Diamond v New York City Hous. Auth.
2019 NY Slip Op 30280(U)
February 7, 2019
Supreme Court, New York County
Docket Number: 153312/18
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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A'SEELAH DIAMOND and RUTH BRITT, on behalf of themselves and a class of those similarly situated,

Plaintiffs,

-against-

THE NEW YORK CITY HOUSING AUTHORITY and OYESHOLA OLATOYE, in her official capacity as Chairperson of the New York City Housing Authority,

Defendants.

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Index No: 153312/18
Motion seq. No. 003

DECISION/ORDER

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This putative class action proceeding concerns basic human rights. Plaintiffs A'seelah Diamond and Ruth Britt, on behalf of themselves and a class similarly situated (collectively, Plaintiffs) seek both a declaratory judgment that NYCHA has breached the warranty of habitability, and a preliminary injunction ordering NYCHA to provide adequate heat and hot water services moving forward. Additionally, Plaintiffs seek consequential damages to compensate them for the loss of the habitable use of their homes and extra costs they incurred in procuring additional heating sources. Plaintiffs also seek punitive damages for NYCHA's knowing and intentional failure to meet habitable living obligations.

Defendants New York City Housing Authority (NYCHA), and its former chairperson, Oyeshola Olatoye (collectively, Defendants), move to dismiss the complaint, pursuant to both federal law and CPLR § 3211, or in the alternative to transfer the matter pursuant to CPLR § 325(d) to the Civil Court of the City of New York, Housing Part (hereinafter referred to as the Housing Court). Defendants argue that Plaintiffs' claims for injunctive relief are preempted by

federal law, and that class certification is improper. Defendants further contend that as this is essentially a landlord tenant dispute, Plaintiffs' claims for damages are best suited to be resolved in Housing Court.

For the reasons set forth below, Defendants' motion to dismiss is granted.

BACKGROUND

Plaintiffs A'seelah Diamond and Ruth Britt are tenants in two separate apartment complexes that are owned by NYCHA in the Kings and Bronx counties of New York. NYCHA is an organization that provides public housing for low- and moderate-income New York residents. As a landlord, NYCHA has a non-delegable duty to provide basic housing needs such as heat and hot water to its residents. However, NYCHA has unequivocally breached its duty to provide the most basic services necessary for habitability (NYSCEF doc No. 40 at ¶ 3).

During the winter of 2017-2018, which was one of the coldest on record in the history of New York, NYCHA failed to provide heat or hot water to approximately 143,000 of 175,000 housing units, leaving roughly 323,098 NYCHA residents without the most basic needs that all New York City residents are entitled to by law (*id.*). NYCHA residents were forced to fend for themselves on winter days where temperatures reached well below freezing, layering themselves in blankets and purchasing space heaters with their own funds to try to heat their units (*id.* at ¶ 5). Some residents also attempted to heat their apartments by turning on their stoves, leaving themselves vulnerable to a severe risk of carbon monoxide poisoning. A very high percentage of NYCHA residents are senior citizens over the age of 65, who are more highly susceptible to suffering health conditions from the cold (*id.*). Many also suffered financially as well, particularly senior citizen residents who in some instances were forced to choose between purchasing space heaters and necessary medications (*id.* at ¶ 6).

While NYCHA's failure to provide heat and hot water is egregious in and of itself, evidence also demonstrates that NYCHA had reason to know that many of the heating systems and boilers in its buildings were in poor condition, and yet took inadequate action to make repairs. NYCHA also made numerous false statements that gravely understated the amount of homes that lost heat, as well as the length of time for which homes suffered outages (*id.* at ¶ 9-10). NYCHA also misrepresented the amount of time it took to close out resident complaints, as it often closed complaint files without checking in on the tenants who had filed them to ensure that their heat had adequately returned (*id.* at 11).

Plaintiffs seek to represent two classes of NYCHA residents, those who suffered a loss of heat last winter and those who are current and/or future residents and therefore have an ongoing risk of losing heat.

