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

PRESENT: MARTIN SHULMAN J.S.C. Justice PART 1

Index Number : 105197/2008
AGUAIZA, JOSE RICARDO
VS
VANTAGE PROPERTIES
Sequence Number : 002
DISMISS

INDEX NO. 105197/08
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

motion to/for

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-V	1
Answering Affidavits — Exhibits A-H	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

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

FILED
MAY 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: May 21, 2009

MARTIN SHULMAN J.S.C.
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: PART 1

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JOSE RICARDO AGUAIZA, NELIS FUENTES, LAURO GUAMAN, MARCOS OLIVEIRA, JORGE ORREGO, VICTOR PALAGUACHI, KENNETH ROBINSON, JAMES WHITE, JANICE WILLIAMS and BUENA VENTURA ZARATE,

Plaintiffs,

-against-

VANTAGE PROPERTIES, LLC, VANTAGE MANAGEMENT SERVICES, LLC, QPI-IX LLC, QPI-XIII LLC, QPI-XXIII LLC, QPI-XXVI LLC, QPI-XXVIII LLC, NEIL RUBLER and ROBERT JON ODELL,

Defendants.

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Index No: 105197/08

Decision and Order

Hon. Martin Shulman, JSC:

Ten plaintiffs-tenants, Jose Ricardo Aguaiza ("Aguaiza"), Nelis Fuentes ("Fuentes"), Lauro Guaman ("Guaman"), Marcos Oliveira ("Oliveira"), Jorge Orrego ("Orrego"), Victor Palaguachi ("Palaguachi"), Kenneth Robinson ("Robinson"), James White ("White"), Janice Williams ("Williams") and Buena Ventura Zarate ("Zarate") ("Plaintiffs" or "Plaintiff" individually), who reside/resided in five different buildings, commenced this action against defendants-landlords ("Defendants") alleging that the latter engaged in deceptive or misleading actions against Plaintiffs in violation of GBL §349(a). In a separately pleaded cause of action in their Amended Verified Complaint ("AVC")(Exhibit A to Motion, *infra*), Plaintiffs further alleged these same actions constitute acts of harassment in violation of Local Law 7 of 2008, also known as the

NYC Tenant Protection Act (i.e., NYC Adm Code §§ 27-2004 *et seq.*)("Local Law 7"), and warrant permanent injunctive relief.

Co-defendant, QPI-IX LLC ("IX"), owns 47-05 45th Street, Woodside, New York (AVC at ¶17, annexed as Exhibit A to Motion) where Aguaiza (Apt. C7) has resided for 14 years (*Id.* at ¶61), Guaman (Apt. B6) has resided for 13 years (*Id.* at ¶106), Palgaguachi has resided for 18 years (*Id.* at ¶154) and Zarate (Apt. D7) has resided for 15 years (*Id.* at ¶222); co-defendant, QPI-XIII LLC ("XIII"), owns 44-08 47th Avenue, Woodside, New York (*Id.* at ¶18) where Orrego (Apt. C1) has resided for 24 years (*Id.* at ¶142); co–defendant, QPI-XXIII LLC ("XXIII") owns 43-23 40th Street, Sunnyside, New York (*Id.* at ¶19) where White (Apt. 6E) has resided for 2 years (*Id.* at ¶187) and Williams has resided for 3 years (*Id.* at ¶204); co-defendant, QPI-XXVI LLC ("XXVI"), owns 37-37 88th Street, Jackson Heights, New York (*Id.* at ¶20) where Fuentes (Apt. 6C) has resided for 21 years (*Id.* at ¶89) and Oliveria (Apt. E6) has resided for 16 years; co-defendant, QPI-XXVIII LLC ("XXVIII"), owns 32-42 33rd Street, Astoria, New York (*Id.* at ¶ 21) where Robinson (Apt. B8) formerly resided for about 2 years (*Id.* at ¶166).[1]

The AVC further alleges that Neil Rubler ("Rubler") is the "founder, president and chief executive officer . . ." of co-defendant Vantage Properties, LLC and the president of co-defendant Vantage Management Services, LLC (collectively, "Vantage"), which control and manage these five residential buildings, and president of the five limited liability companies, IX, XIII, XXIII, XXVI and XXVIII, that own the respective residential

[1] Under circumstances not relevant to this action, Robinson voluntarily surrendered possession of Apt. B8 *inter alia* mooting his need for injunctive relief from Defendants' complained of activities, *infra*.

buildings in Queens, New York. Plaintiffs further allege that co-defendant, Robert Jon Odell ("Odell"), serves as a director and general counsel to Vantage and is a registered officer of these respective owner entities (*Id.* at ¶¶ 22-23).

Nature of the Violations

The following is gleaned from the AVC: "Plaintiffs are low-income, Spanish speaking immigrants with limited English proficiency and/or persons of color. . ." (*Id.* at ¶1). Since the inception of their respective rent stabilized tenancies, the prior owner, Nathan Katz Realty, never sued any Plaintiff for non-payment of rent or sought to terminate Plaintiffs' tenancies based upon lease defaults or non-primary residency (*Id.* at ¶¶ 63-64, 93-94,107-108,122-123, 144-145, 159, 207 and 226).

The subject buildings are part of a substantial portfolio of Queens, New York properties Vantage acquired in 2006. To generate a return on their substantial investment, *viz.*, maximize the vacancy rate and profits via luxury deregulation, Vantage directed IX, XIII, XXIII, XXVI and XXVIII to pursue a scheme to displace rent stabilized tenants from their buildings (*Id.* at ¶¶47-52).

With this profit motive fueling Defendants' actions, Plaintiffs allege a fact pattern of deceptive/harassing activities specific to each Plaintiff. And the common threads collectively binding Plaintiffs *inter alia* involve Defendants commencing baseless non-payment proceedings (Id. at ¶¶ 53-58, 70, 111-113,199-201, 220 and 233), arbitrarily refusing to accept timely tendered rent payments (*Id.* at ¶¶ 53-58, 69, 111, 192, 213 and 229), prosecuting bogus non-primary residency and/or illegal sublet holdover proceedings (Id. at ¶¶ 53-58, 77, 97-105, 114-115, 125-127, 147-153, 160-161, 178-185, and 211), making baseless refusals to offer lease renewals and arbitrarily

demanding proof of identity from Plaintiffs without good cause to maintain their rent stabilized tenancy rights (*Id.* at ¶¶ 53-59, 73-74, 117, 128-130 and 173-175).

Dismissal Motion

In seeking to dismiss the AVC, Defendants contend that: (1) the dispute between the parties is a private one, involves lease defaults and/or rent regulatory matters and does not affect consumers at large; (2) Plaintiffs' claims boil down to "no more than ten separate disputes over ten different actual or perceived breaches of ten lease agreements . . ." (Defendants' Memorandum of Law in Support of Motion at p. 10); (3) Defendants' alleged actions, even if true, are not consumer-oriented and therefore cannot implicate GBL §349; (4) Plaintiffs neither allege that Defendants, jointly and severally, made materially misleading statements of fact regarding the complained of activities (an essential element of a GBL §349 claim), nor allege that they were actually deceived by any statement Defendants may have made to them; (5) Defendants properly refused to accept rent payments from certain Plaintiffs because of pending litigation or where the check facially appeared to be from one other than the tenant(s) of record, properly commenced RPAPL proceedings for untimely rent payments, properly served the statutory predicate notices and lawfully initiated RPAPL proceedings on established statutory grounds (i.e., non-primary residency occupancy, illegal sub-tenancy, illegal overcrowding, etc.), and pursued other appropriate remedies for lease breaches; (6) in the AVC, Plaintiffs do not allege they have been wrongfully evicted or been threatened with eviction, they have been overcharged, they have suffered from Defendants' use of force or threats, they have suffered from a diminution or

discontinuation of any required services,[2] they have suffered any physical injuries (as emotional stress alone is not legally cognizable) and/or they have suffered any pecuniary losses (e.g., lost wages, etc.); (7) putting aside that jurisdiction to dispose of a cause of action for harassment under Local Law 7, a prospectively construed statute, resides solely in the Housing Part of the Civil Court of the City of New York ("Housing Court"), Plaintiffs have not sufficiently pleaded that Defendants engaged in "repeated" conduct proscribed by Local Law 7; (8) this is to say, Plaintiffs have not adequately alleged that Defendants repeatedly initiated and prosecuted frivolous litigation against them especially when certain Plaintiffs admitted to certain lease breaches, when certain Plaintiffs entered into settlement agreements in open court, when certain Defendants had a respective proceeding dismissed without prejudice to a right to reinstatement, and where no judge of the Housing Court has made a ruling that any RPAPL proceeding one or more Defendants may have initiated was meritless; (9) Robinson's claim for injunctive relief under Local Law 7 has been rendered moot due to his voluntary vacatur from his apartment located in the building XXVIII owns; (10) Defendants are entitled to attorneys' fees for being forced to defend against Plaintiffs' frivolous Local Law 7 claim; and (11) the AVC fails to sufficiently plead specific acts of wrongdoing Rubler and/or Odell committed to warrant their respective individual liability.

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[2] Rent Stabilization Code §2520.6 [r] defines required services as "(1) [t]hat space and those services which the owner was maintaining or was required to maintain on the applicable base dates set forth below, and any additional space or services provided or required to be provided thereafter by applicable law. These may include, but are not limited to, the following: repairs, decorating and maintenance, the furnishing of light, heat, hot and cold water, elevator services, janitorial services and removal of refuse."

Plaintiffs' Opposition

In opposition to Defendants' Dismissal Motion, Plaintiffs urge the court to consider the following:

- The allegations contained in the AVC, which must be deemed true, sufficiently plead the requisite criteria to satisfy a GBL §349 and/or Local Law 7 cause of action;

- Defendants have intentionally mis-characterized and omitted references to Plaintiffs' allegations to justify their CPLR 3211(a)(7) motion;

- The AVC is replete with allegations against Defendants for issuing "false rent bills, false *Golub* notices, and [making] false and misleading verbal statements with respect to Tenants' identification, account balances, and tenancy status. *See, e.g.*, Am. Compl. ¶¶ 66-68, 84, 100-11, 113-14, 125, 147-48, 160, 173, 189, 198-99, 211, 213, 215, 218, 230, 233 . . ." (see Plaintiffs' Memorandum of Law in Opposition to Dismissal Motion at p. 7);

- One or more Defendants did not voluntarily discontinue any legal action against one or more Plaintiffs in good faith, but rather did so either under court order or after begrudgingly acknowledging their anticipated failure to prove a prima facie claim;[3]

- The court should disregard inadmissable and extrinsic evidence Defendants now proffer in support of their CPLR 3211(a)(7) motion as either unnecessary to evaluate the sufficiency of the pleaded claims or inadequate as the essential facts as pleaded have not been "'negated beyond substantial question by the affidavits and evidentiary matter submitted [citation omitted]' . . ." (citing to *Biondi v. Beekman*

[3] To illustrate, the AVC alleges that Vantage, *et al.*, waited three months to discontinue the summary holdover proceeding against Robinson (parenthetically, a Caucasian, although the affidavit of service annexed to the petition described a male with black skin and hair) well after Robinson submitted ample documentary proof of his occupancy of his apartment as a primary resident (submitted months before the commencement of the holdover proceeding), filed an answer in court totally denying the allegations of non-primary residency and losing time from work to appear pro se in the Housing Court (AVC at ¶¶ 172-186).

Hill House Apartment Corp., 275 AD2d 76, 81 [1st Dept. 1986]);

- Relying on *23 Realty Assocs. v. Teigman*, 213 AD2d 306 (1st Dept. 1995) ("*Teigman*") and other lower court cases, Plaintiffs' first cause of action under GBL §349 applies to Defendants' conduct against Plaintiffs;

- As such, the AVC sufficiently alleges that Defendants' conduct was consumer-oriented, consisted of materially deceptive or misleading misrepresentations or omissions (e.g., manufactured grounds for non-payment proceedings,[4] needless burden for production of identification documents for lease renewals, misinformation about litigation putting Plaintiffs at risk) and caused Plaintiffs injury (e.g., non-pecuniary in nature such as anxiety, distress, humiliation, annoyance, etc.);

- Since reliance is not an element of a GBL §349 claim, it was unnecessary for Plaintiffs to plead they were actually deceived by Defendants' conduct to defeat Defendants' dismissal motion;

- Defendants' conduct squarely meets the definition of harassment under Local Law 7, *viz.*, NYC Adm Code Section 27-2004(48), especially the "repeated nature of Defendants' conduct against Plaintiffs";

- The AVC pleads fact patterns of harassing activities which began prior to the enactment of Local Law 7 and continued thereafter, foreclosing any bar to this statute's retroactive effect;

- The language of Local Law 7 does not mandate an adjudication as to the frivolous nature of a court proceeding initiated against a tenant at the time of its disposition to deem such litigation harassing conduct under this statute; and

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[4] For example, the AVC alleges that IX held two of Guaman's monthly rent checks without depositing them, notified this plaintiff that he was in arrears and then commenced a non-payment proceeding. After receiving his answer to the non-payment petition filed in Housing Court, wherein Guaman proved he timely paid his rent, IX discontinued the proceeding (AVC at ¶¶111-112; *see* Answer as Exhibit M to Motion)("Disp. Amount/last check was not cashed by LL [landlord]; was only a fake balance").

- The New York Supreme Court clearly has jurisdiction to dispose of Local Law 7 claims.

Defendants' Reply

Defendants echo their earlier arguments with added emphasis on the fact that the AVC fails to sufficiently allege that Defendants' actions, under an objective standard, were likely to mislead a reasonable consumer acting reasonably under the circumstances; the AVC fails to allege a single instance where any Plaintiff was actually deceived by Defendants' conduct; the AVC does not adequately allege how the disputed actions were consumer-oriented, especially when Plaintiffs only manage to cobble together 10 separate lease disputes within Vantage's residential apartment universe of "2200 rental units with over 4,000 tenants [and especially where] [e]rrors relating to ten individuals can easily result from administrative mishaps . . ." (bracketed matter added)(Defendants' Reply Memorandum in Support of Motion at p. 10); Plaintiffs fail to allege an actionable injury under GBL §349; Plaintiffs fail to sufficiently plead a claim under Local Law 7; and the AVC does not allege any facts to sustain a claim against Rubler and Odell for individual liability.

Discussion

On a motion to dismiss a complaint for failure to state a cause of action (CPLR 3211 (a) [7]), a court must liberally construe the complaint, accept as true all the facts alleged in the complaint and accord plaintiff the benefit of every possible inference. *Dank v. Sears Holding Mgmt. Co.*, 59 AD3d 582, 583 (2nd Dept. 2009); *see also*, *Cron v. Hargro Fabrics, Inc.*, 91 NY2d 362 (1998). In other words, the court must deem the AVC to allege whatever can be reasonably inferred therefrom however

imperfectly or informally its facts may be stated. *Barrows v. Rozansky*, 111 AD2d 105 (1st Dept. 1985); *see also, McGill v. Parker*, 179 AD2d 98 (1st Dept. 1992); *Blitman Constr. Corp. v. Kent Village Hous. Co., Inc.*, 91 AD2d 173 (1st Dept. 1983). After accepting the factual allegations as true, the court must then determine simply whether these alleged facts fit within any cognizable legal theory. *Leon v. Martinez*, 84 NY2d 83, 87-88 (1994).

And unlike a motion for summary judgment, extrinsic evidence such as affidavits, New York City Council minutes, leases and other documentation annexed to Defendants' motion to dismiss for failure to state a cause of action need not be examined for the purpose of determining sufficiency of the pleaded allegations contained in the AVC as to each of the two causes of action *(Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]; *see also, 211 W. 56th St. Assocs. v. Dep't of Hous. Pres. & Dev. of City of New York*, 78 AD2d 793 [1st Dept. 1980]).

Plaintiffs' GBL §349 Claim

To state a claim under GBL §349, Plaintiffs must plead three elements *(Stutman v. Chemical Bank*, 95 NY2d 24, 29 [2000]):

> [F]irst, that the challenged act or practice was consumer-oriented; second that it was misleading in a material way; and third that the plaintiff suffered injury as a result of the deceptive act . . . Whether a representation or an omission, the deceptive practice must be "likely to mislead a reasonable consumer acting reasonably under the circumstances" . . . A deceptive practice, however, need not reach the level of common-law fraud to be actionable under section 349 . . . In addition a plaintiff must prove "actual" injury to recover under the statute, though not necessarily pecuniary harm . . .

A GBL §349 claim does not require repeated conduct or a pattern of deceptive

behavior. Rather, "[a] claim brought under this statute must be predicated on an act or practice which is 'consumer-oriented,' that is, an act having the potential to affect the public at large, as distinguished from merely a private contractual dispute. . ." *Elacqua v. Physicians' Reciprocal Insurers*, 52 AD3d 886, 888 (3rd Dept. 2008), citing to *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 NY2d 20 (1995). Moreover, to avoid opening a floodgate of litigation against businesses, the courts adopted "an objective definition of deceptive acts and practices, whether representations or omissions, limited to those likely to mislead a reasonable consumer acting reasonably under the circumstances . . ." (*Oswego*, *supra*, 85 NY2d at 26), and suffering actual injury from that materially deceptive act. *Id.*

Against this backdrop, a fundamental understanding of the relationship of the parties is necessary. It is this relationship and the precise nature of the complained of activities which will determine the issue of whether or not Defendants' actions are consumer-oriented.

Contrary to Plaintiffs' desire to repackage themselves as consumers, it is inescapable that the relationship between Plaintiffs and Defendants is that of landlord and tenant, respectively. Between them there exists both privity of contract (i.e., the leases) and privity of estate (i.e., the leasehold interest in the rent stabilized apartment). In addition to their contractual rights under their leases, Plaintiffs concomitantly enjoy additional rights and protections under the Rent Stabilization Law (NYC Adm Code §26-501 *et seq.*) and Rent Stabilization Code (9 NYCRR §2520.1 *et seq.*) including *inter alia* the right to only be charged rent increases set by the NYC Rent Guidelines

Board for vacancy/renewal leases and other lawful increases prescribed under the Rent Stabilization Code; receive required services (*see* footnote 2, *supra*) and, where relevant here, not be subject to landlord harassment. In this context, Plaintiffs are afforded remedies to enforce their rent stabilization rights (see 9 NYCRR §§2523.4 ["Failure to maintain services"], 2526.1 ["Determination of legal regulated rents; . . ."], etc.) and in addition to the courts, a forum (i.e., New York State Division of Housing and Community Renewal ["DHCR"]) to obtain appropriate remedies imposed against a landlord for varied violations of the Rent Stabilization Law and Code (e.g., rent reduction orders, overcharge awards [including treble damages, attorneys' fees and interest], penalties for harassment activities, etc.). The rent stabilized tenant enjoys these rights not because of his or her status as a consumer of housing services, but rather because of these prescribed statutory protections which were triggered when each Plaintiff executed his or her vacancy lease.

While the modern trend seemingly is to convert a traditional contract of a leasehold interest into a consumer-oriented contract for household services at least in the area of collecting rent arrears (*see Romea v. Heiberger & Assocs.*, 163 F3d 111 [2nd Cir. 1998] and its progeny)(back rent deemed a debt under the federal Fair Debt Collection Practices Act), nonetheless, the Rent Stabilization Code which governs the parties' leasehold relationship does not define a tenant as a consumer of household services, but simply a "person . . . named on a lease as lessee . . . or who is . . . a party . . . to a rental agreement and obligated to pay rent for the use and occupancy of a housing accommodation (*see* 9 NYCRR §2520.6[d]). A tenant initially occupies a rent

stabilized apartment pursuant to a vacancy lease[5] which the tenant periodically renews[6] pursuant to regulatory protocols.

Given the parties' existing landlord-tenant relationships, Plaintiffs' reliance on *Teigman* to legally support their pleaded GBL §349 claim is misplaced. *Teigman* addressed a different consumer protection statute (NYC Adm Code § 20-700) and the right of the Commissioner of the NYC Department of Consumer Affairs to enforce this statute *vis-a-vis* brokers listing New York City apartments in the rental housing marketplace. According to the First Department, brokers are essentially marketers of apartments to potential tenants, or stated another way, marketers of packages of housing services to potential consumers. This consumer protection statute is designed to protect the consumer seeking to rent an apartment in New York City and ensure that the broker provides all the requisite, albeit lawful information to enable a properly educated consumer to make an informed choice prior to signing a lease to rent a particular apartment.

However, *Teigman* did not hold that an executed lease is a contract for a consumer transaction. Such a holding would nullify another well-established consumer statute which is to the contrary, namely, CPLR §4544. This statute reads, in relevant part:

> The portion of any printed contract or agreement involving a consumer transaction *or* a lease for space to be occupied for residential purposes

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[5] 9 NYCRR §2520.6(g) defines a vacancy lease as "[t]he first lease or rental agreement for a housing accommodation that is entered between an owner and a tenant."

[6] 9 NYCRR §2520.6(h) defines a renewal lease as"[a]ny extension of a tenant's lawful occupancy of a housing accommodation pursuant to [9 NYCRR] section 2523 of this Title."

> where the print is not clear and legible . . . may not be received in evidence in any trial, hearing or proceeding on behalf of the party who printed or prepared such contract or agreement . . . As used in the immediately preceding sentence, the term "consumer transaction" means a transaction wherein the money, property or service which is the subject of the transaction is primarily for personal, family or household purposes . . . (emphasis added).

The Practice Commentaries succinctly explain this statute's purpose: "CPLR 4544 prohibits the receipt in evidence, on behalf of the drafter, of that portion of any printed residential lease *or* written agreement involving a consumer transaction . . ." (emphasis added) (Alexander, 2007 Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 4544, at 795).

In this vein, the rationale for the legislature distinguishing a residential lease from a consumer transaction contract is suggested. For purposes of continued occupancy, the landlord-tenant relationship under rent stabilization is contractual in nature (i.e., a landlord generally must offer a renewal lease at the expiration of a vacancy or successive renewal lease term). Nonetheless, in most instances involving the vacancy of a rent regulated apartment and without ever having to sign a vacancy lease, a potential successor tenant's leasehold interest would accrue by virtue of his or her privity of estate grounded on the non-eviction or lease succession provisions of the Rent Stabilization Law and Code (*see* 9 NYCRR §2325.5; *see also*, *Rent Stabilization Ass'n of New York City, Inc. v. Higgins*, 83 NY2d 156 [1993]), and not because that potential tenant executes what Plaintiffs perceive to be a contract for household services. Stated differently, a residential lease together with the statutory protections cloaking a rent stabilized tenant at the inception of that tenant's leasehold interest

which protects that tenant and his or her successor in perpetuity ostensibly cannot be deemed a consumer transaction contract implicating GBL §349.

In any event, stripping away any self-serving motive and factual accuracy for the moment, the overarching disputes between the parties flow from Plaintiffs' contractual obligations under their leases with Defendants, respectively, to timely pay their monthly legal regulated rents. The parties' disputes also flow from a statutory requirement for Plaintiffs to maintain their rent stabilized tenancies as primary residents of their apartments (*see Katz Park Ave. Corp. v. Jagger*, 11 NY3d 314, 318 [2008] [Ciparick, J.,concurring])("The purpose of this law is to alleviate the shortage of housing in New York City by returning underutilized apartments to the marketplace for residents who need them . . .").

There are also certain positives to keep in mind here. Plaintiffs, most of them long term tenants, do not allege in their AVC that Defendants are overcharging them in violation of the Rent Stabilization Law and Code, and/or have intentionally interrupted or discontinued any required services, breached the warranty of habitability or acted in any physical way to interfere with or disturb Plaintiffs' privacy, comfort, peace, repose or quiet enjoyment in their use of their respective apartments. Plaintiffs do not plead any omission as to the required service of any predicate rent demands or statutory notices under the Real Property Actions and Proceedings Law or federal Fair Debt Collection Practices Act, of various notices for non-renewal of leases under the Rent Stabilization Code (Golub notices and/or termination notices[7]) and/or of the underlying nonpayment

[7] Based upon the seminal case of *Golub v. Frank*, 65 NY2d 900 (1985), the Rent Stabilization Code requires a landlord to serve certain predicate notices of an intent not to

or holdover petitions filed with the Housing Court. Nor do Plaintiffs plead any failure to include certain requisite information in the body of these varied documents or plead any procedural infirmities as to service of process.

What Plaintiffs essentially claim is that Defendants are intentionally issuing deceptive or misleading rent bills, rent demands, breach of lease notices (e.g., illegal sublet, MDL violations as to apartment overcrowding, etc.) or non-primary residency notices and thereafter initiating/prosecuting bogus non-payment or holdover proceedings with an intent to cause Plaintiffs to vacate their apartments and give up their valuable rent stabilized tenancies.

Deeming Plaintiffs' allegations as true and giving the AVC its most liberal construction and the benefit of every possible inference, this court concludes that the complained of activities Defendants engaged in (arguably grounded on manufactured lease or contract disputes over rent or unfounded bases for non-renewals of Plaintiffs' leases under the Rent Stabilization Law and Code) are private disputes unique to Plaintiffs as individual rent stabilized tenants and their respective landlord and did not affect consumers at large. *Ramseur v. Hudsonview Co.*, 59 AD3d 308 (1st Dept. 2009). Nor do Defendants' actions, deemed true, have "a potential impact on consumers at large [citations omitted] . . ." *Lakehill Assocs., Inc. v. 6077 Jericho Tpk. Realty Corp.*, 18 AD3d 506, 508 (2nd Dept. 2005).

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renew a tenant's rent stabilized lease based upon non-primary residency and to commence an action or proceeding for the tenant's eviction or ejectment on such ground (see 9 NYCRR §§2524.2 [c] and 2524.4[c]).

