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## **Kahn,v.,HPD,15020/09Decided: July 8, 2010**

Kahn

v.

HPD

Justice Francois A. Rivera

Decided: July 8, 2010

By Notice of Petition and Petition filed on June 18, 2009, petitioner Ellen Kahn commenced this Article 78 proceeding to annul a determination by the New York City Department of Housing Preservation and Development (hereinafter HPD) that she had no succession rights to an apartment. In the alternative, petitioner seeks an order transferring the matter to the Appellate Division, Second Department. By verified answer filed on September 1, 2009, HPD opposes the petition.

### **BACKGROUND**

Ellen Kahn resides in apartment 3H of a Mitchell-Lama housing development, owned by Kings Bay Housing Co., Inc. (hereinafter KBH), located at 2965 Avenue Z, in Brooklyn, New York (hereinafter the subject apartment). On April 9, 2008, Rae Kahn, the petitioner's mother and the last tenant of record of the subject apartment, passed away.

KBH notified the petitioner that she did not have succession rights to the subject apartment and issued a ten day notice to quit the premise. Petitioner appealed KBH's decision to HPD. Francis Lippa, an administrative hearing officer for HPD, (hereinafter AHO Lippa) took documentary evidence from KBH and the petitioner for review on the petitioner's appeal. On April 22, 2009, AHO Lippa issued a decision upholding KBH's determination that petitioner did not have succession rights to the subject apartment and to evict her.

### **THE PLEADINGS**

Ellen Khan's pleadings include a notice of petition, a verified petition and three annexed exhibits. The first exhibit is KBH's ten day notice to quit, dated April 28, 2009, which advises petitioner to vacate the subject apartment. The second is an affirmation of AHO Francis Lippa, dated April 22, 2009, which authenticates his annexed decision denying petitioner's claim to succession rights.

HPD opposes the petition with a memorandum of law, a verified answer and seventeen annexed exhibits, labeled A through Q. Exhibit A is the proprietary lease agreement for the subject premise between KBH, as landlord, and Rae Kahn, as lessee. Exhibit B contains two documents. The first is a certificate of 2,404 capital stock shares issued by KBH to Rae Kahn and Ellen Kahn on February 14, 1999. The second is an affidavit of annual household income for the residents of apartment 3H during calendar year 1999. Exhibit C is a City of New York Department of Health and Mental Hygiene transcript of the death of Rae Kahn on April 9, 2008. Exhibit D is KBH's letter to Ellen Kahn, dated June 18, 2008, denying her claim to succession rights to the subject apartment and advising her how to appeal the denial to HPD. Exhibit E is a letter from AHO Lippa, to Ellen Kahn, dated June 25, 2008. The letter contained, among other things, information about the controlling regulation and the type of documents that petitioner may and should submit on appeal. Exhibit F is Ellen Kahn's letter to AHO Lippa, dated July 1, 2008, appealing KBH's determination. Exhibit G is KBH's letter to Ellen Kahn, dated May 23, 2008 regarding Rae Kahn's death and its effect on occupancy of the subject apartment. Exhibit H is a letter from AHO Lippa to Ellen Khan's counsel, dated July 8, 2008, giving her counsel until August 11, 2008, to submit additional documents on the appeal. Exhibit I is a letter from Ellen Kahn's counsel to AHO Lippa, dated August 5, 2008, with enclosures of additional documents for the appeal. Exhibit J is another letter from petitioner's counsel to AHO Lippa, dated August 11, 2008, which includes a copy of Ellen Kahn's birth certificate. Exhibit K is a series of copies of documents Ellen Kahn submitted to AHO Lippa for her appeal. Exhibit L is KBH's affirmation and an affidavit in opposition to Ellen Kahn's appeal. Exhibit M contains two documents from the New York City Board of Elections. The first contains petitioner's signature under oath taken on February 5, 2008. The second is a list of election dates during September 1995 to February 2008 in which petitioner voted. Exhibit N is KBH's supplemental affirmation in opposition. Exhibit O is a return mail receipt. Exhibit P is a DVD purporting to contain a recording of a television show in which petitioner allegedly participated. Exhibit Q is AHO Lippa's decision dated April 22, 2009, upholding KBH's determination that petitioner did not have succession rights to the subject apartment. Exhibit R is a "ten day notice to quit" dated April 28, 2009, issued by KBH to the petitioner.

Petitioner replies to the verified answer and memorandum of law with an affirmation of her counsel.

