

Matter of Rose v Carrión

2024 NY Slip Op 33900(U)

October 30, 2024

Supreme Court, New York County

Docket Number: Index No. 453207/2023

Judge: John J. Kelley

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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** **56M**

Justice

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In the Matter of
CARL ROSE,

Petitioner,

- v -

ADOLFO CARRIÓN, JR., as COMMISSIONER of the DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK, THE DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK and SECOND ATLANTIC TERMINAL HOUSING CORPORATION,

Respondents.

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**DECISION, ORDER, AND
JUDGMENT**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

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

In this CPLR article 78 proceeding, the petitioner seeks judicial review of an October 25, 2023 New York City Department of Housing Preservation and Development (HPD) determination, issuing a certificate of eviction to the respondent landlord Second Atlantic Terminal Housing Corporation (Second Atlantic). The certificate was issued in connection with a residential Mitchell-Lama cooperative apartment in Second Atlantic’s building, with respect to which the petitioner’s deceased aunt, Catherine Bartley, previously had been issued a propriety lease as the tenant/shareholder of record. In issuing the certificate, HPD, in effect, rejected the petitioner’s claim to remaining family member succession rights. HPD answers the petition and files the administrative record. The petition is denied, and the proceeding is dismissed.

As the Appellate Division, First Department, has explained:

“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”

(*Matter of Borekas v New York City Dept. of Hous. Preservation & Dev.*, 151 AD3d 539, 539 [1st Dept 2017; see 28 RCNY 3-02[p][3]). In reviewing an HPD determination to deny succession rights to a subsidized apartment, the court is limited to assessing whether it was arbitrary and capricious, i.e., whether it was irrational (see *Matter of Ryan v New York City Dept. of Hous. Preserv. & Dev.*, 173 AD3d 642, 643 [1st Dept 2019]; *Matter of Broussard v New York City Dept. of Hous. Preserv. & Dev.*, 170 AD3d 563, 563 [1st Dept 2019]; *Matter of Pietropolo v New York City Dept. of Hous. Preserv. & Dev.*, 39 AD3d 406, 407 [1st Dept 2007]). HPD’s determination was rational and not arbitrary and capricious (see *Matter of Kamara v East Riv. Landing*, 132 AD3d at 510-511).

Bartley resided in the subject apartment until she became ill in the autumn of 2020, when she was moved to Downtown Brooklyn Nursing and Rehabilitation Center, located at 727 Classon Ave in Brooklyn, New York. The petitioner claimed that he had resided continuously as a co-occupant with Bartley in the subject apartment for at least three years prior to that time, and that the apartment was his primary residence during that period. In a determination dated January 20, 2021, Second Atlantic denied the petitioner’s request to recognize him as a remaining family member, with succession rights to the apartment, on the ground that he had not submitted documentation either as to Bartley’s whereabouts or those of a man named Timothy Michelle, and had not submitted any documents required by HPD’s rules that would establish any right to succession. Bartley died on November 7, 2022.

Pursuant to a stipulation dated April 27, 2023, Second Atlantic afford the petitioner an extension of time within which to reapply for remaining family member status. In a determination dated May 31, 2023, Second Atlantic again denied his request. The petitioner

appealed this denial to HPD. In a determination dated October 25, 2023, HPD denied the petitioner's appeal, concluding that the petitioner failed to establish when Bartley actually vacated the subject apartment, that the petitioner had not submitted documentation or evidence sufficient to establish that he resided as a co-occupant with Bartley during the two-year period immediately preceding either her 2020 move to the nursing home, or her death approximately two years later, and that his "failure to be included on the relevant income recertifications" that Bartley had been required to submit to Second Atlantic during the years that he claimed to have resided with her created a "rebuttable presumption" that he "did not reside in the apartment as a primary residence."

The evidence in the administrative record rationally supports HPD's conclusion that the petitioner, although a relative otherwise qualified to assert succession rights to an apartment in a subsidized Mitchell-Lama building (see 28 RCNY 3-02[p][2][ii] [recognizing succession rights of nephew of tenant/shareholder]), failed to sustain his burden of establishing a right to succession (see *Matter of Kralik v New York City Dept. of Hous. Preserv. & Dev.*, 223 AD3d 468, 469-470 [1st Dept 2024]), inasmuch as he did not submit documentary evidence sufficient to support his contention that he resided in the subject apartment as his primary residence, and as a co-occupant of the subject apartment with Bartley, for a continuous period of two years prior to the date when she vacated the apartment, whether measured from the autumn of 2018 until Bartley's move to a nursing home in the autumn of 2020, or from November 7, 2020 until her death on November 7, 2022 (see *Matter of Mantilla v New York City Dept. of Hous. Preserv. & Dev.*, ___AD3d___, 2024 NY Slip Op 04484, *2 [1st Dept, Sep. 19, 2024]; *Matter of Kralik v. New York City Dept. of Hous. Preserv. & Dev.*, 223 AD3d at 469-470]; *Matter of Halcomb v New York City Dept. of Hous. Preserv. & Dev.*, 187 AD3d 673, 674 [1st Dept 2020]). Moreover, the record supports HPD's conclusion that the petitioner failed to establish that he was disabled and, hence, need only demonstrate that he resided continuously with Bartley for one year. Moreover, the petitioner was not identified as an occupant of the apartment in the one income

affidavit that Bartley submitted to Second Atlantic during the last seven years of her life, which she had submitted on November 1, 2015, and the evidence of his primary residence from the autumn of 2018 until November 7, 2022 was not so overwhelming that the absence of an appropriate income affidavit may be overlooked (see *Matter of Fitzpatrick v 1199 Hous. Corp.*, 168 AD3d 578, 578 [1st Dept 2019]; *Matter of Borekas v New York City Dept. of Hous. Preservation & Dev.*, 151 AD3d at 539).


The court notes that, in the context of this case, Bartley did not vacate the subject apartment in the autumn of 2020, when she moved to a nursing home, as there was no evidence before the HPD to support any conclusion that she intended to vacate the apartment or that she did not intend to return to the apartment if her health improved (see *Edelstein, LLC v Connelly*, 2019 NYLJ LEXIS 2558 [Civ Ct, N.Y. County, Jul. 24, 2019] [applying that analysis to rent-regulated apartments]; *90 Elizabeth Apt. LLC v Eng*, 56 Misc 3d 128[A], 2017 NY Slip Op 50833[U], 2017 NY Misc LEXIS 2425 [Civ Ct, N.Y. County, Nov. 2, 2017] [applying that analysis to 9 NYCRR 2204.6(d)(1), which establishes succession rights for rent controlled apartments]; see also *Matter of LJM Venture No. 1 v Joy*, 105 Misc 2d 291 [Sup Ct, N.Y. County 1980] [Wallach, J.]; *Elk 300 E. 83rd LLC v Dowd*, 2015 NY Slip Op 32443[U], 2015 NY Misc LEXIS 4745 [Civ Ct, N.Y. County, Dec. 23, 2015], *affd* 52 Misc 3d 131[A], 2016 NY Slip Op 50976[U], 2016 NY Misc. LEXIS 2333 [App Term 1st Dept, Jun. 27, 2016]; *Soybel v Gruber*, 136 Misc 2d 430 [Civ Ct, N.Y. County 1987] [Tom, J.]). Inasmuch as, for the purposes of determination the petitioner's administrative appeal, the HPD made an assumption that the vacancy occurred upon Bartley's death, and nonetheless rationally concluded that the petitioner failed to submit documentation sufficient to support his claim that he resided as a co-occupant with Bartley from November 7, 2020 until her death on November 7, 2022, there is no basis for annulling the challenged determination on the ground that HPD erroneously deemed the autumn of 2020 to be the date when Bartley vacated the apartment.

In light of the foregoing, it is,

ORDERED that the petition is denied; and it is,
 ADJUDGED that the proceeding is dismissed; and it is further,
 ORDERED that the stay of the pending Civil Court proceeding, as set forth in the
 December 7, 2023 order to show cause initiating this proceeding, be, and hereby is, vacated
 and dissolved.

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

10/30/2024
 DATE


 JOHN J. KELLEY, 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
<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: