

Matter of Barfiled v Visnauska
2021 NY Slip Op 31589(U)
May 12, 2021
Supreme Court, New York County
Docket Number: 101884/2019
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMOND PART IAS MOTION 35EFM

Justice

-----X

IN THE MATTER OF THE APPLICATION OF ANGELA BARFIELD,

Plaintiff,

- v -

RUTHANNE VISNAUSKA, AS COMMISSIONER OF THE NEW YORK STATE HOMES AND COMMUNITY RENEWAL, STARRETT CITY, INC.

Defendant.

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INDEX NO. 101884/2019

MOTION DATE 09/04/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 53, 54, 55, 56, 58, 59

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

Upon the foregoing documents, it is

ORDERED that the motion, pursuant to CPLR 2221, of petitioner Angela Barfield (motion sequence number 003) is denied; and it is further

ORDERED that counsel for respondent New York State Division of Homes & Community Renewal shall serve a copy of this order along with notice of entry on all parties within ten (10) days.

In this proceeding, petitioner Angela Barfield (Barfield) moves, pursuant to CPLR 2221, for leave to renew her Article 78 petition, which the court previously denied and dismissed in a decision dated July 14, 2020 (motion sequence number 003). For the following reasons, Barfield's motion is denied.

FACTS

This matter involves Barfield's claim to succession rights to the tenancy of apartment unit 10E in a building (the building) located at 1460 Pennsylvania Avenue in the County of Kings, City and State of New York. *See* notice of motion, exhibit T. The building is rent-regulated and was managed by co-respondent Starrett City, Inc. (Starrett City) pursuant to the Public Housing Finance Law (PHFL a/k/a the "Mitchell-Lama Law"). *Id.* The co-respondent New York State Division of Homes & Community Renewal (DHCR) is the agency which oversees all rent regulated housing located within New York City. *Id.*

The court discussed the facts of this case at length in its earlier decision (motion sequence number 001), and will not repeat them at length here. Barfield's current motion implicates the following portion of the court's July 14, 2020 decision on motion sequence number 001:

"First, Barfield argues that the DHCR order was arbitrary and capricious in that it 'failed to consider all of the evidence pointing toward a non-traditional family relationship between' Turner and herself. *See* petitioner's mem of law at 4-7. Barfield specifically alleges that the DHCR order 'entirely fails to consider the letters and documentary evidence [she] submitted . . . including the December 2015 power-of-attorney form signed by the parties which evidences the 'formalizing of legal obligations . . . [and that] rather DHCR seemingly relies on one factor - indeed one checkbox on a re-certification form - in determining that no emotional or financial commitment and interdependency existed between [herself] and [Turner].' *Id.*, at 7. The DHCR responds that Barfield's assertion is incorrect because 'despite being specifically asked' to provide documentary evidence to establish some of the elements of a 'non-traditional family relationship,' she simply 'did not respond' to the request. *See* respondents mem of law at 13- 15. The DHCR notes that appellate courts have held that a succession claimant's act of failing to provide requested documentation can provide a rational basis for the DHCR to deny a succession rights claim. *Id.* On that point of law, the DHCR is correct. *See*

e.g., *Matter of Ryan v New York City Dept. of Hous. Preserv. & Dev.*, 173 AD3d 642 (1st Dept 2019): citing *Matter of Renda v New York State Div. of Hous. & Community Renewal*, 22 AD3d 382, 383 (1st Dept 2005). The court also notes that the DHCR order clearly records that Barfield ‘did not respond’ to the notice DHCR had sent her informing her that she ‘could submit documentary evidence to show the existence of an emotional and financial commitment and interdependence’ between herself and Turner. *See* return, exhibit A-13. Barfield's allegation that the DHCR ‘failed to consider’ the significance of the power of attorney form she executed with Turner on December 28, 2015 is belied by the ensuing text of the DHCR order, which plainly includes an analysis of that document. *Id.* The court further finds that it was reasonable for the DHCR to conclude that it would be improper to focus primarily on the existence of a power of attorney with no showing of what personal or financial matters Barfield actually handled for Turner. *See* respondents' mem of law at 15. Although the ‘formalization of legal obligations’ by executing a power of attorney is one of the factors listed in 9 NYCRR § 2520.6 to determine whether there was ‘emotional and financial commitment and interdependence’ between two non-traditional family members, the caselaw that interprets that regulation holds that the presence of any single factor is not dispositive, and that the existence of such a relationship is to be judged using a ‘totality of the circumstances’ test. *See e.g.*, *Matter of 530 Second Ave. Co., LLC v Zenker*, 160 AD3d 160 (1st Dept 2018). The DHCR order plainly found that Barfield had not presented sufficient evidence of such circumstances to demonstrate the existence of such a relationship, and this is the approach sanctioned by New York law. Therefore, the court finds that Barfield's allegations are unsupported, and rejects her ‘non-traditional family relationship’ argument.

