

**Kamal v New York State
Div. of Hous. & Community Renewal**

2025 NY Slip Op 30629(U)

February 21, 2025

Supreme Court, New York County

Docket Number: Index No. 160385/2023

Judge: Shahabuddeen A. Ally

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SHAHABUDDEN A. ALLY
Justice

PART 16M

ANNETTE KAMAL and HANY KAMAL,

Petitioners,

-against-

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL,

Respondent.

INDEX NO. 160385/2023

MOTION DATE 5/21/2024

MOTION SEQ. NO. 001

DECISION & ORDER

The following e-filed documents, listed by NYSCEF document number, were read on this motion (Seq. No. 1) to/for **PRE-SUIT DISCOVERY (CPLR § 3102(c))**: 1-6, 8, 12-14, 16-31

In this proceeding, petitioners ANNETTE KAMAL and HANY KAMAL (“Petitioners”) seek pre-action discovery, pursuant to CPLR § 3102(c), from respondent NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL (“DHCR”). (See Verified Pet., dated Oct. 24, 2023 (“Pet.”) (NYSCEF Doc. 1)) DHCR opposes the application. (See Affirm. in Opp. to Order to Show Cause for Pre-Action Discovery, dated Jan. 4, 2024 (“Schindelman Affirm.”) (NYSCEF Doc. 12))

In their Verified Petition, Petitioners claim that DHCR violated their rights “by negligently allowing Petitioners’ landlord, 430 Realty LLC, and/or their representatives . . . , to fraudulently amend Petitioners’ DHCR Regulated Rent history to make it falsely appear that Petitioners’ apartment . . . was legally removed from Rent Stabilization for a non-existent ‘IMPRVMT’ (improvement).” (Pet. ¶ 2) More specifically, according to Petitioners, between 2009 and 2017 (the years for which Petitioners requested and received the DHCR Rent History for their apartment), the entry for the year 2005 was altered to add the notation “IMPRVMT (Improvement),” when, in fact, no improvement was ever made to the apartment. (*Id.* ¶¶ 11-13) As a result, Petitioners assert that they intend to commence a negligence action against DHCR and any others involved in or allowing the alleged alteration. (*Id.* ¶ 14) In aid of their contemplated action, Petitioners now claim to

require certain pre-action discovery to (1) identify the specific DHCR Records Access Officers or supervisory officers involved in the alleged alteration and (2) to preserve the relevant evidence from destruction. (*See id.* ¶¶ 17-27)

Initially, Petitioners' application must be denied because they failed to allege that this Court would have jurisdiction over the contemplated action. *See In re Wallace*, 239 A.D.2d 14, 16 (3d Dep't 1998) (holding that, "[l]acking jurisdiction over the underlying action, it necessarily follows that Surrogate's Court lacked the authority to grant the incidental relief sought by petitioner" pursuant to CPLR § 3102(c)); *Flyte Time Worldwide v. John Jay College*, No. 151813/2017, 2017 WL 2131040, at *1 (N.Y. Sup. Ct. N.Y. Cnty. May 11, 2017); *Perez v. N.Y. Presbyt. Hosp.*, 11 Misc. 3d 722, 723-24 (N.Y. Civ. Ct. N.Y. Cnty. 2006). *But see In re Murray*, No. 102794/2012, 2012 WL 6065830 (N.Y. Sup. Ct. N.Y. Cnty. Nov. 5, 2012) (distinguishing *In re Wallace* and *Perez* as involving courts of limited jurisdiction, while the Supreme Court is a court of general jurisdiction, and holding that, "[t]hough it is uncontroverted in this proceeding that New York courts do not have jurisdiction to adjudicate claims of fraud against the Bank of New Zealand, it does not follow that they lack power to order discovery in an action to be commenced in New Zealand."). Nor would the Court have jurisdiction over a negligence action seeking monetary damages against DHCR, a state agency. *See Ruotolo v. Div. of Housing & Community Renewal*, 211 A.D.3d 955, 957 (2d Dep't 2022) ("[T]he Court of Claims has exclusive jurisdiction over actions for money damages against State agencies, departments, officials, and employees acting in their official capacity in the exercise of governmental functions. . . . [T]herefore, the Supreme Court has no jurisdiction over the petitioner's claims for monetary damages." (internal citations omitted)). Petitioners do not even attempt to address this jurisdictional infirmity in their reply. (*See generally* Affirm. in Reply, dated Feb. 28, 2024 (NYSCEF Doc. 16))

