

<b>Esplanade Gardens Inc. v Gill</b>
2022 NY Slip Op 32771(U)
August 1, 2022
Civil Court of the City of New York, New York County
Docket Number: Index No. 71477/19
Judge: Karen May Bacdayan
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CIVIL COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: HOUSING PART F

ESPLANADE GARDENS INC.

Index No. 71477/19

Petitioner,

**DECISION/ORDER**

-against-

Motion Sequence Nos. 1 and 2

DANIELLE GILL ET AL

Respondent.

HON KAREN MAY BACDAYAN, JHC

*Guttman Mintz Baker & Sonnenfeldt, PC (Angelo Ficcarata, Esq.), for the petitioner  
New York Legal Assistance Group (Kaitlyn May Filzer, Esq.), for the respondent*

Recitation, as required by CPLR 2219 (a) of the papers considered in review of this motion by NYSCEF Doc No:

<b>Papers</b>	<b>NYSCEF Doc Nos.</b>
Petitioner’s motion seq. 1 and affidavits in support	1-7
Petitioner’s exhibits 1-10	8-17
Respondent’s opposition and cross-motion (seq. 2) and affidavits in support	19-21
Respondent’s exhibits A-G	22-28
Petitioner’s opposition and reply and supporting documents	30-34
Respondent’s reply and annexed exhibits	36-38

**PROCEDURAL HISTORY AND BACKGROUND**

This is a licensee holdover brought against the daughter of the shareholder in a limited income housing cooperative, Danielle Gill (“respondent”). Petitioner has moved for summary judgment based on a Department of Housing, Preservation and Development (“HPD”) determination. that found that respondent is not entitled to succession of her mother’s shares and cooperative apartment. This determination, made upon review of documentary evidence, was upheld on appeal as having a rational basis. (*Gill v New York City Dep’t of Housing Preservation and Development, et al*, Sup Ct, New York County, Sept. 28, 2019, Wan, J., index No. 101110/18.)

Petitioner moves to strike respondents defenses and counterclaims and for summary judgment and use and occupancy. (NYSCEF Doc No. 5, motion sequence 1.) Petitioner argues that respondent is a licensee whose license expired with “the departure of the prior shareholder of record” and that, as this decision was upheld by the supreme court, respondent’s succession rights cannot be re-litigated in housing court. Petitioner believes that Cheryl Gill permanently vacated the premises in 2013 after purchasing a home in New Jersey and that the proceeding is not her primary residence. (NYSCEF Doc No. 6, petitioner’s attorney’s affirmation in support ¶ 11; NYSCEF Doc No. 13, petitioner’s exhibit 6, certificate of eviction.)

Respondent cross-moves for summary judgment and dismissal of the petition pursuant to CPLR 3211 (a) (7) as petitioner has no cause of action against respondent, and pursuant to CPLR 3211 (a) (10) on the basis that Cheryl Gill, the holder of the shares to the apartment is a necessary party to the proceeding without whom full relief cannot be granted. Respondent states unequivocally that she is no longer claiming succession rights to the cooperative apartment. (NYSCEF Doc No. 20, respondent’s attorney’s affirmation ¶ 20.) Indeed, respondent’s answer asserts no claim to succession. Respondent further defends that Cheryl Gill has “not vacated or surrendered her interest in the subject apartment . . . nor has there been a termination of the shareholder of record’s tenancy.” (NYSCEF Doc No. 26, respondents exhibit E, verified answer ¶¶ 17-18.)

It is not disputed that in January 2009, respondent’s mother, Cheryl Gill, purchased 66 shares of stock in Esplanade Gardens, Inc. (NYSCEF Doc No. 8, petitioner’s exhibit 1, stock certificate.) Nor is it disputed that Cheryl Gill’s shares have not been transferred or disposed of in any manner. The stock certificate “incorporates Article VII of bylaws which governs sale [and] disposal of shares.” The bylaws were not provided by either party. However, Article VII of occupancy agreement states:

The Company and member each agrees not to sell, redeem, purchase, retire, pledge, alienate or otherwise dispose of any stock of the Company without prior written consent of the Housing and Redevelopment Board of The City of New York. In the event said consent of the Housing and Redevelopment Board of The City of New York has been obtained, then this Agreement, the Member's right of occupancy and his stock in the Company shall be first offered to the Company for the aggregate sum which the Member paid for said stock.

## DISCUSSION

No certificate of eviction has issued as against Cheryl Gill on the basis that the apartment is not her primary residence in violation of her occupancy agreement. There has been no final determination as to Cheryl Gill's primary residence made by either HPD or a court of competent jurisdiction after appeal as against Cheryl Gill. Supreme court merely determined that HPD's failure to give succession rights to respondent was rational. To the extent that supreme court discussed Cheryl Gill's primary residence, it did so only in the context that *respondent* had not demonstrated that she had lived with her mother for the requisite period as *her* primary residence because she had failed to establish when her mother vacated the apartment. As stated in that decision: "[HPD] determined that the petitioner *failed to prove through sufficient, credible and reliable evidence when her mother permanently vacated the apartment*, and therefore, petitioner failed to prove the required co-residency with the tenant to obtain succession rights (emphasis added)." (NYSCEF Doc No. 14, petitioner's exhibit 7, motion sequence 1 at 4.) Indeed, while petitioner may well be able to prove that the subject premises is not Cheryl Gill's primary residence and that she cannot cure this breach, it has not yet done so. At the very least, there are issues of fact precluding summary judgment in favor of petitioner. However, petitioner's entire cause of action falls on another ground.

It is not "implicit" as petitioner orally argued, that it can now proceed to housing court to evict respondent as a licensee of Cheryl Gill without first properly obtaining possession as against the shareholder. Any housing court proceeding against Cheryl Gill for eviction based on non-primary residence would have to be predicated on a certificate of eviction for *her* eviction, which, in turn, would have to be issued after finding at HPD that the subject premises was not her primary residence. A license proceeding against respondent in housing court would require petitioner to demonstrate that the "licensor is no longer entitled to possession of the property." (RPAPL 713 [7].)

As stated in *Wong v Gouverneur Gardens Hous. Corp.*, 308 AD2d 301, 304–05 (1<sup>st</sup> Dept 2003):

"[The] New York City Rules and Regulations (City Rules) contain detailed procedures for termination proceedings before HPD, mandating a preliminary notice of grounds for eviction, an administrative hearing, an issuance of a certificate of eviction if such grounds are upheld and the right to review by way of a CPLR article 78 proceeding . . . . Additionally, under the City Rules, cooperatives and landlords under the Mitchell–Lama program

are expressly prohibited from commencing an eviction proceeding based upon a holdover or a breach of lease unless a certificate of eviction issued by HPD is obtained (28 RCNY § 3-18[a]). It is obvious, therefore, that the administrative scheme at issue in this case contemplates initial review by HPD (*see Sohn v. Calderon*, 78 N.Y.2d 755, 767, 579 N.Y.S.2d 940, 587 N.E.2d 807 [instances where eviction proceedings may be commenced only after agency-issued certificate of evictions, and where review is limited to article 78 proceedings, evince a legislative intent to have such cases determined by the agency in the first instance] (citations from the original).”

The court finds that not only is Cheryl Gill a necessary party to this proceeding, but also that a licensee proceeding against Danielle Gill is improper until petitioner has possession of the apartment from Cheryl Gill and the shares held by her which are allocated to that apartment.

**CONCLUSION**

Accordingly, it is

ORDERED that petitioner’s motion for summary judgment is DENIED; and it is further ORDERED that respondent’s motion is GRANTED and this proceeding is dismissed for failure to name a necessary party.

The court need not consider petitioner’s remaining arguments.

This constitutes the decision and order of this court.

Dated: August 1, 2022  
New York, NY

So Ordered:  
  
\_\_\_\_\_  
Hon. Karen May Bacdayan

HON. KAREN MAY BACDAYAN  
Judge, Housing Part