

<b>Nieborak v W54-7 LLC</b>
2016 NY Slip Op 31040(U)
January 22, 2016
Supreme Court, New York County
Docket Number: 157084/2014
Judge: Nancy M. Bannon
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 42**

-----X

STEFAN NIEBORAK, NATALIE LIPINKA,  
ALEXANDER LEPINSKY, FARRIS HASSAN,  
KAROLINE DEUTCHMANN, ANDREAS  
DEUTCHMANN, NATHAN MEEKS, SUHAN  
JUNAID, JUNHAO LONG, EVAN SACKS, GREG  
SEXTON, BRYAN HARRIS, NICHOLAS  
FERGUSON, JOSEPH LARATTA, GREGORY  
BRYAN, KATY ZHAO, EDMOND WONG,  
JENNIFER KIM, EN CHIEH CHEN, EDWARD  
KIM, TIM LIM, ANTHONY KIM, CHEERAG  
PATEL, PAUL CHOI, XINDI XU, VALERIE  
WONG, AMY ZHANG, LILIN JIN, CHELSEA  
ABBAS, BRITTANI FEDE, WENDY  
SZCZERBIAK, KIMBERLY BARBA, LOV PATEL,  
VIDUR MITTAL, and ANKIT CHADHA,

Plaintiffs,

-against-

Index No. 157084/2014

W54-7 LLC,

Defendant.

-----X

**NANCY M. BANNON, J.**

**I. Background**

The plaintiffs, all of whom are tenants in the residential building located at 162 West 54<sup>th</sup> Street in Manhattan, commenced this action seeking a judgment declaring that their respective apartments are, and at all relevant times have been, subject to the Rent Stabilization Law (RSL) and for an order reforming their existent leases to provide that the apartments are subject to the RSL, establishing the legal regulated rent for the apartments, and granting them certain other relief, including monetary damages. The plaintiffs now move for a preliminary injunction barring the defendant landlord, W54-7LLC, from commencing summary eviction proceedings against them in New York City Housing Court during the pendency of this action, as the defendant has threatened to do unless they sign leases that they contend to be illegal. The defendant cross-moves to stay this action and direct the plaintiffs to file complaints with the New York State Division of Housing and Community Renewal (DHCR).

In support of their motion, the plaintiffs argue that, they have established a likelihood of success on the merits of the complaint because the defendant has been receiving J-51 tax benefits, which subjects their units to the RSL. They further argue that they have demonstrated irreparable harm if an action in Housing Court is commenced against them because they will be blacklisted on the rental market. Specifically, the plaintiffs allege that the New York State Office of Court Administration (OCA) sells, electronically, lists of all summary eviction proceedings, including all nonpayment and holdover proceedings, that are commenced in the New York City housing courts to tenant screening bureaus (TSBs), which, in turn, prepare tenant screening reports that they sell to prospective landlords and cooperative boards. The plaintiffs contend that tenants whose names appear on the reports, either as petitioners or as respondents, are then blacklisted, making the securing of a rental apartment in the future potentially very difficult if not impossible. The plaintiffs also argue that the equities tip in their favor, such that their motion for a preliminary injunction should be granted.

The defendant does not dispute that it received J-51 tax benefits and that the plaintiffs are, therefore, likely to succeed on the merits of their cause of action seeking a declaration that their respective apartments are, and at all relevant times have been, subject to the RSL. The defendant, however, opposes the plaintiffs' motion for a preliminary injunction on the grounds that the irreparable harm that the plaintiffs contend they will suffer in the absence of a preliminary injunction is speculative and without support. The defendant also cross-moves for an order staying this action and directing the plaintiffs to file complaints with DHCR on the grounds that the Supreme Court is not the preferred forum for adjudication of this dispute.

For the reasons set forth below, the plaintiffs' motion for a preliminary injunction is granted and the defendant's cross-motion for injunctive relief is denied.

## **II. Discussion**

### **A. The Plaintiffs' Motion for a Preliminary Injunction**

The applicable law is well settled. A party is entitled to a preliminary injunction upon a showing of (1) likelihood of success on the merits, (2) irreparable injury absent the granting of preliminary injunctive relief, and (3) a balancing of the equities in the movant's favor. See Nobu Next Door, LLC v Fine Arts Housing, Inc., 4 NY3d 839 (2005); Coinmach Corp. v Alley Pond Owners Corp., 25 AD3d 642 (2<sup>nd</sup> Dept. 2006). "The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual." Ying Fung Moy v Hohi Umeki, 10 AD3d at 604 (2<sup>nd</sup> Dept. 2004); see Trump on the Ocean, LLC v Ash, 81 AD3d 713 (2<sup>nd</sup> Dept. 2011); Masjid Usman, Inc. V Beech 140, LLC, 68

AD3d 942 (2<sup>nd</sup> Dept. 2009). Here, the plaintiffs have made the requisite showing for preliminary injunctive relief.

#### Likelihood of Success on the Merits

In New York City, the J-51 tax incentive program allows owners of multiple dwellings who complete eligible rehabilitation and improvement projects to receive certain tax exemptions and/or abatements. See Admin. Code of City of NY § 11-243. "Eligible projects include moderate and gut rehabilitations; major capital improvements (for example, asbestos abatement or boiler replacement); and conversions of lofts and other nonresidential buildings into multiple dwellings." Roberts v Tishman Speyer Properties, L.P., 13 NY3d 270, 280 (2009); see Admin. Code of City of NY § 11-243(b)(2), (3), (8). When a building receives such exemptions or abatements, any rental units "must be registered with the State Division of Housing and Community Renewal (DHCR), and are generally subject to rent stabilization for at least as long as the J-51 benefits are in force." Roberts v Tishman Speyer Properties, L.P., supra at 280. Further, where a landlord receives J-51 tax benefits, "High Rent/Vacancy Deregulation" ("Luxury Decontrol") provisions are not applicable. See Roberts v Tishman Speyer Properties, L.P., supra.

Here, the plaintiffs have demonstrated a likelihood of success on the merits of their causes of action seeking a judgment declaring that their subject units are subject to rent stabilization, that the defendant is required to offer renewal leases as required by the RSL at legal regulated rents, and that the defendant's efforts to deregulate the subject units are invalid, as well as for reformation of their leases and damages for violations of the Rent Stabilization Code for any rent overcharges. The plaintiffs allege and the defendant does not deny that the subject building has been receiving J-51 tax benefits since the 2003/2004 tax year. The plaintiffs allege that, despite its receipt of J-51 tax benefits since the 2003/2004 tax year, the defendant has continued efforts to deregulate units in the building, including the plaintiffs' units, pursuant to Luxury Decontrol, has issued non-rent stabilized leases for their units, and has raised their rent in excess of the legal rent for their units. For example, one year after beginning to receive J-51 tax benefits, the defendant registered the unit now rented by plaintiff Nieborak and plaintiff Lipkina with DHCR as "permanently exempt" from rent regulation due to "high rent vacancy." Since moving into their unit in March 2010, the defendant has charged plaintiffs Nieborak and Lipkina with rent in excess of the legal rent, most recently \$4,350 per month, and failed to file the required registrations with DHCR for their unit. The thirty-three other plaintiffs make similar allegations.

The defendant provides no argument and submits no evidence to the contrary. Indeed, rather than addressing the merits of the plaintiffs' claims, it argues that DHCR is the preferred forum for adjudication of the issues raised in this action. Accordingly, it fails to overcome the plaintiffs' showing of their likelihood of success on the merits of their claims.

#### Irreparable Harm

The plaintiffs further demonstrate that they will suffer irreparable harm in the absence of preliminary injunctive relief preventing the defendant from commencing summary eviction proceedings against them in New York City Housing Court during the pendency of this action by being blacklisted by TSBs. The plaintiffs set forth that it is OCA's practice to sell lists of parties to summary nonpayment and holdover proceedings to TSBs. The lists, however, do not supply details as to the dispositions of those proceedings. The TSBs then provide the lists to prospective landlords and cooperative boards to evaluate potential tenants and cooperative purchasers, thereby creating a tenant blacklist.

In its opposition to the motion, the defendant does not deny the existence of such a blacklist. Rather, it contends that, because the information provided by OCA is publicly available, its dissemination cannot constitute irreparable harm. However, according to the plaintiffs, although such information is publicly available, the manner in which it is provided by OCA is incomplete. Indeed, the plaintiffs set forth, and the defendant does not dispute, that the information disseminated does not provide any details as to the disposition of each Housing Court case. For example, where a defendant tenant in a non-payment proceeding prevails in part by obtaining a substantial, but not full, rent abatement, the disposition reflects the landlord as the prevailing party. As a result of this incomplete information being disseminated to TSBs, securing a rental or cooperative apartment in the future becomes virtually impossible.

Courts have found similar considerations of a blacklist compiled by TSBs and other credit reporting agencies to constitute irreparable harm, warranting issuance of preliminary injunctive relief. For example, in DeCastro v Bhokari, 201 AD2d 382 (1<sup>st</sup> Dept. 1994), the Appellate Division, First Department, in reversing the denial of a portion of the injunctive relief sought, found that "[i]rreparable harm would ensue if the cooperative were not restrained from cancelling plaintiffs' shares or issuing negative information with respect to the rent strike participants to credit reporting agencies." DeCastro v Bhokari, *supra* at 383. Similarly, in Pultz v Economakis, 8 Misc 3d 1022(A) (Sup Ct, NY County, 2005), the court (Feinman, J.), citing to DeCastro v Bhokari, *supra*, noted the existence of

“credit agencies whose primary business is to report to landlord subscribers, the names of all tenants who have appeared in the computer indices of Housing Court, no matter whether they were the petitioner or respondent, and without regard to whether they were successful in their proceedings. This ‘blacklist’ potentially makes the finding of a rental apartment potentially very difficult if not impossible.” Pultz v Economakis, *supra* at \*10.

The court found that the possibility of being blacklisted would be devastating to the plaintiffs and irreparable injury would occur in the absence of an injunction enjoining the commencement of Housing Court proceedings. Further, if the plaintiffs were to have to present their claims piecemeal in Housing Court, they “would not have the benefit of presenting the totality of the circumstances of the entire building to the ultimate fact finder.” Pultz v Economakis, *supra* at \*10.

Similarly, in Weisent v Subaqua Corp., 16 Misc 3d 1115(A), 2007 NY Slip Op 51428(U) (Sup Ct, NY County, 2007), the court (Kapnick, J.) noted that:

“For some reason, it appears that OCA sells Housing Court eviction case data electronically to companies known as ‘tenant screening bureaus’ (‘TSBs’), [which], in turn, use this data to prepare tenant screening reports which they then sell to other companies and to prospective landlords. ...

“The TSBs ‘have seized upon the ready and cheap availability of electronic records to create and market a product that can be, and probably is, used to victimize blameless individuals. ‘The problem is compounded by the fact that the information available’ from the Housing Court is ‘sketchy in the best of cases and inaccurate and incomplete in the worst.’”

Weisent v Subaqua Corp., *supra* at \*1, *quoting White v First Am. Registry Inc.*, 2007 WL 703926, \*1 (SDNY 2007). Due to the risk of the plaintiff’s name appearing on the blacklist, the court found that the plaintiff demonstrated that she would suffer irreparable harm in the absence of injunctive relief. See Weisent v Subaqua Corp., *supra*.

In Denza v Independence Plaza Assoc., 17 Misc 3d 1122(A), 2007 NY Slip Op 52106(U) (Sup Ct, NY County, 2007), the court (Friedman, J.) also held that preliminary injunctive relief was proper to maintain the status quo, as “Plaintiffs have demonstrated that they would be subject to blacklisting that could make finding a new rental apartment difficult, based on the court administration practice of selling Housing Court eviction case data.” Denza v Independence Plaza Assoc., *supra* at \*5. Likewise, in James v National Arts Club, 33 Misc 3d 1211(A), 2011 NY Slip Op 51885(U) (Sup Ct, NY County, 2011), the court (Edmead, J.) found that the plaintiffs would face irreparable injury in the absence of injunctive relief due to their

potential eviction from their homes of over twenty-five years and the “common practice among New York landlords of using a tenant ‘blacklist.’” James v National Arts Club, supra at \*4.

Here, it is undisputed that the defendant has threatened to commence eviction proceedings in the Housing Court against the plaintiffs if they refuse to sign renewal leases providing for rents that the plaintiffs contend do not conform with the RSL and that are in excess of the legal rent. In the absence of preliminary injunctive relief, the plaintiffs face not only eviction, but being placed on the tenant blacklist as a result of the commencement of any such Housing Court proceedings, which would render securing another rental or cooperative apartment nearly impossible. Even if the plaintiffs were to prevail in part in any such proceedings, they remain subject to blacklisting due to the practice of TSBs of disseminating incomplete information regarding the outcome of Housing Court proceedings. Thus, the harm faced by the plaintiffs by being placed on such a blacklist would be irreparable. See DeCastro v Bhokari, supra; Pultz v Economakis, supra; Weisent v Subaqua Corp., supra; Denza v Independence Plaza Assoc., supra; James v National Arts Club, supra.

