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

PRESENT: HON. CAROL EDMEAD PART 35

Justice

Index Number : 105894/2007

HARVEY, DON

VS.

NYS DIV. HOUSING & COMMUNITY RENEWAL

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 105894-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

read on this motion to/for

PAPERS NUMBERED

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

Answering Affidavits — Exhibits

Replying Affidavits

FILED
MAR 09 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 001 and 002 are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED with respect to motion sequence 001, that the motion to dismiss of defendant Department of Housing and Community Renewal is granted and the complaint is severed and dismissed as against that defendant with costs and disbursements to defendant as taxed by the Clerk of the Court on submission of an appropriate bill of costs; and it is further

ORDERED with respect to motion sequence 002, that the motion to dismiss of defendant IG Second Generation Partners, L.P. is disposed of as follows:

a) the motion is granted as to the first cause of action as against IG Second Generation Partners, L.P. and it is severed and dismissed;

b) the motion is denied with respect to the third cause of action, except to the extent that the claim for punitive damages is dismissed;

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

Dated: J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

c) the request to transfer the second, fourth, fifth and sixth causes of action to the Civil Court is granted and they are severed and transferred; and it is further

ORDERED that defendant IG Second Generation Partners, L.P. is directed to serve an answer to the remaining cause of action within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for defendant IG Second Generation Partners, L.P. shall serve a copy of this order with notice of entry within 20 days of entry on all counsel; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

Dated 3/4/09 ENTER: _____, J.S.C.

HON. CAROL EDMEAD

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 : IAS PART 35

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DON HARVEY Apt 3K, PATRICIA FILOCOMO/ IRIS FRIEDMAN Apt. 15F, IRENE BILO Apt. 15A, SUSAN LEVINE Apt. 12F, GORDON DANA Apt. 12C, PETER BENZAIA Apt. 12B, FRIDA BIERMAN/HELIO SHIAVO Apt. 11L, DIANA HOLTZBERG Apt. 11K, DRU ARSTARK Apt. 11H, CATHERINE WOODHOUSE Apt 11F, AGI GROFF Apt 10K, DAVID BARTLEM Apt. 10J, KARL SOBEL Apt. 9F, SHELLEY GOLDBERG Apt. 8K, JEFF GOLDSTONE Apt. 6C, ILENE WINKLER Apt 5I, NARCISCO RODRIQUEZ Apt. 5C/D, ED WATSON Apt. 5G, MURRAY SOLOMON Apt. 16B, ADELAIDE VACCARO Apt. 2A, A. KIRSHENBAUM Apt. 2C, COOPER Apt. 3 I, ANN VALARDI Apt 4G, ROBERT CIOFALO Apt. 5J, ESTHER MOSES Apt. 5K, BETH WALTERS Apt. 6F, HERMINE DANZER Apt 6G, ELEANOR GOLDSMITH Apt. 6H, HARRIET Y. FRANKEL Apt. 6K, SONDRA RUTHERFORD Apt. 7B, ANN STURZ Apt. 7F, INGA HIRSCHFIELD Apt. 7I, SEBASTIAN COSTANZA Apt. 7K, FRANCES FICUROTTO Apt. 7M, ANNE CAVALLO Apt. 8G, ANA MILLER Apt. 8H, MOSES SACKS Apt. 9A, JOE B. RUZI Apt. 9E, PHYLLIS MARKS Apt. 11I, RICHARD F. WARFORD Apt. 11A, LAJTMAN Apt. 12D, SYLVIA MAIZELL Apt. 12K, KAREN DEVRIES Apt. 12M, MORRIS BERKOWITZ Apt. 14A, MARION BERMUDEZ Apt. 14B, JOSEPH PRIDDY Apt. 14C, STELLA DUBYK Apt. 14D, BLANCHE LORD Apt. 14H, JULIE COUZI Apt. 14J, ARTHUR CROOKSHANK Apt. 14 K, ALFRED MALDONADO Apt. 14L,

Plaintiffs,

-against-

THE NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL and IG SECOND GENERATION PARTNERS, L.P.

Defendants.

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Index No. 105894/07

CAROL R. EDMEAD, J.:

Motion sequence numbers 001 and 002 are consolidated for

disposition. In motion sequence number 001, defendant the New York State Division of Housing and Community Renewal (DHCR) moves to dismiss the complaint and the amended/corrected complaint as against it. In motion sequence number 002, defendant IG Second Generation Partners, L.P. (the landlord or the owner) moves to dismiss the complaint and the amended/corrected complaint as against it.[1]

Plaintiffs are current or past rent-regulated tenants of a 16-story residential building, containing approximately 160 units, located at 166 Second Avenue, New York, New York (the premises) which is owned by defendant landlord.

Plaintiffs, or some of them, have previously been involved in lengthy administrative and court proceedings against the landlord, which began in or about October 28, 1993, when 64 tenants filed an application for rent reduction with DHCR, based on allegations of decreased building-wide services and failure to maintain the premises. The following recitation of facts is based primarily on the decision of Justice Ronald A. Zweibel in the case of *Matter of Filocomo v New York State Div. of Hous. and Community Renewal* (Sup Ct, NY County, April 3, 2006, Zweibel, J., index No. 104963/05).

On December 6 and 7, 1994, DHCR inspected the premises, and

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[1] Plaintiffs have served an amended/corrected summons and complaint removing some tenants who have moved and replacing them with tenants who have replaced them in the building. In light of the court's ruling below, it need not reach DHCR's objections to the amended/corrected pleadings.

based on that inspection, on July 27, 1995, the Rent Administrator (RA) issued an order finding a reduction in essential services for rent-stabilized and rent-controlled tenants, based upon specific conditions cited in DHCR's inspection report, included but not limited to "dirty, chipped, patched, peeling and unpainted walls and ceiling building-wide, including both fire exit stairwells; darkly stained carpeting on various public area floors; and cracked cement in front of the building entrance door." *Id.* at 4-5. In addition, the RA found defects with respect to the intercoms for two apartments, but the resulting rent reduction applied only to those apartments.

Both the tenants and the landlord filed timely Petitions for Review (PARs). The landlord alleged, among other things, that the RA's order failed to address the owner's answer that it was conducting ongoing maintenance and repair and that certain of the conditions on which the RA based her order were *de minimus* and did not justify a building-wide rent reduction.

On June 25, 1997, the Commissioner granted the landlord's PAR in part and denied the tenants' PAR. The commissioner did find certain conditions, such as the cracks in the sidewalk, to be *de minimus*, but determined that, based on the record, the RA had properly found that the landlord had failed to maintain services.

On October 13, 1995, while its PAR was pending, the landlord

filed a separate application for rent restoration, stating that it had corrected certain of the conditions, including painting and plastering of the lobby, floors 2-16 and the stairwells.

In a January 6, 1997 order, based on an inspection conducted on November 18, 1996, the RA denied the application for rent restoration, finding that building-wide services had not been restored, though, based upon the restoration of interim services, the RA did restore rent for the two rent-controlled tenants.

On February 5, 1997, the landlord filed a timely PAR, challenging the RA's general denial of rent restoration.

On December 24, 1997, the Commissioner denied the landlord's second PAR, affirming the RA's order and stating that, pursuant to a DHCR policy statement, where rent has been reduced due to a determination that the owner failed to maintain services, it may not be restored until the owner shows that the particular services have been restored. The Commissioner further stated that the large areas of peeling paint and plaster indicated by the inspection were not *de minimus*.

The landlord filed an Article 78 petition challenging the Commissioner's decision affirming the RA's original order. *JG Second Generation Partners L.P. v DHCR*, Sup Ct, NY County, index No. 115388/97. The court ordered that the tenants be joined as parties and both the tenants and the landlord submitted

photographs to the court allegedly documenting conditions in the building. The matter was remanded to DHCR for redetermination to consider the photographs, which had not been offered at the administrative level. A 19-day hearing was conducted before DHCR beginning on May 8, 2002, and continuing through September 2003, that resulted in a 68-page decision by the Administrative Law Judge (ALJ). The ALJ concluded that, at the time of the complaint, there was a reduction of building-wide services due to various conditions; however, certain of the conditions had been corrected by June 15, 1998. On February 13, 2004, the RA issued her order essentially adopting the findings of the ALJ, and restoring rents effective July 1, 1998, based on the ALJ's finding of restoration of services in June 1998.

Both the landlord and the tenants filed PARs challenging the RA's order. On February 10, 2005, the Commissioner denied both PARs, affirming the RA's order.

Both the owner and the tenants then filed Article 78 proceedings challenging the Commissioner's decision. The court denied and dismissed both petitions, affirming the decision of the Commissioner, and directing the tenants to begin paying the retroactive installments of their restored rent. *Matter of Filocomo v NYSDHCR*, Sup Ct, NY County, April 3, 2006, Zweibel, J., index No. 104963/05.

Although the tenants filed a notice of appeal from the April

3, 2006 decision, apparently they did not perfect their appeal. Prior to Justice Zweibel's decision, however, on November 3, and again on December 9, 2005, counsel for these plaintiffs wrote to DHCR on behalf of the tenants contending that, despite the fact that DHCR had ruled that building-wide rent reductions should be restored as of June 1998, there continued to be leaks on the 15th floor of the building, particularly in Apt. 15F's kitchen and hallway ceiling and east and south walls. The tenants asserted that they should not have to file a new building-wide complaint for rent reduction, and that DHCR should revoke the rent restoration.

Motion Sequence 001

In their first cause of action, which is the only cause of action directed to defendant DHCR, plaintiffs allege that since at least April 30, 2001, there have been and continue to be conditions in the building that constitute violations of the Rent Stabilization Code, such as defective heating, defective roof, illegal plumbing work, illegal renovation and joinder of apartments without permits from the Building Department, and rubbish conditions resulting in fires in the building. According to plaintiffs, the landlord, nonetheless, filed certification of services, pursuant to section 2523.2 of the Rent Stabilization

Code,[2] indicating that all building services were being maintained in compliance with section 2520.6 (r) of the Code. 9 NYCRR 2523.2 and 2520.6 (r). Plaintiffs contend that the landlord has certified that there were no substantial violations in the building, in violation of section 2523.2.

Plaintiffs further contend that at least since April 30, 2001, the landlord has entered into leases with certain of the plaintiffs in which they claimed the right to collect rent increases pursuant to orders of the Rent Guidelines Board in violation of Rent Stabilization Code § 2523.3 (Failure to file a certification of services)[3]. 9 NYCRR 2523.3.

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[2] Rent Stabilization Code § 2523.2 (Certification of services) states as follows:

> Every owner of housing accommodations subject to this Code shall annually file with the DHCR, on a form which the DHCR shall prescribe for that purpose, a written certification that he or she is maintaining and will continue to maintain all services as required by section 2520.6(r) of this Title, or required to be furnished by any law, or regulation applicable to the housing accommodation. Compliance with section 2528.3 of this Title, shall also be compliance with this section.

[3] Rent Stabilization Code § 2523.3 (Failure to file a certification of services) states as follows:

> No owner shall be entitled to collect a rent adjustment pursuant to a rent guidelines board order as authorized under section 2522.5 of this Title, until the owner has filed a proper certification as required by section 2523.2 of this Part, nor shall any owner be entitled to a rent restoration based upon a restoration of services unless such restoration of services has been determined by the DHCR in a proceeding commenced by an owner's application to restore rent or a proceeding commenced pursuant to section 2526.2 of this Title, or in another proceeding pursuant to this Code. Such restoration shall take effect, where restoration of services has been determined in a proceeding commenced by an owner's application for rent restoration, in accordance with section 2522.2 of this Title and, where restoration of services has been determined by the DHCR in a proceeding commenced pursuant to section 2526.2 of this Title, or in another proceeding pursuant in this Code, on the date specified

In their first cause of action, plaintiffs seek an order requiring DHCR to: 1) conduct an examination of all rent certifications of services filed by the landlord from April 30, 2001 to the present; 2) conduct an examination of all substantial violations that are reflected in the records of DHCR as to the premises; and 3) in that examination, include all violations included in the records of Housing Preservation and Development (HPD), the Building Department, the Fire Department, the Department of Environmental Protection and the Health Department.

Plaintiffs further seek a rent abatement of 40% per month as compensatory damages for breach of warranty as well as punitive damages.

Analysis

Under the law and regulations governing rent-regulated housing, there exist somewhat separate regulatory schemes governing rent-controlled and rent-stabilized apartments. *See 301 Holdings, LLC v Matto*, 189 Misc 2d 644 (App Term, 1st Dept 2001), citing *8200 Realty Corp. v Lindsay*, 27 NY2d 124, 137-138, (1970). For example the level of rent for rent-controlled apartments is set by DHCR, pursuant to 9 NYCRR 2201.4, while the rent for rent-stabilized apartments is set by the Rent Guidelines Board, pursuant to sections 26-510 and 26-512 of the Rent

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Footnote Cont'd.

in the order of the DHCR issued in such proceeding.

Stabilization Law. Administrative Code of the City of NY §§ 26-510 and 26-512.

The landlord of a rent-stabilized apartment must annually file a written certificate that he or she is maintaining and will continue to maintain the apartment in compliance with the governing laws and regulations. Rent Stabilization Code, 9 NYCRR 2523.2. A rent-stabilized tenant who believes that the apartment or building is not being adequately maintained may apply to DHCR for a rent reduction to the prior level set by the Rent Guidelines Board and for an order requiring services to be maintained, pursuant to section 26-510 of the Rent Stabilization Code. Administrative Code of the City of NY § 26-514; *see also* 9 NYCRR 2523.4 (Failure to maintain services). DHCR has promulgated specific procedures to govern this process. For example, the tenant must first notify the landlord of the problems in order to give the landlord an opportunity to cure. 9 NYCRR 2523.4 (c). If, as here, the tenants are not satisfied with the decision of the Rent Administrator, they may file a PAR and then, if still dissatisfied, they may file an Article 78 proceeding to obtain court review of the agency's action.

In order to obtain an increase in rent for a rent-controlled apartment, the landlord must certify that all rent-impairing violations have been cleared. (Rent Control Law) Unconsolidated Laws § 26-405 (g) (6) (a) (1). The tenants may apply to DHCR for

a rent reduction based upon decrease in services. 9 NYCRR §§ 2202.14 and 2202.16. Like with rent-stabilized tenants, rent-controlled tenants may seek review of DHCR's ruling, both within the agency and by the court, by means of an Article 78 proceeding.

The court, however, notes from the outset, that sections 2523.2 and 2523.3 relating to certification of services, on which tenants' first cause of action is based, are within the Rent Stabilization Code and apply to rent-stabilized, not rent-controlled apartments. Thus, even assuming that tenants can maintain the cause of action they assert pursuant to these sections, it would only apply to those plaintiffs who are rent-stabilized tenants, and not the rent-controlled tenants.

Although the tenants of 166 Second Avenue have followed the available administrative and court procedures to seek services, repairs and rent reduction in the past, for whatever reason, they have now chosen to disregard that route, merely sending a letter of complaint to DHCR and initiating litigation based upon regulations which do not in themselves provide a direct remedy for tenants. Furthermore, it would appear that at least part of the tenants' complaint could properly have been raised in the prior administrative and judicial proceeding that they chose not to appeal. In their complaint, the tenants allege that from at least April 30, 2001, there have been and continue to be

conditions in the building which constitute violations of the Rent Stabilization Code, some of which the landlord claims to have corrected. Given that the hearing by the ALJ was conducted in May 2002, at least some of the tenants' complaints could properly have been presented to the ALJ.

With respect to the tenants' request for injunctive relief against DHCR, whether termed mandatory injunctive relief, or mandamus, and whether sought by means of a civil action or proceeding,

> "[m]andamus lies to compel the performance of a purely ministerial act where there is a clear legal right to the relief sought." The long established law is that "'[w]hile a manadmus is an appropriate remedy to enforce the performance of a ministerial duty, it is well settled that it will not be awarded to compel an act in respect to which the officer may exercise judgment or discretion.'"

Klostermann v Cuomo, 61 NY2d 525, 539 (1984)(citations omitted). Furthermore, "'[t]he general principle [is] that mandamus will lie against an administrative officer only to compel him to perform a legal duty, and not to direct how he shall perform that duty.'" *Id.* at 540 (citation omitted). The latter is just what the tenants are seeking to do. Such relief is not available to them.

Not every law or regulation promulgated by an administrative agency provides the basis for a private cause of action. *See e.g. Rivera v Village of Spring Val.*, 284 AD2d 521 (2d Dept 2001). In deciding whether such a private cause of action

exists, the court will consider whether the tenants are among the class the regulation was intended to benefit, whether recognition of a private right of action would promote the purpose of the regulation, and whether such a right of action is consistent with the regulatory scheme. *Carrier v Salvation Army*, 88 NY2d 298, 302 (1996). Here, where DHCR has established specific regulatory procedures for seeking a rent reduction, the court concludes that to seek a reduction in rent pursuant to DHCR's regulations governing certification of services, and particularly a reduction in rent which far exceeds that provided for under DHCR's regulatory framework, would be inconsistent with DHCR's regulatory scheme.

Even assuming that a private right of action were available to the tenants to seek a rent reduction for allegedly improper certification of services, this is an area where DHCR has the greatest expertise, thus, it would be appropriate for the court to defer to DHCR under the doctrine of primary jurisdiction. *Davis v Waterside Hous. Co.*, 274 AD2d 318 (1st Dept 2000).

For the above reasons, the tenants have failed to state a cause of action against DHCR and the Agency's motion to dismiss the complaint as to it is granted.

Motion Sequence 002

In Motion Sequence 002 the landlord moves to dismiss the complaint, which asserts the following causes of action against

it:

1) on behalf of all plaintiffs, seeking a rent abatement in the amount of 40% per month on behalf of all the tenants as compensatory damages as well as punitive damages for improper certification of services pursuant to section 2523.2 of the Rent Stabilization Code;

2) on behalf of all plaintiffs, seeking injunctive relief for warranty of habitability relating to allegedly erroneous instructions to the tenants in case of fire or other reason to evacuate the building;

3) on behalf of plaintiff Don Harvey, seeking damages for breach of warranty of habitability in connection with noise and light allegedly being emitted by defendant's commercial tenant, Urban Outfitters;

4) on behalf of plaintiff David Bartlem, seeking funds allegedly due as offsets for past rent reduction from January 1994 to September 1995 and from September 1995 to July 1998 in the total amount of $3,502.94;

5) on behalf of numerous specified rent-controlled tenants, seeking funds allegedly owed pursuant to an order of the commission dated February 10, 2005, in the amount of $102.00 per tenant; and

6) on behalf of plaintiffs Winkler, Hirschfield and Marks, seeking rent abatement for breach of warranty of habitability for

insufficient heat from January 23, 2002 to the present, in the amount of 40% per day of insufficient heat.

First Cause of Action:

As the court has previously concluded, the tenants have no private right of action for damages pursuant to Sections 2523.2 and 2523. Furthermore, the two provisions are part of the Rent Stabilization Code, and relate to rent-stabilized, not rent-controlled apartments. Thus, even were a private right of action to exist pursuant to the regulations, it would not be available to those plaintiffs who are rent-controlled tenants.

Finally, since DHCR has procedures to enable tenants to obtain rent reductions for failure to maintain services, plaintiffs are not without remedy for the alleged wrongs. They just chose not to use that available remedy.

For these reasons, the first cause of action is dismissed as to defendant landlord.

Second Cause of Action

Alleging that a breach of warranty of habitability exists, resulting from erroneous written instructions relating to evacuation of the building in case of fire or other emergency, tenants seek mandatory injunctive relief to correct the condition. Tenants have not specified what instructions have been provided to them, or in what way they are faulty.

More important, Civil Court is the forum which is normally

designated to deal with landlord-tenant disputes. *Cox v J.D. Realty Assoc.*, 217 AD2d 179, 180 (1st Dept 1995). "Civil Court has jurisdiction of landlord tenant disputes (see CCA 204) and when it can decide the dispute, as in this case, it is desirable that it do so." *Id.* at 181 (citation and quotation marks omitted). There is certainly nothing novel in tenants' allegation regarding the allegedly erroneous fire emergency instructions which requires the exercise of jurisdiction by the Supreme Court. Accordingly, the second cause of action is severed and transferred to Civil Court.

Third Cause of Action

Plaintiff Harvey alleges that he has been subjected to unreasonable noise and light from Urban Outfitters, a commercial tenant of the premises. Harvey alleges a breach of the warranty of habitability and seeks compensatory damages in the amount of $500,000, including damages for emotional and mental distress suffered from sleep deprivation, as well as punitive damages.

The landlord contends that Harvey's allegations are far too vague to state a cause of action and that the landlord should not be required to guess or speculate as to the basis for his claim. The landlord further contends that Harvey fails to allege that he took reasonable measures to block the light allegedly entering his apartment, nor does he allege specific violation of noise codes with respect to the noise which is allegedly coming from

the commercial tenant. Finally, the landlord contends that Harvey has failed to state a cause of action for intentional infliction of emotional distress. Therefore, according to the landlord, the cause of action should be dismissed as a matter of law.

On a motion to dismiss, however, the pleadings must be liberally construed most favorably to the plaintiff, and the material allegations must be deemed to be true, and the court may not express an opinion as to the plaintiff's ultimate ability to establish the allegations before a trier of fact. *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506, 509 (1979).

