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

PRESENT: ALICE SCHLESINGER ALICE SCHLESINGER Justice

PART 16

Highbridge House Ogden, LLC, et al

INDEX NO. 100845/08 ~~109478/05~~

MOTION DATE

- v -

MOTION SEQ. NO. 003

NYSDHCR, et al

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
JAN 29 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

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

Dated: JAN 26 2009

ALICE SCHLESINGER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

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HIGHBRIDGE HOUSE OGDEN, LLC, et al.,

Plaintiffs,

-against-

100845/08

Index No. ~~108478/08~~
Motion Seq. No. 003

NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendant,

and

CENTRAL PARK GARDENS TENANTS ASSOCIATION, et al.,

Intervenors-Defendants.

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SCHLESINGER, J.:

Before the Court is plaintiffs' motion for an order pursuant to CPLR §3217 to discontinue this action without prejudice and for related relief. Various defendants have opposed any unconditional discontinuance without prejudice. Although the extended and somewhat tortured history of this litigation need not be reviewed in detail, some background is necessary to the resolution of this motion.

Background Facts

The plaintiffs are sixteen different owners of various residential apartment buildings located in New York, Bronx, Kings and Nassau Counties. All the buildings were previously subject to Article 2 of the Private Housing Finance Law, commonly known as the "Mitchell-Lama" program. In each case, the owner exercised its right to withdraw from Mitchell-Lama, as a result of which the tenants became subject to the Rent Stabilization Law [Admin Code §26-513(a)] or related laws and regulations. In each case, the owner filed

with the New York State Division of Housing and Community Renewal (DHCR) an application to increase the rents of the various regulated tenants in occupancy based on "unique and peculiar" circumstances (the "U/P applications"). On or about November 21, 2007, DHCR amended certain of the regulations which govern the U/P applications. A few months later, plaintiffs then commenced this action for a declaration that the amended regulations were unlawful. Various groups of tenants residing in the buildings have been granted leave to intervene. The Attorney General of the State of New York has intervened to address the constitutional issues.

One other background fact is particularly noteworthy. In 2007, before the disputed amended regulations were promulgated, another similarly situated landowner, Columbus 95th Street LLC, brought a mandamus proceeding pursuant to CPLR Article 78 to compel DHCR to determine its pending U/P application (the *Columbus* proceeding, Index No. 113148/07). After the amended regulations were promulgated but shortly before this action was commenced, Columbus sought leave from then-presiding Justice Stone to amend its petition to add a request for a declaration that the amended regulations were unlawful. Based on the assertion by the *Highbridge* plaintiffs that the two cases were related, and pursuant to prior orders by Justice DeGrasse (who was first assigned to *Highbridge*) and Justice Stone (who was first assigned to *Columbus*), the two cases are now assigned to this Court as related cases. Various tenant groups and the Attorney General have intervened in the *Columbus* case as well.

On November 19, 2008, this Court held a joint conference with all counsel present. At that conference, with the consent of counsel, a coordinated schedule was set for the

briefing and oral argument of all the outstanding issues. The *Highbridge* plaintiffs were directed to move for summary judgment by January 12, 2009, and the *Columbus* petitioner was given until that same date to submit a memorandum of law in support of its petition. All other parties were given an opportunity to submit papers based on parallel schedules in the two cases, and oral argument was set for April 24, 2009. As of this date, petitioner Columbus has served its papers, but the Highbridge plaintiffs have not.

The Instant Motion

In the instant motion, made by Order to Show Cause submitted to this Court on January 9, 2009, the *Highbridge* plaintiffs seek an order:

1. Discontinuing this *Highbridge* action without prejudice;

2. Discontinuing the *Highbridge* plaintiffs' obligation to serve a motion for summary judgment as moot; and

3. Continuing the resolution of the issues raised in the *Columbus* action.

The basis for motion (stated at ¶17) is this:

> rather than continuing to litigate all of the procedural issues – such as DHCR's Second Affirmative Defense – surrounding this Declaratory Judgment Action, the substantive issue (i.e., the illegality of the November Regulations) will be most directly and expeditiously resolved by a final determination on the merits by DHCR of the pending U/P rent adjustment applications.

As indicated earlier, DHCR and the tenants have all opposed any unconditional discontinuance without prejudice. The Attorney General has not taken a position on the motion.

Discussion

The authority of a court to grant or deny a party's motion made pursuant to CPLR 3217(b) to voluntarily discontinue litigation is within the court's "sound discretion." *Tucker v Tucker*, 55 NY2d 378, 383 (1982). Whereas "ordinarily a party cannot be compelled to litigate ..., [p]articular prejudice to the defendant or other improper consequences flowing from discontinuance may however make denial of the discontinuance permissible or ... obligatory." 55 NY2d at 383-84. (discontinuance denied where plaintiff sought to take advantage of change in law and circumvent effective date set by legislature). For example, as the First Department explained in *DuBray v Warner Bros. Records, et al.*, 236 AD2d 312, 314 (1997), "a motion for discontinuance should not be used to circumvent an order of the court ... or to enable plaintiffs to 'do indirectly what they are not permitted to do directly'..." (citations omitted) (discontinuance denied where motivated by forum shopping).