“Next Barfield argues that the DHCR order was arbitrary and capricious in that it ‘failed to consider all of the evidence pointing towards [her] co-occupancy with [Turner] for more than one year prior to his death.’ *See* petitioner's mem of law at 7-10. She specifically asserts that the DHCR order: 1) ‘fails to properly consider the weight of the letters and documentary evidence submitted . . . notably the September 2015 letter handwritten by Mr. Turner seeking to add Ms. Barfield to his lease’; and 2) ‘failed to consider Starrett City’s failure to act upon Mr. Turner's notice in September 2015 that his household composition had changed.’ *Id.*, at 9. The DHCR responds that its order was correct to find that Barfield's evidence was insufficient to show that she had co-occupied apartment 10E with Turner as their primary residence for a period of one year prior to Turner's death. *See* respondents' mem of law at 16-18. For its part, the court notes that both of the documents Barfield refers to in her argument were plainly discussed in the text of the DHCR order. *See* return, exhibit A-13. Therefore, she is incorrect to assert that the DHCR ‘failed to consider’ either of them. Instead, the text of the DHCR order makes it clear that the agency concluded that neither of those documents, on their face, demonstrated that Barfield was occupying apartment 10E as her primary residence during the period of April 9, 2016 until April 9, 2017. Indeed, Barfield's arguments assert that those documents offer secondhand proof via ‘assumption’ and ‘inference’ about her residence (and Turner's intentions), rather than by overt statement or by reference to other supporting documents. The DHCR was correct to deem such proof insufficient. The court also finds that the citations to the administrative record in the DHCR order confirmed that the available evidence showed that Barfield only occupied apartment 10E

as her primary residence for the last four months of the requisite one-year co-occupancy period mandated by 9 NYCRR § 1700-2 (a) (4). Because of this, there was clearly a rational basis from which to conclude that Barfield had not satisfied the co-occupancy requirement of her succession rights claim. Therefore, the court finds that Barfield's 'primary residence' argument is unsupported, and rejects it as well."

See notice of motion, exhibit T.

In her current motion, Barfield argues that new evidence which she did not present at the administrative appeal before the DHCR compels the court to vacate its July 14, 2020 decision, and to remand her Article 78 petition to the agency. Barfield filed this motion on August 11, 2020, and the DHCR eventually submitted its opposition thereto on January 22, 2021. See notice of motion; respondent's mem of law in opposition. This matter is now fully submitted (motion sequence number 003).

DISCUSSION

Pursuant to CPLR 2221 (e) (2) and (3), "a motion for leave to renew . . . shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and . . . shall contain reasonable justification for the failure to present such facts on the prior motion." Such a motion "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination" and "shall contain reasonable justification for the failure to present such facts on the prior motion." *Abu Dhabi Commercial Bank, P.J.S.C. v Credit Suisse Sec. (USA) LLC*, 114 AD3d 432, 432 (1st Dept 2014), quoting CPLR 2221 (e) (2), (3); *American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473, 476 (1st Dept 2006); see also *Matter of Weinberg*, 132 AD2d 190, 209-210 (1st Dept 1987), citing *Foley v Roche*, 68 AD2d 558, 568 (1st Dept 1979) (motion to renew must be based on "material facts which, although extant at the time of the original motion, were not then known to the party seeking renewal and,

consequently, were not placed before the court.”). The Appellate Division, First Department, cautions that “[r]enewal is not available as a ‘second chance’ for parties who have not exercised due diligence in making their first factual presentation.” *Chelsea Piers Management v Forest Elec. Corp.*, 281 AD2d 252, 252 (1st Dept 2001), citing *Rubinstein v Goldman*, 225 AD2d 328 (1st Dept 1996).

Here, the “new evidence” Barfield presents to support her motion consists of her late uncle’s 2016 recertification package and the documents annexed thereto, which included, inter alia, the 2015 power of attorney that her uncle executed with her, a 2015 letter from her uncle to the building’s management asking that she be added to the lease for apartment 10B, her uncle’s 2015 household composition statement, and six months’ worth of bank statements and Social Security Statements showing that she had made transaction on her uncle’s behalf in 2016. *See* notice of motion, Barfield aff, ¶¶ 20, 26; exhibits C-F. Barfield asserts that she would have included these documents on her uncle’s 2015 recertification application, but that a Starrett City management officer had advised her not to do so until Starrett City first processed her uncle’s request that she be added to his lease and household. *Id.*, ¶¶ 25, 27. Barfield further asserts that her uncle made that request in 2015, and submitted the subject documents in 2016, but that Starrett City lost his 2016 recertification package. *Id.*, ¶¶ 29, 33. Barfield then argues that the subject documents provide proof that she resided with and cared for her uncle since 2015. *Id.*, ¶¶ 26, 29. Barfield’s counsel contends that the subject documents constitute “new evidence” that justifies the grant of her CPLR 2221 motion to renew. *Id.*; Johnson affirmation, ¶¶ 61-83. The DHCR responds that Barfield’s motion should be denied, however, because “[a]ll the evidence that Petitioner seeks to have this Court consider now . . . was available to her to provide both at the administrative stage before DHCR . . . and this Court in her motion challenging the August

9, 2019 . . . Order.” *See* respondent’s mem of law at 5-7. After careful consideration, the court agrees.