Plaintiffs originally commenced this action on April 12, 2018, but Defendants did not file an answer to the initial complaint. On May 21, 2018, Plaintiffs submitted both an order to show cause for a preliminary injunction (mot. seq. No. 001) and a motion for class certification (mot. seq. No. 002). At a hearing on May 31, 2018, the Court signed a consent order by which Plaintiffs agreed to withdraw these two motions without prejudice, and to serve and to file an amended complaint; both parties further agreed to a schedule for the submission of an answer and/or new motions. On June 12, 2018, Plaintiffs filed an amended complaint with causes of action for injunctive relief and monetary damages (NYSCEF doc No. 40). Defendants did not file an answer to the amended complaint but continued to make submissions in opposition to the two withdrawn motions. On July 10, 2018, Defendants submitted the current motion to dismiss (mot. seq. No. 003), which also incorporated Defendants' opposition arguments to those two withdrawn motions. The Court thereafter corresponded with the parties and directed them to

submit memoranda of law that addressed all of the issues in the previous motions within the context of the current motion. All outstanding issues are now consolidated before the court in this omnibus motion (mot. seq. No. 003).

In discussing the background of this omnibus motion, the court must discuss a federal court action which involves overlapping issues: *United States of America v New York City Housing Authority* (the federal court action). In support of their motion to dismiss, Defendants here rely on a consent decree that arose from the federal court action. NYCHA and the City of New York executed that consent decree with U.S. Attorney's on behalf of the Department of Housing and Urban Development (HUD) and the Environmental Protection Agency (EPA) on June 11, 2018 (NYSCEF doc No. 81 at 6).

However, on November 14, 2018, Judge William H. Pauley III issued an order that rejected the consent decree and adjourned the matter until NYCHA and HUD could come to an agreement regarding the future of the agency (*United States of America v NYCHA.*, __ F Supp 3d __, 2018 WL 5985379 [SDNY 2018]). On January 31, 2019, NYCHA and the U.S. Attorney for the Southern District, on behalf of HUD and the EPA, reached an agreement whereby HUD executed an "administrative agreement" (*see* February 5, 2019 letter from Defendants, NYSCEF doc No. 102). The administrative agreement superseded the consent decree, which it rendered "null and void, except with respect to the admissions [of NYCHA's various failures to provide safe and adequate housing] contained in paragraph 7 … which NYCHA ratifies and reaffirms" (Agreement, § XXII, https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-new-agreement-fundamental-reform-nycha, accessed February 6, 2019).

A press release from the Justice Department describes the "administrative agreement" as

"requiring NYCHA, under the supervision of a federal monitor, to fundamentally reform its operations and remedy living conditions for its residents, including lead paint hazards, mold growth, pest infestations, lack of heat, and inadequate elevator service" (*Manhattan U.S. Attorney Announces New Agreement For Fundamental Reform at NYCH,* https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-new-agreement-fundamental-reform-nycha, as accessed February 6, 2019). The release stated that the agreement "went into effect immediately" and "does not require court approval" (*id.*). Instead, the U.S. Attorney for the Southern District will withdraw the complaint in the federal action "within 14 days of appointment of the monitor," and will seek "dismissal without prejudice of the complaint (*Agreement*, § I.11, https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-new-agreement-fundamental-reform-nycha, accessed February 6, 2019). While Defendants refer to the June 11, 2018 consent decree, the administrative agreement supersedes it with respect to Defendants' arguments regarding federal preemption of Plaintiffs' application for injunctive relief.[1]

DISCUSSION

INJUNCTIVE RELIEF

Plaintiffs seek a preliminary injunction directing Defendants "to devise and implement a 90-day plan for addressing [NYCHA's] pervasive and persistent heat and hot water outages" and a permanent injunction "ordering Defendants to provide Plaintiffs and all other NYCHA tenants with heat and hot water consistent with NYCHA's obligations under New York law" (NYSCEF doc No. 85 at 9-10).

[1] Upon publication of the administrative agreement, the Court contacted counsel for both parties and asked if they wished to put in additional papers to specifically address the administrative agreement, but the parties declined and opted instead to stand on their papers as submitted.

Defendants make two arguments as to Plaintiffs' application for injunctive relief: that the action is preempted by federal law and that Plaintiffs do not have standing to seek such relief, as there is no private right of action on which they could seek injunctive relief from NYCHA.

Preemption

The Supremacy Clause (US Const, art VI, cl [2]) provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding." Thus, both parties acknowledge that, as the Supreme Court has held, "Congress has the power to preempt state law" (*Crosby v. Nat'l Foreign Trade Council,* 530 US 363, 372 [2000]).

Preemption analysis is tiered. The first tier is for areas where Congress expressly preempts (*see Arizona v United States*, 567 US 387, 388 [2012]). The next tier is where intent to preempt can be inferred from a "framework of regulation" that leaves "no room for States to supplement it (*id.* [internal quotation marks and citation omitted]). In other words, the legislation "is so comprehensive in its scope that Congress wished to occupy the field" (*Doomes v Best Tr. Corp.*, 17 NY3d 594, 601 [2011] [internal quotation marks and citation omitted]). The third tier of preemption does not refer to Congress's intent or whether it has occupied an entire field, but instead focuses on whether there is an actual conflict or when state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives" of federal law (*Arizona*, 567 US at 399 [internal quotation marks and citation omitted]; *see also Doomes*, 17 NY3d at 601). The Court of Appeals has held that "Federal administrative agency regulations, promulgated pursuant to congressional delegation of discretionary quasi-legislative authority to effectuate congressional purposes, may also preempt State law" (*Guice v Charles Schwab & Co.* 89 NY2d 31, 39 [1996]).

In *435 Cent. Park W. Tenant Assn. v Park Front Apts., LLC,* the First Department expressly recognized that HUD rules and regulations may preempt claims based on New York State law (164 AD3d 411 [1st Dept 2018]). The Court held that HUD's rules and regulations governing the collection of rent in rent-regulated apartment buildings in the National Housing Act preempted similar state rules and regulations in New York's State's Rent Stabilization Law (*id.*). The court specifically held that this "conflict preemption" continued for as long as the building's owner was subject to the terms of a HUD-issued below-market-interest-rate mortgage (*Id.*). The First Department, thus, has acknowledged that HUD rules and regulations may preempt New York State housing law under the Supremacy Clause.

Here, HUD entered into the administrative agreement pursuant to its responsibility, under the United States Housing Act of 1937 (Housing Act), to administer low income housing programs, such as NYCHA, that receive federal assistance (42 USC § 1437 *et. seq.*). The administrative agreement found that NYCHA's various failures to provide safe and adequate housing constituted a default of its obligations under the Housing Act pursuant to 42 USC § 1437d (j) (3) (A) (*Agreement*, § I (6), https://www.justice.gov/usao-sdny/pr/manhattan-us-attorney-announces-new-agreement-fundamental-reform-nycha, accessed February 6, 2019). Thus, HUD invoked its remedial powers under 42 USC § 1437d (j) (3) (A) (v) and "determined that the terms of this Agreement constitute an 'an arrangement[] acceptable to the Secretary and in the best interests of the public housing residents … for managing all, or part, of the public housing administered" by NYCHA (*id.* at § I [7]).

The terms of the administrative agreement are broad enough that the injunctive relief sought by Plaintiffs would constitute an obstacle to the accomplishment and execution of its full purposes and objectives. First, the administrative agreement encompasses the heat and hot water

services, as the purpose of the agreement is "to remedy deficient physical conditions in NYCHA properties" and "ensure that NYCHA complies with its obligations under federal law" (*id.* at § I [8]). NYCHA's obligations under federal include the provision of adequate heat and hot water (*see* 24 CFR § 5.703 [c] [requiring a public housing authority, such as NYCHA, to ensure that "building systems," a term that includes HVAC/heating systems, are "free of health and safety hazards, functionally adequate, operable, and in good repair"]).

Second, the administrative agreement gives the monitor broad discretion to design the means of remediating defaults under federal law, such as deficiencies in NYCHA's provision of heat and hot water (*see id.*, § IV). Thus, given the specificity and the breadth of the injunctive relief sought by Plaintiffs, the Court, by granting such relief, would effectively arrogate power delegated to the monitor for itself. This would, under *435 Cent. Park W. Tenant Assn.*, constitute an infringement on the supremacy of federal law and thereby violate the Supremacy Clause (164 AD3d at 413). Accordingly, Plaintiffs' application for injunctive relief must be dismissed, as such relief is preempted by the administrative agreement. This disposition also accords with the doctrine of separation of powers, under which the executive branch and its agencies, rather than the legislative branch, execute laws (*see generally N.Y. State Health Facilities Ass'n v. Axelrod*, 77 N.Y.2d 340 [1991]). From a pragmatic view, HUD and the monitor are simply better equipped to address and remediate the dire, systemic problems raised by this action.