Furthermore, this action relates to the defendants’ allegedly improper deregulation of units throughout the building, rather than of a single unit. Absent preliminary injunctive relief, the plaintiffs would be forced to each separately litigate their claims of the defendant’s allegedly improper deregulation and excessive rent increases in the Housing Court. As in Pultz v Economakis, supra, subjecting the plaintiffs to the litigation of individual proceedings in the Housing Court would prevent them from presenting the totality of the circumstances of the defendant’s allegedly improper and systematic deregulation of their units and would create a risk of inconsistent results among the thirty-five plaintiffs.

Moreover, the defendant’s threats of eviction would constitute irreparable injury if a preliminary injunction is not granted, as the plaintiffs, each of whom have resided in their apartments for up to nearly seven years, face the loss of their homes. It is well settled that maintaining one’s home is an interest that is unquantifiable. See Broadway 500 W. Monroe Mezz II LLC v Transwestern Mezzanine Realty Partners II, LLC, 80 AD3d 483 (1<sup>st</sup> Dept. 2011); Jones v Park Front Apartments, LLC, 73 AD3d 612 (1<sup>st</sup> Dept. 2010); Terrell v Terrell, 279 AD2d 301 (1<sup>st</sup> Dept. 2001). Indeed, courts “do not look favorably upon the forfeiture of leases.” Sharp v Norwood, 223 AD2d 6, 11 (1<sup>st</sup> Dept. 1996) *lv app granted*, 231 AD2d 974 (1<sup>st</sup> Dept. 1996) *aff’d* 89 NY2d 1068 (1997), *rearg denied* 90 NY2d 889 (1997); see Village Ctr. for Care v Sligo Realty and Serv. Corp., 95 AD3d 219 (1<sup>st</sup> Dept. 2012). Any dispossession of the plaintiffs and rental of their units to others would also render ineffectual any judgment the plaintiffs were to obtain in this action, as they ultimately seek issuance of renewal leases that comply with the RSL. See Winchester Global Trust Co. Ltd. v Donovan, 58 AD3d 833 (2<sup>nd</sup> Dept. 2009).

Accordingly, the court finds that the plaintiffs have sufficiently demonstrated that they would suffer irreparable harm in the absence of preliminary injunctive relief.

### Balancing of the Equities

The plaintiffs have also established that the irreparable harm they would suffer if a preliminary injunction is not granted outweighs any harm that the defendant would incur if the preliminary injunction is granted. See McLaughlin, Piven, Vogel, Inc. v W.J. Nolan and Co., 114 AD2d 165 (2<sup>nd</sup> Dept. 1986). As a result of the defendant's issuance of non-rent stabilized leases and allegedly illegal rent increases, the plaintiffs risk losing their homes of up to nearly seven years and being blacklisted in any future search for a rental or cooperative apartment. The granting of a preliminary injunction will merely maintain the status quo during the course of the instant action, whereby the plaintiffs are required to comply with their most recent rental obligations in a timely manner. There is no allegation that the plaintiffs have failed to pay rent in accordance with their most recent leases. Thus, the only harm the defendant would suffer in granting preliminary injunctive relief is a temporary restriction of seeking rental amounts from the plaintiffs in excess of their existing obligations. Accordingly, the harm to the plaintiffs far outweighs any harm that may come to the defendant in allowing them to continue residing in their apartments while continuing to pay rent in accordance with their most recent lease agreements.

Although the defendant does not request the plaintiffs' posting of an undertaking in its opposition to the motion and only raises such request improperly for the first time in its reply papers (see e.g. Mazziotti v Kelly, 129 AD3d 618 [1<sup>st</sup> Dept. 2015]), an undertaking must be posted by the plaintiffs where, as here, preliminary injunctive relief is granted in their favor. See CPLR 6312(b). However, as the defendant has not set forth the potential damages it could incur, an undertaking in the amount of one month's rent in the amount set forth in the plaintiffs' most recent lease agreements would reflect an appropriate undertaking. See Medical Bldgs. Assocs., Inc. v Abner Properties Co., 103 AD3d 488 (1<sup>st</sup> Dept. 2013).