Even if the complained of activities were arguably found to be consumer-oriented, nonetheless, there is not a single allegation that any of Plaintiffs were actually deceived by a material deceptive act likely to mislead a reasonable consumer standing in any of Plaintiffs' shoes. This is a crucial element to sustain a GBL §349 claim. Illustratively, not one of Plaintiffs, confronted with a misleading rent bill and subsequent statutory rent demand for non-existent rent arrears and fearful of a potential eviction, paid what they believed to be bogus arrears amounts unjustly enriching Defendants. And Plaintiffs presumably knew such rent bills and demands were false because they possessed the information necessary to vitiate such demands which eventually led in almost every instance to the discontinuance of Defendants' summary proceedings. Furthermore, none of Plaintiffs agreed to give up their rent stabilized tenancies based upon misrepresentations as to their occupancies as non-primary residents because Plaintiffs possessed the documentary wherewithal to prove they had "'an ongoing, substantial, physical nexus with the premises . . . for actual living purposes' . . ." (*Jagger*, *supra*, 11 NY3d at 316).

Significantly, the AVC consistently alleges that the respective Plaintiffs challenged Defendants regarding the claimed deceptive information contained in Golub notices, substantial lease breach notices, rent bills and demands as well as written and verbal communications from Vantage's agents and employees questioning their lawful rent stabilized tenancies. It may be quite true that Plaintiffs were frustrated, aggravated, emotionally distressed and/or even fearful about Defendants' activities wrongly calling into question their non-violation of any substantial obligation of their leases, but they were not fooled.

To reiterate, there is not a single allegation in the AVC that Plaintiffs were actually deceived and suffered an actual injury therefrom. Moreover, none of Plaintiffs allowed any of Defendants to successfully obtain a forfeiture of his or her stabilized leasehold interest on false pretenses during the prosecution of purported frivolous litigation. Stated more forcefully, even if Defendants' actions are wholly improper, "manifestly they did not mislead [P]laintiffs in any material way and did not constitute 'deceptive acts' within the meaning of the statute . . ." *Varela v. Investors Ins. Holding Corp.*, 81 NY2d 958, 960 (1993). Accordingly, the branch of Defendants' CPLR 3211 (a)(7) motion to dismiss Plaintiffs' first cause of action *inter alia* seeking to declare Defendants' conduct in violation of GBL §349 is granted.

Plaintiffs' Local Law 7 Claim

Historically, New York did not recognize a common law claim for harassment. *See Edelstein v. Farber*, 27 AD3d 202 (1st Dept. 2006). Rent stabilized tenants such as Plaintiffs were relegated to filing a harassment complaint with the DHCR and if harassment was found after holding an administrative hearing, the offending landlord would be liable for monetary penalties (*see* 9 NYCRR §2526.2 [c][2]).

However, these DHCR proceedings are not summary proceedings and due process mandates that such findings against a landlord can only occur after the latter is afforded notice and a reasonable opportunity to be heard, a lengthy, time-consuming process complaining tenants can ill afford. Moreover, when tenants such as Plaintiffs are defending against baseless summary proceedings in Housing Court, what cannot be lost is the real possibility that their landlords are pursuing a course of conduct

intending to force them out of their rent stabilized apartments to de-regulate them and obtain free market rents or pursue other profitable plans (*see* AVC at ¶¶ 36-40, 47-52).

So, in addition to administrative remedies at the DHCR, the City Council enacted Local Law 7 comprised of various code amendments that are the statutory "building blocks" to enable a tenant or groups of tenants to construct an affirmative defense, a counterclaim or a cause of action, for harassment and plead same with the court. Thus, Local Law 7 enacted a specific prohibition against tenant harassment.[8]

Then, Local Law 7, *in pari materia* with the Rent Stabilization Code, defines harassment, in relevant part (NYC Adm. Code §27-2004[a][48][d] and [g]):

> 48. Except where otherwise provided, the term "harassment" shall mean any act or omission by or on behalf of an owner that (I) causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, and (ii) includes one or more of the following:
>
> d. commencing repeated baseless or frivolous court proceedings against any person lawfully entitled to occupancy of such dwelling unit;[9]
>
> g. other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of such dwelling unit and that cause or intended to cause any person lawfully entitled to occupancy of a dwelling

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[8] NYC Adm Code §27-2005(d) states: "The owner of a dwelling unit shall not harass any tenants or persons lawfully entitled to occupancy of such dwelling as set forth in paragraph 48 of subdivision a of section 27-2004 of this chapter."

[9] This definition of harassment tracks the relevant language of Rent Stabilization Code Section (9 NYCRR) § 2525.5 which states: "It shall be unlawful for any owner or any person acting on his or her behalf, directly or indirectly, to engage in any course of conduct (including but not limited to interruption or discontinuance of required services, *or unwarranted or baseless court proceedings*) which interferes with, or disturbs, or is intended to interfere with or disturb, the privacy, comfort, peace, repose or quiet enjoyment of the tenant in his or her use or occupancy of the housing accommodation, or is intended to cause the tenant to vacate such housing accommodation or waive any right afforded under this Code." (emphasis added).

> unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy.