As the court’s July 14, 2020 decision noted, Barfield did present two items of documentary evidence to Starrett City as part of her succession rights application which the Director of the DHCR’s Office of Integrated Housing Management also reviewed during the subsequent administrative appeal proceeding. *See* notice of motion, exhibit T. These specifically included: 1) the power of attorney that she executed with her uncle in December 2015; and 2) the September 2015 letter from her uncle to Starrett City requesting that Barfield be added to his lease and household composition. *Id.* The bank and Social Security statements showing that Barfield executed transactions on her uncle’s behalf were all dated 2016, so they could not have been included in the 2015 recertification application. However, they were certainly available to be included in Barfield’s uncle’s 2016 recertification application, which Barfield claims was lost by Starrett City. Thus, they were also available for inclusion with the succession rights application that Barfield submitted in 2017, with the administrative appeal that she submitted in 2018, and with the Article 78 petition that she filed in 2019.

The court noted at the beginning of this decision that a CPLR 2221 motion to renew must be based on “new facts not offered on the prior motion that would change the prior determination.” *Abu Dhabi Commercial Bank, P.J.S.C. v Credit Suisse Sec. (USA) LLC*, 114 AD3d at 432. However, a court will not consider the question of whether the newly asserted facts would change the prior determination if the plaintiff failed to exercise due diligence in making its first factual presentation. *See e.g., American Audio Serv. Bur. Inc. v AT & T Corp.*, 33 AD3d 473, 476 (1st Dept 2006), citing *Chelsea Piers Mgt. v Forest Elec. Corp.*, 281 AD2d 252 (1st Dept 2001). Here, it is apparent that the evidence which Barfield seeks to submit in

support of her motion to renew were available to her previously. This would mandate a finding that her motion should be denied because she “failed to exercise due diligence.” “It is true that ‘the court, in its discretion, may ... grant renewal, in the interest of justice, upon facts which were known to the movant at the time the original motion was made.’” *Nassau County v Metropolitan Transp. Auth.*, 99 AD3d 617, 619 (1st Dept 2012), quoting *Tishman Constr. Corp. of N.Y. v City of New York*, 280 AD2d 374, 376 (1st Dept 2001). Here, Barfield requests that the court exercise its discretion to excuse her prior failure to produce all of the 2016 documents because she is disabled, and originally appeared pro se, and “[a]s a result of my disability as well as the Coronavirus Pandemic, I was unable to obtain the annexed documents and affidavits as quickly as I would have had there been no pandemic or if she was not disabled.” *See* notice of motion, Barfield aff ¶ 67. Barfield supports her assertion with an affidavit from her treating physician, Markos I. Koutsos, M.D. (Dr. Koutsos), who avers that Barfield “suffered from a Cerebral infarction, diabetes, hypertension and asthma causing severe impairment to her body functions,” including “severe memory loss, difficulty in daily tasks; limited mobility, unsteady walking and weakness in limbs.” *See* notice of motion, Koutsos affirmation, ¶¶ 6-7. The court is certainly sympathetic to Barfield’s condition, and understands her impression that the DHCR performed an unnecessarily limited document examination during its review of her succession rights appeal. Under other circumstances, the court would be willing to consider whether Barfield’s claims justified remanding her Article 78 petition to the DHCR for a more comprehensive review. However, the court does not believe that it would be provident to do so. First, despite her disability, Barfield was capable of gathering all of the 2016 documents when she submitted her uncle’s 2016 recertification application, and was also capable of submitting some of those documents when she filed her own succession rights application with Starrett City. Second,

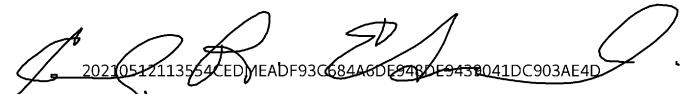
Barfield only appeared pro se in connection with that succession rights application and the subsequent administrative appeal. During the initial litigation of this Article 78 proceeding, Barfield was represented by counsel from Brooklyn Legal Services, and has now retained private counsel from the firm of Angelyn Johnson and Associates, LLC. *Id.*, Barfield aff, ¶¶ 42-46. It does not appear that Barfield’s disability precluded her from gathering the 2016 documents in 2016, or that lack of representation prevented her from submitting those documents earlier in this proceeding. The court is forced to conclude that there are insufficient grounds present to warrant the exercise of discretion that Barfield requests. Accordingly, the court is constrained to find that Barfield’s motion for leave to renew should be denied.

DECISION

ACCORDINGLY, for the foregoing reasons it is hereby

ORDERED that the motion, pursuant to CPLR 2221, of petitioner Angela Barfield (motion sequence number 003) is denied; and it is further

ORDERED that counsel for respondent New York State Division of Homes & Community Renewal shall serve a copy of this order along with notice of entry on all parties within ten (10) days.



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5/12/2021
DATE

CAROL R. EDMEAD, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> DENIED
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> SUBMIT ORDER
		<input type="checkbox"/> FIDUCIARY APPOINTMENT
		<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE