



proceeding. Although there is no signed order to show cause in the file, the motion was on the IA Part 13 calendar on May 10, 2006. The petition that was filed was not otherwise accompanied by notice of petition or an order to show cause granted by the court in lieu thereof (CPLR 7804[a]) to provide a return date, and there is no indication that it was ever calendared.

The procedural history of this proceeding remains somewhat unclear. Nonetheless, it seems from a letter from counsel for respondent HPD to Hon. James P. Dollard dated June 30, 2006, that HPD had considered both the motion and the petition to be before the court on May 10, 2006, and had entered into a stipulation with petitioner on May 10, 2006, extending HPD's time to serve and file answering papers until June 30, 2006. The papers so served and filed by HPD in compliance therewith included an answer to the petition pursuant to CPLR 7804(c). However, it appears from the court's computerized records that petitioner's motion for a stay was submitted without opposition on May 10, 2006 and that the petition was never submitted. One of the papers submitted to the court by counsel for HPD to reconstruct the file in this matter is an unsigned copy of a memorandum decision by Justice Dollard granting the motion for a stay without opposition and directing the submission of an order. The records further recite that the motion for a stay was abandoned on June 26, 2006, presumably due to the failure of petitioner to submit an order. (Uniform Rules for Trial Cts [22 NYCRR] § 202.48[b].) In addition, the records show that the Article 78 proceeding was marked inactive at a status conference on June 27, 2007. No further activity is recorded until the instant motion by respondent Big Six.

Under the circumstances, and pursuant to stipulations of the parties dated February 13, 2008, and March 5, 2008, the original petition was marked submitted, together with the current motion by Big Six, on March 5, 2008, and will be determined on the merits.

Pursuant to an occupancy agreement executed on or about February 22, 1974, petitioner's parents were the members/lessees of an apartment in premises owned by respondent Big Six, a limited-profit housing company organized under the Private Housing Finance Law of the State of New York, popularly known as the Mitchell-Lama Law. Petitioner's father died on May 14, 1994, and his mother, who died on August 9, 1999, did not physically occupy the apartment after July 9, 1996. By letter dated August 16, 2004, Big Six advised petitioner of its determination that he was not entitled to succeed to the leasehold and/or ownership rights to the subject apartment. This proceeding arises from HPD's November 21, 2005 determination denying petitioner's appeal for succession rights to the subject

Mitchell-Lama apartment.

The rules and regulations governing Mitchell-Lama housing companies in the City of New York are set forth in Title 28, Chapter 3 of the Rules of the City of New York. Under the provision of 28 RCNY § 3-02(p)(3) in effect prior to February 1, 2003, where the tenant/cooperator of a Mitchell-Lama apartment has permanently vacated the apartment, a family member of the tenant/cooperator who has resided with the tenant/cooperator in the apartment as a primary residence for a period of not less than two years and has appeared on the income affidavits for at least the two consecutive annual reporting periods prior to the vacatur may request to succeed to the leasehold and/or ownership rights to the apartment. The burden of proof is on the family member to show use of the apartment as a primary residence, as determined under 28 RCNY § 3-02(n)(4), for the required period. (28 RCNY § 3-02[p][3].)

As set forth in 28 RCNY § 3-02(n)(4), the facts and circumstances to be considered in determining the primary residence issue include, but are not limited to, the address used as place of residence or domicile for tax returns, motor vehicle registration, driver's license, voter registration, or other publicly filed documents, and time spent at the dwelling unit. Subparagraph (iv) of section 3-02(n)(4) further provides that no dwelling unit may be considered the primary residence of the tenant/cooperator unless the tenant/cooperator provides proof of filing of a New York City Resident Income Tax return at the claimed primary residence for the most recent preceding tax year or proof that the tenant/cooperator was not legally obligated to file such return. (See, Matter of Nole v New York City Dept. of Hous. Preserv. and Dev., 26 AD3d 163 [2006].) In addition, a tenant/cooperator whose primary residence is in question is obligated to provide proof including, but not limited to, certified New York State income tax returns, utility bills, and voter registration data. (28 RCNY § 3-02[n][4][iv].)

The determination by HPD that petitioner did not meet his burden of establishing that he resided with his mother in the subject apartment as his primary residence for the requisite time period was not arbitrary or capricious and had a rational basis in the record. (See, Matter of Hochhauser v City of New York Dept. of Hous. Preserv. and Dev., 48 AD3d 288 [2008]; Matter of Pietropolo v New York City Dept. of Hous. Preserv. Dev., 39 AD3d 406 [2007].) Despite being provided by HPD with a copy of the succession rights rules and a suggested list of documents to prove primary residence, petitioner failed to submit any documentary evidence to support his claim of having occupied the subject apartment with his mother as his primary residence for the last two years of her occupancy from July 9, 1994 through

July 9, 1996. (Id.) The mere unsubstantiated assertion of petitioner's counsel that petitioner had been unemployed and ill for many years was properly viewed by HPD as insufficient to explain the total lack of documents to establish petitioner's residence. Nor was it irrational for HPD to reject the conclusory affidavits submitted by petitioner as a substitute for documentary proof.

Furthermore, the inclusion of petitioner's name on the income affidavits for the years in question do not, without acceptable proof of primary residence, establish an entitlement to succession rights as a matter of law. (28 RCNY § 3-02[p][3]; see, Matter of Hochhauser, 48 AD3d at 288; Matter of Pietropolo, 39 AD3d at 406-407.) Moreover, although HPD did not base its determination thereon, it was not arbitrary for HPD to find that the credibility of the subject income affidavits had been put in issue by petitioner's acknowledged submission of false income affidavits including his mother's name and signature for 1999 and 2000.

Since judicial review of an administrative determination is limited to the facts and record adduced before the agency, petitioner may not now contend that Big Six is estopped from objecting to his claim of succession rights or submit new affidavits as proof. (See, Matter of Yarbough v Franco, 95 NY2d 342 [2000]; Matter of Fanelli v New York City Conciliation and Appeals Bd., 90 AD2d 756 [1982], affd 58 NY2d 952 [1983].) In any event, 28 RCNY § 3-02(o)(3)(i) specifically provides that acceptance of rent or carrying charges from an occupant shall not give the occupant any rights of tenancy. Finally, petitioner's appeal to HPD was heard pursuant to the review procedure set forth in 28 RCNY § 3-02(p)(8)(ii). Petitioner is not entitled to an evidentiary hearing either under this controlling rule or to satisfy due process. (See, Matter of Hochhauser, 48 AD3d at 288; Matter of Pietropolo, 39 AD3d at 407; Matter of Cadman Plaza N. v New York City Dept. of Hous. Preserv. & Dev., 290 AD2d 344 [2002].)

Inasmuch as there is a rational basis for HPD's decision, the administrative determination may not be disturbed. (See, Matter of Asen Bros & Brook v Leventhal, 54 NY2d 839 [1981]; Matter of 33 Prospect St. Corp. v New York State Div. of Hous. and Community Renewal, 15 AD3d 492 [2005].) Accordingly, the petition is denied and the proceeding is dismissed. The motion by Big Six is, therefore, rendered moot. The court also notes that neither the court file nor the papers submitted by the parties includes a signed order containing a temporary restraining order.

Dated: June 6, 2008

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J.S.C.