Here, the defendants have cited various compelling circumstances which have persuaded this Court, in the exercise of its discretion, to deny the requested discontinuance without prejudice. First and foremost, plaintiffs have affirmatively acted on a number of occasions before various judges to prosecute their claims, first individually and then jointly with the *Columbus* claims. Only now, in the face of its deadline for summary judgment, do the plaintiffs seek to change the course of the litigation which they have charted.

For example, in 2007, before the effective date of the regulations at issue, four of the plaintiffs herein commenced a mandamus proceeding before Justice Eileen Rakower to compel DHCR to process its U/P applications and grant rent increases. *West 97th Street*

Realty, et al., v. DHCR, Index No. 104007/07. By decision entered August 17, 2007, Justice Rakower denied the petition with respect to the buildings in New York County. With respect to similar requests for buildings outside New York County, Justice Rakower transferred venue to those other counties. These very same owners then joined with other owners in various counties within and outside the City of New York to commence this action after the amendments were promulgated, rather than permit DHCR to continue the administrative processing of their applications as they had so vigorously urged Justice Rakower to direct.

After an assignment to Justice DeGrasse, plaintiffs affirmatively moved for a joint trial with the *Columbus* matter pending before Justice Stone, who had already made some preliminary rulings. Justice DeGrasse referred the matter to Justice Stone. When Justice Stone expressed concern about a conflict of interest due to *Highbridge* counsel's representation of his wife in an unrelated matter, plaintiffs orally requested leave to discontinue, which DHCR opposed. Justice Stone then recused himself as to *Highbridge* and *Columbus* and both cases were referred to this Court in the late Spring of 2008.

Although the undisputed purpose of the discontinuance application before Justice Stone was to eliminate any basis for Justice Stone's recusal, counsel had presumably discussed the concept of discontinuance with the plaintiffs at that time. Yet they chose not to pursue discontinuance before this Court when the matter was referred here in the Spring. Instead, they joined with Columbus in moving for this Court's recusal, which was denied.

Plaintiffs again affirmatively acted at the November 19, 2008 conference to prosecute their claims in tandem with the *Columbus* case. At that time, they also sought leave to conduct discovery, which was granted in the order but has since been waived pursuant to the express terms of the order. Having affirmatively acted on so many occasions before so many justices to prosecute their claims in court in tandem with the *Columbus* case rather than before DHCR, the belated attempt to abruptly change course cannot be allowed, whether or not, as DHCR and the tenants contend, it is motivated by forum-shopping.

At oral argument of this motion on January 21, 2009, plaintiffs' counsel sought (over defendants' objections) to explain the belated attempt to change course based on reasons not stated in his papers. He indicated that his clients (presumably all 16) had decided not to pursue the litigation once they realized that the newly elected state legislators had the power to undo any judicial victory by changing the law. The claim is not only highly speculative, but it is also unpersuasive in light of the history of this case (including the November 19 briefing and discovery order made after the election) and the lateness of the motion, made in early January only a few days before plaintiffs' summary judgment deadline.

Another compelling circumstance which justifies the discretionary denial of the discontinuance motion is the prejudice to the parties. Both DHCR and the tenant groups withdrew pending motions to dismiss the *Columbus* case so that matter could be efficiently briefed and determined alongside this case. What is more, DHCR disputes plaintiffs' stated basis for the motion – that accepting the agency's affirmative defense of failure to exhaust administrative remedies and allowing DHCR to determine the U/P applications will lead to

a more expeditious resolution of the issues. AS DHCR explains (at ¶31-32), the defense was asserted because, while this Court undeniably has jurisdiction to grant declaratory relief as to the legality of the amendments, it cannot thereafter proceed to usurp DHCR's function as the ultimate arbiter of plaintiffs' U/P rent increase applications.

What is more, discontinuing this action without prejudice in favor of DHCR's processing of the U/P applications will not necessarily result in a more expeditious determination of the issues. DHCR asserts that all U/P applications are being held in abeyance based on their interpretation of a TRO issued by Justice Stone. Even if that were not the case, oral argument in this case is scheduled for April 24, by which time the issues will be fully briefed and ripe for determination. It is unclear when the U/P applications will be ripe for action. Also, since DHCR promulgated the regulations, it will likely apply them, leading plaintiffs to return to the Supreme Court in an Article 78 proceeding much after April for a determination of the very issues raised herein.

Lastly, a voluntary discontinuance without prejudice would be contrary to the public interest. Hundreds (if not thousands) of tenants are parties here, and they have reportedly incurred considerable expense in this action. And thousands more will be affected by the determination of the issues in this case. Proceeding on the course previously set is the most efficient way to obtain that determination and resolve significant issues affecting so many people.

Under these circumstances, this Court could readily find that plaintiffs waived their right under the November 19, 2008 order to move for summary judgement. However, considering the significance of the issues, the better course is to give all affected parties a full and fair opportunity to be heard. Plaintiffs are therefore being given one final chance

to exercise that opportunity by serving their motion within ten (10) days of the date of this order, being transmitted by telefax today. The balance of the schedule shall be adjusted accordingly. No need exists to alter the *Columbus* schedule, as the parties have already commenced compliance.

Accordingly, it is hereby

ORDERED that plaintiffs' motion to voluntarily discontinue this action is denied.

This constitutes the decision and order of this Court.

Dated: January 26, 2009

JAN 26 2009

J.S.C.

ALICE SCHLESINGER