Standing

Defendants also argue that Plaintiffs' application for injunctive relief should be dismissed as Plaintiffs do not have standing to ask for such relief. In support, Defendants cite to *Delgado v New York City Hous. Auth.* (66 AD3d 607 [1st Dept 2009]). In *Delgado,* NYCHA residents

sought to compel NYCHA to comply with apartment painting regulations under the Housing Maintenance Code (*id.*). The First Department held that

> "[c]ompliance with a housing code is not an unambiguously confirmed right secured by the force of federal law or the United States Constitution, and the United States Housing Act of 1937 (42 USC) § 1437d (l) (3) [i.e., the Public Health and Welfare Act], which obligates public housing authorities to maintain projects 'in a decent, safe, and sanitary condition,' 'does not create a right enforceable under § 1983 to proper maintenance of the housing project'"

(*id.* at 608 [internal citations omitted]).

The First Department concluded that only "the Commissioner of the New York City Department of Housing Preservation and Development is authorized to seek such relief or other sanctions and remedies for violations of the Housing Maintenance Code," and thus, "petitioners do not have a private right of action for the injunctive and declaratory relief sought" (*id.*). *Delgado*'s holding has since been cited in a diverse array of caselaw for the proposition that injunctive relief for non-governmental parties is unavailable when a controlling statutory scheme does not provide for a private right of action (*see Agerbrink v Model Serv. LLC,* No. 14-CV-7841 JPO, 2015 WL 3750674, at *4 [SDNY June 16, 2015] [plaintiff models were precluded from bringing a claim for declaratory judgment as there is no private right of action under Article 11 of the General Business Law]; *cf. Women's Voices for Earth, Inc. v Proctor & Gamble Co.*, 29 Misc. 3d 358 [Sup Ct. 2010] [organizations were not entitled to injunctive relief pursuant to New York Department of Environmental Conservation regulations, as the regulations provided no private right of action]).

Here, while there is no private right of action pursuant to federal law, the statute under the Public Health and Welfare Act cited in the federal action against NYCHA does afford HUD a statutory basis to seek injunctive relief to enforce housing code compliance. Thus, federal law in the form of the Public Health and Welfare Act authorizes a government entity such as HUD to

seek injunctive relief to enforce compliance with its rules and regulations, but no equivalent private right of action is recognized for individuals such as Plaintiffs. Plaintiffs base their claim for injunctive relief in this action on New York State law, which, they assert, does authorize them to seek injunctive relief to enforce NYCHA's obligations.

However, Plaintiffs fail to point to any specific law authorizing a private right of action, or to any caselaw which would provide for an exception to *Delgado*. Thus, *Delgado*'s holding that, as a general matter, New York City housing code does not confer a private right of action is determinative. Without such a private right of action, Plaintiffs, under *Delgado*, do not have standing to seek the injunctive relief sought. As it is both preempted by federal law and precluded by a lack of standing, Plaintiffs' application for injunctive relief must be dismissed.

CLASS CERTIFICATION

As discussed, Plaintiffs seek class certification pursuant to CPLR 901[2] on behalf of two classes of NYCHA residents, both "(1) all NYCHA residents who were deprived of heat and/or hot water at any point from October 1, 2017 to May 31, 2018…and (2) all current and future NYCHA residents seeking injunctive relief against continuing or future violations by NYCHA of its obligations to provide heat and/or hot water to tenants" (NYSCEF doc No. 40 at ¶ 58-63). The first proposed class relates to Plaintiffs' claim for monetary damages, and the second class

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[2] Pursuant to CPLR 901(a):

> One or more members of a class may sue or be sued as representative parties on behalf of all if:
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> "1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;
> "2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;
> "3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
> "4. the representative parties will fairly and adequately protect the interests of the class; and
> 5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

relates to Plaintiffs' claim for injunctive relief. As Plaintiffs are denied injunctive relief, class certification for all current and future NYCHA residents seeking injunctive relief is denied. Only the matter of class certification for monetary damages remains before the Court. Defendants argue that this proposed class of litigants cannot be certified under the governing statute. Specifically, Defendants contend that Plaintiffs do not meet the second prong of CPLR 901. Defendants assert that the common question requirement is not met as "boiler outages, heating failures and gaps in hot water service were divergent across groups of apartments, different buildings and a variety of developments, resulting in tenants experiencing different heat and hot water conditions" (NYSCEF doc No. 82 at 18). Plaintiffs argue in reply that the requirement for uniform damages among a class "has been repeatedly rejected by New York courts" (NYSCEF doc No. 84 at 22-26). For the reasons set forth below, the Court finds that as there is insufficent commonality across the damages Plaintiffs have suffered, a certification for monetary damages is improper.

