2013, and 2014, which are each applicable starting from one-year prior to their submission. Respondent asserts that “[b]ased on the April 28, 2014 date and Income Affidavit, the one-year co-occupancy period in this matter began, at the earliest, on April 28, 2013.” (Affirmation in Opposition to the Petition and in Support of the Order Under Review at 9). Respondent asserts that the Income Affidavits alone cannot be fully representative of a claim to succession rights. Respondent contends that Applicant provided her 2013 income tax returns as well as several other “financial documents” that list the Subject Premises. (Affirmation in Opposition to the Petition and in Support of the Order Under Review at 10). Respondent asserts that the aforementioned documents led them to the conclusion that Applicant and Tenant co-occupied the Subject Premises for the requisite period. Respondent contends that not every document provided was “perfect or pristine,” but this may be expected in a family with a history of mental disabilities. (Affirmation in Opposition to the Petition and in Support of the Order Under Review at 11). Respondent asserts that there is more than sufficient evidence to show that Applicant qualifies for succession rights, thus, the determination in question has a rational basis and “is in accord with applicable law and is entitled to judicial affirmance.” (*Id.*)

Respondent argues that the Court may not consider any evidence or arguments that were not involved in the original determination made by Respondents. Respondent contends that the Court is to rule on whether the determination was rational, thus the Court must refuse to consider information which was not made part of the administrative record. Respondent asserts that Petitioner’s arguments regarding Applicant’s status “as a full time student for the period 2009-2013 at a college out of state (Petition at 5)”; Tenant’s admission “to a nursing home on or about January 2013 (*Id.*)” which, Petitioner’s contend, should be considered the end of her occupancy of the Subject Premises; and the contention that “it was an error to consider the one-year period of co-occupancy as opposed to two years,” cannot be considered by the Court given that they were not considered by Respondents in their determination (*Id.*) Respondent argues that the May 31, 2019 DHCR order should be affirmed and the Petition should be dismissed in its entirety.

### Legal Standard

The question before the Court is “whether a 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. The Court has a well-defined role in Article 78 proceedings, the Court is to determine “whether there is a rational basis for the administrative orders.” *Colton v Berman*, 21 NY2d 322, 329 [1967].

The Court is not tasked with deciding whether they would have made the same decision as the Agency in question and the Court is not to substitute their own determination when writing their opinion. *Matter of Procaccino v Stewart*, 32 AD2d 486, 489 [1st Dep’t, 1969]. “We are considering only what is presented in this case, and our duty in the premises is so simple and clear cut as to be almost axiomatic: we are to determine if an administrative agency... has acted in violation of law, without a rational basis, on insufficient considerations, arbitrarily, and capriciously.” *Id.*

In order to be granted succession rights to a Mitchell-Lama apartment, an applicant must be a family member as defined in 1700.2(a)(7), must have occupied the apartment in question for two years immediately prior to the tenant’s departure, or a period of one year if the applicant is disabled or a senior citizen, and the applicant must establish proof of primary residency. *See* 9 NYCRR § 1727-8.2(a). To establish proof of primary residency, an applicant must be listed “on all annual Income Affidavits, certifications or recertifications required to be executed and filed during the applicable period.” 9 NYCRR § 1727-8.2(a)(2). Although Income Affidavits are an important and necessary part of the proof of primary residency and co-occupancy, they cannot alone settle the question altogether. *Murphy v. DHCR*, 21 N.Y.3d 649 [2013]. To this end, there is “other evidence as establishes that such person actually occupies the dwelling unit for his or her own dwelling purposes and has an ongoing, substantial, physical nexus to the unit,” which can include a variety of documents such as tax returns, voting records, driver’s licenses, and employment records. 9 NYCRR § 1727-8.2(a)(2).

“[J]udicial review of an administrative agency determination is limited to the grounds invoked by the agency.” *Rizzo v. N.Y.S. Div. of Hous. & Cmty. Renewal*, 16 A.D.3d 72, 75-76 [1st Dep’t 2005], *aff’d*, 6 N.Y.3d 104 [2005]. “In reviewing orders of the DHCR, courts are limited to the factual record before the agency when its determination was rendered.” *Id.*

### Discussion

Petitioner has failed to show that Respondent's decision to deny Applicant succession rights to the Subject Premises was arbitrary and capricious. Applicant provided Respondent with a myriad of documents which allowed it to rationally reach the conclusion that Applicant had co-resided in the Subject Premises with Tenant for the requisite period of time. Petitioner did not provide sufficient evidence that Respondent's order for Applicant to be granted succession rights was "made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion." *See* NY CPLR § 7803.

Respondent's May 31, 2019 Order lists the three necessary requirements "to obtain succession to an apartment in a State-aided housing project subject to the PHFL." (Verified Answer, Exhibit A). Respondent stated:

First, succession claimants must establish by a preponderance of credible evidence they are family members of the subject apartment's tenant-of-record. 9 NYCRR §§ 1727-8.1, 1727 8 2(a), and 1727-8.4(a). *See also Calistro v. Lawlor*, 2011 NY 51Ip Op. 30409(U) at 4 [Sup. Ct. N.Y. Co. 2011]; *5th & 106th St. Assocs., LP v. Montanez*, 2015 NY.5lip Op 31876(U) at 9 [Civ. Ct. N.Y. Co. 2015]. The Regulations identify those who may qualify as family members. 9 NYCRR § 1700.2(a)(7).

Second, the succession claimant and tenant-of-record must jointly have occupied the subject apartment as their primary residence. That primary residence must exist throughout the applicable occupancy period immediately prior to the date the tenant permanently vacates the apartment. 9 NYCRR §1727-8.2(a)(1), Cf. 9 NYCRR § 1727-8.3(a) (succession in case of tenant's death). A succession claimant may have only one primary residence. 9 NYCRR§ 1727-8.2(a)(2)(ii). *See eg., Sherman v. New York State Div. of Hous. and Community Renewal*, 144 A.D.3d 533, 534 [1st Dept 2016].

Third, the Regulations provide for the succession claimant to submit established proof of primary residence. 9 NYCRR § 1727-8.2(a)(2). That proof includes the listing of the claimant and tenant-of-record's names together on the subject apartment's required filings with the housing company during the applicable co-occupancy period, 9

NYCRR § 1727-8u2(a)(2)(a), and other pertinent documentation or facts, 9 NYCRR §1727-8.2(a)(2)(b).

(Verified Petition, Exhibit E).

Respondent reasonably determined that Applicant met the above requirements and thus qualified for succession rights to Tenant’s apartment. Applicant provided documentation that established that she was a “remaining family member,” that she resided in the Subject Premises with the Tenant for the applicable occupancy period after the Tenant permanently vacated the Subject Premises. Petitioner did not challenge Applicant’s evidence in the administrative record, thus Respondent accepted Applicant’s evidence as true and undisputed. Accordingly, Petitioner fails to meet its burden of demonstrating that Respondent’s determination should be disturbed by the Court.

Wherefore it is hereby

ORDERED that the Petition be denied; and it is

ORDERED that the Petition 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: July 30, 2020**

ENTER:   
J.S.C.

**HON. EILEEN A. RAKOWER**

**Check one: X FINAL DISPOSITION NON-FINAL DISPOSITION**