

**Cheddie v Wing Fat Prop., Inc.**

2008 NY Slip Op 31715(U)

June 18, 2008

Supreme Court, New York County

Docket Number: 0106799/2007

Judge: Jane S. Solomon

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: JANE S. SOLOFF  
Justice

PART 55

Cheddie

INDEX NO. 106799/07

MOTION DATE 3/31/08

MOTION SEQ. NO. 03

MOTION CAL. NO. \_\_\_\_\_

- v -

Wing Fed Property, Inc.

The following papers, numbered 1 to 12 were read on this motion to/for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1-3

4-9

10-12

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order.

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

RECEIVED  
JUN 19 2008  
IAS MOTION  
SUPPORT OFFICE

FILED  
JUN 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 6/18/08

JANE S. SOLOFF J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

WAS 1150

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

-----X  
ANOUSKA CHEDDIE, NANDO DE CARVALHO,  
JERRY WEINSTEIN and LIZ MCSHEA (NEE LIZ REILLY),

Plaintiffs,

INDEX No. 106799/07

-against-

**DECISION and ORDER**

WING FAT PROPERTY, INC., HARRY LAM  
DANNY LAM, and TZE KIN LAM,

Defendants,

-----X  
JANE S. SOLOMON, J:

**FILED**  
JUN 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Motion sequence numbers 003 and 004 are consolidated for disposition.

Plaintiffs brought this action seeking, *inter alia*, a judicial declaration of their right to rent stabilization coverage of residential apartments. Defendants now move for summary judgment dismissing the complaint and plaintiffs cross move for partial summary judgment on the issue of rent stabilization coverage and to dismiss defendants' affirmative defenses. By separate motion defendants seek to amend their answer to assert an affirmative defense of "substantial rehabilitation".

Plaintiffs, Anouska Cheddie ("Cheddie"), Nando Carvalho ("Carvalho"), Jerry Weinstein ("Weinstein") and Liz McShea (nee Reilly) ("McShea"), are or were tenants in a four story apartment building located at 240 East 23<sup>rd</sup> Street that is owned by defendant Wing Fat Property, Inc. ("Wing Fat")<sup>1</sup>.

Wing Fat purchased the property at a foreclosure sale in 1993, and, according to the defendants, at that time the building was vacant and in a seriously deteriorated condition.

-----  
<sup>1</sup> McShea moved out of the building in the fall of 2005.

(1/14/08 Lam Aff., para. 7) Defendants allege that they undertook to substantially rehabilitate the building by installing, *inter alia*, a new foundation, girders and beams, performing a complete renovation of the layout and configuration of each floor and replacing the heating, hot water, cold water and electrical systems and installing new kitchens and bathrooms. After the renovation, Wing Fat obtained a new certificate of occupancy dated January 3, 1994 that permitted a boiler room and storage in the cellar, a commercial store on the first floor, two offices on the second floor and two apartments each on the third and fourth floors.

All the plaintiffs allege that, notwithstanding the certificate of occupancy, the two units on the second floor have always been occupied as residential units and that the building has always had six apartments. Weinstein and Carvalho have submitted affidavits and leases to demonstrate that they lived in apartments 2A and 2B (Cross Motion, Ex. A and B) on the second floor, that each of the units has stoves, sinks, bathrooms and other residential accoutrements and that the leases substantially complied with rent stabilization.

In April, 2005, McShea filed a rent overcharge complaint with the Department of Housing and Community Renewal ("DHCR"). She alleges that defendants were trying to force her out of the building by charging her a higher rent so that Danny Lam could move into the building (McShea Aff, para. 6). McShea contends that shortly after she filed the complaint with DHCR she moved out of the building and that she never responded to DHCR's request for information or participated in the administrative proceeding. In addition, she notes that she was not notified about the final determination in the DHCR proceeding (McShea Aff., para. 10). On October 5, 2005, DHCR decided McShea's complaint in an order that stated that the building is

not subject to the rent stabilization code because evidence in the record indicated that the building has less than six residential units<sup>2</sup> (Roskoff Aff., Ex. C).

In support of the motion to dismiss the complaint, defendants argue that DHCR's October, 2005 decision finding that the building is not covered by the rent stabilization code is res judicata. Alternatively, they argue that even if the building does have six residential units, it is not subject to rent stabilization because the building has been substantially rehabilitated. In addition, they contend that the proceeding must be dismissed because plaintiffs have failed to exhaust their administrative remedies.

In opposition to the motion for summary judgment dismissing the complaint and in support of the cross motion for partial summary judgment, plaintiffs Cheddie, Carvalho and Weinstein correctly argue that the October 5, 2005 DHCR determination does not have res judicata or collateral estoppel effect as to them because they were not parties to that proceeding and did not have an opportunity to litigate the issue or contest the decision (*see, Gilberg v. Barbieri*, 53 NY.2d 285, 292 [1981][Due process would not permit a litigant to be bound by an adverse decision made in a prior proceeding to which he/she was not a party or in privity with a party.]; *Akgul v. Prime Time Transp., Inc.*, 293 A.D.2d 631 [2<sup>nd</sup> Dept. 2002][the party against whom collateral estoppel is applied must have had a full and fair opportunity to contest the decision]).

However, McShea was a party to the 2005 DHCR proceeding and the October, 2005 decision of DHCR is final as to her. McShea does not allege that she notified DHCR of her new address and that, nevertheless, the agency failed to serve her with the October decision. The time

---

<sup>2</sup> McShea has failed to submit a copy of the complaint she filed with DHCR.

periods for her to file a request for administrative review ("PAR") and/or for filing an Article 78 proceeding have expired due to her own inaction (See, e.g., *Dworman v. DHCR*, 94 N.Y.2d 359, 374 [1999]). Accordingly, the complaint must be dismissed as to her.

Motion and Cross Motion for Summary Judgment

In this case, the substantive question is whether the building located at 240 East 23<sup>rd</sup> Street is subject to the Rent Stabilization Law. Defendants allege that this determination should be made by DHCR.

Although this court has concurrent jurisdiction with DHCR over the issues raised herein (see, *Matter of Ruskin v. Miller*, 172 A.D.2d 164 [1<sup>st</sup> Dept 1991]), it is the DHCR which has primary jurisdiction over questions of whether a building has been substantially rehabilitated and/or is subject to rent stabilization (see, *Davis v. Waterside Housing*, 274 A.D.2d 318, 319 [1<sup>st</sup> Dept. 2000]). In *Haddad Corp. v. Redmond Studio*, 102 A.D.2d 730 (1<sup>st</sup> Dept 1984) the First Department stated,

[W]hile concurrent jurisdiction does exist, where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a judicial tribunal should be withheld pending resolution of the administrative proceeding.

(See also, *In re Jo-Fra Props., Inc.*, 27 A.D.3d 298 [1<sup>st</sup> Dept 2006]; *EPDI Associates v. Conley*, 7 A.D.3d 755, 756 [2<sup>nd</sup> Dept 2003]).

Deference to primary administrative review is particularly important where the matters under consideration are inherently technical and peculiarly within the expertise of the agency (*Davis v. Waterside Housing Co.*, 274 A.D.2d 318 [1<sup>st</sup> Dept. 2000]). Here, the legislature has

specifically authorized DHCR to administer questions related to rent regulation (McKinney's Uncons. Laws of N.Y. Section 8628[c]) and the courts have found that DHCR has primary jurisdiction where there is a question as to whether a building is subject to rent regulation pursuant to the "substantial rehabilitation" act and regulation (*see, e.g. Davis v. Waterside Housing Co., id.; Matter of Ardor Mgt. Corp. v. DHCR*, 104 A.D.2d 984, 987 [2<sup>nd</sup> Dept 1984]).

Indeed, the DHCR Operational Bulletin provides that, "**DHCR** will find that a building has been substantially rehabilitated within the meaning of TPR section 2500.9(e) and RSC Section 2520.11(e) , and is therefore exempt from coverage under the ETPA or RSL . . ." (emphasis added) if, the owner demonstrates, under the totality of the circumstances, that certain specified criteria have been met. The criteria, which are technical and include, among other things, an evaluation of the degree of renovations that have been completed relating to seventeen specific building-wide and apartment systems and a determination that when the rehabilitation was commenced the building was in substandard or seriously deteriorated condition. Clearly, DHCR is best suited to make these technical determinations, in the first instance. Accordingly, it is

ORDERED that the motion for summary judgment is granted to the extent that the action is dismissed as to McShea; and it is further

ORDERED that the remainder of the motion for summary judgment and the cross motion for summary judgment are denied and the action is dismissed without prejudice for DHCR's determination of the issues presented herein; and it further is

ORDERED that the motion for leave to amend the answer is denied as moot.

The clerk is directed to enter judgment accordingly.

DATE: June 18, 2008

ENTER:



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a horizontal line.

J.S.C.  
JUN 19 2008

**FILED**  
JUN 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK