

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

Index No. 157409/2015

In the Matter of the Application of

JIAN MIN LEI,

Petitioner,

For a Judgment Pursuant to Article 78, CPLR,

-against-

NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT, and
GOUVERNEUR GARDENS HOUSING CORP.,

Respondents.

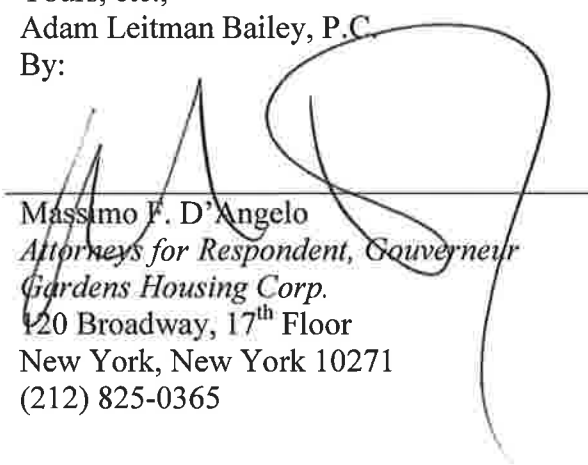
**ORDER AND
JUDGMENT WITH
NOTICE OF ENTRY**

SIRS/MESDAMES:

PLEASE TAKE NOTICE that the within Order and Judgment is a true copy of an Order and Judgment that was signed on August 15, 2016, and duly filed in the office of the Clerk of the Supreme Court of the State of New York, County of New York on August 23, 2016.

Dated: New York, New York
August 23, 2016

Yours, etc.,
Adam Leitman Bailey, P.C.
By:



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SUPREME COURT OF THE STATE OF NEW YORK

~~ALICE SCHLESINGER~~ NEW YORK COUNTY

PRESENT: Hon. ALICE SCHLESINGER
Justice

PART 16

JIAN MIN LEI

INDEX NO. 157409/15

MOTION DATE

MOTION SEQ. NO. 001

- v -

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT, and GOUVERNEUR GARDENS HOUSING
CORP.

The following papers, numbered 1 to _____, were read on this motion for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits— Exhibits _____ | No(s). _____

Replying Affidavits — Exhibits _____ | No(s). _____

In accordance with the accompanying memorandum decision, it is hereby ORDERED and ADJUDGED that the petition is denied, and that this proceeding is dismissed with prejudice. Respondents' counsel shall serve on petitioner's counsel a copy of this order with notice of entry within 20 days of entry.

FILED
AUG 23 2016
COUNTY CLERK'S OFFICE
NEW YORK

Dated: August 15, 2016

Alice Schlesinger
ALICE SCHLESINGER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

check one:.....
check if appropriate:..... MOTION IS:
check if appropriate:.....

CASE DISPOSED
 GRANTED DENIED GRANTED IN PART OTHER
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 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
In the Matter of the Application of
JIAN MIN LEI,

Index No. 157409/2015

Petitioner,

For a Judgment Pursuant to Article 78 of the CPLR,

Motion Seq No. 001

-against-

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PRESERVATION AND DEVELOPMENT and
GOUVERNEUR GARDENS HOUSING CORP.,

Respondents.

-----X
SCHLESINGER, J.:

Petitioner Jian Min Lei commenced this Article 78 proceeding to challenge the March 23, 2015 decision by respondent New York City Department of Housing Preservation and Development ("HPD") denying his claim for succession rights to Apartment 21F (the "Apartment") of the building located at 25 Montgomery Street in Manhattan and owned by respondent Gouverneur Gardens Housing Corp. (the "Company").

For the reasons set forth below, the petition is denied.

