

**1234 Broadway LLC v Schneider**

2012 NY Slip Op 31830(U)

June 26, 2012

Supreme Court, New York County

Docket Number: 102212/12

Judge: Cynthia S. Kern

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SCANNED ON 7/13/2012

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

PRESENT: \_\_\_\_\_  
*Justice*

PART \_\_\_\_\_

Index Number : 102212/2012  
1234 BROADWAY, LLC.  
vs.  
HON. JEAN T. SCHNEIDER  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_ | No(s). \_\_\_\_\_

Upon the foregoing papers, It is ordered that this motion is

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is decided in accordance with the annexed decision.

**FILED**

JUL 11 2012

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/26/12

CRK, J.S.C.

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER  
 DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

-----X

1234 BROADWAY LLC,  
Petitioner,

Index No.102212/12

For an Order Pursuant to Article 78  
of the Civil Practice Law and Rules,

**DECISION/ORDER**

-against-

HONORABLE JEAN T. SCHNEIDER, as  
Judge of the Housing Court and CAROL ALT,  
as clerk of the NYC Civil Court ,et al,

**FILED**

JUL 11 2012

Respondents.

-----X

HON. CYNTHIA S. KERN, J.S.C.

NEW YORK  
COUNTY CLERK'S OFFICE

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

\_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Notice of Cross Motion and Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Petitioner has commenced the present Article 78 proceeding seeking an order, by a writ of mandamus from this court, directing Judge Schneider and the clerk of Civil Court to “enter a final judgment determining the rights of the parties in accordance with the Court’s oral opinion rendered on the record on January 25, 2008.” For the reasons stated below, the motion is denied and this proceeding is dismissed.

Petitioner landlord 1234 Broadway, LLC brought a holdover proceeding on the ground of

non-primary residence in the Civil Court, Housing Part, against the tenant of record who did not appear in the proceeding and the subtenant, Eun Ja Kim, who did appear and claimed tenancy rights. The trial concluded on January 25, 2008 and the Judge rendered a decision on the record granting final judgment in favor of the petitioner against the tenant of record and dismissed the petition as against Eun Ja Kim, the subtenant who actually resided in the premises. By notice of entry dated February 19, 2008, counsel for Eun Ja Kim served a copy of the file jacket denoting the dismissal of the petition against Kim and that the decision was on the record contained in the trial transcript. By notice of appeal, dated February 29, 2008, petitioner appealed the January 25, 2008 decision and order dismissing the petition against Kim. Petitioner alleges that the appellate term, First Department would not allow counsel to perfect the appeal because of the absence of a final judgment or appealable order. Petitioner then did absolutely nothing until it made a motion returnable on September 10, 2011 in which it submitted to the court a proposed order and judgment for signature. By decision dated November 2, 2011, the Judge declined to sign the proposed order and judgment finding the application untimely, based on the delay of almost four years in submitting the proposed order. The court attorney for the Judge then explained to movant that it could submit another order but that it would have to explain the reasons for the almost four year delay between the issuance of the order and the September 2011 application to the court. The petitioner again requested by letter that the court sign the proposed order and judgment but failed to explain the reasons for the delay. Petitioner then brought the present application for a writ of mandamus from this court directing the civil court to enter a final judgment.

Under New York law, "mandamus lies to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought." *Matter of Legal Aid Society of Sullivan County*

*v Scheinman*, 53 N.Y.2d 12,16 (1981). Mandamus does not lie to compel acts that “are entrusted to the respondent official’s discretion. Mandamus is available only where the petitioner’s right to performance is so clear as to admit of no doubt or controversy.” *Coastal Oil New York Inc. v Newton*, 231 A.D.2d 55, 57 (1<sup>st</sup> Dep’t 1997).

In the present case, petitioner is not entitled to a writ of mandamus as the determination by Judge Schneider as to whether to provide petitioner with an order and judgment was a discretionary rather than a ministerial act. It was within the Judge’s discretion to decline to sign the proposed order and judgment without an explanation from the petitioner as to the reason for the extensive delay under the particular circumstances of this case -- where petitioner waited over three years from February 2008 to September 2011 to request an order to be signed by the court, where Petitioner was present at the day of trial when the court issued a decision on the record and where petitioner never submitted the transcript to the court to be so ordered or requested a separate written order for almost four years.

The First Department has specifically held that a so ordered transcript provides an appealable order. *See Domansky v Berkovitch*, 251 A.D.2d 3 (1<sup>st</sup> Dep’t 1998). In that case, the court held that the court’s explicit grant on the record of the plaintiff’s request for leave to amend a pleading was binding on the parties even though not reduced to a formal written order and “could have been appealed from provided only that defendants had had the relevant portions of the conference transcript ‘so ordered.’” *Id.* Thus, the decision of the civil court on the record after the trial was binding on Petitioner even though not reduced to a formal written order and petitioner could have appealed the order by obtaining a so ordered copy of the trial transcript at any time. The petitioner could also have submitted a proposed order and judgment to the court at any time after the trial was

