

RENT REGULATION

Court Rejects DHCR Succession Interpretation

Rent regulation is a function of New York City's housing shortage, "intended to protect dwellers who could not compete in an overheated rental market, through no fault of their own." *Manocherian v. Lenox Hill Hosp.*, 84 N.Y.2d 385, 389, 618 N.Y.S.2d 857 (1994). As further protection, rent regulatory regimes have created "succession" regulations, whereby, under appropriate circumstances, a family member or non-traditional family member of the tenant of record can remain in the apartment after the tenant of record has vacated.

One common feature of succession regulations is that the succeeding tenant must prove that he or she co-occupied the apartment with the tenant of record for a minimum period of time, and as a primary resident, before the tenant of record left for good. In *Murphy v. New York State Division of Housing & Community Renewal*,¹ decided on Oct. 17, 2013, the Court of Appeals, by a 4-3 margin, determined that DHCR had misinterpreted its own succession regulation with respect to the Mitchell-Lama tenant in question.

The Facts

In 1981, Paula and Kevin Murphy, along with their one-month-old son, Paul, moved into a Mitchell-Lama co-operative apartment located at 90 Gold Street in Manhattan. In 2004, Paul petitioned the building owner for succession rights for himself and his uncle James. Pursuant to 9 NYCRR 1727-8.3(a), Paul requested a lease in his own name, asserting that his parents permanently vacated in January 2000, and that he lived with his mother for two years prior thereto.

Mitchell-Lama tenants must file income affidavits with the building owner each year. As part of his succession claim, Paul submitted income affidavits for the years 1990 through 1997, which listed him as an occupant. His mother, however, did not file income affidavits for 1998 and 1999. The owner, asserting that Paul needed to submit such affidavits to prove his occupancy for the requisite two-year period prior to 2000, denied his succession claim. Paul then administratively appealed to DHCR.

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The DHCR Ruling

During the DHCR proceeding, Paul submitted various documents in support of his claim that he lived in the subject apartment during the requisite two-year period. DHCR denied Paul's succession claim, based on his mother's failure to file income affidavits for 1998 and 1999. DHCR observed that its succession regulation, 9 NYCRR 1727-8.3(a), permitted succession rights to tenants who have "been listed on the income affidavit...immediately prior to the permanent vacating of the housing accommodation by the tenant." DHCR also cited its definition of "primary residence," 9 NYCRR 1727-8.2(a)(5), which states that "[p]roof of such residency shall be the listing of such person on the annual income affidavit



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... together with other evidence such as certified copies of tax returns, voting records, motor vehicle registration and driver's license, school registration, bank accounts, employment records, insurance policies, and/or other pertinent documentation or facts."

The Article 78 Proceeding

Paul commenced an Article 78 proceeding, which was assigned to Justice Alice Schlesinger. Schlesinger annulled DHCR's determination, citing "DHCR's myopic interpretation of the tenant succession regulations, resulting in a decision that arbitrarily ignores extensive documentary evidence submitted by petitioner and turns a blind eye to the public policy favoring the continuation of long-term, rent-regulated tenancies." Specifically, the court held that the primary purpose of the income affidavit was to "notify the housing company of the names of the individuals residing in the household so that eligibility requirements are maintained." The court held that DHCR had misinterpreted its own regulation, stating:

In denying petitioner's succession claim, DHCR has arbitrarily applied the applicable regulations to give the annual affidavit the significance of a trump card, invalidating all other evidence in the case. Such a result is not supported by the wording of the regulations or the policy behind it. The definition of 'primary residence' quoted above refers to the annual affidavit as proof of primary residence, but it does not expressly bar an individual from establishing residence through other documentation.

The Appellate Division

The Appellate Division unanimously affirmed Schlesinger's determination in Janu-

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ary 2012. The court agreed that DHCR had exalted form over substance, writing:

While the regulation at issue mandates that tenants of record file annual income affidavits, listing as an occupant the family member seeking succession rights, the relevant inquiry is primary residence during the relevant time period. Accordingly, the failure to file the requisite annual income affidavit is not fatal to succession rights, provided that the party seeking succession proffers an excuse for such failure and demonstrates residency with other documentary proof listed within 22 [sic] NYCRR 1727-8.2(a)(2)(b). Here, petitioner's mother offered such an excuse which was supported by the record (material in brackets supplied).

