

Estate of Maybank v City of New York
2020 NY Slip Op 32594(U)
August 10, 2020
Supreme Court, New York County
Docket Number: 153530/2019
Judge: W. Franc Perry
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY PART IAS MOTION 23EFM

Justice

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ESTATE OF ANDREW MAYBANK, JR., ESTATE OF
ANDREW MAYBANK, SR., & THE ESTATE OF LOTTIE
MAYBANK

Petitioner,

- v -

CITY OF NEW YORK, ESPLANADE GARDENS, INC.,

Respondent.

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INDEX NO. 153530/2019
MOTION DATE 11/14/2019
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 16, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this landlord/tenant matter, the plaintiff decedents' estates (estates or plaintiffs) move via order to show cause to vacate a decision of the New York City Department of Housing Preservation and Development (HPD), an administrative agency of the defendant City of New York (the City), and the City cross-moves to dismiss the petition (together, motion sequence number 001). For the following reasons, the motion is denied and the cross motion is granted.

FACTS

The subject of this litigation is apartment 6L in a building located at 101-125 West 147th Street in the County, City and State of New York (the building). See verified petition, ¶ 6. The building is owned by respondent Esplanade Gardens, Inc. (Esplanade Gardens), which operates it pursuant to the Private Housing Finance Law (PHFL) as a "Mitchell-Lama Co-op." See Pelleman affirmation in opposition, ¶ 8. Under the PHFL, the respondent HPD is the City's

“supervising agency” charged with oversight of Mitchell-Lama Co-ops. *See* notice of cross motion, Horowitz affirmation, ¶¶ 4-5.

Pursuant to a Mitchell-Lama occupancy agreement dated October 3, 1991, apartment 6L’s last cooperator/tenants of record were plaintiffs’ decedents Andrew Maybank, Jr. and his mother, Lottie Maybank.¹ *See* notice of cross motion, Horowitz affirmation, ¶ 11. Lottie Maybank predeceased Andrew Maybank Jr., who eventually also died on May 27, 2017. *Id.*

Also laying claim to apartment 6L are non-parties Corey Neely (Neely) and Timothy Maybank. *See* Pelleman affirmation in opposition, ¶¶ 11, 28-30. Timothy Maybank was a nephew of Andrew Maybank Jr.² *Id.* Neely variously described himself as a son, a nephew and/or an “adopted son/nephew” of Andrew Maybank Jr. *Id.* Both non-parties claimed to have resided in apartment 6L with Andrew Maybank Jr. at various times before he died. *Id.* Neely alleged to have been Andrew Maybank Jr.’s primary caretaker. *See* verified petition, exhibit F. Timothy Maybank also claims to have lived in apartment 6L for many years. *See* verified petition, ¶¶ 10 -14. He established the three plaintiffs’ decedent’s estates for his uncle, his grandmother and his grandfather, in the Surrogate’s Court of New York County on March 19, 2019. *Id.*, ¶¶ 1-3.

Prior to that, however, and after Andrew Maybank Jr.’s death on May 27, 2017, Neely submitted a succession rights application for apartment 6L to Esplanade Gardens on behalf of himself and unnamed co-occupants “John Doe” and “Jane Doe.” *See* notice of cross motion, Horowitz affirmation, ¶ 12. Esplanade Gardens denied that application in a letter decision dated

¹ The final plaintiffs’ decedent, Andrew Maybank Sr., was a cooperator/tenant of record of apartment 6L pursuant to an earlier occupancy agreement, and he predeceased the other plaintiffs’ decedents on August 23, 1979. *See* verified petition, ¶ 6; notice of cross motion, Horowitz affirmation, ¶ 11, n 2.

² Timothy Maybank is the son of Loretta Maybank, one of two sisters of Andrew Maybank Jr. *See* verified petition, ¶ 10.

September 28, 2017 (the denial letter). *See* verified petition, exhibit E. The denial letter informed Neely that he had the right to appeal the decision to HPD within 30 days. *Id.* Neely thereafter filed an appeal on behalf of himself and Timothy Maybank. *See* verified petition, ¶ 17. HPD denied that appeal in a decision dated March 7, 2018 which also issued a certificate of eviction from apartment 6L against Neely, Timothy Maybank and “John and Jane Doe” (the HPD decision). *Id.*, exhibit F. The HPD decision found that, although both Neely and Timothy Maybank had been listed on several annual income certifications which Andrew Maybank Jr. submitted for apartment 6L, (a) Neely failed to establish that he had either a familial relationship or an interdependent relationship with Andrew Maybank Jr., or that he had occupied apartment 6L during the governing “co-residency” period, and (b) Timothy Maybank also failed to establish that he had occupied apartment 6L during the governing “co-residency” period. *Id.* As a result, HPD denied their succession rights application and issued the aforementioned certificate of eviction. *Id.*

Counsel for Neely and Timothy Maybank wrote to HPD on August 13, 2018 to request that HPD vacate its denial decision. *See* verified petition, exhibit H. HPD responded in a letter dated August 28, 2018 which advised counsel that their clients’ only recourse was to commence an Article 78 proceeding to challenge the denial. *See* notice of cross motion, exhibit E. Thereafter, as previously mentioned, Timothy Maybank established the three instant plaintiffs’ decedents’ estates on March 19, 2019. *See* verified petition, ¶¶ 1-3. Subsequently, counsel for Neely, Timothy Maybank and now the estates sent a second letter to HPD on March 20, 2019 which again requested that HPD vacate its denial decision. *Id.*, exhibit J. HPD responded in a letter dated March 26, 2019 to again advise counsel that the only recourse was to commence an Article 78 proceeding to challenge the denial. *See* notice of cross motion, exhibit G.

At this juncture, the court notes that Article 78 proceedings are governed by a four-month statute of limitations. CPLR 217 (1), 7801 et seq. Because HPD issued its denial decision on March 7, 2018, the statute of limitations within which to commence an Article 78 proceeding to challenge that decision expired four months later on July 7, 2018. No such proceeding was commenced within that time period. Instead, plaintiffs submitted the instant petition and order to show cause on April 5, 2019. *See* verified petition, notice of petition, order to show cause. The City and HPD did not file an answer, but opted instead to cross-move, on July 29, 2019, to dismiss the petition. *See* notice of cross motion. Esplanade Gardens likewise opted not to file an answer, and instead submitted an affirmation in opposition to the petition dated September 19, 2019. *See* Pelleman affirmation in opposition. Plaintiffs had earlier submitted reply papers on July 30, 2019. *See* Freeman reply affirmation. The matter is now fully briefed and has been submitted to the court for disposition (together, motion sequence number 001).

DISCUSSION

As previously mentioned, pursuant to CPLR 217 (1) and 7801 et seq., the statute of limitations expired on July 7, 2018 for Neely and Timothy Maybank to challenge HPD's March 7, 2018 decision denying their application for succession rights to apartment 6L. The late filing of an Article 78 petition after the expiration of the statute of limitations warrants the dismissal of the petition. *See e.g. Matter of Kamara v East Riv. Landing*, 132 AD3d 510 (1st Dept 2015). Here, it is clear that any challenge to the March 7, 2018 HPD decision by Neely or Timothy Maybank must be dismissed as untimely.

The petition nevertheless urges that the plaintiff decedents' estates are "indispensable parties" to Neely's and Timothy Maybank's underlying succession rights claims. *See* verified petition, ¶¶ 38-55. HPD responds that this is incorrect because the PHFL and HPD's regulations

provide that “where a tenant/cooperator [of a Mitchell-Lama apartment] has died, the lease and shares of stock for such decedent's apartment shall be surrendered by the decedent's estate or survivors to the housing company.” 28 NYCRR 3-02 (p) (2) (6) (i). As a result, a decedent's estate has no ongoing interest in a subsequent succession rights challenge by a remaining family member or other qualifying occupant. *See* notice of cross motion, Horowitz affirmation at 10-11 (paragraphs not numbered).

Plaintiffs' reply papers reassert their original argument, and further note that HPD “fails to cite any caselaw whatsoever . . . regarding this issue.” *See* Freeman reply affirmation, ¶ 6. The court notes that deficiency in HPD's papers, but its own research has disclosed a recent line of decisions by the Appellate Division, First Department, that recognize that where a deceased tenant/occupant held shares in a Mitchell-Lama cooperative apartment, those shares did not automatically pass to the tenant's estate upon his/her death, but are instead required to be surrendered to the PFHL company which owned and/or managed the Mitchell-Lama cooperative. *See e.g. Costacos v Southbridge Towers, Inc.*, 162 AD3d 588 (1st Dept 2018); citing *Estate of Sherman v Southbridge Towers, Inc.*, 145 AD3d 575 (1st Dept 2016); *Kay v Southbridge Towers, Inc.*, 145 AD3d 576 (1st Dept 2016). Those First Department decisions also recognize that any remaining family members or other occupants of the subject Mitchell-Lama apartment must independently satisfy the criteria for succession rights in order to remain there. *Id.* Pursuant to that line of cases, it is clear that the plaintiff estates herein ceased to have any interest in apartment 6L when their respective decedents passed away. Accordingly, the court rejects the argument that the plaintiff estates are “indispensable parties” to Neely's and Timothy Maybank's subsequent succession rights claims.

Because the court has determined that Neely's and Timothy Maybank's succession rights claims are time barred, and that the plaintiff estates are not "indispensable parties" to the resolution of those claims, the court concludes that the instant petition should be denied. Concomitantly, the court also grants defendants' cross motion to dismiss the petition. Although Esplanade Gardens did not join in defendants' cross motion, its opposition papers did request dismissal of both the petition and the order to show cause which accompanied it. *See* Pelleman in opposition, ¶ 3. The order to show cause provided for a stay of the residential holdover proceeding that Esplanade Gardens had commenced against Neely and Timothy Maybank in the Civil Court of the City of New York under Index Number L&T 63862/18. Neely and Timothy Maybank had asserted that the plaintiff decedents' estates in this action were also necessary parties to that holdover proceeding. *See* verified petition, ¶¶ 56-63. They were incorrect. The Appellate Term for the Second Department has repeatedly held that the estates of deceased tenants of Mitchell-Lama apartments are *not* necessary parties to any subsequent eviction proceedings that may be commenced against the remaining occupants of such apartments (whose continued occupancy depends on the viability of their claims to succession rights). *See e.g. Cadman Towers, Inc. v Barry*, 31 Misc 3d 127 (A), 2011 NY Slip Op 50452(U) (App Term, 2d Dept 2011); *Ryerson Towers v Estate of Brown*, 160 Misc 2d 107 (App Term, 2d Dept 1994).³ Therefore, along with its denial of the instant Article 78 petition, the court also lifts the stay on the prosecution of the Civil Court proceeding which it authorized in the April 5, 2019 order to show cause.

³ The court notes that the cited Appellate Term decisions specifically left open the question of whether a decedent's estate might be a necessary party to an Article 78 proceeding concerning a remaining tenant's succession rights. However, the court also notes that the First Department decisions cited earlier resolve that issue in the negative where Mitchell-Lama co-operative apartment units are concerned.

DECISION

Accordingly, for the foregoing reasons it is hereby

ADJUDGED that the petition for relief, pursuant to CPLR Article 78, of the plaintiffs Estate of Andrew Maybank Jr., Estate of Andrew Maybank, Sr. and Estate of Lottie Maybank (motion sequence number 001) is denied; and it is further

ORDERED that the stay of proceedings which the court authorized in the April 5, 2019 order to show cause in this action with respect to the matter entitled *Esplanade Gardens Inc. v Neely, et al.*, which was commenced in the Civil Court of the City of New York, New York County under Index No. L&T 063862-18, is vacated; and it is further

ORDERED that the cross motion, pursuant to CPLR 3211, of the defendant City of New York (motion sequence number 001) is granted, and the instant petition is dismissed in its entirety as against said defendant, and the Clerk of the Court is directed to enter judgment accordingly in favor of said defendant.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

8/10/2020
DATE


W. FRANC PERRY, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE