

**Matter of Diner v New York City Dept. of Hous.
Preserv. & Dev.**

2021 NY Slip Op 30755(U)

March 2, 2021

Supreme Court, Kings County

Docket Number: 505040/2020

Judge: Carl J. Landicino

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of March, 2021.

PRESENT:

CARL J. LANDICINO, J.S.C.

In the Matter of
MIKHAIL DINER and TAMARA DINER,
Petitioner,
for Judgment under Article 78 of the Civil Practice Law and Rules setting aside the certificate of eviction terminating Petitioner's tenancy

Index No.: 505040/2020

DECISION AND ORDER

-against-

NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT and LUNA PARK HOUSING CORPORATION,
Respondents,

Motions Sequence #1

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion:

Papers Numbered (NYSCEF)

| | | |
|---|-------|--------------|
| Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed | | 1-19 |
| Opposing Affidavits (Affirmations) | | 28, 31-59 |
| Affidavit (Affirmation) in Reply | | 60-67, 68-75 |
| Memoranda of Law | | 29, 30 |

After a review of the papers and oral argument the Court finds as follows:

The Petitioners, Mikhail and Tamara Diner (hereinafter referred to as the "Petitioners") have petitioned for relief, pursuant to CPLR 7803 (3), that the court consider whether the decision of the Respondents, New York City Department of Housing Preservation and Development (hereinafter referred to as "HPD") and Luna Park Housing Corp. (hereinafter referred to as "Luna Park") (hereinafter collectively referred to as the "Respondents"), was either made in violation of lawful procedure, or an error of law, was arbitrary, capricious, or an abuse of discretion. Specifically, the Petitioners dispute HPD's decision to deny them successor rights to the Petitioners, terminating their tenancy and issuing a certificate of eviction against them.

The Petitioners allege that they are residents and shareholders of Apartment No. 14G (hereinafter referred to as the "Apartment") within the building located at 2883 West 12th Street, Brooklyn, NY 11224, which is apparently owned by Luna Park. Luna Park operates the Premises as a Mitchell-Lama cooperative. The Petitioners allege that they primarily resided within the Apartment since 1997 and continue to reside there.

The Petitioners also allege that when they began their occupation of the Apartment, they lived with Tamara Diner's brother, Leonid Kolker, who was the then named tenant of the Apartment. Mr. Kolker allegedly moved from the Apartment in 1999 and the Petitioners applied to be approved as Mr. Kolker's successors. HPD approved the request and issued shares in Mikhail Diner's name. In 2013, the Petitioners sought to add Tamara Diner's name to the shares. At that time, Luna Park began an investigation into the propriety of the 1999 transfer.

This investigation led to a hearing before HPD Hearing Officer Frances Lippa. Hearing Officer Lippa found that (i) the evidence supporting the Petitioners' alleged right of succession was false, (ii) there was no family relationship between Mr. Kolker and the Petitioners; and (iii) the Petitioners had not proved co-residency with Mr. Kolker.

The Petitioners argue that the Respondents decision must be vacated. They also raise that the proceeding was violative of the applicable statute of limitations. The Petitioners further contend that the Respondents' action is a retaliatory eviction because of Mikhail Diner's criticism of Luna Park's management of the Premises.

Luna Park oppose the Petition (motion sequence #1). Luna Park alleges that the Petitioners obtained succession of the tenancy by furnishing fraudulent documents to support their contention that they were related to Mr. Kolker. Luna Park argues that this dispute is one where the issue of substantial evidence has been raised and should therefore be transferred to the Appellate Division, Second Department. Luna Park also argues that the Petitioners failed to demonstrate that HPD acted arbitrarily or capriciously. Further, Luna Park argues that HPD appropriately enforced its rules in this instance. Finally, Luna Park argues that the limitation period for commencement of the underlying proceeding has not expired because the Petitioner's continued fraudulent occupation of the Apartment is a continuing wrong and Luna Park's action was taken in good faith. HPD also opposes the motion (motion sequence #1) and relies on the arguments raised by Luna Park.

The relevant CPLR provisions state in pertinent part as follow:

The only questions that may be raised in a proceeding under this article are:

...

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law in, on the entire record, supported by substantial evidence.

CPLR 7803.

(g) Where the substantial evidence issue specified in question of four of section 7803 is not raised, the court in which the proceeding is commenced shall itself dispose of the issues in the proceeding. Where such an issue is raised, the court shall first dispose of such other objections as could terminate the proceeding, including but not limited to lack of jurisdiction, statute of limitations and res judicata, without reaching the substantial evidence issue. If the determination of the other objections does not terminate the proceeding, the court shall make an order directing that it be transferred for disposition to a term of the appellate division held within the judicial department embracing the county in which the proceeding was commenced.

CPLR 7804.

The argument that the underlying proceeding was barred by the statute of limitations or that the Petitioners' interest is protected by the principles of estoppel, laches, or waiver are without merit. In *Lindsay Park Hous. Corp. v. Hines*, 27 Misc.3d 149 (A), 911 N.Y.S.2d 693 [App Term 2d Dept 2010]), the Court held as follows:

[A] housing company cannot grant Mitchell-Lama tenancy rights by estoppel, laches, or waiver (see *Matter of Schorr v. New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776, 886 N.E.2d 762, 857 N.Y.S.2d 1 [2008]; *Starrett City, Inc. v. Smith*, 25 Misc.3d 42, 889 N.Y.S.2d 362 [App Term, 2d, 11th & 13th Jud. Dists. 2009]; *Gouverner Gardens Hous. Corp. v. Belmlinsky*, 23 Misc. 3d 126[A], 881 N.Y.S.2d 363, 2009 NY Slip Op. 50534[U], 881 N.Y.S.2d 363 [App Term, 1st Dept 2009]). Nor is there any merit to occupant's contention that the proceeding is barred by the statute of limitations, for occupant's remaining in the Mitchell-Lama apartment is a continuing wrong that "is not referable exclusively to the day the original wrong was committed" (*Kaymakcian v. Board of Mgrs. Of Charles House Condominium*, 49 AD3d 407, 854 N.Y.S.2d 52 [2008] [internal quotation marks omitted]), and the cause of action accrues anew each day (see *1050 Tenants Corp. v. Lapidus*, 289 AD2d 145, 735 N.Y.S.2d 47 [2001]).

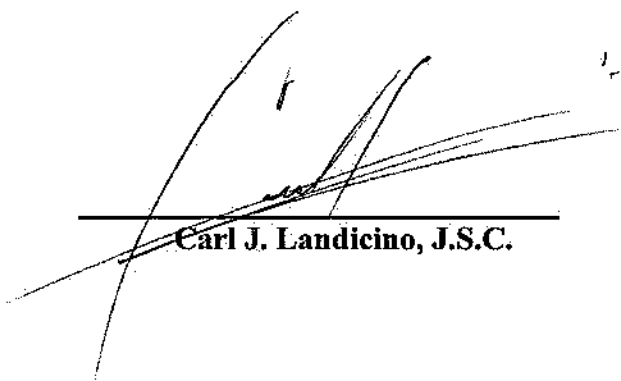
Accordingly, insofar as the underlying proceeding may not be disposed of in relation to the aforesaid dispositive issues, this matter becomes one relating to the issue of substantial evidence and must be transferred to the Appellate Division, Second Department, pursuant to CPLR 7804(g).

Based on the foregoing, it is hereby ORDERED as follows:

This matter is transferred to the Appellate Division of the Second Department in accordance herewith.

This Constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.

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