## **APPLICABLE LAW**

"Mitchell-Lama housing projects provide subsidized housing for low-income families, and, as is to be expected, the demand for such apartments far exceeds the available supply. As a result, each housing company maintains waiting lists, and as each unit becomes available it is filled from either an internal waiting list (residents who want to move from one apartment to another) or an external waiting list (people who do not live in Mitchell-Lama housing). Other than from one of these waiting lists, the only way to become the prime tenant of a Mitchell-Lama apartment is to succeed' to the rights of a prior tenant" (Waldman v. New York City Dept. of Housing Preservation and Development, 10 Misc.3d 1075(A) [N.Y. Sup. 2005]).

This last method is the one at issue in this proceeding. The rules for succession rights are set forth at 28 RCNY §3-02(p): The person claiming succession rights must be related to the tenant of record either in one of the ways specified in §3-02(p)[2](ii)[A], or in a non-traditional manner as defined by §3-02(p)[2](ii)[B]. Either way, the applicant "must have resided in the apartment with the former legal

tenant for two years immediately prior to the tenant's permanent vacatur of the apartment" (Alfred v. Barrios-Paoli, 251 A.D.2d 659, 660 [2nd Dept., 1998]) and "appeared on the income affidavits for at least the two consecutive annual reporting periods prior to the [tenant of record]'s permanent vacating of the apartment" (28 RCNY §3-02(p)[3]) (Waldman v. New York City Dept. of Housing Preservation and Development, 10 Misc.3d 1075(A) [N.Y. Sup. 2005]). The time period is reduced to one year if the occupant is a senior citizen or disabled (Manhattan Plaza Associates, LP v. Department of Housing Preservation and Development of the City of New York, 3 Misc 3d 717, 719 fn 3; [N.Y. Sup. 2004]; 28 RCNY §3-02(p)[3]).

"The regulations implementing the Mitchell-Lama Law which relate to succession rights were amended as of February 1, 2003 ( see 28 RCNY §3-02 [p] ). Prior to the amendment, if a family member did not appear on the income affidavits for the subject apartment for the two years prior to the tenant's vacatur of the apartment, a rebuttable presumption was created that the family member did not reside in the apartment during those two years. The amendment eliminated this rebuttable presumption, so that an occupant who does not appear on the relevant income affidavits may not receive succession rights to the apartment, and does not have the opportunity to present a rebuttal" (Miney v. Donovan, 68 A.D.3d 876, 877[2nd Dept., 2009]).

In article 78 proceedings, the doctrine is well settled that neither the Appellate Division nor the Court of Appeals has power to upset the determination of an administrative tribunal on a question of fact; the courts have no right to review the facts generally as to weight of evidence, beyond seeing to it that there is substantial evidence (See, Pell v. Board of Ed. of Union Free School Dist. No. 1 of Towns of Scarsdale and Mamaroneck, Westchester County, 34 N.Y.2d 222 at 230-231). The approach is the same when the issue concerns the exercise of discretion by the administrative tribunals (id.). The courts cannot interfere unless there is no rational basis for the exercise of discretion or the action complained of is arbitrary and capricious (id.). Rationality is what is reviewed under both the substantial evidence rule and the arbitrary and capricious standard (id.).

Further, the "arbitrary and capricious test chiefly relates to whether a particular action should have been taken or is justified ... and whether the administrative action is without foundation in fact. Arbitrary action is without sound basis in reason and is generally taken without regard to the facts" (id. at 231; see also Jackson v. New York State Urban Dev. Corp., 67 N.Y.2d 300, 417 [1986]). On review of agency action under CPLR Article 78, the courts may not "second guess the agency's choice, which can be annulled only if arbitrary, capricious or unsupported by substantial evidence (Montefusco v. New York State Div. of Housing and Community Renewal, 2009 WL 595564[N.Y. Sup. 2009]).

Under CPLR §7803, subd. 4, the substantial evidence test applies only where a hearing has been held and evidence taken pursuant to direction by law (Colton v. Berman, 21 N.Y.2d 322, 329 [1967]). When there is no hearing pursuant to direction by law, then CPLR §7803, subd. 3 applies. Under CPLR §7803, subd. 3, the court reviews whether the determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty imposed (see Felton v. Halperin, 228 A.D. 2d 595 [2nd Dept., 1996]).

CPLR §1001 sets forth the parties that are necessary to an action or proceeding as follows:

Necessary joinder of parties.

(a) Parties who should be joined. Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so he may be made a defendant.

(b) When joinder excused. When a person who should be joined under subdivision (a) has not been made a party and is subject to the jurisdiction of the court, the court shall order him summoned. If jurisdiction over him can be obtained only by his consent or appearance, the court, when justice requires, may allow the action to proceed without his being made a party. In determining whether to allow the action to proceed, the court shall consider:

1. whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder;

2. the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined;

3. whether and by whom prejudice might have been avoided or may in the future be avoided;

4. the feasibility of a protective provision by order of the court or in the judgment; and

**5. whether an effective judgment may be rendered in the absence of the person who is not joined.**

## **DISCUSSION**

HPD asserts an affirmative defense that KBH, the lessor of the subject apartment, is a necessary party and that the instant petition should be dismissed pursuant to CPLR §1001[a] for failure to name KBH as a respondent. Although, KBH ought to have been joined as a party to this Article 78 proceeding, the court finds that KBH is not an indispensable party. The failure to join KBH is excused in the interest of justice because if proceedings were terminated for failure to join KBH, which was not served within the four-month statute limitations, the petitioner would have no other effective remedy. Furthermore, no apparent prejudice would result to KBH since it was free to intervene and did not do so and its interest is adequately protected by HPD. (CPLR §1001[a] and [b]; see Auto Body Federation of Empire State v. Lewis, 80 A.D. 2d 593-594 [2nd Dept., 1981]; see also Sandor v. Nyquist, 45 A.D. 2d 122 [3rd Dept., 1974]).

HPD, through AHO Lippa, has reviewed KBH's determination to deny petitioner's request for succession rights. The petitioner and KBH gave documents and written submission to AHO Lippa. There was no swearing of witnesses or taking of testimony. Since the review process was not mandated by law, the question of substantial evidence does not arise (see Waldman v. New York City Dept. of Housing Preservation and Development, 10 Misc.3d 1075(A) [N.Y. Sup. 2005]; citing Colton v. Berman, 21 N.Y.2d 322, 329 [1967]). Therefore, the issue before this court is whether HPD's determination was rational. The court notes that petitioner's alternative request to forward the entire matter to the Appellate Division Second Department pursuant to CPLR §7804(g) must be

denied because the question of substantial evidence does not apply.

After receipt of numerous documents from KBH and the petitioner, AHO Lippa found that the petitioner was disabled and an eligible family member for succession rights. Applying 28 RCNY §3-02(p)[3], AHO Lippa focused on the issue of whether the petitioner had established co-residency with Ellen Kahn, her mother, in the subject apartment for the period of April 9, 2007 through April 9, 2008, (the subject period).

In particular, 28 RCNY §§3-02(n)(4)(i) and (ii) authorize HPD to consider evidence such as whether a conflicting address appears on the petitioner's tax returns, driver's licence, motor vehicle registration, voting record or other publicly filed documents.

Surprisingly, KBH did not submit income affidavits for the subject period. If petitioner's name had not been included on the income affidavits for the subject period, she would have no viable claim to succession right (Miney v. Donovan, 68 A.D. 3d 876 [2nd Dept., 2009]). The pertinent income affidavits would have provided potentially case dispositive proof on the question of petitioner's residence.

The AHO relied on a letter from KBH dated May 23, 2008, to handle this issue as follows. "No income affidavits were submitted on appeal. However, based on the housing company's May 23, 2008 letter, it appears that Ellen Khan was included as an occupant of the subject apartment on recent income affidavits."

There is therefore no dispute that the petitioner's income was used to calculate the household rent during the subject period. Petitioner's evidence in support of her claim of co-residency in the subject apartment during the relevant period included the following documents all of which contained the subject residence as petitioner's address. Her New York State drivers license (expiration date June 29, 2008), her social security benefits statements for 2007, correspondence dated in October and December of 2007 sent to her from the Social Security Administration; and correspondence dated August 21 and 30 of 2007, sent to her from the New York State Department of Health. Also included were the 2007 and 2006 Federal 1040 and New York State IT-201 tax returns forms of petitioner's mother using the subject address. In those tax forms petitioner's mother claimed head of household status and claimed that the petitioner was the dependent child living with her at the subject address. Also included is a letter dated October 24, 2007, sent to the petitioner by the Brooklyn Borough President. Also included are monthly bank statements addressed to the petitioner from Washington Mutual Bank from April 2007 through and including April of 2008; Chase Bank statements from May of 2007 through May of 2008. Also included were JP Morgan correspondence addressed to the petitioner from March of 2007 through March 2008. Also included were numerous credit card statements addressed to the petitioner from Victoria's Secrets, Sears Master Card, Disney Rewards and Washington Mutual Credit Card during the subject period.

Where an agency's determination involves a factual evaluation within an area of the agency's expertise and is amply supported by the record, the determination must be accorded great weight and judicial deference (Flake v. Onongaga Landfill Sytems, Inc., 69 N.Y.2d 355, 363 [1987]) Further, courts are required to "resolve [any] reasonable doubts in favor of the administrative findings and decisions" of the responsible agency ( see Town of Henrietta v. Department of Env'tl. Conservation,

76 A.D. 2d 214, 224 [4th Dept., 1980]).

AHO Lippa determined that petitioner's inclusion in the income affidavit during the subject period of review had no probative value on the question of petitioner's co-residency with her mother. In light of the afore quoted rules for succession rights set forth within 28 RCNY §3-02, AHO Lippa's determination to give no weight or probative value to petitioner's inclusion in the income affidavit during the subject period is arbitrary and irrational. It is arbitrary and irrational because it was made with complete disregard for the unambiguous language of 28 RCNY §3-02 which indicates that a person is entitled to a right of succession if that person is disabled and appears on an income affidavit for the year preceding the permanent vacatur of that person's potential predecessor in interest. For the court to view AHO Lippa's determination as being anything but arbitrary and irrational would constitute a brand of the imprimatur of the judiciary on an administrative determination which sucks the life out of a decree an administrative regulation, i.e. 28 RCNY §3-02. This would be the quintessence of arbitrariness and irrationality.

The arbitrariness and irrationality of AHO Lippa's determination is buffered by his stated reliance upon the following evidence to find that petitioner did not reside with her mother during the relevant period: (1) a primary election affidavit oath signed by the petitioner on February 5, 2008 which stated a Bronx address (2) petitioner's "compelling admissions" in her "testimony" "sworn" before "The People's Court" television show in which she allegedly stated that "she made frequent visits to her mother on weekends". AHO Lippa stated that in light of petitioner's "sworn testimony" in the People's Court "if Ms. Kahn had been residing in the subject apartment with her mother in the year prior to her death, she would have seen her mother during the week".

Testimony is defined in Penal Law §210.00(3) as "an oral statement made under oath in a proceeding before any court, body, agency, public servant or other person authorized by law to conduct such proceeding and to administer the oath or cause it to be administered".

"The People's Court" is not a court, body, agency, public servant or other person authorized by law to conduct a proceeding and to administer the oath or cause it to be administered. It is a television show with a production manager, crew, support staff, editors, and actors. Like any other television show, it is supported by its advertisers and its objective is to entertain its audience. It is also edited to allot time for commercial breaks and to complete the show within a designated broadcast time slot. The show has voluntary participants, who are not actors, who speak about disputes on a stage that resembles a court. The words or statements uttered by the these participants are not testimony. They are neither sworn nor reliable. Furthermore, the statements made on the show have no more probative force than the words of an actor reading from a script in a play. The only difference between the two is that the participants of the show may freely ad-lib their lines.

Here, AHO Lippa gave tremendous weight and probative force to words and statements allegedly uttered by the petitioner on "The People's Court" television show. He described the utterances as "sworn testimony" and "compelling admissions". This view of the utterances petitioner allegedly made on the show is irrational. The court uses the adverb allegedly because the DVD submitted, which allegedly contains petitioner's utterances, does not include a certified transcript of its content. Nor did it contain a certification that it is a true and accurate copy of "The People's Court" segment that it purports to be.

Turning to the primary election oath signed by the petitioner on February 5, 2008, the court finds that AHO Lippa did not consider the following principles pertaining to residence and election law as set forth by the Court of Appeals in the matter of People v. O'Hara, 96 N.Y. 2d 378 [2001]. "New York courts have recognized that in this modern and mobile society, an individual can maintain more than one bona fide residence... The crucial determination whether a particular residence complies with the requirements of the Election Law is that the individual must manifest an intent, coupled with physical presence without any aura of sham... As this Court has stated, an individual having two residences may choose one to which she has legitimate, significant and continuing attachments as her residence for purposes of the Election Law" (id.).

The record is unclear as to whether AHO Lippa was aware of the Court of Appeal's holding in the O'Hara and its implication to the petitioner's circumstances. In a nutshell, an individual may have a legitimate, continuing attachment to two residences. As a dual residence, the individual may choose either one for election law purposes. The choice made does not mean that the un-chosen residence is not plaintiff's residence. In light of the erroneous treatment of the "The People's Court" submission, a remand for reconsideration is the proper resolution of the instant petition.

## **CONCLUSION**

For all the foregoing reasons, the court finds that HPD's determination to deny succession rights to the petitioner for the subject apartment was not rationally based.

Accordingly, the court annuls and vacates HPD's determination to deny succession rights to the petitioner. The court remands the matter for reconsideration by HPD keeping in mind the following direction. First, the petitioner enjoys the presumption of residency in the subject apartment based on her presence on the income affidavits during the subject period of review. Therefore, it is KBH's burden to demonstrate petitioner's lack of residency in the subject apartment during the subject period of review. Second, any utterances made by the petitioner during a segment of "The People's Court" are unsworn and are not testimony. Third, plaintiff's primary election affidavit oath must be analyzed consistent with the principle's set forth in the aforementioned O'Hara decision.

The foregoing constitutes the decision and order of this court.

Enter