### **B. The Defendant's Motion for a Stay and Other Injunctive Relief**

The defendant failed to establish that a stay of this action and an order directing the plaintiffs to file complaints with DHCR is warranted. Although the defendant contends that the Supreme Court is not the preferred forum for adjudication of the parties' dispute, it is well settled that dismissal or stay of an action pending administrative resolution of a dispute is only available (1) when the legislature has expressly conferred exclusive, rather than primary, jurisdiction of an issue on the administrative agency (see Sohn v Calderon, 78 NY2d 755

[1991]), (2) when the plaintiffs are the parties seeking referral to the administrative agency for adjudication (see Crimmins v Handler & Co., 249 AD2d 89 [1<sup>st</sup> Dept. 1998]), or (3) when a related administrative proceeding has already taken place or is currently pending. See Wong v Gouverneur Gardens Hous. Corp., 308 AD2d 301 (1<sup>st</sup> Dept. 2003). The defendant does not argue that any such circumstances are present here.

The parties do not dispute that this court has concurrent, not primary, jurisdiction with DHCR over the plaintiffs' rent overcharge claims (see Downing v First Lenox Terrace Assocs., 107 AD3d 86 [1<sup>st</sup> Dept. 2013]) and that DHCR is not authorized to adjudicate the plaintiffs' causes of action for reformation of their leases and damages for violations of General Business Law. It is also undisputed that the plaintiffs have not filed applications with DHCR and do not seek referral to DHCR. Indeed, the plaintiffs' opposition papers to the defendant's cross-motion make clear that they oppose any referral to DHCR. Further, the defendant has not demonstrated that any related proceedings are presently before DHCR or have already taken place. The defendant, in its reply, cites to an application it filed with DHCR pertaining to one of the thirty-five plaintiffs in July 2014 in support of its contention that the remaining plaintiffs should be directed to file complaints with DHCR. This argument is improperly raised for the first time in its reply. See e.g. Erdey v City of New York, 129 AD3d 546 (1<sup>st</sup> Dept. 2015); McDonald v Edelman & Edelman P.C., 118 AD3d 562 (1<sup>st</sup> Dept. 2014). In any event, while the defendant appends the first page of that application to its reply papers, no other information regarding the status of that proceeding is supplied. In addition, it does not dispute that no other application has been filed with DHCR with respect to any of the other plaintiffs.

The defendant's reliance on 40 W. 75<sup>th</sup> St. LLC v Horowitz, 25 Misc 3d 1230(A) (Civ. Ct. 2009) in support of its argument that, in the court's discretion, deference to an administrative agency is permitted where the issues to be resolved fall within its particular expertise is unpersuasive. In 40 W. 75<sup>th</sup> St. LLC v Horowitz, supra, an administrative proceeding between the parties was already pending before the New York State Division of Human Rights and the petitioner did not oppose the respondent's application for a stay. In contrast, here, the defendant submits incomplete information regarding one application that may have been filed with DHCR and the papers submitted on the motion make clear that the plaintiffs do not consent to administrative adjudication of their claims. While deference to DHCR may be permitted, it is not required. See Downing v First Lenox Terrace Assocs., supra. Thus, the defendant has failed to establish that any of the factors that would support referral of the instant issues to DHCR are present here. The defendant's cross-motion is, therefore, denied.

### III. Conclusion

Upon the plaintiffs' showing of a likelihood of success on the merits, irreparable harm in the absence of preliminary injunctive relief, and the balancing of the equities in their favor, the plaintiffs' motion for a preliminary injunction is granted. The defendant's cross-motion for a stay of this action and an order directing the plaintiffs to file complaints with DHCR is denied.

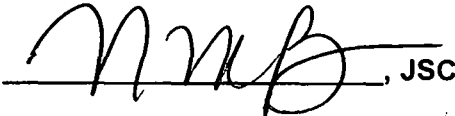
Accordingly, it is hereby

ORDERED that the plaintiffs' motion is granted and, pending final determination of this action, the defendant and its agents are hereby temporarily enjoined, pursuant to CPLR 6301, from commencing a summary eviction proceeding against any of the plaintiffs herein in the New York City Housing Court based upon the renewal of the plaintiffs' leases, upon the condition that the plaintiffs pay monthly use and occupancy in accordance with their most recent lease agreements and that, pursuant to CPLR 6312(b), the plaintiffs each furnish an undertaking in the amount of one month's rent according to their most recent lease agreements, and it is further

ORDERED that the defendant's cross-motion is denied.

This constitutes the Decision and Order of the court.

Dated: January 22, 2016

 JSC  
HON. NANCY M. BANNON