That excuse was extraordinary, managing to impute bad behavior to both the owner and DHCR in one fell swoop. As Paul's mother asserted before DHCR, she refused to submit income affidavits for 1998 and 1999 because "there was corruption at Southbridge Towers and I did not want to provide my financial information. A Southbridge Towers Board member and DHCR employee, Jody Wolfson, was indicted on embezzlement charges." Schlesinger had found that excuse to be credible, observing:

Petitioner's counsel has submitted confirmation that Ms. Wolfson, a DHCR employee who resided at Southbridge, was convicted of corruption for acts occurring from 2000-2005 and that Mrs. Murphy's decision not to file the 1998 and 1999 affidavits (due in 1999 and 2000) was based on information which led to the indictments.

The Court of Appeals

The Court of Appeals granted DHCR leave to appeal and issued its 4-3 affirmance last month. Judge Jonathan Lippman wrote the majority opinion, in which Judges Victoria Graffeo, Robert Smith and Jenny Rivera concurred.

The majority observed that under DHCR's succession regulations, putative successors must establish that they (1) qualify as family members, or were sufficiently interdependent with the tenant of record; (2) occupied the unit as their primary residence during the requisite two-year period; and (3) were listed as co-occupants on the income affidavits filed for the same two-year period. The majority held that notwithstanding the regulation, the failure to be named in an income affidavit was not fatal to a succession claim as long as the other two

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requirements—family membership and primary residence during the two year period—were satisfied. The majority summarized:

As both Supreme Court and the Appellate Division noted, Murphy provided ample evidence in support of his succession application evincing that he resided in the apartment during 1998 and 1999. Indeed, DHCR does not dispute Murphy's residence for the past 32 years. DHCR instead cites only his mother's technical non-compliance for single year to justify evicting him from the only home he has ever known.

Notwithstanding the importance of the income affidavit requirement, 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 Murphy's income or cooccupancy, DHCR's decision to deny Murphy's succession rights was arbitrary and capricious.

The dissent, authored by Judge Susan Read and joined by Judges Eugene Pigott and Sheila Abdul-Salaam, noted that the succession regulation in question, which required the putative successor to satisfy all three criteria, had been in existence since 1991. In 2009, when DHCR was considering amendments to its rules, it considered a change in the regulation whereby the tenant could prevail through evidence of family membership and primary residence, even if he or she were not named in the income affidavit. The dissent tersely noted that "DHCR rejected this approach—now adopted by the majority...."

The dissent, as opposed to Supreme Court, the Appellate Division, and the Court of Appeals majority, was suspicious of Paul's evidence of primary residence. The dissent stated:

...Murphy initially based his application for succession on his father's—not his mother's—purported occupancy of the apartment; he asserted that his father permanently vacated the premises in 'July 2001,' even though his father had not been listed on an income affidavit for years. Murphy also claimed that Southbridge had misplaced the income affidavits for 1998 and 1999.

The dissent continued:

Some months later, Murphy shifted gears, professing that both parents had vacated the apartment in January 2000. Since income affidavits are filed in April for the previous calendar year, this revision of the timeline conveniently meant that the filed income affidavit for year 1997 fell within the two-year period relevant for establishing succession. Murphy also claimed for the first time that the income affidavits for 1998 and 1999 had not been filed because of concerns about unspecified 'mismanagement' issues at Southbridge.

The dissent concluded by stating that DHCR had an obligation to protect the integrity of the Mitchell-Lama program by demanding annual income affidavits, and by establishing penalties for failing to do so. The dissent concluded by observing that the majority's decision "signaled a retreat from...judicial deference" to DHCR, and questioned the majority's "sympathy for Murphy, who benefits to the detriment of the low- or moderate-income family on the waiting list which otherwise would occupy the subsidized housing to which he now succeeds."

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1. *Murphy v. New York State Division of Housing & Community Renewal*, 29 Misc. 3d 1213(A), 918 N.Y.S.2d 399 (Sup. Ct. N.Y. Co. 2010); aff'd 91 A.D.3d 481, 937 N.Y.S.2d 16 (1st Dept. 2012); aff'd 2013 WL 5637985 (2013).