

<b>Matter of Matter of Murphy v New York State Div. of Hous. &amp; Community Renewal</b>
2012 NY Slip Op 00115
Decided on January 12, 2012
Appellate Division, First Department
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Decided on January 12, 2012

Mazzarelli, J.P., Andrias, Saxe, Freedman, Román, JJ.

6524 101005/10

**[\*1]In re Paul Murphy, Petitioner-Respondent,**

v

**New York State Division of Housing and Community Renewal, Respondent-Appellant,  
SouthBridge Towers, Inc., Respondent.**

Eric T. Schneiderman, Attorney General, New York (Brian A. Sutherland of counsel), for appellant.

Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (David Hershey-Webb of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered November 5, 2010, which, among other things, granted the CPLR article 78 petition to annul respondent New York State Division of Housing and Community Renewal's (DHCR) determination, dated October 14, 2009, denying petitioner's appeal from respondent housing company's rejection of his application for succession rights to an apartment, unanimously affirmed, without costs.

Supreme Court properly determined that petitioner submitted ample evidence to

establish that he occupied the subject apartment with his parents as a "primary residence" in 1998 and 1999, the two years immediately before his parents permanently vacated the apartment (9 NYCRR 1727-8.2[a]). It was arbitrary and capricious for DHCR to deny his appeal solely on the ground that no annual income affidavits were filed in 1998 and 1999. While the regulation at issue mandates that tenants of record file annual income affidavits, listing as an occupant the family member seeking succession rights (9 NYCRR 1727-8.2[a][2][a]), the relevant inquiry is primary residency during the relevant time period (Matter of Martino v Southbridge Towers, Inc., 68 AD3d 412, 412 [2009]; Matter of Renda v New York State Div. of Hous. & Community Renewal, 22 AD3d 382, 382 [2005]). 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 (Matter of Gilbert v Perine, 52 AD3d 240, 241 [2008]; Matter of Callwood v Cabrera, 49 AD3d 394, 395 [2008]) and demonstrates residency with other documentary proof listed within 22 NYCRR 1727-8.2(a)(2)(b). Here, petitioner's mother offered such an excuse which was supported by the record. Moreover, petitioner submitted a host of other documents evincing that the subject apartment was in fact his primary residence for the [\*2]relevant time period, namely 1998-1999. Respondent's determination, denying petitioner succession rights to the subject apartment, was thus arbitrary and capricious.

We have considered DHCR's remaining contentions and find them unavailing.

THIS CONSTITUTES THE DECISION AND ORDER  
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JANUARY 12, 2012

CLERK

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