Petitioners' application also fails on the merits. CPLR § 3102(c) provides that pre-action disclosure to aid in bringing an action, to preserve information, or to aid in arbitration may be obtained, but only by court order and only where the "petitioner demonstrates that he or she has a meritorious cause of action and that the information sought is material and necessary to the actionable wrong." *Bishop v. Stevenson Commons. Assocs., L.P.*, 74 A.D.3d 640, 641 (1st Dep't 2010). "Generally, the determination of whether a party has demonstrated merit lies in the sound discretion of the trial court." *Id.*

Here, Petitioners fail to allege any facts that suggest that DHCR or any of its employees were negligent. The mere allegation that the notation “IMPRVMT” was added to the DHCR Rent History for the apartment for year 2005 is not alone sufficient to create an inference of negligence on the part of DHCR or its employees. In any event, DHCR’s submissions sufficiently rebut any inference of negligence. (*See generally* Aff. of Bruce Falbo, sworn to on Jan. 4, 2024 (NYSCEF Doc. 13)) Petitioners’ reply affirmation, in turn, raises new issues and arguments for the first time, and as such will not be considered. *See Mulligan v. City of N.Y.*, 120 A.D.3d 1155, 1156 (1st Dep’t 2014) (holding that arguments “raised for the first time in . . . reply affirmations” were “not properly before” the court). Even if considered, however, Petitioners’ reply does nothing to counter DHCR’s submitted proofs.

Further, Petitioner already has the information necessary to file a complaint against DHCR, because it obviously knows DHCR. If negligence claims can even be maintained against DHCR’s individual employees, they can be named in the complaint as “John Does” or “Jane Does” and their identity discovered through discovery in the action itself. *See Bishop*, 74 A.D.3d at 641 (“[P]etitioner does not explain why he cannot commence the action against Midtown and determine, in the course of discovery, whether any intentional torts might have been committed by the individual employees.”).

Finally, Petitioner has failed to make any factual allegations suggesting that the information sought herein is subject to imminent destruction such that preservation, prior to the commencement of a plenary action, is necessary. *See Flyte Tyme Worldwide*, 2017 WL 2131040, at * 1. Their conclusory allegation that they will “face imminent and irreparable harm should [their application] be denied and in the event of spoliation, or destruction of the enumerated evidence” is insufficient.

Accordingly, it is hereby:

ORDERED and ADJUDGED that Petitioners’ Verified Petition and Order to Show Cause (Seq. No. 1) are **DENIED**, and the Verified Petition is **DISMISSED**; and it is further

ORDERED that DHCR shall serve a copy of this Decision and Order upon Petitioners and upon the Clerk of the General Clerk’s Office with notice of entry within twenty (20) days thereof; and it is further

ORDERED that service upon the Clerk of Court shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (Revised August 15, 2019);¹ and it is further

ORDERED that any requested relief not expressly addressed herein has been considered and is denied; and it is further

ORDERED that the Clerk shall mark Motion Sequence No. 1 decided in all court records; and it is further

ORDERED that the Clerk shall mark this proceeding disposed in all court records.

This constitutes the decision and order of the Court.

February 21, 2025

DATE



SHAHABUDDEEN A. ALLY, A.J.S.C.

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	OTHER
		<input type="checkbox"/>	STAY CASE
		<input type="checkbox"/>	REFERENCE

¹ The protocols are available at <https://www.nycourts.gov/LegacyPDFS/courts/1jd/supctmanh/Efil-protocol.pdf>.