Finally, Local Law 7 grants tenants a judicial forum to pursue the harassment defense or claim (NYC Adm. Code §27-2115[h][1]):

> [I]f there is a claim of harassment pursuant to subdivision d of section 27-2005 of this chapter, the tenant or *any group of tenants*, may individually or jointly apply to the housing part for an order directing the owner and the department to appear before the court. Such order shall be issued at the discretion of the court for good cause shown, and shall be served as the court may direct. . . . Nothing in this section shall preclude any person from seeking relief pursuant to any other applicable provision of law.[10] (Emphasis added)

And while DHCR was limited to imposing monetary penalties, Local Law 7, in addition to containing a monetary penalty provision (NYC Adm Code §27-2115[m][2]), strikingly similar to Rent Stabilization Code Section (9 NYCRR) §2526.2[c][2]), now gives the Housing Court certain injunctive powers (NYC Adm Code§ 27-2120[b]):

> b. Any tenant, or person or group of persons lawfully entitled to occupancy may individually or jointly apply to the housing part of the civil court for an order restraining the owner of the property from engaging in harassment. Except for an order on consent, such order may be granted upon or subsequent to a determination that a violation of subdivision d of section 27-2005 of this chapter has occurred.

With the foregoing in mind, this court rejects the notion that the Supreme Court must decline its jurisdiction over Plaintiffs' second cause of action. First, Local Law 7 contains no language requiring adjudication of a tenant harassment claim by the Housing Court vesting that court with primary exclusive jurisdiction. Second, the

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[10] NYC Adm. Code §27-2115(m)(1) expands the foregoing by providing, in relevant part: "[A] violation of subdivision d of section 27-2005 of this code shall be a class c immediately hazardous violation and a penalty shall be imposed in accordance with this section . . ."

Supreme Court "as a court of 'general original jurisdiction in law and equity' (NY Const. art VI, §7[a]) . . . 'is competent to entertain all causes of action unless its jurisdiction is specifically proscribed' . . . and to that extent its powers are 'unlimited and unqualified' . . ." *Sohn v. Calderon*, 78 NY2d 755, 766 (1991). Third, the Court of Appeals in *Sohn*, *supra*, went on to quote from NY Const. Art. 6, §7[b] which evidently answers the question of whether the Supreme Court has concurrent jurisdiction with the Housing Court to hear a Local Law 7 harassment claim (*Id.*):

> "If the legislature shall create new classes of actions and proceedings, the supreme court shall have jurisdiction over such classes of actions and proceedings" even though "the legislature may provide that another court or courts shall also have jurisdiction and that actions and proceedings of such classes may be originated in such court or courts."

Thus, it is clear from Local Law 7's varied amendments to the NYC Administrative Code that this recently enacted legislation simply affords a tenant the option of adjudicating a harassment dispute in the Housing Court, a forum well within the judicial branch. Parenthetically, there is also ample precedent allowing the Supreme Court to afford a tenant relief historically limited to summary proceedings in the Housing Court. *See Killington Investors v. Leino*, 148 AD2d 334, 336 (1st Dept. 1989)(Supreme Court can grant RPAPL §753[4] relief in an ejectment action); *see also*, *Nestor v. McDowell*, 81 NY2d 410 (1993).

But more to the point and as noted, *supra*, NYC Adm Code § 27-2120[b] now empowers the Housing Court to enjoin a landlord from engaging in tenant harassment notwithstanding the Civil Court Act's limitation on the Housing Court's power to issue injunctions or restraining orders solely to enforce "housing standards." *See Broome Realty Assocs. v. Sek Wing Eng*, 182 Misc.2d 917, 918 (AT 1st Dept. 1999).

However, the City Council appears to have allayed this jurisdictional conundrum with the following amendment, NYC Adm. §27-2115(m)(2), which states, in relevant part: "*if a court of competent jurisdiction finds* that conduct in violation of subdivision d of section 27-2005 of this chapter has occurred, *it may determine that a class c violation existed at the time such conduct occurred.* Notwithstanding the foregoing, *such court may also issue an order restraining the owner of property from violating such subdivision and direct the owner to ensure that no further violation occurs. . .*" (emphasis added).

Suffice it to say, the foregoing statutory language not only removes any doubt about the Supreme Court's jurisdiction to hear a Local Law 7 cause of action, but also expressly permits the court to make findings about whether the harassing conduct is a violation of Local Law 7 "at the time such conduct occurred," *viz.*, to apply this law retroactively to Defendants' complained of activities which occurred prior to Local Law 7's enactment. This interpretation would be consistent with the notion that Local Law 7 is "'remedial in nature and it should be liberally construed to spread its beneficial effects as widely as possible' . . ." *Nestor*, *supra*, 81 NY2d at 414.

As to the pleading sufficiency of the second cause of action under Local Law 7, Defendants implicitly characterize Plaintiffs' argument as a torch and pitch fork mob mentality response to Defendants' right to pursue its contractual and statutory remedies for substantial lease breaches. To further diffuse the harassing nature of the complained of activities, Defendants also utilize a "divide and conquer" approach singling out Plaintiffs' claims as ten isolated lease disputes and urging the court to view each dispute in a vacuum. Defendants then place great emphasis on the language in

NYC Adm. Code §27-2004(a)(48)(d) to the effect that liability for harassment *inter alia* can only occur when a landlord files "repeated baseless and frivolous court proceedings," that is to say, when a landlord engages in a long standing pattern of abuse of process which the AVC does not allege. This court disagrees.