Background Facts

The Company operates the subject building and apartments under Article II of the Private Housing Finance Law, commonly known as "Mitchell-Lama."¹ 9 NYCRR 1727-8.2(a) provides the process for establishing succession rights where, as here, a family member of a tenant/cooperator seeks to obtain the property rights held by the original

¹ In exchange for the company's receipt of tax benefits and low-interest financing, the cooperative apartments in Mitchell-Lama buildings are sold at below-market rates, and limitations are placed on the maintenance fees that can be charged to the cooperators who purchase the shares allocable to the apartments where they reside.

tenant, upon the tenant's vacatur and departure from the apartment. Specifically, this section provides that to obtain succession rights, the family member must demonstrate that he or she resided at the apartment as a primary residence for the two-year period immediately preceding the original tenant's departure. To make this showing, the family member must submit income affidavits showing his or her residence at the apartment, and other relevant evidence to show actual occupation of the apartment for dwelling purposes. These other items can include tax returns, voting records, motor vehicle registration, driver's license, bank accounts, etc. And although the proprietary lease is between a tenant and the cooperative company, HPD is the governmental agency responsible for overseeing such leases and ensuring that they are in conformity with all applicable Mitchell-Lama laws.

Pursuant to a written occupancy agreement, petitioner's father, Sum Gee Louie a/k/a Can Zhi Lei (the "Father") was the tenant of record and shareholder of the Apartment prior to the events in question. Petitioner was named as a family member of the Apartment when the family moved in. In April 2008, the Father advised the Company that he would be vacating the Apartment, and requested that his interest and tenancy be transferred to his son, the petitioner. In response, the Company advised the Father that in order to approve this request, the Father would be required to execute and submit a written transfer agreement.

On August 6, 2009, the Father and Company (by Nayanda Moore, an Assistant Property Manager with the Company) executed a document entitled "Agreement For Surrender Of Ownership Of Cooperative Shares By Co-Owner" (the "Surrender Agreement"). HPD was not a party to the Surrender Agreement, although it appears that the Company sent HPD the Surrender Agreement on or about August 17, 2010 (see

Petition, Ex. "D"). In any event, following execution of the Surrender Agreement, the Company billed petitioner, and accepted his payments, for maintenance of the Apartment.

In June 2011, petitioner requested that the Company transfer him from the Apartment to a larger unit. One month later, the Company denied the request, informing petitioner that he was not listed as a shareholder of the Apartment, and that HPD had not yet determined whether the Father's shares in the Apartment would be transferred into petitioner's name. Petitioner thereafter continued to be billed for and pay the maintenance for Apartment 21F.

Three years later, on July 28, 2014, HPD advised the Company that it could not approve the transfer based on insufficient proof regarding petitioner's residence at the Apartment from August 2007 through August 2009 (the two-year statutory period for succession rights, as discussed above), the Father's residence at the Apartment in 2008, and the relationship between petitioner and the Father.

Following correspondence sent by petitioner to prove his relationship to his Father (since this response, it has been undisputed that petitioner is the Father's son), the Company advised petitioner on October 7, 2014 that it was denying his request for succession, and that petitioner had a right to appeal to HPD.

On October 30, 2014, HPD Administrative Hearing Officer Frances Lippa ("HO Lippa"), who was assigned to hear petitioner's administrative appeal, wrote petitioner, noting the Company's denial of succession rights (Pet., Ex. "K"). In this letter, HPD provided petitioner with the opportunity to submit additional documentation in support of his claim, even if it had not previously been given to the Company. Such documentation, as HO Lippa explained, "must include proof . . . that you resided in the [Apartment] with the tenant of record [the Father] as your primary residence for the two years immediately prior

to [the Father] vacating the Apartment [2008-2009] . . . even if you have been included on the relevant income affidavits or income recertifications." HO Lippa further requested proof of when the Father vacated the Apartment and ceased residing therein as a primary residence, and also requested certified copies of New York State tax returns for 2008-2009.

Petitioner thereafter provided HO Lippa with several documents identifying him and his Father and proving their relationship, income affidavits for the Apartment from 2007-2013 (wherein the petitioner son was included), and copies of his and his Father's tax returns from 2008-2009. Notably, petitioner's 2008 tax return, and his Father's 2008 and 2009 tax returns list their respective addresses as "60 Henry Street" in Manhattan. In other words, petitioner did not list the Apartment as his address on the 2008 tax return.

Before HO Lippa evaluated the matter, she granted petitioner's request for an extension of time to submit additional documentation for consideration. However, petitioner did not submit anything beyond what is listed above. HO Lippa thus based her decision, discussed below, on petitioner's and the Company's documentary submissions. She did not take testimony in rendering her decision.

HO Lippa's Decision

On March 23, 2015, HO Lippa issued a written decision on the matter. She found that on August 9, 2009, the Father surrendered his rights as a tenant/cooperator of the Apartment and requested that his rights be transferred to petitioner. HO Lippa further found that the Father in fact vacated the Apartment on August 9, 2009, and that petitioner was his son.

HO Lippa then noted that petitioner had the burden to prove that he resided in the

Apartment as his primary residence for the two years immediately prior to the Father's vacatur (August 9, 2007 through August 9, 2009). But she found that there is "no independent, credible and reliable documentation proving that [petitioner] resided in the subject apartment as his primary resident throughout the required time period" (Pet., Ex. "A", p. 3). Indeed, HO Lippa pointed to evidence indicating the contrary; namely, petitioner's 2008 tax returns, which listed his address at 60 Henry Street" and not at the Apartment.

HO Lippa acknowledged that petitioner was included as an occupant of the Apartment on income affidavits from 2007-2013. However, she also noted that the Father was also listed as an occupant for the year 2010, even though he had already surrendered his occupancy rights in August 2009 and had vacated the Apartment. HO Lippa found that because of this, she did "not consider any of the income affidavits to be credible and reliable proof of the required co-residency" (Pet. Ex. "A", p. 4). In this regard, she noted that "inclusion on relevant income affidavits is not a sufficient basis upon which to grant succession rights. An application for succession rights who [sic] has been included on the relevant income affidavits must still prove the required co-residency." *Id.*

Based on the above, and particularly on the 2008 tax return listing petitioner as not residing at the Apartment, HO Lippa found that petitioner failed to meet his burden, and thus that he failed to prove his entitlement to succession rights to the Apartment. In connection therewith, HO Lippa denied petitioner's request for succession rights and issued a certificate of eviction against petitioner. Thereafter, petitioner commenced the instant proceeding.

Arguments and Further Background

Petitioner argues that he and the Company effectively entered into a new lease in August 2009. This is based on the Surrender Agreement prepared by the Company and fact that the Company has since been billing and accepting payment from petitioner regarding Apartment maintenance. Petitioner further contends that HPD is bound by the Company's decision to grant petitioner tenancy rights through this lease to the Apartment. Petitioner notes that he resided in the Apartment for approximately five years while paying such maintenance without objection before HPD formally denied his request for succession rights. In doing so, petitioner essentially argues that under *Waldman v. New York City Dep't of Housing Preservation and Development*, 10 Misc3d 1075(a) [Sup Ct New York Cty 2005] *aff'd* 36 AD3d 501 [1st Dep't 2007], HPD waived or is estopped from denying his claim. These arguments are based primarily on petitioner's belief that, since the Company entered into the Surrender Agreement and accepted his maintenance payments, it was reasonable for him to assume that HPD had approved the arrangement and to proceed under this assumption.

In any event, petitioner resides in the Apartment with his wife and children, and alleges in his petition that the Apartment has continuously been his primary residence since 2004.

Discussion

"In reviewing an administrative agency's determination, courts must ascertain whether there is a rational basis for the action in question or whether it is arbitrary and capricious. An action is arbitrary and capricious when it is taken without sound basis in reason or regard to the facts. 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." *Matter of Peckham v Calogero*, 12 NY3d 424, 431 [2009] [internal citations, and quotation marks omitted].

Here, there are two essential issues that must be dealt with. The first is whether, under *Waldman*, HPD waived its rights to challenge, or is estopped from denying, petitioner's succession claim. If so, then the proper remedy under *Waldman* is to remand the matter back to HPD for further fact-finding. If not, the second question is whether HO Lippa's decision was arbitrary or capricious, or lacking a rational basis.

