

560-568 Audubon Tenants Assn v 560-568 Audubon Realty, LLC
2018 NY Slip Op 33589(U)
September 13, 2018
Supreme Court, New York County
Docket Number: 154661/16
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTYPRESENT: HON. BARBARA JAFFEPART 12Justice

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560-568 AUDUBON TENANTS ASSOCIATION, *et*
al.,INDEX NO. 154661/16

Plaintiffs,

MOTION DATE _____

- v -

MOTION SEQ. NO. 3560-568 AUDUBON REALTY, LLC, *et al.*,**DECISION AND ORDER**

Defendants.

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By notice of motion, defendants move pursuant to CPLR 3211(a)(2) and (7) for an order dismissing the complaint on the grounds that the New York State Division of Housing and Community Renewal (DHCR) has primary jurisdiction over the issues related to plaintiffs' rent overcharge claims and that other claims are insufficiently stated in the second amended complaint. Plaintiffs oppose.

As an amended complaint supersedes the complaint before it, there is no prohibition against moving to dismiss as against a subsequent complaint. (*See e.g., Thompson v Cooper*, 24 AD3d 203 [1st Dept 2005] [as original complaint superseded by amended complaint, sufficiency of allegations in earlier complaints rendered academic; court not precluded from entertaining motion to dismiss second amended complaint notwithstanding denial of motion to dismiss initial complaint]; *Shelley v Shelley*, 180 Misc 2d 275 [Sup Ct, Westchester County 1999] [as amended complaint superseded original, defendant permitted to interpose second motion to dismiss]).

While this court has concurrent jurisdiction with DHCR on issues relating to rent regulation, in light of the fact that the issues raised in this proceeding are particularly suited to resolution by DHCR, which has expertise in these matters, plaintiffs' claims are best addressed by DHCR in the first instance. (*See e.g., Collazo v Netherland Property Assets LLC*, 155 AD3d 538 [1st Dept 2017], *lv granted* 31 NY3d 910 [2018] [court providently exercised discretion in ruling that plaintiffs' rent overcharge claims should be determined by DHCR]; *Olsen v Stellar W. 110, LLC*, 96 AD3d 440, 441-2 [1st Dept 2012], *lv dismissed* 20 NY3d 1000 [2013] [although supreme court has jurisdiction over rent overcharge case, matter should be decided by DHCR, given its expertise and ability to investigate allegations of fraud and determine apartment's

regulatory status and applicable rental amounts]; *Wilcox v Pinewood Apt. Assoc., Inc.*, 100 AD3d 873 [2d Dept 2012] [issues of amount of overcharge, whether willful, and whether treble damages warranted more appropriately determined by DHCR pursuant to primary jurisdiction doctrine; “while concurrent jurisdiction exists, where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a judicial tribunal should be withheld pending resolution of the administrative proceeding”]; 390 *W. End Assocs. v Nelligan*, 35 AD3d 306 [1st Dept 2006] [tenants’ claim for rent overcharges and other damages should be resolved in first instance by DHCR]; *Davidson v 730 Riverside Drive, LLC*, 2015 WL 5171072, 2015 NY Slip Op 31714[U] [Sup Ct, New York County] [denying tenant’s motion for partial summary judgment on claim for rent overcharge and attorney fees, and severing claim, dismissing it without prejudice, and directing tenant to bring appropriate claim before DHCR]; *but see Kreisler v B-U Realty Corp.*, AD3d , 201 NY Slip Op 06054 [1st Dept 2018] [“court properly retained jurisdiction over the rent overcharge issues rather than referring these to DHCR, given that legal issues remain open, including the willfulness of defendants’ rent overcharges”].

Deferring the matter to DHCR’s discretion would also promote “a uniformity of ruling [which] is essential to comply with the purposes of the regulatory statute.” (2 NY Jur 2d, Administrative Law § 328 [2018]). Thus, in *Davis v Waterside Hous. Co., Inc.*, the Court held that the trial court should have dismissed a complaint by tenants seeking a declaratory judgment that their apartments were subject to rent stabilization, observing that rent regulation issues are matters routinely within DHCR’s area of expertise. (274 AD2d 318, 318 [2000]). It quoted from *Capital Tel. Co. v Pattersonville Tel. Co.*, 56 NY2d 11, 22 (1982):

The doctrine of primary jurisdiction is intended to co-ordinate the relationship between courts and administrative agencies to the end that divergence of opinion between them not render ineffective the statutes with which both are concerned, and to the extent that the matter before the court is within the agency’s specialized field, to make available to the court in reaching its judgment the agency’s views concerning not only the factual and technical issues involved but also the scope and meaning of the statute administered by the agency.

(274 AD2d 318, 318).

While plaintiffs assert that defendants’ jurisdictional argument should have been raised earlier over the two years during which this case was pending, and that they are or will be prejudiced by the delay, it is undisputed that the parties are in the midst of exchanging document discovery and that no depositions have been conducted. (NYSCEF 126).

In plaintiffs’ first cause of action, they allege fraud in the rent regulation process and in defendants’ rent registrations. There is no claim for common law fraud. DHCR has jurisdiction over and expertise in the determination of a tenant’s rent stabilization status and proper rent registrations and may award damages for fraud committed by a landlord. (*See Olsen*, 96 AD3d at 441-442 [dismissing complaint on ground that DHCR had primary jurisdiction over rent overcharge matter; “DHCR can investigate plaintiffs’ fraud allegations, determine the regulatory status of the apartment, and . . . determine the base rent”]; *see also Friscia v Lem Lee 13th Ltd.*

Partnership, 2006 WL 4937209 [Sup Ct, New York County 2006] [dismissing complaint based on DHCR's jurisdiction over rent regulation issues], *aff'd* 37 AD3d 168 [1st Dept 2007] [while tenants argued on appeal that complaint raised issues not susceptible of resolution by DHCR, such as common law fraud, dismissal affirmed as issues entailed factual determinations within DHCR's expertise]).

Plaintiffs may not maintain a claim pursuant to the General Business Law (GBL) § 349 related to alleged violations of the rent regulation laws. (*See Collazo v Netherland Property Assets LLC*, 155 AD3d 538 [1st Dept 2017], *lv granted* 31 NY3d 910 [2018] [tenants failed to state claim for relief under GBL § 349]; *Aguaiza v Vantage Props., LLC*, 69 AD3d 422 [1st Dept 2010] [private disputes between landlords and tenants not covered by GBL § 349]).

Plaintiffs' claim pursuant to 42 USC § 4852d is insufficiently pleaded. (*See G.M.M. v Kimpson*, 92 F Supp 3d 53 [ED NY 2015], *citing to Kaye v Acme Investments, Inc.*, 2008 WL 5188712, *3 [ED Mich 2008] [dismissing plaintiff's section 4852d complaint for failure to show damages resulting from technical violation of federal statute]; *Christian v Warwick Realty, LLC*, 2014 WL 2434626 [D Rhode Island 2014] [claim pursuant to 42 USC § 4852d subject to dismissal as complaint contained no allegation that plaintiff or any member of plaintiff's family had been damaged by lead exposure or by failure to disclose risks of lead poisoning]).

Accordingly, it is hereby

ORDERED, that the complaint is dismissed in its entirety, with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

9/13/18

DATE

BARBARA JAFFE, J.S.C.

HON. BARBARA JAFFE

CHECK ONE:

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CASE DISPOSED

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GRANTED

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DENIED

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NON-FINAL DISPOSITION

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GRANTED IN PART

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OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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DO NOT POST

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FIDUCIARY APPOINTMENT

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REFERENCE