Local Law 7 clearly permits Plaintiffs, as a group of tenants, to plead a cause of action for tenant harassment. And in doing so, Plaintiffs have collectively alleged activities that suggest a pattern of harassment to cause Plaintiffs to vacate their apartments or surrender or waive their statutorily protected tenancy rights in relation to their occupancy of rent stabilized apartments. Where applicable, Defendants' harassing conduct, as alleged and deemed true, includes repeatedly sending Plaintiffs various predicate notices (required pre-litigation notices) containing unfounded or false information about their rent payment histories to justify baseless non-payment proceedings, unfounded or false information about Plaintiffs' substantial breaches of their leases (e.g., illegal sublet, overcrowded occupancies, etc.) and/or unfounded or false information about their non-primary residency occupancy of their apartments to justify baseless holdover proceedings. It also includes Defendants' repeated, bad faith refusals to accept rent payments and/or offer renewal leases under false pretenses setting into motion manufactured facts for Plaintiffs' potential evictions. Collectively, Plaintiffs as a group have alleged a pattern of repeated baseless or frivolous proceedings over a period of one year with the intent of causing Plaintiffs to vacate their apartments or surrender their valuable leasehold interests.

Contrary to Defendants' interpretation of harassing conduct, a violation of Local Law 7 does not require a pattern of behavior "across a large swath of tenants . . ." (*see*

Defendants' Reply Memorandum of Law in Support of Motion at p. 12). If that were the case, a single tenant would be incapable of pleading, let alone prevailing, on a harassment cause of action. And, for purposes of determining the sufficiency of Plaintiffs' pleaded second cause of action, there is certainly no legal requirement at this juncture to conduct a qualitative or quantitative analysis of Defendants' complained of activities.[11] Accordingly, the branch of Defendants' CPLR 3211(a)(7) motion to dismiss Plaintiffs' second cause of action is denied.

This court cannot conclude this part of the discussion without a final comment. It should be abundantly clear that all tenants regardless of race, religion, ethnicity, national origin, age, gender or sexual orientation have the right to occupy their apartments without suffering from harassment. Yet, without charging Defendants with discriminatory conduct, the AVC and Plaintiffs' counsel's papers highlight the fact that Plaintiffs are Spanish speaking immigrants or persons of color. Perhaps this group of tenants was selected "to be especially sympathetic and appealing . . ." (*Krimstock v. Kelly*, 306 F3d 40, 47, n. 7 [2nd Cir. 2002]). Under these circumstances, a Plaintiff's ethnicity or race should be an irrelevant factor in addressing the merits of the underlying claim of harassment against Defendants. Accordingly, if Plaintiffs ultimately prevail on

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[11] Even upon a record in a round of summary judgment motion practice, the Court of Appeals in *Domen Holding Co. v. Aranovich*, 1 NY3d 117 (2003), in modifying an order of the Appellate Division, First Department (302 AD2d 132 [1st Dept. 2003]), applied similar reasoning when it reinstated a landlord's nuisance complaint against a tenant. By analogy, the Appellate Division had concluded that quantitatively, three incidents of a tenant's boyfriend's obnoxious conduct to fellow tenants over a five year period did not constitute a continuous or chronic pattern of nuisance activity. The Court of Appeals implicitly rejected any quantitative or qualitative test in analyzing these nuisance incidents to sustain the sufficiency of the underlying predicate notice of termination and the complaint.

their second cause of action and prove by a preponderance of the credible evidence that Defendants engaged in harassment against Plaintiffs in violation of Local Law 7, such conduct will be deemed no more or no less egregious because of a tenant's ethnicity or race.

Rubler and Odell

Plaintiffs seek to hold Rubler and Odell individually liable for the Defendants' harassing conduct. That Odell and Rubler hold key positions as corporate officers in Vantage and in IX, XIII, XXIII, XXVI and XXVIII does not require that they should be individually liable for the complained of activities. As officers of Vantage as well as any of the limited liability companies that own the buildings where Plaintiffs respectively reside, each was presumably required to sign "correspondence, pleadings and notices . . ." (Defendants' Reply Memorandum in Support of Motion at p. 16) in their corporate capacities. Nowhere in the AVC do Plaintiffs allege that Rubler and Odell acted in a manner to substitute or superadd their "personal liability for, or to, that of . . ." (*Worthy v. New York City Hous. Auth.*, 21 AD3d 284, 286 [1st Dept. 2005]) Vantage, IX, XIII, XXIII, XXVI and XXVIII. During the few instances Odell and Rubler were identified in the AVC, it seemed readily apparent these corporate officers were merely signing certain documents in their corporate capacity to further the business interests of their respective corporations/limited liability companies. Nor was there any allegation that Rubler and/or Odell "exclusively and completely control the management and operation of the buildings, . . ." *Matias ex rel. Palma v. Mondo Props. LLC*, 43 AD3d 367, 368

(1st Dept. 2007). The branch of Defendants' motion to dismiss the AVC for failure to state a cause of action against Rubler and Odell for individual liability is granted. Accordingly, it is

ORDERED that Defendants' motion to dismiss is granted to the extent that the first cause of action is dismissed and the entire action is dismissed as to defendants Rubler and Odell, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remaining second cause of action is severed and continued as to the remaining defendants; and it is further

ORDERED that, pursuant to CPLR 3211(f), the remaining defendants shall serve their answers to the complaint within ten (10) days of service of notice of entry of this Decision and Order.

Counsel for the parties are directed to appear for a preliminary conference on June 23, 2009 at 9:30 a.m. at 111 Centre Street, Room 1127B, New York, New York.

This constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

DATED: New York, New York
May 21, 2009

HON. MARTIN SHULMAN, J.S.C.