Waldman concerned a group of petitioner residents claiming succession rights, who had entered into leases with the cooperative housing company at various times between 1990-1997. In 1998, HPD, which was responsible for overseeing the leases (as it is here), conducted an audit in furtherance of an investigation undertaken based on the building's failure to comply with a 1990 stipulation which called for at least 16 units in the building to be rented to non-white families. Around this time, the building at issue had been plagued by anti-Semitism and other racial strife. *Waldman*, 10 Misc3d 1075(A).

In any event, the audit revealed that the building had permitted inappropriate succession practices for several years, and the succession rights of 36 (white) tenants were re-evaluated and subsequently denied. Following some preliminary litigation, HPD agreed to give the tenants a full review process, including evidentiary hearings. Thereafter, HO Lippa, on behalf of HPD (the same hearing officer as in this case) presided over hearings, finding against all of the tenants and essentially rescinding the leases for the

purported successors. An Article 78 proceeding ensued wherein the tenants challenged not only HO Lippa's determination, but also challenged the process leading up to the final determination. The tenants argued it was all arbitrary and capricious. *Waldman*, 10 Misc3d 1075(A).

In *Waldman*, there were two types of succession rights claims: one involved non-traditional family relationship; and the other involved a traditional family relationship. Regarding the first type, the court found that the purported successors had submitted multiple income verification forms listing them as members of the household during the requisite period, and that the building had failed to submit any evidence contradicting this showing. The court further found that HO Lippa had ignored the successors' evidence in this regard. *Waldman*, 10 Misc3d 1075(A).

As to the successor who had a traditional familial relationship with the original tenant, the court found that he had submitted uncontradicted testimony as to his residency at the apartment during the requisite period. In conjunction with this finding, the court found that HO Lippa had merely found that this testimony was not credible, despite the submission of substantial corroborating evidence of the successor's residence, including income certification forms, and an official letter from a Seminary which stated that its records reflected that the successor had lived at apartment while he was a student at the Seminary (during the requisite period). *Waldman*, 10 Misc3d 1075(A).

Based on these findings, and given that the building had entered into leases with the purported successors with no objection from HPD, the trial court found that waiver and/or estoppel applied to bar HPD from retroactively rescinding the leases, and that the proper course of action under the facts would have been for HPD to "take action against

[the building] in accordance with the regulations it enacted." *Waldman*, 10 Misc3d 1075(A).

Nonetheless, *Waldman* is clearly distinguishable from the present matter. For one, there is no indication that HO Lippa ignored any evidence submitted by petitioner. Although, for example, she declined to credit the income affidavits as proof of petitioner's residence, she did not ignore them altogether, evaluating them via a type of *falsus in uno* ("false in one thing, false in everything") analysis. As noted above, HO Lippa found that the 2010 income affidavit for the Apartment had no probative value, as it listed the Father (who had vacated the Apartment one year earlier) as then residing in the Apartment. This, to HO Lippa, totally undermined any probative value that the remaining income affidavits may have had. Although this court may not necessarily agree with this analysis, it finds that this determination was within HO Lippa's purview as administrative hearing officer, and was not itself arbitrary or capricious. But it does show that HO Lippa did consider the income affidavits in her determination.

Additionally, unlike the situation in *Waldman*, where the purported successor testified without contradiction that he resided in the Apartment, petitioner never provided an affidavit to HO Lippa (or, in fact, to this court averring that the Apartment was his primary residence during the statutory period). This is particularly troubling given that petitioner was given multiple opportunities by HPD to supplement his evidentiary submissions.²

Further, however persuasive it may have been regarding waiver and estoppel, *Waldman* was decided in 2005 and affirmed in 2007, before the Court of Appeals decision of *Schorr v. New York City Dep't of Hous. Preserv. & Dev.*, 10 NY3d 776 [2008]. In *Schorr*,

² Further, petitioner and the Company never entered into a formal lease for the Apartment; at best, an implied periodic tenancy was created.

a succession rights matter similar to the present case, the petitioner argued that HPD "acquiesced" in a new tenancy between him and the cooperative building company and thus was estopped from later evicting him. However, the Court rejected this argument, finding that it was well settled that "estoppel cannot be invoked against a governmental agency to prevent it from discharging its statutory duties." *Id.* at 779 [internal citations omitted]. The Court then found that, because the petitioner had not shown his entitlement to succession rights, he was an illegal tenant, and therefore eviction, not barred by estoppel, was permissible. *Waldman* was not mentioned. Thus, under *Schorr*, this court declines to apply the doctrines of waiver or estoppel to the present case.

Therefore, having disposed of the question of *Waldman's* applicability, the second and final issue is whether HO Lippa's determination was arbitrary and capricious. For the reasons stated above, and for those that follow, the court finds that it was not.

A brief discussion of *Murphy v. DHCR*, 29 Misc3d 1213(A) [Sup Ct New York Cty 2010], *aff'd* 91 AD3d 481, *aff'd* 21 NY3d 649 [2013], is instructive here. In *Murphy*, the purported successor was the son of the tenants/shareholders of record. Before the hearing officer was a plethora of evidence indicating that the son actually resided in the subject apartment since he was an infant up to and including the requisite period. In fact, it was undisputed among the parties that the son so resided in the apartment. However, the income affidavit for the apartment for one of the two requisite years, listing the son as a co-occupant, had not been filed by the mother/tenant.

Although the administrative agency denied the claim for succession rights based on this one kernel, the courts, all the way through final appeal, found that the agency's decision was arbitrary and capricious and that the son was entitled to succession rights.

The Court of Appeals noted the importance of the filing of such income affidavits in a succession rights case, but found that notwithstanding same, "given the overwhelming evidence of residency provided in this case, and the lack of relationship between the tenant-of-record's failure to file and [the son's] income or co-occupancy, [the agency's] decision to deny [the son] succession rights was arbitrary and capricious." *Murphy*, 21 NY3d at 655.

Murphy is thus illustrative to demonstrate the courts' prerogative to conduct a totality of the circumstances analysis so as to look beyond mere technical violations like a missing income affidavit in an effort to get to the essential truth: whether the purported successor in fact lived in the apartment for the statutory period. In *Murphy*, it was clear he did.

However, the present case is clearly distinguishable from *Murphy*. Here, there was no such "overwhelming" evidence demonstrating that petitioner resided in the Apartment from August 2007 through August 2009. If anything, the evidence in favor of succession is underwhelming, at best. In fact, there were only two forms of evidence submitted that are relevant to petitioner's claim: the income affidavits and the 2008-2009 tax returns.³ And as noted above, HO Lippa found credibility problems with the income affidavits, and a serious issue with the 2008 tax return, as it listed a different address altogether. Thus, irrespective of whether HO Lippa's decision to not credit any of the income affidavits was correct, there was substantial evidence which put into question petitioner's claim. Certainly here, there were no mere technical violations to disregard as in *Murphy*. Rather, the fundamental claim of co-habitation in the requisite period was put into question.


³ Again, the court would be remiss to not mention petitioner's failure to submit an affidavit to HO Lippa despite numerous chances to do so.

In conclusion, the court is constrained to uphold HO Lippa's determination. Petitioner simply did not meet his burden to show that the Apartment was his primary residence during the statutory period, despite having numerous opportunities to supplement the record. With no sworn statement detailing his recollection of August 2007-2009, and with nothing more than the (according to HO Lippa) flawed income affidavits and a tax return that indicated petitioner lived elsewhere, this court cannot conclude that HO Lippa's determination was arbitrary and capricious, or lacking a rational basis.

Accordingly, it is hereby

ORDERED and ADJUDGED that the petition is denied, and that this proceeding is dismissed with prejudice. Respondent's counsel shall serve on petitioner's counsel a copy of this order with notice of entry within 20 days of entry.

Dated: August 15, 2016


J.S.C.


Clerk

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157409/2015

Order + Judgment

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157409/2015

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