The Court notes that Plaintiffs base their opposition argument primarily on the holding of *Roberts v Ocean Prime, LLC*, where the First Department upheld the trial court's certification of a class of tenants residing in a storm damaged apartment building, over the defendants' "commonality" objection, on the ground that "the proof at trial will consist of evidence of defendants' efforts to prevent damage in advance of the storm and to repair damage after the storm" (148 AD3d 525 [1st Dept 2017]). The First Department reasoned that "[s]ince the class consists of tenants of the building, common questions predominate over individual questions concerning the amount and type of damages sustained by each class member" *(Id.)*. As a result, the First Department concluded that "[a]ny differences in proof with respect to the applicability of the warranty of habitability . . . as between residential tenants and commercial tenants is

insufficient to overcome the significant common questions, and the court may, in its discretion, establish subclasses" *(Id.)*. Here, Plaintiffs argue that the commonality requirement is similarly satisfied as all class members suffered from the same failure to provide heat and hot water. However, the Court believes that this is far too cursory an application of *Roberts*.

The Court of Appeals provided a more instructive review of damages in warranty of habitability cases in *Park W. Mgt. Corp. v Mitchell* (47 NY2d 316 [1979]). Therein, the Court noted that "[p]roblematical in these cases is the method of ascertaining damages occasioned by the landlord's breach . . . the proper measure of [which] is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach" (47 NY2d at 329). The Court further noted that "[i]n ascertaining damages, the finder of fact must weigh the severity of the violation and duration of the conditions giving rise to the breach as well as the effectiveness of steps taken by the landlord to abate those conditions" *(Id.)*. *Park W. Mgt. Corp.* did not address the issue of class certification or the question of "commonality." Instead, the parties therein mutually consented that the trial court's decision would bind all of the tenants of a multiple building development whose services were affected when the development's maintenance workers went on strike. However, the issues of class certification and commonality were addressed in *Adler v Ogden CAP Props., LLC* (42 Misc. 3d 613 [Sup Ct, NY County 2013]), *aff'd* 126 AD3d 544 [1st Dept 2015]), a warranty of habitability case which followed *Park W. Mgt. Corp.*

In *Adler,* which involved a class certification for damages to buildings after Superstorm Sandy, the trial court noted that assessing damages for each apartment is extremely fact-specific, as it is dependent on the mitigation efforts by the landlord for each individual building (42 Misc.

3d at 626). The court acknowledged that while "certain factors, such as electricity outages, can be determined on a class-wide basis… there is simply no way to make class-wide determinations about landlords' mitigation efforts or the effects of the outages in each area or, for that matter, each building" (*Id.*). The court concluded that class certification was improper, noting that "the only way to expeditiously accomplish the original desired goal of recouping compensation for all storm-related, warranty of habitability claims is to utilize the capable services of Housing Court" (42 Misc. 3d at 629).

The facts here are sufficiently similar to those in *Adler* to warrant a similar finding. Plaintiffs themselves admit that their "proposed damages class would likely encompass approximately 320,000 NYCHA tenants from approximately 143,000 NYCHA housing units" in 2,462 NYCHA buildings located at unspecified addresses scattered across the City (NYSCEF doc No. 84 at 24). Plaintiffs do not claim, nor could they, that every tenant in every unit was completely without any heat or hot water service for the period of October 1, 2017 through May 31, 2018 so as to all be entitled to the same measure of compensation for NYCHA's purported warranty of habitability breaches. The Court must instead apply the *Adler* standard that damages must be assessed by a review of specific conditions and mitigation efforts in each unit. It is apparently obvious that here so many individualized inquiries are required that the idea of a uniform measure of damages is completely illogical.

In *Roberts*, where class certification was permitted, all of the members of the plaintiff class were residents of the same building. In *Adler*, where class certification was denied, the proposed plaintiff classes resided in two separate Manhattan apartment buildings located approximately 15 blocks apart. In this case, Diamond resides in a NYCHA project in Brooklyn, Britt resides in a NYCHA project in the Bronx, and the proposed plaintiff class would include

members residing in NYCHA projects in all five of New York City's boroughs. There is simply no way to conclude that those proposed class members are united by a "common question of fact" as they clearly suffered different and disparate degrees of harm as a result of NYCHA's failure to provide adequate heat and hot water last winter, and therefore they are entitled to differing amounts of monetary damages. Plaintiffs' contention that the proposed class members are united by a "common question of law," in that those damages all result from NYCHA's breaches of their individual warranties of habitability, is unavailing. Instead, in this case, "the fact specific nature of determining (a) landlord's mitigation efforts is not compatible with the commonality and numerosity factors" (42 Misc. 3d at 627). Therefore, the Court concludes that Plaintiffs have failed to meet the "commonality" criteria set forth in CPLR 901 (a) (2) with regards to the harm they have suffered, a class certification for monetary damages is improper.

INDIVIDUAL DAMAGES

The Court now turns to Defendants' motion to dismiss Diamond's and Britt's own individual monetary damages claims. Defendants initially argue that Diamond's claim should be dismissed for lack of standing, as she is in arrears on her rent payments to NYCHA (NYSCEF doc No. 82 at 7). In support of this argument, Defendants cite *Young v GSL Enters.* for the proposition that a tenant who has not paid rent lacks standing to commence an action for damages based on a breach of the warranty of habitability (237 AD2d 119 [1st Dept 1997]). Plaintiffs do not deny that Diamond is in arrears but insist that she nevertheless has standing to assert her monetary damages claim, and object to Defendants' interpretation of *Young* (NYSCEF doc No. 85 at 12). As *Young* does not address the issue of standing, the Court declines to reach the Defendants standing argument as to Plaintiffs' claim for monetary damages.

Defendants also argue that Housing Court is the proper forum to adjudicate Plaintiffs claim for monetary damages for breach of the warrant of habitability. Plaintiffs argue that: (1) they are not currently parties to any pending litigation in Housing Court; (2) Housing Court does not have jurisdiction over equitable claims for injunctive and/or declaratory relief, nor is it allowed to award consequential or punitive damages; and (3) warranty of habitability issues can only be raised in Housing Court as defenses to non-payment of rent claims (NYSCEF doc No. 85 at 15-20).

The first contention is irrelevant as no statute requires that prior litigation be pending in another court as a prerequisite to this Court dismissing a claim without prejudice. The second contention is moot as the Court has already dismissed Plaintiffs' equitable claims pursuant to the Supremacy Clause. As to the third, Plaintiffs are correct that they may only raise a warranty of habitability claim defensively in Housing Court. However, Plaintiffs may file a breach of contract action in Civil Court, rather than waiting to be hailed into Housing Court.

As noted above, the Court of Appeals in *Park W. Mgt. Corp.* observed that "the proper measure of damages for breach of the warranty (of habitability) is the difference between the fair market value of the premises if they had been as warranted, as measured by the rent reserved under the lease, and the value of the premises during the period of the breach" (47 NY2d at 329). The Court noted that damages in a breach action can be awarded in either "a sum of money awarded to the tenant in a plenary action or a percentage reduction of the contracted-for rent as a setoff in summary nonpayment proceeding" when the tenant pleads the landlord's breach of the warranty of habitability as a defense to not paying rent (*id.*).

It is therefore apparent that New York State law affords Diamond and Britt the right to pursue their breach of warranty claims as plaintiffs in Civil Court rather than obliging them to act

as respondents in Housing Court. Furthermore, the New York City Rent Stabilization Law (RSL) affords Diamond and Britt, as rent-regulated tenants, the right to apply to the New York State Division of Housing and Community Renewal (DHCR) for a rent reduction order based on a diminution of services caused by a breach of the warranty of habitability. The RSL additionally permits them to either file the reduction order as a monetary judgment in Civil Court or utilize it as a setoff in the manner described above (NY Uncons Laws § 26-514). Should they choose to pursue this course, they are free to re-file their damages claims with the DHCR.

While Plaintiffs are correct that the court *has* jurisdiction, it would be improvident to *exercise* it in these circumstances (*see Cox v J.D. Realty Assocs*, 217 AD2d 179 [1st Dept 1995] [noting that civil court is the forum "explicitly designated" by the Legislature to adjudicate disputes between landlords and tenants]). The Court offers no opinion as to which of the paths, outlined above, Plaintiffs should travel. Instead, the Court merely grants the final branch of Defendants' motion to the extent that Plaintiffs' individual monetary damages claims are dismissed without prejudice.

CONCLUSION

Accordingly, it is

ORDERED that Defendants' motion to dismiss the Complaint is granted; and it is further

ORDERED that the causes of action in which Plaintiffs seek monetary damages are dismissed without prejudice; and it is further

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that counsel for Defendants is to serve a copy of this order, and notice of entry, on all parties within 10 days of entry.

Dated: February 7, 2019

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.