Although the court concludes that Harvey has sufficiently alleged a cause of action for nuisance, he has not sufficiently alleged a claim of conduct "so outrageous that as to evince a high degree of moral turpitude and showing such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Zarin v Reid & Priest*, 184 AD2d 385, 388 [1st Dept 1992], citing *Walker v Sheldon*, 10 NY2d 401, 404 [1961]), as required to obtain punitive damages.

The landlord's motion to dismiss the third cause of action is, therefore, denied, though the claim for punitive damages is dismissed.

Fourth Cause of Action

Plaintiff Bartlem alleges that, as a signatory to the

building-wide rent reduction complaint filed in or about November 1993, he never received the rent off-set to which he was entitled for the periods of January 1994 to September 1995 and September 1995 to July 1998. Bartlem alleges that he is owed $3,502.94 for those off-sets.

A claim for less than $25,000 is within the jurisdiction of the Civil Court and, therefore, this cause of action is severed and transferred to that court.

Fifth Cause of Action

Thirty-four individual rent-controlled tenants allege that they are entitled to the benefits under the RA's Order No. PI430014RP dated February 13, 2004, as affirmed in the Commissioner's Administrative Review Order Nos. SC 430074-RO/SC430049-RT, dated February 10, 2005, in the amount of $102.00 for each tenant. Even were those amounts aggregated, they would only total $3468.00. This cause of action is, therefore, severed and transferred to the Civil Court. That court may more properly consider defendant's contention regarding statute of limitations.

Sixth Cause of Action

Plaintiffs Winkler, Hirschfield, and Marks, all of whom live in the "I" line in the building, allege that from at least January 23, 2002, to the present, they have suffered and continue to suffer from insufficient heat in their apartments. These three plaintiffs seek a rent abatement of 40% per day for each

day they can prove insufficient heat.

According to the affidavit of Sophia Lamas, the managing agent for the premises, the respective monthly rents for plaintiffs Winkler, Hirschfield and Marks are $717.35, $1220.22, and $1235.25. Landlords are required to provide heat for New York City apartments from October 1 through May 31, maintaining the temperature at 69 degrees during the hours between 6 A.M. and 10 P.M., when the temperature falls below 55 degrees Fahrenheit outside, and maintaining the temperature at least 55 degrees during the hours between 10 P.M. and 6 A.M. when the outside temperature falls below 40 degrees Fahrenheit outside. Assuming those three plaintiffs could establish that the landlord failed to meet the requirements of the multiple dwelling law every single day for an eight-month period from January 2002 to January 2009, they would be entitled to recover approximately, $16,000.00, $27,300.00 and $27,700.00 respectively. It is, of course, highly unlikely that plaintiffs will even be able to establish that the outside temperature fell below the level triggering the requirement of heat every single day from October 1 through May 31 during that seven-year period, particularly during the months of April and May. And of course, they must also establish that on each and every day during that period, the landlord failed to provide the level of heat required by the multiple dwelling law. Therefore, the court finds merit in

defendant landlord's assertion that the tenants' claims do not reach the threshold amount for Supreme Court. The sixth cause of action is, therefore, severed and transferred to the Civil Court because a reasonable damage estimate does not exceed $25,000. *See Schneiderman v Marcus*, 6 Misc 3d 1007(A), 800 NYS2d 356, 2004 NY Slip Op. 51746(U) (Sup Ct, NY County, 2004).

Accordingly, it is hereby

ORDERED with respect to motion sequence 001, that the motion to dismiss of defendant Department of Housing and Community Renewal is granted and the complaint is severed and dismissed as against that defendant with costs and disbursements to defendant as taxed by the Clerk of the Court on submission of an appropriate bill of costs; and it is further

ORDERED with respect to motion sequence 002, that the motion to dismiss of defendant IG Second Generation Partners, L.P. is disposed of as follows:

a) the motion is granted as to the first cause of action as against IG Second Generation Partners, L.P. and it is severed and dismissed;

b) the motion is denied with respect to the third cause of action, except to the extent that the claim for punitive damages is dismissed;

c) the request to transfer the second, fourth, fifth and sixth causes of action to the Civil Court is granted and they are

severed and transferred; and it is further

ORDERED that defendant IG Second Generation Partners, L.P. is directed to serve an answer to the remaining cause of action within 10 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

Dated: March 4, 2009

ENTER:

Carol R. Edmead, J.S.C.

HON. CAROL EDMEAD